

CEASEVAL REPORTS

WP 2

2018

CEASEVAL

Evaluation of the Common European Asylum System under Pressure and Recommendations for Further Development

Baseline study on access to protection, reception and distribution of asylum seekers and the determination of asylum claims in the EU

Hans van Oort in cooperation with Hemme Battjes & Evelien Brouwer

Amsterdam Centre for Migration and Refugee Law
Vrije Universiteit Amsterdam

This project has received funding from the European Union's Horizon 2020 research and innovation programme under Grant Agreement No 770037



CONTENTS

| | |
|---|-----------|
| LIST OF ABBREVIATIONS | 4 |
| EXECUTIVE SUMMARY | 5 |
| INTRODUCTION | 9 |
| METHODOLOGY | 9 |
| PART I. THE COMMON EUROPEAN ASYLUM SYSTEM | 10 |
| 1. Historical development and legal instruments | 10 |
| 2. Policy responses | 11 |
| PART II. DETERMINATION OF THE RESPONSIBILITY FOR ASYLUM CLAIMS | 13 |
| 1. Introduction | 13 |
| 2. Dublin III Regulation (604/2013/EU) | 13 |
| 2.1 The main objectives of the Dublin system | 13 |
| 2.2 Reviewing the Dublin system | 13 |
| 2.2.1 Design | 13 |
| 2.2.2 Implementation, effectiveness and efficiency | 15 |
| 2.2.3 Fundamental rights | 20 |
| 2.2.4 Other observations | 23 |
| 3. Relocation | 23 |
| 4. Proposal for a Dublin IV Regulation | 24 |
| PART III. THE DETERMINATION OF ASYLUM CLAIMS | 26 |
| 1. Introduction | 26 |
| 2. Recast Asylum Procedures Directive (2013/32/EU) | 26 |
| 2.1 The main objectives of the recast Asylum Procedures Directive | 26 |
| 2.2 Reviewing the recast Asylum Procedures Directive | 27 |
| 2.2.1 Access to the territory | 27 |
| 2.2.2 Access to the procedure | 29 |
| 2.2.3 Special procedures | 29 |
| 2.2.4 Special procedural guarantees | 31 |
| 2.2.5 Safe country concepts | 32 |
| 2.2.6 Access to an effective remedy | 35 |
| 3. Proposal for an Asylum Procedures Regulation | 35 |
| 4. Hotspots | 38 |
| 4.1 Objectives | 38 |
| 4.2 Design | 39 |
| 4.3 Implementation in Greece and Italy | 39 |
| 5. Recast Qualification Directive (2011/95/EU) | 41 |

| | |
|--|-----------|
| 5.1 The main objectives of the recast Qualification Directive | 41 |
| 5.2 Reviewing the recast Qualification Directive | 42 |
| 5.2.1 Design | 42 |
| 5.2.2 Implementation | 47 |
| 6. Proposal for a Qualification Regulation | 49 |
| PART IV. THE RECEPTION OF ASYLUM SEEKERS | 52 |
| 1. Introduction | 52 |
| 2. Recast Reception Conditions Directive (2013/33/EU) | 52 |
| 2.1 The main objectives of the recast Reception Conditions Directive | 52 |
| 2.2 Reviewing the recast Reception Conditions Directive | 52 |
| 2.2.1 Design | 52 |
| 2.2.2 Implementation | 59 |
| 3. Proposal for a recast Reception Conditions Directive | 63 |
| BIBLIOGRAPHY | 67 |

LIST OF ABBREVIATIONS

| | |
|-------|---|
| AIDA | Asylum Information Database |
| APD | recast Asylum Procedures Directive (2013/32/EU) |
| APR | (Commission Proposal for an) Asylum Procedures Regulation |
| CEAS | Common European Asylum System |
| CFR | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| CRC | Convention on the Rights of the Child |
| DCR | Dutch Council for Refugees |
| EASO | European Asylum Support Office |
| EC | European Commission |
| ECHR | European Convention on Human Rights |
| ECRE | European Council on Refugees and Exiles |
| ECtHR | European Court of Human Rights |
| EP | European Parliament |
| FRA | European Union Agency for Fundamental Rights |
| ICMPD | International Centre for Migration Policy Development |
| NGO | Non-Governmental Organisation |
| QD | recast Qualification Directive (2011/95/EU) |
| QR | (Commission Proposal for a) Qualification Regulation |
| RCD | recast Reception Conditions Directive (2013/33/EU) |
| TEU | Treaty of the European Union |
| TEC | Treaty Establishing the European Community |
| TFEU | Treaty on the Functioning of the European Union |
| UNHCR | United Nations High Commissioner for Refugees |

EXECUTIVE SUMMARY

In 2015-2016, migration towards Europe has pressured on the EU asylum and migration systems, challenging the adequacy of the legal design of the Common European Asylum System (CEAS). This impact on the implementation of both the CEAS and national asylum systems in practice called the further harmonisation into question. This baseline study provides a comprehensive overview of the commentaries and evaluations that were made on the functioning of the CEAS between January 2014 and December 2017. This study is part of the CEASEVAL project, which is an EU funded Horizon 2020 project evaluating the Common European Asylum System. An earlier version has been submitted as deliverable to the European Commission in March 2018.

The CEAS under pressure

Many authors signal the high influx of refugees in recent years, which has put a spotlight on the functioning of the CEAS. EU wide responses to the refugee crisis have also been evaluated. The Council's attempt to provide relief for Italy and Greece in the form of the **Decisions on relocation** is often criticised for not being very successful in terms of the results that have been achieved. Only a limited number of asylum seekers have been relocated so far. The relocation scheme has failed to relieve pressure for Italy and Greece, as returns to those countries continue under the Dublin Regulation. In addition, the criteria of eligibility for relocation mean that Italy and Greece are left with those applicants who are less likely to receive status, i.e. mostly the more complex cases.

The **hotspot approach** was designed by the European Commission with the objective of providing operational support to countries under pressure and to support the relocation and return processes. A major criticism of the hotspots seems to be that hotspots do not offer a new approach of relieving the front line states other than with registering as many migrants and asylum seekers as possible and thus making the frontline states fully responsible for all who arrive. Additionally, the speed of registering applications that is part of the hotspot approach is not typically synonymous with due care and increases the risk of standardised and poorly motivated decisions once the applications are processed on the mainland. Finally, reception conditions in hotspots are reported to be inadequate and below the standards laid down in the Reception Conditions Directive.

Determination of the responsibility for asylum claims

Criticism on the design of the **Dublin system** focuses on its lack of a burden-sharing rationale, its failure to take into account the differences between Member States in terms of size, development and reception conditions and its disregard of the preferences or personal interests of the asylum seeker. These shortcomings lead to a disproportionate burden for border Member States and may lead to secondary movements that undermine the system's aim of swift access to the asylum procedure.

According to many commentators, obtaining an accurate picture of the **implementation** of the Dublin system is hampered by the limited availability of data on the operation of the system. This gives rise to concerns on the overall transparency of the operation of the Dublin procedure and entails that an evaluation of the operation of the Dublin system can only be indicative. On the basis of the information that is available, commentators describe great variations in the way the Dublin criteria are interpreted and applied by Member States.

The **effectiveness** of the Dublin system is considered to be hampered by the lack of a level playing field in terms of the consideration and treatment of asylum seekers across Member States. This may result in secondary movements and avoidance of the Dublin system as asylum seekers will try to reach their desired destination, thus undermining one of Dublin's goals to determine rapidly the responsible

Member State and guarantee effective access to the asylum procedure. The Dublin system also does not seem to be effective in terms of realising the transfer of protection seekers from one Member State to another. Throughout the years, the number of effected Dublin transfers is consistently low compared to the number of Dublin requests issued.

Commentators have also considered the **efficiency** of the Dublin system. The exact costs of operating the Dublin system are difficult to ascertain. In general, Dublin can be considered inefficient in the sense that the system only establishes the responsibility of a Member State for processing an asylum claim without addressing the merits of the claim itself. The overall efficiency is also reduced by the limited amount of actual transfers and the length of Dublin procedures.

Regarding the respect for fundamental rights, concerns are voiced about the limited use that seems to be made of the family criteria for determining state responsibility, the non refoulement principle and the seemingly widespread use of detention for the purpose of Dublin transfers.

The Commission's **proposal for a Dublin IV Regulation** is not considered to fundamentally rethink the current system for allocating responsibility for asylum claims. Applicants on the whole face stricter rules that are unfair from the perspective of asylum seekers. Distribution inequalities for Member States would be increased due to the requirement for countries of first entry to conduct admissibility and merit-related assessments before applying the Regulation. The envisaged corrective mechanism is not considered to be a solution to distribution inequalities: it is much too narrow in scope and can only be applied when the Member States face situations of a disproportionate number of asylum applications for which they are responsible.

Determination of asylum claims

Access to protection seems to be an important theme in the discussions about the **Asylum Procedures Directive**. Many Member States seem to obstruct the attempts of asylum seekers to gain access to the territory. Such actions go against the provisions of the Directive and could also entail a violation of the principle of non-refoulement. Access to the procedure can be challenging for asylum seekers due to the combination of rising numbers of asylum applications and continuing deficiencies in the asylum procedure. The widespread use of special procedures, such as accelerated, admissibility or border procedures, is reason for concern as these procedures are often characterised by reduced procedural safeguards. Furthermore, the current fragmentation of asylum procedures is considered to be in contrast with the goal of establishing common asylum procedures. Finally, access to an effective remedy seems far from guaranteed as the Directive only contains an obligation to ensure access to free legal assistance at the appeal stage. In addition, merits testing and low remuneration of lawyers under national legal aid schemes may obstruct access to an effective remedy in practice.

The safe country of origin concept and the safe third country concept are also prominently discussed. Comments on the first concept revolve around the divergent policies of Member States as to which countries should be considered as safe and questions are raised regarding the compatibility of this concept with the key focus of human rights and refugee law on the individual assessment of each case and the personal circumstances of the applicant. A widely discussed example of the application of the safe third country concept is the EU-Turkey Statement. The concept of safe third country is said to have in itself no clear basis in international refugee and human rights law and the application of the concept to Turkey is considered to be highly questionable.

The Commission's **proposal for an Asylum Procedures Regulation** is welcomed for its effort to advance the harmonisation of asylum procedures. Concerns are expressed about the proposal's removal of the suspensive effect of appeals against first instance decisions made in the context of the safe third country concept. The establishment of a provision for a common European list of safe countries of origin is considered to be a positive development, but it is also noted that the Regulation does not address the shortcomings of the safe country of origin and safe third country concept.

When it comes to the eligibility criteria for and content of international protection, striking differences are signaled in the treatment of beneficiaries of international protection with respect to residence permits, access to social welfare and the grounds for withdrawing the status. It is unclear how the different applications of the definitions of refugee protection versus subsidiary protection could warrant the distinctions contained in the **Qualification Directive**. The way in which the Directive deals with international protection needs arising *sur place* is considered highly problematic as it seems to be based on the suspicion that convictions allegedly developed *sur place* are faked. This seems to be at odds with the Refugee Convention. The lack of mutual recognition of positive asylum decisions among Member States is considered to be incongruous in view of the rights that EU citizens have and is also regarded as a missed opportunity for preventing secondary movements.

Concerns on the **implementation** of the Directive mostly relate to the divergence in recognition rates and the type of protection status granted to applicants originating from the same country of origin, evidencing a lack of harmonisation in practice. It is also noted that the integration of beneficiaries of international protection is a field that almost completely remains outside the scope of the CEAS.

The Commission's **proposal for a Qualification Regulation** is aimed at achieving further harmonisation. It is questioned whether harmonisation, without sufficient practical cooperation and guidelines, will actually lead to uniform decision making in asylum claims. Moreover, harmonisation as proposed by the Commission seems to promote 'harmonisation downwards' in the form of undermining access to protection and creating greater possibilities for exclusion. The proposal fails to address the divergence in the duration of residence permits awarded to refugees and subsidiary protection beneficiaries. It also does not adopt a different approach compared to the current policy regarding the protection needs arising *sur place* and the proposed mandatory assessment of the internal protection alternative is considered to go against the Refugee Convention.

Reception of asylum seekers

Regarding the **Reception Conditions Directive**, comments are made on the lack of a clear definition of 'reception'. As a consequence, considerable variations exist among Member States in terms of what constitutes first-line and second-line reception and who is responsible for it. It is considered contrary to human rights obligations that the Directive allows Member States to reduce or withdraw reception conditions or otherwise sanction asylum seekers who do not comply with procedural or other rules. The Directive does not specify what system should be used for the identification of vulnerable persons (nor does the Asylum Procedures Directive). As a result, the identification of vulnerability becomes arbitrary. Compared to the first phase Reception Conditions Directive, the circumstances under which detention of asylum seekers is permitted have been clarified. This is considered a certain improvement in the rights of asylum seekers. At the same time, detention as a concept raises questions of compatibility with fundamental rights.

Limited data are available on the **implementation** of the Directive. Nevertheless, it has become clear that substantial discrepancies exist in the level of harmonisation of reception conditions between the

different Member States, which is deemed to have negative repercussions for the functioning of the CEAS as a whole. Immigration detention remains an area of great concern as it has become a routine, rather than exceptional response to the irregular entry or stay of asylum seekers and migrants in a number of countries.

Though the Commission identifies the main challenge of the Reception Conditions Directive as one of poor implementation of existing standards, it proposes a **recast of the Directive** as opposed to a directly applicable Reception Regulation. It is questioned whether this is the right choice of instrument in view of the diverging reception conditions and the disparate recognition rates among Member States. The proposal contains improvements regarding the assessment of special reception needs as it lays down more detailed and clear obligations for national authorities with a view to ensuring better identification of vulnerabilities from the first contact with newly arriving persons. The lowering of the maximum waiting period for access to the labour market from nine to six months is considered to be a positive development from the perspective of the asylum seeker. Another welcome measure is the introduction of a contingency planning obligation with a view to ensuring adequate reception needs in situations of disproportionate pressure.

INTRODUCTION

This study was carried out by Hans Van Oort (junior-researcher Amsterdam Centre for Migration and Refugee Law (ACMRL), Vrije Universiteit Amsterdam) as a part of the CEASEVAL project, which is an EU funded Horizon 2020 project evaluating the Common European Asylum System.¹ The research was guided by objective 2.1 of the project: ‘to summarise the studies, evaluations and academic works on the functioning of the CEAS, its latest proposals and measures taken in the context of the European Agenda on Migration’ and carried out under the supervision of Hemme Battjes and Evelien Brouwer, professor respectively senior-researcher at the ACMRL.

This report proceeds in parts. Part I contains an introduction to the CEAS, including an overview of the legal instruments that together form the EU *acquis* on asylum. Part II deals with the currently applicable Dublin Regulation, the Commission proposal for a Dublin IV Regulation and the Council Decisions on relocation. The determination of asylum claims is the subject of Part III. This part first deals with reviews of the recast Asylum Procedures Directive and the Commission proposal for an Asylum Procedures Regulation. It subsequently focuses on the Hotspot approach, the recast Qualification Directive and the Commission proposal for a Qualification Regulation. The reception of asylum seekers is the theme of Part IV, in which an overview is given of the comments on the recast Reception Conditions Directive and the Commission proposal for a recast Reception Conditions Directive.

METHODOLOGY

This study was conducted through the use of desk research which, generally, involved legal publications dated between 1 January 2014 and 1 November 2017 (the starting date of the research project). A comprehensive range of publications has been included, consisting of policy documents, research conducted by academic experts, views of NGO’s and reports of EU Agencies. Specific attention has been paid to the distinction between deficiencies in the legal design of the CEAS and in its implementation. The research is presented in the form of a baseline study, which means that the contents of this report merely represent the content of the publications studied. The authors and supervisors of this report have withheld their personal views entirely, confining their contribution to selecting and summarising the publications studied and presenting the research according to a thematic outline. Footnotes have been used abundantly to ensure that all views can be traced back to the original author.

For reasons of legibility, the choice has been made to refer to ‘Member States’ throughout the report, irrespective of the type of legal instrument discussed. Therefore, it should be noted that the term ‘Member States’ refers to only those states taking part in the legal instrument and not necessarily to EU Member States.

¹ Also see the dedicated website: <http://ceaseval.eu/>.

PART I. THE COMMON EUROPEAN ASYLUM SYSTEM

1. Historical development and legal instruments

EU cooperation on asylum first took shape at an intergovernmental level between 1985 and 1990 on the basis of the Schengen Agreement which aimed to abolish internal borders.² Policymakers feared that the abolishment of border controls would put incentives in place for asylum seekers to shop for asylum. Additional measures aimed at controlling the movement of asylum seekers on European territory were therefore deemed indispensable.³ This resulted in the establishment of a mechanism to determine which state was responsible for processing asylum applications, first laid down in the 1990 Schengen Implementation Convention.⁴ It was replaced by a concurring mechanism in the 1990 Dublin Convention,⁵ which entered into force in 1997 and was signed by Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom.⁶

The intergovernmental approach remained unchanged by the Maastricht Treaty of 7 February 1992.⁷ The Treaty on the European Union acknowledged asylum as a 'matter of common interest' within its Third Pillar devoted to the field of Justice and Home Affairs.⁸ A major change was introduced by the 1997 Treaty of Amsterdam,⁹ shifting asylum from the third pillar (Inter-governmental) to the first pillar (Community). Asylum was thus brought within the competence of the European Community, prompting the development of the harmonisation process.¹⁰ The very notion of the CEAS was only introduced in October 1999 by the European Council in its Tampere Conclusions.¹¹ These Conclusions thus constitute the founding act of the CEAS.¹²

The first stage of the development of the CEAS consisted of setting minimum standards,¹³ the only exception being the rules governing the determination of the Member State responsible for examining an asylum request.¹⁴ Between 1999 and 2004, four Directives and two Regulations were adopted. Among these was the 2003 Dublin II Regulation, replacing the 1990 Dublin Convention.¹⁵ The accompanying Eurodac Regulation¹⁶ established a database for recording fingerprint data of asylum applicants to aid implementation of the Dublin system. The Dublin mechanism was further backed up by the Reception Conditions Directive,¹⁷ the Qualification Directive¹⁸ and the Asylum Procedures Directive.¹⁹ The instruments of first phase of the CEAS were criticised for their failure to achieve

² Boeles P et al. (2014) *European Migration Law*. Morsel: Intersentia. 2nd edition, 246-247.

³ Boeles P et al. (2014), 247.

⁴ Convention Implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (Schengen Implementing Convention), 19 June 1990 [2000] *OJEU* L 239/19.

⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1997] *OJEU* C254/1.

⁶ Fratzke S (2015) *Not Adding Up. The Fading Promise of Europe's Dublin System*. Migration Policy Institute Europe, 3; Hailbronner K and Thym D (2016) Legal Framework for EU Asylum Policy. In: Hailbronner K and Thym D (eds.) *EU Immigration and Asylum Law. A Commentary*. München: C.H. Beck, 1024.

⁷ Treaty of Maastricht on European Union, 7 February 1992 [2000] *OJEU* C 191.

⁸ Treaty of Maastricht, see Title VI on cooperation in the field of Justice and Home Affairs.

⁹ Treaty of Amsterdam, 2 October 1997 [1997] *OJEU* C 340.

¹⁰ Chetail V (2016) The Common European Asylum System: Bric-à-brac or System? In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 9-10.

¹¹ Council of the European Union (1999) *Presidency Conclusions. Tampere European Council*. 15-16 October 1999.

¹² Chetail V (2016) The Common European Asylum System: Bric-à-brac or System? In: Chetail V, De Bruycker P and Maiani F (eds.), 10-11. Article 63 TEC.

¹⁴ Chetail V (2016) The Common European Asylum System: Bric-à-brac or System? In: Chetail V, De Bruycker P and Maiani F (eds.), 11-12.

¹⁵ Regulation (EC) 343/2003.

¹⁶ Regulation (EC) 2725/2000, replaced by Regulation (EU) 603/2013.

¹⁷ Directive 2003/9/EC.

¹⁸ Directive 2004/83/EC.

¹⁹ Directive 2005/85/EC.

common standards across Member States, which was addressed in the second development phase of the CEAS.²⁰

The new development step was already scheduled by the 1999 Tampere Conclusions. The first package of asylum legislation was meant as an initial phase which in the longer term should lead to a common procedure and status.²¹ This objective of ensuring a genuine common asylum policy was explicitly underscored by the European Council in its 2004 Hague Programme²² and the 2009 Stockholm Programme.²³ Concrete and important steps in the development of the CEAS were taken with the Treaty of Lisbon, which was signed in December 2007 and entered into force on 1 December 2009. The very notion of a Common European Asylum System was laid down in Article 78 TFEU. As a result, establishing such a common system moved from being a general policy objective to being a specific legal duty binding upon all Member States and EU institutions. The key components of the CEAS have become primary law objectives and set no longer 'minimum' but 'common' or 'uniform' standards.²⁴ Article 6(1) TFEU as amended by the Lisbon Treaty has established the European Charter of Fundamental Rights of 7 December 2000 with the same legal value as the EU constitutive treaties, which is considered to be a welcome development for anchoring refugee rights within human rights law.²⁵ The second phase of harmonisation resulted in a recast of the Qualification Directive,²⁶ the Reception Conditions Directive,²⁷ the Asylum Procedures Directive,²⁸ the Dublin Regulation²⁹ and the Eurodac Regulation.³⁰

2. Policy responses

On 13 May 2015, the European Commission presented its European Agenda on Migration,³¹ setting out a comprehensive approach for improving the management of migration in all its aspects. The Agenda had been planned before, but got influenced by incidents in the Mediterranean where 1,700 persons drowned while crossing the sea in 2015.³² Based on this initiative of the Commission, the Council adopted two decisions³³ on relocation of asylum seekers from Greece and Italy. While these are temporary solutions, the Commission also envisages a lasting solution in the form of an emergency response system under Article 78(3) TFEU.³⁴ The second implementation package of the European Agenda on Migration thus also contains a proposal for amending the Dublin Regulation by introducing a permanent crisis relocation system, which may be triggered by delegated acts by the EC if an EU MS is confronted with a crisis situation jeopardising the application of the Dublin system.

On 6 April 2016, the European Commission presented a communication outlining its approach for the reform of the CEAS.³⁵ According to the Commission, 'there are significant structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy'.³⁶

²⁰ Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 14-16.

²¹ *Ibid.*, 17.

²² The Hague Programme: strengthening freedom, security and justice in the European Union [2005] *OJEU* C 53/1.

²³ Stockholm Programme: an open and secure Europe serving and protecting citizens [2010] *OJEU* C 115/1.

²⁴ Article 78(2) TFEU.

²⁵ Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 21

²⁶ Directive 2011/95/EU.

²⁷ Directive 2013/33/EU.

²⁸ Directive 2013/32/EU.

²⁹ Regulation (EU) 604/2013.

³⁰ Regulation (EU) 603/2013.

³¹ European Commission (2015) *A European Agenda on Migration*. COM(2015) 240, 13 May 2015. Brussels.

³² Wagner M, Baumgartner P et al. (2016) *The Implementation of the Common European Asylum System*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 556.953, 31.

³³ Council Decisions (EU) 2015/1523 and (EU) 2015/1601.

³⁴ European Commission (2015) COM 2015(240), 4.

³⁵ European Commission (2016) *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*. COM(2016) 197, 6 April 2016. Brussels.

According to the Agenda, the weaknesses and shortcomings of the CEAS should be addressed by:³⁷

- reforming the Dublin system by either supplementing the system with a 'corrective fairness mechanism' or by replacing it with a new system for allocating asylum applications across EU Member States based on a distribution key;
- reinforcing the Eurodac system expanding its purpose beyond assisting in determining the Member State responsible for examining an asylum application;
- further harmonising the CEAS rules through replacing the Asylum Procedures Directive and the Qualification Directive by regulations and further modifications of the recast Reception Conditions Directive.
- taking measures to prevent secondary movements of asylum seekers;
- extending the mandate for EASO, meaning a more dominant role for this organisation in policy implementation and a strengthened operational role.

³⁶ European Commission (2016) COM(2016)197, 2.

³⁷ Wagner M, Baumgartner P et al. (2016), 35.

PART II. DETERMINATION OF THE RESPONSIBILITY FOR ASYLUM CLAIMS

1. Introduction

Within the context of this report, the subject of responsibility determination covers the Dublin III Regulation (Chapter 2) and the Council Decisions on relocation (Chapter 3). An overview of the comments on the Commission proposal for a Dublin IV Regulation is provided in Chapter 4.

2. Dublin III Regulation (604/2013/EU)

2.1 The main objectives of the Dublin system

The currently applicable Dublin III Regulation³⁸ came into effect in January 2014. The countries participating in the Dublin system consist of all EU Member States³⁹ as well as Iceland, Liechtenstein, Norway and Switzerland. In essence, the Dublin system serves to allocate responsibility among Member States for the examination of asylum claims. The rules of the Dublin system aim to ensure quick access to the asylum procedure and the examination of an application in substance by a single, clearly determined Member State.⁴⁰

In more detail, the Dublin arrangements aim to:

- prevent asylum seekers from being shuffled between states ('refugees in orbit') by applying clear criteria for the determination of responsibility of an EU Member State;
- prevent multiple asylum applications by making one country responsible for an asylum application;
- prevent 'asylum-shopping' by providing clear indications of which country is responsible, irrespective of the asylum seeker's preference.⁴¹

2.2 Reviewing the Dublin system

When it comes to evaluating the Dublin system, it seems safe to echo the words of the European Commission in stating that the system is "not working as it should".⁴² In 2011, the case of *M.S.S. v. Belgium and Greece*⁴³ demonstrated the shortcomings of the Dublin system in terms of respecting fundamental rights. A few years later, the large-scale uncontrolled arrival of asylum seekers, refugees and migrants in 2015 confirmed the structural weaknesses in the design and implementation of the Dublin system.⁴⁴ In the vast amount of literature and reports that has been written on the functioning of the Dublin system, a number of themes recur. This section is structured along the lines of those themes. A distinction can be made between flaws that directly relate to the design of the system and shortcomings in the way it operates, although the two inevitably overlap.

2.2.1 Design

As will be seen, some elements in the blueprint of the Dublin system are not beneficial to, or even undermine, achieving specific objectives of the Dublin Regulation. At the same time, elements that would contribute to achieving the Dublin objectives seem to be missing from the system.

³⁸ Regulation (EU) 604/2013.

³⁹ Denmark joined via a bilateral agreement.

⁴⁰ European Commission (2016) *The Dublin System*. Factsheet, 1.

⁴¹ Wagner M, Baumgartner P et al. (2016), 45; Battjes H et al. (2016) *The Crisis of European Refugee Law: Lessons from Lake Success*.

Preadvies CJV, 8; European Commission (2016) *Evaluation of the Implementation of the Dublin III Regulation*. 18 March 2016, 5. See for a critique of the term 'asylum shopping': 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*. University of Oxford, Refugee Studies Centre. Working Paper Series No. 105, 20.

⁴² European Commission (2015) COM(2015) 240, 13.

⁴³ ECtHR *M.S.S. v. Belgium and Greece* (30696/09).

⁴⁴ Di Filippo M (2016) *From Dublin to Athens: A Plea for Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures*. International Institute of Humanitarian Law. Policy Brief, 1.

The development of a system that allocates responsibility for considering asylum applications, is based on Article 78(2)(e) of the Treaty on the Functioning of the European Union (TFEU). This article leaves room for several allocation systems, provided they are in line with the protection principles of Article 78(1) TFEU and with the principle of solidarity and a fair sharing of responsibility of Article 80 TFEU.⁴⁵ Yet, the Dublin system lacks a burden-sharing rationale and was not designed to sustainably share the responsibility for asylum applicants across the EU.⁴⁶ Some authors even point to the contrary and consider that the Dublin criterion of assigning responsibility on the basis of irregular entry seems to be a disciplinary measure and punishment. The Member States that facilitate the individual's arrival in the Union will be responsible for determining their asylum claims, which points to a degree of fault on the part of the responsible Member State.⁴⁷ In addition, this criterion of the Member State through which first entry into the EU occurred, is the most frequently used criterion for allocating responsibility, even though it is hierarchically subordinate to the other Dublin criteria of determining the responsible Member State.⁴⁸ As a consequence, the responsibility for the vast majority of asylum seekers is placed on a limited number of individual Member States: through Greece alone, in excess of 800,000 people reached the EU in 2015,⁴⁹ accounting for 80% of the people arriving irregularly in Europe by sea that year.⁵⁰ In particular the border Member States carry a disproportional burden with regard to the arrival of asylum seekers,⁵¹ although their de facto burden arguably also has to do with their reception and absorption capacities, and not only with the design of the Dublin system.⁵²

Assigning responsibility based on where the asylum seeker first entered the territory of the European Union, is facilitated by the Eurodac database.⁵³ This database complements the Dublin system. It was established as a technical support for the determination of responsibility and stores the fingerprints of asylum seekers and irregular migrants taken during initial registration in a Member State. The stored fingerprints serve as evidence of whether the person in question has already lodged an asylum application in another EU country.⁵⁴

Through the years, the set of countries that participate in the Dublin system have become increasingly diverse. The initial 12 participating countries were far more homogeneous in terms of for instance economic and social conditions than can be said of the 32 countries that currently participate.⁵⁵ Still, the Dublin criteria fail to reflect in any way the respective size, development or resources in the asylum

⁴⁵ Maiani F (2016) The Dublin III Regulation: A New Legal Framework for a More Humane System? In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 102-103.

⁴⁶ Maas S et al. (2015) *Evaluation of the Dublin III Regulation*. Study prepared by ICF International for the European Commission, 4; European Commission (2016) *The Dublin System*. Factsheet, 1; Garlick MV (2016) The Dublin System, Solidarity and Individual Rights. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 164.

⁴⁷ Mouzourakis M (2014), 10-11; Guild E et al. (2015) *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*. Centre for European Policy Studies. Paper No. 77, 17-18.

⁴⁸ Guild E et al. (2015c), 17-18; European Commission (2016) *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*. COM(2016) 197, 6 April 2016, 4.; Fratzke S (2015), 5; UNHCR (2017a) *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, 90; Battjes H et al. (2016), 9. See UNHCR (2017a), 86-90 for an overview of the possible reasons for the way in which the responsibility criteria seem to be used in practice.

⁴⁹ Wagner M and Kraler A (2016) *International Refugee Protection and European Responses. International Centre for Migration Policy Development*. Working Paper 12, 8.

⁵⁰ UNHCR (2015) *Over one million sea arrivals reach Europe in 2015*. Available at: <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>.

⁵¹ Battjes H et al. (2016), 9; Carrera S et al. (2015) *The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities*. Centre for European Policy Studies. Essay no. 20, 13; Brekke JP and Brochmann G (2014) Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation. *Journal of Refugee Studies* 28(2): 148.

