BERND PARUSEL

Pieces
of the
puzzle

MANAGING MIGRATION
IN THE EU

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The European Liberal Forum (ELF) is the official political foundation of the European Liberal Party, the ALDE Party. Together with 46 member organisations, we work all over Europe to bring new ideas into the political debate, to provide a platform for discussion, and to empower citizens to make their voices heard.

ELF was founded in 2007 to strengthen the liberal and democrat movement in Europe. Our work is guided by liberal ideals and a belief in the principle of freedom. We stand for a future-oriented Europe that offers opportunities for every citizen. ELF is engaged on all political levels, from the local to the European.

We bring together a diverse network of national foundations, think tanks and other experts. At the same time, we are also close to, but independent from, the ALDE Party and other Liberal actors in Europe. In this role, our forum serves as a space for an open and informed exchange of views between a wide range of different actors.

About Fores

Fores – Forum for reforms, entrepreneurship and sustainability – is a green and liberal think tank. We are a non-profit foundation that wants to renew the debate in Sweden and Europe with a belief in entrepreneurship and creating opportunities for people to shape their own lives. Market-based solutions to climate change and other environmental challenges, the long-term benefits of migration and a welcoming society, the gains of increased levels of entrepreneurship, the need for a modernization of the welfare sector and the challenges of the rapidly changing digital society – these are some of the issues we focus on. We act as a link between curious citizens, opinion makers, entrepreneurs, policymakers and researchers.

About the author

Bernd Parusel is a migration and asylum expert. He studied political science in Germany and Italy and holds a PhD from the Institute for Migration and Intercultural Studies (IMIS) of the University of Osnabrück.

He is currently on leave from the Swedish Migration Agency, where he has been responsible for studies and reports in the framework of the European Migration Network (EMN). He has also served as an adviser and secretary of a Government-appointed cross-party commission of inquiry, tasked with examining Sweden's future migration policy. Bernd has previously worked at the Swedish Migration Studies Delegation (DELMI) and as a research associate at the Federal Office for Migration and Refugees in Germany, as well as a lecturer of European migration and asylum policy at the University of Erlangen-Nuremberg. He has published articles and book chapters on asylum, immigration and integration policies in Sweden, unaccompanied minors, circular migration and the development of the Common European Asylum System.

Foreword

For the last two decades, the idea of a Common European Asylum System (CEAS) has been discussed in the EU[1]. With conflicts and war rendering countries uninhabitable and forcing people to flee their homes, the need for a well-managed European migration system is more urgent than ever. A common system is also desirable as it would result in a more sustainable and robust European response to heavy migration pressures. At the time of producing this study, a new EU Pact on migration and asylum is being negotiated. The question is if this will be the future of a true European system or if the Member States of the EU will continue to struggle to reach a consensus regarding responsibility-sharing and other mechanisms needed for a joint system to function.

It is clear that there are different political wills and diverging views on the topic of migration and asylum in the EU. On the one hand, there are relatively liberal governments who are inclined to accept asylum seekers, view the right to asylum as a fundamental right and see the benefits for society of a managed migration. On the other, there are more conservative or reactionary governments, that claim that high levels of asylum seekers are a threat to internal order and security and would like migration to Europe to cease. Regardless, migration is an inevitable phenomenon, and it is necessary for the EU to reach an

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1 European Commission. *Common European Asylum System*. [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en]

agreement. A sustainable and effective asylum system is key in securing humanitarian values while migration is also furthering economic and societal progress[2]. Ylva Johansson, EU Commissioner for Home Affairs, said it herself: "(...)*migration is normal. Migration has always been there; migration will always be there. Migration is part of what makes our continent prosper*"[3]. It is through a liberal agenda that we can view migration as a safeguard for refugees and a guarantor of the right to asylum, as well as a tool to improve our open world by acting as a catalyst for economic growth. However, one of the prominent shortcomings of the common European system has been the lack of foresight. Something that we now must shift our focus to - integration or return.

