

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection**

Study for the LIBE Committee







**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**JUSTICE, FREEDOM AND SECURITY**

# **NEW APPROACHES, ALTERNATIVE AVENUES AND MEANS OF ACCESS TO ASYLUM PROCEDURES FOR PERSONS SEEKING INTERNATIONAL PROTECTION**

**STUDY**

## **Abstract**

Upon request by the LIBE committee, this study examines the workings of the Common European Asylum System (CEAS), in order to assess the need and potential for new approaches to ensure access to protection for people seeking it in the EU, including joint processing and distribution of asylum seekers. Rather than advocating the addition of further complexity and coercion to the CEAS, the study proposes a focus on front-line reception and streamlined refugee status determination, in order to mitigate the asylum challenges facing Member States, and guarantee the rights of asylum seekers and refugees according to the EU acquis and international legal standards.

**DOCUMENT REQUESTED BY THE  
COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

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## GLOSSARY

- Acquis** Accumulated legislation and jurisprudence constituting the body of European Union law
- Asylum seeker(s) or protection seeker(s)** Person(s) seeking international protection, whether recognition as a refugee, subsidiary protection beneficiary or other protection status
- Königsteiner Schlüssel** German key for the distribution of asylum applicants between Bundesländer
- Humanitarian visa** Visa authorising a non-national's entry on humanitarian grounds
- Legal support** Legal information, advice and representation
- Non-entrée policies** Policies directed towards restricting the entry of non-nationals into a state
- Praesidium** Project on first screening of persons arriving by sea, coordinated by the Italian Ministry of Interior
- Refugee(s)** The term is used throughout to refer to persons falling under the definition of the 1951 Refugee Convention or subsidiary protection beneficiaries
- Refugee status determination** The term is used throughout to refer to determinations concerning both refugee status and subsidiary protection



## LIST OF ABBREVIATIONS

- ALDE** Alliance of Liberals and Democrats in Europe
- AMIF** Asylum, Migration and Integration Fund
- APD** Asylum Procedures Directive
- ARIO** International Law Commission Articles on Responsibility of International Organisations
- ASR** International Law Commission Articles on State Responsibility
- CAT** United Nations Convention against Torture 1984
- CoE** Council of Europe
- COREPER** Permanent Representatives Committee (Council of the European Union configuration)
- CPT** Council of Europe Committee for the Prevention of Torture
- CEAS** Common European Asylum System
- CJEU** Court of Justice of the European Union
- CSR** United Nations Convention Relating to the Status of Refugees
- DRC** Democratic Republic of the Congo
- ECHR** European Convention on Human Rights 1950
- ECtHR** European Court of Human Rights
- ECRE** European Council on Refugees and Exiles
- EASO** European Asylum Support Office
- EMN** European Migration Network
- ERF** European Refugee Fund
- EU** European Union
- EUCFR** Charter of Fundamental Rights of the European Union
- EU-LISA** European Union Agency for Large-Scale IT Systems in the Area of Home Affairs

<b>EURODAC</b>	European fingerprint database
<b>EUROSTAT</b>	European Commission Directorate-General in charge of providing statistical information
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>FRONTEX</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>IHRL</b>	International human rights law
<b>ILC</b>	International Law Commission
<b>IOM</b>	International Organisation for Migration
<b>JRS</b>	Jesuit Refugee Service
<b>LIBE</b>	Civil Liberties, Justice and Home Affairs Committee
<b>NATO</b>	North Atlantic Treaty Organisation
<b>NGO(s)</b>	Non-governmental organisation(s)
<b>QD</b>	Qualification Directive
<b>RCD</b>	Reception Conditions Directive
<b>RSD</b>	Refugee status determination (includes subsidiary protection status determination)
<b>SCIFA</b>	Strategic Committee on Immigration, Frontiers and Asylum (Council of the European Union configuration)
<b>SCO</b>	Safe country of origin
<b>STC</b>	Safe third country
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## **EXECUTIVE SUMMARY**

### **Introduction**

This Study examines the Common European Asylum System (CEAS) in order to assess the relevance and utility of joint processing and distribution of asylum applicants. These are often conceived of as 'burden-sharing' mechanisms. At the outset, we attempt to 'unpack' the notion of 'burden', by noting that the weight of the 'burden' of hosting asylum seekers and assessing their protection needs depends significantly on how coercive and complex asylum processes are. Before identifying ways to share the burden, it is thus desirable to reduce it by avoiding unnecessary coercion and complexity. Asylum seekers are inherently vulnerable, and in the absence of safe legal means of access to the EU, will usually be irregular entrants. Apparently intractable political differences across the EU on the 'burden' of hosting asylum seekers could be overcome if the gap between political rhetoric and reality is overcome, and front-line reception and processing capacity enhanced across all EU Member States.

### **Evidence-Led Policy-Making in the CEAS**

The international obligations of the Member States, as reaffirmed under EU law, demonstrate a continuous commitment to afford international protection to those requiring it. This commitment is not subject to any numerical limit on the persons for whom the Member States may be responsible.

Asylum data is gathered by a number of sources, including UNHCR, EUROSTAT, EASO and FRONTEX. Evidence on asylum applications at four key moments in the CEAS' development (1999, 2004, 2009 and 2014) indicates that the overall variation in total numbers of asylum seekers and their main countries of origin remains surprisingly low in the EU. This is striking as this period covers the significant enlargement of the EU. However, recognition rates for protection seekers reveal significant discrepancies between Member States in the ways in which they assess asylum claims, even for asylum seekers from the same countries of origin over the same periods.

An evidence-based evaluation of the Dublin system is problematic, as statistics on Dublin transfers are relatively scarce beyond the data provided by annual EURODAC reports. According to available statistics, only around 25% of outgoing requests have resulted in transfers during the period 2008-2012, meaning that Dublin transfers take place in only around 3% of asylum cases in the EU. Most applications are processed where asylum seekers actually apply for asylum, irrespective of the Dublin allocation criteria.

### **Current and Proposed Joint Approaches to Allocation, Access to Procedures, First-Line Reception and Processing**

Various ideas have been developed around possible joint approaches to facilitating access to procedures and first-line reception of asylum seekers and alternative means of allocating responsibility for those potentially in need of protection. In addition to individual Member State practices, thinking on alternative and joint approaches has taken place among Member States at EU level, within EU bodies and among international organisations, civil

society and academia. In 2014, discussions around challenges in responding to large numbers of sea arrivals, notably in the context of the Mare Nostrum operation in the Mediterranean, have prompted reflection on the need for more effective operational responses on protection at maritime borders, involving Member States, EASO and other EU bodies, civil society and UNHCR.

EASO also in 2014 facilitated a series of pilot projects testing elements of joint processing, in relation to different aspects of the initial stage of the asylum process. While at the time of writing, final reports had not been published and an independent evaluation had not been carried out, the pilots are reported to have been received in generally positive terms by those Member States taking part.

In 2006-2010, a project known as Praesidium, carried out in Italy with the aim of ensuring provision of information and legal counselling to new arrivals by sea and identifying appropriate channels for access to the asylum procedure, involved cooperation in partnership between government, international and non-governmental organisations. While issues have been raised around its sustainability and support, its proactive, interactive and multi-actor approach merits further consideration.

A 2013 'Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU' from the European Commission envisioned different options for joint processing, ranging from the provision of joint teams to a Member State under pressure, to a fully-fledged, centralised EU processing mechanism.

While the Dublin system remains the current legal framework for allocating responsibility for asylum claims where more than one Member State is involved, different proposals have been tabled over time, including by EP, NGO and academic representatives, for a 'European distribution key', along the lines of Germany's distribution model for asylum seekers, which would be based on quantitative (GDP, population, territory size, unemployment rate) and qualitative (family and social ties, integration prospects) criteria to allocate responsibility for asylum seekers and beneficiaries of protection between Member States. In order to be developed further, such ideas would need to identify distribution criteria that gain general support and avoid the use of coercion. Mutual recognition of positive asylum decisions and transfer of protection also attracted interest on the part of some Member States, following their mention in the Commission's March 2014 Communication. An appropriate model and process for establishing mutual recognition, addressing several concerns about quality and potential pressures, could ensure greater free movement for recognised refugees, and represent progress towards the Treaty objective of a uniform status of asylum, valid throughout the Union.

## **Legal Constraints on First-Line Reception, Refugee Status Determination, Joint Processing Schemes, and Distribution Mechanisms**

All of the joint processing options that may be introduced remain governed by the EU *acquis* and international law regarding RSD, including asylum seeker and refugee rights and the standards of fairness and effective remedies set out in general principles and the Charter of Fundamental Rights.

In addition, first-line reception arrangements must comply with the principle of non-refoulement, the right to family unity, and the needs and entitlements of particularly vulnerable applicants. To ensure fairness and effectiveness of rights, decisions must be taken within an adequate time-scale and ensuring access, both in law and in practice, to appropriate procedures and related means and safeguards guaranteeing a real opportunity for asylum seekers to present and advance their claims. The right to legal assistance, representation, and translation must thus be provided according to EU and international legal standards with a view to ensuring that applications for international protection are subjected to full and thorough examination, including detailed consideration of all the relevant factors surrounding the particular case and the prevailing situation in the country of origin. Finally, effective remedies must be available to those whose claim has been rejected at first instance, in conformity with the standards set out in Article 13 ECHR and Article 47 EUCFR.

## **Designing Fair Procedures and Ensuring Effective Remedies: a Proactive, Interactive Approach**

A proactive, interactive approach to asylum procedures requires fairness to be assured from the outset, to ensure trust between asylum seekers and host states. Taking into account the peculiar position of all asylum seekers as a particularly vulnerable group, assessing specific vulnerability should not add further procedural complexity. Rather, we urge a preliminary vulnerability assessment, taking into account all possible sources of vulnerability, and moving swiftly on to substantive RSD. If an allocation mechanism is used, it must be non-coercive and so based on an interview with the applicant. In the absence of safe legal access to Europe, it is crucial that punitive approaches to irregular entry are avoided, in accordance with Article 31 CSR. Irregular entry should not affect the assessment of the asylum claim. Detention of asylum seekers should be a last resort, only to be contemplated upon specific strong reasons in the individual case and where alternatives to detention are not possible. In short, it is rarely if ever justified – alternatives must be put in place. Front-loading holistic advice and legal support is crucial for establishing trust and quality first-instance decisions, thereby reducing appeals and judicial reviews. General legal information is no substitute for legal representation. Manifestly well-founded procedures are beneficial both to asylum seekers and host communities. Reform of the Temporary Protection Directive is needed, and the potential of further examining group determination procedures should be explored. Good institutional design requires a multi-actor approach to foster accountability and expertise. Joint processing arrangements could help improve asylum systems if they alleviate coercion and complexity. All depends on the detail and institutional context. Coercion in the allocation of responsibility is likely to exacerbate 'burden' rather than distributing it fairly.

## **Possible Solutions: Giving Meaning to Solidarity and Fair Responsibility Sharing**

Ensuring greater compliance with EU and international legal standards in the reception and treatment of asylum seekers and RSD is an essential requirement for ensuring access to protection for those who are entitled to it in the EU. Proactive and interactive approaches to first-line reception and RSD must be developed and strengthened, involving actors including civil society and international organisations, as well as national authorities and EU bodies, to ensure that rights are respected and high-quality RSD decisions can be made.

Focussing on arrangements for redistribution of asylum seekers, particularly involving coercion, creates the risk of diverting resources and attention from the central task of improving the operation of national systems, and of development of approaches that might also fail to prevent secondary movement or ensure respect for *acquis* standards. Rather, the Dublin system should be applied in a way that avoids the use of coercion, acknowledging the practical realities of movements across borders within the Schengen area, and enables the preferences of asylum seekers to be taken into account. 'Dublin without coercion' is a first step; wholesale reform would be preferable.

Joint processing arrangements can provide a means to enhance the operation of national asylum systems, and the potential for further cooperation should be closely examined where it can further enhance efficiency and compliance with legal standards.

Finally, mutual recognition is a step towards the establishment of a uniform status of asylum and should be pursued, along with effective implementation of existing legal arrangements which can facilitate free movement of refugees.

## Conclusions and Policy Recommendations

1. 'Dublin without coercion' offers more sustainable and fair allocation of responsibility, in line with fundamental rights. This could be achieved through more principled implementation of the recast Dublin Regulation, in line with its objectives, as well as of other asylum *acquis* instruments, the Charter of Fundamental Rights and other obligations under international and European human rights and refugee law. Wider use of Dublin's family-related responsibility criteria as well as provisions on dependent persons and discretionary grounds (including as related to humanitarian elements, family or cultural considerations), requiring Member States to keep or bring together relatives and other people with relationships and other meaningful links to a particular country, could contribute to this and lead to greater cooperation on the part of asylum seekers. The European Parliament should require the Commission to closely monitor Member State practices in this regard and promote the application of Dublin rules in line with fundamental rights.
2. Member States are required, under the RCD, to provide reception conditions in line with the legally defined standards and of sufficient capacity. It must be possible for Member States to provide for regular levels of demand on an ongoing basis, and to build in flexibility and contingency or standby arrangements to adapt to fluctuations in numbers, given the inherently shifting and unpredictable nature of asylum flows. As noted in Chapter 2, while the number of asylum seekers increases and decreases from year to year, particularly at national level, longer-term figures are generally stable. Where there is a genuine situation of pressure, which is clearly beyond the capacity of the Member States to respond, there should be scope in the system for Member States to make arrangements to support each other and agree among themselves to provide for the needs of individual or specific groups of asylum seekers. The European Parliament should require the Commission to reinforce its efforts to ensure that the Member States have in place at all times first-line reception arrangements of both quantity and quality as required by the Directive to receive and provide for asylum seekers.
3. Member States must take account of the rights, needs, and preferences of asylum seekers when determining responsibility for asylum claims. The recast Dublin Regulation's requirement for a personal interview affords an opportunity for Member

States to take note of a particular asylum seeker's preference to have his or her claim assessed in a particular Member State, together with his or her reasons, and to explore the matter with the other Member State(s) concerned. The European Parliament, in cooperation with relevant actors, including EASO, the Commission, and UNHCR, should be informed and be able to follow up on the application of Dublin rules in line with the MA and K rulings.

4. In 2015, the European Commission is expected to conduct a review of the Dublin Regulation. 'Dublin without coercion' offers a better way to implement the Dublin system right now. Deep reform would be appropriate at that stage, to ensure that fundamental rights are respected, and to ban in law the use of excessive coercion. The European Parliament should be an active player in this process, requiring from the Commission all necessary data to that effect.
5. The key to fair and equitable distribution of asylum seekers across the EU is getting right the institutional design of the CEAS at both EU and national level. Such an institutional design must be based on the front-loading of the system, a proactive, interactive approach to fairness, and the establishment across the EU of successful asylum reception and RSD. The institutions must be flexible and robust to deal with variations in demand, and must be multi-actor; state authorities must work harmoniously with civil society actors, non-governmental organisations etc. to ensure that asylum seekers have confidence in the asylum system and in particular the first-line reception conditions available to them. The European Parliament, in cooperation with the Commission and EASO, should promote multi-actor dialogues to foster cooperation at the different levels of government and administration of the CEAS.
6. Coercion against asylum seekers must be excluded from any distribution system, if it is to be fair and equitable. It is the use of coercion and institutions of coercion against them, as asylum seekers often correctly perceive it, that has contaminated the RSD systems of far too many Member States. This coercion undermines trust, which not only creates disaffection and despair, but also undermines effective RSD. The European Parliament should request that the Commission and Member States examine as a matter of urgency the justifications and specific application of coercion to asylum seekers in the EU, so as to provide for alternatives in line with the Charter of Fundamental Rights and international protection standards.
7. The swift determination of asylum claims requires proper and effective first-line reception and a multi-actor institutional framework. Where asylum applications are hastily refused on the basis of inadequate information, that refusal will often be difficult to correct. In far too many cases, appeals and review cannot correct poor first instance decisions. One of the most significant reasons why state authorities take poor decisions at first instance is because first-line reception is inadequate or unavailable, so asylum seekers are unable to navigate the process. The frequency of subsequent applications, in turn, is to a large extent due to the failure of authorities to enable asylum seekers to properly engage with the asylum process from the outset, as has been condemned by courts of highest instance, including the ECtHR and the CJEU. This is not a fair and just procedure and contrasts fundamentally with basic principles of good administration. The European Parliament should demand that the CEAS requirements of good administration and a fair procedure be carried out fully and following compliance with the RCD and the EUCFR.



8. The ECtHR has pointed out that asylum seekers, by legal definition, are vulnerable. They are not entitled to work, to reside except in a temporary capacity or to engage in the normal activities of people living in a state. They live in conditions of uncertainty and anxiety. This vulnerability creates positive obligations for the EU and the Member States. This vulnerability must not be instrumentalised by national policies to demonise asylum seekers and their claims to international protection. The European Parliament should require the Commission to investigate ways to mitigate the vulnerability of asylum seekers through a proper and complete implementation of the CEAS requirements, in accordance with the recast RCD and APD.
9. Multi-actor involvement in first-line reception includes not only state actors but also non-governmental organisations, supranational actors and civil society actors. In order to limit secondary movement of asylum seekers and to ensure that there is a full and comprehensive examination of every asylum application made in the EU, the confidence not only of the national authorities but also critically of the asylum seekers must be engaged. Far too many national asylum bodies are associated with or nested in ministries which are responsible for police and criminal justice. Far too often, authorities responsible for dealing with asylum seekers have powers of arrest and coercion. This is not conducive to achieving the trust of asylum seekers. The European Parliament should request the Commission to examine and report upon the involvement of Member State coercive institutions in asylum procedures at national level in order to seek to diminish this role and attendant practices.
10. To avoid further complexity and coercion, in case joint processing schemes are introduced and further pursued, we invite those concerned to follow a progressive approach, starting with the simplest form of 'supported' processing initiatives and building on them as and when they have proven to be effective in delivering fairness and enhancing compliance with pre-existing first-line reception and RSD obligations. The European Parliament should support this understanding and engage in a dialogue with the Commission, EASO, and related actors, to promote it.
11. The new AMIF between 2014 and 2020 will spend a total of EUR 3.137 billion for the seven years on asylum, migration and integration of third-country nationals in the EU. It should be recalled that the ERF provided generous funding to many Member States, including among those with the worst record of reception conditions (EUR 630 million over the period 2008-13), but with results which were not always tangible. The European Parliament should request the Court of Auditors to examine the use of ERF funds for first-line reception specifically in those Member States where the greatest shortcomings have been identified. The European Parliament needs to make sure that ERF and AMIF money is effectively spent on first-line reception capacities required. The Schengen Evaluation System recently approved by the European Parliament may be a model for monitoring which could be considered for this purpose.



## 1. INTRODUCTION – UNPACKING THE ‘BURDEN’

This study examines the Common European Asylum System (CEAS) in order to outline the shortcomings of the current system, which impede effective access to protection in the EU, and lead to political impasses which undermine solidarity in dealing with asylum in the EU. The Dublin System<sup>1</sup> is currently a large part of the problem, but, it is suggested, with some re-working, could become part of the solution if it were implemented without coercing asylum seekers.

### 1.1. Safe access from outside the EU – what this study is NOT about

Various non-entrée policies make safe, legal access to asylum in the EU impossible for most refugees.<sup>2</sup> These range from visa policies to illegal pushbacks, as has been widely noted in relation to the Syrian refugee crisis.<sup>3</sup> Many mechanisms could be developed to allow asylum seekers safe and legal access to the EU from countries of origin or transit, including in particular forms of Protected Entry Procedures (PEPs).<sup>4</sup> Already set out is a roadmap to develop these procedures, starting with a more flexible use of the present European Visa Code, which allows the issuance of Humanitarian Visas with limited territorial validity under derogation from normal entry requirements; and developing further EU rules on the issuance of Protection Visas.<sup>5</sup> It is arguable that the Visa Code actually requires the issuance of such Humanitarian Visas, if EU Member States are to meet their international and EU obligations effectively and in good faith.<sup>6</sup>

The European Parliament is well aware of the lack of safe, legal routes for refugees to seek protection in Europe. For instance, in its Resolution on Syrian refugees on 3 October 2013, the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament voted a resolution on the Syria refugee crisis.<sup>7</sup> Beyond recommending continued

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<sup>1</sup> The Dublin System is comprised by 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) (Dublin III Regulation) [2013] OJ L180/31 and Regulation (EU) No 603/2013 of the European Parliament and of the Council on the establishment of ‘Eurodac’ [...] (recast) (EURODAC Regulation) [2013] OJ L180/1.

<sup>2</sup> For a recent survey, see Hathaway, J. and Gammeltoft-Hansen, T. (2014) ‘Non-refoulement in a world of cooperative deterrence’, U of Michigan Law & Econ Research Paper No. 14-016.

<sup>3</sup> UNHCR (2014) ‘Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity’, Geneva, 11 July 2014. Available from: (<http://www.refworld.org/docid/53b69f574.html>).

<sup>4</sup> European Commission (2014) ‘An open and secure Europe: making it happen’, COM(2014) 154, 11 March 2014, Brussels, develops the idea of Protected Entry Procedures (PEP), defined by Noll as “an overarching concept for arrangements allowing a non national to approach the potential host state outside its territory with a claim for asylum or other form of international protection and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final”, in Noll, G. et al (2002) ‘Study on the feasibility of processing asylum claims outside the EU’, The Danish Centre for Human Rights, European Commission, 3.

<sup>5</sup> Hein, C. and Damato, M. (2012) ‘Exploring avenues for protected entry in Europe’, Italian Council for Refugees, Milan.

<sup>6</sup> This is based on the wording of 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) [2009] OJ L243/1, and the application by analogy of the recent CJEU judgment in the Case C-84/12 Koushaki, 19 December 2013. See further Moreno-Lax, V. (2008) ‘Must EU Borders have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States’ Obligations to Provide International Protection to Refugees’, European Journal of Migration and Law 10: 315; Iben Jensen, U. (2014) ‘Humanitarian Visas: Option or Obligation?’, Study for the European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 509.986 September 2014, Brussels.

<sup>7</sup> European Parliament, “EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria”, LIBE/7/14063, 2013/2851(RSP), 3 October 2013, Brussels.

humanitarian assistance to assist Syria's neighbouring countries in handling refugee flows, the LIBE Committee called on Member States to guarantee Syrian refugees safe entry into the EU and access to fair asylum procedures. The Committee also urged the Commission to consider the application of the Temporary Protection Directive "if and when conditions demand it". The EP's call for a greater protection response on the part of the Union was reiterated in its "Resolution on the situation in Syria", adopted on 6 February 2014.<sup>8</sup>

This study is not addressing access from outside the EU, but rather the situation of those who reach the territory of the EU Member States to seek protection. Accordingly, its starting premise is that these protection seekers will usually be irregular entrants. Nor does this study consider how the EU should meet its solidaristic obligations to states hosting most of the world's refugees, such as providing aid and assistance, resettlement opportunities and onward migration opportunities.

Rather, given our focus on spontaneous arrivals, much of this study aims to highlight and urge a decisive move away from the perverse practices in asylum procedures and reception which in many cases have been normalised across Europe, and even spread further afield.<sup>9</sup> Asylum procedures in Europe have become excessively coercive and complex, to the detriment of both asylum seekers and Member States. Before moving to examine new mechanisms for joint processing and distribution, it should be clear what the current shortcomings are.

There is no point in adding extra layers of complexity, in the name of efficiency or burden-sharing.

## **1.2. A burden of our creation**

Both joint processing and distribution mechanisms have multiple possible aims. Both are often cited as burden-sharing mechanisms, as a way of sharing administrative burdens or the burden of hosting asylum seekers in general. Before these mechanisms are canvassed, however, the notion of 'burden' needs careful attention.

In most of the work to date on 'burden sharing' it is assumed that the 'burden' of hosting an asylum seeker and processing his or her claim are stable. However, the concept of 'burden' should not be taken as an unquestioned consequence of an asylum seeker's presence. The 'burden' depends significantly on the policies and practises of the host state.

By identifying the key shortcomings in asylum processes at present, we unpack the burden. The aim is to ensure that before identifying ways to share the burden, it should be reduced by avoiding unnecessary coercion and complexity.

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<sup>8</sup> European Parliament, "Resolution on the situation in Syria", 2014/2531(RSP), 6 February 2014, Strasbourg.

<sup>9</sup> Lambert, H., McAdam, J. and Fullerton, M. (eds.) (2013), *The Global Reach of European Refugee Law*, Cambridge, Cambridge University Press.

### 1.2.1. The costs of coercion

#### 1.2.1.1. *Ethical commitment - humanity*

This study is based on a principled ethical commitment to avoid undue coercion, as a basic liberty-protective principle of the rule of law and human rights, and a founding value of the EU according to Article 2 of the Treaty on European Union (TEU).<sup>10</sup> When we discuss the rights of non-citizens, there is a risk of losing sight of the fact that it is a discussion on human beings, with the same human rights and basic dignity as anyone else. Asylum seekers in particular have a right to seek and enjoy asylum,<sup>11</sup> or, in EU law, a right to asylum,<sup>12</sup> and have a right to remain in the EU to do so. Even those who are irregularly present and liable to removal are human beings, and thus human rights bearers. Their human rights should not be violated, nor should they be treated as mere objects of state power. This value should be embodied in a principled commitment to avoid unnecessary coercion. This principle is not legally or ethically innovative: It pertains to elementary considerations of freedom and humanity and underlies human rights commitments such as the requirement to use detention sparingly, and procedural rights such as the right to be heard and the right to effective judicial protection. It is expressed in the principle of proportionality in particular. However, this basic value can be overshadowed when asylum seekers are reified as a 'burden' to be dealt with.

When public authorities coerce people without justification, they violate their autonomy and harm them. Throughout this study we refer to evidence of human rights violations perpetrated against asylum seekers and refugees, in the name of migration control. The Dublin system in particular seems to have become an instrument of coercion, with massive human costs with little public purpose.<sup>13</sup>

That those who come to Europe seeking protection are all too often litigants before human rights bodies and courts should give us pause: All too often, they win their cases establishing that their deprivation of liberty, detention conditions, deportations, deprivation of family contact, enforced destitution, and asylum process have violated their human rights. It must be recalled that 'asylum' should be a protective process, not a punitive, coercive, inhuman or degrading one.

In making explicit the principled commitment to avoid unnecessary coercion, we do not endorse the notion that asylum seekers should have 'free choice' as to their country of destination in all instances. But rather, the law, properly interpreted, requires that they should be heard as regards the reasons for their choice of destination, and if there are strong reasons, such as kin or connections, access to that country of asylum should be facilitated. An appropriate reading of the Dublin III Regulation supports this view that asylum seekers' agency, reasoning and voice has a role to play, as is set out in Chapter 4.

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10 Treaty on European Union (TEU) [2010] OJ C83/1.

11 Universal Declaration of Human Rights (UDHR), Article 14(1).

12 Charter of Fundamental Rights of the European Union (EUCFR), Article 18.

13 ECRE (2013) Dublin II Regulation: Lives on Hold, February 2013, Brussels. Available from: <<http://www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html>>; Jesuit Refugee Service (2013) (2013) Protection Interrupted: The Dublin Regulation's Impact on Asylum Seekers' Protection, June 2013, Brussels. Available from: <[http://www.jrseurope.org/DIASP%20Publications/Protection%20Interrupted\\_JRS%20Europe\\_June%202013.pdf](http://www.jrseurope.org/DIASP%20Publications/Protection%20Interrupted_JRS%20Europe_June%202013.pdf)>.

We would prefer to see Dublin abandoned or substantially reformed, but if that is not politically feasible, it should be implemented in a way that complies with the fundamental rights of asylum seekers and refugees, and minimises coercion: 'Dublin without coercion' is possible under the current system and, it is contended, legally required to avoid human rights violations and politically sensible to minimise the costs of complexity and coercion.<sup>14</sup> Moreover, as the CJEU has acknowledged, at least as regards unaccompanied children, ensuring prompt allocation of responsibility should also be seen as an important way to guarantee the rights of asylum seekers, and ensure an efficient asylum system.<sup>15</sup>

#### 1.2.1.2. *The costs of coercion*

The second reason for highlighting the importance of avoiding unnecessary coercion is to avoid unnecessary costs.

Much of the material on burden-sharing tends to assume that each asylum seeker is a fixed burden. However, asylum policies determine how long the asylum process takes, whether asylum seekers may work, in what sorts of accommodation they reside. The more coercive the process, the most costly it will be. The evidence-base on detention backs this up,<sup>16</sup> but there is no comprehensive data on the costs of running asylum system across the EU. As one of the interviewees participating in this study's research put it,

*"[D]ata on the costs of asylum systems are very important. Especially for Dublin, such data are nowhere to be found. So we need more data to appreciate how much asylum costs Member States. A cost/benefit evidence base still lacks in the Union."<sup>17</sup>*

More sophisticated work on burden sharing acknowledges that if asylum systems are unnecessarily coercive or complicated, costs increase. Thielemann *et al.*, for instance, explain that the costs related to the reception and processing of asylum seekers are closely linked to the use of coercive measures against protection seekers:

*"[a]s soon as the system requires asylum seekers to remain in a country against their will, costs escalate (e.g. of detention, determination of MS responsible and transfer)".<sup>18</sup>*

In particular, they note that costs of running the UK asylum system, among others, are high due to extensive use of detention.<sup>19</sup> This is a crucial premise of this study: Even if it is agreed that the 'burden' of hosting asylum seekers is unevenly spread across EU Member

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14 This is the title of a forthcoming article by Costello, C. and Maiani, F.

15 Case C-648/11 MA v Secretary of State for the Home Department [2013] 3 CMLR 49, para 54.

16 Edwards, A. (2011) 'Back to Basics: The Right to Liberty and Security of the Person and "Alternatives to Detention" of Asylum seekers, Refugees, Stateless Persons and Other Migrants', UNHCR Legal and Protection Policy Research Series. Available from: <<http://www.unhcr.org/4dc949c49.html>>; Sampson, R. et al. (2011) 'There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention', International Detention Coalition. Available from: <<http://idcoalition.org/cap/handbook/>>; JRS (2011) 'From Deprivation to Liberty. Alternatives to Detention in Belgium, Germany and the United Kingdom', December 2011. Available from: <<http://www.jrseurope.org/JRSEuropeFromDeprivationToLiberty20122011.pdf>>.

17 Interview with a Member of the European Parliament, 9 September 2014 (interviewer's unofficial translation from French).

18 Thielemann E., Williams, R. and Boswell, C. (2010), 'What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?', European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 419.620, 22 January 2010, Brussels, 146.