⁵² Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), .165.

⁵³ Established on the basis of Regulation (EU) 603/2013.

⁵⁴ Wagner M and Kraler A (2016), 7-8. More elaborately on EURODAC and an analysis of EURODAC data, see Guild E et al. (2015c).

⁵⁵ Wagner M, Baumgartner P et al. (2016), 46.

system and reception systems of the Member States.⁵⁶ Instead, the Dublin system works on the underlying assumption that asylum seekers will receive the same level of protection in every Member State when it comes to qualifying for international protection, the asylum procedure and reception conditions.⁵⁷ This is not the case: despite the standards contained in the different directives⁵⁸ of the CEAS, the length of asylum procedures, the reception conditions and rates of recognition for international protection vary across Member States.⁵⁹ As a result of these differences, protection seekers may prefer to move elsewhere in the EU.⁶⁰ These secondary movements challenge the Dublin system's aim of quick access to the asylum procedure. This connection between the level of reception conditions and secondary movements is however not undisputed. Other researchers suggest that pull factors such as social ties, the reputation of other countries or job opportunities may be regarded as more important by asylum seekers when making the choice for a certain country.⁶¹

The Dublin criteria on the determination of the responsible state, do not take into account the preference or personal interests of the asylum seeker.⁶² This could not only hamper the integration of asylum seekers, but also results in a rather bureaucratic, discretionary distribution of asylum seekers in Europe.⁶³ It can also lead to secondary movements and multiple applications as many protection seekers travel back or travel onto their preferred destination, once transferred.⁶⁴ This development in turn has led several Member States to reintroduce internal border controls to manage the influx.⁶⁵

2.2.2 Implementation, effectiveness and efficiency

This section looks at how the Dublin system has been implemented by Member States and provides a largely analytical perspective on the extent to which Dublin can be described as effective and efficient. Effectiveness and efficiency in part result from the degree of implementation, but are also influenced by other factors such as the implementation of the wider EU *acquis* on asylum. It follows from the literature reviewed that effectiveness stands for the extent to which the Dublin system achieves its objectives as set out in paragraph 2.1 above. Efficiency in turn relates to the costs involved with running the Dublin system in terms of time, money and human costs.

Availability of data

Statistical data on the operation of the Dublin system have always been incomplete⁶⁶ and should therefore be interpreted with caution. EU sources such as Eurostat and the European Asylum Support Office (EASO) encounter difficulties in gathering and releasing up-to-date information, as participating countries fail to provide detailed and up-to-date Dublin statistics, despite a clear obligation under the

⁵⁶ Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 165.

⁵⁷ Battjes H et al. (2016), 9.

⁵⁸ Asylum Procedures Directive, Qualification Directive, Reception Conditions Directive.

⁵⁹ European Commission (2016) COM(2016) 197, 4-5; Fratzke S (2015), 16,

⁶⁰ Costello C and Mouzourakis M (2014) Reflections on reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough? *Asiel&Migrantenrecht* 10, 411; Fratzke S (2015), 15.

⁶¹ Wagner M, Baumgartner P et al. (2016), 82; Wagner M and Kraler A (2016), 12.

⁶² Battjes H et al. (2016), 10; Di Filippo M (2016b), 3; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 177; Chetail V (2016) Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System. *European Journal of Human Rights* 5: 596. For an elaboration on migrant choice in relation the European refugee crisis and other mass migration, see: Garvey JI (2017) *The Future Legal Management of Mass Migration*. University of San Francisco School of Law. Research Paper no. 2017-13.

⁶³ ECRE (2015) *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*. AIDA Annual Report 2014/2015, 52.

⁶⁴ Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 108; Maas S et al. (2015), 5; Mouzourakis M (2014), 20.

⁶⁵ European Commission (2016) COM(2016) 197, 4; European Commission (2016) *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*. COM(2016) 85, 10 February 2016. Brussels, 16.

⁶⁶ Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 107.

Migration Statistics Regulation.⁶⁷ For the 2016 Asylum Information Database (AIDA) report, full information is only available for nine countries.⁶⁸ Eurostat data on Dublin statistics have been incomplete every year since 2010 and are consistently released late.⁶⁹ On a more specific level, limited statistical information is available about the responsibility criteria on which Dublin requests are based. Eurostat and EASO only specify the applicable criterion for the “take charge” requests and not for “take back” requests, even though the latter category is far more applied.⁷⁰ In addition, most Member States fail to provide statistics on the use of asylum detention⁷¹ and it should be noted here that detention (and other elements of the CEAS) are not covered by the Migration Statistics Regulation.⁷² Consequently, an accurate and comprehensive statistical picture of the Dublin system does not seem to exist.⁷³ This is in itself problematic: an analytical evaluation of the Dublin system can only be indicative and the lack of data gives rise to concerns on the overall transparency of the operation of the Dublin procedure. Improvements in this area can be made by reviewing the cooperation between different EU entities such as EASO, the European Migration Network (EMN) and The Fundamental Rights Agency (FRA). More clearly demarcated areas of information collection for these organisations can prevent duplication of efforts and excessive workload on national administrations.⁷⁴

Implementation and harmonisation

In practice, considerable variety can be found in the ways in which Member States determine responsibility for an asylum claim.⁷⁵ Most of the Member States at times work outside the Dublin system by assuming responsibility without undertaking any formal Dublin evaluation, even if evidence obtained during registration or initial processing suggests another Member State may be responsible. The reasons for not undertaking a formal Dublin examination varied from humanitarian to efficiency considerations.⁷⁶ Several Member States reported to the European Commission on having to assume responsibility because no other Member State could be designated under the hierarchy of criteria. Although this practice would be in conformity with the Dublin procedure (i.e. Article 3(2) of the Regulation), the underlying absence of conclusive evidence for the responsibility of another Member State could also point to shortcomings in the implementation of the Eurodac Regulation.⁷⁷ According to several Member States, gaps (increasingly) exist in registration and fingerprint procedures in other Member States,⁷⁸ although the eu-LISA report on the 2016 activities of the Eurodac system states that the number of fingerprint datasets stored in the system increased by 25% in 2016.⁷⁹

⁶⁷ ECRE (2015) *AIDA Annual Report 2014/2015*, 24; ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*, 1; ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*. AIDA Legal Briefing no. 2, 8-9. ECRE (2017) *The Dublin system in the first half of 2017. Key figures from selected European countries*, 1. Migration Statistics Regulation: Regulation (EC) 862/2007, see *inter alia* Recital 6 and article 4(4) of the Regulation.

⁶⁸ ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*.

⁶⁹ ECRE (2018) *Making Asylum Numbers Count. ECRE's analysis of gaps and needs for reform in data collection on the Common European Asylum System*. Policy Note 10, 2.

⁷⁰ ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*, 6-7. EASO refers to 6,705 take back and 3,650 take charge requests in 2014. Jurado E et al. (2016) *Evaluation of the Implementation of the Dublin III Regulation*. Study prepared by ICF International for the European Commission, 37.

⁷¹ ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*, 7-8. Asylum detention here refers to all detention on the grounds mentioned in Article 8(3) of Regulation 2013/33/EU, including detention for the purpose of a Dublin transfer, see Article 8(3)(f) of Regulation 2013/33/EU and Article 28 of Regulation (EU) 604/2013.

⁷² ECRE (2018) *Making Asylum Numbers Count. ECRE's analysis of gaps and needs for reform in data collection on the Common European Asylum System*. Policy Note 10, 2.

⁷³ ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*.

⁷⁴ ECRE (2018) *Making Asylum Numbers Count*, 3-4.

⁷⁵ Jurado E et al. (2016).

⁷⁶ Jurado E et al. (2016), 20-21.

⁷⁷ Regulation (EU) 603/2013.

⁷⁸ Jurado E et al. (2016), 22.

⁷⁹ eu-LISA (2017) *Annual report on the 2016 activities of the Eurodac central system, including its technical functioning and security pursuant to Article 40(1) of Regulation (EU) No 603/2013*, 18.

When Member States *do* apply the Dublin criteria for determining responsibility, important differences seem to exist in how the criteria are interpreted and applied. Some Member States implement Dublin ‘by the book’, while others show greater flexibility, namely in the application of the family unity criteria.⁸⁰ As described in paragraph 2.2.1 the hierarchically most important Dublin criteria are not the ones that are applied the most, although there is no evidence to suggest that Member States are (solely) responsible for this.⁸¹ When it comes to interpretation of the criteria, a lack of consensus seems to exist between Member States on determination of responsibility, as demonstrated by the considerable amount of rejected requests.⁸²

Large scale arrivals (often referred to as the ‘refugee crisis’) also had their effect by putting a strain on national asylum systems.⁸³ The high influx of asylum seekers has led to delays in the processing of applications. EU Member States who were most affected by the large-scale influx started to widely ignore the Dublin system by letting through persons who did not explicitly request asylum on their territory.⁸⁴ Transfers have also been affected by the sharp increase in the number of arriving asylum seekers. Perhaps in an attempt to meet the time limits for submitting a request, Member States submit transfer requests without providing proper documentation to motivate the request, which has led to further administrative delays and even a higher rejection rate of these requests by receiving Member States.⁸⁵

Discrepancies also exist⁸⁶ in the national practices of Member States regarding the use of the discretionary clauses of Article 17 of the Dublin Regulation. Article 17(1) allows Member States to examine an application for international protection, even if this is not its responsibility under the criteria laid down in the Regulation.⁸⁷ According to Article 17(2), a Member State may also request another Member State to take charge of an applicant based on other grounds than the normally used criteria for determining responsibility. In Switzerland, Article 17(1) can only be relied upon in conjunction with another legal provision, whereas in Austria asylum seekers may directly request authorities to consider the application of this clause. In the UK, the asylum applicant is not informed during the screening interview about the possibility of relying on the discretionary clauses. Instead, this option is only likely to be raised if the applicant considers legally challenging a Dublin decision. It should however be noted that these discrepancies only affect a limited number of cases, as the discretionary clauses are rarely used.⁸⁸

Effectiveness

When considering the effectiveness of Dublin, the implementation of the wider EU *acquis* on asylum must also be taken into account as underlying the Dublin system is the core assumption that asylum applicants will receive equivalent consideration and treatment in whatever Member State they lodge their claim.⁸⁹ Reality shows that differences persist. To start with, seven out of 32 Dublin Member States are not fully bound by the EU *acquis* on asylum.⁹⁰ In addition, four of these countries are not an EU

⁸⁰ ECRE (2015) AIDA Annual Report 2014/2015, 82.

⁸¹ For an overview of the possible reasons for the way in which the responsibility criteria seem to be used in practice, see: UNHCR (2017a), 86-90 and Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 181.

⁸² European Commission (2016) COM(2016) 197, 4.

⁸³ Maas S et al. (2015), 6.

⁸⁴ Wagner M, Baumgartner P et al. (2016), 48.

⁸⁵ Maas S et al. (2015), 6; UNHCR (2017a), 90. Also see Preambles 10-14 of Regulation (EU) 604/2013.

⁸⁶ ECRE (2015) AIDA Annual Report 2014/2015, 83.

⁸⁷ Article 17(1) of Regulation (EU) 604/2013.

⁸⁸ UNHCR (2017a), 116; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 183-184; ECRE (2017) *The concept of vulnerability in European asylum procedures*, 49.

⁸⁹ Maas S et al. (2015), 5; Di Filippo M (2016b), 2; ECRE (2015) AIDA Annual Report 2014/2015, 51.

⁹⁰ Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F

Member State and are therefore not bound by general EU principles.⁹¹ Among the states that are bound by the EU asylum *acquis*, differences remain in the application of EU asylum standards, integration capacity and comprehensive observance of fundamental rights.⁹² Some even doubt whether a truly common asylum system exists.⁹³

These differences in standards can have far-reaching consequences on the proper functioning of the Dublin system, as for instance demonstrated by the suspension of Dublin transfers to Greece in 2011.⁹⁴ The lack of a level playing field also encourages secondary movements (see paragraph 2.2.1 above). In doing so, asylum seekers may try to avoid registration at designated reception facilities by using the services of smugglers, or take riskier routes to pass ‘under the radar’ to reach their desired destination.⁹⁵ This widespread avoidance of the Dublin system ends up undermining the central policy goal of providing swift access to status determination. Applicants may seriously undermine their own claim to protection in their attempts to escape the system.

Dublin’s claim to provide swift access to asylum procedures is undermined by the length of the time frames within the Dublin Regulation. Even when authorities closely comply with stipulated deadlines, applicants may still wait up to 10 months (take back requests) or 11 months (take charge requests) before the procedure for examining the claim for international protection starts.⁹⁶ Furthermore, statistics show that Member States regularly fail to respect the time limits prescribed by the regulation.⁹⁷ For as long as a decision has not been made, asylum seekers are kept in limbo.⁹⁸ After acceptance of the transfer request by another Member State, applicants reportedly are transferred within the time limit of six months (Article 29 Dublin Regulation), but the time taken varies widely.⁹⁹ All in all, Dublin seems to be failing to quickly identify a responsible Member State so that applicants can access an asylum procedure in a timely manner.¹⁰⁰

The Dublin system does not seem to be effective in terms of realising the transfer of protection seekers from one Member State to another. In the limited number of Member States on which statistics are available, the number of effected Dublin transfers is consistently low compared to the number of

(eds.), 109.

⁹¹ Iceland, Liechtenstein, Norway and Switzerland.

⁹² Di Filippo M (2016b), 3; Stevens D (2016) The humaneness of EU asylum law and policy. In: Ferreira N and Kostakopoulou D (eds.) *The Human Face of the European Union: are EU law and policy humane enough?* Cambridge: Cambridge University Press, 248; ECRE (2015) AIDA Annual Report 2014/2015, 48; Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 7; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 170-174; Maas S et al. (2015), 5; Brekke JP and Brochmann G (2014), 145-146; European Commission (2016) *The Dublin System*. Factsheet, 2; Hruschka C (2016) Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation. *ERA Forum* 17(4), 482; Battjes H et al. (2016), 9; Costello C and Mouzourakis M (2014). For a detailed case study on secondary movement of Eritrean asylum seekers from Italy to Norway, see: Brekke JP and Brochmann G (2014).

⁹³ Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 16; Bauloz et al. (2015) Introducing the Second Phase of the Common European Asylum System. In: Bauloz C et al. (eds.) *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Leiden: Koninklijke Brill NV, 3-5.

⁹⁴ European Commission (2016) COM(2016) 197, 4. European Commission (2016) Commission Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation EU No 604/2013 [2016] OJEU L 340/60 (In the meantime, the Commission has recommended to resume Dublin returns to Greece as from 15 March 2017). Guild E et al. (2015) *The 2015 Refugee Crisis in the European Union*. Centre for European Policy Studies. Policy Brief No. 332, 4.

⁹⁵ Rijken C (2017) Threats, Monsters and the ‘Refugee Crisis’. *Tilburg Law Review* 22: 274.

⁹⁶ Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 110.

⁹⁷ Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 175.

⁹⁸ Maas S et al. (2015), 4-5; Fratzke S (2015), 18.

⁹⁹ UNHCR (2017a), 147.

¹⁰⁰ UNHCR (2017a), 156.

requests issued. In 2015¹⁰¹ and 2016,¹⁰² the percentage of actual transfers compared to the total issued requests stood at 11%, rising to 18% for the first half of 2017.¹⁰³ A similar picture arises when looking at the actual transfers as a percentage of accepted requests: in 2013, 28 per cent of accepted requests resulted in actual transfers.¹⁰⁴ It should be noted here that the current rules provide an incentive for asylum seekers to try and prevent being transferred. Responsibility for handling an asylum application shifts between Member States after a given time. So, if an applicant absconds for long enough in a Member State without being effectively transferred, this Member State will eventually become responsible.¹⁰⁵

In terms of an even distribution of applicants among Member States, the results of operating the Dublin system are also limited. Data indicates that there is some redistributive effect, but for most Member States the net transfers are close to zero.¹⁰⁶ This means that these states receive and transfer similar numbers of applicants to other Member States, so that their incoming and outgoing requests cancel each other out.

Efficiency

An evaluation of the efficiency of the Dublin Regulation is hampered by the difficulty that seems to exist in ascertaining the costs of the Dublin system.¹⁰⁷ The following picture arises on the basis of the information that is available, which must be regarded as an illustration rather than a sound determination of the costs of the Dublin system.

A distinction can be made between direct and indirect financial costs. The direct costs comprise for instance the staff costs of the specialized Dublin units within national asylum authorities, the cost of operating IT systems such as Eurodac, overheads and the costs surrounding the transfer of Dublin applicants (including the cost of detention).¹⁰⁸ Direct costs also refer to the cost of appeals against Dublin decisions. It is estimated that in 2014, based on an average appeal rate of 54%, these costs amounted to 28 million euros, not including the cost of legal aid.¹⁰⁹ Indirect costs refer to reception costs, return and readmission costs of failed Dublin applicants and the irregular migration costs of failed Dublin applicants that are not returned.¹¹⁰ The direct and indirect costs of the Dublin system together amounted to approximately 1 billion euros in 2014 across the EU.¹¹¹ Member States themselves generally find the cost of implementing the Dublin Regulation proportionate in view of the outcomes generated.¹¹²

¹⁰¹ ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*, 4. Statistics were only available for: Germany, Switzerland, Italy, Sweden, Hungary, Greece, Poland and Bulgaria.

¹⁰² ECRE (2017) *The Dublin system in the first half of 2017. Key figures from selected European countries*, 5-6. Statistics were only available for: Germany, Austria, Greece, Switzerland, Bulgaria, Cyprus, Hungary, Poland, Malta, Croatia and Spain.

¹⁰³ ECRE (2017) *The Dublin system in the first half of 2017. Key figures from selected European countries*, 5-6. Statistics were only available for: Germany, Austria, Greece, Switzerland, Bulgaria, Cyprus, Hungary, Poland, Malta, Croatia and Spain.

¹⁰⁴ Fratzke S (2015), 11-12.

¹⁰⁵ European Commission (2016)COM(2016) 197, 4.

¹⁰⁶ Maas S et al. (2015), 10.

¹⁰⁷ Williams R (2015) *Beyond Dublin. A Discussion Paper for the Greens / EFA in the European Parliament*, 10; Mouzourakis M (2014), 25; Fratzke S (2015), 15; Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 107.

¹⁰⁸ Maas S et al. (2015), 11; Mouzourakis M (2014), 25; Fratzke S (2015), 15-16.

¹⁰⁹ Maas S et al. (2015), 27-28. Concerning the reliability of these data, it should be noted that the rate of appeal was *assumed* to be 50% unless data for a Member State were provided by Member States' administrations.

¹¹⁰ Maas S et al. (2015), 11; Mouzourakis M (2014), 25; Fratzke S (2015), 15-16.

¹¹¹ Maas S et al. (2015), 11.

¹¹² *Ibid.*, 14.

The cost effectiveness of the Dublin system is affected by a number of variables. First, the efficiency in processing Dublin applications influences cost effectiveness in the sense that shorter procedures make the system less costly. Second, the efficiency in effecting the transfer decisions in other Member States plays a role: more actual transfers leads to a less costly system. Third, the cost of the system is influenced by the efficiency in returning asylum applicants whose claims are unfounded: the system becomes less costly if more failed applicants are returned.¹¹³

In general, the Dublin system can be considered inefficient in the sense that it only establishes the responsibility of a Member State for processing an asylum claim without addressing the merits of the claim itself.¹¹⁴ More specifically, Dublin procedures are lengthy, time limits are regularly exceeded by Member States and actual transfers only take place in a minority of the cases where transfer requests are accepted as pointed out above when considering the effectiveness of the Dublin system. Some Member States transfer back and forth an equal number of asylum seekers with the same Member States and several Member States have net Dublin transfers of less than 100 Dublin applicants.¹¹⁵ This reduces the overall efficiency¹¹⁶ of the Dublin system and increases reception and return or readmission costs.¹¹⁷

When it comes to the number of rejected asylum seekers not transferred and/or not returned to their country of origin, high social costs linked to irregular migration will be generated.¹¹⁸ In 2015, it was estimated that a maximum of 42% of the Dublin applicants not effectively transferred may still be staying as irregular migrants either in the hosting Member State or in the EU.¹¹⁹

The human costs of waiting for the individual asylum seeker should be added to the aforementioned financial and social costs.¹²⁰ The longer the Dublin procedure takes, the longer the integration of asylum seekers will be postponed and thus their chance to effectively contribute to society.¹²¹ In addition, the human costs of the Dublin system are increased by the fact that applicant preferences are not taken into account, as indicated in paragraph 2.2.1 of Part II. The prolonged state of anxiety, separation from relatives, poor living conditions and possible detention should also be taken into account.¹²²

2.2.3 Fundamental rights

Case law of both the CJEU and the ECtHR demonstrates that the interpretation and application of the Dublin Regulation must comply with fundamental rights.¹²³ This paragraph will touch on commentaries regarding the respect for fundamental rights in the context of the interpretation and application of the Dublin III regulation by Member States. In general, the CEAS is viewed as geared towards the

¹¹³ *Ibid.*, 13-14.

¹¹⁴ Vanheule D, Van Selm J and Boswell C (2011) *The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 453.167, 47.

¹¹⁵ Maas S et al (2015), 14.

¹¹⁶ Maiani F (2016) *The Dublin III Regulation: A New Legal Framework for a More Humane System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 107.

¹¹⁷ Maas S et al. (2015), 14.

¹¹⁸ *Ibid.*, 15.

¹¹⁹ *Ibid.*, 15.

¹²⁰ Vanheule D, Van Selm J and Boswell C (2011), 47.

¹²¹ Maas S et al. (2015), 15.

¹²² Williams R (2015), 10.

¹²³ See for instance ECtHR *M.S.S. v. Belgium and Greece* (30696/09); Joined cases CJEU *N.S. v. Secretary for the Home Department* (C-411/10) and CJEU *M.E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-493/10). For a more extensive overview see: UNHCR (2017a), 17-21.

securitisation of borders rather than the protection of individuals¹²⁴ which in practice is reinforced by the absence of repercussions for Member States in the event of manifest violations of fundamental rights.¹²⁵ On a more specific level, the Dublin system and its application give rise concern in the following areas.

Eurodac Regulation

The current Eurodac Regulation¹²⁶ has changed the nature and objective of the Eurodac database as compared to the first Eurodac Regulation.¹²⁷ National law enforcement authorities and Europol may since July 2015 under conditions have access to the database for the purposes of preventing, detecting or investigating terrorist offences or other serious crimes.¹²⁸ This can be considered a strong deviation from Eurodac's original purpose of facilitating the determination responsible for an asylum claim within the context of the Dublin mechanism. This deviation is in itself considered as an interference with the right to data protection as protected in Article 8 of the EU Charter for Fundamental Rights (CFR) and the access by national law enforcement authorities to such data forms a further interference with the fundamental right of private life under Article 7 CFR and Article 8 ECHR.¹²⁹ A further concern is the reported use of force or coercion by authorities when collecting fingerprints.¹³⁰

Family and children

Paragraphs 2.2.1 and 2.2.2 have described that Member States do not apply the Dublin hierarchy of criteria as prescribed by the Regulation when determining the responsible Member State. This forms a risk to the right for respect of family life (Article 8 ECHR): although family criteria are clearly at the top of the Dublin hierarchy (see Articles 8-11 of the Dublin Regulation), the criteria involving illegal entry into the European Union are most used in practice.¹³¹

When it comes to children, recital 13 and Article 6 of the Dublin Regulation state that the best interests of the child are a primary consideration in applying the Dublin Regulation. In practice, guidance and adequate training on conducting the best interest assessment generally appear to be lacking and specific needs of unaccompanied minors are frequently neglected.¹³² A lack of standardised approach in areas such as age assessment, representation and family tracing create significant delays in family reunion procedures concerning children, with inconsistent approaches across Member States.¹³³ Divergent practices exist of what counts as proof of family links.¹³⁴

¹²⁴ Wijnkoop M (2014) Human Security and CEAS: bringing human rights into the centre of the EU's asylum policies. In: Matera C and Taylor A (eds.) *The Common European Asylum System and human rights: enhancing protection in times of emergencies*. Centre for the Law of EU External Relations. Working papers 2014/7, 14.

¹²⁵ Battjes H et al. (2016), 8; Wijnkoop M (2014) *Human Security and CEAS: bringing human rights into the centre of the EU's asylum policies*. In: Matera C and Taylor A (eds.), 49.

¹²⁶ Regulation (EU) 603/2013.

¹²⁷ Regulation (EC) 2725/2000.

¹²⁸ Vavoula N (2015) The Recast Eurodac Regulation. Are Asylum Seekers Treated as Suspected Criminals? In: Bauloz C et al. (eds.) *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Leiden: Koninklijke Brill NV, 252.

¹²⁹ Vavoula N (2015) *The Recast Eurodac Regulation. Are Asylum Seekers Treated as Suspected Criminals?* In: Bauloz C et al. (eds.), 260; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 177.

¹³⁰ Crépeau F and Purkey A (2016) *Facilitating Mobility and Fostering Diversity. Getting EU Migration Governance to Respect the Human Rights of Migrants*. Centre for European Policy Studies. Paper no. 92, 14-15.

¹³¹ Fratzke S (2015), 5 and 17; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 180.

¹³² Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 180.

¹³³ UNHCR (2017a), 82; Wagner M, Baumgartner P et al. (2016), 48.

¹³⁴ UNHCR (2017a), 90.

Transfers

When it comes to the principle of *non-refoulement* the Dublin Regulation is based on the premise that all Member States respect this principle and thus can be considered as safe for third country nationals.¹³⁵ Practice however shows a lack of harmonisation with inconsistent interpretation of the refugee definition contained in Article 1A of the Refugee Convention and / or the risk of inhuman or degrading treatment in violation of Article 3 ECHR and Article 4 of the EU Charter.¹³⁶ Case law has shown that asylum and reception conditions vary greatly and therefore transfers between Dublin states can amount to human rights violations.¹³⁷

Concerns have also been raised about the ability of protection seekers to access asylum procedures after a transfer has been completed to outside the Dublin area. In the case of Greece, reports indicate that some transferees may have been returned to Turkey before their applications were fully evaluated, which could have amounted to refoulement.¹³⁸

The position of vulnerable asylum seekers in transfer can be even more precarious. Research has raised questions as to whether authorities provide all necessary medical information, or whether there are appropriate assurances that the necessary medical facilities will be available after an applicant has been transferred.¹³⁹

Detention

Freedom from arbitrary detention is enshrined in the right to liberty and security of the person as laid down in Article 5 ECHR and Article 6 of the EU Charter. Although limited data are available,¹⁴⁰ detention seems to be used in a majority of cases by many Member States.¹⁴¹

Detention in the context of the Dublin system is governed by Article 28 of the Regulation, from which follows that Member States may detain the person concerned when there is a significant risk of absconding. In addition, as follows from the same article, detention may only take place if less coercive measure cannot be applied effectively and must be for as short a period as possible. Whilst practical duration of detention to secure transfers under the Dublin Regulation varies, time limits for detention appear to be respected in practice.¹⁴² Evidence suggest that applicants placed in detention are less well informed about Dublin procedures or their rights to appeal.¹⁴³ Concerns also exist when it comes to the assessment of the necessity and proportionality of detention, which does not always seem to take place.¹⁴⁴ The definition of the risk of absconding varies between different countries and tends to be widely construed by reference to numerous criteria.¹⁴⁵

¹³⁵ Recital 3 of Regulation (EU) 604/2013. The principle of non-refoulement is also laid down in article 33(1) Refugee Convention.

¹³⁶ UNHCR (2017a), 17.

¹³⁷ Maas S et al. (2015), 16. ECtHR *M.S.S. v. Belgium and Greece* (30696/09); ECtHR *Tarakhel v. Switzerland* (29217/12); Joined cases CJEU *N.S. v. Secretary for the Home Department* (C-411/10) and CJEU *M.E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-493/10).

¹³⁸ Fratzke S (2015), 19.

¹³⁹ Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 182.

¹⁴⁰ Fratzke S (2015), 19.

¹⁴¹ Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 177-179.

¹⁴² UNHCR (2017a), 171.

¹⁴³ UNHCR (2017a), 171; Fratzke S (2015), 19.

¹⁴⁴ UNHCR (2017a), 171.

¹⁴⁵ ECRE (2015) AIDA Annual Report 2014/2015, 85-86.

2.2.4 Other observations

When it comes to the discretionary clauses in Article 17, the structure of the Regulation does not provide clarity in the boundaries between the two clauses which leads to a non-transparent application of the provisions in practice.¹⁴⁶ In addition, there is a lack of public information about the use of these clauses.¹⁴⁷

3. Relocation

In September 2015, two Council Decisions took effect that were aimed at providing temporary relief for Italy and Greece.¹⁴⁸ The decisions are a temporary derogation from the Dublin III provisions on allocation of responsibility for reception and determining asylum applications.¹⁴⁹ The first Council Decision (2015/1523) aims at relocation of 40,000 asylum seekers and is voluntary, whereas the second Council Decision (2015/1601) accounts for 120,000 places and includes mandatory relocation quota.¹⁵⁰ The decisions are part of the 'European Agenda on Migration'¹⁵¹ and introduced a scheme for relocation with a key for division based on population size, gross domestic product, the number of spontaneous asylum applications and unemployment rates.¹⁵² In order to be eligible for relocation, the asylum seeker has to be in clear need of international protection and demonstrated (according to the Decisions) by being a national or stateless resident of a country for which the EU-wide recognition rate is more than 75%.¹⁵³

The relocation decisions are welcomed for allowing the disproportionately burdened states of Italy and Greece to derogate from the Dublin criterion of allocating competence on the basis of the first entry principle. In theory this meant that some of the pressure that these countries had to deal with would be transferred to other Member States.¹⁵⁴ When it comes to implementation and results however, the relocation scheme leaves a lot to be desired.¹⁵⁵

In terms of the number of asylum seekers transferred, the initial target of 160,000 persons was reduced to 106,000 in September 2016.¹⁵⁶ Even the reduced target stands in stark contrast with reality: until now, April 2018, around 35,000 asylum seekers have been relocated.¹⁵⁷ At the very best, some argue

¹⁴⁶ ECRE (2015) AIDA Annual Report 2014/2015, 83; Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 184. For statistics on the use of discretionary clauses, see: ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*, 3.

¹⁴⁷ Garlick MV (2016) *The Dublin System, Solidarity and Individual Rights*. In: Chetail V, De Bruycker P and Maiani F (eds.), 183.

¹⁴⁸ Council Decision (EU) 2015/1523 entered into force on 16 September 2015 and applied until 17 September 2017. Council Decision (EU) 2015/1601 entered into force on 25 September 2015 and applied until 26 September 2017. As Hungary refused to cooperate, the relocation decision only applies to asylum seekers in Greece and Italy.