ELF (European Liberal Forum) and FORES are publishing this study in the hope of contributing a factually anchored account of how we can reach a sustainable and humane European asylum system that guarantees the right to asylum. The study explores the problems of the existing European asylum system, identifies core issues to be resolved and proposes potential future scenarios. Through looking at the past and the present, this study aims to offer possible liberal solutions to a difficult issue. We hope to influence the political debate in a positive spirit and push for a more liberal agenda on migration and asylum.

Therese Lindström
Director of the Migration & Integration Programme
Fores

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2   European Investment Bank (2016). *Migration and the EU: Challenges, opportunities, the role of EIB*. [https://www.eib.org/attachments/migration_and_the_eu_en.pdf]

3   EU, LIBE meeting, 24 September 2020. [https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-opening-statement-libe-debate-new-pact-asylum-and-migration_en]

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Introduction

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Over the past ten years (2010-2019), the Member States of the European Union have provided protection to at least 940,000 people who had fled the war in Syria and arrived in the EU to apply for asylum.[4] In total, over 2.3 million asylum seekers from a diverse range of countries, predominantly in the Middle East, Asia, and Africa, were granted a right to stay in the EU over these years. [5]

However, instead of taking pride in this achievement and trying to build on it, European societies and the political leaders of the EU and its Member States are today deeply divided over asylum, refugees and migrants. After strong inflows of people seeking protection during the so-called "European refugee crisis" in 2015, proposals to reform and strengthen the so-called Common European Asylum System (CEAS)[6] reached a standstill as a result of these divisions. Instead, one Member State after another has been trying to close its doors, often without coordinating new measures at supranational level. Some Member

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4 This figure was calculated on the basis of Eurostat data on total positive decisions (first instance) on asylum applications by Syrian nationals. The true number of Syrians who received protection in the EU is probably considerably higher because the figure quoted does not include resettled refugees, people who received protection after appealing a negative first-instance decision, or individuals who were allowed to stay although they did not qualify for any form of international protection. Source: Eurostat, First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded), extracted on 24 August 2020, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfsta&lang=en.
5 Eurostat, First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded), extracted on 24 August 2020, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfsta&lang=en.
6 The current so-called CEAS contains both EU Directives to be implemented in the national legislation and EU Regulations that are in direct effect. The CEAS is presented in detail below.

States lowered their protection standards and tried to become more unattractive as destinations for people in need (EMN 2017b; Parusel 2016). Others have erected fences or other physical barriers (Dunai 2017), obstructed private search-and-rescue missions at sea or tried to close their ports to vessels carrying migrants and refugees (Cusumano and Gombeer 2020). Both at national and at EU level, controversial agreements have been made with Turkey, Libya and other countries in the EU's vicinity (Collett 2017), and there are allegations of irregular migrants and asylum seekers being pushed back to unsafe third countries in the Aegean and on the Central Mediterranean route (Amnesty International 2020a; Christides et al. 2020). Altogether, progress was mostly made in terms of border control and deterrence strategies, rather than on creating fair and robust asylum systems.

Yet short-term measures and unilateral approaches do not seem to resolve the bigger problem and remove its underlying causes. More people than ever are forcibly displaced by conflict and persecution, and migrants continue to attempt to cross the Mediterranean towards Europe even if this irregular entry route and others have become increasingly dangerous.[7] While only a small fraction of all displaced people in the world attempt to reach Europe, migration pressures on the EU are likely to continue or even intensify due to ongoing or new conflicts and persecution in the EU's vicinity (UNHCR 2020a). Climate change might also play its part (Kraler et al. 2020). This raises the question how the EU and its Member States can deal with irregular migration and asylum in a more credible, sustainable and solutions-oriented manner without compromising the right to asylum and European as well as international values and human rights standards. While we cannot expect that the EU can turn the world into a place where nobody needs to flee any more, at least not in the short run, it certainly can find better policies on asylum and solve at least some of

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7   According to the International Organisation for Migration's *Missing Migrants Project*, almost 63,000 people arrived by sea to Italy, Spain, Malta and Greece between 1 January and the end of October 2020. In the same period, there were more than 90,000 attempted crossings and approximately 770 registered deaths. https://missingmigrants.iom.int.

the long-standing deficits and injustices it is struggling with.