19 Thielemann et al. (n. 18), 107.

States, transferring asylum seekers itself is a costly process, likely to exacerbate the 'burden' rather than distribute it fairly. The options of sharing resources, financial and bureaucratic, are therefore usually preferable.

Opting for coercion in the geographical distribution of asylum seekers and refugees may be costly for Member States in the longer term also. Policies of enforced dispersal outside main urban areas, adopted in Germany, Austria, Belgium, Denmark, the Netherlands, Sweden and the UK, have had negative impact on refugees' economic activity.<sup>20</sup> The Swedish example is illuminating. Under a policy introduced in 1985, for instance, Sweden dispersed resettled refugees throughout the country, often to remote locations. A study conducted by Aslund and Rooth found that welfare dependency and non-employment increased as a result, particularly for those dispersed to remote areas with poor employment prospects.<sup>21</sup>

Coercion will be costly not only in the direct sense, as we see with detention in particular. Coercion is also costly in that it undermines asylum seekers cooperative predisposition, which in turn undermines trust in the host state authorities. This in turn leads to disaffection, absconding, and undermines the integrity of the asylum process.<sup>22</sup> One of the central insights from the literature on why individuals obey the law (admittedly mainly concerned with interactions between citizens and the state) is the centrality of procedural justice, in particular perceptions of fair treatment.<sup>23</sup>

### 1.2.2. The costs of complexity

The other source of the asylum 'burden' is excessive complexity, which in turn leads to delay, unnecessary appeals and judicial reviews. The original Asylum Procedures Directive<sup>24</sup> permitted a range of diverse procedures and bodies to determine asylum claims. In implementation, further procedural variation and proliferation unsurprisingly emerged.<sup>25</sup> The recast Asylum Procedures Directive (APD)<sup>26</sup> makes some highly significant improvements in some respects, but it is far from a simple set of commitments. In particular, border and 'safe third country' (STC) and European STC procedures remain in place, as do the 'safe country of origin' (SCO) provisions. In many instances, accelerated procedures or those which aim to dispose of claims without proper examination will be subject to appeals and/or judicial reviews. Of late, the European Court of Human Rights (ECtHR) has deemed accelerated procedures in both France and Spain as failing to provide effective protection against violations of Article 3 ECHR.<sup>27</sup> Cases before the ECtHR and the Court of Justice of the EU (CJEU) are always but the tip of the iceberg, with many rights

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20 Hatton, T. J. (2013) 'Refugee and Asylum Migration', 453-468 in Constant, A. F. and Zimmermann, K. F. (eds), *International Handbook on the Economics of Migration*, Northampton, Edward Elgar Publishing, 465.

21 Aslund, O. and Rooth, D.-O. (2007), 'Do When and Where Matter? Initial Labour Market Conditions and Immigrant Earnings', *Economic Journal* 117: 422-448.

22 Costello, C. and Kaytaz, E. (2013) 'Building Empirical Research into Alternatives to Detention: Perceptions of Asylum seekers and Refugees in Toronto and Geneva', PPLA/2013/02, June 2013, 15-16.

23 Tyler, T. R. (2006) *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance*, Princeton, Princeton University Press.

24 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

25 European Commission (2010) Report on the Application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2010) 465, 8 September 2010, Brussels; UNHCR (2010) 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice', March 2010. Available from: <<http://www.unhcr.org/4c7b71039.html>>.

26 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) (Asylum Procedures Directive) [2013] OJ L180/60.

27 IM v France (2012) Application no. 9152/09, European Court of Human Rights, 2 May 2012; AC v Spain (2014) Application no. 6528/11, European Court of Human Rights, 22 April 2014.

violations being resolved at the domestic level, or even failing to make it to any court. Indeed, the repeated recourse to Rule 39 of the ECHR to stop Dublin deportations is a manifestation of failures at the domestic level, lack of effective protection in particular.<sup>28</sup>

Chapter 6 sets out some principles of institutional design to help avoid unnecessary complexity. At this stage it is simply noted that any assessment of the costs of the asylum 'burden' must take into account how complexity, like coercion, creates costs.

### 1.2.3. An unequal burden?

Reviewing the recent history of the debate on burden-sharing reveals that the most significant inequality is between the wealthy states of the Global North and the poor of the Global South. Refugees are overwhelmingly concentrated in the Global South. The current Syrian refugee crisis reflects this familiar pattern, with the vast majority of those displaced being in the region around Syria, and less than 4% in the EU.<sup>29</sup> While this study is not concerned with global or regional burden sharing *per se*, it must always be borne in mind.

The various intra-EU burden-sharing proposals relating to 'distribution key' ideas surveyed in Chapter 3 are thus concerned with a much less pressing form of burden-sharing than global burden-sharing. Some of these take different criteria relevant to determining the reception capacity of each state, and then based on the numbers of asylum seekers hosted, make determinations of whether particular states are over- and under-burdened. These approaches are illuminating, but have their limitations, in that they do not effectively capture how asylum policy, in particular its coercive aspects, contribute to the costs of hosting asylum seekers and determining their claims.

In the political debate within Europe, there are divergent, entrenched positions. Rather than identify particular individual states' short-term concerns, this analysis attempts merely to capture and address the source of disagreement. In particular, there is a persistent gulf between the perception and the reality of asylum caseloads across the EU. For ease of explanation, we refer to 'Southern' and 'Northern' states, mindful that this is an oversimplification. Southern European states perceive themselves to be on the frontline of first reception, yet Northern States process more asylum claims, both in absolute numbers and, in some cases, relative to their populations.<sup>30</sup> This gulf between political perception and reality has led to a schism in the views of what the 'problem' is in Europe. For Northern states, the problem is that Southern States do not run effective asylum systems, so people come North seeking protection, letting Southern States avoid their international responsibilities. For Southern States, the problem is that they are allocated responsibility because of an accident of geography, and want to be able to transfer responsibility and people northwards.

Both perceptions are partly correct in that they are of different things: Southern states are correct that the Dublin System arbitrarily distributes asylum burdens; but Northern states are correct that they are overburdened as Dublin does not work and most asylum claims are processed by the states where asylum seekers first claim asylum, rather than through which

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28 ECRE (2009) 'ECTHR Interim Measures (Rule 39) to Stop Dublin Transfers'. Available from: <<http://cmr.jur.ru.nl/cmr/docs/ecre.rule39.pdf>>.

29 UNHCR (n. 3).

30 For a recent overview of asylum applications in the EU, see EUROSTAT (2014) Asylum Applicants and First Instance Decisions on Asylum Applications: 2013, KS-QA-14-003-EN-N, Brussels.



they enter the EU for the first time, as Chapter 2 illustrates. In this context, what sort of 'burden-sharing' proposals could meet with approval when governments do not share an understanding of the 'problem'?

Our suggestion is that rather than a 'burden-sharing' response, what is needed are two separate responses to address the distinct challenges. Some EU states certainly need to do a better job at running their asylum systems, both reception conditions and refugee status determination (RSD). In addition, mechanisms should be put in place to ensure that first-line reception is supported across the EU. Allocation mechanisms should not be coercive, thereby reducing costs and clandestine migration across the EU.

This study accordingly aims to help narrow the distance between political perception and reality: What Southern States seek does not amount to a huge change from the actual practice, in which most asylum seekers exercise a considerable degree of agency over their country of destination.<sup>31</sup> However, at present, the costs are huge and born by the asylum seekers, who pay smugglers (a term used here to encompass smugglers, facilitators, agents,  *passeurs*) exorbitant amounts not only to reach the EU, but then to reach their destination countries within Europe. A better allocation mechanism would break asylum seekers dependency on smugglers, and instead put in a place a **co-operative mechanism for the allocation of responsibility for asylum applications. 'Dublin without coercion' is the first step in that direction.**

The position of Northern States also reflects an empirical reality, in that at present, there is strong evidence that Southern States breach their EU commitments in different ways: they fail to register and process asylum claims; they breach their duties in terms of reception conditions, detaining unlawfully and exposing asylum seekers to poor living conditions. Our proposed allocation mechanism would aim, to the extent possible, to take smugglers out of the equation, and allow asylum seekers to use their own considerable resources and energies to recuperate, make their claims as best as possible, which they are legally obligated to do under both the Qualification Directive (QD)<sup>32</sup> and APD, and start new lives in Europe if their claims are recognised, or look to other regularisation, voluntary return or other outcomes if not.

## 1.3. Understanding the population

### 1.3.1. Legal vulnerability

As is set out in Chapter 4, there are clear legal duties to assess and respond to the vulnerabilities of asylum seekers under both Dublin III, and the recast APD<sup>33</sup> and RCD.<sup>34</sup>

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31 This point was stressed to the EP in 2009: see Maiani, F. and Vevstad, V. (2009) 'Reflection Note on the Evaluation of the Dublin System and the Dublin III Proposal', European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 410.690, March 2009, Brussels.

32 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) (Qualification Directive) [2011] OJ L337/9.

33 APD, Recital 29: an applicant "may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape other serious forms of psychological, physical or sexual violence".

34 RCD, Article 21: Member States must "take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor

These instruments incorporate different notions of vulnerable applicants or applicants with special needs. Nonetheless, they reflect a general understanding that before asylum procedures may begin, a process must identify the asylum seekers' needs. This notion that some asylum seekers have particular vulnerabilities, in that they have particular experiences or features which mean they have additional needs, should not obscure the fact that all asylum seekers are vulnerable by definition, as the ECtHR noted in *MSS v Belgium and Greece*. The Court spoke of the "vulnerability inherent in his situation as an asylum seeker".<sup>35</sup> Asylum seekers are interpreted

*"as such, [members] of a particularly underprivileged and vulnerable population group in need of special protection in the form of basic reception facilities".<sup>36</sup>*

In the eyes of the ECtHR, asylum seekers are a vulnerable category for legal reasons: they lack effective rights to work, their right to stay in the territory is by definition precarious, and their status requires determination. As the host state places them in this particular vulnerable status, it has, in turn, positive duties toward them to take measures to ensure their living conditions are not inhumane and degrading.

This legal notion of 'vulnerability' is appropriate in determining states' legal duties. However, it should not overshadow other substantive understandings of vulnerability, particularly given the health and psycho-social needs of asylum seekers. The state has particular positive obligations to all asylum seekers, as the states' migration control prerogatives place them in a legally vulnerable position. That as a matter of fact this population also includes many individuals with particular health and psychosocial needs should be borne in mind when determining how to meet those duties. But the particular, additional needs of some, should not obscure the vulnerability of all as a category.

### 1.3.2. Irregular entrants

As noted above, there are many ways the EU and its Member States could more effectively ensure legal access for asylum seekers to their territory.

In the absence of these policies, it is likely that most asylum seekers will be irregular entrants. Those who enter irregularly may do so on false papers, or clandestinely without papers. Or they may be advised by smugglers to destroy their identity documents. This impairs access to asylum in several ways.

It should be borne in mind that this population will often include many people who have had recourse to smugglers, or 'agents' as asylum seekers usually call them, in their journey. Smuggling takes a wide variety of forms, sometimes benign and motivated by humanitarian concern, other times motivated by profit, and more exploitative in nature, often exposing migrants to great dangers.<sup>37</sup> It should of course be borne in mind that, while smugglers bear responsibility for exposing migrants to risks in their journeys, states too bear moral and arguably legal responsibility, for it is their border control practices which

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children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation".

<sup>35</sup> *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 233.

<sup>36</sup> *MSS v Belgium and Greece*, para 251; *Hassan v Netherlands and Italy*, App. No. 40524/10, para 179.

<sup>37</sup> Gammeltoft-Hansen, T. (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge, Cambridge University Press.



contribute to this dangerous environment.<sup>38</sup> In extreme cases, smuggling transactions can become trafficking: where the migration process renders the migrant more vulnerable and the agent can control the migrant through violence or other forms of coercion.

Those who arrive in the EU seeking protection thus should be acknowledged as including refugees (who by definition have a well-founded fear of persecution or face real risk of serious harm) often due to past persecution or serious harm in their country of origin. The recognition rates of asylum seekers in the EU, as Chapter 2 demonstrates, are relatively stable overall, as is the overall number of asylum claims annually. Moreover, the mixed flows of migrants and refugees also include victims of smuggling and even trafficking. While these two phenomena (smuggling and trafficking) should not be conflated, it is important to recognise that migration controls create a vulnerability that may be exploited.

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From these starting premises, this study examines the EU legal and policy instruments with the aim of identifying why there are such failures in terms of reception and processing asylum claims across the EU. These issues will be examined from the perspective of bringing the CEAS more in line with the EU legal principles of fairness, solidarity, effective remedies and proportionality.

The Study proceeds as follows:

- (1) assessing the evidence available on the operation of the CEAS and demand for international protection in the EU; as well as the relevance/use of asylum data by policy-makers (Chapter 2);
- (2) examining the current legal framework, practice and proposals to date on allocation of responsibility and joint approaches to access to procedures, first-line reception, and processing of asylum seekers (Chapter 3);
- (3) understanding the legal constraints and requirements for the legality of first-line reception, RSD, joint processing and distribution mechanisms (Chapter 4);
- (4) developing a proactive, interactive approach to fair procedures and effective remedies as regards both first-line reception, joint processing and distribution mechanisms (Chapter 5);
- (5) outlining possible solutions aimed at giving more effective meaning to solidarity and fair sharing of responsibility (Chapter 6); and
- (6) providing a set of policy recommendations to the European Parliament and other relevant policy makers (Chapter 7).

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38 Spijkerboer, T. (2009) 'The Human Costs of Border Control', *European Journal of Migration and Law* 9: 127-139; T Spijkerboer 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) *The Law & Ethics of Human Rights*

## 2. EVIDENCE-LED POLICY MAKING IN THE CEAS

### KEY FINDINGS

- Member States are committed to providing international protection and ready to widen their obligations to people in need of protection (viz the UN Convention against Enforced Disappearances);
- Looking at four key years of the CEAS – 1999, 2004, 2009 and 2014 - the overall variations in numbers of asylum seekers is surprisingly low, in spite of the EU's successive enlargements; in addition, the main countries of origin of asylum seekers have not varied dramatically;
- The EU's geographical expansion has not translated into a parallel EU-wide increase in reception capacity by the addition of new Member states. On the contrary, the stability of figures for the four key years suggests a net reduction in reception places over time, across the EU.
- Recognition rates for those seeking international protection, however, reveal very significant differences even where countries of origin and profiles of asylum seekers are the same;
- The data equally implies that the impact of the Dublin system is limited as regards the distribution of responsibility among Member States, which contrasts sharply with the financial and human costs of Dublin transfers;
- As the data indicates a fairly stable framework, it should be possible to address first reception for asylum seekers through a correct implementation of the CEAS, in line with fundamental rights and international protection standards.

This chapter examines the evidence which is available about (a) the operation of the CEAS and (b) the demands upon it. The objective of the chapter is to focus on the existing knowledge about the demand for first reception by persons seeking international protection in the EU. We focus, in particular, on knowledge created by UNHCR, EU sources with particular reference to EUROSTAT, FRONTEX and EASO. In order to imagine creatively and realistically new approaches and alternative avenues and means of access to asylum procedures for people seeking international protection, the first step must be to understand the nature of that demand. Who seeks international protection in the EU and its Member States, and what happens to those requests? How do the numbers of requests relate to Member State resources? New policy initiatives need to be based on concrete, comprehensive and accurate data and should be led by evidence about the subject. While evidence of political claims and sensitivities is important, the starting place must be evidence about the facts on the ground: who, how many, where, when. Only then can there be an objective assessment of the political claims. So as a first step in this analysis, the best available knowledge about asylum demands in the EU is set out.

### 2.1. Numbers or ethics?

It is important to remember that the EU and its Member States' obligations to provide international protection for those in need are unrelated to the quantity of demand. There is no numerical limit on the EU and its Member States' duty to provide refuge for those qualifying under the Refugee Convention. Everyone who seeks protection in the EU and

meets the definition of a refugee is entitled to protection.<sup>39</sup> Similarly, there is no numerical limit on the EU and its Member States' duty to provide international protection to persons at risk of torture under the UN Convention against Torture 1984 (CAT).<sup>40</sup> All Member States have ratified that convention and accept that where someone fulfils the criteria of being at risk of torture if "refouled", that person (and everyone else who fulfils the definition) is entitled to protection, including residence. No numerical limit applies either to the duty not to send a person to any country where there are substantial grounds for believing that she would be in danger of being subjected to enforced disappearance, contained in the UN Convention against Enforced Disappearance 2006.<sup>41</sup> This most recent addition to the international protection regime has been signed by all but five Member States<sup>42</sup> and ratified already by eight. Even in 2006, more than seven years after the EU was given competence to create the CEAS, the Member States were signing up to new protection obligations which have no numerical limit. Why is this important? All too often we hear in the political discussion that there are too many asylum seekers and Member States are not able to fulfil their obligations. Indeed, this study is premised on some of these concerns. Yet, at the same time, the Member States have been continuously widening the scope of the class of persons entitled to international protection including on their territory. The duty to provide international protection does not only come from the Refugee Convention 1951 and its 1967 Protocol. But in 1984 the Member States began signing and ratifying the CAT which opened up the duty to provide international protection to a wide group of persons (anyone at risk of torture) and excluded entirely the possibility of refusing such protection because of the unsavoury actions of the individual. All Member States have ratified the CAT. Again in 2006, the Member States have widened the category of persons to whom they owe a duty of international protection to include those at risk of enforced disappearance irrespective of their actions or character. These are not the actions of states which consider themselves overburdened by protection seekers. These are the actions of responsible members of the international community which take very seriously the duty to provide international protection to those at risk of unacceptable action by other states (such as persecution, torture or enforced disappearance). No attempt was made by any of the Member States either on the ratification of the CAT or the signature and/or ratification of the Convention against Enforced Disappearance to place a numerical limit on the number of persons for whom it might be responsible.

Numbers are important but the EU Member States, by their actions, have demonstrated that they consider the ethics of human rights more important. People are entitled, under refugee and human rights law, to international protection including in the territory of the Member States. There is no evidence that the Member States are seeking to resile from their international legal duty to provide protection. Indeed when a new category of persons not clearly incorporated into the existing canon of international law emerges, such as those at risk of enforced disappearance, the Member States take on new obligations to provide them with protection. The reputation of the EU and its Member States within the international community as states committed to international human rights is extremely important not least as the Member States have not avoided the challenge of committing themselves to

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39 Subject to the exclusion provisions contained in Article 1F of the Refugee Convention.

40 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York (Convention against Torture), UN Treaty Series Vol. 1465, p. 85. There is no exclusion provision in this treaty.

41 International Convention for the Protection of All Persons from Enforced Disappearance, 20. December 2006, New York (Convention against Enforced Disappearance), UN Treaty Series Vol. 2715, Doc A/61/448, Article 16(1): "No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."

42 Czech Republic, Estonia, Hungary, Latvia and the UK.

new protection duties. The challenge is to provide the protection to which Member States have freely committed themselves. In this chapter, statistics are examined as they are critical to the subject of first-line reception but it must be recalled that international protection is fundamentally about international refugee and human rights obligations, and not about numbers.

## 2.2. Sources of data

There are numerous sources of information about demands on the asylum systems of the EU Member States though only some of them have specific authority. UNHCR has been producing its Statistical Yearbooks since 2001 and since 1994 has produced statistical annexes. This is a particularly rich source of data on asylum which is collected from states and produced by UNHCR in seeking to provide information about refugees. EUROSTAT is a much more recent participant in the creation of knowledge about asylum following the adoption of a 2007 Regulation requiring the Member States to provide it with relevant data.<sup>43</sup> FRONTEX began publishing data on asylum in its Risk Analyses from 2010. These sources provide a rich basis for analysis of demand for international protection in the EU and its Member States, though the data is not always consistent.<sup>44</sup>

In order to understand the data on demand and outcomes, we will take four snapshot pictures of asylum demand, one for each of the following years: 1999 – the date of the transfer of competence for asylum from national to EU level under the Amsterdam Treaty, which marks the starting point of the CEAS project; 2004 – the end of the first five year period during which the first phase of the CEAS was completed and the initial objectives of the 1999 Tampere Conclusions of the European Council were evaluated; 2009 – the end of the first ten years of the CEAS project and the date of entry into force of the Lisbon Treaty, which conferred legally binding force, and status equivalent to that of the Treaties, upon the Charter of Fundamental Rights. The importance of the EU Charter of Fundamental Rights for asylum in the EU is most clearly highlighted in Article 18 – the right to asylum – and Article 19(2) on *non-refoulement*. But, as judgments of the CJEU have indicated, other provisions of the Charter are highly relevant. The final year to be examined is 2014 – the year following the completion of the 2<sup>nd</sup> phase of the CEAS and the current position regarding demand for international protection.

For each of these four years (focusing on publications produced in each of the four years which normally reflects the statistical information of the preceding 12 months and thus the evidence on the basis of which policy may have been formulated), the overall numbers of asylum seekers in EU with a breakdown of the main destination states within the EU are set out. This provides an overview of where asylum seekers have been seeking asylum at the times of key decision making in the EU and the similarities and changes over time. This data is complemented by information regarding the countries of origin of asylum seekers at the same four points in time and their distribution across the key recipient Member States for each period. Outcomes are also included. This tranche of data will provide a general picture of asylum demand in the EU at each of the four main points in the development of the CEAS.

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43 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 repealing Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] OJ L199/23.

44 As national sources in every case are Member State institutions, the variations in statistical information at the international level only reflects the divergence in national administrative or statistical practice.

### 2.3. Four critical dates: 1999, 2004, 2009 and 2014

This section examines the variations in first reception demand and outcomes in the main recipient Member States at each of the four dates. This will facilitate some initial conclusions about demand over time and the way in which those Member States where the majority of the demand has been received have dealt with the requests. We will focus on variations over time, in order to understand what is dynamic and what is stable regarding demand for international protection. As the objective is to examine the first reception pressures on the Member States at key times of creation and reform of the CEAS, only information on asylum seekers and refugees in those countries which were Member States at the relevant time is considered. The reason for this is because it is only those Member States which have been entitled to negotiate and adopt in the Council the CEAS measures.

The source of information on asylum seekers and refugees for 1999 is the UNHCR 1999 Statistical Overview of refugees and others of concern to UNHCR.<sup>45</sup> At Table IV.1. are found the statistics on all cases, pending cases, cases submitted during the year and recognition rates. Here the focus is only upon the cases submitted during the year to avoid the problem of delayed decision making. Similarly, while the outcomes are only those for the cases determined in that year (rather than the cases submitted as the two are often quite different depending on how long it takes officials to reach decisions), this figure provides a basis for comparison and aids an understanding of the facts on the ground at the time when critical decisions on the CEAS were taken. UNHCR divides the EU into Eastern, Northern and Southern Europe, each group including both some Member States and some non-Member States.

In 1999, there were 15 Member States.<sup>46</sup> According to UNHCR data, the picture was the following:

	1999	
Country	Cases submitted during the year	Percentage (%) recognised (refugee and other statuses)
Austria	20,100	56
Belgium	35,780	40.7
Denmark	6,470	51.8
Finland	3,110	27.2
France	30,910	19.3

45 UNHCR (2000) 'Refugees and Others of Concern to UNHCR: 1999 Statistical Overview', Geneva, July 2000. Available from: <<http://www.unhcr.org/3ae6bc834.html>>.

46 Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, UK.

Germany	95,110	13.3
Greece	1,530	26.3
Ireland	3,370(not including repeat applications)	35.0
Italy	33,360	72.5
Luxembourg	2,910	[not available]
Netherlands	39,300	15.6
Portugal	270	24.4
Spain	8,410	11.7
Sweden	11,230	34.4
UK	71,150	72.5
<b>Total</b>	<b>363,010</b>	<b>35.76</b>

The ten main countries of origin of asylum seekers in the EU that year were:

- Yugoslavia (Former Republic – including all the former components by then independent states)
- Iraq
- Afghanistan
- Turkey
- Somalia
- Sri Lanka
- Iran
- Russian Federation
- China
- Armenia

The distribution across the Member States of asylum seekers from the top ten countries was rather heterogeneous. For instance, in Austria, the first and second places were Yugoslavia and Iran, while for France, the two top countries of origin were China and Yugoslavia. For Spain the largest single country of origin was Algeria; and in Portugal Sierra Leone. Clearly the events leading to the NATO bombing of Serbia and Kosovo were among the most important political factors which had substantial consequences for asylum seekers from the former Yugoslavia coming to the EU.

The next critical date for this examination is 2004,<sup>47</sup> the end of the first phase of the CEAS and the year when the adoption of the legislative measures of the CEAS had to be achieved (though in fact some measures were adopted in the following year). So while the first table

47 UNHCR (2004) 'UNHCR Statistical Yearbook 2004', Geneva, 21 August 2005. Available from: <<http://www.unhcr.org/44e96c842.html>>.

tells us what the reception pressures were at the time of shifting asylum to EU competence, this second year informs of the conditions at the end of the first legislative phase. 2004 was also a transition year, when on 1 May, ten new Member States acceded to the EU. But, as the majority of the CEAS measures were negotiated by the 15 Member States, we will focus only on these and include the new 10 Member States in our consideration of the 2009 statistics, by which time those states would also have transposed the CEAS acquis and be applying it.

	2004	
Country	Cases submitted during the year	Percentage (%) recognised (refugee and other)
Austria	24,634	55
Belgium	22,604 (all procedures)	18
Denmark	2,031	12.5
Finland	3,861	52
France	110,252 (excluding repeat applications)	11.5
Germany	122,830 (excluding repeat applications)	6 (available only for new applications)
Greece	7,294	1 (first instance only)
Ireland	7,410	10
Italy	9,722	35
Luxembourg	1,577	31
Netherlands	12,338	32.5
Portugal	113	16
Spain	5,535	18
Sweden	23,161	9
UK	86,123	16.5
<b>Total</b>	<b>439,485</b>	<b>21.2</b>

The ten main countries of origin of asylum seekers in Europe (here the UNHCR figures include the EU 25) that year were:

- Russian Federation
- Serbia and Montenegro
- Turkey
- China
- Nigeria



- India
- DRC
- Iran
- Iraq
- Pakistan

The distribution of asylum seekers continued to be rather heterogeneous. For example, Austria's top five countries of origin for 2004 were DRC, Russian Federation, Serbia/Montenegro and Slovakia and Guinea. In Denmark the top five were Serbia/Montenegro, Afghanistan, Iraq, Russian Federation and Somalia. But in Germany the top five were Turkey, Serbia/Montenegro, Russian Federation, Vietnam and Iran. In Spain the top five countries of origin were Nigeria, Algeria, Colombia, Mali and Guinea.

By 2003-2004 the key political events which were having an impact of refugee flight were the US-led invasions of Afghanistan and Iraq. While these two countries had 1<sup>st</sup> and 2<sup>nd</sup> places as countries of origin in 1999, by 2003-2004 Afghanistan had dropped (temporarily) off the top ten and Iraq had fallen to 9<sup>th</sup> place. The armed conflict in Chechnya of 1999 had reduced in intensity by 2003-2004 but in 2003 there was a controversial referendum on regional devolution of power. The continuing importance of the Russian Federation as key country of origin of asylum seekers in the EU certainly reflects these events.

The next pivotal date in the CEAS is 2009,<sup>48</sup> the entry into force of the Lisbon Treaty which provided legal status for the Charter equal to the other EU treaties. Article 18 of the Charter provides a right to asylum, something not seen in the EU since the modification of a number of national constitutions to comply with the Schengen Implementing Convention 1990.<sup>49</sup> By this point, the new Member States which had joined in 2004 had transposed the CEAS and the first five years of its operation, including the end of all the transitional periods, were over. While Bulgaria and Romania joined the EU on 1 January 2007, data is included separately from these two countries as their integration into the CEAS was taking place over that year.

	2009	
Country	Cases submitted during the year	Percentage (%) recognised (refugees and other)
Austria	15,821	26.1
Belgium	22,277	16.9
Cyprus	6,914	16

48 UNHCR (2010) 'UNHCR Statistical Yearbook 2009', Geneva, October 2010. Available from: <<http://www.unhcr.org/4ce532ff9.html>>.

49 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990 [2000] OJ L239/19.

Czech Republic	1,832	20.8
Denmark	4,562	37.4
Estonia	36	9.5
Finland	5,910	77.8
France	42,118	14.3
Germany	27,649 (not including repeat applications)	42.9
Greece	28,023	2.2
Hungary	4,672	22.4
Ireland	5,260	5.9
Italy	17,603	43.5
Latvia	52	40.7
Lithuania	211	29.2
Luxembourg	477 (excluding judicial review)	30.5
Malta	3,216	32.8
Netherlands	14,905	48.3
Poland	10,587	38.2
Portugal	139	52.0
Slovakia	822	25.2
Slovenia	183	18.9
Spain	3,007	7.6
Sweden	37,897	24.1
UK	46,025	29.5
<b>Total</b>	<b>300,198</b>	<b>28.5</b>

	2009	
Country	Cases submitted during the year	Percentage (%) recognised (refugee and other)
Bulgaria	853	41.3
Romania	835	10.6
<b>Total</b>	<b>1,688</b>	<b>25.95</b>

In 2009, the ten main countries of origin of asylum seekers to the EU of 27 Member States, according to FRONTEX in its Risk Analysis July 2011,<sup>50</sup> were:

- Afghanistan
- Serbia
- Iraq
- Russian Federation
- Iran
- Somalia
- Eritrea
- Pakistan
- Tunisia
- Not specified

It is particularly striking how sharp the drop in overall numbers of asylum seekers in 2008-2009 was in an EU of 25 Member States, in comparison with 2003-2004 in an EU of 15 Member States. The drop is over 138,000 people. Once again distribution across the Member States was rather diverse. In France the top five countries of origin were Russian Federation, Serbia, Turkey, Sri Lanka and DRC. But in Poland the top five were Russian Federation, Belarus, Sri Lanka, Vietnam and India. In Sweden the top five were Iraq, Somalia, Serbia, stateless people and applicants from Eritrea, while in the UK, the list was Afghanistan, Iran, Zimbabwe, China and Iraq.

International political tensions in 2008-2009 included the US and Allied exercise investment of military power in Iraq in an attempt to diminish political violence there. Afghanistan continued to be in substantial disarray; the Sri Lankan military launched an offence against the Tamil Tigers and declared victory on 18 May 2009. The Russian operation in Chechnya was officially ended on 15 April 2009 but in August of the preceding year, 2008, there were very substantial military tensions between Russia and Georgia over Abkhazia. The Somali civil war took a new turn as the Al Shabaab group gathered strength and authority over increasingly large parts of the country.