¹⁴⁹ Guild E, Costello C and Moreno-Lax V (2017) *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 583.132, 18. The derogation is partial. According to Preamble 19 of Council Decision 2015/1523, relocation measures do not absolve Member States from applying Dublin III in full as regards family reunification, special protection of unaccompanied minors and the discretionary clause on humanitarian grounds.

¹⁵⁰ Wagner M, Baumgartner P et al. (2016), 55; Battjes H and Brouwer ER (2015) The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and ECtHR by National Courts. *Review of European Administrative Law* 8(2): 11; De Bruycker P and Tsourdi E (2016) Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 525.

¹⁵¹ European Commission (2015) COM 2015(240).

¹⁵² Rijken C (2017), 270.

¹⁵³ See Article 3(2) of Council Decision (EU) 2015/1523 and of Council Decision (EU) 2015/1601. Rijken C (2017), 271.

¹⁵⁴ ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*, 5; Maas S et al. (2015), 15. The Council Decisions on relocation derogate in particular from Article 13(1) of Regulation (EU) 604/2013 and also from the procedural steps including the time limits laid down in article 21, 22 and 29 of Regulation (EU) 604/2013.

¹⁵⁵ Rijken C (2017), 271; Di Filippo M (2016b), 4; Battjes H and Brouwer ER (2015), 10-11.

¹⁵⁶ Rijken C (2017), 270.

¹⁵⁷ Member States' Support to Emergency Relocation Mechanism: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

that Member States have demonstrated a lack of cooperation and responsibility sharing,¹⁵⁸ while Slovakia, Hungary and Poland even refused to cooperate.¹⁵⁹ It should also be noted that the relocation scheme runs parallel to the Dublin Regulation, meaning that returns to Italy and Greece from other countries could continue. The effects of this are most visible in the case of Italy. In 2016, according to data from ECRE, 1,864 asylum seekers were transferred from Italy while at the same time the country received 2,086 asylum seekers.¹⁶⁰ Operation of the relocation system parallel to the working of the Dublin system for Italy thus resulted in the net receipt of 222 asylum seekers, evidencing the failure to relieve pressure for this country.¹⁶¹ This raises questions about the effectiveness and efficiency of the relocation scheme, especially in view of the substantial administrative costs involved with running the relocation programme. The eligibility criteria further reduce any benefits of relocation for Italy and Greece, as they are left with those applicants who are less likely to receive any international protection. These less straightforward cases are likely to put a considerable and long-term strain on already overburdened reception systems and resources with limited prospects of return to the country of origin if they turn out not to be eligible for international protection status.¹⁶²

The relocation scheme also affects the asylum seeker, who is forcibly transferred within Europe.¹⁶³ Most crucially the eligibility threshold of originating from a country with a recognition rate of 75% has been considered arbitrary and was not useful to relieve the pressure in overburdened countries (particularly in Italy).¹⁶⁴ The relocation scheme has also led to the exclusion of certain profiles following the opportunity that Member States were given to indicate their preferences.¹⁶⁵

4. Proposal for a Dublin IV Regulation

In May 2016, the European Commission presented its proposal¹⁶⁶ for a recast of Dublin III.¹⁶⁷ There seems to be consensus in the literature that the proposal does not fundamentally rethink the current system for allocating responsibility for asylum claims.¹⁶⁸

Applicants on the whole face stricter and disproportionate rules.¹⁶⁹ These include far-reaching sanctions for secondary movements in the form of mandatory use of the accelerated procedure¹⁷⁰ and the

¹⁵⁸ Crépeau F and Purkey A (2016), 21.

¹⁵⁹ Rijken C (2017), 272.

¹⁶⁰ ECRE (2017) *The Dublin system in 2016. Key figures from selected European countries*, 5.

¹⁶¹ Wagner M, Baumgartner P et al. (2016), 57.

¹⁶² Rijken C (2017), 271; ECRE (2015) AIDA Annual Report 2014/2015, 42; Wagner M, Baumgartner P et al. (2016), 58.

¹⁶³ Battjes H and Brouwer ER (2015), 11; De Bruycker P and Tsourdi E (2016) *Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension*. In: Chetail V, De Bruycker P and Maiani F (eds.), 528; Wagner M, Baumgartner P et al. (2016), 56.

¹⁶⁴ Rijken C (2017), 271; Wagner M, Baumgartner P et al. (2016), 57.

¹⁶⁵ Rijken C (2017) Threats, Monsters and the 'Refugee Crisis'. *Tilburg Law Review* 22: 270.

¹⁶⁶ European Commission, *Proposal for a [Dublin IV Regulation]*. COM(2016) 270 , 4 May 2016. Brussels. And see European Commission (2016) COM(2016) 197.

¹⁶⁷ Regulation (EU) 604/2013.

¹⁶⁸ See: ECRE (2016) *ECRE Comments on the Commission Proposal for a Dublin IV Regulation*; ECRE (2016) *The road out of Dublin: reform of the Dublin Regulation. ECRE's overview of the main changes in the proposal to recast the Dublin Regulation, and its recommendations for the Council and European Parliament*. Policy Note 2; Amnesty International (2016) *The Proposed Dublin Reform*. Position Paper; Di Filippo M (2016) Dublin 'reloaded' or time for ambitious pragmatism? *EU Migration Law Blog*; Tubakovic T (2016) The Dublin IV Recast: A Missed Opportunity. *Refugee Research Blog*; Klaassen M (2016) The Commission proposal on the recast of the Dublin Regulation: A backward step? *Leiden Law Blog*; UNHCR (2016) *UNHCR comments on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270*; Chetail V (2016) Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System. *European Journal of Human Rights* 5; Meijers Committee (2018) CM1805 *Note on the proposal for the Procedures Regulation and Dublin Regulation*; Consortium of Migrants Assisting Organizations in the Czech Republic (2016) *Position paper on the proposed reform of the Common European Asylum System*.

¹⁶⁹ ECRE (2016) *ECRE Comments on the Commission Proposal for a Dublin IV Regulation*, 38; ECRE (2016) *The road out of Dublin: reform of the*

withdrawal of reception conditions.¹⁷¹ The proposal also imposes limitations on an applicant's right to an effective remedy. Wholesale exclusion from this right takes place when an applicant has been subject to a 'take back' Dublin procedure¹⁷² and the scope of the appeal against transfer decisions¹⁷³ is limited to the assessment of risks of inhuman or degrading treatment¹⁷⁴ or to infringements of the family provisions.¹⁷⁵ Finally, the possibility of transfer to third countries¹⁷⁶ entails a high likelihood for applicants to have their claim rejected before ever reaching the Dublin system.

On the side of the Member States, distribution inequalities would be increased due to the requirement for countries of first entry to conduct admissibility and merit-related assessments before applying the Regulation.¹⁷⁷ The deletion of Articles 15(1)¹⁷⁸, (2)¹⁷⁹ and 19¹⁸⁰ means that responsibility can no longer move away from the countries of first entry. In addition, they will have no means of relief from their obligation to take back or take charge of an applicant when a transferring country is not complying with the time limits for transfer.¹⁸¹ The envisaged corrective mechanism will not have a sufficiently redistributive effect as it is much too narrow in scope¹⁸² and only kicks in when the countries of first entry face situations of a disproportionate number of asylum applications.¹⁸³ As a consequence, the responsibility for processing asylum applications as well as the reception of refugees will continue to be placed disproportionately upon a few states under the Dublin IV proposal.¹⁸⁴

Dublin Regulation. ECRE's overview of the main changes in the proposal to recast the Dublin Regulation, and its recommendations for the Council and European Parliament.

¹⁷⁰ Proposal Dublin IV, Article 5(1).

¹⁷¹ Proposal Dublin IV, Article 5(3).

¹⁷² Proposal Dublin IV, Article 20(5).

¹⁷³ Proposal Dublin IV, Article 28(4).

¹⁷⁴ Proposal Dublin IV, Article 3(2).

¹⁷⁵ Proposal Dublin IV, Articles 10-13 and 18.

¹⁷⁶ Proposal Dublin IV, Article 3(3). Also see Tubakovic T (2016).

¹⁷⁷ Proposal Dublin IV, Article 3(3).

¹⁷⁸ 12-month time limit after which entry-related responsibility ceases under the current Regulation (EU) 604/2013.

¹⁷⁹ Responsibility shift on grounds of a five-month stay in a Member State.

¹⁸⁰ Cessation of responsibilities incumbent on the receiving state where the applicant has left the EU for a period exceeding three months.

¹⁸¹ If, as proposed, Article 30(2) (Member State responsible is relieved of its obligations to take charge or take back the person concerned when the transfer does not take place within the four weeks' time limit) is deleted.

¹⁸² For instance, the member state of first entry experiencing the 'disproportionate pressure' is still responsible for the admissibility check (Recitals 32-33 of the Proposed Regulation).

¹⁸³ Articles 34-43 of Proposal Dublin IV. It is a blind allocation mechanism and a reference key will allocate to each member state their respective share of asylum seekers. For a more elaborate commentary on the proposed corrective mechanism see for instance: Amnesty International (2016) *The Proposed Dublin Reform*.

¹⁸⁴ Amnesty International (2016) *The Proposed Dublin Reform*.

PART III. THE DETERMINATION OF ASYLUM CLAIMS

1. Introduction

This part begins with an overview of the comments on the currently applicable Asylum Procedures Directive in Chapter 2. The reviews of the Commission proposal for an Asylum Procedures Regulation are presented in Chapter 3 and the Hotspot approach is the subject of Chapter 4. Chapters 5 and 6 deal with the recast Qualification Directive and the Commission proposal for a Qualification Regulation respectively. Where possible, a distinction will be made between the design and implementation of the instrument concerned.

2. Recast Asylum Procedures Directive (2013/32/EU)

2.1 The main objectives of the recast Asylum Procedures Directive

The recast Asylum Procedures Directive¹⁸⁵ (hereinafter referred to as “Procedures Directive” or “Directive”) provides the procedural framework for granting and withdrawing the international protection (both refugee and subsidiary) that is set forth in the Qualification Directive.¹⁸⁶ The making of an application activates the rights for asylum seekers as provided in the Reception Conditions Directive. The currently applicable Procedures Directive took effect on 19 July 2013 and had to be transposed by Member States no later than 20 July 2015.¹⁸⁷ Denmark does not take part in the Directive and neither do Ireland or the UK.¹⁸⁸ The latter two countries did however participate in the first phase Directive and therefore remain bound by that first Directive even though it has been repealed for the other Member States.¹⁸⁹

The Directive aims to ensure the application of common procedural standards for the processing of applications for international protection: the outcome of the application should not be dependent on the Member State that carried out the examination procedure.¹⁹⁰ More specifically, the Procedures Directive requires national authorities to provide all applicants with effective access¹⁹¹ to legally certain, efficient and effective procedures.¹⁹² The Directive applies to all applications made in the territory of the Member States, including at the border, in the territorial waters or in transit zones. When acting extra-territorially, border control authorities must bring and disembark applicants on land so that asylum seekers may access the application and examination procedure on EU territory. Authorities must provide sufficient information on the logistics of lodging an application at the external border, transit zones and territorial waters.¹⁹³ The procedural rules concern both procedures at first instance and procedures in appeal. The Directive also regulates the use of safe country concepts, i.e. the concepts of the safe country of origin, the safe third country and the first country of asylum.¹⁹⁴

The Directive explicitly refers to the full and inclusive application of the Refugee Convention, the Charter on Fundamental Rights of the EU and the European Convention on Human Rights, which means that the Directive should be interpreted in conformity with these instruments.¹⁹⁵ It will become apparent in the

¹⁸⁵ Directive 2013/32/EU, previously Directive 2005/85/EC.

¹⁸⁶ As stipulated in Article 1 of Directive 2013/32/EU. Also see Boeles P et al. (2014), 275.

¹⁸⁷ With the exception of the provisions in Article 31(3)-(5), which are to be transposed by 20 July 2018.

¹⁸⁸ Boeles P et al. (2014), 275.

¹⁸⁹ Boeles P et al. (2014), 275.

¹⁹⁰ Wagner M, Baumgartner P et al. (2016), 70; European Commission (2016) COM(2016) 197, 10.

¹⁹¹ See Recital 25. Effective access is further clarified in *inter alia* Article 4(1) (3) (4) APD, Article 6(1) APD and Article 8(2) APD.

¹⁹² ECRE (2015) AIDA Annual Report 2014/2015, 67.

¹⁹³ Recital 26 APD.

¹⁹⁴ Wagner M, Baumgartner P et al. (2016), 75-76.

¹⁹⁵ Battjes H et al. (2016), 7. Also see Recital 3 APD and Recital 60 APD.

remainder of this section that the various evaluations of the Procedures Directive often include references to this broader legal framework.

2.2 Reviewing the recast Asylum Procedures Directive

The recast Asylum Procedures Directive is considered by some to be the most complex instrument in the CEAS.¹⁹⁶ Over the years EU Member States have developed their own asylum procedures to implement international obligations deriving from the 1951 Refugee Convention. These procedures are embedded in specific national administrative procedural rules and legal traditions. Efforts to develop common standards for asylum procedures generally had to take into account these national differences since the political will for broad harmonisation was limited. As a result, the Directive gives Member States considerable leeway and thus only partially was instrumental to contribute to harmonisation.

This is further illustrated by the difficulties surrounding the transposition of the Procedures Directive.¹⁹⁷ On 23 September 2015, the Commission adopted 18 infringement decisions against Member States for the failure to communicate the transposition of the Asylum Procedures Directive.¹⁹⁸ On 10 February 2016, Reasoned Opinions were addressed to three Member States for the failure to notify the Commission of their transposition measures.¹⁹⁹

On the basis of the literature reviewed, “access” seems to be a key feature of the Procedures Directive – both on paper and in practice. A distinction is made here between access to the territory and access to the procedure. As will be developed below, the safe country concepts as a part of the Directive are extensively discussed and considered to be highly controversial. These concepts will therefore be reviewed in a separate paragraph.

2.2.1 Access to the territory

The current underlying presumption of the CEAS is that effective access to the asylum procedure cannot be decoupled from access to the territory.²⁰⁰ This presumption is also considered as one of the crucial deficiencies of the CEAS and international protection scheme. As laid out above, Recital 26 of the Directive obliges Member States’ officials to bring and disembark applicants on land where they are present on the member state’s territorial waters so that they may effectively access the examination procedure.²⁰¹

Responses of the authorities to people arriving at the EU’s external borders have been varied. On the one hand, under the year-long Mare Nostrum Operation launched by the Italian authorities in 2013, Italian coast guards have rescued thousands of migrants at sea, disembarking them on Italian soil.²⁰² These rescue actions are in sharp contrast with the push-back operation to Libya that were carried out by Italy at its external borders a few years before in 2009, which was condemned by the ECtHR as a clear violation of the principle of non-refoulement.²⁰³ Throughout the rest of Europe, a varied use of barriers

¹⁹⁶ Wagner M and Kraler A (2016), 10-11.

¹⁹⁷ Wagner M, Baumgartner P et al. (2016), 75.

¹⁹⁸ European Commission (2015) *More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work*. Press Release. 23 September 2015. Brussels.

¹⁹⁹ European Commission (2016) *Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings*. Press Release. 10 February 2016. Brussels.

²⁰⁰ Wagner M and Kraler A (2016) *International Refugee Protection and European Responses*. International Centre for Migration Policy Development. Working Paper 12.

²⁰¹ ECRE (2015) *AIDA Annual Report 2014/2015*, 67.

²⁰² ECRE (2014) *Mind the gap: an NGO perspective on challenges to accessing protection in the Common European Asylum System*. AIDA Annual Report 2013/2014, 46.

²⁰³ ECtHR *Hirsi Jamaa and Others v. Italy* (27765/09).

can be spotted, leading to de facto policies of non-entrée.²⁰⁴ These policies include the proliferation of fences, intensified border patrols as well as direct refusal of entry, not only at the EU external borders but also at the borders between EU Member States and continuously on the high seas (although the Procedures Directive does not apply to the latter). This approach has been dubbed “Fortress Europe”-policies.²⁰⁵ Examples include the fences on the border between Hungary and Serbia and between Greece and Turkey as well as Italy’s repatriation of third country nationals via readmission agreements to third countries and to Greece.²⁰⁶ The securitisation of the border between France and the UK at Calais has resulted in a bottle-necking of persons into insalubrious conditions and has led to a refusal of entry into the UK for persons arguably entitled to protection in the country.²⁰⁷ Direct refusal of entry has also been particularly apparent in Bulgaria where the Migration Directorate reported that in 2014 6.400 third-country nationals were officially refused access to the territory and in 2015 police patrols dispatched along the Bulgarian-Turkish border were replaced by army staff.²⁰⁸ In Ceuta and Melilla, the Spanish authorities used rubber bullets to deter migrants from entering Spanish territory, leading to the death of 12 people in February 2014. Another 23 people were summarily returned to Morocco, in conditions that seem to be in violation of international human rights law, including the principle of non-refoulement.²⁰⁹

Such actions of Member States go against the provisions of the Asylum Procedures Directive, furthermore a Member State is at risk of violating the principle of non-refoulement where entry is refused or a border is too onerous to cross.²¹⁰ In view of for instance Spanish legislation²¹¹ that allows for rejection at the border of Ceuta and Melilla where a person attempts to cross without authorisation, it is also noted that the Refugee Convention presupposes that refugees will enter territories irregularly and thus cannot be penalised for doing so.²¹²

It is argued that the Procedures Directive does not address the most serious access challenge, namely the absence of safe routes to seek asylum from outside the EU. In addition to the examples above, various official policies such as visa policies, carrier sanctions and various forms of cooperation between the EU and third countries preclude safe and legal access to asylum in the EU.²¹³ Several authors advocate an alternative approach of facilitating access to protection in Europe for people fleeing war and persecution through protected entry procedures, resettlement, humanitarian visas and other means to facilitate entry into the EU in a legal and safe manner.²¹⁴

²⁰⁴ ECRE (2015) AIDA Annual Report 2014/2015, 68; EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 85-90. For an elaboration on politics of non-entrée, see Hathaway JC and Gammeltoft-Hansen T (2014) *Non-Refoulement in a World of Cooperative Deterrence*. Law & Economics Working Papers. Paper 106.

²⁰⁵ Amnesty International (2016) *Tackling the global refugee crisis: from shirking to sharing responsibility*, 26.

²⁰⁶ ECRE (2015) AIDA Annual Report 2014/2015, 68-69; Bacon L (2016) To What Extent Can the Right to Asylum Be Limited by a State’s Sovereign Right to Control Its Borders? A Comparative Assessment of the Lawfulness of European National Asylum Law and Procedure. *Auckland University Law Review* 22.

²⁰⁷ ECRE (2015) AIDA Annual Report 2014/2015, 69.

²⁰⁸ ECRE (2015) AIDA Country Report Bulgaria. Third Update. January 2015, 9 and 17.

²⁰⁹ ECRE (2014) AIDA Annual Report 2013/2014, 47; Den Heijer M, Rijpma J and Spijkerboer TP (2016) Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System. *Common Market Law Review* 53: 616.

²¹⁰ ECRE (2015) AIDA Annual Report 2014/2015, 68.

²¹¹ Organic Law 4/2015 of 30 March 2015 on the protection of security of citizens (Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana), available in Spanish at: <https://boe.es/buscar/doc.php?id=BOE-A-2015-3442>.

²¹² Article 31 Refugee Convention; ECRE (2015) AIDA Annual Report 2014/2015, 70.

²¹³ Costello C and Hancox E (2016) The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 389.

²¹⁴ ECRE (2014) AIDA Annual Report 2013/2014, 47; Guild E et al. (2015d), 5; Médecins Sans Frontières (2016) *Obstacle Course to Europe. A Policy-Made Humanitarian Crisis at EU Borders*; Moreno-Lax V (2015) *Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward*. Red Cross EU Office, 33-38.

2.2.2 Access to the procedure

Even when applicants have reached the territory, access to the procedure can be challenging due to the combination of rising numbers of asylum applications and procedural structures, including staff and resources shortages.²¹⁵ Additionally, the design of the procedures and the way in which they are applied by Member States also have an effect on the degree to which the procedures are accessible for seekers of international protection.

When it comes to the procedure itself, the Directive distinguishes between various types:²¹⁶

- a regular asylum procedure to examine protection needs;²¹⁷
- a prioritised procedure to examine protection needs of vulnerable or manifestly well-founded cases;²¹⁸
- an accelerated procedure to examine protection needs of ostensibly unfounded or security-related cases;²¹⁹
- an admissibility procedure for asylum seekers who may be the responsibility of another country or have lodged repetitive claims';²²⁰
- a Dublin procedure for asylum seekers whose claims may fall under the responsibility of another EU Member State;²²¹
- a border procedure to speedily conduct admissibility or examine the merits under an accelerated procedure at borders or in transit zones.²²²

The above distinction between different procedures has been characterised as the fragmentation of asylum procedures, which in itself is in contrast with the goal²²³ of establishing common asylum procedures.²²⁴ The multitude of procedures also leads to rudimentary categorisations of different asylum seekers and is said to serve as a means towards an overall objective of deflection.²²⁵

2.2.3 Special procedures

The use of special procedures, such as accelerated, admissibility or border procedures, is widespread in the EU and these procedures are often characterized by reduced procedural safeguards, such as the lack of an automatic suspensive effect of the appeal and reduced time limits.²²⁶ This paragraph provides an overview of the particularities and challenges related to a number of these procedures. The concepts of safe country of origin and safe third country also provide a basis for the application of a special procedure (the accelerated and admissibility procedure respectively). However, as explained in paragraph 2.1, the safe country concepts will be discussed in a separate paragraph.

²¹⁵ ECRE (2015) AIDA Annual Report 2014/2015, 75.

²¹⁶ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 8.

²¹⁷ Article 31(1) APD.

²¹⁸ Article 31(7) APD.

²¹⁹ Article 31(8) APD.

²²⁰ Article 33-34 APD.

²²¹ Governed by the Dublin III Regulation (604/2013/EU).

²²² Article 43 APD.

²²³ Article 78 TFEU; Recital 4 APD.

²²⁴ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 8-9; Costello C and Hancox E (2016) *The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*. In: Chetail V, De Bruycker P and Maiani F (eds.), 383.

²²⁵ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 8-9; Guild E (2016) *The Complex Relationship of Asylum and Border Controls in the European Union*. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 39; Costello C and Hancox E (2016) *The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*. In: Chetail V, De Bruycker P and Maiani F (eds.), 383.

²²⁶ ECRE (2015) AIDA Annual Report 2014/2015, 49; ECRE (2014) AIDA Annual Report 2013/2014, 61.

Border procedures

Member States may provide for procedures at the border or transit zones for deciding on the admissibility²²⁷ of an applicant or the substance²²⁸ of an application in a procedure where the circumstances exist for using an accelerated procedure.²²⁹ These procedures can take place at the border and a first instance decision should be issued within four weeks in accordance with 43 (2) APD by a responsible determining authority which is obliged to carry out an appropriate examination of the asylum claim. The authority must be provided with the appropriate means, sufficient competent personnel and relevant training.²³⁰ Even though Article 34(2) of the Directive makes it possible for the admissibility interview (which appears to be undertaken frequently at the border) to be conducted by personnel of authorities other than the determining authority, this does not exempt such personnel from complying with the training conditions under Article 4.²³¹ Border guards should also observe the language, legal and procedural information guarantees under Articles 12 and 19.

In spite of these constraints on paper, it follows from reports dealing with practices at the borders that there are risks attached to allowing border officials to (preliminary or substantively) examine claims.²³² According to UNHCR reports, applicants must expressly use the word ‘asylum’ before Estonian border guards will process their claim.²³³ Such requirements disregard much of the Procedures Directive’s guarantees²³⁴ necessary to ensure effective access to protection. Even when an explicit demand for asylum is made, there have been reports of Estonian border guards carrying out returns to Russia, before a full examination has been carried out.²³⁵ According to the European Union Agency for Fundamental Rights (FRA), a large proportion of border guards in Spain, Hungary, Poland and Greece would not initiate an asylum procedure if a person expressly requested asylum or if the guards understood the individual’s life was at risk.²³⁶ These cases raise evident issues of non-refoulement, demonstrating clearly the dangers of allocating asylum responsibilities to a border authority.²³⁷

Aside from the aforementioned risks related to border guard competences, the use of border procedures in itself has significant ramifications on effective access to the asylum procedure. According to Article 31(8) of the Procedures Directive, limited grounds exist for the application of border procedures. Nevertheless, Member States have made full use of Article 43 of the Procedures Directive; immediately refusing further entry to the territory, undertaking de facto admissibility procedures as well as imposing accelerated time limits and detention.²³⁸ As a matter of policy, where a person arrives at a border post in the Netherlands, Belgium, France, Germany and Austria, entry can be refused on grounds of a lack of documentation and the individual is immediately detained.²³⁹ This systemic policy is in not in line with recital 21 and in breach of Article 26 of the Procedures Directive.²⁴⁰

²²⁷ Article 33 APD.

²²⁸ Article 31 (8) APD.

²²⁹ Article 43 (1) APD; Costello C and Hancox E (2016) *The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*. In: Chetail V, De Bruycker P and Maiani F (eds.), 422.

²³⁰ Article 4 APD.

²³¹ ECRE (2015) AIDA Annual Report 2014/2015, 71.

²³² ECRE (2015) AIDA Annual Report 2014/2015, 71.

²³³ See UNHCR (2015) *Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens*.

²³⁴ APD: Recital 26, Article 6(1) and Article 8.

²³⁵ EASO (2015) *Annual Report on the Situation of Asylum in the European Union 2014*, 85.

²³⁶ FRA (2014) *Fundamental rights at land borders: findings from selected European border crossing points*.

²³⁷ ECRE (2015) AIDA Annual Report 2014/2015, 72.

²³⁸ *Ibid.*, 72.

²³⁹ ECRE (2015) AIDA Annual Report 2014/2015, 72.

²⁴⁰ It is also in breach of Articles 8 and 10 RCD and Article 31 Refugee Convention. See further on current detention practices in all countries: applying a border procedure: <http://www.asylumineurope.org/sites/default/files/shadow-reports/boundariesliberty.pdf>.

Accelerated and prioritised procedures

The Procedures Directive enables the application of special procedures to deal with specific caseloads which may warrant swifter decisions. Prioritised procedures entail a more rapid examination of claims without derogating from normally applicable procedural time limits, principles and guarantees.²⁴¹ Accelerated procedures differ from regular procedural rules by introducing shorter, but reasonable time limits for certain procedural steps.²⁴²

A number of risks are attached to the application of accelerated procedures. Accelerated procedures involve appeals subject to shorter time-limits and which often have no automatic suspensive effect over removal decisions, thereby exposing asylum seekers to the risk of deportation before their appeal is decided.²⁴³ This in turn entails the risk of Member States violating an individual's right to seek asylum and to non-refoulement.²⁴⁴ Nevertheless, reduced safeguards can be applied in a considerable number of cases, due to the wide scope for Member States to apply accelerated procedures in practice: the Directive provides ten grounds for acceleration of the procedure.²⁴⁵ In addition, the legal status of these procedures of expediency is not always defined with precision in domestic asylum systems, creating risks of legal uncertainty and arbitrariness in practice.²⁴⁶ It is also observed that the possibility of accelerated and prioritised procedures showcases a normative distinction within the Directive. Member States are encouraged to favourably prioritise applications from persons with manifestly well-founded claims or vulnerabilities warranting special protection while on the other hand, unfounded or manifestly unfounded applications can be accelerated under a less protective procedural regime, on the assumption that they will most likely be rejected.²⁴⁷

2.2.4 Special procedural guarantees

The recast Asylum Procedures Directive provides special procedural guarantees to certain applicants.²⁴⁸ Beyond unaccompanied children,²⁴⁹ the Procedures Directive only defines these applicants in terms of their reduced ability to benefit from the rights and comply with the obligations under the Directive due to individual circumstances.²⁵⁰ The Directive does not include an exhaustive list of asylum seekers presumed to be in need of special procedural guarantees. Instead, it indicatively refers to need of such guarantees related to age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders, or as a result of torture, rape or other serious forms of psychological, physical or sexual violence.²⁵¹

Concerns in this area mainly relate to inconsistencies in the conceptualisation of vulnerability in EU law and the fact that the APD guarantee of exemption from special procedures is marginally implemented in practice.²⁵² Some of these concerns will be discussed in section 2.2 of Part IV, when reviewing the recast Reception Conditions Directive.

²⁴¹ APD: Recital 19 and Article 31 (7).

²⁴² Recital 20 APD.

²⁴³ Article 46(6) APD.

²⁴⁴ Bacon L (2016), 86.

²⁴⁵ As stipulated in Article 31(8) APD. Also see: Costello C and Hancox E (2016) *The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*. In: Chetail V, De Bruycker P and Maiani F (eds.), 412-413; Guild E et al. (2015c), 23.

²⁴⁶ ECRE (2015) AIDA Annual Report 2014/2015, 77.

²⁴⁷ ECRE (2015) AIDA Annual Report 2014/2015, 76.

²⁴⁸ ECRE (2017) *The concept of vulnerability in European asylum procedures*, 14.

²⁴⁹ Article 25 APD.

²⁵⁰ Article 2(d) APD.

²⁵¹ Recital 29 APD.

²⁵² ECRE (2017) *The concept of vulnerability in European asylum procedures*.

2.2.5 Safe country concepts

The Procedures Directive distinguishes between four safe country concepts: the first country of asylum (Article 35), the safe country of origin (Article 36 and annex II), the safe third country (Article 38) and the European safe third country (Article 39). On the basis of these safe country concepts, national authorities may presume the admissibility and / or well-foundedness of an applicant's claim before ever interviewing him or her.²⁵³ The Procedures Directive also leaves room for a system whereby the suspensive effect of the appeal is not automatic, but must be requested by the applicant and decided upon separately by the Court or Tribunal.²⁵⁴ This system can be applied in all circumstances where the Directive allows for the application of one of the four safe country concepts. This increases the risk that for practical reasons the applicant fails to request, because he has not been sufficiently informed about this requirement, or where the applicant did not have timely access to legal assistance.²⁵⁵

Out of all safe country concepts, the concepts of the safe country of origin and the safe third country are most prominently discussed in the literature reviewed. Hence, only those concepts will be discussed in more depth in this report. Member States use the safe country of origin concept to accelerate the examination of asylum claims where the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances.²⁵⁶ The application of the safe third country mechanism provides the ground for Member States to declare asylum applications inadmissible presuming that the applicant already could have accessed protection in another country with which he or she has a connection. Among other the applicant must have had the possibility to request refugee status and receive protection in accordance with the 1951 Refugee Convention in that third state.

Safe country of origin concept

Under Articles 36-37 of the Procedures Directive, Member States may designate a country as a safe country of origin where its nationals are generally and consistently at no risk of persecution or serious harm on the basis of the law, political situation and general circumstances.²⁵⁷ The safe country of origin concept may be used as a basis for accelerated procedures.²⁵⁸ Concerns regarding the safe country of origin concept relate to its implementation and its (in)compatibility with human rights.