This study aims to contribute to energise the European debate on migration and asylum and help policymakers make decisions founded on research and facts. In short, it asks what's wrong with the Common European Asylum System and how it could be fixed. The idea is to identify the key problems the CEAS faces today, examine why they have so far not been resolved, and explore their consequences. Following from this analysis, the study aims to present scenarios for future developments to clarify the choices political leaders can make, and to highlight desirable and less-desirable developments.

Purpose, method and outline of the study

Many of the issues addressed in this study are not new. Over the past several years, there has been a surge in research, analysis and policy documents on the CEAS. The main rationale behind this study is not that there is a lack of knowledge and analysis – but rather that the knowledge we have is not accessible enough for everyone; that the information we have is quickly outdated due to the rapidly changing nature of international migration to Europe and policy actors' responses to migration and asylum; and that the most basic facts often get out of sight in hectic and controversial debates. The study's main goal is therefore to provide a solid situational update and to remind readers of the main issues at stake. A central message it wants to convey is that many problems we see today are likely to continue to reappear in different shapes, although they have in fact existed for a long time, sometimes decades.

The study has a broad target group. It is intended to inform policymakers, both at EU level and in the Member States. It shall also be useful for a general public interested in EU policies and migration as well as journalists and multipliers within academia, the media and civil society. The study shall also be accessible for readers without deeper previous knowledge of EU asylum and migration policies.

The study was informed by a roundtable discussion among experts, researchers and policy makers hosted by ELF and FORES on 29 September, 2020. Further to this essential input, it is based on a desk review of relevant literature with a focus on policy and legislative documents published by EU institutions up to and including October 2020. It also aims to reflect the state of research (mainly in social sciences and law) on the CEAS and migration policy in the EU, although, to keep the study short and accessible, not all research questions and topics that academics and think tanks have looked into could be given the attention they might deserve. The study also recapitulates and updates some findings from the author's own study "Reforming the Common European Asylum System" (Parusel and Schneider 2017), which mainly examined the issue of responsibility-sharing among the EU Member States for the reception of asylum seekers and the problem of fairness regarding Member States' decision-making in asylum cases.

To provide readers with the most important background facts in a structured manner, the following Chapter (Chapter 3) briefly explains what asylum is and then traces and explains the development of the CEAS from its beginnings in the early 1990s until today. Particular attention is devoted to the Dublin Regulation as a centrepiece of the CEAS and how it has evolved over time.

In Chapter 4, the study then gives a picture of where we stand today. It takes a look at the European Commission's New Pact on Migration and Asylum (EC 2020a) and tries to present a snapshot of some of the main asylum-related problems in 2020.

Chapter 5 goes deeper into the CEAS to identify and discusses three key problems at the core of the European asylum-policy crisis, which are closely linked to each other:

(1) There is a **lack of legal entry pathways** for people seeking protection, which pushes them towards irregular and dangerous channels and creates emergency situations.

(2) Despite clear commitments to solidarity among the Member States, **the EU has no system that guarantees fair sharing among the Member States** of the responsibilities arising from the arrival and reception of asylum seekers. The distribution of asylum seekers across the EU is volatile and unbalanced.

(3) The chances of asylum applicants to receive protection in the EU vary greatly depending on where in the EU their asylum claims are processed. Some nationalities are often recognised as refugees in some Member States but not in others. The legal instruments of the CEAS and practical cooperation on asylum have **not yet led to an approximation of national asylum decisions and processing**.

The study explains why these problems have not been solved and what their consequences are. In this context, the analysis also points to other problems that have complicated the CEAS and that have to be addressed to reach the goal of a coherent and credible long-term approach, such as diverging reception conditions for asylum seekers, diverging rights and integration arrangements for those granted protection, credibility problems regarding the return of rejected asylum seekers to their countries of origin, and cooperation on migration and asylum with countries outside the EU.