50 FRONTEX (2011) 'Annual Risk Analysis 2011', Warsaw, April 2011. Available from: <[http://frontex.europa.eu/assets/Attachments\\_News/ara\\_2011\\_for\\_public\\_release.pdf](http://frontex.europa.eu/assets/Attachments_News/ara_2011_for_public_release.pdf)>.

In 2014 there were 28 Member States (Croatia had joined on 1 July 2013). According to EUROSTAT data on first applications for 2013<sup>51</sup> and UNHCR data on recognition rates 2012,<sup>52</sup> the picture was the following:

	2014	
Country	Cases submitted during the year	Percentage (%) recognised (refugee and others)
Austria	17,413 (data gathered from UNHCR)	34.8
Belgium	11,965	23.4
Bulgaria	6,980	28.9
Croatia	1,045	16.8
Cyprus	1,335 (there is no data for 2 months of this year)	7.9
Czech Republic	490	39.1
Denmark	7,170	46.0
Estonia	95	22.8
Finland	2,985	54.1
France	58,925	9.4
Germany	109,375	31.9 (not including repeat applications)
Greece	7,860	0.9
Hungary	18,945 (data for the first 3 months of this year is missing)	48.0
Ireland	910	8.7
Italy	26,920	38.1
Latvia	185	24.8

51 EUROSTAT (2014) Asylum Applicants and First Instance Decisions on Asylum Applications: 2013, KS-QA-14-003-EN-N, Brussels.

52 UNHCR (2013) 'UNHCR Statistical Yearbook 2012', Geneva, 10 December 2013. Available from: <<http://www.unhcr.org/52a7213b9.html>>. Note that EUROSTAT does not produce data in this form.

Lithuania	250	13.5
Luxembourg	990	2.4
Malta	2,205	90.7
Netherlands	14,375	41.0
Poland	13,645 (data for December is not available)	12.1
Portugal	500	96.3
Romania	1,405	11.7
Slovakia	290	40.4
Slovenia	240	16.9
Spain	4,285	20.0
Sweden	54,255	49.1
UK	28,950	37.0
<b>Total</b>	<b>393,988</b>	<b>30.95</b>

Notwithstanding the much larger EU of 2013-2014 with 28 Member States, the total number of asylum applications remained substantially lower than the number of applications in 2004 to the EU 15 – about 40,000 fewer applications. According to EUROSTAT, the countries of origin of asylum seekers in the EU in the 4<sup>th</sup> quarter of 2013, by Member State where the applications were made, continued to vary substantially. The EU top five countries of origin were Syria, Serbia, Afghanistan, Eritrea and Russian Federation. But for France the top five were DRC, Albania, Bangladesh, Russian Federation and Kosovo. For Germany they were Serbia, Syria, Macedonia, Eritrea and Afghanistan. In the Netherlands the top five were Syria, Somalia, Eritrea, Iraq and Afghanistan. Sweden had Syria, stateless people, Eritrea, Somalia and Afghanistan as its top five.

The political situation in 2013-2014 was marked in particular by a bloody civil war in Syria which was dragging on, continued and intensifying bloodshed in Iraq and Afghanistan, international intervention in Mali and Central African Republic and a coup in Egypt followed by a crackdown on former members of the governing party.

This snapshot of the numbers of people seeking asylum in the EU and recognition rates is striking, as is the very limited regard for situations and the use of violence in some of the main countries of origin of asylum seekers over the relevant period. First, and perhaps most astonishing, is the fact that although the EU grew by more than one-third in population and territorial terms between 1999 and 2014 with the arrival of 13 new Member States, the numbers of asylum seekers requesting international protection has dropped, most dramatically since 2004. This is indicative of a net reduction in available asylum space

and supports calls for the EU to make more efforts to assist refugees around the world. It also has resulted in the comparative share of asylum seekers in the EU to drop substantially in comparison with other parts of the world. According to UNHCR's most recent data on global asylum trends, 10.1 million refugees (86% of the world's refugee population) are hosted by developing countries.<sup>53</sup>

## **2.4. Dublin I, II and III: the outcomes of asylum seeker transfers**

The Dublin I,<sup>54</sup> II<sup>55</sup> and III<sup>56</sup> systems are not responsibility-sharing mechanisms, as they do not take into account questions of overall numbers, capacity or other criteria which might be described as homogenising outcomes. Rather, the Dublin I, II and III systems are based on three simple principles which are antagonistic to responsibility-sharing in the sense of distributing in equal numbers asylum seekers across the EU. The three principles are: first, the Member States are responsible for determining where an asylum application must be examined. The most frequently used criterion, which is usually decisive (though hierarchically subordinate to other criteria), is the Member State through which first entry into the EU occurred. Secondly, any negative decision on asylum by the responsible Member State is automatically recognised as final for all Member States; and thirdly a positive decision has only limited territorial application in the Member State where the decision was made. So looking at, for instance, the recognition rate in Malta in 2013-2014 which surpasses 90%, none of those persons recognised in Malta as entitled to international protection are permitted to move (in their capacity as recognised refugees) to any other Member State. Thus neither at the first reception stage nor at the recognition stage can it be said that Dublin is a responsibility-sharing mechanism. If anything, it may be considered a disciplining measure – Member States which allow people irregularly to cross their borders will be responsible for determining their asylum claims, should they make them. Nonetheless, in any discussion about first reception of asylum seekers in the Union and their distribution among the Member States, it is imperative to look at the outcomes of Dublin I, II and III because they give a clear indication of the interest of Member States in moving people around the EU.

This section is based on the available EURODAC data from the annual reports of EURODAC, dating from 2004. The EURODAC database of fingerprints of people who have applied for asylum or have been apprehended irregularly crossing the external borders of the EU is available for checks for fingerprints of persons whom Member States suspect should be the asylum responsibility of another Member State. The information which is found in the EURODAC reports relates to the number of asylum seekers who apply for asylum in a second Member State and also whether those persons have actually been sent back to that second state.

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53 UNHCR (2014) 'UNHCR Global Trends 2013', Geneva, 20 June 2014. Available from: <<http://unhcr.org/trends2013/>>, 16.

54 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1997] OJ C254/1.

55 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 or stateless person (Dublin II Regulation) [2003] OJ L50/1.

56 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) (Dublin III Regulation) [2013] OJ L180/31.

The first EURODAC annual report was published on 5 May 2004.<sup>57</sup> Category 1 data is that of people who have applied for asylum and whose fingerprints have been sent to the EURODAC database (which ought to include all people who have applied for asylum). Category 2 data is fingerprints of persons apprehended irregularly crossing the external frontier of the EU in the event that they seek asylum in another Member State. Category 3 data is that relating to aliens found irregularly present in a Member State whose fingerprints are sent for a check against the EURODAC database. If the fingerprints sent to EURODAC correspond to fingerprints already in the database, there is what the system calls a 'hit'.

The first report on the system covers the period 15 January 2003 to 15 January 2004. The figures include Iceland and Norway and 14 Member States (Denmark was excluded for legislative reasons at that time). Over this period there were a total of 271,573 successful transactions – that is the checking of asylum seekers or others' fingerprints. Of that figure 246,902 were fingerprints of asylum seekers. This was the year in which there were 439,467 new asylum applications, meaning less than two-thirds of those new applications were the subject of a EURODAC search. Of those checks, 14,960 revealed a 'hit' where the asylum seeker had already applied for asylum in another Member State and then had moved and applied again. Looking only at the data on hits between Member States (but not where the same person has applied more than once in the same Member State), only three Member States have a hit rate over 2,000 – Germany (2,820), UK (2,734) and Sweden (2,636), resulting in the identification of asylum seekers who should be the responsibility of another Member State. Among the Member States responsible for taking back asylum seekers, the top five are: Austria (3,533), Germany (2,147), Italy (1,911) Sweden (1,505) and the Netherlands (1,113).

The first evaluation of the Dublin system carried out by the Commission covers 2005.<sup>58</sup> In that year, Austria had 805 incoming transfers and 589 outgoing ones. Germany had 2,716 incoming transfers and 2,748 outgoing transfers. Italy had 419 incoming and 47 outgoing transfers while the Netherlands had 862 incoming and 982 outgoing. No data was available for Sweden but the UK had 366 incoming and 1,824 outgoing transfers. What is most noticeable about these figures is how low they are in comparison with the numbers of asylum applications received in any of these countries in 2003-2004, though the numbers are more consistent with the 'hit' rates. The 'hit' rates for category 2 and category 3 data against category 1 are remarkably low – a total of 673 for category 2 and 1,181 for category 3. These figures are so low as not to merit further analysis.

On 25 September 2009 the Commission issued its annual report on the operation of EURODAC in 2008.<sup>59</sup> The data included covers 2008 and 27 Member States, Iceland, Norway and Switzerland. Denmark is included in these figures. The total number of hits of category 1 to category 1 was 33,456 (where an asylum seeker had already made an asylum application in another Member State or participating state).<sup>60</sup> This is about 2 ½ times the 2004 figure. The five top countries 'hit' (which had first submitted the fingerprints of the asylum seeker to EURODAC and against which another country checked fingerprints)

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57 European Commission (2004) First Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit, SEC(2004) 557, 5 May 2004, Brussels.

58 European Commission (2007) Report on the Evaluation of the Dublin System, COM(2007) 299, 6 June 2007, Brussels; European Commission (2007) Staff Working Document Accompanying the Report on the Evaluation of the Dublin System, SEC(2007) 742, 6 June 2007, Brussels.

59 European Commission (2009) Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit in 2008, COM(2009) 494, 25 September 2009, Brussels.

60 This figure requires the subtraction of local hits which are hits against the same Member State which sent the fingerprints for checking from the total.

were: Poland (4,373), Sweden (3,877), Germany (3,635), Italy (3,310) and Austria (2,682). The top five sender countries with 'hits' from other Member States were: France (4,637), Norway (3,051), Austria (2,969), Sweden (2,968) and Belgium (2,679).<sup>61</sup> The Commission carried out its review in 2007 of the Dublin system in anticipation of the recasting of the regulation, including a detailed analysis of findings. Thereafter, after the proposal for a recast was tabled,<sup>62</sup> there has been little further data available on actual return of asylum seekers from one Member State to another on the basis of EURODAC hits (or otherwise). Data from 2003 – 2005 used in that Report indicate that of all asylum applications over the period, Dublin transfers accounted for 4.05% for incoming transfers and 4.28 % for outgoing transfers. This data was analysed for the European Parliament in the Reflection Note of 2009.<sup>63</sup>

EU-LISA, the EU's Agency for Large Scale IT Systems, which is now responsible for EURODAC, issued the 2013 Annual Report in July 2014.<sup>64</sup> The data includes the EU 28 and the 3 non-EU states. Category 1 hits to category 1 data totaled 124,942 (excluding hits where the same Member State sends the fingerprints and is the one which first registered them in EURODAC). This is a substantial rise in use of the system. The top five 'hit' countries were: Italy (14,225), Poland (11,377), Sweden (11,101), Greece (10,973) and Hungary (10,296). The top five sending countries with a hit following were: Germany (41,617), Sweden (12,782), France (10,606), Switzerland (8,910) and Italy (8,387). The information included in the Commission's 5<sup>th</sup> Annual Report on Immigration and Asylum 2013 and its accompanying Staff Working Document on Dublin returns is rather limited.<sup>65</sup> It notes simply that Croatia had received some 372 requests to take back from other Member States and Hungary had an augmented case load resulting from the Dublin procedure. Spain had also received an increased number of take back requests.

EASO's Annual Report on the Situation of Asylum in the European Union 2013, however, contains information that could speak somewhat to the efficiency of the Dublin mechanism. EASO mentions that, out of an annual average of 35,000 outgoing requests during the period 2008-2012, only about 8,500 (25% of outgoing requests) actually resulted in transfers.<sup>66</sup> Accordingly:

*"[A]lthough the proportion of outgoing requests was on average about 12% of the number of registered asylum applicants, Dublin transfers were made in the case of only about 3% of those making an asylum claim in the EU".<sup>67</sup>*

The picture which emerges from the operation of the EURODAC and Dublin I, II and III systems is not particularly illuminating. One has the impression that much effort and

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61 This figure requires the subtraction of local hits which are hits against the same Member State which sent the fingerprints for checking. Local hits indicate that an asylum seeker has submitted a second application in the same Member State but has not moved to another Member State.

62 European Commission (2009) Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554, 21 October 2009, Brussels.

63 Maiani and Vevstad, V (n. 31).

64 EU-LISA (2014) Annual Report on the 2013 Activities of the Central Unit of Eurodac pursuant to Article 24(1) of Regulation (EC) No 2725/2000, 31 May 2014, Tallinn. Available from: <[http://www.eulisa.europa.eu/Publications/Reports/eulisa\\_report\\_eurodac\\_en.pdf](http://www.eulisa.europa.eu/Publications/Reports/eulisa_report_eurodac_en.pdf)>.

65 European Commission (2014) 5th Annual Report on Immigration and Asylum, COM(2014) 288, 22 May 2014, Brussels; European Commission (2014) Staff Working Document Accompanying the 5th Annual Report on Immigration and Asylum, SWD(2014) 165, 22 May 2014, Brussels.

66 EASO (2013) Annual Report on the Situation of Asylum in the European Union 2012, Valletta. Available from: <<http://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-Final.pdf>>, 30.

67 Ibid.



expenditure goes into maintaining a database of fingerprints which reveals increases in secondary movement of asylum seekers but not on a particularly dramatic scale; and a fairly desultory number of actual transfers of asylum seekers back from one Member State to another. In relation to the overall numbers of asylum claims, this activity is quite minor. Further, the top sending and receiving countries under the system are, in a number of prominent cases, the same. So, while the EURODAC data produces hits 'against' and 'for' a state (taking 'for' as meaning that the state can send the asylum seeker somewhere else and 'against' meaning that the state is required to receive an asylum seeker from another country), the end result to the overall number of asylum seekers for which the state is responsible does not change much. For individual asylum seekers, by contrast, the human cost may be enormous.<sup>68</sup>

## 2.5. Using data

In the preparation of this study, questionnaires were sent out to policy makers within national asylum institutions and within the EU institutions and UNHCR. Among other subjects, questions were asked concerning the extent to which authorities consider and use such data in their day-to-day work. According to the answers received, national asylum authorities tend to make regular use of EUROSTAT, UNHCR, EASO and FRONTEX data and national statistics when preparing their positions on the CEAS, while particular emphasis is placed on the use of EASO and EUROSTAT-generated data for that purpose.

More specifically, one Member State has relied on EASO and UNHCR-generated data to prepare its positions for the "Meeting of Southern and South-Eastern European countries about the Common European Asylum System and Burden-Sharing" in Athens on 15 May 2014, as well as for meetings with the European Commission relating to funding. Another Member State confirmed it has specifically used EASO's annual report to prepare its AMIF multiannual programme. Another respondent detailed that EUROSTAT and UNHCR data was brought forward in several Council meetings on asylum at both Working Party and Permanent Representatives Committee (COREPER) level. Furthermore, data is systematically relied upon in the context of bilateral information exchange between partners, according to one respondent Member State.

Respondent asylum authorities have unanimously agreed that the improvements in data collection and presentation, marked particularly by EUROSTAT, have been helpful in facilitating regular use of asylum data by Member States. As EASO officials explained in interview, the Support Office has been able to make a number of improvements in EUROSTAT's definition system for asylum statistics: Dublin transfers are no longer registered as rejection decisions, and follow-up is carried out on family reunification data in order for EUROSTAT to change its definitions and guidelines for Member States. Accordingly, EASO expects more accurate and reliable EUROSTAT data on Dublin as of 2014.

Questions regarding the exact use of annual EURODAC reports, however, has attracted different responses from Member States. As one Member State suggested, these reports are not used as frequently. Two Member States found that these reports are relied upon by asylum authorities for the supervision of the database and the implementation of

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68 ECRE (n. 13).

Regulation (EC) 2725/2000 (EURODAC Regulation), while others stated that they only use EURODAC reports for reference and comparison purposes.

On the other hand, the way in which policy makers use available asylum data may often raise difficulties as regards evidence-led policy-making in the CEAS. According to a UNHCR official, policy makers within national authorities, EU institutions and UNHCR often rely on statistics without going into detail as to what a particular set of data may mean.

## **2.6. Conclusion**

The objective of this chapter has been to set the scene clearly and on the basis of all publicly available data on the demand for first reception by people seeking international protection in the EU. The analysis taken four points of time for comparison: 1999, 2004, 2009 and 2014 – all key moments in the creation of the CEAS. It has been found that, while there have been variations among the number of asylum seekers coming to the EU and differences in the countries of origin of asylum seekers who seek asylum in one Member State or another, the overall numbers have not changed dramatically over time, thereby indicating a net reduction in first reception capacity across the EU-28. Every now and then there are dramatic spikes such as in France in 2004 or dramatic drops such as in Germany in 2009 but these are rare. Rather in some countries there have been steady increases or decreases – Sweden in the first case and Greece in the second. What is much more worrying is the very substantial differences in recognition rates among the Member States. Of course this is in part explained by the fact that countries of origin of asylum seekers also differ substantially across the Member States. Yet, even where the top ten countries of origin are the same or similar, the recognition rates are alarmingly diverse. The application of the Dublin I, II or III system for allocating responsibility for asylum seekers appears to have had only a minor impact on Member States' first reception obligations. Yet, the human costs for the people who are transferred is enormous. The trauma which this system causes to them has been well documented.<sup>69</sup> The current situation is not consistent with the EU Charter's commitment to respect the human dignity of everyone to whom EU law applies.

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69 JRS (n. 13).

### **3. CURRENT AND PROPOSED JOINT APPROACHES TO ALLOCATION, ACCESS TO PROCEDURES, FIRST-LINE RECEPTION AND PROCESSING**

#### **KEY FINDINGS**

- The Dublin system, governing allocation of responsibility for claims in the EU at present, relies heavily on coercion, and is characterised by many problems in practice. These are linked to a great extent to divergent standards and non-compliance with EU obligations in reception and procedures in some Member States.
- Joint processing proposals have ranged from the provision of support teams to Member States to a fully-fledged EU processing system. EASO has developed pilot projects relating to different steps of the asylum process which provide an important basis for assessing the potential for expanded joint activities in future.
- Multi-actor arrangements, involving partnership between government, international and non-governmental organisations, can bring to bear valuable experience in first-line reception. Previous projects and current UNHCR proposals contain elements for strengthened initial reception and processing arrangements that merit close consideration.
- Some proposals from EP, NGO and academic quarters for a 'European distribution key', along the lines of Germany's internal distribution model, advocate for use of responsibility-allocation criteria related to national authorities' capacity and other factors.
- Mutual recognition of positive asylum decisions could provide an important way forward, in line with the Treaty obligation to establish a uniform status of asylum, valid throughout the Union.

This chapter aims to examine the existing legal framework, selected aspects of practice, and proposals developed to date for alternative approaches to first-line reception of asylum seekers on the one hand; and on the other, allocation of responsibility for asylum seekers, and provision of protection. In reflecting on possible ways to address immediate challenges facing the Member States in relation to asylum, it is important to take account of proposals made to date in studies commissioned by EU institutions, discussions in and between institutions and Member States, as well as ideas developed by academics and international organisations that have attracted interest at EU level. Some of these have not been taken forward to date, due to various reasons, which include an already-charged EU policy and legal agenda on asylum, political and institutional caution, the need for further development of the ideas, and for further legislative amendments as well as political support to make them possible. However, some of these may merit further examination, development or use in the future. This chapter will examine their potential, in light of the current situation in and expected further evolution of the CEAS, as well as on-going debates about fair sharing of responsibility for asylum.

### 3.1. Access to procedures, responsibility for asylum claims and asylum seekers' basic entitlements: current EU framework and practice

The TFEU foresees establishment of a "common procedure" and "uniform status of asylum, valid throughout the Union" as well as a "uniform status of subsidiary protection".<sup>70</sup> To date, however, current legislation (as amended by recent recasts) has established common standards aimed at ensuring harmonised approaches to asylum procedures, as well as reception and qualification for protection, at national level. Processing (including initial screening) of asylum seekers is conducted under national law in national territory, and while the legislation of Member States should reflect the common EU standards, there remain significant differences in practice.<sup>71</sup> There is not, as yet, a fully common procedure across the Union, and experts agree that further steps can and should be taken to achieve this, through closer approximation of national practices, as well as enhanced practical cooperation and other initiatives at EU level. The Strategic Guidelines on the future Justice and Home Affairs agenda, agreed by the European Council in June 2014, have affirmed this, stating that "[t]he full transposition and effective implementation of the Common European Asylum System (CEAS) is an absolute priority. This should result in high common standards and stronger cooperation, creating a level playing field where asylum seekers are given the same procedural guarantees and protection throughout the Union".<sup>72</sup>

The recast APD, adopted in June 2013, contains amendments designed to facilitate **access to procedures** for those who express the wish to request asylum,<sup>73</sup> as well as specific rules for people who may be in need of special procedural guarantees and unaccompanied minors.<sup>74</sup> The need for such strengthened rules and safeguards emerges clearly from past reports on state practice documenting significant challenges, delays and obstacles to accessing fair procedures in some Member States.<sup>75</sup> The recast APD also contains new rules relating to unfounded and manifestly unfounded claims,<sup>76</sup> inadmissible claims<sup>77</sup> and accelerated procedures.<sup>78</sup> While the grounds for acceleration of claims have been reduced somewhat, there remains wide scope for Member States to apply accelerated procedures, with reduced safeguards in practice, in a number of cases.

**Allocation of responsibility** for asylum seekers, where more than one Member State may be concerned, is regulated by the Dublin Regulation, implemented in conjunction with the EURODAC database, governed by the EURODAC Regulation, which contains the fingerprints of people who have claimed asylum or have been detected entering or staying irregularly in

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70 TFEU, Article 78.

71 European Commission (2008) Policy Plan on Asylum, COM(2008) 360, 17 June 2008, Brussels; UNHCR (2011) 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum seekers Fleeing Indiscriminate Violence', 27 July 2011. Available from: <<http://www.refworld.org/docid/4e2ee0022.html>>.

72 Council of the European Union (2014) European Council 26-27 June 2014 Conclusions, EUCO 79/14, 27 June 2014, Brussels, para 7.

73 APD, Article 6.

74 APD, Articles 7-8.

75 European Commission (2010) Report on the Application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2010) 465, 8 September 2010, Brussels; EASO (2013) Annual Report on the Situation of Asylum in the European Union 2012, Valletta. Available from: <<http://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-Final.pdf>>; EASO (2014) Annual Report on the situation of Asylum in the European Union 2013, Valletta. Available from: <<http://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>>, 75ff.

76 APD, Article 32.

77 APD, Articles 33-34.

78 APD, Article 31(8).

the EU. The Dublin criteria for allocation of responsibility do not include or take account of relative levels of capacity on the part of national governments, as it was not conceived as a burden-sharing mechanism.<sup>79</sup> Questions could thus arise about its consistency with Treaty provisions requiring that EU asylum measures and implementation be in accordance with the principle of solidarity and fair sharing of responsibility among the Member States.<sup>80</sup>

**Reception conditions** for those awaiting outcomes on their asylum applications are regulated by the recast RCD. While standards have improved progressively in a number of Member States over the years,<sup>81</sup> there remain widely documented recent cases where EU standards are not met.<sup>82</sup> In 2011, the ECtHR found in *MSS v Belgium and Greece* that conditions in Greece violated Article 3 ECHR, and reiterated its conclusion 3 years later in *FH v Greece*.<sup>83</sup> It is noteworthy that some of the major documented shortcomings in reception standards, and resultant violations of asylum seekers' rights, have occurred in Member States at the Union's external frontiers.

The CJEU has clarified that in Dublin cases, the Member State in which the asylum seeker is located is responsible for providing reception facilities and entitlements, until the point at which a person is transferred to another responsible Dublin state.<sup>84</sup> Pending this ruling, the situation was unclear and some asylum seekers were deprived of their entitlements while responsibility was debated.<sup>85</sup> This has also subsequently been clarified in the recast RCD, along with other amendments confirming that Member States must provide the full range of reception rights to asylum seekers in detention, as part of new rules providing for exhaustive, defined legal grounds for detention, judicial oversight and new binding minimum conditions for detention.

### 3.2. First-line reception – identification, registration and referral

In many Member States, **border authorities** are likely to be the first point of contact between asylum seekers arriving at Member States' frontiers. Once an asylum seeker has been identified as a person seeking or potentially in need of protection,<sup>86</sup> and has indicated his or her intention to request international protection, he or she should be referred to

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79 See also Chapter 2 above, 27.

80 TFEU, Article 80.

81 De Bruycker, P. (2007) 'Comparative Overview of the Implementation of Directive 2003/9 of 27 January 2003 on minimum standards for the reception of asylum seekers in the EU Member States'. October 2006, Brussels. Available from:

<[http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/odysseus\\_synthesis\\_report\\_2007\\_en\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/odysseus_synthesis_report_2007_en_en.pdf)>; EMN (2014) 'The Organisation of Reception Facilities for Asylum Seekers in different Member States'. Available from: <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_second\\_focussedstudy2013\\_organisation\\_of\\_reception\\_facilities\\_final\\_version\\_28feb2014.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_second_focussedstudy2013_organisation_of_reception_facilities_final_version_28feb2014.pdf)>.

82 UNHCR (2014) 'UNHCR Observations on the Current Situation of Asylum in Bulgaria'. Available from: <<http://www.refworld.org/docid/534cd85b4.html>>; ECRE (2014) ECRE Joins UNHCR in a Call for the Suspension of Dublin Transfers to Bulgaria, January 2014, Brussels. Available from:

<[http://ecre.karakasstaging.be/index.php?option=com\\_downloads&id=215](http://ecre.karakasstaging.be/index.php?option=com_downloads&id=215)>; Amnesty International (2012) 'Punishment without a Crime: Detention of Migrants and Asylum Seekers in Cyprus, June 2012. Available from: <<http://www.amnesty.org/fr/library/asset/EUR17/001/2012/en/36f06387-9ce6-43df-9734-a4550fa413d6/eur170012012en.pdf>>; ProAsyl (2013) 'Asyl in der Republik Zypern: Verfahrensstandards, Rechtslage und Lebensbedingung auf dem Pruefstandt'. Available from: <[http://www.borderline-europe.de/sites/default/files/readingtips/2013\\_04\\_report\\_ZYpern\\_KUB.pdf](http://www.borderline-europe.de/sites/default/files/readingtips/2013_04_report_ZYpern_KUB.pdf)>.

83 *FH v Greece* [2014] ECHR 860, para 108.

84 Case C-179/11 *Cimade & GISTI v Ministre de l'Intérieur* [2013] 1 CMLR 11.

85 De Bruycker (n. 81).

86 Extensive work has been undertaken over recent years to train and raise the awareness and knowledge of border officials on the methods for identifying some who may be in need of protection, and ensure those rights are respected.

competent asylum authorities responsible for registering claims. The APD foresees considerable scope for Member States to apply border procedures to claimants, including where the grounds for applying accelerated procedures apply.<sup>87</sup>

Amendments to the **Asylum Procedures Directive**, providing for clarified and strengthened obligations to provide information and ensure access to the procedure, should also ensure that asylum seekers are accurately distinguished from those not requesting or in need of international protection. This is however a process that may be fraught in the pressured circumstances prevailing at a land, sea or air border, with limited time for authorities to respond and significant numbers of people seeking to move through into the territory of the Member States. Those claiming asylum may be categorised thereafter in the course of the procedure, based on whether they are considered to have an inadmissible, unfounded or manifestly unfounded claim, and whether they should or can be placed in accelerated procedures, among others.

Some national practice highlights the potential, as well as the limitations, on current rules and arrangements for screening of newly-arrived asylum seekers. This study, which cannot provide a comprehensive overview, will recount selected aspects of some collective approaches used to date.<sup>88</sup>

In Italy, between 2006-2010, a project known as "*Praesidium: Strengthening of reception capacity in respect of migration flows*" was established and implemented, involving the Italian Ministry of Interior (MOI), UNHCR, IOM and the Italian Red Cross working in partnership. It was funded for the first three years by the European Commission, and solely by the Italian MOI in 2010; in its fourth year, Save the Children Italy also joined as a project partner. Initially implemented on Lampedusa, and subsequently rolled out to Calabria and other locations on the Italian coast and mainland, the project aimed to ensure provision of information, legal counselling and other basic facilities to new arrivals by sea in Italy, and sought to identify the appropriate channels in each case for reception and for access to the appropriate legal or administrative procedure. Those seeking or in need of protection were given information and support by UNHCR in connection with the asylum procedure, as well as identification and particular assistance to vulnerable people in the asylum process, and monitoring of reception conditions and effective access to procedures. IOM played a key role in regards to information, advice and services to migrants, in addition to support in relation of voluntary return where possible; while the Italian Red Cross sought to identify and provide support to people with medical needs and vulnerable people in general. Save the Children focussed on unaccompanied minor arrivals, in the asylum procedure and otherwise, to ensure their adequate treatment and that their particular needs were met.

Several positive aspects of the *Praesidium* project were identified in a UNHCR evaluation, which described it as an 'innovative' model for responding to a mixed migration situation, notably because of the strength of the partnership between government, international and non-governmental organisations, and the division of competences based on the respective actors' mandates and expertise.<sup>89</sup> However, it was noted that the success of the model depended for its utility and impact on the policy context in which it operated (one which in 2009 shifted suddenly and sharply towards deterrence and pushbacks of migrants and

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87 APD, Article 43.

88 See further Annex III below.

89 UNHCR (2009) 'Refugee Protection and Mixed Migration: A Review of UNHCR's Operational Role in Southern Italy', PDES/2009/05, September 2009. Available from: <<http://www.unhcr.org/4ac35c600.pdf>>.



asylum seekers in Libya, leading to a dramatic drop in arrivals and dwindling demand for the multi-partner model). It also concluded that more emphasis should have been placed on ensuring greater sustainability from the outset in the design of the arrangement and its support systems, and aiming for more effective coordination and alignment of goals and strategies between the partners.

Civil society actors have highlighted the importance of adequate funding to ensure, in addition to general sustainability, that such arrangements can respond to large-scale arrivals, which are frequently the norm at sea borders.