When it comes to the implementation of the safe countries of origin concept, considerable variations exist between Member States. According to the Commission, 22 Member States have implemented it into their domestic legislation, 15 Member States apply it in practice, ten Member States have designated safe countries of origin and five Member States apply the safe country of origin concept on a case-by-case basis.²⁵⁹ Among the Member States that do apply the safe country of origin concept, different practices are identified, resulting in a 'confusing patchwork' of lists of safe countries.²⁶⁰ Member States have divergent policies as to which countries should be considered as safe countries for

²⁵³ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 9.

²⁵⁴ Article 46(6) (a) (b) and (d) APD.

²⁵⁵ ECRE (2014) AIDA Annual Report 2013/2014, 53.

²⁵⁶ Article 31(8) (b) and 36 (1) APD; Bacon L (2016), 88.

²⁵⁷ Annex I APD.

²⁵⁸ Costello C and Hancox E (2016) *The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee*. In: Chetail V, De Bruycker P and Maiani F (eds.), 419.

²⁵⁹ Wagner M, Baumgartner P et al. (2016), 76; Meijers Committee (2015) *CM1515 Note on an EU list of safe countries of origin. Recommendations and amendments*, 2.

²⁶⁰ Adviescommissie voor Vreemdelingenzaken (2018) *Op zoek naar veilige(r) landen. Onderzoek naar beweegredenen van asielzoekers*, 138. (Report in Dutch, with summary and recommendations in English). See: ECRE (2015) AIDA Annual Report 2014/2015, 49-50 about the lack of agreement among Member States on whether the countries in the Western Balkans can be considered safe. See further https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_inform_safe_country_of_origin_final_en_1.pdf.

the purpose of the examination of an asylum application.²⁶¹ The draft EU list of safe countries of origin is very limited, as it only includes seven non-EU countries.²⁶² When it comes to withdrawing countries from the national lists with safe countries of origin, similar differences exist in law and practice among EU Member States.²⁶³ As a result of the above, the use of the safe country of origin concept seems to undermine rather than to contribute to the objective of convergence of decision-making within the EU. This is considered to be at odds with the objective of the CEAS to treat similar cases alike and to ensure the same outcome regardless of the EU Member State in which the application is lodged.²⁶⁴

The safe country of origin concept raises a number of questions when it comes to compatibility with the key focus of human rights and refugee law on the individual assessment of each case and the personal circumstances of the applicant.²⁶⁵ An asylum claim can only be expedited as ostensibly unfounded if the country of origin is listed as safe and the asylum seeker has not submitted any serious grounds rebutting this presumption, based on his or her particular circumstances.²⁶⁶ In a country that is generally considered safe, certain minorities can still find themselves exposed to ill-treatment. In their efforts to prove this, nationals of listed countries have to discharge a higher burden of proof as opposed to other asylum seekers, who need to deal with the shared burden of proof normally applicable in asylum procedures.²⁶⁷ This extended burden of proof for nationals of listed countries must often be discharged within the highly demanding time-limits and reduced procedural safeguards of the accelerated procedure.²⁶⁸ To rebut the presumption, the asylum seeker is expected to have access to quality legal assistance so as to provide convincing reasons for not applying the concept in his or her particular case. Given the extremely short time frames within which this needs to be done effective access to quality legal assistance is essential but in practice often absent. In addition, presumptions of safety are not an easy hurdle to overcome. In practice, the chance that international protection will be provided after application of the safe country of origin concept and the resulting accelerated procedure is worryingly low. According to data from EASO, 89,3% of applications examined under the accelerated procedure in the EU between March and December 2014 led to a negative decision.²⁶⁹ Therefore, it is in respect of those categories of refugees from safe countries, to which the Convention extends its protection, that the 'safe country of origin' concept creates high risks of unfairness.²⁷⁰ In addition, it has been said to be a clear violation of the Refugee Convention itself to raise the standard of proof for particular nationalities, as Article 3 of the Refugee Convention prohibits discrimination in the application of the Convention on grounds of race, religion or country of origin.²⁷¹

Safe third country: the EU-Turkey statement

The safe third country concept²⁷² operates on the basis of the presumption that an applicant for international protection could have obtained this protection in another country and therefore the receiving state is entitled to reject responsibility for the protection claim by declaring the application

²⁶¹ ECRE (2014) AIDA Annual Report 2013/2014, 49; ECRE (2015) *"Safe countries of origin": A safe concept?* AIDA Legal Briefing no. 3, 4-5.

²⁶² Adviescommissie voor Vreemdelingenzaken (2018), 138 and see: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf.

²⁶³ ECRE (2014) AIDA Annual Report 2013/2014, 52.

²⁶⁴ ECRE (2014) AIDA Annual Report 2013/2014, 53.

²⁶⁵ ECRE (2014) AIDA Annual Report 2013/2014, 52.

²⁶⁶ ECRE (2015) *"Safe countries of origin": A safe concept?*, 9.

²⁶⁷ Article 4(1) QD; ECRE (2015) AIDA Annual Report 2014/2015, 49-50.

²⁶⁸ ECRE (2015) *"Safe countries of origin": A safe concept?*, 2 and 9-10; ECRE (2014) AIDA Annual Report 2013/2014, 48;

²⁶⁹ ECRE (2015) *"Safe countries of origin": A safe concept?*, 10.

²⁷⁰ *Ibid.*, 4.

²⁷¹ Battjes H et al. (2016), 13.

²⁷² Article 38(1) APD lists five criteria for a country to be considered a safe third country.

inadmissible and barring applicants from a full examination of the merits of their claim.²⁷³ Central conditions of the safe third country concept concern the necessary connection between the individual asylum seeker and the third country as well as access to the asylum procedure and a requisite level of protection in the third country.²⁷⁴

A widely discussed example of the application of the safe third country concept is the EU-Turkey statement.²⁷⁵ The idea behind this statement is that asylum applications can be declared inadmissible by Greece because Turkey can be considered a safe third country within the meaning of the Procedures Directive.²⁷⁶ The statement entails the engagement of Turkey to take back all irregular migrants entering the Greek islands. In addition, among other measures, a 1:1 scheme is included on the basis of which for each Syrian asylum seeker who has been readmitted by Turkey from Greece, a Syrian would be resettled from Turkey to one of the EU Member States.²⁷⁷

The concept of safe third country in itself has no clear legal basis in international refugee and human rights law.²⁷⁸ According to 2017 reports from ECRE, experience in Greece shows that systematic application of the safe third country concept in truncated border procedures does not result in more efficient or shorter procedures and increases the risk of serious human rights violations, including refoulement.²⁷⁹ A similar practice in Hungary has already been judged unlawful by the ECtHR.²⁸⁰ In addition, applying this concept to Turkey is considered to be highly questionable as Turkey is not bound by EU asylum law and according to various reports Turkey has violated the human rights of refugees and asylum seekers, including by detaining them and forcibly returning them to the country of origin.²⁸¹ It is also to be noted that Turkey is the only country applying a geographical limitation to the Refugee Convention: the Refugee Convention is only applied to European refugees.²⁸² An exception is made for Syrian nationals readmitted from Greece, who 'may have their protection status installed upon arrival', however they are not being granted a refugee status.²⁸³

On a more practical level, the value of the EU-Turkey agreement can also be questioned as it is unlikely to limit spontaneous arrivals.²⁸⁴ Also, a specialised border procedure is required as art. 4 protocol 4 to the ECHR prohibits collective expulsion of aliens. Greece thus needs to conduct an individual assessment irrespective of whether Turkey is considered a safe third country or not, an obligation also enshrined in the Asylum Procedures Directive. Consequently, the agreement causes an increased case load, although the Greek asylum system lacks the necessary capacity to process the claims.²⁸⁵

²⁷³ ECRE (2017) *Debunking the 'safe third country' myth. ECRE's concerns about EU proposals for expanded use of the safe third country concept*. Policy Note 8, 1.

²⁷⁴ Article 38 APD; ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 19.

²⁷⁵ European Council (2016) *EU-Turkey statement, 18 March 2016*. Press release 144/16.

²⁷⁶ Battjes H et al. (2016), 14; Wagner M, Baumgartner P et al. (2016), 68; ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 19.

²⁷⁷ Wagner M and Kraler A (2016), 9.

²⁷⁸ ECRE (2017) *Debunking the 'safe third country' myth. ECRE's concerns about EU proposals for expanded use of the safe third country concept*, 2.

²⁷⁹ ECRE (2017) *Debunking the 'safe third country' myth. ECRE's concerns about EU proposals for expanded use of the safe third country concept*, 4.

²⁸⁰ ECtHR *Ilias and Ahmed v. Hungary* (47287/15).

²⁸¹ Battjes H et al. (2016), 15; Wagner M, Baumgartner P et al. (2016), 69. More elaborately on the situation of migrants and refugees readmitted to Turkey, see: Ulusoy O and Battjes H (2017) *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*. VU Migration Law Working Paper Series No 15.

²⁸² ECRE (2017) *Debunking the 'safe third country' myth. ECRE's concerns about EU proposals for expanded use of the safe third country concept*, 3.

²⁸³ Article 12 of the Turkish Temporary Protection Regulation, also see Ulusoy O and Battjes H (2017), 25.

²⁸⁴ Wagner M, Baumgartner P et al. (2016), 69.

²⁸⁵ Wagner M, Baumgartner P et al. (2016), 68.

2.2.6 Access to an effective remedy

The rigorous scrutiny of a first instance decision by an independent appeal body is considered to be a key procedural safeguard in the context of asylum procedures.²⁸⁶ Examining a person's well-founded fear of persecution or risk of serious harm is a complex and challenging task and the outcome may be the difference between life and death for the individuals concerned, making the right to an effective remedy a crucially important right.²⁸⁷ In order for asylum seekers to assert this right, access to quality free legal assistance is considered to be essential as asylum seekers by definition find themselves in a disadvantaged position in a procedure which is conducted in most cases in a language they do not understand and in a legal framework with which they are not familiar.²⁸⁸

Article 19 to 23 of the Procedures Directive are the main norms relating to legal aid for applicants for international protection.²⁸⁹ The provisions on legal aid leave states a lot of discretion in introducing their own modalities, exemptions and limits.²⁹⁰ Also, states only have an obligation to ensure access to free legal assistance and representation at the appeal stage.²⁹¹ Perhaps not surprisingly, access to free legal assistance and representation during the first instance of the regular procedure²⁹² varies considerably in practice.²⁹³ In some countries, asylum seekers have access to free legal assistance, whereas in others no free legal assistance is required under the law or asylum seekers experience difficulties in accessing free legal assistance at the first instance in practice.²⁹⁴ The benefit of quality legal assistance starting at the first instance of the asylum procedure would be its contribution to frontloading, the policy of investing sufficient resources in the first stage of the asylum procedure so as to increase the chance that first instance decisions are correct.²⁹⁵ When it comes to accessing free legal assistance at the appeal stage, obstacles may also exist. For instance, low remuneration of lawyers under the legal aid scheme makes it less attractive for lawyers to engage in asylum and immigration cases which continues to be a problem in Malta, Italy, the Netherlands, Belgium, France and Sweden.²⁹⁶ In addition, merits testing applies in several countries, whereby free legal assistance is made dependent on the likelihood of the appeal being successful.²⁹⁷

3. Proposal for an Asylum Procedures Regulation

On 13 July 2016, the Commission put forward a proposal for an Asylum Procedures Regulation.²⁹⁸ According to Article 288 TFEU, a regulation is binding in its entirety and directly applicable in all Member States. No higher standards can be set in national law and the choice to replace the directive with a regulation therefore is in itself an effort to advance the harmonisation of European asylum systems.²⁹⁹

²⁸⁶ ECRE (2014) AIDA Annual Report 2013/2014, 57. For a more recent report, see: ECRE and ELENA (2017) *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*.

²⁸⁷ ECRE (2014) AIDA Annual Report 2013/2014, 57.

²⁸⁸ *Ibid.*, 57.

²⁸⁹ Mikolajczyk B (2016) Legal Aid for Applicants for International Protection. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 465.

²⁹⁰ Mikolajczyk B (2016) *Legal Aid for Applicants for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 467.

²⁹¹ Article 20 APD.

²⁹² I.e. not special procedures, such as border, admissibility, accelerated and Dublin procedures.

²⁹³ ECRE (2014) AIDA Annual Report 2013/2014, 57; EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 91-93.

²⁹⁴ ECRE (2014) AIDA Annual Report 2013/2014, 57.

²⁹⁵ *Ibid.*, 59.

²⁹⁶ *Ibid.*, 58.

²⁹⁷ *Ibid.*, 58.

²⁹⁸ European Commission (2016) *Proposal for [an Asylum Procedures Regulation]*. COM(2016) 467, 13 July 2016. Brussels.

²⁹⁹ European Commission (2016) *Proposal for [an Asylum Procedures Regulation]*, 7.

The aim of harmonisation also follows from the prescriptive approach that the proposal takes with regard to many details of the procedure.³⁰⁰

Judicial protection

The extension of the obligation to provide free legal assistance and representation to the administrative stage of the procedure is an important contribution to the overall fairness and efficiency of the CEAS.³⁰¹ The provision however still has its limitations: Article 15(3)-(5) leave extensive scope for Member States to deprive applicants of the right to free legal assistance, in particular through a broad application of the so-called 'merits test'.³⁰²

The lack of suspensive effect of appeals that applies under the Directive against decisions that have been made in the accelerated procedure or the admissibility procedure (also see paragraph 2.2.3 above) is extended under the proposed Regulation to also include first instance decisions in the context of the safe third country concept.³⁰³ The lack of suspensive effect of appeals is highly problematic: protective measures are only determined after an expulsion and thus risk violating the principle of non-refoulement.³⁰⁴

Safe country concepts

The proposed Asylum Procedures Regulation makes provision for a common European list of safe countries of origin.³⁰⁵ While this would address the concerns relating to the divergent implementation of the concept among Member States, it does not deal with the shortcomings of the concept itself³⁰⁶ (also see paragraph 2.2.5 above). The application of a safe country of origin concept *inter alia* leads to discrimination of asylum seekers on the basis of their nationality and generates prejudice against asylum-seekers from countries designated as 'safe', when the need for international protection must be determined on the basis of individual circumstances.³⁰⁷

The proposal also makes changes to another safe country concept, i.e. the first country of asylum. It is currently optional for Member States to examine whether or not there is a first country of asylum and the Regulation would make this assessment mandatory.³⁰⁸ As a consequence, Member States will be required not to examine an application on the merits if a person is deemed to come from a first country of asylum.³⁰⁹ The proposed mandatory nature results in an overall lowering of protection standards within the EU³¹⁰ and it is also questioned whether the European Commission is best placed to decide for all Member States that and how they should apply the first country of asylum concept.³¹¹ The change also risks having important adverse effects on access to the asylum procedure as it will require a number of Member States to reject applications as inadmissible on the basis of a concept which is currently unknown in their practice.³¹² Regarding the execution of the first country of asylum concept, the

³⁰⁰ ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 70.

³⁰¹ Article 15(1) APR; ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 19.

³⁰² ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 19.

³⁰³ Article 54(2) APR.

³⁰⁴ Amnesty International (2017) *The Proposed Asylum Procedures Regulation*. Position Paper, 9.

³⁰⁵ Article 48 APR.

³⁰⁶ Article 47 APR.

³⁰⁷ Amnesty International (2017) *The Proposed Asylum Procedures Regulation*, 2; ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 58

³⁰⁸ Article 44 APR.

³⁰⁹ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 6.

³¹⁰ ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 52.

³¹¹ Meijers Committee (2016) *CM1614 Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final)*, 7.

³¹² ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 17.

proposal sets a lower threshold with respect to the status the applicant must have received in the first country of asylum for that country to be considered safe, as compared to the current recast Asylum Procedures Directive. Whereas the latter requires that the applicant has been recognised as a refugee in the country concerned, according to Article 44(1)(a) of the Commission proposal the applicant must have enjoyed ‘protection in accordance with the Geneva Convention’, which leaves more ambiguity as to the status the applicant should have obtained.³¹³ Alternatively, according to Article 44(1)(b) of the Proposal a third country can also be considered a first country of asylum if the applicant ‘otherwise has enjoyed sufficient protection in that country’. The notion of sufficient protection also applies to the safe third country concept³¹⁴ and in comparison to the recast Asylum Procedures Directive, the proposal does try define more precisely what ‘sufficient protection’ means.³¹⁵ This clarification is in itself a welcome development, but an extensive interpretation is still possible as the definition does not guarantee that protection must be effective and available in practice.³¹⁶ Finally, the concept also applies to unaccompanied minors.³¹⁷ It is debated whether the accelerated procedure that comes with the safe country concepts is suited to take into account a child’s particular vulnerability.³¹⁸

The proposal also envisages the mandatory application of the safe third country concept³¹⁹ by all Member States. The application of this concept, if not rebutted, leads to an asylum claim being rejected as inadmissible without an examination of the application on its merits.³²⁰ The Regulation does not seem to address the concerns associated with the safe third country concept (also see paragraph 2.2.5 above). In practice, there is the danger that criteria for the determination of a ‘safe third country’ are either implemented wrongly or without sufficient rigour and asylum seekers are returned to countries outside the EU which do not offer them effective protection.³²¹ This could be a violation of their human right to seek asylum and could lead to direct and indirect *refoulement*. A number of other concerns exist with regard to the application of the safe third country concept. First of all, Article 45(3)(a) of the proposed Asylum Procedures Regulation establishes that the reasonableness of the connection between the asylum seeker and the third country can be assumed on the basis that ‘the applicant has transited through that third country which is geographically close to the country of origin of the applicant’. However, transit through a country is in itself not sufficient to establish a sufficient connection with a country.³²² Secondly, the concept no longer requires the possibility to be recognised as a refugee in the third country for this country to be considered safe. Instead, the proposal refers to the possibility to ‘receive protection in accordance with the substantive standards of the Refugee Convention or sufficient protection as referred to in [the first country of asylum concept], as appropriate’.³²³ What constitutes the substantive standards of the Refugee Convention remains undefined and therefore open to very broad and divergent interpretation.³²⁴ It also seems to imply that protection in accordance with the Refugee Convention can be granted to a person without necessarily recognising him or her as a refugee.³²⁵ Finally, the Regulation does not rule out the application of the safe third country concept to

³¹³ ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 52.

³¹⁴ Article 45(1)(e) APR.

³¹⁵ Article 44(2) APR.

³¹⁶ ECRE (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, 53-54.

³¹⁷ Article 44(4) APR.

³¹⁸ Amnesty International (2017) *The Proposed Asylum Procedures Regulation*, 3. The principle of the best interest of the child is reaffirmed in Article 21 APR.

³¹⁹ Articles 45 and 46 APR.

³²⁰ Article 36(1)(b) APR.

³²¹ Amnesty International (2017) *The Proposed Asylum Procedures Regulation*, 4.

³²² *Ibid.*, 3.

³²³ Article 45(1)(e) APR.

³²⁴ Guild E et al. (2015d), 55.

³²⁵ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 18.

unaccompanied minors.³²⁶ In this respect, the same concern applies as mentioned above: special procedures do not seem to be suitable for properly dealing with a child's vulnerability.³²⁷

4. Hotspots

4.1 Objectives

The set-up of the hotspot approach was announced by the European Commission in its May 2015 Agenda on Migration.³²⁸ Hotspots are facilities for the first reception, registration and initial processing of migrants, located at key arrival points in frontline Member States.³²⁹ The hotspot approach aims to improve cooperation between the European Asylum Support Office, Frontex, Europol, Eurojust and Member States in dealing with the immediate challenge of the large-scale arrivals of migrants.³³⁰

The precise objectives of the hotspot approach remain somewhat unclear, as no specific legal framework has been established for hotspots.³³¹ They should serve the following purposes:³³²

- to provide operational support to countries under pressure;
- to conduct swift identification, registration and fingerprinting of arriving migrants;
- to function as a filter mechanism to determine protection needs among mixed migrations flows;
- to support the relocation and return process.

The policy link between relocation and hotspot approach is made explicit in Articles 7 and 8 of the relocation Decisions: relocation is to be accompanied by "increased operational support" and may be suspended should the beneficiary state fail to comply with its "hotspot roadmap". Support of the return process is achieved by the enhanced law enforcement analysis on the ground that hotspots entail.³³³ Finally, hotspots also have a security role. In this respect, the Commission has stated that the hotspot approach helps to 'identify any individuals posing a threat to EU security and separate them from those who need protection'.³³⁴

³²⁶ Article 45(5) APR.

³²⁷ Amnesty International (2017) *The Proposed Asylum Procedures Regulation*, 3-4.

³²⁸ European Commission (2015) COM(2015) 240.

³²⁹ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 4.

³³⁰ European Commission (2015) COM(2015) 240; ECRE (2015) AIDA Annual Report 2014/2015, 53. For information on the division of tasks among the different EU agencies, see Wagner M, Baumgartner P et al. (2016), 60; EASO (2015) *EASO Hotspot – Relocation Operating Plan to Italy*. EASO/COS/2015/945; EASO (2015) *EASO Hotspot Operation Plan to Greece. Amendment No 1*. EASO/COS/2015/937; EASO (2016) *EASO Hotspot Operating Plan to Greece. Amendment No 2*. EASO/COS/2016/391; Neville D, Sy S and Rigon A (2016) *On the frontline: the hotspot approach to managing migration*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 556.942, 27-29.

³³¹ Neville D, Sy S and Rigon A (2016), 29-31.

³³² Wagner M, Baumgartner P et al. (2016), 59-60. According to the Commission, the hotspot approach serves to intervene rapidly "in an integrated manner in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external border" (see: European Commission (2015) *Explanatory note on the "Hotspot" approach*). The hotspot is also defined in Article 2 para 10 of Regulation (EU) 2016/1624.

³³³ Neville D, Sy S and Rigon A (2016), 26. The policy framework governing the hotspots operate was first set out in an unofficial "explanatory note" sent by Commissioner Avromopoulos to Justice and Home Affairs Ministers on 15 July 2015 (see: European Commission (2015) *Explanatory note on the "Hotspot" approach*), the principles of which were later restated in: European Commission (2015) *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council. Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration*. COM(2015) 490, 29 September 2015. Brussels.

³³⁴ European Commission (2016) *Communication from the Commission to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union*. COM(2016) 230, 20 April 2016. Brussels, 5; European Commission (2015) *The Hotspot Approach to Managing Exceptional Migratory Flows*. Factsheet.

4.2 Design

As briefly mentioned above, no specific legal framework has been established for hotspots as such. Rather, the deployment of both EASO and Frontex to provide operational support is regulated by the respective regulations on the two agencies.³³⁵ Hence, operational support provided in the hotspots by both EASO and Frontex is explicitly provided for in existing legislation. This however does not answer the question as to what extent EU agencies operating on the ground can be considered liable for actions within hotspots. While executive powers may rest with Member States, the enhanced operational support provided by EU agencies in the pressurised environment of the hotspots calls for much clearer accountability and liability provisions, ideally laid down in a separate legal instrument.³³⁶

The lack of a specific legal framework also leads to a lack of legal certainty and clarity as to the fundamental objectives of the hotspots³³⁷ and to the interaction of EU and national rules.³³⁸ The national legal basis of hot spots in Greece and Italy is also thin and lacks transparency.³³⁹

A major criticism of the hotspots seems to be that hotspots are no new solution, but facilitate the working of the current asylum system: frontline states are in fact assisted to better handle the full extent of their responsibilities under the existing Schengen and Dublin arrangements.³⁴⁰ Hotspots are clearly designed to shift back on frontline states all the responsibilities they carry under current EU legislation: to identify migrants, to provide first reception, to identify and return those who do not claim protection, and to channel those who do so towards asylum procedures in the responsible state – in most cases, none other than the frontline state itself.³⁴¹ The objective of fingerprinting all migrants exponentially increases the responsibilities of frontline Member States and at the same time contribute to making the disproportionate share of asylum applications for frontline Member States inherent in the Dublin system a reality (see also Part II).³⁴² The limited number of relocations (see Part II, chapter 3) does not begin to offset the greater responsibilities incurred through the “fingerprinting of all migrants”.³⁴³

4.3 Implementation in Greece and Italy

According to the 18 December 2017 Hotspot State of Play of the European Commission³⁴⁴, there are five active hotspots in Italy³⁴⁵ and five in Greece.³⁴⁶ The Italian hotspots have a considerably smaller capacity than the Greek centres. In spite of the multi-agency design of hotspots, there seems to be a clear focus on Frontex-related tasks,³⁴⁷ while the Fundamental Rights Agency is missing from the design altogether.³⁴⁸ When it comes to the performance of the hotspot centres, the Commission itself has been

³³⁵ Neville D, Sy S and Rigon A (2016), 29.

³³⁶ *Ibid.*, 31.

³³⁷ Wagner M, Baumgartner P et al. (2016), 60.

³³⁸ Neville D, Sy S and Rigon A (2016), 30-31.

³³⁹ Wagner M, Baumgartner P et al. (2016), 60; Neville D, Sy S and Rigon A (2016), 39.

³⁴⁰ Maiani F (2016) Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System? *EU Migration Law Blog*; Wagner M, Baumgartner P et al. (2016), 60-61.

³⁴¹ Maiani F (2016a).

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ See: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf.

³⁴⁵ Lampedusa, Pozzallo, Taranto, Trapani, Messina.

³⁴⁶ Lesvos, Chios, Samos, Leros, Kos.

³⁴⁷ Neville D, Sy S and Rigon A (2016), 34, 36, 38.

³⁴⁸ *Ibid.*, 31.

keen to point to the significant increase in fingerprinting rates, ultimately reaching 100% in both the Greek³⁴⁹ and Italian³⁵⁰ hotspots.³⁵¹

The hotspot approach rests on the assumption that national authorities and assisting EU Agencies are able to quickly and accurately separate those who are in need of international protection from those who ought to be returned.³⁵² Such a speed of processing is not typically synonymous with due care,³⁵³ but instead increases the risk of standardised and poorly motivated decisions, of refoulement³⁵⁴ and could result in large numbers of people being returned into unsafe or unviable situations without proper consideration of their claims.³⁵⁵ In Italy, for instance, asylum seekers entering hotspots are given a brief questionnaire and asked to tick between boxes entitled “occupation”, “to join relatives”, “escaping poverty” or “asylum”. Officials then determine whether a person is to be channeled into the asylum procedure or to be returned on the basis of this questionnaire.³⁵⁶ In addition, Italian authorities are reported to use coercion in order to conduct fingerprinting.³⁵⁷ Another ‘hasty’ method used to separate asylum seekers from economic migrants is taking the 75% threshold³⁵⁸ as the guiding measurement for assessment, leading to blanket denials of access to the asylum procedure for people coming from non-qualifying countries (such as Gambia, Nigeria and Senegal).³⁵⁹ Such a practice is considered to be in clear violation of the right to asylum as outlined in Article 18 of the Charter of Fundamental Rights.³⁶⁰ In Greece, Syrians have been prioritised over all other nationalities in registration, identification and access to asylum.³⁶¹

The proper application of the mentioned 75% threshold is to be found in the context of relocation: whether or not an international protection seeker qualifies for relocation depends on nationality. In spite of the objectives, hotspots generally play a small role in implementing the emergency relocation decisions, due to the slow pace of processing and the limited number of eligible applicants.³⁶² This also leaves large numbers outside the scope of relocation and the manner in which they are dealt with in the hotspot context appears to lack clarity.³⁶³

In a broader context, a number of risks for the protection of fundamental rights exist in both Greek and Italian hotspots.³⁶⁴ For instance, delays in the examination of asylum claims in Greek hotspots prevent effective access to asylum procedures and is not in compliance with Article 18 CFR.³⁶⁵ The protection needs of unaccompanied children cannot adequately be met in the hotspots, and delays in processing their applications are not line with Article 24 CFR which requires to give primary consideration to the

³⁴⁹ Neville D, Sy S and Rigon A (2016), 36.

³⁵⁰ *Ibid.*, 40.

³⁵¹ Also see: European Court of Auditors (2017) *EU response to the refugee crisis: the ‘hotspot’ approach*. Special Report no 06/2017, 38.

³⁵² ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 10.

³⁵³ DCR (2016) *The implementation of the hotspots in Italy and Greece. A study*, 11.

³⁵⁴ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 10.

³⁵⁵ Neville D, Sy S and Rigon A (2016), 30.

³⁵⁶ ECRE (2016) *Admissibility, responsibility and safety in European asylum procedures*, 10.

³⁵⁷ Wagner M, Baumgartner P et al. (2016), 61; DCR (2016) *The implementation of the hotspots in Italy and Greece*, 11.

³⁵⁸ According to this threshold, a person coming from a country which has an average EU recognition rate of 75% or higher is a person in clear need of international protection, see Article 3(2) of Council Decision (EU) 2015/1523 and of Council Decision (EU) 2015/1601.

³⁵⁹ Neville D, Sy S and Rigon A (2016), 40.

³⁶⁰ Wagner M, Baumgartner P et al. (2016), 61.

³⁶¹ DCR (2016) *The implementation of the hotspots in Italy and Greece*, 14.

³⁶² *Ibid.*, 12.

³⁶³ Webber F (2015) ‘Hotspots’ for asylum applications: some things we urgently need to know. *EU Law Analysis*.

³⁶⁴ DCR (2016) *The implementation of the hotspots in Italy and Greece*, 13-15. For an elaborate study on fundamental rights in the context of hotspots, see FRA (2016) *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy*. FRA Opinion 5/2016.

³⁶⁵ FRA (2015), 4.

best interests of the child.³⁶⁶ The inconsistent provision of information to persons in the hotspots on rights and procedures applicable to them goes against the right to good administration under Article 41 CFR.³⁶⁷ Regarding reception conditions in the hotspots, it should be noted that the Reception Conditions Directive also includes those waiting to enter the regular asylum procedure or the admissibility procedure as soon as they have made an application for international protection.³⁶⁸ In practice, reception conditions are inadequate and often below the standards laid down in the Directive. Transit sites are used for prolonged accommodation, whereas they should only be used for a few days. Reception in the hotspots does not cover for specialised services for mental health and other specialised needs.³⁶⁹ Detention is widely applied as standard practice, without an adequate individualised assessment and without key procedural safeguards to prevent arbitrary detention in place.³⁷⁰ In addition, lawyers and NGOs do not always have access to asylum seekers in detention. Systematic detention in the context of border procedures is considered to be contrary to Article 31(1) of the Refugee Convention³⁷¹ and contrary to states' human rights obligations on the basis of Article 6 CFR and Article 5 ECHR to use detention only in exceptional circumstances. Finally, the provision of information in a language that the refugee understands and at all stages of the process remains problematic in the context of the hotspots.³⁷²

The nature of the hotspot work in Greece has significantly changed after the adoption of the EU-Turkey statement. According to the Commission: "the hotspots on the islands in Greece will need to be adapted – with the current focus on registration and screening before swift transfer to the mainland replaced by the objective of implementing returns to Turkey".³⁷³ In practice, the hotspots on Greek islands have been turned into closed centres in which migrants were effectively detained until 2017.³⁷⁴ Relocation was taken entirely out of the equation.³⁷⁵

5. Recast Qualification Directive (2011/95/EU)

5.1 The main objectives of the recast Qualification Directive

The recast Qualification Directive³⁷⁶ lays down the standards for the qualification of third-country nationals as beneficiaries of international protection as well as the content of this international protection.³⁷⁷

In more detail, the Qualification Directive:³⁷⁸

- aims to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection (either refugee status or subsidiary protection);³⁷⁹

³⁶⁶ FRA (2015), 5.