On the basis of the analysis in Chapter 5, the subsequent Chapter 6 presents a number of possible scenarios for future developments, in particular with regard to responsibility-sharing and solidarity among the Member States. Finally, Chapter 7 presents conclusions and policy recommendations.

A brief history of asylum and the CEAS

3.1 The basics of asylum: International and European law

States are responsible for protecting the rights of their citizens. When governments are unable or unwilling to do this, people may face such serious threats that they are forced to flee and seek protection elsewhere. If this happens, another country has to step in to ensure that the refugees' basic rights are respected. This is known as "international protection" or "asylum" (IPU and UNHCR 2017: 15).

The concept of asylum or sanctuary is accepted in all regions of the world. It can often be traced back to ancient traditions, philosophical teachings or religious principles. The concept is also recognised in numerous human-rights instruments, notably the *Universal Declaration of Human Rights*, which in Article 14(1) establishes that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".[8]

In 1951, the *Convention relating to the Status of Refugees* was adopted.[9] It still serves as the foundation of international refugee law today. The Convention defines the term "refugee", establishes the principle that

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8   The *Universal Declaration of Human Rights* was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).
9   The *Convention relating to the Status of Refugees* was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. It entered into force on 22 April 1954.

refugees should not be forcibly returned to a territory where their lives or freedom would be threatened (the principle of *non-refoulement*), and sets out the duties of refugees as well as States' responsibilities toward them.

> According to the Convention, a refugee is someone who:
> - has a well-founded fear of being persecuted because of his or her race; religion; nationality; membership of a particular social group; or political opinion;
> - is outside his or her country of origin or habitual residence;
> - is unable or unwilling to avail him- or herself of the protection of that country, or to return there, because of fear of persecution.

A person is a refugee as soon as the criteria contained in this definition are fulfilled. In other words, a person does not become a refugee because of a positive decision on an application for protection. Recognition of refugee status is declaratory: it confirms that the person is indeed a refugee. For this reason, asylum seekers should not be returned to their countries of origin until their claims have been examined (IPU and UNHCR 2017: 18).

The 1951 Refugee Convention was drawn up shortly after the Second World War, and its authors were focused on refugee problems existing at that time. As new crises emerged during the 1950s and early 1960s, it became clear that the temporal and geographical scope of the Convention, which was limited to protecting European refugees in the aftermath of the Second World War, needed to be widened. In 1967, a Protocol to the Convention was adopted, removing its temporal and geographical limits.[10] By acceding to the Protocol, states agreed to apply the core content of the Convention to all persons covered by the

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10   The *Protocol relating to the status of refugees* was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. It entered into force on 4 October 1967.

Protocol's refugee definition, without limitations of time or place.

In order to respond to regional specificities, states and groups of states in different parts of the world have developed regional laws and standards that complement the international refugee protection regime. Particularly far-reaching regional developments have taken place in Europe, where the EU in 1999 decided to create a Common European Asylum System based on the "full and inclusive application of the Geneva Convention" (European Council 1999). The origins and the development over time of the CEAS are further explored in the Sections below.

In 2007, the EU also adopted a *Charter of Fundamental Rights*, which has a status equal to that of the EU's founding treaties and includes provisions on the right to asylum and protection from removal, expulsion or extradition to a serious risk of being subject to the death penalty, torture or other inhuman or degrading treatment or punishment.

International refugee law following from the 1951 Refugee Convention is also complemented by other bodies of law, notably international human rights law, humanitarian law, and criminal law. Important examples are the *International Covenant on Civil and Political Rights*,[11] the *Convention against Torture*[12] and the *Convention on the Rights of the Child*.[13] The principle of *non-refoulement* is either explicitly included or can be derived from these (and other) international instruments (IOM 2014).