In 2014, *Praesidium* continues to operate in a significantly scaled-down way, with the authorities in the leading operational role and other organisations engaged chiefly in monitoring and providing support in various ways.<sup>90</sup>

In other regions of the world, screening and other processes involving asylum seekers have been carried out at sea, on board vessels responsible for interception at or near maritime borders. **On-board asylum seeker screening arrangements** have been used by the United States at various points in the past, including for over ten years from 1981 as part of maritime interception operations for people in small boats seeking to reach the US from Haiti. Under this practice, any Haitian vessel that appeared to be carrying migrants or asylum seekers was boarded, and passengers transferred to US Coast Guard cutters, where they were interviewed by representatives of the US State Department and the Immigration and Nationalisation Service, with the aid of an interpreter. The ostensible aim of the interview was to determine if the person could substantiate a well-founded fear of persecution. However, out of some 25,000 people intercepted and handled in this way in over ten years, only 28 were transferred to the US for processing. The rest were returned to Haiti – notwithstanding well-documented evidence of human rights abuses by successive Haitian governments during that time.<sup>91</sup>

Many critics have objected to the practice of conducting screening at sea, based on the unsuitability of shipboard facilities, in most cases, including their inability to serve effectively as venues where access to information, rest and medical care can be guaranteed in appropriate conditions, as well as arrangements that could enable an asylum seeker to submit and pursue his or her claim effectively, including information about the procedure and its consequences, legal advice and counselling.<sup>92</sup> Other difficult conditions associated with the US model have included overcrowding, sickness and fatigue, exacerbating the challenges around efficient screening.<sup>93</sup> When numbers of those intercepted at sea *en route* to the US rose sharply after a coup that overthrew President Jean-Bertrand Aristide, the US government changed its policy – after a brief attempt at housing asylum seekers on the decks of the Coast Guard cutters – and began to transfer them to a tent camp that was rapidly established at Guantanamo Bay, Cuba. Screening was also carried out in that facility, under unsatisfactory conditions, for a number of months, during which, at least, a far higher proportion (32%) were found to have a claim which merited a substantive examination. However, when the numbers rose rapidly in mid-1992, the US decided to

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90 Italian MOI, IOM, UNHCR, Save the Children and Italian Red Cross (2012) 'Praesidium Project: Recommendations and Good Practices in the Management of Mixed Migratory Flows by Sea'. Available from: <<http://resourcecentre.savethechildren.se/sites/default/files/documents/6893.pdf>>.

91 Mitchell, C. (1994) 'US policy towards Haitian boat people, 1972-1993', *Annals of the American Academy of Political and Social Science* 534: 69-80.

92 Frelick, B. (2003) 'In-country Refugee Processing of Haitians: The Case Against', *Refuge* 21(4): 66-72.

93 Helton, A. (1993) 'Toward a New U.S. Policy Concerning Haitian Asylum Seekers', *In Defense of the Alien* 16: 143-145.

close the Guantanamo camps and authorised the Coast Guard forcibly to repatriate all Haitians intercepted at sea, in apparent disregard of the principle of *non-refoulement* and other basic standards.

Although the US has continued to conduct screening on board ships on a periodic basis over the years, and UNHCR took part in monitoring at some key points, it has never gained the formal endorsement of UNHCR nor been recognised by experts as a viable approach. By contrast, the most recent example of the use of this method by **Australia**, in July 2014, attracted vociferous criticism from the UN Refugee Agency. The "**enhanced screening procedures**" used at sea in that case were not judged to provide sufficient safeguards to ensure a fair and accurate decision. The fact that those 'screened out' under such procedures were subsequently returned to their country of origin, Sri Lanka, was seen to create a very serious risk of *refoulement*.<sup>94</sup>

In the **European** context, where the extraterritorial application of the *non-refoulement* principle has been clearly established, along with a legal obligation for states to facilitate access to territory and procedures where an asylum claim can be examined fairly and protection provided,<sup>95</sup> there would appear to be many reasons why RSD cannot effectively be conducted on board ships, and any first screening on board could create an inherent risk of *refoulement*. Questions of how one could ensure effective remedies, special procedural guarantees for those in need thereof, legal aid and other requirements are extremely difficult to address, notably given that coast guard vessels patrolling the Mediterranean are customarily far smaller than the US vessels used in the Haitian displacement context. Given existing sensitivities in Europe and with neighbouring countries, and differences of view around responsibility for search and rescue, as well as disembarkation following search and rescue or interception, this would appear to create a significant risk of tension among Member States as well as real potential for violation of asylum seekers' rights.

In 2014, following the tragic loss of life in the sea near Lampedusa in late 2013, and in the context of discussions on the work of the Task Force Mediterranean, UNHCR has developed a proposal for an '**EU solidarity package for rescue at sea**' which "aims to support Member States (MS) to address some of the challenges they face with the continuing high numbers of persons in need of international protection who arrive by sea to the EU" in mixed flows. Among other things, the proposed "EU Solidarity Package" would focus on strengthening asylum and reception systems in concerned Member States, including admission, registration and Dublin procedures; and measures designed to identify persons with links to other Member States, including family and cultural ties, and promote their transfer to those states "to reduce the 'burden' of the MS under pressure". It also seeks to encourage more engagement in joint processing, and promote the voluntary assumption of responsibility by other Member States for special groups of 'manifestly founded' asylum seekers, or relocation of persons granted international protection. As such, it seeks to provide support at the point of arrival and first-line reception; for the processing of claims, including through joint or supported processing; and encourage responsibility-sharing in relation to solutions.

The UNHCR proposals build on the obligations in the *acquis* in relation to first-line reception, adopting a proactive and interactive multi-actor approach, foreseeing support from UNHCR, EASO, IOM, other Member States and NGOs to assist the receiving Member

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94 UNHCR (2014) 'Returns to Sri Lanka of individuals intercepted at sea', 7 July 2014. Available from: <<http://www.unhcr.org/53baa6ff6.html>>.

95 Hirsi Jamaa and Others v Italy (2012) 55 EHRR 627.



State with initial steps. These include screening for medical and other special needs; provision of information, counselling and legal advice where appropriate; identification and fingerprinting, as well as registration of basic bio-data, and information relevant to family and other links in other Member States. Thereafter, it seeks to promote a 'fairer' means of allocating responsibility for claims – not by departing from Dublin as such, but by calling for a modified and individual rights-oriented implementation thereof. It is foreseen that identification of the responsible state under Dublin could be undertaken with help from a support team of other Member States' experts, coordinated by EASO; and that additional efforts should be used to apply, on a prioritised basis, criteria relating to family members and dependency. The more extensive use of the humanitarian and discretionary clauses is encouraged, in accordance with recent pronouncements by the CJEU<sup>96</sup> – potentially in connection with particular groups, such as Syrians and Eritreans. The objective is apparently to prioritise the processing of claims of, and sharing of responsibility for, groups which in the vast majority of cases need protection. This would involve a different approach to the implementation of Dublin than that most commonly used to date,<sup>97</sup> in full compliance with fundamental rights and international protection standards.

Further joint efforts are foreseen in the proposal in relation to substantive **claim processing** (with help from joint processing teams drawn from other Member States' experts); and redistributing responsibility for those granted protection. UNHCR refers specifically to relocation within the EU of people in need of protection; resettlement to third countries, and sponsored private humanitarian admission – which could also provide protection for relatives in third countries who may be vulnerable and in need of assistance to gain access to and protection in the EU. Reunification of refugees and subsidiary protection holders is also encouraged within the EU, and suggests facilitated or expedited processes with support from UNHCR, IOM, NGOs and others.<sup>98</sup>

As of the time of writing, discussions among concerned Member States, EU bodies and UNHCR was taking place on the possibility of such a joint approach in the context of sea arrivals.

### 3.3. Joint processing models

The European Council called in The Hague Programme of 2004 for a study on the "appropriateness, possibilities and difficulties, as well as the legal and practical applications, of **joint processing of asylum claims within the Union**".<sup>99</sup> This call was repeated in the Stockholm Programme in 2009,<sup>100</sup> after the European Commission in its 2008 Policy Plan on Asylum<sup>101</sup> proposed to 'examine how joint processing might alleviate the pressure on specific overburdened Member States.' In February 2013, the Commission published its '**Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the**

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96 Case C-245/11 K [2013] 1 WLR 883; MA v Secretary of State for the Home Department.

97 See ECRE (n. 13); JRS (n. 13).

98 UNHCR (2014) 'Central Mediterranean Sea Initiative: Proposal for a Response Package for Protection at Sea', October 2014 (Forthcoming).

99 European Council (2005), The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C53/4, Official Journal of the European Union, Luxembourg, para 1.3.

100 European Council (2010) The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C115/32, Official Journal of the European Union, Luxembourg, section 6.2.2: The Stockholm Programme invited "the Commission to finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications".

101 European Commission (n. 71), section 5.1.2: "Solidarity mechanisms".

**EU**,<sup>102</sup> which observed that joint processing was 'envisioned as a possible solidarity mechanism to help Member States cope with some of the challenges they may be faced with in asylum matters.' The study involved research and extensive consultation with Member States, EU bodies and other stakeholders, based on which it proposed four possible models for joint processing. Three of these essentially envisaged the provision of support from joint teams to national processes in Member States affected by 'particular pressures', operating in the framework of the national asylum law and institutions of the concerned Member State.

These three options were developed around the Early Warning mechanism in Article 33 of the subsequently-adopted recast Dublin Regulation. Option A foresaw the provision of support from joint teams to a Member State during the 'crisis management' phase of the early warning system, and subject to the Dublin rules and criteria on allocation of responsibility. Option B proposed a departure from Dublin in that states taking part in the arrangement would determine a quota of refugees and subsidiary protection beneficiaries that they would be prepared to take, and these would be relocated to the volunteering state's territory after joint processing in the Member State 'under pressure'. EU support for returns and removals of those not in need of protection was also envisaged at this point. Option C was similar to option A, except that support to the affected Member State from joint teams – which would become an institutionalised 'joint processing pool' coordinated by EASO, in which participation would be mandatory for each Member State – would be applied already in the 'crisis prevention' phase of the early warning system. Responsibility for RSD would however be determined by Dublin, and obligations to provide protection for those identified as needing it would remain with the responsible state.

Option D, in dramatic contrast to the other three, foresaw a full-scale EU system for RSD in relation to some or all asylum claims, conducted by an EU entity with legal power to take binding decisions on claims and distribute those found to be in need of protection in accordance with an agreed distribution key. It was acknowledged in the study that Option D was not politically feasible at the time of its writing, but that testing its feasibility and implications was seen as very useful as a contribution to reflection and debate.

While the study was the subject of discussion and cautious interest in non-governmental and academic circles, its proposals were overshadowed in subsequent months by the legislative process, as Member States negotiated intensively in the Council and with the Parliament to try to reach agreement on the texts. Events in late 2013 underlined the pressing need to explore further means of assisting states responding to arrivals at the external borders after the tragic deaths at sea of hundreds of people near Lampedusa in October 2013. The Commission proposed that EASO set up a first project on 'supported processing of asylum applications [allowing] a quicker and more efficient processing of asylum applications, relieving the asylum system of the responsible Member State without shifting responsibility for the examination of the asylum application and in full respect of the nationally applicable legal framework'.<sup>103</sup>

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102 Urth et al. (2013) 'Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for the Joint Processing of Asylum Applications on the Territory of the EU', European Commission, Directorate-General Home Affairs, HOME/2011/ERFX/FW/04, 13 February 2013, Brussels.

103 European Commission (2013) Communication on the Work of the Task Force Mediterranean, COM(2013) 869, 4 December 2013, Brussels, action 5.4.

The **European Asylum Support Office**, in addition to its ongoing support activities for Member States,<sup>104</sup> proposed in spring 2014 a series of limited **pilot projects testing aspects of joint processing**, defined for the pilots' purposes as 'an arrangement under which the processing of asylum applications is conducted jointly by experts of two or more Member States, under the coordination of EASO, in support of a requesting Member State'. The joint actions were foreseen as extending up to, but not including, the conduct of personal interviews, thus covering first-line reception, registration of identity data, fingerprints, identification of specific needs and assessment of responsibility under Dublin. This limited scope sought to avoid political, legal, linguistic and financial questions in relation to further joint action on analysis of cases, and/or making recommendations or taking legally binding decisions. Member States were asked to volunteer to take part, and as of mid-2014, eight pilot actions had been launched – focussing on areas including gathering information relevant to Dublin responsibility; identifying people with medical needs; unaccompanied minors and others.<sup>105</sup> At the time of writing, no official reports or independent evaluation had been published regarding their outcomes. However, initial impressions from stakeholders suggested that the pilots had had a positive impact, including through enabling Member States to share expertise and good practice, and to understand the situation and challenges in different states. While Member States see clear scope to continue and develop collaboration in this way, they also perceive some potential obstacles,<sup>106</sup> and will need to determine to what extent and in which contexts they wish to develop further joint action. Any proposals further to expand and develop joint processing will be required to respect the relevant legal standards, as discussed in Chapter 4.

Experience and discussion to date have thus shown that, while there is a general commitment at political level, as well as a binding legal obligation in the Treaties, to implement asylum measures and policies in line with principles of solidarity and fair sharing of responsibility, there is nevertheless some hesitation about moving to far-reaching joint action to support Member States facing pressure, following significant arrival numbers at external borders or otherwise. At present, systems for admitting, registering claims and RSD are firmly situated within national law and structures, based on EU common standards, and subject to Dublin rules on allocation of responsibility. EASO support and assistance from officials of other EU Member States has been provided through technical advice and assistance that does not involve direct participation in the asylum process, with positive results.

While joint processing has been identified as a potential further way, beyond sharing of financial and other resources, to provide support and demonstrate solidarity, Member States remain cautious, apparently due to a concern that moves to such arrangements, and conferring authority on a person or entity which is not a part of their own national structures, could undermine in some way national control over processes, or parts of processes, that can lead to the grant of rights to enter and remain in their territory. As such, they could be seen as constituting a potential encroachment on Member States' sovereignty. However, given that the Treaty foresees an eventual move in the future to a 'common procedure' and 'uniform status', there is arguably already a clear legal basis, if not an obligation, to consider joint processing arrangements, and explore their further potential. Such examination and exploration can help ensure that EU Member States are more effectively able to ensure access to procedures and to protection to those in need.

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104 EASO, Annual Activity Report 2013, Valletta. Available from: <<http://easo.europa.eu/wp-content/uploads/Annual-Activity-Report-2013.pdf>>.

105 Interview with EASO, 9 September 2014.

106 See Annex III, section 1.1.

### 3.4. Allocation of responsibility for asylum claim processing or solutions

Responsibility for determining asylum claims made in the EU – and thereafter, for provision of protection for those found to need protection in a responsible state – is determined, under present law and practice, by the Dublin system, subject to voluntary actions Member States might take in particular instances. However, some initiatives and ideas have been put forward which propose or explore other possible approaches to allocation of responsibility for either asylum seekers or people granted protection.

#### 3.4.1. Redistribution of responsibility for asylum seekers

The legal basis for allocation of responsibility for asylum claims among EU Member States and others taking part in the Regulation – Iceland, Liechtenstein, Norway and Switzerland – is the **Dublin system**.

The many problems associated with the implementation of Dublin have been extensively documented over recent years.<sup>107</sup> Its impact in undermining trust between asylum seekers and the authorities should not be underestimated. Asylum seekers who find themselves in detention or in substandard reception centres often wish to move on to other Member States to seek protection, typically wishing to seek protection where they have family or other connections. The pejorative term ‘asylum shopping’ implies that the motives behind an asylum seeker’s decision to apply for international protection in a country other than that of first arrival are the product of an inherently rational economic choice. The term is often used to suggest that the asylum seeker is motivated to apply in a Member State offering higher material reception conditions and welfare support.<sup>108</sup> Yet there is a wide array of legitimate reasons for which a person may prefer a specific country: the existence of support communities and diasporas, extended family or language affinity are indicative examples.<sup>109</sup> Empirical studies highlight that asylum seekers’ choice of destination is determined primarily by the presence of family members and friends rather than labour market conditions and admission policies.<sup>110</sup> As Thielemann observes, there is “little evidence for the claim that there is widespread and systematic ‘asylum shopping’ to exploit differences in host countries’ welfare provisions”.<sup>111</sup>

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107 Maiani and Vevstad (n. 31); Hurwitz, A. (2009) *The Collective Responsibility of States to Protect Refugees*, Oxford, OUP, Chapter 3; ECRE (n. 13); JRS (n. 13); Mouzourakis, M. (2014) “‘We Need to Talk about Dublin’: Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union”, RSC Working Paper (Forthcoming).

108 Mouzourakis (n. 107).

109 Gonzalez-Settlage, R. (2012) ‘Indirect Refoulement: Challenging Canada’s Participation in the Canada-United States Safe Third Country Agreement’, *Wisconsin International Law Journal* 30(1): 142-189, 150-151.

110 Havinga, T. and Bocker, A. (1999) ‘Country of asylum by choice or by chance: asylum seekers in Belgium, the Netherlands and the UK’, *Journal of Ethnic and Migration Studies* 25(1): 43-61; Robinson, V. and Segrott, J. (2002) ‘Understanding the decision making of asylum seekers’, Home Office, London. Available from: <<http://rds.homeoffice.gov.uk/rds/pdfs2/hors243.pdf>>.

111 Thielemann, E. (2004). *Does Policy Matter? On Governments’ Attempts to Control Unwanted Migration*. UC San Diego: Center for Comparative Immigration Studies. Available from: <<http://personal.lse.ac.uk/thielema/Papers-PDF/CCIS-WP-112-2004.pdf>>, 28. See also Newman J. in Adimi [2001] QB 667, “[T]here is a choice of refuge beyond the first safe territory by land or sea... Thus there exists a rational basis for exercising choice where to seek asylum. I am unable to accept that to recognise it is to legitimate forum shopping.” On the legality of safe third country arrangements generally, see Moreno-Lax, V. (2014), ‘The legality of the “safe third country” notion reconsidered: an appraisal in light of general international

On the other hand, increasingly restrictive policies do not always have the desired deterrent effects. Asylum seekers and other migrants tend to resort to alternative routes offered by smugglers and other illicit actors.<sup>112</sup> The system has a number of other perverse and unintended consequences, and as a means of controlling asylum seekers' behaviour in secondary movements, it fails to achieve its goal. Its persistent use by Member States in many cases where it carries high costs and administrative burdens suggests a punitive motivation, beyond the explicit aims of the Regulation. Rather than simplifying the distribution of asylum seekers in the Union, evidence seems to suggest that Dublin in many cases incentivises secondary movement.<sup>113</sup> Firstly, bearing in mind that the criterion of irregular entry and stay forms the prevalent ground for determining the responsible country, expert evidence indicates that many applicants are more inclined to enter a first Member State undetected and to move irregularly to a second Member State before lodging an asylum claim and being fingerprinted in EURODAC, rather than applying in the state of first arrival.<sup>114</sup> Secondly, the rule of mutual recognition of negative but not positive asylum decisions leaves an applicant with limited options: following the decision of the first country of asylum, he or she can either be rejected throughout the entire Union or be confined within the boundaries of the Member State which granted him or her protection. Particularly where conditions for recognised protection beneficiaries in some Member States are inadequate, and fail to meet the asylum *acquis* standards, many asylum seekers are thus inclined irregularly to enter a second Member State and make a subsequent asylum claim there before the first Member State decides on their case.<sup>115</sup> As the findings of the Jesuit Refugee Service (JRS) suggest, the majority of asylum seekers subject to Dublin procedures have in fact irregularly moved across various European countries.<sup>116</sup>

Experience to date on **legal challenges against Dublin transfers** reveals a problematic tendency to attempt to insulate decisions from legal challenge, and persist in returns in spite of mounting evidence that asylum seekers' resistance to transfer is well-founded. In many cases, asylum seekers have sought protection against transfers in domestic and European courts, often making Rule 39 applications to the ECtHR. This long-standing experience suggests that a different approach to fairness of transfers is urgently required. The strategy of attempting to shield transfers from scrutiny by using statutory bars on access to courts, accelerated and truncated procedures for Dublin returns, and limiting legal aid, are inconsistent with law. Moreover, they lead in practice to further legal challenges, greater costs and delay in the asylum process.

While the basic principle of Dublin have been reaffirmed in the 2013 recast, some Member States would see the need for changes to the system.<sup>117</sup> The scope and areas for such further adjustment should be explored in the European Commission's forthcoming report on the application of the Regulation to the Parliament and Council, which is required by Article

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rules on the law of treaties', in Goodwin-Gill, G. S. (ed.), *International Migrations*, 2010 Research Session of the Centre for Studies and Research in International Law and International Relations, The Hague Academy of International Law, (The Hague: Martinus Nijhoff, Forthcoming).

112 Crisp, J. (2003) 'A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime', UNHCR Working Paper No 100, 9; Thielemann (n. 18), 28.

113 Mouzourakis, M. (n. 107), 20.

114 UN Human Rights Council (2013) 'Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants', A/HRC/23/46, 24 February 2013, New York, 70.

115 Costello, C. (2012) 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', *Human Rights Law Review* 12(2): 287-339, 315.

116 JRS (n. 13), 129.

117 See Annex III, section 1.2.



46 by 21 July 2016 and which should also propose 'the necessary amendments' to the Regulation.

It should be noted that the **ECtHR** only halts Dublin deportations when there are substantial grounds to believe there is a real risk of ill-treatment contrary to Article 3 ECHR. The situation in the Member State concerned may be harsh, unpleasant, unsuitable, and yet not meet this threshold. Persisting with Dublin removals despite evidence of breaches of EU minimum standards which may not reach the threshold of Article 3 ECHR / Article 4 EUCFR is highly problematic: such transfers undermine EU legal commitments, and knowingly expose asylum seekers to treatment contrary to EU law.

**Ideas around redistributing responsibilities and 'burdens' or costs for asylum seekers** have been in circulation for a number of years, based on objective factors, different from those referred to in the Dublin Regulation, which in some cases take into account capacity of states to receive, host and process asylum seekers, as well as protect those found to be refugees. The concept was articulated by eminent refugee lawyer Atle Grahl-Madsen in 1965, who argued that states should negotiate a pre-determined quota-based system for distributing responsibility in ways that ensured that states would not be overburdened, with reference to GNP and population.<sup>118</sup> Since then, variations of this concept have been formulated, in relation to Europe and the international refugee protection system, but have not been adopted in practice to date.

In the EU context, in 2010, the European Parliament commissioned a study entitled '**What system of burden-sharing between Member States for the reception of asylum seekers?**'<sup>119</sup> This analysis, which appears to be the most comprehensive recent public effort to date to quantify the costs of reception, procedures, detention, Dublin and returns, also examined relative capacities and proposed several policy options for redistributing such costs among Member States. The study concluded that the overall asylum spending by national governments was relatively low ("less than what UK citizens spend on pets and pet food" in 2007),<sup>120</sup> but noted significant differences in the way in which asylum-related costs are recorded and published between states; in the elements that are included in cost calculations associated with asylum; in the standard and scope of service provision, and other factors, which made it difficult to make comprehensive and comparable assessments of sums involved. The study concluded with recommendations for various actions that could aim to address the imbalances observed and challenges faced in some Member States, which essentially included (voluntary) redistribution of asylum seekers; waivers of Dublin for Member States "under pressure";<sup>121</sup> greater EU financial support and compensation and strengthened capacity-building (including for Member States with low numbers of asylum seekers and limited economies of scale). According to the recommendations, redistribution arrangements for asylum seekers could have regard to relative, rather than absolute, numbers of asylum seekers, as well as GDP and population size, subject to cost/benefit analysis.

A monitoring framework was also foreseen for oversight of the impact of responsibility-sharing arrangements and other aspects of operation of the CEAS, operated by the EASO – an idea which has essentially been taken up in the EASO's information-gathering mandate

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118 Grahl-Madsen, A. (1966) *The Status of Refugees in International Law*, Sijthoff. The idea was later elaborated in 1983.

119 Thielemann et al. (n. 18).

120 Thielemann et al. (n. 18), 19.

121 Note that the idea of Dublin waivers or 'temporary suspension' was comprehensively rejected in the Council in 2010-11 when it was proposed by the Commission as part of the Dublin recast.

under its Regulation and the Early Warning Mechanism in Article 33 of the Dublin Regulation. The study also suggested that 'the costs and benefits of allowing asylum seekers free movement within the EU could be explored', which would be a significant departure from the legal framework and preferred policy positions of Member States in 2010 and today.

Over recent years, several detailed proposals have been developed and discussed around the idea of **new distribution criteria for asylum seekers**, beyond the Dublin framework. Among these, the concept of a 'European distribution key' has attracted interest and support among some Member States.<sup>122</sup> The distribution key idea for asylum seekers in Europe was developed and discussed in a seminar hosted by ALDE MEPs<sup>123</sup> prior to the Triantafyllides report of 2012, which was subsequently cited in the LIBE Committee's resolution on enhanced intra-EU solidarity for asylum. Inspired by Germany's *Königsteiner Schlüssel*, which involves a system used to allocate responsibility among the Bundesländer for the reception of asylum seekers, the seminar sought to test the feasibility and desirability of such a concept EU-wide. Perspectives from different political groups in the Parliament, from the Commission, EASO, national authorities, academia, NGOs and international organisations were sought and cautious interest expressed in exploring the idea further. A subsequent publication<sup>124</sup> sets out those different contributions, and annexes detailed tables listing the potential approaches to different distribution criteria, and the results that it would have in numerical terms, compared to the existing patterns of arrival and presence in Member States. However, the idea of distribution arrangements based on criteria including GDP and population size was taken up only in relation to protection beneficiaries – thus failing to address the question of how to redress the perceived imbalances and strains on national asylum decision-making systems by existing distribution patterns and Dublin.

In March 2013, a consortium of NGOs issued a **Memorandum on "Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility"**.<sup>125</sup> With negotiations reaching their conclusion on the recast asylum instruments, including Dublin, as well as the new budgetary framework, this proposal sought to inject a new perspective into the debate, proposing that a new criterion be introduced which would fundamentally change the Dublin system: that of 'free choice' of Member State by the asylum seeker. According to the proposal, this element would replace the existing Dublin criterion relating to the first state through which the asylum seeker had irregularly entered the EU.<sup>126</sup> The first state of entry of the asylum seeker, under this proposal, would be required to register his or her arrival and provide a document confirming the date, place of entry and other basic data, which the asylum seeker would be expected to present to the authorities of the state in which he or she chose to seek protection. In order to redress any imbalances that this approach might create between Member States and their respective asylum seeker caseloads, the Memorandum foresees that a compensation fund would be established 'based on solidarity and fairness' to assist receiving states. It was argued that costs would be less than under the current system, given asylum seekers could rely on support from family members in the countries in which

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122 See Annex III, section 1.2.

123 Nadja Hirsch (ALDE, Germany) and Sophia in't Veld (ALDE, Netherlands), 2012.

124 Hirsch, N. (2013) *Asylum: Towards a Common European Responsibility for the Asylum System: a European Distribution Key for Asylum seekers*, Friedl-Brehl-Verlag, Feldafing.

125 German Bar Association, AWO Workers' Welfare Association, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS (2013) (2013) *Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility*, March 2013. Available from: <[www.proasyl.de/fileadmin/proasyl/fm\\_redakteure/STARTSEITE/Memorandum\\_Dublin\\_engl.pdf](http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Memorandum_Dublin_engl.pdf)>.

126 Dublin III Regulation, Article 13.

they had chosen to claim asylum. It also acknowledges that Dublin's low transfer rate means that the majority of claims are *de facto* dealt with in the Member State in which the applicant applies.<sup>127</sup>

In November 2013, a Policy Brief was issued by the German Institute for International and Security Affairs (also known as its German acronym 'SWP') proposing a "**multi-factor model**" for a quota under a new distribution arrangement for asylum seekers.<sup>128</sup> The model took into account the economic strength of the different Member States; population; size of territory and unemployment rate, each of which could be weighted differently. The model purported to be capable of 'calculating a fair reception quota' for each Member State, based on objective, publicly-available official data.<sup>129</sup>

The SWP brief proposed in brief terms two possible approaches to implementation of such a quota, if it were politically accepted and agreed in the Council, and implemented following any necessary changes. These involved, firstly, the actual, **physical redistribution** or relocation of asylum seekers in excess of a Member State's quota to another Member State hosting less than its allocated tally. This approach was seen as potentially enabling asylum seekers to pursue their asylum claim in the state of their preference (if the quota and national governments concerned agreed on transfer in that person's particular case). Secondly, the possibility could be foreseen of permitting Member States to pay compensation, in amounts defined by their respective quotas, to cover the costs of reception and processing in Member States which hosted asylum seekers in excess of their allocated amount. This, it was proposed, could also enable Member States the option of retaining the Dublin system as a means for allocating asylum seekers in physical terms, while ensuring a fairer distribution of costs through a 'solidarity' fund to which Member States should contribute in direct relation to their quota proportions.<sup>130</sup>

The above proposals, put forward as an alternative basis for allocating responsibility based on criteria linked to size, economic strength, population and other factors, have the advantage that they take into account Member States' respective capacities. This is a dimension which was not prioritised when the Dublin system was developed, in the Regulation's predecessor instruments adopted in the early years of the development of the Schengen systems, at a time when some of the disparities which pose challenges to fair sharing of responsibility between States for asylum were less or figured less prominently in political debates. They nevertheless raise important questions and challenges of their own. Reaching agreement among governments on the precise criteria and weighting among them under such a formula would be likely to pose a challenge, as each Member State is likely to be inclined to favour a formula which would result in a lower number for itself. The

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127 See Chapter 2; see also Maiani and Vevstad (n. 31).

128 Schneider et al. (2013) 'European Refugee Policy: Pathways to Fairer Burden-Sharing', Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR) GmbH.

129 Applied to the 2013 figures, the model would foresee that Germany should be responsible for receiving 15.8% of the EU's total number of asylum seekers; France 13.11%, the UK 11.54% and Italy 10.78%. All other Member States would receive less than 10%, with Netherlands at 3.98%, Greece receiving 2.09%, Luxembourg 0.76% and Malta 0.5%. The analysis also concluded that, by comparison with the 'fair' quota which the model would establish, Sweden in 2008-12 had received over 266% of its share (being 154,000 claimants, compared to the 42,000 that would be its responsibility under the proposed model); while Belgium had received almost 200%, Hungary 34% less than it would be allocated under the model, and Estonia was close to 97% below (i.e. receiving less than half) its 'fair' share.

130 A similar proposal was discussed in a short paper published online on 11 October 2013, which utilised 'nominal GDP' as the determining criterion: See Thym, D. (2013) 'Germany's Domestic "Königstein Quota System" and EU Asylum Policy, Verfassungsblog 11 October 2013. Available from:

<<http://www.verfassungsblog.de/en/germanys-domestic-koenigstein-quota-system-and-eu-asylum-policy/>> (accessed 11 September 2014).



organisational aspects of such an arrangement would also need to be developed, including how one would administer the reallocation of individuals, through a central EU entity, which would determine who goes where, also raising potentially complex questions around cost, control and accountability. The distribution key and quota models put forward by SWP do not refer either explicitly to asylum seeker choice, creating the danger that if they were applied without regard to the wishes of asylum seekers, their application could be subverted in practice by asylum seekers who choose to move on from a state to which they have been allocated, essentially defeating the purpose of the system and encountering some of the same obstacles to effective implementation of Dublin.