³⁶⁷ *Ibid.*, 9.

³⁶⁸ Recital 8 RCD.

³⁶⁹ DCR (2016) *The implementation of the hotspots in Italy and Greece*, 11 and 13-15.

³⁷⁰ On detention, also see: Pichou M (2016) Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights. *Critical Quarterly for Legislation and Law* 2.

³⁷¹ This article is considered to prohibit states to penalise refugees on account of their irregular entry provided they present themselves without delay to the authorities.

³⁷² DCR (2016) *The implementation of the hotspots in Italy and Greece*, 15.

³⁷³ European Commission (2016) *Communication from the Commission to the European Parliament, the European Council and the Council. Next operational steps in EU-Turkey cooperation in the field of migration*. COM(2016) 166, 16 March 2016. Brussels.

³⁷⁴ Wagner M, Baumgartner P et al. (2016), 60; Neville D, Sy S and Rigon A (2016), 36-37. Since 2017 asylum seekers are kept in 'open centres' with a geographical limitation on the island.

³⁷⁵ DCR (2016) *The implementation of the hotspots in Italy and Greece*, 12.

³⁷⁶ Directive 2011/95/EU.

³⁷⁷ Article 1 QD; Moreno-Lax V (2017) *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, 377.

³⁷⁸ Wagner M, Baumgartner P et al. (2016), 71.

³⁷⁹ International protection is defined in Article 2(a) QD. Article 2(d) QD provides the refugee definition and Article 2(f) QD provides a

- aims to ensure that a minimum level of benefits is available for those persons in all Member States;
- stipulates that the assessment of an application for international protection is to be carried out on an individual basis;
- stipulates the content of international protection for two categories of beneficiaries of international protection.

Denmark, the United Kingdom and Ireland do not take part in the Directive.³⁸⁰ The latter two countries did take part in Directive 2004/83/EC and remain subject to their obligations under this former instrument.³⁸¹

5.2 Reviewing the recast Qualification Directive

The reviews of the recast Qualification Directive seem to be mixed.³⁸² As will be developed below, some amendments to the recast Directive have achieved observance of international law and more harmonisation. At the same time, commentators have argued that considerable room for improvement still exists in terms of compliance with international law and further harmonisation. The Directive has for instance not succeeded in providing a truly harmonised common policy on qualification for international protection.³⁸³

This section provides an overview of the provisions and themes from the Directive that seem to be most prominently discussed. A distinction is made between design (paragraph 5.2.1) and implementation (paragraph 5.2.2) of the Directive.

5.2.1 Design

Harmonisation

In terms of harmonisation, Article 78(2)(a) and (b) TFEU call for the establishment of a ‘common procedure’ and ‘uniform status of asylum, valid throughout the Union’ as well as a ‘uniform status of subsidiary protection’. The Qualification Directive and its legislative history, including documents on the negotiations on draft proposals, are however ambiguous as regards the level of harmonisation aimed at.³⁸⁴ The preamble of the 2011 recast Qualification Directive mentions in Recital 10 ‘a higher level of approximation’ of rules on recognition on the basis of ‘higher standards’ and in Recitals 12, 24 and 34 of ‘common criteria’. It follows from the recast Qualification Directive’s title and Article 1 that the Directive aims for a ‘uniform status’, which should be distinguished from qualification and from the content of protection. What this status refers to is quite unclear.³⁸⁵ Hence, the Directive does not seem to aim for uniform standards as called for by Article 78(2)(a) and (b) TFEU. Instead, the Directive may be said to aim at a higher level of approximation criteria.³⁸⁶ The extent to which harmonisation has been achieved in practice will be dealt with in paragraph 5.2.2 below.

³⁸⁰ definition of persons eligible for subsidiary protection. The latter is only applicable if those persons did not qualify for refugee status. Peers S et al. (eds.) (2015) *EU Immigration and Asylum Law (Text and Commentary)*. Volume 3: EU Asylum Law. Leiden: Koninklijke Brill NV. 2nd revised edition, 76.

³⁸¹ QD: Article 40, Recital 52 and Recital 53.

³⁸² For an elaborate commentary on the QD, see for instance Peers S et al. (eds.) (2015), 65-182 and Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 197-239.

³⁸³ Peers S et al. (eds.) (2015), 181.

³⁸⁴ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 198.

³⁸⁵ *Ibid.*, 198.

³⁸⁶ *Ibid.*, 198.

Refugee status and subsidiary protection

Since the 2004 Qualification Directive, international protection in the EU is of a double nature. It not only relies on the refugee status established by the Refugee Convention,³⁸⁷ but also entails the granting of subsidiary protection to asylum-seekers not qualifying as refugees but nonetheless in need of protection because of risks of serious harm if sent back to their country of origin.³⁸⁸ The two types of international protection were not conceived on an equal footing: subsidiary protection conferred lesser rights than refugee status.³⁸⁹ The Recast Qualification Directive has changed this considerably and places subsidiary protection beneficiaries on equal footing with refugees with regard to most benefits, now including the right to family unity, issuance of travel documents, access to employment, to healthcare and to integration facilities.³⁹⁰

However, striking differences³⁹¹ still exist in the treatment of the two types of beneficiaries of international protection with respect to residence permits³⁹² and access to social welfare.³⁹³ First of all, beneficiaries of subsidiary protection receive a residence permit which must be valid for at least one year while refugee status holders receive a residence permit which shall be valid for at least three years. This weakens the potential of beneficiaries of subsidiary protection for integration in the host society³⁹⁴ and leads to extra administrative efforts as the need for subsidiary protection has to be re-assessed at relatively short intervals.³⁹⁵ In Member States where authorities have not opted for a uniform duration of residence for both statuses, the divergence has also had its consequences on the type of protection granted to key nationalities. In Germany for instance, which remains by far the largest host state for Syrian nationals, Syrians were overwhelmingly granted refugee status in 2015 (95,7%).³⁹⁶ In the first nine months of 2016, this had shifted to 65,4% refugee status and 34,3% subsidiary protection, which could be related to the suspension of family reunification for subsidiary protection holders in March 2016. In addition, as many as 17.000 appeals against erroneous refusals of refugee status have been filed before German courts.³⁹⁷ Secondly, Member States may limit the social assistance granted to beneficiaries of subsidiary protection status to 'core benefits'.³⁹⁸ This limitation, of which actually few Member States have made use, e.g. Austria, has been severely criticised by observers, to the point that Member States were urged not to implement the provision.³⁹⁹ In addition, the combination of the less favourable provisions in terms of both the residence permit and the access to social welfare seems to make it all the more difficult for beneficiaries of subsidiary protection to become eligible for long-term residence status. The requirements for obtaining this status are continuous residence for a five-year period, economic self-sufficiency and sickness insurance, as well as compliance with integration conditions if requested by Member States.⁴⁰⁰ The limited benefits in terms of residence permits and social welfare

³⁸⁷ Article 1A(2) Refugee Convention.

³⁸⁸ Bauloz C and Ruiz G (2016) Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection? In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 240-241.

³⁸⁹ *Ibid.*, 241 and 242.

³⁹⁰ *Ibid.*, 244.

³⁹¹ Wagner M and Kraler A (2016), 11; Peers S et al. (eds.) (2015), 75, 168-169, 174-175; ECRE (2014) AIDA Annual Report 2013/2014, 38. For an elaboration on the content of both protection statuses, see Bauloz C and Ruiz G (2016) *Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?* In: Chetail V, De Bruycker P and Maiani F (eds.), 240-268.

³⁹² Article 24 QD.

³⁹³ Article 29 QD.

³⁹⁴ Bauloz C and Ruiz G (2016) *Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?* In: Chetail V, De Bruycker P and Maiani F (eds.), 264.

³⁹⁵ Wagner M and Kraler A (2016), 17.

³⁹⁶ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 16.

³⁹⁷ *Ibid.*, 16. A more recent AIDA report on Germany has been published in March 2018.

³⁹⁸ Recital 45 QD.

³⁹⁹ Peers S et al. (eds.) (2015), 174.

⁴⁰⁰ See in particular Articles 4 and 5 of Directive 2003/109/EC.

might however preclude subsidiary protection beneficiaries to attain this necessary level of integration.⁴⁰¹

Further inexplicable differences can be found in the grounds for refusal of protection.⁴⁰² Article 12(1) QD requires exclusion from refugee status on grounds equivalent to Article 1D or 1E of the Refugee Convention, while similar provisions are lacking in the exclusionary clause for subsidiary protection.⁴⁰³ The grounds for exclusion from refugee status thus seem wider than for exclusion from subsidiary protection.⁴⁰⁴ Similar differences exist with regard to exclusion on public order grounds.⁴⁰⁵ Exclusion from refugee status on public order grounds is limited to the grounds mentioned in Article 1F of the Refugee Convention,⁴⁰⁶ those for exclusion from subsidiary protection are considerably wider.⁴⁰⁷ It is unclear how the differences in the definitions of refugee protection versus subsidiary protection could warrant this distinction.⁴⁰⁸

The differences in procedural and substantial rights attached to both protection statuses leads to considerable additional administrative effort since people granted subsidiary protection often take legal action in order to obtain the better refugee status.⁴⁰⁹

Family members

The definition of family members⁴¹⁰ in the Directive has been extended compared to the previous Directive and is now in line with the Family Reunification Directive.⁴¹¹ This adds to the coherence⁴¹² of the European asylum legislation and it better secures observance of the right to respect for family life as enshrined in Articles 7 CFR and 8 ECHR and the rights of the child in Articles 24(3) CFR and 7(1) Convention on the Rights of the Child (CRC).⁴¹³ There are however also differences between the definition of family in the Qualification Directive and the Family Reunification Directive.⁴¹⁴ The category of minor adopted children of the spouse of the refugee is not included in the family definition of the Qualification Directive.⁴¹⁵ The Qualification Directive also states a number of additional requirements on eligibility for the family residence permit, among them that the family already existed in the country of origin, a limitation that is not included in the Family Reunification Directive. This approach disregards the fact that refugees may form genuine and lasting family relationships during or after flight, ties that

⁴⁰¹ Bauloz C and Ruiz G (2016) *Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?* In: Chetail V, De Bruycker P and Maiani F (eds.), 267.

⁴⁰² Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 223-225.

⁴⁰³ Article 17 QD.

⁴⁰⁴ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 223.

⁴⁰⁵ *Ibid.*, 224.

⁴⁰⁶ Article 12(2) QD.

⁴⁰⁷ Article 17 QD.

⁴⁰⁸ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 225.

⁴⁰⁹ Wagner M and Kraler A (2016), 17.

⁴¹⁰ Article 2(j) QD. The rules for qualification of family members for international protection follow from Article 2(j) QD read together with Article 23(2) QD. Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 206.

⁴¹¹ Article 10(3) Directive 2003/86/EG.

⁴¹² It follows from Article 78(2) TFEU that the measures contained in the QD are part of 'a common European asylum system'. Coherence among the measures is therefore required, see: Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 199.

⁴¹³ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 206-207.

⁴¹⁴ *Ibid.*, 207.

⁴¹⁵ *Ibid.*, 207.

are also protected by Article 8 ECHR.⁴¹⁶ Also, the favourable provisions of Articles 10(2)⁴¹⁷ and (3)(b)⁴¹⁸ of the Family Reunification Directive have no counterpart in the Qualification Directive. There is no reasonable explanation for these differences, which have the following consequences.⁴¹⁹ The family members that fall within the aforementioned favourable provisions of the Family Reunification Directive are not entitled to the status of dependent family member under the Qualification Directive, and hence can be required to leave the Member State in order to apply for family reunification in their country of origin. By maintaining these differences the Qualification Directive does not increase coherence as much as it could have done, and to the same extent does not secure the observance of the instruments of international law mentioned above.⁴²⁰

Applying for international protection

From a perspective of international law,⁴²¹ criticism is expressed on Article 5 QD which deals with international protection needs arising *sur place* (i.e. in the host country).⁴²² Article 5 (3) QD⁴²³ is considered a highly problematic provision as it seems to be based on the suspicion that convictions allegedly developed *sur place* are faked, in order to obtain by fraud refugee status.⁴²⁴ Indeed in certain cases the stated fear of persecution may be fake, but if the third country national does demonstrate well-founded fear of being persecuted due to circumstances created by his decision after entering the host country, there seems to be no ground in the Refugee Convention or elsewhere to deny refugee status.⁴²⁵ Hence, this provision introduces a ground for refusal which is at odds with the Refugee Convention. The same applies to Article 4(3)(d) QD,⁴²⁶ which imposes the obligation to assess the purpose of *sur place* activities. Again, there is no basis in the Refugee Convention for such an obligation.⁴²⁷

Article 7 of the Directive provides that protection against persecution or serious harm can only be provided by the State and 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State'. The Refugee Convention⁴²⁸ however requires protection to come from a State and therefore this provision in the Directive seems to ignore the

⁴¹⁶ Peers S et al. (eds.) (2015), 86-87.

⁴¹⁷ Article 10(2) of Directive 2003/86/EC: 'The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee'.

⁴¹⁸ Article 3(b) of Directive 2003/86/EC: 'If the refugee is an unaccompanied minor, the Member States: (b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced'.

⁴¹⁹ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 208.

⁴²⁰ *Ibid.*, 208.

⁴²¹ Article 78(1) TFEU sets the aim of 'ensuring compliance' with the Refugee Convention 'and other relevant treaties'.

⁴²² Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 222; Peers S et al. (eds.) (2015), 93-95.

⁴²³ Article 5(3) QD: 'Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin'.

⁴²⁴ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 222.

⁴²⁵ *Ibid.*, 222.

⁴²⁶ Article 4(3)(d) QD: 'The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: whether the applicant's activities since leaving the country of origin were engaged in for the sole purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the application to persecution or serious harm if returned to that country'. Considered to be crucial here is the wording "the assessment (...) includes" (not: may include).

⁴²⁷ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 222-223.

⁴²⁸ Article 1A(2) Refugee Convention.

Refugee Convention.⁴²⁹ At the same time, the Article also has clarified protection as compared to the first Qualification Directive. The first paragraph makes clear that the list of actors that can provide protection is exhaustive. This better secures compliance with international law in the sense that it clarifies that not any actor can offer relevant protection.⁴³⁰ Another valuable clarification is the requirement in Article 7(2) that protection against persecution or serious harm must be effective and of a non-temporary nature.⁴³¹

Qualification for being a refugee

Article 9 of the Directive defines ‘acts of persecution’. Only the third paragraph of this article has been changed by the 2011 recast. Its previous wording required a link between reasons for persecution under Article 10 of the Directive and the acts of persecution. The text has been amended to cover also a connection between reasons for persecution and the *failure to protect*, reflecting the prevailing understanding of Article 1A of the Refugee Convention.⁴³² This change has thus increased compliance of the Directive with the Refugee Convention.⁴³³

In order for a harmful act to amount to persecution in the sense of the Refugee Convention, it needs to be motivated by at least one of the five reasons relevant to the refugee definition.⁴³⁴ When assessing Convention reasons for persecution, Member States are required to take the points listed in Article 10 into account. The Directive provides guidance for the interpretation of protected grounds. Among the points listed, is the identification of ‘a particular social group’ in Article 10(1)(d). This term is considered the vaguest of the refugee definition.⁴³⁵ The last indent of Article 10(1)(d) provides guidance as to whether people of a particular gender or sexual orientation may constitute a particular social group. The current text as amended by the 2011 recast states in more demanding terms that gender related aspects should be taken into account, and indeed does not exclude the possibility that gender is sufficient for defining a particular social group. Thus, it adds to securing conformity with the Refugee Convention.⁴³⁶ There are however also missed opportunities here. For belonging to a particular social group, Article 10(1)(d) sets two cumulative requirements: the applicants must have a characteristic they cannot change or cannot be asked to change, and the group must be recognisable in the society in the country of origin. It however follows from UNHCR Guidelines that these are alternative tests and should not be applied cumulatively.⁴³⁷ The Union legislator missed the opportunity to correct the cumulative reading of the requirements and thus secure better observance of the Refugee Convention.⁴³⁸

There is an ambivalent structure in the Qualification Directive with regard to the principle of non-refoulement.⁴³⁹ On 14 July 2016, a Czech Court asked the CJEU whether Article 14(4) QD, which allows

⁴²⁹ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 209-210.

⁴³⁰ *Ibid.*, 208.

⁴³¹ *Ibid.*, 209.

⁴³² Peers S et al. (eds.) (2015), 109-110.

⁴³³ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 213-214.

⁴³⁴ UNHCR (1992) *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, paras. 66-67.

⁴³⁵ Peers S et al. (eds.) (2015), 112.

⁴³⁶ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 214.

⁴³⁷ *Ibid.*, 215-216 and see: UNHCR (2002) *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and /or its 1967 Protocol relating to the Status of Refugees*. HCR/GIP/02/02, para. 11.

⁴³⁸ Battjes H (2016) *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*. In: Chetail V, De Bruycker P and Maiani F (eds.), 216.

⁴³⁹ Peers S et al. (eds.) (2015), 160-163.

for revoking, ending or refusing to renew refugee status for reasons of criminal behaviour or a security risk, is invalid in light of the principle of non refoulement.⁴⁴⁰ At the time of concluding the research for this report, no ruling had taken place in this case but the following comments on this case have been made.

The EU principle of non-refoulement is laid down in Article 19(2) CFR and Article 21 QD deals with non-refoulement directly. The first paragraph of the article states that Member States shall respect the principle of non-refoulement 'in accordance with their international obligations'. At the same time, the second paragraph states that refoulement of a refugee is nevertheless allowed in some cases, 'where not prohibited by the international obligations' mentioned in the first paragraph. In suggesting that refoulement would nevertheless be allowed under certain conditions, Article 21(2) QD is considered to be confusing.⁴⁴¹

Recognition of asylum decisions

In case a refugee is recognised by a certain Member State, the Qualification Directive currently does not provide for recognition of this positive decision on the asylum application other Member States.⁴⁴² At the same time, mutual recognition of negative asylum decisions *does* apply under existing legislation and practice. Hence, asylum-seekers and even recognised refugees are in the current situation legally stranded in one Member State.⁴⁴³ Even if that state is in breach of its obligations to provide entitlements associated with a protection status under the Qualification Directive, the refugee is not free to move, unless and until she or he qualifies for long-term residence.⁴⁴⁴ This situation is considered to be especially incongruous in view of the rights that EU citizens have: Member States *do* recognise the rights of one another's nationals as EU citizens, even though no harmonisation at all has taken place regarding the conditions of naturalisation.⁴⁴⁵ In addition, mutual recognition of protection awarded by other Member States has been described as an important step in the further development of the CEAS⁴⁴⁶ and it implicitly follows from Article 28 and the related schedule of the Refugee Convention.⁴⁴⁷ Mutual recognition could also strengthen a common European protection status and could have positive effects on the prevention of secondary migratory movements during the asylum procedure.⁴⁴⁸

5.2.2 Implementation

When it comes to the implementation of the Recast Qualification Directive, the main concern seems to be the divergence in recognition rates and the type of protection status granted (either refugee or subsidiary) to applicants originating from the same country of origin.⁴⁴⁹ In this respect, the common European asylum system is referred to as a 'lottery of protection'.⁴⁵⁰

⁴⁴⁰ CJEU C-391/16.

⁴⁴¹ Boeles P (2017) Non-refoulement: is part of the EU's Qualification Directive invalid? *EU Law Analysis*.

⁴⁴² Wagner M and Kraler A (2016), 18; Guild E et al. (2015) *Enhancing the Common European Asylum System and alternatives to Dublin*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 519.234, 39.

⁴⁴³ Guild E et al. (2015b), 42.

⁴⁴⁴ *Ibid.*, 42.

⁴⁴⁵ *Ibid.*, 42.

⁴⁴⁶ Council of the European Union (1999) *Presidency Conclusions. Tampere European Council*. 15-16 October 1999, para. 15.

⁴⁴⁷ Guild E et al. (2015b), 40: Article 28 and the related Schedule (para. 7 and para. 11) of the Refugee Convention contain an obligation for State Parties to issue travel documents to refugees and to recognise the validity of those issued by other States, which implicitly entails a form of mutual recognition of positive refugee status determination decisions made by those states.

⁴⁴⁸ Wagner M and Kraler A (2016), 18.

⁴⁴⁹ ECRE (2015) AIDA Annual Report 2014/2015, 18-23; ECRE (2014) AIDA Annual Report 2013/2014, 16-20; Guild E (2016) *The Complex Relationship of Asylum and Border Controls in the European Union*. In: Chetail V, De Bruycker P and Maiani F (eds.), 45; European Commission (2016) COM(2016) 197, 5; Wagner M and Kraler A (2016), 11; Wagner M, Baumgartner P et al. (2016), 72; ECRE (2017) *Refugee rights subsidising? Europe's two-tier protection regime and its effects on the rights of beneficiaries*, 11.

⁴⁵⁰ Becker U and Hagn N (2016) *Reform of the European Asylum System: Why Common Social Standards are Imperative*. CESifo DICE Report

According to 2016 EASO data on recognition rates reveal substantial disparities between countries: the median recognition rate for applicants with Syrian nationality is 97%, but varies between countries from 10% to 100%.⁴⁵¹ A similar picture applies to Eritrean applicants for whom the median recognition rate amounts to 89% and varies from 47% to 100%. These considerable divergences in refugee recognition rates can hardly be explained by the mere peculiarities of individual cases.⁴⁵² Variations also existed in the type of status that countries granted to asylum seekers.⁴⁵³ For example, in 2016 refugee status rates for Syrians have varied across a range from 100% in Ireland and 92% in the UK and Italy to no more than 0,9% in Spain, the latter overwhelmingly granting subsidiary protection.⁴⁵⁴

Differences in the status granted have a direct and far-reaching impact on the lives of beneficiaries of international protection in terms of their rights and integration prospects.⁴⁵⁵ In addition to the differences that follow directly from the Directive (see paragraph 5.2.1 above), many countries subject holders of subsidiary protection to less preferential treatment in several other areas.⁴⁵⁶ The distinction for instance concerns residence rights: In France refugees receive a residence permit valid for 10 years, while subsidiary protection beneficiaries are only entitled to residence for 1 year, renewable for 2-year periods.⁴⁵⁷

Where harmonisation has taken place in practice, it seems in part to have taken the form of a ‘race to the bottom’. Member States were and are of the opinion that different arrangements create a pull effect towards those states with more favourable arrangements, an effect that became more visible during the period of large influx of refugees.⁴⁵⁸ As a consequence, some countries curtailed the rights associated with the respective status in order to reduce the attractiveness of their national asylum systems.⁴⁵⁹ As an example, several countries (Austria, Belgium, Denmark, Hungary and Sweden) have adapted their legislation by restricting the period of residence permit granted to beneficiaries of international protection, bringing it more in line with the minimum periods provided for in Article 24 QD, even though the Qualification Directive leaves it to the Member States to adopt more favourable provisions.⁴⁶⁰

Other observations

The Qualification Directive provides that the assessment for international protection should be carried out on an individual basis. However, as a result of large scale arrivals and due to the high number of asylum claims, Member States have experienced a backlog in the processing of individual asylum applications.⁴⁶¹ The Temporary Protection Directive⁴⁶² would allow states to grant protection status to a pre-defined group of persons in need of international protection immediately, thus alleviating pressure on the asylum procedures and make resources available for the processing of applications of other

14(4), 21; ECRE (2017) *Refugee rights subsiding? Europe’s two-tier protection regime and its effects on the rights of beneficiaries*, 12-13.

⁴⁵¹ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 25.

⁴⁵² Becker U and Hagn N (2016), 21.

⁴⁵³ Adviescommissie voor Vreemdelingenzaken (2015) *Sharing responsibility. A proposal for a European Asylum System based on solidarity*, 19.

⁴⁵⁴ ECRE (2017) *Refugee rights subsiding? Europe’s two-tier protection regime and its effects on the rights of beneficiaries*, 13 and see: Becker U and Hagn N, 21; European Commission (2016) *Proposal for a [Qualification Regulation]*. COM(2016) 466, footnote 12.

⁴⁵⁵ ECRE (2017) *Refugee rights subsiding? Europe’s two-tier protection regime and its effects on the rights of beneficiaries*, 14.

⁴⁵⁶ *Ibid.*, 15-23.

⁴⁵⁷ *Ibid.*, 15.

⁴⁵⁸ Wagner M and Kraler A (2016), 17-18.

⁴⁵⁹ *Ibid.*, 11.

⁴⁶⁰ Article 3 QD and Recital 14 QD; EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 135; European Migration Network (2017) *2016 Annual Report on Migration and Asylum*, 22.

⁴⁶¹ Wagner M, Baumgartner P et al. (2016), 73.

⁴⁶² Directive 2001/55/EC.

nationalities.⁴⁶³ However, so far the Commission never has submitted a proposal for a Council Decision triggering the application of the Temporary Protection Directive.

The interpretation of serious harm (Article 15(c) QD) is subject to very divergent implementation practices.⁴⁶⁴ Most Member States have not established guidelines to interpret the terms ‘real risk’, ‘serious harm’ or ‘armed conflict’. Varying interpretations by Member States have resulted in differences in transposition of the Qualification Directive.⁴⁶⁵ In addition, the question of individualisation of the serious threat revealed different practices between Member States.⁴⁶⁶

Integration

It should be noted that the integration of beneficiaries of international protection is a field which almost completely remains outside the scope of the CEAS: once a person is recognised as being in need of international protection there is often very little support available with particular difficulties in finding accommodation.⁴⁶⁷ Still, in order to facilitate the integration of beneficiaries of international protection into society, a number of countries introduced a range of measures, including more favourable support rates or facilitated access to services, longer availability of integration programmes, additional support measures, integration courses and attendance obligations.⁴⁶⁸

In June 2016, the Commission adopted an Action Plan on the integration of third-country nationals.⁴⁶⁹ The action plan provides a comprehensive framework to support Member States’ efforts in developing and strengthening their integration policies, and describes concrete measures the Commission will implement in this regard.⁴⁷⁰

6. Proposal for a Qualification Regulation

On the same date as the proposal for a Procedures Regulation, the Commission presented its proposal for a Qualification Regulation.⁴⁷¹ The choice for a Regulation demonstrates the Commission’s commitment to achieving further harmonisation in the field of qualification criteria and the content of protection.⁴⁷²

Harmonisation

In the Explanatory Memorandum to the Regulation, the Commission acknowledges the currently existing differences in recognition rates and in the level of rights in the national asylum systems attached to the protection status concerned (also see paragraph 5.2.2 above).⁴⁷³ The Commission’s response is one of legislative harmonisation, which it considers as the principal tool for ensuring more

⁴⁶³ Wagner M, Baumgartner P et al. (2016), 74. More elaborately on the added value of the Temporary Protection Directive, see: Ineli-Ciger (2015) *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*. In: Bauloz C et al. (eds.) *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Leiden: Koninklijke Brill NV, 225-246.

⁴⁶⁴ Wagner M, Baumgartner P et al. (2016), 72; Peers S et al. (eds.) (2015), 137-140.

⁴⁶⁵ Peers S et al. (eds.) (2015), 140-147.

⁴⁶⁶ EASO (2015) *The Implementation of Article 15(c) QD in EU Member States*. EASO Practical Guides Series, 1-4.

⁴⁶⁷ Wagner M, Baumgartner P et al. (2016), 95.

⁴⁶⁸ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 137; European Migration Network (2017) *2016 Annual Report on Migration and Asylum*, 50-58.

⁴⁶⁹ European Commission (2016) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan on the integration of third country nationals*. COM(2016) 377, 7 June 2016. Brussels.

⁴⁷⁰ European Migration Network (2017) *2016 Annual Report on Migration and Asylum*, 50.

⁴⁷¹ European Commission (2016) *Proposal for a [Qualification Regulation]*. COM(2016) 466.

⁴⁷² According to Article 288 TFEU, a regulation is binding in its entirety and directly applicable in all Member States. In contrast, a directive is only binding as to the result to be achieved and leaves room for national authorities to choose form and methods for achieving this result.

⁴⁷³ European Commission (2016) *Proposal for a [Qualification Regulation]*. COM(2016) 466, 4.

convergence in outcomes across the EU.⁴⁷⁴ This approach of prescriptive harmonisation is however met with criticism. First of all, it is questioned whether harmonisation will lead to uniform decision making in asylum claims. Member States could still continue to reach different outcomes under the same rules, in the absence of practical cooperation and guidelines.⁴⁷⁵ Secondly, harmonisation as proposed by the Commission seems to promote ‘harmonisation downwards’, by means of undermining access to protection and creating greater possibilities for exclusion.⁴⁷⁶ This is particularly visible in Article 14: the optional grounds for revoking or refusing to renew refugee status under the Directive relating to persons deemed to be a threat to public order or, having been convicted of a particular serious crime, constitute a danger to the community, are now rendered mandatory under Article 14(1)(d)-(e).⁴⁷⁷ These provisions are at odds with the Refugee Convention as they fall outside the scope of the exclusion clauses foreseen in the Convention.⁴⁷⁸ Article 26(2)(c) of the proposal stipulates that a residence permit shall not be renewed or shall be revoked for reasons of national security or public order, and no longer for *compelling* reasons as was the case in the Directive⁴⁷⁹. This broadens the ground for revoking or refusing to renew a residence permit issued to a beneficiary.⁴⁸⁰ The deletion of this word seems unjustifiable, in the absence of any related explanation in the Explanatory Memorandum or the Preamble of the proposal.