There are also regional instruments that are relevant to refugee protection. In Europe, they include the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)[14] and its Protocols as well as other instruments. Although the ECHR does not

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11 The *International Covenant on Economic, Social and Cultural Rights* was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. It entered into force on 3 January 1976.
12 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. It entered into force on 26 June 1987.
13 The *Convention on the Rights of the Child* was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990.
14 The *Convention for the Protection of Human Rights and Fundamental Freedoms* was opened for signature in Rome on 4 November 1950 and came into force in 1953.

explicitly mention refugees, it has had strong impacts on asylum and migration law and policy in Europe, in areas such as *non-refoulement*, family reunification and limits on detention (Costello 2016).

3.2 Intergovernmental cooperation, free movement and Schengen (1985-1999)

In the 1990s, in the context of establishing a single European market without internal borders, the Member States of the European Communities recognised that issues concerning asylum and immigration should be brought within the framework of the EU Treaties. The basic perception was that if people were to be able to circulate freely within the EU, which was one of the main objectives of the Schengen Agreements of 1985 and the Schengen Convention of 1990, there would need to be common rules on who would be allowed to enter from a non-EU country and under what circumstances and conditions. To this end, the participating states agreed on common rules regarding the control of their external borders and visa requirements for nationals of countries outside the Schengen area. It is often argued that this approach, which privileges nationals of the Member States regarding free circulation within the EU, framed the entry and arrival of non-EU nationals, and especially asylum seekers, as an anomaly. Asylum was in this sense very early on linked to matters of security and control (e.g., Huysmans 2000).

The ambition to work together on asylum, immigration and borders was also influenced by acute refugee crises, i.e. problems of the Member States in dealing with large numbers of people that were displaced by the conflicts in the Balkans in the 1990s and the collapse of communist regimes in Eastern Europe (IARLJ-Europe 2016: 13).

An early cornerstone of the common European policies on asylum and migration to be developed was the Convention determining the State responsible for examining applications for asylum lodged in one

of the Member States of the European Communities, the so-called *Dublin Convention*. It was signed in June 1990 and entered into force in September 1997. It defined a procedure, by which responsibility for examining an application for asylum, and for providing accommodation, would always lie with the Member State that had played the most important role in the asylum seeker's entry into Europe. Usually, this was the state where an asylum seeker first entered the territory of a Member State, or where he or she could be proven to have first stayed.

Part of the reasoning behind the Dublin Convention was that, in the early 1990s, Member States such as Germany and France had insisted on the defining of responsibilities for asylum claims. They feared that their standards of protection and accommodation, which they considered higher than in other Member States, would make them "reserve countries of asylum" within the Community, in which the majority of asylum seekers would apply for protection, or in which economically motivated migrants with no acute threat or experience of persecution would also try to make claims. In essence, they wanted to prevent asylum seekers from entering European territory in other Member States and then moving further on to France or Germany (Lavenex 2001; Niemann and Lauter 2011).

Until 1999, the Council also adopted a number of non-legislative resolutions and recommendations on asylum and migration, such as a resolution on minimum standards for asylum procedures. Texts of this kind were not binding on the Member States, however, and the Court of Justice of the European Union (CJEU) had no jurisdiction on asylum matters.

The Maastricht Treaty, which came into force on 1 November 1993, formally made asylum an EU matter, albeit it was still dealt with in the framework of intergovernmental cooperation, i.e. with limited competencies for the common EU institutions.

3.3 The Tampere conclusions and the first generation of CEAS instruments (1999-2008)

An important step towards today's CEAS was the communitisation of certain political competences regarding migration and asylum through the Treaty of Amsterdam, which was signed in 1997. Since May 1999, when this Treaty came into force, asylum and immigration has been an area of supranational EU competence. Legislation has since been elaborated and adopted under the ordinary legislative procedure (or "co-decision" procedure). This means that legislative proposals from the European Commission are sent to the Council and the European Parliament, which decide under the principle of parity. Article 63 of the Treaty Establishing the European Community (TEC) provided that the Council was to adopt a specific set of measures on asylum, refugees and displaced persons within five years. Such measures were to be in accordance with the 1951 Refugee Convention and "other relevant treaties".