The 'free choice' model proposed by a consortium of NGOs avoids this pitfall. However, it also raises questions which could potentially undermine its feasibility. Among these, it is possible that 'free choice' might result in greater imbalances and less equitable sharing than seen at present, as a small number of Member States might prove to be the most frequently-chosen destination. Some Member States express the fear that opening scope for free movement of asylum seekers, or refugees, would essentially draw most or all asylum seekers to the states with the highest living standards and social assistance.<sup>131</sup> However, the current system nevertheless also results in extensive secondary movement to those states, notwithstanding its high costs and extensive administration. Ascertaining and seeking to address the asylum seeker's preference would be consistent with law and practical realities, and address the coercive effects of the system as it stands.

Outside the EU, James Hathaway and Alexander Neve published a proposal in 1997 based on a collective project aimed at rethinking key parts of the refugee protection system.<sup>132</sup> Their idea suggested that international 'cooperation frameworks' could be put in place under which states in the 'global north' should be prepared to contribute financially to the costs of supporting refugees in lower-cost countries. It was suggested that industrialised countries would be more prepared to do so if they were able to spend less on reception, processing and entitlements to refugees in their own, high-cost economies. In a different model, Schuck argued for a system of tradeable refugee 'quotas', under which there could be a 'marketplace' for refugees which would encourage states to trade places in their respective allocations, and obtain the most economically efficient outcome.<sup>133</sup> However, these approaches have been contested, including by Anker, Fitzpatrick and Shacknove,<sup>134</sup> who argued that the foreseen economic benefits would be unlikely to materialise.<sup>135</sup> Moreover, under such a framework, once refugees were formally made the responsibility of states in the 'global south', northern states would not feel sufficiently 'implicated' to ensure that the essential funds were provided, with the result that the protection and assistance underpinning the entire cooperation framework concept may not be guaranteed.

In more recent years, the notion of '**tradeable refugee quotas**' has re-emerged in academic discussions in Europe. Moraga and Rappoport approached the idea from the

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131 French Ministry of Interior and German Ministry of Interior (2014) 'Franco-German Declaration on the Communication of the European Commission of 11 March 2014, "An open and secure Europe: Making it happen" (COM(2014) 154 final)', 25 April 2014.

132 Hathaway, J. C. and Neve, A. R. (1997) 'Making International Law Relevant Again: a Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Law Journal* 10: 115-211.

133 Schuck, P. (1997) 'Refugee Burden-Sharing: a Modest Proposal' (1997) *Yale Journal of International Law* 22: 243-297; Schuck (2014) 'Refugee Burden-Sharing: A Modest Proposal Fifteen Years Later?', Chapter 4 in Shapira, A. et al. (eds.), *Contemporary Challenges to the Nation State: Global and Israeli Perspectives Vol. III: The Nation State and Immigration: The Age of Multiculturalism*, Sussex, Sussex Academic Press.

134 Anker et al. (1998) 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal* 11: 295-309.

135 Part of the reason underlying this critique was that developed states were not expected to be prepared to transfer money saved from reductions in expenditure on asylum at home to refugees abroad.

perspective of economics, arguing that a market could be created for asylum seekers or refugees in the same way it operated for goods which are in demand, or those which were undesirable, in the same way that waste products are traded.<sup>136</sup> The model they envisaged would generate a 'price' for Member States to accept and take responsibility for such people, and based on which Member States could negotiate to accept more than the fixed quota allocated to them in exchange for financial support equivalent to the 'price' of those people accepted. Kusomanen<sup>137</sup> also defended the idea against objections based on the perceived commodification of the people concerned, as well as the viability of the concept, in light of real-world constraints and drivers around the movement of asylum seekers, as well as the political realities surrounding the asylum debate. Eiko Thielemann in 2014 has also argued for the idea further to be considered, but acknowledges the many questions that would have to be answered in order for such ideas to be developed and progress further towards realistic consideration and application – and for which there seems currently to be no ready replies, nor interest on the part of states to engage.<sup>138</sup>

### 3.4.2. Allocation of responsibility for people granted international protection

In relation to **people granted international protection (refugee status or subsidiary protection)**, the EU has undertaken two ERF-funded projects in 2011-12, known as **EUREMA I and II** ('European Union Relocation from Malta'). These involved the relocation of people found by Malta to be in need of protection to other Member States, based on offers from those Member States, and with the consent of the persons concerned. The project was launched after calls from Malta for support from other Member States to deal with the pressures of integrating significant numbers of people needing protection, exacerbated by Malta's limited geographical and population size, among other factors, and in the wake of increased arrival numbers by sea. The Council endorsed the idea in conclusions adopted in 2009,<sup>139</sup> and a total of some 500 people were transferred to other Member States in 2011-12, based on referrals from UNHCR and with assistance from IOM. However, there were a number of challenges documented in relation to the project, including some people who were relocated who subsequently asked to return to Malta. While this was perceived as ingratitude by some States, a fact-finding report on the projects also documented failures to provide the full range of entitlements that had been promised, in relation to support, accommodation and access to schooling for children, among other things, as well as the difficulty of settling a small number of transferees in a new community with a limited or no diaspora population from the countries or regions of origin of those transferred. Some Member States reported legal difficulties due to the lack of a legislative basis for admitting people recognised in another Member State, in the absence of mutual recognition rules or an RSD made under their own systems. Implied in debate around these issues was a measure of evident concern that the standards of RSD in Malta may not be comparable to those of the would-be receiving Member State. The net 'burden-sharing' impact of the project was also questioned, as the number of asylum seekers transferred to Malta under Dublin in 2010 alone was 560 – more than all of those

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136 Fernandez-Huertes Moraga, J. and Rappoport, H. (2011) 'Tradable Immigration Quotas', Institute for the Study of Labor Discussion Paper No. 5765.

137 Kusomanen, J. (2013). 'What (If Anything) Is Wrong with Trading Refugee Quotas?', *Res Publica*, 19(2): 103-119.

138 Thielemann, E. (2014) 'Refugee protection in Europe: a proposal for burden-sharing', *Eutopia* 19 May 2014. Available from: <<http://eutopiamagazine.eu/en/eiko-thielemann/issue/refugee-protection-europe-proposal-burden-sharing>>.

139 Council of the European Union (2009) Brussels European Council 18/19 June 2009: Presidency Conclusions, 1125/2/09 REV 2 CONCL 2, 10 July 2009, Brussels.

transferred out of Malta under EUREMA in the course of its two phases. When the Commission subsequently put forward the idea of establishment of a permanent relocation scheme,<sup>140</sup> the idea was received positively by the European Parliament,<sup>141</sup> but Member States did not respond with interest, and the scheme has subsequently not been included in any formal Commission proposal.

The **European Parliament** in 2012 adopted a resolution in favour of the 'use of an EU Distribution Key for the relocation of beneficiaries of international protection, based on appropriate indicators relating to Member States' reception and integration capacities, such as Member States' GDP, population and surface area and beneficiaries' best interest and integration prospects'. The Parliament noted that this '**EU distribution key**' could be part of the response for Member States which are facing 'specific and disproportionate pressures on their national asylum systems or during emergency situations', and acknowledged that introduction of such a system would be 'without prejudice to each Member State's obligation to implement and apply the existing EU asylum *acquis*.'<sup>142</sup> The idea of such a key had previously been discussed in the Parliament, but as a possible approach to the redistribution of asylum seekers (see above, section 3.4) rather than people found to be in need of protection. It would appear that the shift, in putting forward the European distribution key idea in discussions on relocation of people already granted protection, was based on significant perceived or actual national opposition to an arrangement that would significantly depart from Dublin, in a period when the negotiations on the recasts were in a sensitive and difficult phase. Nevertheless, the risk of a clash with the essential principles of Dublin remains, given that Dublin implies that not only RSD, but also longer-term responsibility for providing protection, will be that of the Dublin responsible state. The proposal for the distribution key for protection beneficiaries, while attracting significant interest in the context of the wider discussions around relocation, has not been further developed or specifically proposed for the CEAS agenda to date.

In September 2014, Austria put forward a proposal for a distribution arrangement for refugees to be resettled from third countries, based on the 'distribution key' notion used in Germany for asylum seekers and elaborated by the SWP (see above, section 3.4(a)). While this proposal was still under consideration at the time of writing, and would relate to refugees identified outside the EU rather than those granted status in EU Member States RSD processes, it confirms that there is interest among Member States in exploring further the distribution key notion for people in need of protection.<sup>143</sup>

Free movement is a fundamental principle of the EU legal order. As legally present third country nationals with a particularly strong form of status derived from international law, refugees should enjoy free movement rights beyond those available at present, bearing in mind that other categories of third country nationals, such as EU Blue Card holders, have extensive entitlements in this area. **Enhanced free movement of people granted protection** in the EU is a further potential means to adjust the distribution of responsibility for refugees and subsidiary protection beneficiaries in the EU. While enhanced free movement rights for asylum seekers are not likely to be politically feasible – unless the

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140 European Commission (2011) On Enhanced Intra-EU Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust, COM(2011) 835, 2 December 2011, Brussels, 8.

141 European Parliament (2012) Report on Enhanced Intra-EU Solidarity in the Field of Asylum (2012/2032 (INI)), PE489.453v03-00, 19 July 2013, Strasbourg, paras 46-48.

142 European Parliament, *op cit*, para 47.

143 'Austrian delegation, Note to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA): EU resettlement initiative – "Save lives" – discussion paper, Council document 13287/14 LIMITE ASIM 77/ENFOPOL 278, 16 September 2014'.

'free choice' model mentioned above (3.4) were to be taken up – discussions in 2014 have raised the possibility of enhanced rights for refugees, in the form of discussions on possible steps towards mutual recognition of positive asylum decisions. Under the existing law, people with refugee or subsidiary protection status have the right to long-term residence after five years, which takes into account half of the time during which they awaited an outcome in an asylum procedure.<sup>144</sup> Among other things, this entails the right, subject to conditions including an independent means of support and/or employment, to move and take up residence in another Member State. However, there have been a number of challenges observed in relation to implementation of long-term residence for other third country nationals, highlighting the need for further work at national level to achieve the aims of this measure.<sup>145</sup>

In this regard, should be recalled also that Member States carry an obligation under the Refugee Convention to seek to facilitate the naturalisation of refugees. Article 34 CSR provides that Member States shall "make every effect to expedite naturalization proceedings' and reduce costs associated therewith". Yet national approaches to granting citizenship to recognised refugees vary widely, and in some states, it can take many years. Naturalisation would evidently be another means by which refugees could secure the means to exercise free movement rights, and lead to some redistribution of refugee populations in line with market opportunities and other factors.

Echoing an earlier call in the Stockholm Programme,<sup>146</sup> in March 2014, the European Commission proposed 'new rules on **mutual recognition of asylum decisions** across the Member States and a framework for **transfer of protection** should be developed in line with the Treaty objective of creating a uniform status valid throughout the EU'.<sup>147</sup> This proposal, which has been supported subsequently by the Italian EU Presidency and several other Member States, with notable exceptions,<sup>148</sup> is in need of further elaboration and discussion in order to clarify the terms on which it could be acceptable to most or all Member States. Some Member States have expressed reservations about mutual recognition, if such recognition would carry with it the right to take up residence in other Member States immediately following a grant of protected status, on an unconditional basis.<sup>149</sup> If this were the case, it is argued that such an arrangement could result in *de facto* redistribution of recognised refugees and subsidiary protection beneficiaries, but in ways that could place uneven pressures on some states, most notably those with high levels of social assistance. The need to ensure that asylum procedures and decision-making

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144 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive) [2004] OJ L16/44, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L132/1.

145 In its 2011 implementation report, the Commission 'deplored' the weak impact of the Directive, as evidenced by the few permits issued by most Member States. It noted that in 2009, around four fifths of these third-country nationals having LTR status were living in four Member States: Estonia (187 400), Austria (166,600), Czech Republic (49,200), and Italy (45,200). In France and Germany, only 2,000 third-country residents had acquired the LTR permit. As the report noted, in many instances, the advantages of LTR status may not be apparent, or migrants may prefer to seek to naturalise if that is possible in their Member State of residence. See European Commission (2011) Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585, 28 September 2011, Brussels.

146 Stockholm Programme, section 6.2.1: the European Council encouraged "the Commission to consider, once the second phase of the CEAS has been fully implemented and on the basis of an evaluation of the effect of that legislation and of the EASO, the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law".

147 European Commission (n. 4), section 3.1.

148 See Annex III, section 1.2.

149 See French Ministry of Interior and German Ministry of Interior (n. 131).

practice is more harmonised has also been emphasised in the context of mutual recognition.

Thus, mutual recognition (or a shorter period before the right to long-term residence is secured) would potentially enhance free movement of protection holders, and contribute to achievement of goals expressed in the Treaties and reflecting free movement principles which underlie the EU's development. While it would appear to need further development as an idea, and discussion with the Member States in order to create the conditions for its adoption, it merits careful consideration.

### 3.5. Conclusions

The APD, RCD and Dublin Regulation establish the current legal framework for access, reception and allocation of responsibility among Member States for asylum seekers as part of the asylum *acquis* instruments required by Article 78 TFEU. Challenges in their implementation have prompted reflection and efforts to identify more effective ways to respond to asylum seeker arrivals at EU Member States' borders, including in situations of large-scale arrivals or where Member States otherwise face challenges to their capacity.

In 2014, in addition to its various forms of support provided to Member States, EASO's joint processing pilot projects have elicited positive responses from participating states. Although limited in scale and pending evaluation, these pilots may provide the basis for exploring further constructive joint initiatives in the area of first-line reception and claim registration, among other steps.

Tragedies at sea and arrivals at Southern external Member States, including notably in the context of the *Mare Nostrum* operation, have highlighted the importance of more effective approaches to first-line reception. Joint, multi-actor actions in this field should be developed and undertaken as a means to ensure that obligations towards asylum seekers, under EU and international law, are fulfilled.

Initiatives such as the *Praesidium* project have highlighted the potential value of multi-actor, proactive and interactive approaches, involving state authorities acting with EU support, working together with civil society and international organisations.

While Dublin remains the current framework for allocating responsibility for asylum claims where more than one Member State is involved, other approaches have been sought and considered. 'Free choice' models have been proposed by civil society but are not endorsed by Member States. Ideas around a 'distribution key' for the EU, put forward by EP, NGO and academic representatives, by contrast, are of interest to some states. Criteria for distribution under such a system would be needed which would have general support, and avoid the use of coercion.

Mutual recognition of positive asylum decisions and transfer of protection have also attracted considerable interest. An appropriate model and process for establishing mutual recognition, addressing relevant concerns about quality and potential pressures, could ensure greater free movement for recognised refugees, and represent progress towards the Treaty objective of a uniform status of asylum, valid throughout the Union.



## 4. LEGAL CONSTRAINTS ON FIRST-LINE RECEPTION, RSD, JOINT PROCESSING SCHEMES AND DISTRIBUTION MECHANISMS

### KEY FINDINGS

- **All asylum decisions**, including those on identification, referral, reception conditions, special needs, distribution, and RSD, are **subject to the requirements of fairness, good administration, and effective remedies**, recognised in Articles 41 and 47 EUCFR.
- **Legal responsibility** accrues to the Member States and/or the EU on account of actions or omissions that entail a violation of international protection obligations. Therefore, any joint processing schemes or distribution mechanism that may be adopted should clearly delimit the tasks and duties of each cooperating party.
- The **prompt identification and swift referral** of asylum seekers to the competent asylum authorities constitutes a key priority of the CEAS. On account of the declaratory nature of RSD, it must be borne in mind that the mere expression of their wish to apply for international protection makes them applicants, without any formalities being necessary.
- The efficient management of migration flows must not curtail the **effectiveness of fundamental rights**. Rather in the reverse, Member States are duty bound to organise their administrations in a way such as to satisfy the requirements of their fundamental rights obligations.
- **Access to RSD** should be unobstructed, both in law and in practice, and proactively facilitated by properly trained and competent personnel and suitable facilities, including translation and legal assistance. Any conceivable limitations must meet the requirements of proportionality and be assessed against asylum seekers' right to gain effective access to RSD.
- **First-line reception** must be assured from the moment the asylum application is lodged, in such a way and amount as to guarantee a dignified standard of living and any special needs of the applicant. In particular, the rights to liberty, family unity, and *non-refoulement* must be ensured throughout RSD, with detention constituting a measure of last resort and enforced Dublin transfers an exceptional coercive mechanism, subject to full consideration of humanitarian and other grounds pre-empting removal.
- **Procedures at first instance** are subject to good administration and effective remedy guarantees, so as not to vitiate RSD or pre-empt the outcome of appeals. Examinations at this stage must be rigorous and independent, including a personal interview. Any obstacles regarding time limits, accelerated procedures, safety or other presumptions, and evidentiary rules, must preserve the effectiveness of procedural guarantees and not render their exercise pointless or exceedingly difficult.
- Negative decisions are subject to **effective remedies** and judicial protection, allowing a competent authority to deal with the substance of the relevant complaint and to grant appropriate relief. Both access to, and the exercise of, appeal rights must be unobstructed and proactively facilitated, especially via linguistic and legal assistance. Considering the irreversible damage that may occur, remedies must be endowed with automatic suspensive effect, in accordance with Article 13 ECHR and 47 EUCFR.

There is a series of legal constraints to be complied with for the EU and the Member States to meet their existing obligations under international and EU law, regardless of which options of 'joint' or 'supported' processing and distribution were to be pursued from those identified in Chapter 3.

*Non-refoulement* is a key guarantee, applicable whenever states exercise jurisdiction.<sup>150</sup> To ensure that it is respected, processes must identify risks and protection needs of those involved.<sup>151</sup> The obligation to establish fair and effective remedies is recognised under domestic, EU, and international law. Depending on the nature of the process and decision in question, all three sources of legal obligation may be concurrently applicable. In addition, the treatment of asylum seekers on arrival is also regulated by the three orders of law. Under EU law, the RCD applies as soon as the asylum application is made.<sup>152</sup> This is reflective of the generally accepted principle that refugee status is declaratory.<sup>153</sup> Under that principle, refugees are refugees as soon as they meet the requirements of the CSR and are thus entitled to a number of guarantees according to different levels of attachment to the host state, including through their physical presence on the territory.<sup>154</sup>

This chapter clarifies the content of these standards, to what sorts of decisions they apply and at what stage in the process, as well as how they apply together and interact.

It should be decided which legal framework will apply to joint processing initiatives within the realm of the rule of law, whether it is the current CEAS *acquis* or a dedicated instrument yet to be adopted. Both the Dublin III Regulation and all recast Directives apply within the entirety of the territorial confines of the Member States (including on the territorial sea).<sup>155</sup> Accordingly, at least until the introduction of more specific arrangements, current EU asylum rules are applicable. Moreover, in light of the doctrine of acquired rights, the binding character of the EUCFR, and the principle of non-discrimination, it is arguable that future arrangements may not be lawful if they entail a lowering of present levels of human rights protection. The relationship between joint processing mechanisms and CEAS instruments will have to be worked out, bearing in mind that Member States will, in any event, retain their international obligations under human rights and refugee law.

## 4.1. Decisions and applicable standards

What? There are several distinct legal processes and decisions envisaged in this study: identification (of asylum seekers within mixed flows); referral (to competent authorities); reception conditions interview (to identify specific needs and entitlements of vulnerable persons); RSD; appeal before a court or tribunal; and distribution (whether *ex ante* – if joint processing initiatives are pursued within the remit of Dublin arrangements – or *ex post* – if joint processing is followed in parallel, implying transfers from the joint processing

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150 Moreno-Lax, V. (2012) '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law', in Maes, M. et al. (eds), *The External Dimensions of EU Asylum and Immigration Policy*, Bruylant, 385.

151 *Hirsi Jamaa v Italy* (2012) 55 EHRR 627.

152 Case C-179/11 *Cimade & GISTI* [2013] 1 CMLR 11, para 39; Case C-79/13 *Saciri*, Court of Justice of the European Union, 27 February 2014, paras 33-34.

153 UNHCR (1979) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, para 28.

154 See the classification of 'criteria of entitlement to treatment in accordance with the Convention' in Goodwin-Gill, G. S. and McAdam, J. (2007) *The Refugee in International Law*, 3rd Ed, Oxford, Oxford University Press, 524 ff; Hathaway, J. C. (2005) *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, at 154 ff.

155 APD, Article 3; Dublin III Regulation, Article 3(1); RCD, Article 3(1).

scheme to the final asylum country within the EU). All these decisions have legal consequences, and although they are for the most part preliminary to the actual final determination of the asylum claim, those legal consequences mean that these decisions are in themselves subject to the requirements of fairness and effective remedies. Both the relevant EU and international legal obligations will be set out below, so as to elucidate the current legal constraints applicable to these decisions.

Who decides? This study examines various possibilities for joint processing initiatives and distribution of asylum applications. These options embody choices as to which authorities should conduct the several decisions involved. It could be national, multi-national teams, EU officials, UNHCR, or a combination thereof. Depending on the legal authority being exercised, different types and degrees of responsibility may be accrued.

The default position in EU law is that of decentralised administration, whereby national officials apply EU standards, retaining sole responsibility for their actions or omissions.<sup>156</sup> In those cases, domestic, EU, and international standards of fairness are applicable. In contrast, if a wholly centralised EU authority takes a decision on behalf of the EU itself under EU law, domestic law would no longer bind the decision-maker. However, EU standards of fairness would remain applicable,<sup>157</sup> and international rules indirectly apply.<sup>158</sup> Any responsibility that may be incurred for violations thereof would normally pertain to the EU alone.<sup>159</sup>

In the event that an intermediate mechanism is chosen, with national officials supported by officials from other Member States, or from a EU institution or body such as EASO, without them taking the relevant decision, legal responsibility for that decision, in principle, remains with the host Member State subject to national, EU, and international norms.<sup>160</sup> Indeed, in the absence of specific arrangements transferring authority or otherwise allowing partner States or organisations to take decisions on their own behalf,<sup>161</sup> any violations of international obligations that may occur could be attributed to the host Member State. This, however, does not entirely exclude the responsibility of assisting officials from other Member States, who, by their acts or omissions, may have aided the perpetration of the violation in question.<sup>162</sup> Moreover, according to the principle of 'independent responsibility',<sup>163</sup> [w]here several States are responsible for the same internationally wrongful act, the responsibility of *each* State may be invoked in relation to that act'.<sup>164</sup> In turn, acts of EU officials that may have contributed to the violation would be imputable to the EU itself and entail its responsibility under international law.<sup>165</sup> Thus, it is essential,

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156 ILC (2001) Articles on State Responsibility (ASR), UNGA A/56/10, corrected by A/56/49(Vol. I)/Corr.4, Articles 1-2.

157 EUCFR, Article 51(1).

158 See Article 18 EUCFR and Article 78(1) TFEU, on the obligation to establish a CEAS in full compliance with the 1951 Geneva Convention and other relevant treaties. See also Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* [2010] ECR I-1493, paras. 51-53, and similar statements in subsequent case law on the CEAS instruments.

159 ILC (2011), Articles on the Responsibility of International Organisations (ARIO), UNGA A/66/10, Articles 3, 4 and 6.

160 ASR, Articles 5, 6 and 8. See also Goodwin-Gill, G. S. (2007) 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', *UTS Law Review* 9: 26, at 34: "[Under international law] no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organization".

161 ASR, Article 20.

162 Art. 16 ASR.

163 ILC (2001), Annual Report: Commentary to the Articles on State Responsibility, Chapter IV, Commentary to Article 47, para 3.

164 ASR, Article 47 (emphasis added).

165 ARIO, Articles 14, 15, 17 and 18.



before embarking on joint processing schemes, to clearly delimit the tasks and responsibilities of each cooperating party, following the prescriptions of the ILC Articles on State Responsibility and the Responsibility of International Organisations.<sup>166</sup>

Where? The examination of asylum claims involves taking legal decisions on which procedures to apply. Regardless of where this process takes place, it entails the exercise of legal authority. Domestic standards often apply to decisions of the public authorities irrespective of where those decisions are taken. Under international human rights law (IHRL), the key concept of 'jurisdiction' is used to clarify that human rights standards only apply where states exercise 'effective control' over persons or territory. In practice, this means that when legal decisions are made extra-territorially they remain subject to states' international human rights obligations, as a result of the 'effective control' paradigm.<sup>167</sup> In contrast, if authorities are 'implementing' EU law, irrespective of where that exercise of public authority takes place, EU standards of fair procedures and effective remedies will always be applicable, regardless of whether the 'effective control' threshold under IHRL is considered to be met.<sup>168</sup> This means that EU obligations are potentially wider than those under IHRL.

All of the joint processing options identified in Chapter 3 would take place on the territory of EU Member States. In this situation, there is no question that the decisions are within their 'jurisdiction' (in the sense the term is used in IHRL). If EU law is applied, EU standards of fairness and effective remedies, as enshrined in general principles and the EUCFR, apply as well, even where EU legislation does not make express provision thereto.<sup>169</sup>

## 4.2. Identification and referral

Upon arrival into EU territory, the priority must be to **identify** any asylum seekers amongst mixed flows wishing to apply for international protection. To this end, it should be born in mind that a request made in any manner whatsoever by a third-country national, 'who can be understood to seek refugee status or subsidiary protection', is enough.<sup>170</sup> It is the mere expression of their wish to apply for asylum that makes them applicants,<sup>171</sup> with no further formalities being necessary to that effect. This is in line with the declaratory character of refugee status, given that refugees are such *ab initio*, independently of RSD.<sup>172</sup>

Applications must then be **registered** without delay.<sup>173</sup> The recast APD has codified the obligation to 'ensure that a person who has made an application for international protection

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166 Note that these remain applicable, unless other specific arrangements have been adopted. See Article 55 ASR and Article 64 ARIO.

167 *Al-Skeini v UK* (2011) 53 EHRR 18.

168 For an elaboration, see Moreno-Lax, V. and Costello, C. (2014) 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', 1657-1684 in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing.

169 Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.

170 APD, Article 2(b); QD, Article 2(h); Dublin III Regulation, Article 2(b); RCD, Article 2(a).

171 APD, Recital 27.

172 See UNHCR, *Handbook* (n. 152), para 28, and acknowledgement to that effect in Recital 21 QD.

173 The recast APD foresees a period of 3 or 6 days for the registration of applications made respectively to either a competent asylum authority or other authorities of the Member State, in Article 6(1) APD. However, note that these time frames can be extended up to 10 days in the event of simultaneous applications by a large number of applicants, under Article 6(5) APD, which appears to be an exceedingly long lapse, considering the risks and uncertainty that non-registration or late submission involve, in both substantive and procedural terms.

has an effective opportunity to lodge it as soon as possible'.<sup>174</sup> Thus, the act of making an asylum application (by any means) is not coterminous with (formally) lodging it. Although the lodging of an application may be subject to some formalities, such as filling a form or submitting it in person, these should not be excessive or unreasonable. On the contrary, they should be adapted to the particular situation of the applicant (whether particularly vulnerable or with special needs) and the specific circumstances of the case (on account of whether the encounter with State authorities happens at the border, on land, or in the territorial sea). Access to determination procedures must in every case be unobstructed, both in law and in fact.<sup>175</sup>

An additional requirement ensuing from this obligation is that of ensuring that **State authorities** likely to make first contact with asylum seekers receive specific training on how to deal with applications for international protection,<sup>176</sup> and are given clear and unequivocal instructions to refer applicants to the competent authorities immediately.<sup>177</sup> They should, in particular, be able to provide applicants with all the necessary information as to where and how their applications may be lodged,<sup>178</sup> as well as relevant details concerning reception conditions,<sup>179</sup> Dublin decisions,<sup>180</sup> and any measure restricting their right to liberty.<sup>181</sup>

To facilitate **communication** and render the **information** understandable to those concerned in good time and form, it is essential that professional translation services are available.<sup>182</sup> It is therefore questionable whether limitations on the obligation to provide timely information in understandable form inscribed in Article 8 of the recast APD, which may be confined to asylum seekers held in detention or present at the border, is justified. As pointed out in the introduction to this study, considering that there are no means of legal access to the territory of the Member States for the purposes of seeking asylum, it should be expected that asylum seekers make their way into the EU irregularly as a rule.<sup>183</sup> On account of the 'non-penalisation principle' enshrined in Article 31 RSC, combined with that of non-discrimination established in Article 3 of the same instrument, it is unclear why refugees encountered elsewhere in the territory of the Member State concerned should not equally be provided with the necessary details to enable them to lodge an application or that these be provided only 'on request'.<sup>184</sup> It is also unclear how access to the necessary information may have any impact on security or public order, as it appears to be assumed.<sup>185</sup>

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174 APD, Article 6(2).

175 *MSS v Belgium and Greece*, paras 288 and 290; *IM v France*, paras 128 and 130; *AC v Spain*, paras 82, 85 and 86.

176 See APD, Recital 26. See also Article 35 of the Dublin III Regulation regarding the Dublin system.

177 The sole acquisition of 'general knowledge' by border guards and others, without specific training, as contemplated in Article 4(4) APD (if read in isolation from Recital 26), may be insufficient for these authorities to discharge their responsibilities vis-à-vis refugees and persons otherwise in need of international protection.

178 APD, Recital 26.

179 RCD, Article 5.

180 Dublin III Regulation, Article 4.

181 RCD, Articles 7(4) and 9(2).

182 APD, Recital 28.

183 *Moreno-Lax* (n. 7), and references therein.

184 APD, Article 19(1). Cf. Dublin III Regulation, Article 4, providing for the duty to deliver information on the Dublin system to all applicants 'as soon as' the application has been filed. Compare also to Article 5(1) RCD, allowing for a delay of up to 15 days to provide applicants with information on their reception conditions entitlements, which is hardly compatible with the CJEU's prescriptions in *Cimade & GISTI* and *Saciri* (see below).