Refugee status and subsidiary protection

The proposal fails to address the divergence in the duration of residence permits awarded to refugees and subsidiary protection beneficiaries: the validity period still is three years for refugee residence permits⁴⁸¹ and one year for subsidiary protection residence permits.⁴⁸² In addition, these provisions no longer leave room for Member States to opt for more favourable standards, as several Member States have done under the current legal regime of the Qualification Directive.⁴⁸³ Alignment of the duration of both residence permits would address the practical shortcomings that currently are the result of this divergence (see paragraph 5.2.1 above). Moreover, there seems to be no objective reason for assuming subsidiary protection to be of a more temporary nature than refugee status.⁴⁸⁴

Other observations

Article 5(3) of the current Qualification Directive deals with protection for applicants who file a subsequent application. This provision states that an international protection status shall normally not be granted where an applicant has filed a subsequent application and the risk of persecution or serious harm is based on circumstances that the applicant has created by his or her own decision since leaving the country of origin. This seems to be based on the assumption that convictions allegedly developed *sur place* are faked (also see paragraph 5.2.1 above) and such an exclusion opposes the standards of the Refugee Convention.⁴⁸⁵ The proposal does not address this shortcoming, but instead turns the current provision into a mandatory rule by removing the discretion that the Directive left to Member States.⁴⁸⁶

⁴⁷⁴ *Ibid.*, 4-5.

⁴⁷⁵ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 4.

⁴⁷⁶ *Ibid.*, 4.

⁴⁷⁷ UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 25.

⁴⁷⁸ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 2 and 13.

⁴⁷⁹ Article 24(2) QD.

⁴⁸⁰ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 17.

⁴⁸¹ Article 26(1)(a) QR.

⁴⁸² Article 26(1)(b) QR.

⁴⁸³ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 16.

⁴⁸⁴ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 16-17; UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 36; ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*. Policy Paper 2, 31.

⁴⁸⁵ UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 12.

⁴⁸⁶ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 6.

The proposal also maintains the contested cumulative test for the concept of ‘membership of a particular social group’ as a reason for persecution in Article 10(1)(d) (also see paragraph 5.2.1 above, ‘qualification for being a refugee’).⁴⁸⁷

A far-reaching reform is proposed to the assessment of the internal protection alternative,⁴⁸⁸ which is envisaged to become mandatory for Member States. Even though considerable improvements are made to the procedural guarantees⁴⁸⁹ surrounding this assessment, the internal protection concept itself is not in line with the Refugee Convention as it adds an additional criterion to eligibility for refugee status beyond the criteria foreseen in Article 1A of said Convention.⁴⁹⁰ On a more practical level, the internal protection check increases the workload of the determining authority.⁴⁹¹

Concerns exist that the proposed mandatory review of status (Articles 15 and 21) would place a high administrative burden on Member States and undermine the protected person’s prospects of integration in host communities.⁴⁹²

The extension of the definition of family members is welcomed, as it now also includes families that were formed after leaving the country of origin, including while in transit, but before arrival on the territory of the Member State.⁴⁹³ Concern however also exists that other close family relations, such as dependent adult children or the dependent parents of an adult, as well as same sex couples, are not included in the definition.⁴⁹⁴

Finally, it is observed that the CJEU’s ruling in *El Kott*⁴⁹⁵ has been codified in Article 12(4) of the proposal as further guidance is introduced on the application of the exclusion clause relating to Palestinian refugees under Article 1D of the Refugee Convention.⁴⁹⁶

⁴⁸⁷ *Ibid.*, 8.

⁴⁸⁸ That is to say, protection in a part of the country of origin.

⁴⁸⁹ These guarantees *inter alia* include the provisions that the burden of demonstrating the availability of internal protection will rest on the determining authority, and not on the applicant. See Article 8(2)-(4) QR.

⁴⁹⁰ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 6-7.

⁴⁹¹ UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 15.

⁴⁹² ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 14-15; UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 2 and 27-31.

⁴⁹³ Article 2(9) QR.

⁴⁹⁴ UNHCR (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*, 33.

⁴⁹⁵ CJEU *El Kott* (C-364/11).

⁴⁹⁶ ECRE (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*, 10.

PART IV. THE RECEPTION OF ASYLUM SEEKERS

1. Introduction

This part includes an overview of the comments on the Recast Reception Conditions Directive (Chapter 2) and the Commission proposal for (another) recast of the Reception Conditions Directive (Chapter 3). A distinction will be made between the design and the implementation of the Directive.

2. Recast Reception Conditions Directive (2013/33/EU)

2.1 The main objectives of the recast Reception Conditions Directive

The recast Reception Conditions Directive⁴⁹⁷ lays down standards for the reception of asylum seekers within the Member States. These standards should ensure a dignified standard of living and comparable living conditions in all Member States.⁴⁹⁸ A key aim of the Directive is to limit secondary movements of asylum applicants within the EU by addressing disparities in reception conditions.⁴⁹⁹

The legal basis for the Directive is Article 78(2)(f) TFEU. The Directive covers all third-country nationals and stateless persons who make an application for international protection, as long as they enjoy the status of applicant in a Member State.⁵⁰⁰ A person ceases to be an applicant when a final decision on his application is taken.⁵⁰¹ A 'final decision' must be understood as a decision that can no longer be challenged under national law.⁵⁰²

The United Kingdom, Ireland and Denmark do not take part in the recast Reception Conditions Directive.⁵⁰³ The UK did however opt in to the first phase Reception Conditions Directive,⁵⁰⁴ which implies that it remains bound by that Directive. In addition, when implementing the Dublin Regulation the United Kingdom and Ireland and Denmark and the non-EU Dublin states *are* bound by the specific articles of the recast Reception Conditions Directive that deal with detention. This follows from Article 28(4) of the Dublin III Regulation,⁵⁰⁵ which incorporates the specific Articles 9, 10 and 11 of the recast Reception Conditions Directive into the text of the Dublin Regulation.

2.2 Reviewing the recast Reception Conditions Directive

2.2.1 Design

In general, the level of protection granted by the Directive can be seen as observing the Refugee Convention, in so far as the Convention provides for a specific set of rights to the category of refugees who are physically present in a state's territory, irrespective of their legal status.⁵⁰⁶ The Reception Conditions Directive generally complies with this standard, and does, in fact, grant a number of rights to asylum seekers which states under the Refugee Convention are only obliged to grant to refugees who have expressly been permitted residence.⁵⁰⁷

⁴⁹⁷ Directive 2013/33/EU, preceded by the first phase Reception Conditions Directive 2003/9/EC.

⁴⁹⁸ Recital 5 RCD and Recital 11 RCD.

⁴⁹⁹ Recital 12 RCD; Wagner M, Baumgartner P et al. (2016), 83.

⁵⁰⁰ Article 3(1) RCD.

⁵⁰¹ Article 2(c) APD.

⁵⁰² Article 2(e) APD.

⁵⁰³ Boeles P et al. (2014), 268.

⁵⁰⁴ Directive 2003/9/EC.

⁵⁰⁵ Regulation (EU) 604/2013.

⁵⁰⁶ Boeles P et al. (2014), 267. See in particular Articles 4, 13, 14, 22, 25 and 27 of the Refugee Convention.

⁵⁰⁷ Boeles P et al. (2014), 267-268.

Reception

The Directive does not provide a clear definition of ‘reception’. Instead, reference is made to different *forms* of reception conditions made available to asylum seekers, including material conditions (housing, food, clothing, vouchers and financial allowances),⁵⁰⁸ health care,⁵⁰⁹ employment⁵¹⁰ and education.⁵¹¹ A clear conceptual definition of ‘reception’ is lacking, which leads to different interpretations and thus legal effects in the Member States.⁵¹² For instance, a number of states draw clear institutional distinctions between the framework of ‘first reception’ as hosting of new arrivals and the second-line (longer-term) reception as accommodation of persons who have entered the asylum procedure, although the distinction between first- and second-line reception is not formally drawn in the EU legal framework.⁵¹³ As a consequence, considerable variations exist among Member States in terms of what constitutes first-line and second-line reception and who is responsible for it.⁵¹⁴

Harmonisation

The recast Reception Conditions Directive affords a higher level of harmonisation than the previous⁵¹⁵ legislative instrument. Improvements in this respect include the detailed regulation of detention grounds and detention conditions for asylum seekers.⁵¹⁶ In addition, the recast Directive speaks of ‘standards’ for reception and thus no longer of ‘minimum standards’ as the first phase Directive did. Still, the recast Directive does not aim at fully harmonising reception conditions as there was insufficient agreement among Member States on the question of where to draw the lines of such common standards.⁵¹⁷ Article 4 expressly allows Member States to retain or introduce more favourable standards.⁵¹⁸ The last indent of that provision stipulates that such national laws with more favourable provisions can be introduced ‘insofar as [they] are compatible with this Directive’. Ultimately, how far Member States may go in this regard will have to be established by the Court of Justice.⁵¹⁹

Criticism has been expressed regarding the Directive’s objective to limit secondary movements of asylum seekers through harmonisation of reception conditions. The level of material reception conditions during the asylum procedure may only have limited impact on secondary movements of asylum seekers because other pull factors such as social ties, reputation of other countries or job opportunities may be regarded as more important by asylum seekers.⁵²⁰

Scope

In comparison to the previous Reception Conditions Directive, the recast has widened the scope of applicability of the Directive to all applicants for international protection, including those in territorial waters or in transit zones of a Member state, and subsidiary protection.⁵²¹ This implies that the Directive is also applicable in hotspots (also see Part III, Chapter 4).⁵²²

⁵⁰⁸ Article 2(g) RCD.

⁵⁰⁹ Article 19 RCD.

⁵¹⁰ Article 15 RCD.

⁵¹¹ Articles 14 and 16 RCD.

⁵¹² ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 9; ECRE (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 11.

⁵¹³ ECRE (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 11.

⁵¹⁴ *Ibid.*, 11-12.

⁵¹⁵ Directive 2003/9/EC.

⁵¹⁶ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* Chetail V, De Bruycker P and Maiani F (eds.) (2016) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 310.

⁵¹⁷ Boeles P et al. (2014), 269; Peers S et al. (eds.) (2015), 512; Wagner M and Kraler A (2016), 11.

⁵¹⁸ Also see Recital 28 RCD.

⁵¹⁹ Peers S et al. (eds.) (2015), 505.

⁵²⁰ Wagner M, Baumgartner P et al. (2016), 82; Wagner M and Kraler A (2016), 12.

⁵²¹ Article 3(1) RCD read together with Article 2(a) RCD and see Recital 13 RCD. Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard*

Material reception conditions

Material reception conditions are defined in Article 2(g) and include housing, food, clothing and a daily expenses allowance. It is left to the discretion of Member States how these material conditions are provided. Housing for instance could take the form of State-provided accommodation in reception centres or private houses.⁵²³

The Directive states that these material reception conditions must be available from the moment the applicant submits his or her application for asylum. According to Article 17(2), Member States are to ensure that: ‘material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health’. Furthermore, Member States must ensure that this standard of living is met in the specific situation of vulnerable persons, as well as in relation to the situation of persons who are in detention.⁵²⁴ In order to provide safeguards against abuse, the recast Directive also provides that Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have their own sufficient means to ensure their subsistence.⁵²⁵ If the applicants have sufficient resources, Member States may ask them to cover, or contribute to, the costs of the material reception.⁵²⁶ Existing legal standards endorse Member States to set exceptionally different modalities for material reception conditions when material reception conditions are not available in certain geographical areas⁵²⁷ or when housing capacities normally available are temporarily exhausted⁵²⁸ for a ‘reasonable period, which should be as short as possible’.⁵²⁹ These exceptions raise concerns, particularly in view of the incapacity of some Member States to fulfill their obligations under this Directive as evidenced by the events in the case of *M.S.S. v. Belgium and Greece* (also see paragraph 2.2.2).⁵³⁰ The scope of Member State’s discretionary power regarding housing entitlements of asylum seekers under the Directive has been significantly reduced by criteria formulated by the CJEU in its case law.⁵³¹

The level of the financial allowances provided to asylum applicants is largely left to the discretion of Member States.⁵³² The benchmark of financial assistance is set to levels established by Member States, either by law or by practice, to ensure ‘adequate standards of living for nationals’.⁵³³ It is however explicitly stated that Member States may grant less favourable treatment to applicants compared to nationals, in particular where material support is partially provided in kind, or where the level(s), applied to nationals, aim to ensure a higher standard of living than that prescribed for applicants in the Reception Conditions Directive.⁵³⁴ As the association with the amount of social assistance received by nationals can be easily departed from, this formulation does not seem to address sufficiently the

of Living for Asylum Seekers? In: Chetail V, De Bruycker P and Maiani F (eds.), 281; Peers S et al. (eds.) (2015), 507-508.

⁵²² Wagner M, Baumgartner P et al. (2016), 83.

⁵²³ ECRE (2014) AIDA Annual Report 2013/2014, 64.

⁵²⁴ Article 17(2) RCD.

⁵²⁵ Article 17(3) RCD.

⁵²⁶ Article 17(4) RCD.

⁵²⁷ Recital 19 RCD.

⁵²⁸ Article 18(9)(b) RCD.

⁵²⁹ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 10.

⁵³⁰ Peers S et al. (eds.) (2015), 535-536.

⁵³¹ See for instance CJEU *Chakroun* (C-578/08), para. 43 and CJEU *Saciri* (C-79/13).

⁵³² Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 303.

⁵³³ Article 17(5) RCD.

⁵³⁴ Article 17(5) RCD and see Recital 24 RCD.

problematic situation that has occurred in several Member States with regard to divergences in standards.⁵³⁵

The Directive permits Member States to sanction what is considered as deviant behaviour with reduction or even, in exceptional cases, withdrawal of reception conditions for asylum seekers who do not comply with procedural or other rules.⁵³⁶ The compatibility of this provision with Member States' human rights obligations is questionable.⁵³⁷ Member States may apply sanctions (other than reduction or withdrawal of material reception conditions)⁵³⁸ in the event of (1) serious breaches of the rules of the accommodation centres and (2) in case of seriously violent behaviour.⁵³⁹ The first term remains rather vague as the rules of accommodation centres are themselves not in any way part of the Directive and therefore vary considerably among the accommodation centres.⁵⁴⁰

It should be noted here that Article 20 of the recast Directive only allows for the withdrawal of *material* reception conditions.⁵⁴¹ In addition, the Directive prescribes that Member States 'shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a 'dignified standard of living for all applicants'.⁵⁴² Although it is not entirely clear what constitutes a 'dignified standard of living', these provisions in the Directive seem to provide for a non-derogable minimum of material reception conditions.⁵⁴³

The concept of vulnerability

The EU asylum *acquis* explicitly acknowledges that vulnerable applicants⁵⁴⁴ may be in need of special reception⁵⁴⁵ (and procedural⁵⁴⁶) needs.⁵⁴⁷ As mentioned in the section on the Asylum Procedures Directive (see paragraph 2.2.4 of Part III), inconsistencies exist in the conceptualisation of vulnerability within EU law.

The recast Asylum Procedures Directive defines applicants in need of special procedural guarantees⁵⁴⁸ in terms of their reduced ability to benefit from the rights and comply with the obligations under the

⁵³⁵ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 303.

⁵³⁶ Article 20(1)-(3) RCD; Peers S et al. (eds.) (2015), 537-539.

⁵³⁷ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 304.

⁵³⁸ *Ibid.*, 307. The phrasing of Article 20(5) RCD points to the fact that sanctions are something different than reduction or withdrawal of material reception conditions.

⁵³⁹ Article 20(4) RCD.

⁵⁴⁰ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 307.

⁵⁴¹ According to Article 2(g) RCD material reception conditions means: 'the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance'.

⁵⁴² Article 20(5) RCD.

⁵⁴³ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 308.

⁵⁴⁴ For an elaboration on the notion of vulnerability in European asylum procedures, see ECRE (2017) *The concept of vulnerability in European asylum procedures*.

⁵⁴⁵ Recital 14 RCD.

⁵⁴⁶ Recital 29 RCD.

⁵⁴⁷ For a legal analysis with regard to victims of human trafficking, see: Stoyanova V (2015) *Victims of Human Trafficking. A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Phase of the EU Asylum Legislation*. In: Bauloz C et al. (eds.) *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Leiden: Koninklijke Brill NV, 58-108. For more on the concept of vulnerability in the context of second generation asylum directives and regulations, see: Jakuleviciene L (2016) *Vulnerable Persons as a New Sub-Group of Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 353-373.

⁵⁴⁸ ECRE (2017) *The concept of vulnerability in European asylum procedures*, 14.

Directive due to individual circumstances.⁵⁴⁹ The Procedures Directive does not include an exhaustive list of asylum seekers presumed to be in need of special procedural guarantees. Instead, it indicatively refers to need of such guarantees related to age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders, or as a result of torture, rape or other serious forms of psychological, physical or sexual violence.⁵⁵⁰ In comparison, the recast Reception Conditions Directive refers to the notion of ‘vulnerable persons’ through a non-exhaustive list of such persons⁵⁵¹ and Article 22(1) of this Directive holds the obligation for Member States to assess whether an applicant has special protection needs. The Reception Conditions Directive also introduces the separate concept of ‘applicant with special reception needs’.⁵⁵² Further confusion on the scope of the notion of ‘vulnerable persons’ arises from provisions such as Article 11 which refers to the ‘detention of vulnerable persons and of applicants with special reception needs’. It should also be noted that the Directive fails to recognise in accordance with the case-law of the ECtHR⁵⁵³ that asylum seekers constitute a vulnerable group *per se*.⁵⁵⁴

It follows from the above that the different pieces of legislation do not adopt a consistent and principled understanding of the vulnerability of individuals undergoing the asylum process. Instead, a variety of concepts can be observed, describing the asylum seeker as “vulnerable”, “in need of special procedural guarantees” or “with special reception needs”.⁵⁵⁵ There is a risk that this inconsistency translates into ambiguity in domestic legal orders.⁵⁵⁶ In fact, the definition of vulnerable groups of asylum seekers in most countries follows the wording of the 2003 Reception Conditions Directive and its recast and thus makes no reference to elements listed in the recast Asylum Procedures Directive such as sexual orientation and gender identity.⁵⁵⁷ The margin of discretion left to European countries in the definition of vulnerability in the asylum process has led to disparities in the categories of applicants deemed as vulnerable. For instance, in a number of countries covered by the asylum information database, AIDA, people with a serious illness or a mental disorder are not considered vulnerable, contrary to the standards set out in the EU asylum *acquis*.⁵⁵⁸

Even though it seems a missed opportunity that the definitions in both Directives do not converge, it should be recognised that also the needs of vulnerable persons in the context of both directives may differ. For instance, while an unaccompanied child asylum seekers will require special reception conditions and also special procedural guarantees to assist him/her to participate in the asylum procedure, a single parent with minor children may only need special arrangements for children in order to take part in the asylum interview. Therefore, if the mechanisms from both Directives were to be joined together, when implementing it clear distinction should be drawn between the two requirements, leading to two different assessments.⁵⁵⁹

When it comes to recognising vulnerable persons in practice, the recast Reception Conditions Directive does not specify what the system of identification shall look like (and nor does the recast Procedures

⁵⁴⁹ Article 2(d) APD.

⁵⁵⁰ Recital 29 APD. Only unaccompanied children are defined as a specific group of applicants entitled to special procedural guarantees (Article 25 APD).

⁵⁵¹ Article 21 RCD: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor 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.

⁵⁵² Article 2(k) RCD.

⁵⁵³ ECtHR *M.S.S. v. Belgium and Greece* (30696/09), para. 251.

⁵⁵⁴ Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 31-32.

⁵⁵⁵ ECRE (2017) *The concept of vulnerability in European asylum procedures*, 12-13.

⁵⁵⁶ *Ibid.*, 16.

⁵⁵⁷ *Ibid.*, 16.

⁵⁵⁸ *Ibid.*, 16-17.

⁵⁵⁹ Jakuleviciene L (2016) *Vulnerable Persons as a New Sub-Group of Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 364-365.

Directive).⁵⁶⁰ Instead the content of Reception Conditions Directive is in this respect limited to the clear requirement for Member States to establish a ‘vulnerability assessment’.⁵⁶¹ This void does not seem to have been filled by Member States themselves: few have inducted norms for vulnerability assessment procedures into their national legislation. The lack of a regulatory framework in national legislation in many Member States, in combination with high numbers of asylum seekers and limited reception capacities makes the identification of vulnerability arbitrary and the application of the provisions in the recast Directive relating to asylum seekers with special reception needs in those countries very unlikely.⁵⁶²

Access to the labour market

Asylum seekers’ access to the labour market has been described as one of their most important rights and at the same time as one of their most controversial entitlements.⁵⁶³ Under the recast Reception Conditions Directive, access to the labour market is to be granted ‘no later than 9 months’ from the date of the application for international protection.⁵⁶⁴ This means that, compared to the first phase Directive, the waiting time has been reduced from 12 months to 9 months.⁵⁶⁵ It should however be noted that there is no obligation to ensure access to the labour market if a first-instance decision is taken within the waiting period of 9 months, or if the delay for taking such decision beyond 9 months can be attributed to the applicant. Hence, the possibility still exists to deny asylum seekers access to the labour market throughout the entire asylum procedure.⁵⁶⁶

Member States should decide on the conditions under which access to the labour market is to be granted. There is consequently no right to automatic access after a maximum of nine months but the individual right to a decision.⁵⁶⁷ The provision hence does not refer to abstract conditions of access but to a decision on the individual case.⁵⁶⁸ Once the waiting period, where applied, has expired, Member States can impose a general restriction on access to the labour market in the form of the priority rule mentioned in Article 15(2).⁵⁶⁹ This legal provision enables EU Member States to prioritise EU citizens and legally staying third-country nationals over asylum seekers ‘for reasons of labour market policies’ and is not in conformity with Article 17 of the Refugee Convention.⁵⁷⁰

Detention

⁵⁶⁰ Jakuleviciene L (2016) *Vulnerable Persons as a New Sub-Group of Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 365; Wagner M, Baumgartner P et al. (2016), 86.

⁵⁶¹ Article 22 RCD.

⁵⁶² ECRE (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 35; Wagner M, Baumgartner P et al. (2016), 87.

⁵⁶³ Slingenberg L (2014) *Asylum seekers’ access to employment: tensions with human rights obligations in the recast directive on reception conditions for asylum seekers*. In: Matera C and Taylor A (eds.) *The Common European Asylum System and human rights: enhancing protection in times of emergencies*. Centre for the Law of EU External Relations. Working papers 2014/7, 93.

⁵⁶⁴ Article 15(1) RCD.

⁵⁶⁵ Wagner M, Baumgartner P et al. (2016), 87.

⁵⁶⁶ Slingenberg L (2014) *Asylum seekers’ access to employment: tensions with human rights obligations in the recast directive on reception conditions for asylum seekers*. In: Matera C and Taylor A (eds.), 103.

⁵⁶⁷ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 297.

⁵⁶⁸ *Ibid.*, 297.

⁵⁶⁹ *Ibid.*, 297.

⁵⁷⁰ Slingenberg L (2014) *Asylum seekers’ access to employment: tensions with human rights obligations in the recast directive on reception conditions for asylum seekers*. In: Matera C and Taylor A (eds.), 98-99. It follows from Article 17 Refugee Convention that Asylum seekers who have resided on the territory for more than three years or who have a spouse or one or more children possessing the nationality of the host state, may not be subjected to policies that prioritise other non-nationals with regard to access to the labour market. More elaborately on the recast Reception Conditions Directive in the light of international law, see: Slingenberg CH (2014) *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*. Oxford: Hart Publishing.

Articles 8 through 11 of the Directive were newly inserted in the recast and deal with the controversial issue of detention of asylum seekers.⁵⁷¹ Compared to the 2003 version of the Directive, the recast has clarified that the Directive applies in detention centres.⁵⁷² Recital 8 now states that the Directive applies ‘in all locations and facilities hosting applicants’. The clarification of circumstances under which detention of asylum seekers is permitted is a key improvement⁵⁷³ of the 2013 revision and the legal regime of detention is now finally in line with human rights treaties.⁵⁷⁴ At the same time, detention as a concept raises questions of compatibility with the right to liberty of Article 6 of the EU Charter of Fundamental Rights.⁵⁷⁵

International law does not prohibit the detention of asylum seekers per se: Article 31(2) Refugee Convention makes it possible to restrict free movement of refugees on account of illegal entry or presence, if such restriction is necessary, and until their status is regularised or they have been admitted to another country. It is generally accepted that detention of asylum seekers under that provision is allowed to verify the identity of the asylum seeker, in particular, in the case of loss or destruction of travel documents and to prevent him from absconding.⁵⁷⁶ More contested is whether that provision also allows for detention merely for conducting the actual asylum procedure. It follows from the term ‘necessary’ in Article 31(2) that detention can only be exceptionally resorted to for a legitimate purpose, and that detention for the mere convenience of the authorities is not permitted.⁵⁷⁷

It follows from Article 8(1) and (2) of the Reception Conditions Directive that the automatic detention of asylum applicants is prohibited: detention must be ‘necessary’, be based on an individual assessment and may only occur if other less coercive measures are unavailable. This wording echoes the spirit and legal obligations that are established in the Refugee Convention that provides for protection against penalisation for refugees.⁵⁷⁸ Apart from these general requirements, Article 8(3) contains an exhaustive list of six permissible grounds for detention,⁵⁷⁹ which is considered to be one of the main advances of the recast.⁵⁸⁰ The possibility to detain an asylum applicant in order to decide on his right to enter the territory, Article 8(3)(c), is rather wide, but it must be read together with Articles 43, 31(8) and 33 of the Procedures Directive, from which it follows that an asylum applicant may only be subjected to a border procedure in order to decide on his right of entry under prescribed grounds, which relate to establishing the admissibility of the application or to grounds for applying the accelerated procedure.⁵⁸¹ Although the list is exhaustive, the grounds are vague and remain open to interpretation.⁵⁸² For instance, the concepts of public order or national security as referred to in Article 8(3)(e) of the Reception Conditions Directive have not been defined, and therefore the threat of practices of quasi-automatic detention cannot be excluded.⁵⁸³ Article 9 contains guarantees for detained applicants, including the right of judicial review.

⁵⁷¹ Boeles P et al. (2014), 271.

⁵⁷² Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 279.

⁵⁷³ Boeles P et al. (2014), 275.

⁵⁷⁴ Chetail V (2016) *The Common European Asylum System: Bric-à-brac or System?* In: Chetail V, De Bruycker P and Maiani F (eds.), 31.

⁵⁷⁵ Peers S et al. (eds.) (2015), 544.

⁵⁷⁶ Boeles P et al. (2014), 271.

⁵⁷⁷ *Ibid.*, 272.

⁵⁷⁸ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 286.

⁵⁷⁹ Article 8(3)(a)-(f) RCD: (a) determining or verifying identity; (b) minimising the risk of the applicant absconding; (c) deciding on the applicant’s right of entry; (d) carrying out a removal process where an applicant’s claim is unfounded; (e) protecting national security or public order; (f) carrying out a return in accordance with a Dublin transfer procedure.

⁵⁸⁰ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 287.

⁵⁸¹ Boeles P et al. (2014), 273.

⁵⁸² Peers S et al. (eds.) (2015), 521.

⁵⁸³ *Ibid.*, 521.

However, the Directive authorises Member States to restrict this right on the basis of multiple grounds that Article 9(7) and (8) enumerate, which may in practice obstruct effective access to a judicial remedy, contrary to the general principle of effective judicial protection and Article 47 CFR.⁵⁸⁴ Paragraph 4 of Article 9 enounces several obligations regarding information to be provided to the applicants in a language ‘which they understand or are *reasonably supposed to understand*’ (emphasis added). This formulation raises concern as to its compatibility with Article 5(2) ECHR,⁵⁸⁵ which stipulates that information of the reasons of the arrest and of any charges against the individual, should be communicated in a language ‘which he understands’.

Article 10 provides the requisite detention conditions, from which follows the possibility of resorting to prison accommodation if no specialised detention facilities are available.⁵⁸⁶ The possibility of detaining minors is provided in Article 11, albeit only as a measure of last resort, and by taking into account the minor’s best interests (Article 11(2)).

The conditions and guarantees foreseen in Articles 9 to 11 of the Directive also govern Dublin detention.⁵⁸⁷

Family members

Although the notion of ‘family members’ has been extended to the parents of a minor, it is still limited to the nuclear family which already existed in the country of origin and whose members are present in the same Member State in relation to the application for international protection.⁵⁸⁸ On this topic, also see the review of the recast Qualification Directive, in paragraph 5.2.1 of Part III.

2.2.2 Implementation

The limited availability of data about the operation of the CEAS in general (also see paragraph 2.2.2 of Part II) also extends to information regarding the implementation of the recast Reception Conditions Directive. Member States are under no duty to report statistics on reception capacity and occupancy either under the recast Reception Conditions Directive⁵⁸⁹ or under the Migration Statistics Regulation.⁵⁹⁰ The opacity and complexity of several countries’ reception systems pose a further substantial challenge to any meaningful mapping and analysis at European level.⁵⁹¹

Nevertheless, it has become quite clear that substantial discrepancies exist in the level of asylum harmonisation between the different Member States,⁵⁹² for example the chronic reception ‘crises’ in France and Italy, leading to systematic homelessness and destitution of asylum seekers. The 2011 ECtHR case of *M.S.S. v. Belgium and Greece* is an early and prominent example. The case revolved around the removal of an asylum claimant by Belgium to Greece under the Dublin II Regulation.⁵⁹³ The ECtHR ruled not only that the detention conditions and the living circumstances of the claimant in Greece amounted

⁵⁸⁴ Peers S et al. (eds.) (2015), 522.

⁵⁸⁵ Tsourdi E (2016) *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?* In: Chetail V, De Bruycker P and Maiani F (eds.), 295. Also see ECtHR *Nowak v. Ukraine* (60846/10).

⁵⁸⁶ Boeles P et al. (2014), 273.

⁵⁸⁷ Peers S et al. (eds.) (2015), 526. Recital 20 and Article 28(4) of Regulation (EU) 604/2013.

⁵⁸⁸ Article 2(j) RCD.

⁵⁸⁹ Reception capacity is not mentioned in the list of information to be reported to the Commission pursuant to Annex I to the RCD.

⁵⁹⁰ ECRE (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 42.

⁵⁹¹ *Ibid.*, 42.

⁵⁹² For more on the implementation of the recast Reception Conditions Directive in selected Member States see: Minderhoud PE and Zwaan KM (eds.) (2016) *The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Oisterwijk: Wolf Legal Publishers.