While the Amsterdam Treaty thus provided the legal foundation for the creation of the CEAS, it did not explicitly mention or describe such a system. This was first officially envisaged in October 1999, at a special meeting of the European Council in Tampere (Finland), which is still today regarded as a landmark summit. As stated in the Conclusions of that meeting, the Council agreed to work "towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention". It went on to state the future key components of the CEAS, which are

> *"a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection" (European Council 1999).*

The Council also confirmed "the importance the Union and Member States attach to absolute respect of the right to seek asylum" and the need to ensure "that nobody is sent back to persecution".

During the following years, secondary legislation (directives and regulations) were elaborated and adopted to implement Article 63 of the TEC in light of the Tampere Conclusions. These instruments dealt with minimum conditions for the reception of asylum seekers in the Member States,[15] asylum procedures,[16] and criteria for granting refugee status and subsidiary protection.[17] Another key element of the harmonisation of asylum policies was the transformation of the Dublin Convention into an EU Regulation,[18] establishing rules for the determination of the Member State responsible for processing an asylum application.[19]

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15 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

16 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

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

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

19 Further legislation adopted during this period was the Eurodac Regulation (Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention), the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof) and a regulation laying down detailed rules for the application of the Dublin Regulation (Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national).

Infobox 1: The Dublin Regulation – a contested instrument

The Dublin Regulation is one of the key components of the CEAS. Its initial aim was to determine which Member State is responsible for examining an asylum application, in order to avoid multiple applications across the EU, and to guarantee that asylum seekers get quick and effective access to the procedures for granting international protection. The current version of the Dublin Regulation[20] has been in force since July 2013. It is often called the "Dublin III Regulation". It applies to all EU Member States as well as four associated states: Norway, Iceland, Switzerland and Liechtenstein.

The Regulation requires that asylum seekers file an application in the Member State upon entry into the EU or in the Member State where they are already present. When someone applies for asylum, no matter where in the EU, their fingerprints are taken and transmitted to the EURODAC system to detect whether they have already been registered as an applicant for international protection or have entered the EU irregularly through another Member State.

The Regulation applies to all applicants for international protection. An application can lead to a transfer to another Member State, if the criteria set out in the Regulation indicate that another Member State is responsible. The main criteria relate, in that order, to family unity and the welfare of minors, possession of a residence permit or visa issued by a Member State, country of illegal entry, and place of application (Fratzke 2015: 5). However, the Regulation also gives the Member States discretion to derogate from these criteria, through the use of discretionary clauses. The "sovereignty clause" in article 17(1) permits a Member State to take responsibility for examining an application, on a discretionary basis, even if it is not responsible under the criteria laid down in the Regulation. The "humanitarian clause" in article 17(2) allows the Member State

20 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

where an applicant is present to request another Member State to take responsibility for an applicant to reunite families on humanitarian grounds, even where that Member State is not responsible.

The Dublin system is often criticised for being ineffective, costly and difficult to apply (Fratzke 2015; ECRE 2020a; EPRS 2020; UNHCR 2017). Sometimes, lengthy transfer procedures prolong the asylum process instead of giving applicants swift access to a procedure. The number of transfer requests (so-called *take back* or *take charge* requests) is generally much higher than the number of transfers that are actually carried out. In Germany, which often has the highest number of transfer requests sent to other countries, only 17 percent of all outgoing requests led to actual transfers in 2019 (ECRE 2020a: 9).

It has also been observed that there is a lack of a formal coordination mechanism at national levels to implement the procedures induced by the Dublin Regulation, in addition to very different capacities (e.g., staff and funding) across the Member States. This makes it difficult to apply Dublin procedures in a coherent and consistent way across the EU. There is also a lack of compliance as regards procedural guarantees and safeguards for asylum applicants, especially for children, and adequate information that applicants can understand is not always provided. The length of the procedures and their lack of predictable outcomes coupled with poor reception conditions including the use of detention and social precarity lead to numerous impacts on the wellbeing of asylum applicants. Furthermore, because of the many differences across Member States in the ways in which asylum claims are handled, the application of the Dublin Regulation has so far been unable to prevent secondary movements and to ensure clarity[21] – and fairness – in the asylum process (EPRS 2020).