185 APD, Article 8(2).

The efficient management of migration flows or border-crossing points must not curtail the effectiveness of fundamental rights.<sup>186</sup> Rather in the reverse,<sup>187</sup> Member States are duty bound to organise their asylum systems, and their administrations at large, in a way such as to enable them to satisfy the requirements of their fundamental rights obligations.<sup>188</sup> Any conceivable limitations have to pursue a legitimate aim, be strictly necessary, and meet the requirements of proportionality.<sup>189</sup> Above all, they shall be assessed against the background of asylum seekers' right 'to gain effective access to the procedure for determining refugee status',<sup>190</sup> which must remain a 'practical and effective' entitlement.<sup>191</sup>

### 4.3. First-line reception

Key fundamental rights, including the principle of *non-refoulement*, the right to family unity and the needs and entitlements of particularly vulnerable groups must be adequately catered for, in conformity with current legal standards.

Once refugees (who, again, are only declared as such by RSD) have applied for international protection, they must be provided **treatment** and facilities in accordance with the RCD without delay.<sup>192</sup> Article 1 EUCFR requires explicitly for the respect and protection of human dignity, 'preclude[ing] the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum ... – of the protection of the minimum standards laid down by that directive'.<sup>193</sup> In particular, **material reception conditions**, comprising housing, food, clothing, and a daily expenses allowance,<sup>194</sup> must be provided in such a way and amount as to ensure a dignified standard of living, adequate for the health of applicants, and capable of guaranteeing their subsistence.<sup>195</sup> Over-demand or the saturation of reception facilities do not constitute 'a justification for any derogation from meeting those standards'.<sup>196</sup> Member States have indeed an obligation to establish and maintain their reception capacity, in accordance with their positive fundamental rights obligations, irrespective of the number of applications.

In this respect, national authorities must have regard 'to the preservation of the interests of **persons having specific needs**'.<sup>197</sup> In particular, reception arrangements 'must be sufficient to preserve family unity and the best interests of the child',<sup>198</sup> which constitute a primary consideration.<sup>199</sup> The recast RCD provides for a general obligation for Member States to take into account the specific vulnerabilities of applicants with special needs, including minors, elderly persons, pregnant women, victims of torture, trafficking, and other forms of violence.<sup>200</sup> A comprehensive assessment must be carried out as soon as

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186 (*mutatis mutandis*) *IM v France*, para 147.

187 *MSS v Belgium and Greece*, para 216.

188 *AC v Spain*, para 104.

189 CFR, Article 52(1).

190 *Amuur v France* (1996) 22 EHRR 533, para 43.

191 *Artico v Italy* (1980) 3 EHRR 1, para 33.

192 *Cimade & GISTI*, para 39; *Saciri*, paras 33-34. See also Dublin III Regulation, Recital 11.

193 *Saciri*, para 35; *Cimade & GISTI*, para 56.

194 RCD, Article 2(g).

195 *Saciri*, paras 37, 39 and 46. See also RCD, Recital 11 and Article 17(2).

196 *Saciri*, para 50.

197 *Saciri*, para 46.

198 *Saciri*, paras 41 and 45. See also RCD, Recital 9 and Article 12.

199 RCD, Recitals 14 and 22 and Article 23(1). See also APD, Recital 33; and Dublin III Regulation, Recitals 13 and 14.

200 RCD, Article 21. On minors, see Article 23; on unaccompanied minors, Article 24; and on victims of torture and violence, Article 25.

possible, so as to account for their special requirements,<sup>201</sup> including any necessary health care and assistance.<sup>202</sup> Considering the importance of the interests at stake, the applicant him- or herself should be able to make submissions on his or her own behalf.<sup>203</sup> Thus, a personal interview by competent personnel<sup>204</sup> constitutes an unavoidable requirement to ensure accuracy in the identification of special needs.<sup>205</sup> On the other hand, vulnerability assessments should not become an additional source of complexity, unduly delaying access to RSD.

That same evaluation should serve to specify whether any 'special procedural guarantees' are required to ensure effective access to the asylum procedure<sup>206</sup> – the introduction of a separate, parallel process to that contemplated in Article 22 of the recast RCD should be avoided, not only for reasons of procedural economy, but also to pre-empt contradictory outcomes. Whether gender-sensitive,<sup>207</sup> minor-friendly,<sup>208</sup> or other special arrangements are necessary should be determined at this stage.<sup>209</sup> Errors in the determination of the needs of the applicant, albeit not explicitly contemplated in the recast instruments, remain subject to judicial review and effective remedy standards under Article 47 EUCFR.

In any event, special needs evaluations should be undertaken against the background principle that *all* asylum seekers belong to a 'particularly vulnerable group' in need of special protection, as discussed in Chapter 1.<sup>210</sup> With this consideration in mind, it is crucial that their plight is not further unnecessarily compounded. Therefore, coercive and punitive measures, including **detention**, shall constitute the exception and not the general rule.<sup>211</sup> An asylum seeker must not be held in detention 'for the sole reason that he or she is an applicant [of international protection]'.<sup>212</sup> The exhaustive grounds for detention as well as the conditions and guarantees contemplated in the recast RCD must be thoroughly complied with, providing in particular for speedy judicial review.<sup>213</sup> So as to ensure the mental and physical wellbeing of applicants and respect their fundamental right to liberty, detention must be 'a measure of last resort', adopted only in exceptional circumstances relating to strong reasons in the individual situation, in accordance with the principles of necessity and proportionality,<sup>214</sup> when alternatives to detention cannot be applied effectively in the particular case.<sup>215</sup> Reporting duties and other options must be considered first. And situations of *de facto* deprivation of liberty, through retention at the border or in

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201 RCD, Article 22.

202 RCD, Articles 19(2), 17(2) and 18(3).

203 Case C-277/11 MM, CJEU, 22 November 2012, paras. 81 ff, recognising the nature of the right to be heard as a "fundamental principle of EU law" of general application with a very broad scope, applicable "in all proceedings which are liable to culminate in a measure adversely affecting a person".

204 If the format and underlying rationale of the Dublin interview contemplated in Article 5 Dublin III Regulation were adequately adapted to this purpose, it could constitute a one-stop venue to establish any special needs of the applicant.

205 (*mutatis mutandis*) *Jussila v Finland* (2007) 45 EHRR 39, para 40, establishing the essential nature of oral hearings as a fundamental principle of fair trial guarantees. Note that Article 47(2) EUCFR incorporates within the EU legal order both Articles 6 and 13 ECHR standards for all types of proceedings.

206 APD, Recital 29 and Article 24.

207 APD, Recitals 32 and 35.

208 APD, Article 25; Dublin III Regulation, Article 6 on guarantees for minors within Dublin.

209 APD, Article 24(3).

210 *MSS v Belgium and Greece*, para 251.

211 EUCFR, Article 6. For an elaboration, see Moreno-Lax V. (2011) 'Beyond Saadi v UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law', *Human Rights and International Legal Discourse* 5: 166.

212 APD, Article 26(1); RCD, Article 8(1); Dublin III Regulation, Article 28 and Recital 20.

213 RCD, Articles 8-11 and Recitals 16-19; Dublin III Regulation, Article 28(4). See also Guild, E. and V Moreno-Lax, V. (2014) 'The Reception Conditions Directive', in Peers, S. et al. (eds), *EU Immigration and Asylum Law*, 2nd edn, Vol 3, Brill (Forthcoming).

214 RCD, Recitals 15 and 20; Dublin III Regulation, Recital 20.

215 RCD, Article 8(2); Dublin III Regulation, Article 28(2).

transit zones, or via assigned residence, must be avoided and submitted to the same type and degree of scrutiny. All measures entailing a restriction on free movement remain subject to appeal rights and effective remedies.<sup>216</sup>

Throughout the duration of the asylum procedure, asylum seekers are **entitled to remain** in the Member State concerned<sup>217</sup> for the purposes of the procedure and to determine their right to international protection.<sup>218</sup> The limitation introduced in Article 9(1) of the recast APD, circumscribing this entitlement to the period 'until the determining authority has made a decision ... at first instance' may lead to a violation of the principle of *non-refoulement*. As elaborated below, the Strasbourg Court has mandated that appeals against decisions entailing the expulsion of the applicant be endowed with 'automatic suspensive effect', which translates into an obligation to extend asylum seekers' right to remain until such time as it has been determined by a final judicial decision that removal is safe.<sup>219</sup>

Under the **Dublin** system, a number of **additional guarantees** must be taken into account to respect fundamental rights, enhance fairness, and minimise coercion. Any transfers should bear in mind the particular needs and entitlements of asylum seekers generally and, especially, of those with specific vulnerabilities. Within this group, unaccompanied minors with no family members in another Member State, as a rule, 'should not be transferred to another Member State'.<sup>220</sup> The primary objective shall be to ensure prompt access to determination procedures, without unnecessarily prolonging the Dublin phase.<sup>221</sup> By virtue of Article 24(2) of the Charter, the best interests of the child must be a primary consideration in all decisions concerning them, including those regarding Dublin transfers.<sup>222</sup>

Nothing prevents the extension of this reasoning, linking vulnerability to exoneration from removal, to other cases. In other words, 'Dublin without coercion' can and should be implemented under the current legal structures. In particular, there may be instances in which persons may be unfit to travel due to illness, pregnancy, or trauma, whereby enforced transfer may in itself constitute a breach of the *non-refoulement* guarantee.<sup>223</sup>

Humanitarian considerations play also a role in the correct application of Dublin discretionary clauses. According to the CJEU, these should be interpreted broadly, so as to preserve their effectiveness and the overall objectives of maintaining family unity and allowing prompt access to RSD.<sup>224</sup> Therefore, where there is a situation of dependence of the asylum seeker on a relative, or vice versa,<sup>225</sup> provided that family ties existed already in the country of origin,<sup>226</sup> Member States are 'normally obliged to keep [or bring] those persons together'.<sup>227</sup> Such an obligation may only be derogated from on account of 'exceptional' circumstances.<sup>228</sup>

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216 RCD, Articles 9(4)-(5) and 26(1). See also EUCFR, Articles 6 and 47.

217 Cimade and GISTI, para 46 ff.

218 Note that neither the recognition of refugee status nor the grant of subsidiary protection may be withheld, if applicants fulfill the relevant qualification criteria. See QD, Articles 13 and 18, establishing that Member States 'shall grant' the corresponding status when the conditions are met.

219 Gebremedhin v France (2007), Appl. No. 25389/05, ECtHR, 26 April 2007, para 66.

220 MA, para 55.

221 MA, para 61.

222 MA, para 59.

223 Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2008) 46 EHRR 23, para 69.

224 K, paras 31, 35, 40, 48 and 54.

225 K, para 32.

226 K, para 42.

227 K, para 44; Dublin III Regulation, Article 16.

228 K para 46.

In cases where these considerations are of no application, Dublin transfers remain still subject to *non-refoulement* prescriptions. When there are substantial grounds for believing that the asylum seeker may face a real risk of suffering serious harm upon arrival in the Member State responsible under Dublin rules, the transfer cannot take place.<sup>229</sup> Whether the risk stems from 'systemic flaws' in the asylum procedure or the reception conditions of that Member State or whether it has a different origin is not decisive, contrary to what the CJEU's recent case-law appears to imply.<sup>230</sup> According to Article 52(3) EUCFR, in so far as the Charter contains rights that correspond to rights guaranteed by the ECHR, their meaning and scope shall, in principle, be 'the same'. Following the Charter Explanations, the rationale is 'to ensure the necessary consistency between the Charter and the ECHR', which means, in particular, that 'the level of protection afforded by the Charter may *never* be lower than that guaranteed by the ECHR'.<sup>231</sup> Hence, Article 4 EUCFR must be deemed to afford *at least* the same kind and degree of protection against *refoulement* as does Article 3 ECHR. And, in any event, Dublin transfer decisions remain subject to appeal and effective remedy guarantees.<sup>232</sup>

#### 4.4. Fair procedures (at first instance)

To guarantee the effectiveness and legality of first instance procedures, including via joint processing initiatives, these must be endowed with adequate procedural guarantees. Identification and referral are key steps in ensuring access to asylum procedures, but there are additional safeguards that are required as well.

Following the Strasbourg Court, the delivery of 'insufficient **information** for asylum seekers about the procedures to be followed, [the absence of a] reliable system of **communication** between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, [as well as] lack of **legal aid**' must be considered 'shortcomings in access to the asylum procedure' that State Parties have to avoid.<sup>233</sup> States must offer a 'real and adequate opportunity' to individual applicants to advance their claims.<sup>234</sup> **Legal assistance and interpretation** are thus essential, already at first instance, to ensure the appropriate conduct of proceedings.<sup>235</sup>

Asylum proceedings require '**independent and rigorous scrutiny**' of all factors relevant to the case.<sup>236</sup> The competent body 'must be able to examine the substance of the complaint and afford proper reparation',<sup>237</sup> including by direct examination of the applicant

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229 *MSS v Belgium and Greece*.

230 Cf. Joined Cases C-411/10 and 493/10 *NS & ME* [2012] 2 CMLR 9, paras 86, 94, and 106. See also, Dublin III Regulation, Article 3(2) DR III; Case C-4/11 *Puid* [2014] 2 WLR 98, para 30; and Case C-394/12 *Abdullahi* [2013] ECR I-0000, paras 60 and 62.

231 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, at 33 (emphasis added). On their legal character and interpretative weight, see EUCFR, Article 52(7) EUCFR and Article 6(1) TEU.

232 Dublin III Regulation, Article 27 and Recital 19, to be interpreted in light of Article 47 EUCFR.

233 *MSS v Belgium and Greece*, para 301.

234 *MSS v Belgium and Greece*, para 313.

235 *IM v France*, paras 145, 151 and 155. See also APD, Article 12(1)(a)-(b) on interpretation and accessibility of information. Cf. APD, Article 20 ff, limiting access to free legal assistance and representation to appeal proceedings.

236 *Jabari v Turkey* [2000] ECHR 368, para 39. See also *Abdulla*, paras 90 and 70-71; APD, Article 10(3); and QD, Article 4.

237 *MSS v Belgium and Greece*, para 387.



at a **personal interview**.<sup>238</sup> Decisions must be served in writing, following a legal procedure previously established by law, specifying the underlying reasons alongside the means and conditions to mount an appeal.<sup>239</sup>

Where the **competent body** is not a court, several conditions must be met to ensure its impartiality, such as 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.<sup>240</sup>

**Time limits** and similar restrictions on access to RSD 'should not be so short, or applied so inflexibly, as to deny the applicant ... a realistic opportunity to prove his or her claim'.<sup>241</sup> Despite the fact that excessive duration may render RSD inadequate<sup>242</sup> and possibly run counter to the right to good administration,<sup>243</sup> expediency should not be at the expense of a full and complete examination.<sup>244</sup> Therefore, although prioritised or **accelerated procedures** are not prohibited *per se*, the effectiveness of procedural guarantees requires the provision of sufficient time for applicants to defend their applications.<sup>245</sup> The automatic acceleration of certain types of claim, such as those submitted at the border or in transit zones, or considered *a priori* inadmissible or unfounded, without regard to the particulars of the case must be avoided. Nor can acceleration entail a reduction of basic guarantees or lead to a cursory examination.<sup>246</sup> In particular, pursuant to the principle of non-penalisation of refugees contained in Article 31 CSR and on account of the absence of legal channels to enter the EU and seek asylum,<sup>247</sup> no negative inference should be deduced from the lack of identity or travel documents, so as to automatically lead to accelerated or abridged RSD.

**Evidentiary rules** must also respect the effectiveness of procedural safeguards. The assessment of any risks of *refoulement* must be undertaken *ex nunc*, without attaching excessive importance to whether evidence is submitted outside time limits. New elements that may influence the decision on the case have to be taken into consideration.<sup>248</sup> While it is 'in principle' for the applicant to adduce evidence on *refoulement* or persecution risks,<sup>249</sup> national authorities are not allowed to remain passive in this respect. General information on the prevailing situation in the country of envisaged return constitutes '*prima facie* evidence' that States cannot disregard.<sup>250</sup> The **level of proof** required should equally be non-excessive. As discussed in the Introduction to this study, asylum seekers often come irregularly using false documents or without documentation. Asking the applicant to produce '*concrete* evidence' is disproportionate, as it increases the **burden of proof** 'to such an extent as to hinder the examination on the merits'. Applicants must therefore

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238 EUCFR, Article 41(2)(a), on "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken"; and APD, Article 14 ff.

239 *Abdolkhani and Karimnia v Turkey*, Application no. 30471/08, ECtHR, 22 September 2009, paras 107-117; APD, Articles 11 and 12(1)(d)-(f); and EUCFR, Article 41.

240 Case C-175/11 *HID*, CJEU, 31 January 2013, para 83.

241 *Bahaddar v The Netherlands*, (1998) 26 EHRR 278, para 45. See also Case 33/76 *Rewe* [1976] ECR 1989, para 5; and APD, Article 10(1).

242 *Doran v Ireland* (2006) 42 EHRR 13, para 57.

243 Case C-604/12 *HN*, CJEU, 8 May 2014, para 50, establishing that the right includes 'the right of any person to have his or her affairs handled impartially and within a reasonable period of time', which is applicable to RSD procedures.

244 APD, Article 31(2).

245 *IM v France*, para 147; *AC v Spain*, para 100.

246 *IM v France*, paras 141, 144, 148 and 154. See also *HID*, paras 74-75. Cf. APD, Articles 31(8) and 43.

247 *Guild and Moreno-Lax* (n. 121).

248 *Hilal v UK* (2001) 33 EHRR 2, paras 61 ff.

249 *Saadi v Italy* (2009) 49 EHRR 30, para 129.

250 *MSS v Belgium and Greece*, para 296.

simply establish the 'arguable nature' of their claims.<sup>251</sup> Then, it is for the State to dispel any doubts as to their veracity.<sup>252</sup>

**Presumptions of safety** must be subject to rebuttal.<sup>253</sup> Consequently, to apply safe third country measures,<sup>254</sup> States 'must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of [the relevant] risks'.<sup>255</sup> Detention and living conditions as well as standards of treatment in the third country concerned are also relevant.<sup>256</sup> And the applicant 'should not be expected to bear the entire burden of proof' in this context either.<sup>257</sup> State Parties must 'verify' the purported safety of the third country themselves.<sup>258</sup> Where information about the circumstances in the country of return is widely diffused, it may be presumed that they already 'know or ought to know' about it.<sup>259</sup> In those circumstances 'it cannot be held against the applicant that he did not inform ... of the reasons why he did not wish to be transferred' to the third country concerned.<sup>260</sup> As a result, if the presumption of safety is unwarranted, the transfer must be suspended *ex officio*, on the determining authority's own motion.

Accordingly, **admissibility procedures** and rules categorising claims as **unfounded** or **manifestly unfounded applications** on the basis of general assumptions on safety may unduly bar access to RSD procedures.<sup>261</sup> Considering the irreparable nature of the damage that can be caused to the applicant in case of mistaken decisions, the obligation to ensure a full and comprehensive examination of the merits of an 'arguable claim' cannot be dispensed with.<sup>262</sup> Only **repeat applications** may justify a departure from this rule, in case the first application were subjected to close and rigorous scrutiny and no new elements have arisen since.<sup>263</sup> Otherwise, automatic dismissals or summary examinations are incompatible with basic procedural guarantees at first instance, recognized under EU and international legal standards.

## 4.5. Effective remedies

The right to effective judicial protection constitutes a general principle of EU law.<sup>264</sup> Effective remedies must be available to those whose applications have been rejected at first instance or have otherwise received a negative decision.<sup>265</sup> How the effectiveness of remedies is to be guaranteed in the context of joint processing or distribution schemes

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251 *MSS v Belgium and Greece*, para 389.

252 In this sense, see Spijkerboer, T. (2009) 'Subsidiarity and "Arguability": the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', *International Journal of Refugee Law* 21: 48. See also Garlick, M. and Moreno-Lax, V. (2014) 'The Qualification Directive', in Peers, S. et al. (eds), *EU Immigration and Asylum Law*, 2nd edn, Vol 3, Brill (forthcoming), especially section 2.2.1 on Article 4 recast QD.

253 NS & ME, para 99.

254 APD, Articles 35 (FCA), 36 and 37 (SCO), 38 (STC), and 39 (ESTC).

255 *MSS v Belgium and Greece*, para 342.

256 *MSS v Belgium and Greece*, paras 362-368.

257 *MSS v Belgium and Greece*, para 352. See also NS & ME, para 90-92.

258 *MSS v Belgium and Greece*, para 359.

259 *MSS v Belgium and Greece*, para 358 and 367. See also NS & ME, para 94.

260 *MSS v Belgium and Greece*, para 366.

261 APD, Articles 32-34.

262 *Boyle and Rice v UK* (1988) 10 EHRR 425, para 55, deeming 'arguable' claims disclosing a prima facie issue under the ECHR.

263 *IM v France*, paras 142-143; *AC v Spain*, para 99. See also APD, Article 40 ff.

264 *Case C-69/10 Diouf* [2011] ECR I-7151, paras 48-49.

265 APD, Article 46(1)-(2), listing all decisions concerned. Cf. TEU, Article 19(1), requiring MS to "provide remedies sufficient to ensure effective legal protection in [all] fields covered by Union law".



needs to be considered, as the rules contained in Articles 13 ECHR and 47 EUCFR remain applicable.

The **purpose** of effective remedy guarantees is to ensure the availability of a legal means to enforce fundamental rights, allowing a **competent authority** both to deal with the substance of the relevant complaint and to grant appropriate relief.<sup>266</sup> That authority does not 'necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'.<sup>267</sup> In particular, the **scope of review** must indeed be such as to allow it 'both to deal with the substance of the relevant ... complaint and to grant appropriate relief'.<sup>268</sup>

Taking account of the 'irreversible nature of the damage' that may result if the risk of *refoulement* or persecution materialises, an effective remedy 'imperatively requires **close scrutiny** ... as well as a particularly prompt response',<sup>269</sup> including a full and *ex nunc* assessment of facts and law.<sup>270</sup>

Like first instance guarantees, to be effective, remedies must also be **legally and materially accessible**.<sup>271</sup> Therefore, time limits and other restrictions must not render the exercise of appeal rights 'impossible or excessively difficult'.<sup>272</sup> What is more, the State is required to take active steps to make them accessible *in practice*, especially 'where asylum seekers are concerned'. In particular, when the applicant lacks the means to pay a lawyer, **free legal aid and representation** as well as **linguistic assistance** must be provided.<sup>273</sup> As will be discussed in Chapter 5, this is in stark contrast with the serious shortcomings of the legal aid regime codified in the recast APD.

As a corollary, effectiveness 'requires that the remedy may prevent the execution of measures ... whose effects are potentially irreversible'.<sup>274</sup> It would render the remedy pointless, if such measures were executed before the competent authorities had examined their compatibility with the rights to asylum and to *non-refoulement*.<sup>275</sup> Therefore, effective remedy guarantees require access to appeals 'with **automatic suspensive effect**',<sup>276</sup> provided for as such in law, without administrative or other practical arrangements being sufficient to that effect.<sup>277</sup> Considering the possibility of erroneous refusals, suspension 'on request' or even *ex officio* on a case-by-case basis, as contemplated in the provisions of the recast APD and the Dublin III Regulation, are not enough.<sup>278</sup>

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266 Jabari v Turkey, para 48.

267 Conka v Belgium (2002) 34 EHRR 54, para 75. See also HID, paras 78 ff.

268 Jabari v Turkey, para 48.

269 MSS v Belgium and Greece, paras 293 and 320-321.

270 D and Others v Turkey, Application no. 24245/03, ECtHR, 22 June 2006, para 54. See also APD, Article 46(3).

271 Salah Sheekh v The Netherlands (2007) 45 EHRR 50, para 121; NA v UK, 25904/07, ECtHR, 17 July 2008, para 89.

272 Case C-432/05 Unibet [2007] ECR I-2271, para 43; and APD, Article 46(4).

273 MSS v Belgium and Greece, para 319; and EUCFR, Article 47(3). Cf. APD, Article 20 ff; Dublin III Regulation, Article 27(5)-(6); and RCD, Article 26.

274 Conka v Belgium, para 79.

275 EUCFR, Articles 18 and 19.

276 Gebremedhin v France, para 66; MSS v Belgium and Greece, para 393.

277 IM v France, paras 132, 134-135; AC v Spain, para 95.

278 AC v Spain, para 94. Cf. APD, Article 46(5)-(8) and Dublin III Regulation, Article 27(3)-(4).

## 5. DESIGNING FAIR PROCEDURES AND ENSURING EFFECTIVE REMEDIES: A PROACTIVE, INTERACTIVE APPROACH

### KEY FINDINGS

- A proactive, interactive approach to asylum procedures requires fairness to be assured from the outset, to ensure trust between asylum seekers and host states.
- Taking into account that *all* asylum seekers are legally vulnerable, assessing specific vulnerabilities should not add further procedural complexity. Rather, we urge a preliminary vulnerability assessment, taking into account all possible sources of vulnerability, and moving swiftly on to substantive RSD.
- In the absence of safe legal access to Europe, it is crucial that punitive approaches to irregular entry are avoided, in accordance with Article 31 CSR. Irregular entry should not affect the assessment of the asylum claim.
- Detention of asylum seekers should be a last resort, only to be contemplated upon specific strong reasons in the individual case and where alternatives to detention are not available.
- Front-loading holistic advice and legal support is crucial for establishing trust and quality first-instance decisions, thereby reducing appeals and judicial reviews. General legal information is no substitute for legal representation.
- Manifestly well-founded procedures are beneficial both to asylum seekers and host communities. We urge for reform of the Temporary Protection Directive and recognise the potential of further examining group determination procedures.
- Good institutional design requires a multi-actor approach to foster accountability and expertise.
- Joint processing arrangements could help improve asylum system if they alleviate coercion and complexity. All depends on the detail and institutional context.
- Coercion in the allocation of responsibility is likely to exacerbate 'burden' rather than distributing it fairly.

This chapter builds on analysis of the legal constraints outlined in the preceding chapter, and will set out some practical methods to ensure that first reception, joint processing and distribution processes and decisions are fair and subject to effective remedies.

Before turning to the specificities of the forms of joint processing and distribution, the general principles and concerns set out in Chapter 1 are recalled. In particular, ways are sought seek to avoid the costs of coercion and complexity, and design institutions which work cooperatively as far as practicable with asylum seekers, facilitating swift determination of their claims.

Much of this chapter focuses on avoiding the perverse procedural practices have come to be normalised across Europe, and even spread to other regions.<sup>279</sup> Asylum procedures in Europe have become excessively coercive and complex, to the detriment of both asylum

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279 Lambert, H., McAdam, J. and Fullerton, M. (eds.) (2013), *The Global Reach of European Refugee Law*, Cambridge, Cambridge University Press.

seekers and states. Rather than an exceptional mechanism, the Dublin system builds in coercive transfer to countries presumed safe, in the face of strong evidence to the contrary. Before examining new mechanisms for joint processing and distribution, the current shortcomings should be clearly identified. As this study stated at the outset, there is no point in adding extra layers of complexity, in the name of efficiency or burden-sharing.

The notion of effective judicial protection and an effective remedy before a court or tribunal is inherently *ex post*: Once a decision is taken, it is envisaged that the right to challenge that decision is available as an important way to ensure the legality and fairness of that decision. However, the work of ensuring fairness must be built into processes from the outset; an *ex ante* approach to fairness is crucial from an institutional design point of view. Effective remedies against bad decisions are important and an unavoidable element of fairness, but they are not enough. The law also requires public authorities to ensure fairness at first instance;<sup>280</sup> something which can also reduce or avert the need for legal challenges, to the benefit both of the state and applicants.

This chapter accordingly develops a *proactive, interactive* approach to fairness and effective remedies, in keeping with the overlapping domestic, EU and international standards that are applicable. By a *proactive* approach we mean an approach to fairness and effective remedies that aims to ensure fairness from the beginning of the process, and integrate fairness in all aspects of the procedures. Rather than seeking to limit or constrain access to effective remedies, it aims to ensure fairness from the outset, and therefore minimise the need for court challenges against bad decisions. By an *interactive* approach, we mean one that takes into account the crucial trust-building role of first encounters between asylum seekers and public officials, and the importance of minimising coercion. It is important not only that procedures be fair, but that they are perceived to be fair by asylum seekers.

RSD, the core of the QD and APD (including in their recast versions), depends on effective communication between the authorities and the asylum seeker, so first contact must help ensure trust and understanding. Building trust not only into intra-EU Member State relations, but crucially also into the interaction between States and asylum seekers, is key to the success of the CEAS. Many asylum seekers arrive after traumatic experiences in their home countries, and also undergoing perilous journeys. Their first encounters with the authorities are crucial for their own well-being and also to maintain their cooperative disposition to the asylum process. Any procedures must bear in mind that many will be traumatised and wary on arrival.

## 5.1. Principles of institutional design

This study is premised on the importance of minimising coercion and complexity in asylum procedures; and acknowledging that the population of asylum seekers' comprises many vulnerable irregular entrants to the EU.

### 5.1.1. Assessing all asylum seekers' vulnerability

As discussed in the Introduction to this study, the APD and RCD contain different notions of vulnerability, the determination of which has various potential legal consequences. Often, these different situations of vulnerability are based on past experiences. But how are

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280 EUCFR, Article 41; Case C-604/12 HN, Court of Justice of the European Union, 8 May 2014.

asylum seekers to prove their past experiences? The recast APD envisages that those asylum seekers with special needs should be identified, and then should not be subjected to accelerated procedures, for instance. Yet, assessing vulnerability based on past experiences adds an extra layer of procedural complexity, potentially also undermining efficiency.

APD contains some striking improvements, not least in streamlining the process for both refugee status and subsidiary protection, a move most Member States had made in any event. And the leeway for special procedures has been in some respects reduced. However, the new 'special needs' notion is ill-defined, and some of the provisions on unaccompanied minors, although immensely detailed, are also opaque and complex. There is a perversity in acknowledging that some asylum seekers are more vulnerable than others in terms of their ability to navigate procedures, and yet to address this by introducing greater procedural complexity.

Instead, we urge a preliminary vulnerability assessment, which takes into account all possible sources of vulnerability, and moves swiftly on to the substantive asylum determination.

#### 5.1.2. Ensuring non-punitive approaches to irregular entry

The fact that asylum seekers are often irregular entrants has three principal implications in practice: They are often subject to punitive measures as irregular entrants; they may have been harmed or traumatised along their journeys; and they may be misinformed about asylum and asylum procedures. These features each may hamper access to asylum. If they are detained for irregular entry, they may be unable to make a prompt asylum claim or access suitable advice and support. If they have been harmed or traumatised along their way, they may continue to be vulnerable on arrival, facing communicative problems and lacking trust in the authorities. If they lack appropriate information or advice, their first contacts with the asylum authorities are likely to be unproductive, and may not allow them to provide all the information necessary to inform assessment of their status.