⁵⁹³ Stevens D (2016), 247.

to a breach of Article 3 ECHR by Greece, but also that Belgium had violated this right by transferring the applicant under the Dublin Regulation to Greece. This judgment put an end to the notion of blind trust, also by referring to the lack of harmonised practices amongst EU Member States and the observation of minimum standards of reception of asylum seekers, as dictated by the Directives. Indeed, the whole notion of ‘mutual trust’ on which so much of the CEAS depended, was clearly flawed.⁵⁹⁴ The M.S.S. judgment was followed in 2011 by a judgment of the CJEU in the case *NS and ME*,⁵⁹⁵ where the CJEU underlined the necessity of ‘rebuttal of trust’ in case of ‘systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers’ in another Member State.⁵⁹⁶ The Dublin system is to be seen as based on the assumption that Member States can and should have confidence in each other’s asylum systems in the wider sense, including reception conditions.⁵⁹⁷ This was officially reflected in the Stockholm Programme’s proclamation of the EU as ‘a common area of protection and solidarity’⁵⁹⁸ and has been reconfirmed by the CJEU.⁵⁹⁹ However, the lack of dignified reception conditions has been the main reason for national and European Courts to suspend transfers of asylum seekers to the responsible Member State.⁶⁰⁰ The implementation of the recast Reception Conditions Directive thus directly affects other legal acts of the CEAS, such as the Dublin Regulation.⁶⁰¹

The large-scale and uncontrolled arrival of migrants in 2015 further highlighted the shortcomings of the CEAS, for instance the failure of asylum authorities to open up new reception spaces promptly.⁶⁰² It should be noted here that reception systems rarely operate in a stable context. The number of applicants changes from month to month and is difficult to forecast. Moreover, during periods of lower numbers of applications, reception capacities come under the scrutiny of austerity measures. This dynamic context makes the efficient management of reception infrastructure a particularly challenging task.⁶⁰³

As outlined above in paragraph 2.1, the current legislative framework laid out in the recast Reception Conditions Directive should ensure that applicants are offered an equivalent level of treatment in regard to reception conditions in all Member States. The current Directive however still leaves a considerable degree of discretion to define what constitutes an adequate standard of living and how it should be achieved. In addition, the levels of investment injected into the regular reception systems are inadequate.⁶⁰⁴ As a consequence, reception conditions continue to vary greatly in terms of how the reception system is organised and in terms of the standard provided to asylum seekers.⁶⁰⁵ When it

⁵⁹⁴ Stevens D (2016), 248.

⁵⁹⁵ Violation of Article 4 CFR.

⁵⁹⁶ Joined cases CJEU *N.S. v. Secretary for the Home Department* (C-411/10) and CJEU *M.E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-493/10), para. 89.

⁵⁹⁷ Vested-Hansen J (2016) Reception Conditions as Human Rights: Pan-European Standards or Systemic Deficiencies? In: Chetail V, De Bruycker P and Maiani F (eds.) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV, 318-319; ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 20.

⁵⁹⁸ Stockholm Programme: an open and secure Europe serving and protecting citizens [2010] *OJEU* C 115/1, para. 6.2.

⁵⁹⁹ See for instance CJEU *N.S. and M.E.* (joined cases C-411/10 and C-493/10), paras. 78-79, 83. For an analysis of the ways in which the ECtHR has responded to allegations of Member States’ failure to comply with the EU standards on reception conditions for asylum seekers, see Vested-Hansen J (2016) *Reception Conditions as Human Rights: Pan-European Standards or Systemic Deficiencies?* In: Chetail V, De Bruycker P and Maiani F (eds.), 317-352.

⁶⁰⁰ Wagner M, Baumgartner P et al. (2016), 82.

⁶⁰¹ Wagner M and Kraller A (2016), 12.

⁶⁰² ECRE (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 30-34.

⁶⁰³ Wagner M, Baumgartner P et al. (2016), 82; EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 104.

⁶⁰⁴ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 6.

⁶⁰⁵ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 104; ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 5; European Migration Network (2014) *The Organisation of Reception Facilities for Asylum Seekers in different Member States*, 2.

comes to housing for instance, some countries accommodate asylum seekers in different centres (the Netherlands), others prefer private housing solutions (Sweden).⁶⁰⁶

The continued and broad use of temporary forms of reception shows a lack of preparedness and limitations of contingency planning in many countries.⁶⁰⁷ Especially in the situation of a considerable increase in the number of applications, Member States have severe difficulties meeting their obligations for reception conditions, in particular with providing accommodation which guarantees an adequate standard of living.⁶⁰⁸ The accommodation of vulnerable persons poses particular problems, with them being placed in highly unsuitable conditions in several Member States.⁶⁰⁹ Finally, whilst migrants have a right to shelter regardless of their legal status, eviction and destruction of their living spaces has taken place in various areas across Europe.⁶¹⁰

In some countries, access to work remains challenging for most applicants for international protection with administrative difficulties linked to recognition of diplomas and qualification as well as language requirements.⁶¹¹ Considerable variations also exist in the duration of the waiting period before access to employment is granted by the national authorities of the Member States, from immediate access in some countries to a 9-month waiting period in others.⁶¹² At the same time, in for instance Austria, Finland and Germany, initiatives are being deployed to facilitate the integration of the beneficiaries of international protection into the labour market.⁶¹³

Assessment of special reception needs

The implementation of the obligation to identify those in need of special procedural guarantees (see paragraph 2.2.1, ‘the concept of vulnerability’) has led to wide disparities among European countries in the mechanisms through which the identification of special needs is conducted.⁶¹⁴ The unstable nature of reception in Europe has borne down heavily on the ability of states to assess special reception and procedural needs, to the point that identification of vulnerability has ultimately been forgone by a significant number of countries. When it is actually carried out, the identification of vulnerability is often done in a very superficial manner and may only lead to identifying self-evident cases.⁶¹⁵

Concerns were voiced by the civil society and UNHCR as to *inter alia* the age determination procedure (e.g. lack of a comprehensive assessment, overreliance on medical examination), vulnerability and referral mechanisms (e.g. lack of identification and referral mechanisms in place for persons with specific needs and lack of expertise among stakeholders making the necessary assessment) and the quality of services provided to vulnerable applicants (e.g. in terms of addressing mental and psychological and shelter needs).⁶¹⁶ Only few countries⁶¹⁷ have formal identification mechanisms in

⁶⁰⁶ Wagner M, Baumgartner P et al. (2016), 82.

⁶⁰⁷ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 10.

⁶⁰⁸ Wagner M, Baumgartner P et al. (2016), 84-85.

⁶⁰⁹ *Ibid.*, 86.

⁶¹⁰ For instance the destruction of parts of the ‘jungle’ in Calais in 2016. Ansems de Vries L, Carrera S and Guild E (2016) *Documenting the Migration Crisis in the Mediterranean. Spaces of Transit, Migration Management and Migrant Agency*. Centre for European Policy Studies. Paper no. 94, 6.

⁶¹¹ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 139.

⁶¹² Wagner M, Baumgartner P et al. (2016), 88-89.

⁶¹³ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 53.

⁶¹⁴ ECRE (2017) *The concept of vulnerability in European asylum procedures*, 22.

⁶¹⁵ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE’s vision for Europe’s role in the global refugee protection regime*, 7.

⁶¹⁶ EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 134.

⁶¹⁷ These countries include France, the Netherlands, Sweden and the UK.

place that systematically identify applicants with special needs in practice.⁶¹⁸ Even then, the formal procedures in these countries are not necessarily similar, thereby adding another layer of noticeable differences in the way special needs are assessed within the EU.⁶¹⁹ Informal arrangements to identify vulnerabilities also exist: in Austria for instance, applicants are asked in a brochure to raise special needs themselves upon arrival in the initial reception centre or where an official may classify applicants as victims of trafficking if this is suspected during the interview.⁶²⁰ For example, it has been noted that vulnerabilities often go unnoticed on the Greek islands, due to the extremely short duration of the fast-track border procedure applied since the EU-Turkey statement.⁶²¹

Despite these shortcomings, improvements have been made by Member States in the assessment of special reception needs of asylum seekers. In 2016, several countries have implemented measures to streamline support to people with special reception needs.⁶²² These include special registration forms in Belgium and Cyprus and the establishment of 'single desks' in France to ensure better coordination between various authorities.⁶²³ EASO has an important role in supporting national authorities' efforts to identify vulnerable asylum seekers. One of the multiannual objectives of the EU Agency for 2017-2019 is to 'contribute to the better identification of and adequate support to vulnerable applicants in asylum processes'.⁶²⁴ To this end, EASO has developed particular cooperation with specific EU countries through the creation of Operating Plans (Greece and Italy) or Support Plans (Cyprus and Bulgaria).⁶²⁵

Detention

As elaborated on in paragraph 2.2.1 above, the recast Reception Conditions Directive included the adoption of asylum-specific rules on detention. Understanding the scale of detention practices across Member States hence is an integral part of monitoring the implementation of the EU *acquis* and the absence of statistical provision by Member States relating to the use of asylum detention as part of their reporting obligations under the recast Reception Conditions Directive is therefore highly problematic.⁶²⁶

Detention (and other elements of the CEAS) are not covered by the Migration Statistics Regulation.⁶²⁷ EASO has taken steps to incorporate detention figures in the statistical information collected under its Early Warning and Preparedness (EPS) system but such data has however not been made public to date.⁶²⁸

Immigration detention remains an area of great concern as it has become a routine, rather than exceptional, response to the irregular entry or stay of asylum seekers and migrants in a number of countries.⁶²⁹ Detention upon arrival seems to be structurally embedded in several reception systems, as exemplified in Bulgaria.⁶³⁰ In the case of Italy and Greece, the implementation of the hotspot approach

⁶¹⁸ ECRE (2017) *The concept of vulnerability in European asylum procedures*, 22.

⁶¹⁹ *Ibid.*, 22-24.

⁶²⁰ *Ibid.*, 24.

⁶²¹ *Ibid.*, 24-25.

⁶²² EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 107.

⁶²³ *Ibid.*, 107. Note that Belgium's new law (March 2018) requires the applicant to state whether they have special needs.

⁶²⁴ EASO (2016) *EASO Single Programming Document. Multiannual Programming 2017-2019*, 13.

⁶²⁵ For details on 2016 activities, see: EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 62-64.

⁶²⁶ ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*, 7; Singleton A (2016) *Migration and Asylum Data for Policy-making in the European Union. The problem with numbers*. Centre for European Policy Studies. Paper No. 89, 6. For a more general note on the availability of data within the CEAS, see Part II, par. 2.2.2 of this baseline study.

⁶²⁷ ECRE (2018) *Making Asylum Numbers Count. ECRE's analysis of gaps and needs for reform in data collection on the Common European Asylum System*. Policy Note 10, 2.

⁶²⁸ ECRE (2015) *Asylum Statistics in the European Union: A Need for Numbers*, 7.

⁶²⁹ ECRE (2014) *AIDA Annual Report 2013/2014*, 67.

⁶³⁰ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE's vision for Europe's role in the global refugee protection*

(see Part III, Chapter 4) has reinforced the policy of Member States to detain asylum seekers and migrants, contrary to states' human rights duties to only apply detention in exceptional circumstances.⁶³¹ A similar situation seems to exist in Hungary, where all asylum seekers are automatically detained as of 2017.⁶³² For Bulgaria, UNHCR reported a practice of assigning some unaccompanied children to random adults and placing them in detention centres (the Bulgarian Law on Foreigners prohibits the detention of unaccompanied children but allows the detention of accompanied ones for up to 3 months).⁶³³

There are a number of general human rights concerns relating to the impact of detention. Prolonged detention without a clear justification has been shown to have a devastating effect on migrants' and asylum seekers' mental health, for example by contributing to post-traumatic stress disorder, anxiety and depression.⁶³⁴ This is frequently compounded by unacceptable detention conditions, such as unsanitary toilet and shower facilities and unhygienic kitchens. Plus, there is often a lack of effective access to healthcare, as well as to physical and recreational activities.⁶³⁵ Long periods of immigration detention can also lead to sustained barriers to migrants claiming their economic and social rights, even after having been released. UNHCR research suggests that detention disempowers migrants who are often keen to work. A sustained absence from the labour market and the emotional and mental toll of detention can lead to migrants becoming unnecessarily dependent on state-provided support later on.⁶³⁶

3. Proposal for a recast Reception Conditions Directive

On 13 July 2016, the Commission proposed another recast of the Reception Conditions Directive.⁶³⁷ The Commission identifies the main challenge of the recast Reception Conditions Directive as one of poor implementation of existing standards.⁶³⁸ Yet, contrary to legislative changes to the EU instruments governing qualification and asylum procedures, which would be transformed from Directives into Regulations (see Part III chapters 3 and 6), the alignment of Member States' reception standards is to remain governed by a Directive. It is questioned whether this is the right choice of instrument, in view of the diverging reception conditions and disparate recognition rates amongst the EU Member States.⁶³⁹ Regarding this choice of instrument, the Commission states that: 'Considering the current significant differences in Member States' social and economic conditions, it is not considered feasible or desirable to fully harmonise Member States' reception conditions.'⁶⁴⁰

Material reception conditions

The definition of material reception conditions is clarified in Article 2(7) which includes essential non-food items such as sanitary items. The proposal also strengthens the guarantees applicable in cases where Member States exceptionally set different modalities for material reception conditions under Article 17(9), in particular when normal housing capacities are temporarily exhausted. In these cases,

regime, 9.

⁶³¹ ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE's vision for Europe's role in the global refugee protection regime*, 9; Wagner M, Baumgartner P et al. (2016), 89-90; Ansems de Vries L, Carrera S and Guild E (2016), 4.

⁶³² EASO (2017) *Annual Report on the Situation of Asylum in the European Union 2016*, 112.

⁶³³ *Ibid.*, 114.

⁶³⁴ Crépeau F and Purkey A (2016), 11.

⁶³⁵ *Ibid.*, 11-12.

⁶³⁶ *Ibid.*, 12.

⁶³⁷ European Commission (2016) *Proposal for a [recast of the Reception Conditions Directive]*. COM(2016) 465, 13 July 2016. Brussels.

⁶³⁸ European Commission (2016) *Proposal for a [recast of the Reception Conditions Directive]*. COM(2016) 465, 3 (Explanatory Memorandum) and Recital 5 proposal recast RCD.

⁶³⁹ Lassen CK (2017) *Reforming the Common European Asylum Policy (CEAS)*. Europeum Institute for European Policy. Policy Paper, 8.

⁶⁴⁰ European Commission (2016) *Proposal for a [recast of the Reception Conditions Directive]*. COM(2016) 465, 6 (Explanatory Memorandum).

Member States must guarantee a ‘dignified standard of living’ and health care, as opposed to a coverage of ‘basic needs’, as per the current Directive (also see ‘Material reception conditions’ in paragraph 2.2.1 above).

The proposed Directive contains the newly inserted provision of Article 17a which excludes asylum seekers who are not in the Member State designated as responsible by the Dublin Regulation from reception conditions. This is in contrast with the reasoning of the CJEU in *Cimade and Gisti*⁶⁴¹ that reception conditions are made available to a person as long as he or she is an asylum seeker with a right to remain on the territory, and that asylum seekers are an indivisible class of persons.⁶⁴² This principle seems to be maintained, since the provisions on the scope of the Directive remain unchanged in Article 3 of the proposal, as does the right to move freely within the territory in Article 7(1). At the same time, Article 9(1) of the proposed Asylum Procedures Regulation has been amended to restrict the right to remain to the Member State responsible. Still, the proposed provision also seems to contradict the overall spirit of the ‘common procedure for international protection in the Union’ proposed under the Asylum Procedures Regulation, since it would fragment the individual’s legal status depending on whether he or she has reached the Member State designated as responsible by the Dublin Regulation. The Member State responsible for the application can restrict reception conditions under Article 19. This means that the proposal allows double penalisation for the category of applicants concerned here: both the Member State conducting a Dublin procedure and the Member State responsible for the application can impose sanctions, which would negatively affect the ability of applicants to present their claim effectively.⁶⁴³ It should be noted that Article 19(1) brings about a significant improvement: the amendments indicate that material reception conditions provided in kind may not be withdrawn and it is also clarified that health care may not be restricted or withdrawn.⁶⁴⁴ According to Article 17a(2), Member States shall ensure a ‘dignified standard of living’ for all persons falling under Article 17a, but based on past developments it is questioned whether this will be realised in practice for applicants deprived of reception conditions.⁶⁴⁵

Assessment of special reception needs

The term ‘vulnerability’ is replaced throughout the text by ‘special reception needs’, which seems to ensure more conceptual coherence as compared to the terminology in the current Recast Reception Conditions Directive (also see ‘The concept of vulnerability in paragraph 2.2.1 above). Other improvements are included in Article 21(1), which requires identification to be carried out ‘as early as possible’ rather than ‘within a reasonable time limit’.⁶⁴⁶ The proposal also requires the assessment of special reception needs to be conducted ‘systematically’.⁶⁴⁷ Article 21(2) contains more detailed and clear obligations for national authorities with a view to ensuring better identification of vulnerabilities from the first contact with newly arriving persons.⁶⁴⁸ These obligations for instance include training on detecting first signs of special reception needs and including information on special needs in the applicant’s file. The provision however continues to omit the applicant’s right to be heard in the assessment of special reception needs, which (despite the training of officials to detect signs of

⁶⁴¹ CJEU C-179/11, see in particular paras. 39-40 and 46-48.

⁶⁴² ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 6.

⁶⁴³ UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM(2016) 465*, 13.

⁶⁴⁴ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 7.

⁶⁴⁵ *Ibid.*, 6-7.

⁶⁴⁶ *Ibid.*, 19.

⁶⁴⁷ UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM(2016) 465*, 15.

⁶⁴⁸ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 20.

vulnerability) may lead to neglecting important vulnerabilities and thus depriving asylum seekers of necessary support.⁶⁴⁹

Access to the labour market

Article 15(1) of the proposal lowers the maximum waiting period for allowing asylum seekers to access the labour market from 9 to 6 months. Applicants channeled into an accelerated procedure are however, under certain grounds, excluded from labour market access which contravenes the principle of non-discrimination of refugees laid down in Article 3 of the Refugee Convention.⁶⁵⁰ Recital 35 encourages (but does not bind) Member States to lay down a time limit of 3 months for allowing applicants with claims 'likely to be well-founded' to find employment.⁶⁵¹ Although the notion of likely well-founded claims is not defined, the Recital refers to prioritised caseloads in accordance with the Asylum Procedures Regulation⁶⁵² as an example warranting earlier labour market access.

Detention

The new ground for detention in Article 8 (3) of the proposal, allowing detention in order to ensure compliance with legal obligations of the asylum seeker on the basis of an individual decision and where there is a risk of absconding, seemingly reflect the terms of Article 5(1)(b) ECHR.⁶⁵³ In addition, the Explanatory Memorandum states that the proposal is fully compatible with Article 6 of the EU Charter of Fundamental Rights, read in the light of Article 5 ECHR.⁶⁵⁴ This is noted as a positive development in the Commission's reasoning on the legal basis for detaining asylum seekers under the right to liberty guaranteed by the Charter as compared to the current version of the Reception Conditions Directive.⁶⁵⁵ The grounds for detention in Article 8(3) however do not seem to fully reflect this reasoning. Several existing (and unaltered) grounds for detention are incompatible with the right to liberty under the Charter, as they are not connected to a concrete obligation incumbent on the applicant⁶⁵⁶ or because they are punitive⁶⁵⁷ in nature.⁶⁵⁸ The proposal also maintains the possibility to detain persons with special needs during the asylum procedure, even though a number of Member States already exempt these persons from detention based on provisions of national law.⁶⁵⁹

Other observations

The definition of 'family members' in Article 2(3) refers to the definition contained in the proposal for a Qualification Regulation (also see Part III, Chapter 6) and now extends to also include families formed after leaving the country of origin but before arrival on the territory of the Member State. While this is considered to be a welcome amendment, it is suggested that the definition of family members should be aligned with the proposal to recast the Dublin Regulation and further extend to also include other close family members, such as dependent children or the dependent parents of an adult, as well as

⁶⁴⁹ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 20; ECRE (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE's vision for Europe's role in the global refugee protection regime*, 7.

⁶⁵⁰ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 17; UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM(2016) 465*, 14.

⁶⁵¹ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 16.

⁶⁵² Article 33(5)(a) APR.

⁶⁵³ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 11.

⁶⁵⁴ European Commission (2016) *Proposal for a [recast of the Reception Conditions Directive]*. COM(2016) 465, 10 (Explanatory Memorandum).

⁶⁵⁵ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 11.

⁶⁵⁶ Article 8(3)(a), (b), (c), (d) and (f) proposal recast RCD.

⁶⁵⁷ Article 8(3)(c) proposal recast RCD.

⁶⁵⁸ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 12-13.

⁶⁵⁹ *Ibid.*, 14.

siblings.⁶⁶⁰ Same sex couples should also be considered favourably in line with the principle of family unity.

Whereas the concept of ‘risk of absconding’ has been codified in Article 2(n) of the Dublin Regulation, the notion of ‘absconding’ per se is defined for the first time in the EU asylum *acquis* in Article 2(10) of the proposal. Comments are made on the connotation of morally blameworthy conduct that is attached to the term ‘absconding’.⁶⁶¹ The ‘risk of absconding’ is defined by Article 2(11) in accordance with the definition in the Dublin Regulation and leaves it up to the national legal systems to define objective criteria. Such a wide margin of discretion for Member States could however lead to open-ended definitions of the criteria for determining the risk of absconding, which increase risks of arbitrary deprivation of liberty by national authorities and does not contribute to a harmonised approach in the EU.⁶⁶² In view of the far-reaching consequences⁶⁶³ of the determination of a risk of absconding, the objective criteria for such an assessment should be exhaustively and restrictively defined in Article 2(11) of the proposed recast of the Reception Conditions Directive and the corollary provision in the Dublin Regulation.⁶⁶⁴

The proposal contains strengthened safeguards for accompanied⁶⁶⁵ and unaccompanied⁶⁶⁶ children. The introduction of a maximum period for appointing a guardian as an enforceable obligation is considered to be a key improvement of the proposal.⁶⁶⁷

Article 28 introduces a contingency planning obligation. Member States must submit to the Asylum Agency their contingency plans for ensuring adequate reception needs when faced with disproportionate pressure, which is a welcome measure with a view to ensuring greater preparedness towards large-scale arrivals in the future.⁶⁶⁸ At the same time, criticism is expressed on Article 28(1), which conditions Member States’ reception planning to the functioning of the Dublin system while practice has shown that pressure on reception systems may be exerted on Member States regardless of their formal responsibilities under the Dublin Regulation.⁶⁶⁹

⁶⁶⁰ UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* – COM(2016) 465, 8.

⁶⁶¹ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 8.

⁶⁶² *Ibid.*, 9; UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* – COM(2016) 465, 8-9.

⁶⁶³ Recital 19 proposal recast RCD.

⁶⁶⁴ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 9.

⁶⁶⁵ Article 22 proposal recast RCD.

⁶⁶⁶ Article 23 proposal recast RCD.

⁶⁶⁷ UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* – COM(2016) 465, 16.

⁶⁶⁸ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 15; UNHCR (2017) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* – COM(2016) 465, 17-18.

⁶⁶⁹ ECRE (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, 15.

BIBLIOGRAPHY

Treaties and agreements

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome (ECHR) [1950] Council of European Treaty Series, No. 5.

Convention Relating to the Status of Refugees, 28 July 1951, Geneva (Refugee) Convention, UN Treaty Series, Vol. 189, p. 137.

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 (Schengen Implementing Convention), 19 June 1990 [2000] *OJEU* L239/19.

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

Charter of Fundamental Rights of the European Union (Charter) [2000] *OJEU* C634/1.

Consolidated Version of the Treaty on European Union (TEU) [2010] *OJEU* C83/1.

Consolidated Version of the Treaty on the Function of the European Union (TFEU) [2010] *OJEU* C83/47.

Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community ('Lisbon Treaty') [2007] *OJEU* C306/1.

Treaty of Amsterdam, 2 October 1997 [1997] *OJEU* C 340.

Treaty of Maastricht on European Union, 7 February 1992 [2000] *OJEU* C 191.

EU legislation

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 [2001] *OJEU* L 212/12.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] *OJEU* L 31/18.

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

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] *OJEU* L 326/18.

Council 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) (Recast Qualification Directive) [2011] *OJEU* L 337/9.

Council 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] *OJEU* L 180/60.

Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive) [2013] *OJEU* L 180/96.

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] *OJEU* L 50/1.

Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] *OJEU* L 199/23.

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] *OJEU* L 304/1.

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] *OJEU* L 132/11.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (Eurodac Regulation) [2013] *OJEU* L 180/1.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) (Dublin III Regulation) [2013] *OJEU* L 180/31.

EU legislative proposals

European Commission (2016) *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*. COM(2016) 465, 13 July 2016. Brussels.

European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*. COM(2016) 270, 4 May 2016. Brussels.

European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*. COM(2016) 467, 13 July 2016. Brussels.

European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*. COM(2016) 466, 13 July 2016. Brussels.

Other EU documents

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

European Commission (2015) *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council. Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration*. COM(2015) 490, 29 September 2015. Brussels.

European Commission (2015) *Explanatory note on the “Hotspot” approach*. Available at: <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>.

European Commission (2015) *More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work*. Press Release. 23 September 2015. Brussels. Available at: http://europa.eu/rapid/press-release_IP-15-5699_en.htm.

European Commission (2015) *The Hotspot Approach to Managing Exceptional Migratory Flows*. Factsheet. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf.

European Commission (2016) Commission Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation EU No 604/2013 [2016] OJEU L 340/60.

European Commission (2016) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan on the integration of third country nationals*. COM(2016) 377, 7 June 2016. Brussels.

European Commission (2016) *Communication from the Commission to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union*. COM(2016) 230, 20 April 2016. Brussels.

European Commission (2016) *Communication from the Commission to the European Parliament, the European Council and the Council. Next operational steps in EU-Turkey cooperation in the field of migration*. COM(2016) 166, 16 March 2016. Brussels.

European Commission (2016) *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*. COM(2016) 85, 10 February 2016. Brussels.

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

European Commission (2016) *The Dublin System*. Factsheet. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet_-_the_dublin_system_en.pdf.

European Commission (2016) *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*. COM(2016) 197, 6 April 2016. Brussels.

European Council (2015) Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. *OJEU* 2015 L 239/146.

European Council (2015) Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. *OJEU* 2015 L 248/80.

European Council (2016) *EU-Turkey statement, 18 March 2016*. Press release 144/16. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>.

The Hague Programme: strengthening freedom, security and justice in the European Union [2005] *OJEU* C 53/1.

Stockholm Programme: an open and secure Europe serving and protecting citizens [2010] *OJEU* C 115/1.

Case-law

CJEU 4 March 2010 *Chakroun* (C-578/08)

CJEU 21 December 2011 *M.E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-493/10)

CJEU 21 December 2011 *N.S. v. Secretary for the Home Department* (C-411/10)

CJEU 9 November 2012 *Cimade and GISTI* (C-179/11)

CJEU 19 December 2012 *El Kott* (C-364/11)

CJEU 27 February 2014 *Saciri and Others* (C-79/13)

CJEU C-391/16 (pending)

ECtHR 21 January 2011 *M.S.S. v. Belgium and Greece* (30696/09)

ECtHR 23 February 2012 *Hirsi Jamaa and Others v. Italy* (27765/09)

ECtHR 31 March 2011 *Nowak v. Ukraine* (60846/10)

ECtHR 14 March 2017 *Ilias and Ahmed v. Hungary* (47287/15)

Secondary sources

All the websites referenced were last accessed on 29 April 2018.

Actionaid (2016) Separated. *The challenges of relocation and family reunification for refugees arriving in Greece*. Available at:

http://actionaid.org/sites/files/actionaid/aa_relocation_reunification_report_eng.pdf.

Adviescommissie voor Vreemdelingenzaken (2015) *Sharing responsibility. A proposal for a European Asylum System based on solidarity*. Available at: <https://acvz.org/wp-content/uploads/2016/03/Sharing-responsibility.pdf>.

Adviescommissie voor Vreemdelingenzaken (2018) *Op zoek naar veilige(r) landen. Onderzoek naar beweegredenen van asielzoekers*. Available at: https://acvz.org/wp-content/uploads/2018/02/WEB_107663-veiligere_landen.pdf

Amnesty International (2016) *Hotspot Italy. How EU's flagship approach leads to violations of refugee and migrants rights*. Available at:

<https://www.amnesty.org/download/Documents/EUR3050042016ENGLISH.PDF>.

Amnesty International (2016) *Tackling the global refugee crisis: from shirking to sharing responsibility*.

Available at: <https://www.amnesty.org/download/Documents/POL4049052016ENGLISH.PDF>.

Amnesty International (2016) *The human rights risks of external migration policies*. Available at:

<https://www.amnesty.org/download/Documents/POL3062002017ENGLISH.PDF>.

Amnesty International (2016) *The Proposed Dublin Reform. Position Paper*. Available at:

www.amnesty.eu/content/assets/AI_position_paper_on_Dublin_IV_proposal.pdf.

Amnesty International (2016) *The Proposed EU Resettlement Framework. Position Paper*. Available at:

www.amnesty.eu/content/assets/AI_position_paper_on_EU_resettlment_framework_proposal.pdf.

Amnesty International (2017) *A perfect storm: the failure of European policies in the Central Mediterranean*. Available from:

<https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>.

Amnesty International (2017) *The Proposed Asylum Procedures Regulation. Position Paper*. Available at:

http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf.

Ansems de Vries L, Carrera S and Guild E (2016) *Documenting the Migration Crisis in the Mediterranean. Spaces of Transit, Migration Management and Migrant Agency*. Centre for European Policy Studies.

Paper no. 94. Available at: <https://www.ceps.eu/publications/documenting-migration-crisis-mediterranean-spaces-transit-migration-management-and>.

Bacon L (2016) To What Extent Can the Right to Asylum Be Limited by a State's Sovereign Right to Control Its Borders? A Comparative Assessment of the Lawfulness of European National Asylum Law and Procedure. *Auckland University Law Review* 22: 69-105.

Battjes H and Brouwer ER (2015) The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and ECtHR by National Courts. *Review of European Administrative Law* 8(2): 183-214.

Battjes H et al. (2016) *The Crisis of European Refugee Law: Lessons from Lake Success*. Preadvies CJV. Available at: <http://christenjuristen.nl/wp-content/uploads/2016/05/H.-Battjes-E.-Brouwer-L.-Slingenberg-T.-Spijkerboer-The-Crisis-of-European-Refugee-Law.pdf>.

Bauloz C et al. (eds.) (2015) *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Leiden: Koninklijke Brill NV.

Becker U and Hagn N (2016) *Reform of the European Asylum System: Why Common Social Standards are Imperative*. CESifo DICE Report 14(4): 21-25. Available at: <https://www.cesifo-group.de/DocDL/dice-report-2016-4-becker-hagn-december.pdf>.

Boeles P (2017) Non-refoulement: is part of the EU's Qualification Directive invalid? *EU Law Analysis*. Available at: <http://eulawanalysis.blogspot.nl/search?q=boeles>.

Boeles P et al. (2014) *European Migration Law*. Mortsels: Intersentia. 2nd edition.

Brekke JP and Brochmann G (2014) Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation. *Journal of Refugee Studies* 28(2): 145-162.

Bruno GC, Palombino FM and Amoroso D (2016) *Migration and Development: Some Reflections on Current Legal Issues*. Rome: CNR edizioni.