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21   On secondary movements, see Infobox 2.

The former Dublin Convention's responsibility-allocation criteria were basically maintained, although several ground-breaking changes in policy circumstances occurred. The enlargements of the EU in 2004 and 2007 turned a number of new EU members into *frontline* states on the main irregular immigration routes. The declamation of a Common European Asylum System (CEAS) certainly constituted a major milestone. However, the establishment of a common legal system on asylum was not supported by the creation of a common asylum space, in which, for example, national asylum decisions (or rejections) would be mutually recognised or beneficiaries of international protection would be free to move within the EU the same way as EU citizens. Furthermore, a fair and efficient system for sharing the tasks and responsibilities of refugee reception and the processing of applications was not implemented although the Treaty on the Functioning of the European Union (TFEU) explicitly demanded that the EU's common policy on asylum were to be "based on solidarity between Member States" (Article 67 TFEU), including the "fair sharing of responsibility" (Article 80 TFEU).[22]

Consequently, it can be argued that, from the inception of the first phase of the CEAS, it was already clear that a second generation of legal instruments would eventually be needed, as the EU would have to move from setting minimum standards to common procedures and uniform protection statuses (European Council 1999). Over the years following the adoption of the first generation of CEAS instruments, the implementation of the minimum standards as set out by the first-generation legislative instruments also showed that there remained significant discrepancies between the Member States in their reception of applicants, asylum procedures, and assessment of qualification for international protection. This was considered to result in divergent outcomes for applicants, which went against the principle of provid-

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22   For an analysis of the principle of solidarity in Article 80 TFEU as the guiding principle of European immigration and asylum policies and the difficulties to operationalize it, see Karageorgiou 2016.

ing equal access to protection across the EU (EC 2008: 3). It was also considered necessary to supplement greater legal harmonisation with effective practical cooperation between national asylum administrations to improve convergence in asylum decision-making by Member States. Finally, it was agreed that there was a need for measures to increase solidarity and responsibility among EU States, and between EU and non-EU States (EC 2008: 4-11).

3.4 The second generation of CEAS instruments (2008-2015)

A second phase of harmonisation began in 2008 with the *European Pact on Asylum*, which stipulated the EU's objective of establishing a "common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection" on the basis of "high protection standards" (CEU 2008). By that time, the TFEU had been adopted, which entered into force in December 2009. For the first time, the creation of a CEAS was now explicitly referred to in EU primary law.

By June 2013, the second stage of the CEAS was completed with the enactment of amended, or so-called "recast", secondary legislation, except for the Temporary Protection Directive of 2001, which remained unchanged. Again, the CEAS mainly comprised six pieces of legislation,[23] as briefly presented in Table 1 below.

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23   As a seventh instrument, the CEAS also includes Commission Regulation (EC) No 1560/2003 of 2 September, 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. This Regulation defines more detailed rules on the use of the Dublin Regulation. It entered into force on 6 September, 2003.

Table 1: Second-generation CEAS instruments

Short title	Full title		Purpose / main content	Date of entry into force
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.		This directive was designed to establish a common EU response to a mass influx of displaced persons unable to return to their country of origin. It defines the decision-making procedure needed to trigger, extend or end temporary protection. To date, it was never used.	7 August 2001
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).		This regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application.	19 July 2013
The Eurodac Regulation (recast)	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).		This Regulation establishes the EU asylum fingerprint database Eurodac. When someone applies for asylum, no matter where they are in the EU, their fingerprints are transmitted to the Eurodac central system.	19 July 2013
Reception Conditions Directive (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).		This directive aims at ensuring harmonised standards of reception conditions throughout the Union, including access to housing, food, clothing, health care, education for minors and employment under certain conditions.	19 July 2013
Qualification Directive (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).		This directive sets out criteria for applicants to qualify for refugee status or subsidiary protection. It also defines the rights afforded to beneficiaries of these statuses, which includes provisions on protection from refoulement; residence permits; travel documents; access to employment, education, social welfare, healthcare; access to accommodation and integration measures.	9 January 2012
Asylum Procedures Directive (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).		This directive sets common procedures for granting and withdrawing international protection, intended to provide asylum seekers with certain safeguards and to enable Member States to operate efficient asylum procedures.	19 July 2013