As long as safe, legal access to asylum in Europe is lacking, it is crucial that punitive approaches to irregular entry are avoided.<sup>281</sup> Under Article 31 CSR, States commit not to penalise asylum seekers for illegal entry, provided they make their claims without delay. In spite of clearer rules in the recast RCD, which only permit detention on six exhaustive grounds (determining the applicant's identity, risk of absconding, deciding on the applicant's right to enter the country, preventing the applicant from frustrating the enforcement of a return decision, national security grounds, and applying the Dublin Regulation) and as a last resort if alternative measures cannot be applied,<sup>282</sup> many EU Member States continue to detain irregular entrants on arrival. The recast APD contains important rules which aim to ensure that those in detention can claim asylum, but those rules are yet to enter into force in many Member States, and in any event, will be difficult to implement in practice.<sup>283</sup> Once in detention, sources of information and support are invariably fewer, and vulnerable migrants in particular may lack the communicative abilities or access to the authorities to claim asylum.

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281 Guild and Moreno-Lax (n. 212).

282 RCD, Article 8.

283 Garlick M. (2014) 'The Procedures Directive', in Peers, S. et al. (eds), *EU Immigration and Asylum Law*, 2nd edn, Vol 3, Brill (forthcoming).

An appropriate application of Article 31 CSR would limit or prevent imposition of 'penalties' on asylum seekers for irregular entry, while adherence to the RCD and 2012 UNHCR detention guidelines would require states to use alternatives to detention where possible.<sup>284</sup> Both these moves in turn would enhance access to asylum. Accordingly, detention of asylum seekers on arrival should be used only as a last resort. There is generally no good reason for it. Only where there are specific strong reasons in the individual case, and alternatives to detention will not be effective, should detention even be contemplated for asylum seekers with pending claims. Alternatives must be put in place.

A further consequence of irregular entrance is within the RSD process itself. States often treat lack of appropriate documentation as a basis for drawing negative inferences or imposing accelerated procedures.<sup>285</sup> When age or nationality are contested (as is often the case in asylum processes), lack of documentation is usually at issue. As discussed previously, refugees often lack documentation as they may not have had any in their country of origin, or they may have been advised by smugglers to destroy their papers. In any event, it impedes effective RSD to treat lack of documentation as dispositive. Article 4(5) QD acknowledges that documentary proof should not be demanded in all cases and Article 31 RSC that refugees should not, as a rule, be penalised for irregular entry.

### 5.1.3. Avoiding unnecessary complexity and delay

#### 5.1.3.1. *Front-loading advice, support & administrative resources*

In order to have good asylum determinations, streamlined procedures will be key, and should move relatively swiftly to determination of the substantive asylum claims. In order for that to be possible, asylum seekers, often after traumatic experiences and journeys, require advice and support.

The rationales for front-loading advice and support are several. Clearly, it is more efficient to ensure recognition of claims at the outset, rather than have those with protection needs wait in legal uncertainty and incur the costs associated with lengthy processes. It is unfair to them, and also disadvantageous for host communities. Integration would be facilitated by earlier recognition. Needless to say frontloading should also be less costly for the state in terms of administrative resources. If the state is also concerned to remove those whose claims are rejected, then a more reliable, well-understood and fair first instance procedure would also be preferable, in that it would foster greater trust between asylum seekers and the state, in particular if it is facilitated by legal and other relevant forms of advice.

Asylum seekers often arrive ill-informed about their rights and the legal process facing them. A small study comparing the experiences of asylum seekers and refugees in Toronto and Geneva found striking differences in terms of their knowledge and understanding of the RSD process, largely due to different sources of information, advice and support.<sup>286</sup> Early access to legal information, advice and representation was the norm in Toronto. As well as their own lawyers, the interviewees lived in shelters which provided extensive holistic support, with regular information sessions on topics including but not confined to legal

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284 UNHCR (2012) 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum seekers and Alternatives to Detention'. Available from: <<http://www.refworld.org/docid/50348953b8.html>>.

285 Asylum Procedures Directive, Article 31(8)(d).

286 Costello and Kaytaz (n. 22).

rights and obligations. In contrast, in Geneva, legal representation was rare, and usually lawyers were only contacted at the appeal stage, if at all. Social workers tended to feed partial information to asylum seekers, and long delays were common. These factors led to strikingly different experiences of the asylum system, notwithstanding the similar aggregate recognition rates for refugees in Canada and Switzerland.

### *5.1.3.2. Front-loading legal support*

Front-loading legal information, advice and representation (collectively referred to as legal support) at the outset is a crucial aspect, necessary to ensure that asylum seekers explain their claims properly, and understand the reasons for decisions affecting them. It also helps ensure better first instance decisions, thereby reducing appeals and judicial reviews.

Front-loading legal support should be seen as a component of a fair asylum procedure rather than an isolated requirement. Early legal support encourages asylum seekers to develop trust in the asylum system and view the procedure as a collaborative rather than adversarial process.<sup>287</sup> Trust is fundamental to ensuring the asylum seeker's cooperation with the asylum authorities and could reduce the risk of absconding. In that light, through the use of early legal support, Member States could avoid coercive measures such as detention.

Moreover, the provision of early legal support contributes to sounder decisions during the procedure, thereby reducing costly and lengthy appeals. The Solihull front-loading decision-making Pilot conducted in 2007-2008 by UNHCR in the context of its Quality Initiative Project could be seen as a vivid illustration of the value of front-loading in the asylum process. UNHCR's findings identified improved quality in the procedural aspects of decision-making as a result of early provision of legal advice; namely, more evidence was made available to decision-makers by applicants before the first instance decision.<sup>288</sup>

Legal representation, however, differs considerably from legal information. However detailed and precise, information about the asylum process does not amount to the assistance provided by a qualified legal advisor enabling the asylum seeker to support his or her case throughout the different stages of the application. Accordingly, it is regrettable that the Recast APD opts for "legal and procedural information free of charge",<sup>289</sup> rather than, as the Commission had proposed, free legal representation.<sup>290</sup> However, this does not rule out innovative methods to deliver cost-effective legal representation at the outset of the asylum procedure, via legal NGOs and other qualified organisations.

The availability of legal aid has direct impact on front-loading legal advice. A study on the provision of legal advice in the UK, Ireland and Estonia, conducted by Anderson and Conlan, concluded that restrictions on legal aid have adversely affected the provision of appropriate early legal advice.<sup>291</sup>

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287 Anderson, B. and Conlan, S. (2014) 'Providing Protection – Access to Early Legal Advice for Asylum Seekers', August 2014. Available from: <<http://www.refworld.org/docid/53f2fbde4.html>>.

288 UNHCR (2009) 'Quality Initiative Project: Sixth Report to the Minister', April 2009. Available from: <[http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/QI\\_Sixth\\_Report.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Sixth_Report.pdf)>, 3.

289 Asylum Procedures Directive, Article 19(1).

290 European Commission (2009) Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554, 21 October 2009, Brussels, 39.

291 Anderson and Conlan (n. 286), 29.



### *5.1.3.3. Manifestly well-founded procedures*

Manifestly well-founded procedures are beneficial to all. If asylum seekers have strong protection claims, recognising these swiftly is beneficial not only to the asylum seekers, but also to host communities.

The recast APD allows acceleration of claims when they appear based on strong grounds at the outset.<sup>292</sup> With asylum seekers from countries such as Syria and Eritrea, a manifestly well-founded approach would seem warranted, to ensure that decisions are made swiftly. Unfortunately, the APD also allows the deadline for deciding on claims to be postponed (Article 31), subject to the overall time limit of 21 months, “where the determining authority cannot reasonably be expected to decide” during the prescribed time limits under Article 31(3), “due to an uncertain situation in the country of origin which is expected to be temporary”. If read too broadly, this could introduce further delay into asylum procedures.

It also further reduces the likelihood of triggering the Temporary Protection Directive,<sup>293</sup> a measure with many important features and with the capacity to enhance access to protection in the EU.

### *5.1.3.4. The Temporary Protection Directive*

The Temporary Protection Directive provides for a special protection mechanism which confers a status that is a “middle ground” between that of an asylum seeker and a Convention refugee.<sup>294</sup> Beneficiaries are entitled to housing, social welfare, medical care and access to education, as well as access to the labour market under certain conditions.<sup>295</sup> While persons covered by the Directive remain entitled to apply for asylum, the power of Member States to withdraw temporary protection while the asylum claim is examined may act as a disincentive to apply.<sup>296</sup>

However, the Directive’s mechanism is only triggered by “a mass influx of displaced persons from third countries”, which is established by a Council Decision adopted by qualified majority based on a Commission proposal.<sup>297</sup>

The Temporary Protection Directive also aims to “promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons”.<sup>298</sup> The Directive rests on the principle of double voluntariness, thereby requiring the consent

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292 Asylum Procedures Directive, Article 31(7).

293 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 (Temporary Protection Directive) [2001] OJ L212/12.

294 Durieux, J.-F. and Hurwitz, A. (2004) ‘How Many is Too Many? African and European Legal Responses to Mass Influxes and Refugees’, German Yearbook of International Law 47: 105, 149.

295 Temporary Protection Directive, Articles 8-16.

296 Temporary Protection Directive, Articles 17-18.

297 Temporary Protection Directive, Article 5(1).

298 Temporary Protection Directive, Article 1.



of both the recipient state and the individuals concerned before temporary protection beneficiaries may be relocated from one Member State to another.<sup>299</sup>

The failure to invoke the Temporary Protection Directive to date suggests some changes to its trigger mechanism are required. However, we strongly urge that it be reformed, rather than replaced. The alternative is reflected in some states' current reactions to Syrian asylum seekers: while some are recognised as refugees, others receive *ad hoc* forms of national temporary protection, or even have delayed making asylum determinations altogether.

#### 5.1.3.5. Other forms of group determination

Manifestly well-founded procedures and the Temporary Protection mechanism share the tendency to identify refugees on a group basis, potentially based on their origins. In this connection, further examination should be given to other forms of group determination, which would be more efficient and fair when protection needs are clear.<sup>300</sup>

#### 5.1.4. Accountability and expertise: a multi-actor approach

A further important principle of good institutional design is to ensure appropriate accountability and expertise. A multi-actor approach, where overall tasks and responsibilities are agreed and well-defined beforehand, is the best way to do this.

In particular, effective identification of asylum seekers, as well as categories of people with specific needs and vulnerabilities, is a key priority. Those seeking protection, bearing in mind their inherent vulnerability, should be identified as soon as possible and referred to appropriate facilities and processes. In addition to competent Member States authorities, a range of other actors can and should be involved in first-line reception and identification, including civil society, semi-governmental and international organisations, in line with their particular mandates, experience and areas of expertise. These can potentially ensure that the specific needs of people such as unaccompanied children, those who have experienced torture or trauma, victims of sexual or gender-based violence, and others, can gain access to relevant facilities and participate effectively in relevant procedures.

Furthermore, a multi-actor approach will also help enhance accountability and transparency. To ensure that joint processing schemes are fair and transparent, and function appropriately and according to the rule of law, accountability channels should be contemplated. Monitoring by Fundamental Rights Agency (FRA), the EU Ombudsman, the Council of Europe (CoE) Commissioner for Human Rights, or the Committee for the Prevention of Torture (CPT) should be unobstructed. In addition, dedicated monitoring regimes could be devised, entrusting NGOs and/or UNHCR with the main responsibility for running them. Reporting duties to the EASO and the EU institutions, including the European Parliament, should also be introduced.

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299 Temporary Protection Directive, Article 26.

300 See further Durieux, J.-F. (2008) 'The Many Faces of "Prima Facie"', *Refuge* 25(2): 151-163.

One such model for first-line reception arrangements for those arriving at sea borders, proposed by UNHCR in September 2014,<sup>301</sup> merits further consideration from Member States and EU institutions.

## 5.2. Joint processing

'Joint' or 'supported' processing arrangements could help improve asylum systems, if they help alleviate unnecessary coercion and complexity, and assist in better decision-making and enhance reception capacity. All depends on the detail and institutional context. In particular, while moving officials may seem like a good way to enhance processing capacity, the benefits of joint processing seem more related to allowing officials to interact and learn from each other, and see systems in different states operate. While this is beneficial as a learning experience for officials, and it may plug short-term gaps in reception and processing capacity in particular states, it is no substitute for the host state's adequately investing in its own system.

Notably, in the responses to our surveys, several respondents detailed the benefits of joint processing in terms of (1) improving the quality of asylum procedures by prioritising applications that are likely to be well-founded, (2) supporting Member States which cannot sustain large numbers of applicants. In its survey response, EASO identified benefits to Member States: exchanging best practices, contributing to a common understanding ultimately leading to mutual trust.

As piloted by the EASO in a series of projects in 2014, it appears that some informal moves towards joint processing may help provide additional resources, personnel and expertise to assist Member States in addressing particular aspects of the asylum process. Carried out with the aim of promoting and ensuring high standards of practice, such activities could help achieve the objective of enhanced access to fair procedures and other entitlements. Effective monitoring systems could assist in ensuring that such activities are in line with relevant standards and bringing added value.

Targeted support to Member States' capacity may be needed in certain situations, where arrivals create particular strain, or where ongoing gaps or weaknesses may need to be addressed. The range of tools available from the EASO, including permanent, special and emergency support, should be fully utilised by Member States, with the encouragement of other Member States and institutions where necessary. Early Warning and Preparedness arrangements, under Article 33 of the Dublin Regulation and under the EASO Regulation,<sup>302</sup> should be employed as necessary to ensure that problems do not develop into situations of crisis or systemic deficiency, in which asylum seekers' rights are violated.

To provide for more far-reaching 'joint processing' arrangements, going beyond the pre-interview stage in the asylum process to any substantive legal step, amendments would be required to existing EU and national legislation. It is unclear what the benefits of further centralisation of decision-making would be for refugees. Moving towards a uniform status for refugees would be beneficial, but mutual recognition of positive asylum determinations would have the same aim for them. Minimising the protection lottery across the EU is desirable, but not convergence for its own sake. Again, depending on the form and aims of these moves, they could be beneficial.

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301 See further Chapter 3.

302 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (EASO Regulation) [2010] OJ L132/11.

### 5.3. Distribution Mechanisms

At the beginning of this study, we set out an ethical and pragmatic commitment to minimise coercion in any allocation mechanism. This will not amount to a system of 'free choice' for asylum seekers, but rather one where, as part of the preliminary process, alongside with an assessment of vulnerability, options for where they can have their claim formally examined may be considered. At the outset, we propose a 'Dublin without coercion' model, where the family and humanitarian clauses of Dublin are used more appropriately and liberally, following the CJEU's guidance in *K* and *MA*. The Dublin interview, currently legally required, provides the opportunity to give effect to allocation without coercion.

The workability of distribution mechanisms depends largely on the background context. Dublin does not work, as recognition rates and reception conditions vary vastly across the EU, and asylum seekers often have established preferences as to where they wish to claim asylum. Accordingly, only the unlucky few are transferred against their will, but the suffering inflicted is often disproportionate, as has been condemned in *MSS* and *NS & ME* by the European courts.

Current distribution mechanisms in the EU have long-lasting consequences for the asylum seeker. Not only does the allocated country determine the likelihood of the asylum claim being recognised or not, but even if recognised, there is at present no positive mutual recognition of asylum decisions.<sup>303</sup> Unless the refugee meets the requirements of the Long-Term Residents Directive, the allocation of responsibility for the asylum claim determines not only the chances of recognition as a refugee, but also where he or she will be effectively required to live indefinitely. Under these circumstances, any allocation system will come under significant strain if it is at all coercive, as asylum seekers resist its imposition.

Accordingly, much of this study aims to urge to enhance reception and processing capacity. If reception and processing capacity across the EU were improved, some 'secondary movements' could be minimised.

The distribution criteria discussed in Chapter 3 serve to understand how the asylum 'burden' is distributed across EU Member States. These measurements are useful and important in demonstrating which states host most asylum seekers relative to their reception capacity (however this is calculated). However, even if it is discovered that some states are doing more than their fair share, we do not move from this conclusion to one where asylum seekers are redistributed coercively. Transferring asylum seekers is in itself a costly process, likely to exacerbate the 'burden' rather than distribute it fairly. The options of sharing resources, financial and bureaucratic, are therefore usually preferable.

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303 For analysis refer to Peers, S. (2012) 'Transfer of International Protection and European Union Law', *International Journal of Refugee Law* 24: 527.

## 6. POSSIBLE SOLUTIONS: GIVING MEANING TO SOLIDARITY AND FAIR RESPONSIBILITY SHARING

### KEY FINDINGS

- Ensuring greater compliance with EU and international legal standards in the reception and treatment of asylum seekers and RSD is an essential requirement for ensuring access to protection for those who are entitled to it in the EU.
- Proactive and interactive approaches to first-line reception and RSD must be developed and strengthened, involving actors including civil society and international organisations, as well as national authorities and EU bodies, to ensure that rights are respected and high-quality RSD decisions can be made.
- Focussing on arrangements for redistribution of asylum seekers, particularly involving coercion, creates the risk of diverting resources and attention from the central task of improving the operation of national systems, and of development of new ideas that might also fail to prevent secondary movement or ensure respect for *acquis* standards.
- The Dublin system should be reconfigured and applied in a way that avoids the use of coercion, and enables the preferences of asylum seekers to be taken into account. Member States must maintain capacity to respond on a flexible basis to foreseeable asylum seeker caseloads, but the possibility for voluntary transfer of asylum seekers to other states where demand is overwhelming should exist.
- Joint processing arrangements can provide a means to enhance the operation of national asylum systems, and the potential for further cooperation should be closely examined where it can further enhance efficiency and compliance with legal standards.
- Mutual recognition is a step towards establishment of a uniform status of asylum, as required by the Treaties. This idea, along with effective implementation of existing legal arrangements which can facilitate free movement of refugees, should be pursued.

Any discussion of new or alternative approaches and reinforced access to fair and effective asylum procedures should start from the need to ensure more effective observance of the legal standards in the EU *acquis* for reception, access and provision of international protection. The current EU norms, recently affirmed and strengthened through a number of new procedural and substantive guarantees in the recast process, are not respected in full in all Member States. Systemic deficiencies in reception and asylum processes, as well as failure to fulfil asylum seekers' and protection beneficiaries' rights in a number of areas, are among the main reasons why those seeking or in need of protection move on to other Member States. This is acknowledged in judgments of the European and Member States' courts in many cases relating to Dublin,<sup>304</sup> as well as policy discussions at EU level.

In this context, focussing predominantly on changes to rules and arrangements for allocating responsibility for claims could divert attention from the overwhelming challenge: namely, ensuring compliance with and respect for the rights of asylum seekers to adequate reception and procedural standards, and of refugees and subsidiary protection beneficiaries

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304 MSS v Belgium and Greece; NS & ME.

to the entitlements which their protected status entails. While this is a complex, politically sensitive, costly and multifaceted task, it would solve many or all of the current problems around the implementation of Dublin, secondary movement, solidarity among states and violations of individuals' rights. Thus while this study seeks to make recommendations for more effective ways of ensuring responsibility among States is allocated and fulfilled, it emphasises first and foremost the central importance of providing sufficient, high-quality reception standards and procedures for determining protection needs. This must be a key priority for European States and for the EU in order to ensure the ongoing viability of the CEAS and national asylum systems, and the availability of international protection in the Union as required by European, national and international law.

## **6.1. Access to asylum systems: Institutional design and principles**

In order to ensure swift access to effective first-line reception and asylum claim determination arrangements, the following are identified as important elements:

- Rather than creating further exceptional and specialised procedures for particular categories of arrivals, national systems and the CEAS should strive for more consistent and effective observation of basic safeguards and defined standards for reception, identification and access to asylum procedures, through a proactive and interactive approach. The experience of implementation of existing asylum laws shows that introducing further complexity, processes or channels is not likely to result in swifter procedures at higher standards. Thus the emphasis should rest on achieving access to efficient and high-quality mainstream reception and procedures.
- Resources and priority should focus on ensuring that all Member States are equipped, encouraged, supported and, where necessary, compelled to fulfil their obligations to provide adequate reception conditions and fair and effective claim determinations. A proactive and interactive approach should be encouraged to ensure high-quality, accurate decisions as swiftly as practicable at first instance, without expediency curtailing the effectiveness of rights and basic procedural guarantees. To this end, among other measures, national asylum authorities are encouraged to invest in institutional capacity, training (based on and potentially extending beyond their *acquis* obligations) and quality assurance activities. Practical cooperation, including as facilitated by EASO, should also aim at ensuring excellence in asylum decision-making, and EU financial support should also be targeted towards relevant areas of need at national level.
- Targeted support to Member States' capacity may be needed in certain situations, where arrivals create particular strain, or where ongoing gaps or weaknesses may need to be addressed. The range of tools available from the EASO, including permanent, special and emergency support, should be fully utilised by Member States, with the encouragement of other Member States and institutions where necessary. Early Warning and Preparedness arrangements, under Article 33 of the Dublin Regulation and under the EASO Regulation, should be employed as necessary to ensure that problems do not develop into situations of crisis or systemic deficiency, in which asylum seekers' rights are violated.
- Elements identified in redistribution arrangements that have been proposed to date could potentially be considered in assessing the need for appropriate measures to address capacity problems. These include territorial size, population, economic

strength, reception capacity and others, including as related to the level of development of the asylum and reception systems – while also ensuring that Member States have strong incentives to invest in and operate well-functioning systems. Such concepts should and cannot take the place of committed national efforts to consistently strengthen the operation of their systems, including through proactive and interactive approaches and bringing to bear the skills of multiple actors and where feasible.

- 'Joint' or 'supported' processing arrangements, including as piloted in relation to specific aspects of the asylum process by the EASO in a series of projects in 2014, would appear to have potentially important capacity to provide additional resources, personnel and expertise to assist Member States in addressing particular elements in the process. Carried out with the aim of promoting and ensuring high standards of practice, such activities could help achieve the objective of enhanced access to fair procedures and other entitlements. Effective monitoring systems are also important to ensure that such activities are in line with relevant standards and bringing added value. Joint arrangements should also encompass cooperation on reception, including sharing of expertise and good practice, but also potentially material resources where necessary and appropriate. A multi-actor approach, involving civil society and international actors as well as state officials and EU bodies, can further ensure transparency and the availability of a broad range of skills to address needs.
- Further development of joint processing arrangements may have value in a number of contexts including, but not limited to, emergency or particular pressure situations. Close consideration should be given to taking forward such cooperation in ways that will not necessarily require changes to legislation in the short term. The question of whether legislative change may bring added value may nevertheless warrant reassessment in the future if such arrangements continue to bring benefits, and more far-reaching joint action on a European level would be desirable. These may also in the longer term contribute to efforts to establish a common procedure as well as a uniform status of asylum, as required by Article 78 TFEU.
- Effective identification of asylum seekers, as well as categories of people with specific needs and vulnerabilities, is a priority. Those seeking protection, bearing in mind their inherent vulnerability, should be identified as soon as possible and referred to appropriate facilities and processes. In addition to competent Member States authorities, a range of other actors can and should be involved in first-line reception and identification, including civil society, semi-governmental and international organisations, in line with their particular mandates, experience and areas of expertise. These can potentially ensure that the specific needs of people such as unaccompanied children, those who have experienced torture or trauma, victims of sexual or gender-based violence, and others, can gain access to relevant facilities and participate effectively in relevant procedures. One such model for first-line reception arrangements for those arriving at sea borders, proposed by UNHCR in September 2014, merits detailed consideration from Member States and EU institutions. However, any such system must avoid the use of coercion.

EU funding support to Member States' asylum systems and initiatives must be strategically used and targeted at areas of real need, including in relation to strengthening first-line reception and identification arrangements to ensure that obligations are met and legal standards of treatment and protection are fulfilled. EU funding should not be a substitute for investment of national resources; but where required, its use should be designed to



ensure maximum positive impact. New provisions in the Asylum, Migration and Integration Fund should be applied effectively to ensure greater flexibility, stakeholder involvement and responsible and sustainable use of EU funds. To this end, effective monitoring arrangements are critical. The Parliament is encouraged to take an active role in monitoring and ensuring accountability for the use of EU funding.

## 6.2. Allocation of responsibility: Dublin without coercion

The allocation of responsibility for asylum seekers among Member States under the Common European Asylum System (CEAS) is currently governed by the Dublin system. While Dublin has been referred to as a 'cornerstone' of the CEAS,<sup>305</sup> the serious problems associated with its implementation in practice are widely documented.<sup>306</sup> Utilising criteria for distribution that do not relate to the capacity of Member States for receiving asylum seekers, and have limited connection to factors which are of concern for asylum seekers,<sup>307</sup> the system in many cases does not produce outcomes which are fair nor sustainable for states nor asylum applicants. Its human costs are well-known, and the available evidence appears to indicate that its high costs are disproportionate to the low numbers of actual transfers that Member States are able to effect in practice.<sup>308</sup>

The complexity and delays involved in Dublin processes mean that the system fails to achieve its expressed aims of identifying the Member State responsible for an asylum claim in a timely manner.<sup>309</sup> Persistent high numbers of applicants moving between or claiming protection in more than one Member State also demonstrates its failure to achieve the implicit aim of preventing secondary movement, sometimes characterised pejoratively and simplistically as 'asylum shopping'.

Among the reasons for failure to achieve these goals is the fact that current implementation of the system is heavily reliant on coercion. Coercion is accorded central importance because of the absence of internal borders within the EU, which creates the possibility of physical movement by asylum seekers between Member States.<sup>310</sup> Detention is thus employed on a widespread and in some cases near-systematic basis, to increase the prospects of successful transfer of asylum seekers to the states which Dublin designates as responsible for their claims, because the great majority of transfers (or attempted transfers) are contrary to the asylum seeker's will.

Coercion in the distribution of asylum seekers effectively leads to violation of fundamental rights and creates unacceptable hardship. If reception conditions are inadequate, then people are forced, as a result of the operation of the system itself, to move, as the only

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305 Dublin III Regulation, Recital 7; Stockholm Programme, section 6.2

306 ECRE (n. 13); JRS (n. 13)

307 While the Dublin Regulation requires responsibility to be allocated based on family connections as a priority (Articles 8, 9 and 10), in practice, these criteria are used in the minority of cases. By contrast, the criterion relating to the first state of irregular entry or stay (Article 13) is the most frequently-applied basis for allocating responsibility. See also above, Chapter 3.

308 See above, chapter 2.

309 Dublin Regulation, Recitals 4, 5.

310 Groups of people staying without shelter close to the French city of Calais, seeking to reach the UK, illustrates powerfully the phenomenon of movements within the EU of asylum seekers and other people who have entered the EU irregularly, and are not willing to remain in other countries that Dublin would designate for them. See Muir, H. (2014) 'The Migrant Crisis in Calais Shows the EU's Failure to See the Big Picture', The Guardian 5 September. Available from: <[http://www.theguardian.com/commentisfree/2014/sep/05/migrant-crisis-calais-eu-europe?CMP=tw\\_t\\_gu](http://www.theguardian.com/commentisfree/2014/sep/05/migrant-crisis-calais-eu-europe?CMP=tw_t_gu)>.



alternative to enduring unacceptable conditions, including in some cases inadequate sustenance, no shelter, and exposure to the risk of violence, exploitation and other grave risks.

The Dublin system is built on an implicit presumption that asylum seekers will be able to enjoy access to similar standards of treatment and rights in all participating states, but this goal, which is also the objective of the CEAS as a whole, is yet to be achieved in practice. The lack of trust that asylum seekers have for the system – and for the likelihood that it will ensure them of access to similar standards of treatment and rights in all participating states – means that secondary movements persist, contrary to Dublin’s implicit aim of preventing what is characterised negatively and simplistically as ‘asylum shopping’. In many cases, Member States are unwilling or unable to comply with its provisions.<sup>311</sup>

The 2013 recast of the Dublin Regulation sought to address some of the gaps and problematic aspects of the Regulation’s implementation, including through strengthened procedural safeguards and shorter deadlines to reduce delays, among other things. However, to ensure more effective and sustainable allocation of responsibility and respect for rights in practice, there remains a need to reconfigure the system to remove, or at least significantly reduce, its coercive and punitive elements. This could be achieved through a number of steps:

- More sustainable and fairer allocation of responsibility in line with fundamental rights could be achieved to a significant extent through strengthened implementation of the recast Regulation, in line with its objectives,<sup>312</sup> as well as of other asylum *acquis* instruments, the Charter of Fundamental Rights and other obligations under international and European human rights law. As propounded by the CJEU in *MA* and *K*, wider use of Dublin’s family-related responsibility criteria; as well as provisions on dependent persons and discretionary grounds (including as related to humanitarian elements, family or cultural considerations), requiring states to keep or bring together relatives and other people with relationships and other meaningful links to a particular Member States, could contribute to this and lead to greater cooperation on the part of asylum seekers.
- Member States are required, under the RCD, to provide reception conditions in line with the legally-defined standards and of sufficient capacity.<sup>313</sup> It must be possible for Member States to provide for regular levels of demand on an ongoing basis, and to build in flexibility and contingency or standby arrangements to adapt to fluctuations in numbers, given the inherently shifting and unpredictable nature of asylum flows. As noted in chapter 2 above, while the numbers of asylum seekers increase and decrease from year to year, particularly at national level, the longer-term numbers are generally stable. Where there is a genuine situation of pressure which is clearly beyond the capacity of the Member States to respond, there should be scope in the system for Member States to make arrangements to provide support and agree among them to provide for the needs of individual or specific groups of asylum seekers. This might be of particular importance where a hosting Member State does not have the facilities to meet the specific reception needs of an asylum

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311 In 2014, many asylum seekers entering through Italy declined to be fingerprinted, which did not have the legal nor practical means to compel them to provide them involuntarily. See Italian Refugee Council, AIDA Country Report: Italy, April 2014. Available from: <[http://www.asylumineurope.org/files/report-download/aida\\_nationalreport\\_italy\\_second\\_update\\_final\\_0.pdf](http://www.asylumineurope.org/files/report-download/aida_nationalreport_italy_second_update_final_0.pdf)>, 26-27.

312 See Dublin Regulation, Preamble, Recitals 4, 5, 13, 14.

313 RCD, Articles 17(1)-(3); see also Articles 12, 14 and 18.

seeker, such as specialised medical treatment or counselling. Done on a consensual basis between the Member States and with the asylum seeker, the costs and delays of such arrangements should be limited. While this should be available as an exceptional arrangement to address a particular gap, Member States should in principle seek to ensure that they have flexible adequate capacity to address all foreseeable needs.