Capicchiano Young S (2017) Dublin IV and EXCOM: Aspirational Blunders and Illusive Solidarity. *European Journal of Migration and Law* 19: 370-395.

Carrera S and Den Hertog L (2016) *A European Border and Coast Guard: What's in a name?* Centre for European Policy Studies. Paper no. 88. Available at: <https://www.ceps.eu/publications/european-border-and-coast-guard-what's-name>.

Carrera S and Gros D (2015) *No need for walls to equitably distribute the refugees*. Centre for European Policy Studies. Commentary. Available at: <https://www.ceps.eu/publications/no-need-walls-equitably-distribute-refugees>.

Carrera S and Guild E (2015) *Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU*. Centre for European Policy Studies. Policy Brief no. 334. Available at: <https://www.ceps.eu/publications/can-new-refugee-relocation-system-work-perils-dublin-logic-and-flawed-reception>.

Carrera S and Guild E (2016) *EU-Turkey plan for handling refugees is fraught with legal and procedural challenges*. Centre for European Policy Studies Commentary. Available at: <https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges>.

Carrera S and Lannoo K (2015) *Treat the root causes of the asylum crisis, not the symptoms*. Centre for European Policy Studies. Commentary. Available at: <https://www.ceps.eu/publications/treat-root-causes-asylum-crisis-not-symptoms>.

Carrera S et al. (2017) *The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?* Centre for European Policy Studies. Task Force Report. Available at: <https://www.ceps.eu/publications/european-border-and-coast-guard-addressing-migration-and-asylum-challenges>.

Carrera S et al. (2015) *The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities*. Centre for European Policy Studies. Essay no. 20. Available at: <https://www.ceps.eu/publications/eu's-response-refugee-crisis-taking-stock-and-setting-policy-priorities>.

Carrera S, Gros D and Guild E (2015) *What priorities for the new European agenda on migration?* Centre for European Policy Studies. Commentary. Available at: <https://www.ceps.eu/publications/what-priorities-new-european-agenda-migration>.

Casolari F (2016) The EU's hotspot approach to managing the migration crisis: a blind spot for international responsibility? In: Conforti B, Ferrari Bravo L, Francioni F, Ronzitti N, Sacerdoti G and Pavoni R (eds.) *The Italian Yearbook of International Law 25 (2015)*. Leiden: Brill Nijhoff, 109-134.

Chetail V (2016) Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System. *European Journal of Human Rights* 5: 584-602.

Chetail V, De Bruycker P and Maiani F (eds.) (2016) *Reforming the Common European Asylum System. The New European Refugee Law*. Leiden: Koninklijke Brill NV.

Consortium of Migrants Assisting Organizations in the Czech Republic (2016) *Position paper on the proposed reform of the Common European Asylum System*. Available at: http://migraceonline.cz/doc/CEAS_position_paper_EN.pdf.

Constant AF and Zimmermann KF (2016) *Towards a New European Asylum Policy that Works*. CESifo DICE Report 14(4): 3-8. Available at: <http://www.cesifogroup.info/DocDL/dice-report-2016-4-constant-zimmermann-december.pdf>.

Costello C and Mouzourakis M (2014) Reflections on reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough? *Asiel&Migrantenrecht* 10: 404-411.

Crépeau F and Purkey A (2016) *Facilitating Mobility and Fostering Diversity. Getting EU Migration Governance to Respect the Human Rights of Migrants*. Centre for European Policy Studies. Paper no. 92. Available at: <https://www.ceps.eu/publications/facilitating-mobility-and-fostering-diversity-getting-eu-migration-governance-respect>.

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

Danish Refugee Council (2017) *Danish Refugee Council's position on the reform of the Dublin system*. Available at: https://drc.ngo/media/3717013/drc-policy-paper_-drcs-postiion-on-the-reform-of-the-dublin-system.pdf.

De Bruycker P (2017) A Happy New Year for Migration and Asylum Policy? A Critical Review of the Legal and Policy Developments in 2016 in Relation to the Crisis of the European Union. *EU Migration Law Blog*. Available at: <http://eumigrationlawblog.eu/a-happy-new-year-for-migration-and-asylum-policy/>.

Den Heijer M, Rijpma J and Spijkerboer TP (2016) Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System. *Common Market Law Review* 53: 607-642.

Di Filippo M (2016) Dublin 'reloaded' or time for ambitious pragmatism? *EU Migration Law Blog*. Available at: <http://eumigrationlawblog.eu/dublin-reloaded/>.

Di Filippo M (2016) From Dublin to Athens: A Plea for Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures. *International Institute of Humanitarian Law*. Policy Brief. Available at: https://www.researchgate.net/publication/292608372_From_Dublin_to_Athens_A_Plea_for_a_Radical_Rethinking_of_the_Allocation_of_Jurisdiction_in_Asylum_Procedures.

Dutch Council for Refugees (2016) *The implementation of the hotspots in Italy and Greece. A study*. Available at: <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>.

Dutch Council for Refugees and European Council for Refugees and Exiles (2016) *The DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey*. Available at: https://www.ecre.org/wp-content/uploads/2016/07/DCR-and-ECRE-Desk-Research-on-application-of-a-safe-third-country-and-a-first-country-of-asylum-concepts-to-Turkey_May-2016.pdf.

eu-LISA (2017) *Annual report on the 2016 activities of the Eurodac central system, including its technical functioning and security pursuant to Article 40(1) of Regulation (EU) No 603/2013*. Available at: https://www.eulisa.europa.eu/Publications/Reports/2017-088_2016%20Eurodac%20Annual%20Report.pdf.

European Asylum Support Office (2015) *Annual Report on the Situation of Asylum in the European Union 2014*. Available at: <https://www.easo.europa.eu/sites/default/files/public/EASO-Annual-Report-2014.pdf>.

European Asylum Support Office (2015) *EASO Hotspot Operation Plan to Greece. Amendment No 1*. EASO/COS/2015/937. Available at: <https://www.easo.europa.eu/sites/default/files/EASO%20HOTSPOT%20OPERATING%20PLAN%20TO%20GREECE-Amendment%20No%201.pdf>.

European Asylum Support Office (2015) *EASO Hotspot – Relocation Operating Plan to Italy*. EASO/COS/2015/945. Available at: https://www.easo.europa.eu/sites/default/files/EASO%20Hotspot%20Relocation%20Operating%20Plan%20to%20Italy_cleaned_17.12.15.compressed.pdf.

European Asylum Support Office (2015) *The Implementation of Article 15(c) QD in EU Member States*. EASO Practical Guides Series. Available at: https://www.easo.europa.eu/sites/default/files/public/EASO_The-Implementation-of-Art-15c-QD-in-EU-Member-States.pdf.

European Asylum Support Office (2016) *EASO Hotspot Operating Plan to Greece. Amendment No 2*. EASO/COS/2016/391. Available at: <https://www.easo.europa.eu/sites/default/files/20160401%20Hotspot%20Operating%20Plan%20-%20Amendment%20No%202.pdf>.

European Asylum Support Office (2016) *EASO Single Programming Document. Multiannual Programming 2017-2019*. Available at: <https://www.easo.europa.eu/sites/default/files/Annex%203-Work%20Programme%202017-SPD%20Master-151216.pdf>.

European Asylum Support Office (2017) *Annual Report on the Situation of Asylum in the European Union 2016*. Available at: <https://www.easo.europa.eu/sites/default/files/Annual-Report-2016.pdf>.

European Council on Refugees and Exiles (2014) *Mind the gap: an NGO perspective on challenges to accessing protection in the Common European Asylum System*. AIDA Annual Report 2013/2014. Available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/aida_annual_report_2013-2014_0.pdf.

European Council on Refugees and Exiles (2015) *“Safe countries of origin”: A safe concept?* AIDA Legal Briefing no. 3. Available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/AIDA%20Third%20Legal%20Briefing_Safe%20Country%20of%20Origin.pdf.

European Council on Refugees and Exiles (2015) *AIDA Country Report Bulgaria. Third Update. January 2015*. Available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_bulgaria_report_third_update_final_january_2015.pdf.

European Council on Refugees and Exiles (2015) *AIDA Country Report Poland. Third Update. January 2015*. Available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_poland_third_update_final_clean-1.pdf.

European Council on Refugees and Exiles (2015) *Asylum Statistics in the European Union: A Need for Numbers*. AIDA Legal Briefing no. 2. Available at: <https://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-Asylum-statistics-in-the-EU-a-need-for-numbers-August-2015.pdf>.

European Council on Refugees and Exiles (2015) *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*. AIDA Annual Report 2014/2015. Available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf.

European Council on Refugees and Exiles (2015) *ECRE Comments on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*. Available at: https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Dublin-III-Regulation_March-2015.pdf.

European Council on Refugees and Exiles (2015) *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU*. Available at: <http://www.refworld.org/pdfid/5506a3d44.pdf>.

European Council on Refugees and Exiles (2016) *Admissibility, responsibility and safety in European asylum procedures*. Available at: <https://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf>.

European Council on Refugees and Exiles (2016) *ECRE Comments on the Commission Proposal for a Dublin IV Regulation*. Available at: <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>.

European Council on Refugees and Exiles (2016) *ECRE Comments on the Commission Proposal for a Qualification Regulation*. Available at: <https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-QR.pdf>.

European Council on Refugees and Exiles (2016) *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*. Available at: https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf.

European Council on Refugees and Exiles (2016) *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*. Available at: <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf>.

European Council on Refugees and Exiles (2016) *The length of asylum procedures in Europe*. Available at: <https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf>.

European Council on Refugees and Exiles (2016) *The road out of Dublin: reform of the Dublin Regulation. ECRE's overview of the main changes in the proposal to recast the Dublin Regulation, and its recommendations for the Council and European Parliament*. Policy Note 2. Available at: <https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-02.pdf>.

European Council on Refugees and Exiles (2016) *Wrong counts and closing doors: the reception of asylum seekers in Europe*. Available at: <http://www.refworld.org/docid/571dd50d4.html>.

European Council on Refugees and Exiles (2017) *Accelerated, prioritised and fast-track asylum procedures. Legal frameworks and practice in Europe*. AIDA legal briefing. Available at: https://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf.

European Council on Refugees and Exiles (2017) *Debunking the 'safe third country' myth. ECRE's concerns about EU proposals for expanded use of the safe third country concept*. Policy Note 8. Available at: <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf/>.

European Council on Refugees and Exiles (2017) *Principles for fair and sustainable refugee protection in Europe. ECRE's vision for Europe's role in the global refugee protection regime*. Policy Paper 2. Available at: <https://www.ecre.org/wp-content/uploads/2017/04/Policy-Papers-02.pdf>.

European Council on Refugees and Exiles (2017) *Refugee rights subsiding? Europe's two-tier protection regime and its effects on the rights of beneficiaries*. Available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_refugee_rights_subsiding.pdf.

European Council on Refugees and Exiles (2017) *Relocation not procrastination. ECRE's assessment of the obstacles to relocation of asylum seekers from Greece and Italy and its proposals for a continuation of relocation after September 2017*. Policy Note 7. Available at: <https://www.ecre.org/wp-content/uploads/2017/09/Policy-Note-07.pdf>.

European Council on Refugees and Exiles (2017) *The detention of asylum seekers in Europe: constructed on shaky ground?* Available at: https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf.

European Council on Refugees and Exiles (2017) *The Dublin system in 2016. Key figures from selected European countries*. Available at: http://s3.amazonaws.com/ecre/wp-content/uploads/2017/03/27170638/AIDA_2016Update_Dublin.pdf.

European Council on Refugees and Exiles (2017) *The Dublin system in the first half of 2017. Key figures from selected European countries*. Available at: http://www.asylumineurope.org/sites/default/files/aida_halfyear2017update_dublin.pdf.

European Council on Refugees and Exiles (2018) *Making Asylum Numbers Count. ECRE's analysis of gaps and needs for reform in data collection on the Common European Asylum System*. Policy Note 10. Available at: <https://www.ecre.org/wp-content/uploads/2018/01/Policy-Note-10.pdf>.

European Council on Refugees and Exiles (2017) *The concept of vulnerability in European asylum procedures*. Available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_vulnerability_in_asylum_procedures.pdf.

European Council on Refugees and Exiles and European Legal Network on Asylum (2017) *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*. Available at: <https://www.ecre.org/wp-content/uploads/2017/11/Legal-Note-2.pdf>.

European Court of Auditors (2017) *EU response to the refugee crisis: the 'hotspot' approach*. Special Report no 06/2017. Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf.

European Migration Network (2014) *The Organisation of Reception Facilities for Asylum Seekers in different Member States*. Available at: http://emn.ie/files/p_20140207073231EMN%20Organisation%20of%20Reception%20Facilities%20Syntesis%20Report.pdf.

European Migration Network (2017) *2016 Annual Report on Migration and Asylum*. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_apr2016_synthesis_report_final_en.pdf.

European Stability Initiative (2017) *A Rome Plan for the Mediterranean migration crisis. The case for take-back realism*. Available at: <https://www.esiweb.org/pdf/ESI%20-%20Rome%20Plan%20for%20Mediterranean%20-%20Berlin%2019%20June.pdf>.

European Union Agency for Fundamental Rights (2014) *Fundamental rights at land borders: findings from selected European border crossing points*. Available at: <http://fra.europa.eu/en/publication/2014/fundamental-rights-land-borders-findings-selected-european-union-border-crossing>.

European Union Agency for Fundamental Rights (2015) *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*. FRA Focus. Available at: <http://fra.europa.eu/en/publication/2015/fundamental-rights-implications-obligation-provide-fingerprints-eurodac>.

European Union Agency for Fundamental Rights (2016) *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*. FRA Opinion 5/2016. Available at: <http://fra.europa.eu/en/opinion/2016/fra-opinion-hotspots-approach>.

Fargues P and Bonfanti S (2014) *When the best option is a leaky boat: why migrants risk their lives crossing the Mediterranean and what Europe is doing about it*. Migration Policy Centre, European University Institute, Robert Schuman Centre for Advanced Studies. Policy Brief. Available at: <http://cadmus.eui.eu/handle/1814/33271>.

Ferreira N and Kostakopoulou D (eds.) (2016) *The Human Face of the European Union. Are EU Law and Policy Humane Enough?* Cambridge: Cambridge University Press.

Fijnaut C (2015) The Refugee Crisis: The End of Schengen? *European Journal of Crime, Criminal Law and Criminal Justice* 23: 313-332.

Fratzke S (2015) *Not Adding Up. The Fading Promise of Europe's Dublin System*. Migration Policy Institute Europe. Available at: <https://www.migrationpolicy.org/sites/default/files/publications/MPIe-Asylum-DublinReg.pdf>.

Frelick B, Kysel IM and Podkul J (2016) The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants. *Journal on Migration and Human Security* 4(4): 190-220.

García Andrade P et al. (2015) *EU cooperation with third countries in the field of migration*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 536.469. Available at: [www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU\(2015\)536469_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf).

Garlick MV (2016) *Solidarity Under Strain. Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union*. Radboud University.

Garvey JI (2017) *The Future Legal Management of Mass Migration*. University of San Francisco School of Law. Research Paper no. 2017-13. Available at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035043.

Gatti M (2016) The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2) *EJIL: Talk! Blog of the European Journal of International Law*. Available at: <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>.

Gatti M (2016) The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2) *EJIL: Talk! Blog of the European Journal of International Law*. Available at: <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/>.

Gray H (2013) Surveying the Foundations: Article 80 TFEU and the Common European Asylum System. *Liverpool Law Review* 34(3): 175-193.

Gros D (2018) *Europe's Double Refugee Crisis*. Centre for European Policy Studies. Commentary. Available at: <https://www.ceps.eu/publications/Europe-double-refugee-crisis>.

Guild E (2013) *The right to leave a country*. Council of Europe Commissioner for Human Rights. Issue Paper. Available at: <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510>.

Guild E (2016) *Rethinking Migration Distribution in the EU: Shall we start with the facts?* Centre for European Policy Studies. Essay No. 23. Available at: <https://www.ceps.eu/publications/rethinking-migration-distribution-eu-shall-we-start-facts>.

Guild E and Carrera S (2016) *Rethinking asylum distribution in the EU: Shall we start with the facts?* Centre for European Policy Studies. Commentary. Available at:
<https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts>.

Guild E et al. (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 509.989. Available at:
www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf.

Guild E et al. (2015a) *Enhancing the Common European Asylum System and Alternatives to Dublin*. Centre for European Policy Studies. Paper no. 83. Available at:
<https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin>.

Guild E et al. (2015b) *Enhancing the Common European Asylum System and alternatives to Dublin*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 519.234. Available at:
[www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf).

Guild E et al. (2015c) *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*. Centre for European Policy Studies. Paper No. 77. Available at: <https://www.ceps.eu/publications/new-approaches-alternative-avenues-and-means-access-asylum-procedures-persons-seeking>.

Guild E et al. (2015d) *The 2015 Refugee Crisis in the European Union*. Centre for European Policy Studies. Policy Brief No. 332. Available at: <https://www.ceps.eu/publications/2015-refugee-crisis-european-union>.

Guild E et al. (2015e) *What is happening to the Schengen borders?* Centre for European Policy Studies. Paper no. 86. Available from: <https://www.ceps.eu/publications/what-happening-schengen-borders>.

Guild E, Costello C and Moreno-Lax V (2017) *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 583.132. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf).

Hailbronner K and Thym D (eds.) (2016) *EU Immigration and Asylum Law. A Commentary*. München: C.H. Beck.

Hathaway JC and Gammeltoft-Hansen T (2014) *Non-Refoulement in a World of Cooperative Deterrence*. Law & Economics Working Papers. Paper 106. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1216&context=law_econ_current.

Hatton TJ (2015) *Asylum Policy in the EU: the Case for Deeper Integration*. CESifo Economic Studies 61(3-4): 605-637.

Hatton TJ (2016) *The Common European Asylum System – the Role of Burden Sharing*. CESifo DICE Report 14(4): 9-13. Available at: <https://www.cesifo-group.de/DocDL/dice-report-2016-4-hatton-december.pdf>.

Hilpold P (2017) *Quotas as an Instrument of Burden-Sharing in International Refugee Law – The Many Facets of an Instrument Still in the Making*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910825.

Hristova T, Apostolova R and Fiedler M (2015) On some methodological issues concerning anti-Dublin politics. *Movements, Journal for critical migration and border regime studies* 1(1): 1-17.

Hruschka C (2014) The (reformed) Dublin III Regulation – a tool for enhanced effectiveness and higher standards of protection? *ERA Forum* 15(4): 469-483.

Hruschka C (2016) Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation. *ERA Forum* 17(4): 521-534.

Iben Jensen U (2014) *Humanitarian visas: option or obligation?* European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 509.986. Available at:

www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU%282014%29509986_EN.pdf.

Ippolito F (2013) The Contribution of the European Courts to the Common European Asylum System and Its Ongoing Recast Process. *Maastricht Journal of European and Competitive Law* 20(2): 261-281.

Jurado E et al. (2016) *Evaluation of the Implementation of the Dublin III Regulation*. Study prepared by ICF International for the European Commission. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf.

Karageorgiou E (2016) Solidarity and sharing in the Common European Asylum System: the case of Syrian Refugees. *European Politics and Society* 17(2): 196-214.

Katz S (2017) A More Acceptable Solution: The Proposed European Union Agency of Asylum and Refugees. *Case Western Reserve Journal of International Law* 49: 303-329.

Klaassen M (2016) The Commission proposal on the recast of the Dublin Regulation: A backward step? *Leiden Law Blog*. Available at: <http://leidenlawblog.nl/articles/the-commission-proposal-on-the-recast-of-the-dublin-regulation-a-backward-s>.

Küçük E (2016) The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing? *European Law Journal* 22: 448-469.

Lassen CK (2017) *Reforming the Common European Asylum Policy (CEAS)*. Europeum Institute for European Policy. Policy Paper. Available at: <http://www.europeum.org/en/articles/detail/1500/reforming-the-common-european-asylum-policy-ceas>.

Maas S et al. (2015) *Evaluation of the Dublin III Regulation*. Study prepared by ICF International for the European Commission. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf.

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

Maiani F (2016) *The Reform of the Dublin III Regulation*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 571.360. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).

Matera C and Taylor A (eds.) (2014) *The Common European Asylum System and human rights: enhancing protection in times of emergencies*. Centre for the Law of EU External Relations. Working papers 2014/7. Available at: <https://research.vu.nl/ws/portalfiles/portal/1158877>.

Médecins Sans Frontières (2016) *Obstacle Course to Europe. A Policy-Made Humanitarian Crisis at EU Borders*. Available at:

https://www.doctorswithoutborders.org/sites/usa/files/2016_01_msf_obstacle_course_to_europe_-_final_-_low_res.pdf.

Meijers Committee (2015) CM1515 *Note on an EU list of safe countries of origin. Recommendations and amendments*. Available at: http://www.commissie-meijers.nl/sites/all/files/cm1515_an_eu_list_of_safe_countries_of_origin.pdf.

Meijers Committee (2016) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final)*. Available at: http://www.commissie-meijers.nl/sites/all/files/cm1614_comments_.pdf.

Meijers Committee (2018) CM1805 *Note on the proposal for the Procedures Regulation and Dublin Regulation*. Available at: http://www.commissie-meijers.nl/sites/all/files/cm1805_note.pdf.

Menéndez AJ (2016) The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration. *European Law Journal* 22(4): 388-416.

Mercator Dialogue on Asylum and Migration (2017) *Sharing responsibility for refugees and expanding legal immigration*. 2017 Medam Assessment Report on Asylum and Migration Policies in Europe. Available at: <http://www.medam-migration.eu/wp-content/uploads/2017/05/2017-MEDAM-Assessment-Report.pdf>.

Minderhoud PE and Zwaan KM (eds.) (2016) *The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Oisterwijk: Wolf Legal Publishers.

Mitsilegas V (2014) Solidarity and Trust in the Common European Asylum System. *Comparative Migration Studies* 2(2): 181-202.

Morano-Foadi S (2017) Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures. *European Journal of Migration and Law* 19: 223-254.

Moreno-Lax V (2015) *Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward*. Red Cross EU Office. Available at: <https://redcross.eu/latest-news/ueope-in-crisis-facilitating-access-to-protection-discarding-offshore-processing-and-mapping-alternatives-for-the-way-forward>.

Moreno-Lax V (2017) *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*. Oxford: Oxford University Press.

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*. University of Oxford, Refugee Studies Centre. Working Paper Series No. 105. Available at: <https://www.rsc.ox.ac.uk/files/files-1/wp105-we-need-to-talk-about-dublin.pdf>.

Nakache D and Losier J (2017) The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind? *E-International Relations*. Available at: <http://www.e-ir.info/2017/07/25/the-european-union-immigration-agreement-with-libya-out-of-sight-out-of-mind/>.

Nancheva N (2015) The Common European Asylum System and the failure to protect: Bulgaria's Syrian refugee crisis. *Southeast European and Black Sea Studies* 15(4): 439-455.

Neville D, Sy S and Rigon A (2016) *On the frontline: the hotspot approach to managing migration*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 556.942. Available at: [www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU\(2016\)556942_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf).

Papageorgiou I (2017) *International protection in Greece*. Background information for the LIBE Committee delegation to Greece 22-25 May 2017. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 583.145. Available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/583145/IPOL_STU\(2017\)583145_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583145/IPOL_STU(2017)583145_EN.pdf).

Peers S (2016) The draft EU/Turkey deal on migration and refugees: is it legal? *EU Law Analysis*. Available at: <http://eulawanalysis.blogspot.nl/2016/03/the-draft-euturkey-deal-on-migration.html>.

Peers S and Roman E (2016) The EU, Turkey and the Refugee Crisis: What could possibly go wrong? *EU Law Analysis*. <http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

Peers S et al. (eds.) (2015) *EU Immigration and Asylum Law (Text and Commentary)*. Volume 3: EU Asylum Law. Leiden: Koninklijke Brill NV. 2nd revised edition.

Pichou M (2016) Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights. *Critical Quarterly for Legislation and Law* 2: 114-131.

Rapoport H and Fernández-Huertas Moraga J (2014) *Tradable Refugee-admission Quotas: a Policy Proposal to Reform the EU Asylum Policy*. European University Institute, Robert Schuman Centre for Advanced Studies, Migration Policy Centre Working Paper 2014/101. Available at: http://cadmus.eui.eu/bitstream/handle/1814/33097/RSCAS_2014_101.pdf.

Red Cross (2016) *Reforming the Common European Asylum System in a spirit of humanity and solidarity*. Position paper. Available at: <https://redcross.eu/positions-publications/reforming-the-common-european-asylum-system-in-a-spirit-of-humanity-and-solidarity>.

Reneman AM (2014) *EU asylum procedures and the right to an effective remedy*. Oxford and Portland, OR: Hart Publishing.

Rijken C (2017) Threats, Monsters and the 'Refugee Crisis'. *Tilburg Law Review* 22: 267-275.

Rodrigues PR (2016) EU-Turkey deal: good on paper, bad in practice. *Leiden Law Blog*. Available at: <http://leidenlawblog.nl/articles/eu-turkey-deal-good-on-paper-bad-in-practice>.

Rosenfeldt H (2017) *The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944116.

Savino M (2016) The Refugee Crisis as a Challenge for Public Law: The Italian Case. *German Law Journal* 17(6): 981-1004.

Singleton A (2016) *Migration and Asylum Data for Policy-making in the European Union. The problem with numbers*. Centre for European Policy Studies. Paper No. 89. Available at: <https://www.ceps.eu/publications/migration-and-asylum-data-policy-making-european-union---problem-numbers>.

Slingenberg CH (2014) *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*. Oxford: Hart Publishing.

Spijkerboer TP (2016) Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths? *University of Oxford Border Criminologies Blog*. Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>.

Spijkerboer TP (2017) *Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice*. Available at: <http://thomasspijkerboer.eu/wp-content/uploads/2017/10/Bifurcation-DEF-2.pdf>.

Stevens D (2016) The humaneness of EU asylum law and policy. In: Ferreira N and Kostakopoulou D (eds.) *The Human Face of the European Union: are EU law and policy humane enough?* Cambridge: Cambridge University Press, 235-259.

Številová Z and Rozumek M (2016) How To Reform The Common European Asylum System: A View from East-Central Europe. *Social Europe*. Available at: <https://www.socialeurope.eu/reform-common-european-asylum-system-view-east-central-europe>.

Thym D (2017) Pitfalls of the Law, Politics and Administrative Practices in the Reform of the Common European Asylum System. *EU Migration Law Blog*. Available at: <http://eumigrationlawblog.eu/pitfalls-of-the-law-politics-and-administrative-practices-in-the-reform-of-the-common-european-asylum-system/>.

Tsourdi E (2017) Hotspots and EU Agencies: Towards an integrated European administration? *EU Migration Law Blog*. Available at: <http://eumigrationlawblog.eu/hotspots-and-eu/>.

Tubakovic T (2016) The Dublin IV Recast: A Missed Opportunity. *Refugee Research Blog*. Available at: <http://refugeereseearchblog.org/the-dublin-iv-recast-a-missed-opportunity/>.

Tubakovic T and Murray P (2017) Has the EU really solved its refugee crisis? *Refugee Research Blog*. Available at: <http://refugeereseearchblog.org/has-the-eu-really-solved-its-refugee-crisis/>.

Ulusoy O and Battjes H (2017) *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*. VU Migration Law Working Paper Series No. 15. Available at: https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf.

United Nations High Commissioner for Refugees (1992) *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. Available at: <http://www.unhcr.org/4d93528a9.pdf>.

United Nations High Commissioner for Refugees (2002) *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and /or its 1967 Protocol relating to the Status of Refugees*. HCR/GIP/02/02. Available at: <http://www.unhcr.org/3d58de2da.pdf>.

United Nations High Commissioner for Refugees (2015) *Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens*. Available at: <http://www.refworld.org/docid/5823348c4.html>.

United Nations High Commissioner for Refugees (2015) *Over one million sea arrivals reach Europe in 2015*. Available at: <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>.

United Nations High Commissioner for Refugees (2016) *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*. Available at: <http://www.refworld.org/docid/58385d4e4.html>.

United Nations High Commissioner for Refugees (2016) *Legal considerations on the return of asylum-seekers and refugees from Greece Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*. Available at: <http://www.refworld.org/docid/56f3ee3f4.html>.

United Nations High Commissioner for Refugees (2016) *Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum-Seekers and Migrants*. Available at: <http://www.refworld.org/docid/56ebf31b4.html>.

United Nations High Commissioner for Refugees (2016) *UNHCR comments on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270*. Available at: <http://www.refworld.org/docid/585cdb094.html>.

United Nations High Commissioner for Refugees (2017a) *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*. Available at: <http://www.refworld.org/docid/59d5dcb64.html>.

United Nations High Commissioner for Refugees (2017b) *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM(2016) 465*. Available at: <http://www.refworld.org/docid/59a6d6094.html>.

United Nations High Commissioner for Refugees (2018) *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016) 466*. Available at: <http://www.refworld.org/docid/5a7835f24.html>.

Vanheule D, Van Selm J and Boswell C (2011) *The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 453.167. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET\(2011\)453167_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf).

Wagner M and Baumgartner P (2017) *Past, Present and Future Solidarity: Which Relocation Mechanisms Work and Which Do Not?* International Centre for Migration Policy Development. Policy Brief. Available at: https://www.icmpd.org/fileadmin/user_upload/Policy_Brief_Relocation-20062017_FINAL.pdf.

Wagner M and Kraler A (2014) *An Effective Asylum Responsibility-Sharing Mechanism*. International Centre for Migration Policy Development. ICMPD Asylum Programme for Member States, Thematic Paper. Available at: https://www.icmpd.org/fileadmin/ICMPD-Website/ICMPD_General/Publications/2014/ICMPD_TP_Responsibility_Sharing_October_FINAL.pdf.

Wagner M and Kraler A (2016) *International Refugee Protection and European Responses*. International Centre for Migration Policy Development. Working Paper 12. Available at: https://www.icmpd.org/fileadmin/user_upload/Wagner_Kraler_VMC_IntProt_WP_12_15112016-FINAL.pdf.

Wagner M, Baumgartner P et al. (2016) *The Implementation of the Common European Asylum System*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 556.953. Available at: [www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU\(2016\)556953_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf).

Webber F (2015) 'Hotspots' for asylum applications: some things we urgently need to know. *EU Law Analysis*. Available at: <http://eulawanalysis.blogspot.nl/2015/09/hotspots-for-asylum-applications-some.html>.

Wendel M (2016) The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System. *German Law Journal* 17(6): 1005-1032.

Williams R (2015) *Beyond Dublin. A Discussion Paper for the Greens / EFA in the European Parliament*. Available at: https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Policy_papers/Migration_asylum/Beyond_Dublin_paper_final.pdf.

Zaun N (2016) Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making. *Journal of European Public Policy* 23(1): 136-154.