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

Hans van Oort, Hemme Battjes and Evelien Brouwer

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Abstract

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. The baseline study examines in particular the EU wide responses to the high influx of refugees, the hotspot approach, and the implementation and effectiveness of the Dublin system with regard to the determination of the responsible state for an asylum application. Furthermore, this study provides an overview of the main comments and evaluations dealing with the Procedure Directive, the Qualification Directive, and the Reception Directive, also taking into account new proposals of the European Commission.

Keywords: Common European Asylum System, harmonisation, Dublin Regulation, Procedure Directive, Reception Directive, Qualification Directive, hotspot approach

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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 NGOs 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.

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[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

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2 Boeles P et al. (2014) *European Migration Law*. Mortsel: 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.

13 Article 63 TEC.

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 Regulation[16] 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 Directive[18] and the Asylum Procedures Directive.[19] The instruments of first phase of the CEAS were criticised for their failure to achieve 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 Programme[22] 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 Regulation[29] and the Eurodac Regulation.[30]

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[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.
[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.

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 decisions[33] 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 or 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]

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.

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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.

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 Regulation[38] came into effect in January 2014. The countries participating in the Dublin system consist of all EU Member States[39] 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

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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).

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.

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

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[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.

[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.

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 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 directives[58] 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

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[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.

[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,

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

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[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.

Statistical data on the operation of the Dublin system have always been incomplete[66] 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 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 detention[71] 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

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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.

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.*

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]

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

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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.

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.

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 exist[86] 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 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

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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
(eds.), 109.

91 Iceland, Liechtenstein, Norway and Switzerland.

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 decisions has not been made, asylum seekers are kept in limbo.[98] After acceptance of the transfer request

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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.

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 requests issued. In 2015[101] 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.

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[99] UNHCR (2017a), 147.

[100] UNHCR (2017a), 156.

[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.

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]

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 efficiency[116] of the Dublin system and increases reception and return or readmission costs.[117]

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[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.

[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.

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 securitisation of borders rather than the protection of individuals[124] 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 Regulation[126] 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

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[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.
[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.

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]

Transfers

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[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.

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

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[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.

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]

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

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[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.

[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 ECrtHR by National Courts. *Review of European Administrative Law* 8(2): 11;

of the 'European Agenda on Migration'[151] and introduced a scheme for relocation with a key for division based on population size, gross domestic pro, 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 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

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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.

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.

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 relief 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 proposal[166] 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]

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[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*

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 procedure[170] and 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 procedure[172] and the scope of the appeal against transfer decisions[173] is limited to the assessment of risks of inhuman or degrading treatment[174] or to infringements of the family provisions.[175] Finally, the possibility of transfer to third countries[176] 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 19[180] 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 scope[182] 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

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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*

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 wihtin 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

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]

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 Directive[185] (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 access[191] 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

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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.

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 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.

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[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.

[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.

2.2.1 Access to the territory

The current underlaying 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 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

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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).

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.

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 legislation[211] 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]

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

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[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.

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 goal[223] 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]

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[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.

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.

Border procedures

Member States may provide for procedures at the border or transit zones for deciding on the admissibility[227] of an applicant or the substance[228] 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 guarantees[234] 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

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

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]

Accelerated and prioritized procedures

The Procedures Directive enables the application of special procedures to deal with specific caseloads that 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

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[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.
[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*

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.

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

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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*.

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

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

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 the purpose of the examination of

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[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.

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

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[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.

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 concept[272] 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 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 rom 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

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[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.

[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).

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]

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

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[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.

[286] ECRE (2014) AIDA Annual Report 2013/2014, 57. Fore 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.

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 procedure[292] 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] 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

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[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.
[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.

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 itself[306] (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 EU[310] 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 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

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[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.

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 concept[314] 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 concept[319] 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

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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.

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 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]

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[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.
[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

- 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]

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

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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.

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

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 hotspots[337] 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 Commission[344], there are five active hotspots in Italy[345] 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 keen to point to

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[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.

the significant increase in fingerprinting rates, ultimately reaching 100% in both the Greek[349]and Italian[350] 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 refoulement[354] 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% threshold[358] 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]

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[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.*

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 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 Convention[371] 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

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[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.

[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.*

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 Directive[376] 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]

- 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

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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 definition of persons eligible for subsidiary protection. The latter is only applicable if those persons did not qualify for refugee status.

[380] 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:

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.

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

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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.

[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

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 differences[391] still exist in the treatment of the two types of beneficiaries of international protection with respect to residence permits[392] 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 society[394] 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

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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.

compliance with integration conditions if requested by Member States.[400] The limited benefits in terms of residence permits and social welfare 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 members[410] 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 coherence[412] of the European

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

[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.

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 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) QD[423] is considered

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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.

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

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 Convention[428] however requires protection to come from a State and therefore this provision in the Directive seems to ignore the 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

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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.

[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.

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 for revoking, ending or refusing to renew refugee status for reasons of criminal behaviour or a security risk, is

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[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.

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 CEAS[446] 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]

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[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.

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]

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]

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[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 subsiding? 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
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.

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 Directive[462] 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 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]

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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.

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.

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 persons 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 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

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[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.

[474] *Ibid.*, 4-5.

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 Directive[479]. 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 permits[481] 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

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[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.

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] 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 guarantees[489] surrounding this assessment, the internal protection concept itself is not 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]

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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.

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).

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 Directive[497] 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.

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

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]

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] employment[510] 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 previous[515] 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

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[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.
[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.

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]

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

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[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 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.

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 areas[527] or when housing capacities normally available are temporarily exhausted[528] 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 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

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[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.
[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.

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 applicants[544] may be in need of special reception[545] (and procedural[546]) 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.

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[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.

The recast Asylum Procedures Directive defines applicants in need of special procedural guarantees[548] in terms of their reduced ability to benefit from the rights and comply with the obligations under the 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 persons[551] 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 ECtHR[553] 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

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

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.

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 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

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[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.

[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.

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

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 improvement[573] of the 2013 revision and the legal regime of detention

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[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.

[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.

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

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[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.

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. 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 Directive[589] 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]

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583 *Ibid.*, 521.

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.

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 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

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[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.

[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.

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 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

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[601] Wagner M and Kraler 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.

[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.

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 countries[617] have formal identification mechanisms in 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

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[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.

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

[619] *Ibid.,* 22-24.

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

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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.

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 (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 un accompanied 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

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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 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.

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, 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

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[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).

[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.

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 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 Regulation[652] as an example warranting earlier labour market access.

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[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.
[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.

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 applicant[656] or because they are punitive[657] 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 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

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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.

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.

authorities and does not contribute to a harmonised approach in the EU.[662] In view of the far-reaching consequences[663] 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 accompanied[665] and unaccompanied[666] 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]

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[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.

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