- Furthermore, states must take account of the preferences of asylum seekers when determining responsibility for asylum claims. The recast Dublin Regulation's requirement for a personal interview which relates to Dublin affords an opportunity for Member States to take note of a particular asylum seeker's objective to have his or her claim assessed in a particular state, and his or her reasons, and explore the matter with the concerned other Member State, on account of their respective obligations under the Dublin III Regulation itself and other relevant fundamental rights and refugee law standards.
- In 2015, the European Commission is expected to conduct a review of the Dublin Regulation.<sup>314</sup> At that time, remaining gaps should be addressed to ensure that rights are respected, and to encourage Member States to maintain adequate, sufficient reception capacity, and make available, where needed, additional places or support where it may be required.
- Member States must not allow the inadequacies of their reception and RSD systems to become a factor which forces asylum seekers to move elsewhere in the Union to gain access to a fair and effective asylum process. The question of sharing responsibility for asylum seekers must first of all be determined on the basis of a level playing field where genuinely CEAS compliant first-line reception is available to all asylum seekers no matter where they make their first application for asylum.
- All Member States are required to operate a system meeting EU standards with sufficient flexibility to meet the needs of asylum seekers, including the average and reasonably foreseeable numbers, with flexibility to deal with high levels of demand in periods of pressure. If a Member State, in accordance with the statistical evidence on average asylum applications in that Member State, experiences a particularly high level of demand, then a system to facilitate the voluntary and non-coercive movement of asylum seekers who wish to do so, in full knowledge of the relevant reception conditions, should be available.

Following a grant of international protection, there may be circumstances in which the holder has an interest in taking up residence in another Member State. The 2011 amendment to the Long Term Residents' Directive ensured that people who are granted protection may receive long-term residence after five years (including half of the time during which their claim was under consideration), with associated greater rights as regards mobility in the Union. In addition, states are also encouraged to consider other grounds on which a refugee or subsidiary protection holder may seek to reside in another Member State, such as family reunification, study or employment. While a legal basis for mutual recognition of positive asylum decisions is not yet explicitly included in the *acquis* framework, at the time of writing, the idea is under discussion among Member States and institutions.<sup>315</sup> Stakeholders are encouraged to consider closely the possibilities as this may

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<sup>314</sup> European Commission (n. 140), 7.

<sup>315</sup> European Commission (n. 3).

also contribute to the means for achieving a more sustainable, equitable distribution of responsibility for protection in line with the rights of people in need of protection.

## 7. CONCLUSIONS AND POLICY RECOMMENDATIONS

This examination of the CEAS as regards first-line reception, processing (joint and otherwise) and distribution of asylum seekers in the European Union has revealed a number of clear findings and challenges. The obvious conclusions are perhaps the simplest to enumerate though they are not among the easiest to reconcile with the various political demands of some actors.

The first conclusion which must be drawn from the statistical data on asylum in the European Union is that far from welcoming refugees in accordance with the size, wealth and capacities of the Member States the EU has been receiving a diminishing number of asylum seekers since 1999 until 2014 relative to its increasing size and wealth (notwithstanding the 2008 – 2013 recession). An EU of 15 Member States received more asylum seekers (and had higher recognition rates for persons in need of international protection) than an EU of 28 Member States in 2013. While there have been some changes in the main countries of origin of asylum seekers, the asylum demands in respect of the major origin countries of asylum seekers in the EU must be viewed in light of our knowledge of world events in the countries of origin. Discourse on 'mixed flows' has obscured the fact that many of those who claim asylum are from refugee producing countries. At the moment the situation of those fleeing Syria, Iraq and Afghanistan is particularly devastating. That these countries are among the main countries of origin of asylum seekers in the EU cannot surprise anyone. That Eritrea and Somalia will most probably still be major sources of asylum seekers in the EU should equally be unsurprising.

Secondly, the major crisis of the CEAS which has manifested over recent years has to do with reception conditions. The incapacity or unwillingness of some Member States to utilise the European Refugee Fund to put in place adequate reception facilities or the failure to deliver reception conditions on the ground, irrespective of whether ERF funds were allocated and received, is the most visible of failures regarding reception. Decisions of both the CJEU and the ECtHR on reception conditions in some Member States, in particular *NS/ME* and *MSS v Belgium and Greece*, have unequivocally documented these failures. There have been considered opinions of the UNHCR on reception conditions in various Member States and reports produced by the most reputable international human rights non-governmental organisations on the failure of reception conditions in a number of Member States. At the same time, the CEAS remains underpinned by pervasive shortcomings in RSD, which have been equally criticised by the ECtHR. Failures in providing fair procedures are linked to institutional obstacles to asylum seekers' effective access to the process and excessively complex procedures, which undermine trust between protection seeker and asylum system.

Thirdly, discussions around distribution of asylum seekers across the EU and the inequalities of demands on Member States for first-line reception of asylum seekers could serve as a distraction from the fundamental need for the creation and maintenance of both qualitatively acceptable and quantitatively appropriate reception conditions. When asylum seekers, who as a result of EU law almost inevitably arrive irregularly in the EU, come to some Member States, they are not offered the reception conditions which the CEAS promises them. If such reception conditions as the CEAS requires to be made available both in quality and quantity were assured across the EU, then secondary movements of asylum seekers are likely to be much reduced.

Fourthly, the Dublin I, II and III system for responsibility sharing of asylum seekers can be applied in a way consistent with reasonable and human rights sensitive reception of asylum seekers in the EU. A key shortcoming of the Dublin system is the use of coercion, which often creates perverse incentives for irregular movement and for avoiding the asylum process altogether. 'Dublin without coercion', that is, using Dublin to allocate responsibility in light of asylum seekers' preferences after a cooperative assessment, reflects an appropriate reading of the Dublin III reform, in line with CJEU and ECtHR pronouncements and the applicable international protection obligations at EU and international level. The Dublin system results in the movement of about 3% of asylum seekers in the EU from one Member State to another. The use of coercion in the Dublin system has led to an inexorable increase in costly and ineffective detention of asylum seekers in a manner which defies the logic on the ground. Why some asylum seekers are detained for months, while others in practically identical situations are not, is fundamentally incompatible with the principle of rule of law. Arbitrary and unforeseeable detention of asylum seekers coupled with a high degree of coercion, and in far too many cases violence, is the inevitable outcome of a Dublin system based on the use of coercion to achieve extremely low numbers of outcomes, which however entail the unacceptable, if not degrading or inhuman, treatment of those concerned.

Fifthly, it is the very rationale of the internal market conceived of as an area of free movement of goods, persons, services and capital, coupled with the Schengen system of no border controls among participating Member States, that is inimical to the Dublin coercive system. Coercion could be avoided through an application of the Dublin Regulation that is based on the EUCFR and takes account of asylum seekers' choices.

In light of the above conclusions, the following recommendations are made:

1. 'Dublin without coercion' offers more sustainable and fair allocation of responsibility, in line with fundamental rights. This could be achieved through more principled implementation of the recast Dublin Regulation, in line with its objectives,<sup>316</sup> as well as of other asylum *acquis* instruments, the Charter of Fundamental Rights and other obligations under international and European human rights and refugee law. Wider use of Dublin's family-related responsibility criteria as well as provisions on dependent persons and discretionary grounds (including as related to humanitarian elements, family or cultural considerations), requiring Member States to keep or bring together relatives and other people with relationships and other meaningful links to a particular country could contribute to this and lead to greater cooperation on the part of asylum seekers. The European Parliament should require the Commission to closely monitor Member State practices in this regard and promote the application of Dublin rules in line with the EUCFR.
2. Member States are required, under the RCD, to provide reception conditions in line with the legally defined standards and of sufficient capacity.<sup>317</sup> It must be possible for Member States to provide for regular levels of demand on an ongoing basis, and to build in flexibility and contingency or standby arrangements to adapt to fluctuations in numbers, given the inherently shifting and unpredictable nature of asylum flows. As noted in Chapter 2, while the number of asylum seekers increases and decreases from year to year, particularly at national level, longer-term figures are generally stable. Where there is a genuine situation of pressure, which is clearly

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<sup>316</sup> See Dublin Regulation, Preamble, Recitals 4, 5, 13, 14.

<sup>317</sup> RCD, Articles 17(1)-(3); see also Articles 12, 14 and 18.

beyond the capacity of the Member States to respond, there should be scope in the system for Member States to make arrangements to support each other and agree among themselves to provide for the needs of individual or specific groups of asylum seekers. The European Parliament should require the Commission to reinforce its efforts to ensure that the Member States have in place at all times first-line reception arrangements of both quantity and quality as required by the Directive to receive and provide for asylum seekers.

Furthermore, Member States must take account of the rights, needs, and preferences of asylum seekers when determining responsibility for asylum claims. The recast Dublin Regulation's requirement for a personal interview affords an opportunity for Member States to take note of a particular asylum seeker's preference to have his or her claim assessed in a particular state, and his or her reasons, and explore the matter with the other Member State(s) concerned. The European Parliament, in cooperation with the relevant actors, including EASO, the Commission, and UNHCR, should be informed and be able to follow up on the application of Dublin rules in line with the *MA* and *K* rulings.

3. In 2015, the European Commission is expected to conduct a review of the Dublin Regulation.<sup>318</sup> 'Dublin without coercion' offers a better way to implement the Dublin system right now. Deep reform would be appropriate at that stage, to ensure that fundamental rights are respected, and to ban in law the use of excessive coercion. The European Parliament should be an active player in this process, requiring from the Commission all necessary data to that effect.
4. The key to fair and equitable distribution of asylum seekers across the EU is getting right the institutional design of the CEAS at both EU and national level. Such an institutional design must be based on the front-loading of the system, a proactive, interactive approach to fairness, and the establishment across the EU of successful asylum reception and RSD. The institutions must be flexible and robust to deal with variations in demand, and must be multi-actor; state authorities must work harmoniously with civil society actors, non-governmental organisations etc. to ensure that asylum seekers have confidence in the asylum system and in particular the first-line reception conditions available to them. The European Parliament, in cooperation with the Commission and EASO, should promote multi-actor dialogues to foster cooperation at the different levels of government and administration of the CEAS.
5. Coercion against asylum seekers must be excluded from any distribution system, if it is to be fair and equitable. It is the use of coercion and institutions of coercion against them, as asylum seekers often correctly perceive it, that has contaminated the RSD systems of far too many Member States. This coercion undermines trust, which not only creates disaffection and despair, but also undermines effective RSD. The European Parliament should request that the Commission and Member States examine as a matter of urgency the justifications and specific application of coercion to asylum seekers in the EU, so as to provide for alternatives in line with the EUCFR and international protection standards.
6. The swift determination of asylum claims requires proper and effective first-line reception and a multi-actor institutional framework. Where asylum applications are

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hastily refused on the basis of inadequate information, that refusal will often be difficult to correct. In far too many cases, appeals and review cannot correct poor first instance decisions. One of the most significant reasons why state authorities take poor decisions at first instance is because first-line reception is inadequate or unavailable, so asylum seekers are unable to navigate the process. The frequency of subsequent applications, in turn, is to a large extent due to the failure of authorities to enable asylum seekers to properly engage with the asylum process from the outset,<sup>319</sup> as has been condemned by Courts of highest instance, including the ECtHR and the CJEU. This is not a fair and just procedure and contrasts fundamentally with basic principles of good administration. The European Parliament should demand that the CEAS requirements of good administration and a fair procedure be carried out fully and following compliance with the RCD and the EUCFR.

7. The ECtHR has pointed out that asylum seekers, by legal definition, are vulnerable. They are not entitled to work, to reside except in a temporary capacity or to engage in the normal activities of people living in a state. They live in conditions of uncertainty and anxiety. This vulnerability creates positive obligations for the EU and the Member States. This vulnerability must not be instrumentalised by national policies to demonise asylum seekers and their claims to international protection. The European Parliament should require the Commission to investigate ways to mitigate the vulnerability of asylum seekers through a proper and complete implementation of the CEAS requirements, in accordance with the recast RCD and APD.
8. Multi-actor involvement in first-line reception includes not only state actors but also non-governmental organisations, supranational actors and civil society actors. In order to limit secondary movement of asylum seekers and to ensure that there is a full and comprehensive examination of every asylum application made in the EU, the confidence not only of the national authorities but also critically of the asylum seekers must be engaged. Far too many national asylum bodies are associated with or nested in ministries which are responsible for police and criminal justice. Far too often, authorities responsible for dealing with asylum seekers have powers of arrest and coercion. This is not conducive to achieving the trust of asylum seekers. The European Parliament should request the Commission to examine and report upon the involvement of Member State coercive institutions in asylum procedures at national level in order to seek to diminish this role and attendant practices.
9. To avoid further complexity and coercion, in case joint processing schemes are introduced and further pursued, we invite those concerned to follow a progressive approach, starting with the simplest form of 'supported' processing initiatives and building on them as and when they have proven to be effective in delivering fairness and enhancing compliance with pre-existing first-line reception and RSD obligations. The European Parliament should support this understanding and engage in a dialogue with the Commission, EASO, and related actors, to promote it.
10. The new AMIF between 2014 and 2020 will spend a total of EUR 3.137 billion for the seven years on asylum, migration and integration of third-country nationals in the EU. It should be recalled that the ERF provided generous funding to many Member States, including among those with the worst record of reception conditions (EUR

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319 See UNHCR (2010) 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice', March 2010. Available from: <<http://www.unhcr.org/4c7b71039.html>>



630 million over the period 2008-13), but with results which were not always tangible. The European Parliament should request the Court of Auditors to examine the use of ERF funds for first-line reception specifically in those Member States where the greatest shortcomings have been identified. The European Parliament needs to make sure that ERF and AMIF money is effectively spent on first-line reception capacities required. The Schengen Evaluation System recently approved by the European Parliament may be a model for monitoring which could be considered for this purpose.

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## **ANNEXES**

### **ANNEX I – ACKNOWLEDGMENTS**

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### **ANNEX II – LIST OF INTERVIEWEES**

<b>INTERVIEWEE</b>	<b>DATE</b>	<b>PLACE</b>
<b>UNHCR Bureau for Europe</b>	<b>16 July 2014</b>	<b>Brussels</b>
<b>European Asylum Support Office (EASO)</b>	<b>9 September 2014</b>	<b>Brussels</b>
<b>Member of the European Parliament</b>	<b>9 September 2014</b>	<b>Brussels</b>
<b>Asylum Service, Ministry of Public Order &amp; Citizen Protection, Greece</b>	<b>10 September 2014</b>	<b>Athens</b>



## ANNEX III – KEY INSIGHTS EMERGING FROM SURVEYS AND INTERVIEWS

This Annex contains key insights and contributions from Member States, EU institutions and other stakeholders on current practices and new approaches to asylum procedures, as they emerge from the questionnaires sent out and the interviews conducted in the course of the research carried out for this study.

While input was invited from a wide range of actors, the responses received were limited, potentially due to the time constraints imposed on the study. Sixteen responses were received in response to 22 survey requests. Main elements of those responses are summarised below.

Our respondents include:

<b>Respondent</b>	<b>Questionnaire</b>	<b>Interview</b>
<b>Austria</b>	<b>x</b>	
<b>Bulgaria</b>	<b>x</b>	
<b>Cyprus</b>	<b>x</b>	
<b>France</b>	<b>x</b>	
<b>Germany</b>	<b>x</b>	
<b>Greece</b>	<b>x</b>	<b>x</b>
<b>Malta</b>	<b>x</b>	
<b>Netherlands</b>	<b>x</b>	
<b>Member of the EP</b>	<b>x</b>	<b>x</b>
<b>General Secretariat of the Council of the EU (DG D1B – Asylum, Immigration)</b>	<b>x</b>	
<b>EASO</b>	<b>x</b>	<b>x</b>
<b>FRA</b>	<b>x</b>	
<b>FRONTEX (Fundamental Rights Officer)</b>	<b>x</b>	
<b>UNHCR Bureau for Europe</b>		<b>x</b>

## 1. Current Framework and Proposals on Joint Processing and Distribution

### 1.1. Joint processing initiatives

#### The benefits of joint processing

Some respondents (Cyprus, Greece) highlighted the potential benefits of joint processing in terms of (1) improving the quality of asylum procedures, including through scope to prioritising applications, such as those that are likely to be well-founded; and (2) supporting Member States which are unable to respond effectively to large numbers of applicants.

In its survey response, EASO identified benefits accruing to Member States: exchange of best practices, contribution to a common understanding ultimately leading to increased mutual trust. In interview, EASO officials suggested that joint processing initiatives could, given the requisite interest and conditions, develop into a “moving asylum system” assisting Member States facing pressures. Emphasis was placed on tackling ‘asylum shopping’ and ‘manifestly unfounded’ claims in that context.<sup>320</sup>

Other respondents have been more cautious regarding the benefits of joint processing. For an MEP, “if procedures are not qualitatively improved, there is no point in having joint processing merely to have solidarity on paper”.<sup>321</sup> Greece also shared the view that piecemeal joint processing could do little in response to a large crisis in one Member State.<sup>322</sup>

Malta approached the issue from a different perspective, suggesting that joint processing in itself would be of little practical value, if not accompanied by a distribution mechanism.

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Despite initial scepticism towards the Commission’s February 2013 study on joint processing, EASO found that Member States in 2014 were more receptive to the idea of joint processing pilots on specific aspects of the asylum procedure, presented in the Commission’s Communication on the Task Force Mediterranean.<sup>323</sup>

As EASO explained, reluctance around joint processing initiatives is not due to lack of interest in solidarity. However, Member States tend to have different expectations from joint processing, which raise a number of legal and practical issues.

For that reason, EASO officials explained to us that the idea was to “break down the whole process and identify specific steps in the asylum process without any grand design”.<sup>324</sup>

FRA agreed that pilot projects afforded an opportunity to examine and explore solutions to legal and practical difficulties, with a view to moving towards more far-reaching EU joint processing in the long run. FRONTEX also indicated support to the idea of an EASO-coordinated initiative, run with focal points from all Member States.

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320 Interview with EASO, 9 September 2014.

321 Interview with a Member of the European Parliament, 9 September 2014 (interviewer’s unofficial translation from French).

322 Interview with the Greek Asylum Service, 11 September 2014 (interviewer’s unofficial translation from Greek).

323 European Commission (n. 103).

324 Interview with EASO, 9 September 2014.

In its response, EASO detailed the development of a 'bottom up' approach to joint processing initiatives following a proposal tabled at the meeting of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) on 6 May 2014, which was positively received by the Council. Eight pilot projects had been launched and the results under consideration by EASO and the Member States as of mid-September 2014, relating to the following subjects and involving the countries listed below:

- Unaccompanied minors: Cyprus hosting experts from Sweden
- Country of origin information (COI): Hungary hosting experts from Austria
- Dublin determination: Italy hosting experts from the Netherlands, Romania, Sweden
- Registration and case management: Sweden hosting experts from Denmark and vice versa
- Dublin determination: Germany hosting experts from Austria and vice versa
- Vulnerability assessment: UK hosting experts from Norway, Slovenia and vice versa

As of September 2014, two projects are currently under preparation:

- Registration and case management: France hosting experts from Belgium and vice versa
- Registration and case management: Belgium hosting experts from the Netherlands and vice versa.

It has been noted that these projects have been initiated primarily among countries which traditionally work together on asylum. So far, the implementation of the pilots between participating states has revealed significant potential of joint processing activities in enhancing mutual trust, according to EASO. EASO recognises, however, that such forms of joint processing as have been tested in the pilots reflect to a certain extent cooperation that already exists between Member States.

EASO also indicated its intention to propose a joint processing pilot involving several steps of the asylum procedure, including the personal interview, within the current EU legal framework. The need for any amendments to national and EU law in order to explore further joint processing models would be considered at future stages of the pilots, as and if necessary.

Two Member States (France, Germany) stated their view that any proposal on a new system for joint processing and screening would be premature at this stage.

Another Member State (Greece) – which did not participate in any of the pilots – considered the pilot projects as a "brainstorming activity" on the part of EASO, which largely remains abstract at this stage.<sup>325</sup>

According to Greece, any discussion on joint processing should cover the entire chain of international protection processes, including reception, Dublin and subsequent steps; rather than breaking down the asylum process to different isolated 'technical' components.

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325 Interview with the Greek Asylum Service, 11 September 2014.

## 2. Distribution of responsibility and the Dublin system

### 2.1. EWM and changes to the Dublin Regulation

On the issue of the Dublin III Regulation early warning mechanism (EWM), EASO highlighted that the mechanism's very recent coming into force may explain cautious responses at this stage. Three Member States (France, Germany, Austria) agreed that the Union needs more time to evaluate the EWM in light of the new *acquis* – given that APD and RCD have not yet been transposed into national law in all Member States, prior to the deadline for doing so – before identifying further weaknesses in the Dublin system.

At the same time, a number of Member States (Bulgaria, Cyprus, Greece) and civil society organisations (ECRE, Dutch Refugee Council) would call for changes to the Dublin Regulation at this stage, addressing the following issues:

- Family unity and the 'first country of application' principle should be the only criteria for determining the Member State responsible (Cyprus, Greece)
- Time-limits for Dublin procedures should be shortened (Cyprus)
- Clearer procedures should be introduced to ensure family unity for UAMs and vulnerable persons (Cyprus)
- A more flexible approach should be in place for returns to countries experiencing pressures on their asylum systems (Cyprus), given that it would likely prolong Dublin procedures and delay the examination of claims (ECRE)
- Detention should be excluded or further curtailed to a few hours/days (Dutch Refugee Council, ECRE)

According to EASO, Dublin – as a system which accords central importance to national sovereignty and implicitly assumes control of movement across intra-EU borders - is not suited to the realities of the modern European Union.

Bulgaria and Cyprus see realistic prospects of such changes in the short term. On the other hand, France, Germany, Austria, Malta and Greece do not believe that the Dublin regime is likely to change in the coming years. This view is shared by MEPs and civil society organisations such as ECRE and the Dutch Refugee Council.

As Greek officials explained, the broader political purpose behind Dublin remained unchanged by the recast. The use of Dublin by national authorities (and the feasibility of a 'Dublin without coercion' model) differs between Member States: some Member States implement Dublin 'by the book', while others show greater flexibility, namely in the application of the family unity criteria.<sup>326</sup> In that light, the idea of examining **how different asylum authorities implement the Dublin Regulation** was put forward as a possible research question for future studies.

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326 Interview with the Greek Asylum Service, 11 September 2014.

## 2.2. Alternative models for distribution of responsibility

### 2.2.1. *Distribution key*

There was clear support among several respondents for the idea of a distribution key for responsibility for asylum seekers (and beneficiaries of protection, as well as non-returnable persons), based on different quantitative and qualitative criteria (Bulgaria, Cyprus, Greece, Malta, FRA, one MEP). Those respondents consider that such a mechanism should be mandatory.

One Member State (Austria) referred to a proposal it presented to SCIFA entitled "Save Lives". The aim of the Austrian initiative is to offer legal access to refugees and opt for a distribution scheme for those entering across the EU. Such a distribution system should be mandatory for both Member States and asylum seekers. Austria was hesitant, however, to see the replacement of the Dublin system with a quota system at this stage.

For UNHCR, a distribution key along the German model would be going too far to have realistic prospects as an EU-wide solution.

France and Germany are opposed to alternative models for allocating responsibility.

### 2.2.2. *Pooling reception capacity*

The idea of pooling reception capacity has also been positively received by some respondents (Bulgaria, Cyprus). EASO considers that this could be practically implemented. However, a number of legal and practical issues arise, in the view of some respondents. For Malta and FRONTEX, this would have little significance unless it translates into distribution of asylum-seekers on a basis other than Dublin (and also including assumption of responsibility for processing the asylum claim).

A different formula, suggested by FRONTEX, could have some Member States focussing on reception and others on final relocation (echoing to a certain extent elements of the Hathaway and Neve burden-sharing model), but would require the EU to provide and allocate funding accordingly.

The transfer of asylum seekers from one country to another for reception purposes would hinder rapid processing (according to Cyprus, ECRE, Dutch Refugee Council), hinder the asylum seeker's access to legal assistance and disrupt family and social ties (ECRE, Dutch Refugee Council), and raise coercion issues (France, ECRE, Dutch Refugee Council).

For Greece, pooling reception capacity (e.g. as part of larger-scale joint processing) would not avoid the current problems. Beyond increasing the risk of coercion against asylum seekers, officials found that "the costs of reception capacity have not been considered, although this would involve high costs".<sup>327</sup> Austria and Germany also agreed that any discussion on pooling reception capacity would be premature at this point.

ECRE and the Dutch Refugee Council also found that this could have perverse effects by acting as a disincentive for certain Member States to invest in creating sufficient reception capacity on their territory.

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<sup>327</sup> Interview with the Greek Asylum Service, 11 September 2014.

FRA found that this would be more easily achieved when and if processing were undertaken at EU level.

### 2.3. Mutual recognition of positive asylum decisions

Several respondents (Bulgaria, Cyprus, Greece, Malta, FRA, ECRE, Dutch Refugee Council) are receptive to the notion of mutual recognition (which has not been defined in detail in their responses). On the other hand, three Member States (France, Austria, Germany) seem opposed to mutual recognition until asylum systems have effectively been harmonised with regard to procedures and recognition. UNHCR and the Council Secretariat also see little prospects for it at this stage.

Moreover, the increasing granting of humanitarian protection statuses by some Member States may complicate the application of mutual recognition EU-wide (France).

Greece and Malta advocated against any preconditions to free movement of those granted protection. Cyprus could accept restrictions such as limitations on work rights, but only as a short-term measure. Malta also suggested an obligation not to depend on the host state's social assistance system (similar to that provided in migration instruments).

For other respondents (France and the Netherlands), however, mutual recognition of asylum decisions does not per se amount to a right of free movement; France maintains the position that the only right to free movement for protection beneficiaries stems from the amended Long-Term Residents' Directive (Directive 2003/109/EC, as amended by 2011/51/EU). The Netherlands stated that free movement of refugees should remain regulated by the same Directive.

## 3. Legal Constraints on First Line Reception, and Joint Reception

### 3.1. Legal obstacles to joint processing

According to the responses which received, legal barriers to further action on joint processing could include:

- Lack of clear definition of "screening" in the APD (France)
- Access to national databases (EASO, Bulgaria, Cyprus, Greece)
- Differing criteria for the use of accelerated procedures (EASO)
- Differing mandates and levels of authority among employees/officials (Greece)
- Legal basis for interviewing applicants (EASO)
- Language regimes: EASO and Greece understand this as a practical challenge but the legislation of at least one Member State provides that the only languages used in the asylum process are those defined in the country's constitution (Cyprus).

Practical obstacles identified by EASO also include divergence in the organisation of workflows e.g. in case prioritisation.

Another obstacle, raised by Malta, relates to the scope of target Member States for joint processing schemes. Which Member States would qualify as "main points of arrival" and under what criteria? This concern seems to be shared by FRONTEX, who pointed out in her

response that EASO currently has signed memoranda of understanding only with countries situated at the external borders of the Union.

### 3.2. Target group for joint processing

Different views were expressed among respondents as to the criteria for targeting persons for joint processing:

- Asylum seekers whose claims are likely to be well-founded (Bulgaria, Cyprus) e.g. persons from a country of origin in crisis. Some analogies could be drawn between this idea and UNHCR's suggestion to invoke the Dublin humanitarian clause for Syrians and Eritreans in its 2014 "Response Package for the Mediterranean".  
ECRE acknowledged the benefits of this approach from the viewpoint of efficiency, but raised the possibility of contravening the principle of non-discrimination of refugees on the basis of nationality (Article 3 CSR), as well as Article 21 EUCFR.
- Vulnerable applicants who require immediate processing (Cyprus, Greece) and minors (Greece), as well as victims of trafficking in human beings, which do not adequately benefit from protection under the Anti-Trafficking Directive in all Member States at the moment (FRONTEX)
- People arriving at those EU's external borders most affected in terms of numbers (FRA)
- Mode of arrival (Dutch Refugee Council). This could be seen in line with UNHCR's "Response Package for the Mediterranean" which focuses on rescue at sea.

EASO and Malta found that joint processing should not be circumscribed to a specific target group but rather be used as a flexible tool for national experts to work together; providing the basis for a "moving asylum system" beyond specific emergencies. According to Malta, introducing specific target groups would result in an additional procedural step, rendering the asylum process more complex.

France, on the other hand, would only see prospects of joint processing where a Member State is facing a "mass influx" to which it cannot effectively respond. This could suggest parallels with the Temporary Protection Directive, which might be a more pertinent instrument upon which to rely, according to ECRE.

### 3.3. Reception conditions

One Member State (Greece) and FRA considered that dedicated, initial reception centres may need to be built in countries experiencing high influx. For the Dutch Refugee Council, reception facilities should be close to the place where the actual interview would be carried out. According to other respondents (Bulgaria, Cyprus, France<sup>328</sup>, FRONTEX<sup>329</sup>), however, no special reception centres are necessary.

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328 Note that France only sees joint processing as pertinent in cases of mass influx in a Member State.

329 FRONTEX noted, however, that Italy's reception capacity may have to be reassessed.



In terms of administration, FRA was of the view that reception centres should remain regulated by national law but largely financed by EU funds. Joint administration of reception centres could also be considered, according to one Member State (Cyprus).

Austria found that reception conditions should be considered as a very last step in the CEAS harmonisation process, as they raise sensitive issues.

## **4. Designing Fair Procedures**

### **4.1. Front-loading legal support**

Respondent national authorities (Greece, France) were not entirely clear as to the exact meaning of the term 'screening' in order to define the applicable legal standards.

As regards the duty to provide legal aid and assistance, a number of Member States (Bulgaria, Cyprus, Austria) found a duty on the state to provide the conditions for the enjoyment of the right of legal assistance. Responses do not clarify, however, whether such assistance is to be provided free of charge to the asylum seeker.

Malta and Germany, on the other hand, stated that neither under EU law nor under national law is there a duty to provide free legal assistance at the first instance stage.

### **4.2. A multi-actor approach**

Respondents generally agree that NGOs and international organisations would not assume any new role beyond their current activities in the context of a multi-actor approach to procedures, especially in relation to joint processing initiatives.

NGOs could provide support such as COI and quality assurance (Bulgaria, Greece, FRA), as well as training for staff (Greece). Malta pointed to the possibility of counselling to prepare applicants/beneficiaries for transfer to a different Member State, similar to that provided under the EUREMA I and II intra-EU relocation projects. Greece also suggested the idea of seconding NGO support staff to asylum authorities in cases of emergency. FRONTEX placed emphasis on close involvement of NGOs and international organisations involvement in the identification of persons with specific needs, such as victims of trafficking and unaccompanied minors.



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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