Alongside the legislative processes regarding the CEAS, a number of other EU measures and funding instruments have accompanied the ambition to create a harmonised approach to asylum. In 2011, for instance, the European Asylum Support Office (EASO) in Malta started its operations with the aim of assisting the Member States in adjusting their asylum systems to the evolving EU framework and providing support to those facing pressures.[24] The EU has also been funding projects across Member States regarding reception facilities, return procedures, or border control, and it manages policy-supporting, advisory structures such as the European Migration Network (EMN), or networks for contacts and information exchange among national practitioners, such as the European Network of Asylum Reception Organisations (ENARO).

The Dublin Regulation persisted in the new CEAS, but to address some of the criticisms (as mentioned in Infobox 1), the new Dublin III Regulation further clarified the hierarchy of criteria determining Member State responsibility and added procedural rights for asylum seekers, such as a right to information and to a personal interview. Dublin III also established a mechanism for early warning, preparedness and crisis management. This mechanism (in article 33) can be understood as an effort to combine the Regulation's responsibility-allocation criteria with responsibility sharing, linked to the idea of solidarity among the Member States. It was intended to prevent the deterioration or collapse of asylum systems as a result of particular pressures on, or deficiencies in, the asylum system of one or more EU States and provides for remedial actions and measures of solidarity.

However, if the principle of solidarity between the Member States as enshrined by the TFEU is understood in such a way that it means a fair distribution of applicants for international protection according to the Member States' relative absorption capacities, it is clear that

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24   Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

Dublin III, including its early-warning mechanism, fell short of achieving this objective. Rather than establishing a fair responsibility sharing, the Regulation contributed to a situation in which primarily Mediterranean *frontline* states and Member States with external Schengen borders towards the main irregular migration routes would be obliged to process the bulk of asylum claims submitted in the EU. In 2008 and 2009, for example, the highest rates of asylum applicants, when compared to each Member State's own population, were recorded in Malta and Cyprus (Eurostat 2009; Eurostat 2010). As the following Section shows, similarly unbalanced situations emerged again after the 2015 asylum crisis, where some Member States were disproportionately affected by large numbers of arrivals while others barely noticed any numerical changes. Events also showed, long before 2015, that some countries silently departed from the Dublin system. Member States that felt burdened beyond their subjective capacity or unwilling to participate in the CEAS at all performed a more or less open boycott of the Dublin principles by consciously failing to register and fingerprint asylum applicants or by encouraging their secondary movement to other Member States (Pastore and Roman 2014: 21-22; Zaun 2019).

EU institutions have been aware of the imbalances that the Dublin system had created, years before the so-called "refugee crisis" of 2015, and the Commission, the European Parliament and the Council repeatedly called for an asylum system that lives up to the principle of solidarity stated in the EU treaties (see e.g. EC 2011; EP 2012; European Council 2012).

Infobox 2: Secondary movement of asylum seekers

For many years, the secondary movement of refugees and asylum seekers, notably in an irregular manner, has been a matter of political concern in the EU but also elsewhere. Globally speaking, the term *secondary movements* (or *onward movement*) refers to movement by refugees and asylum seekers from one country where they enjoyed international protection, or could have sought and received such international protection, to another where they may request it (UNHCR 2019: 1). In the EU context, *secondary movements of asylum* seekers refer to movements of third-country nationals between EU countries for the purpose of seeking international protection in a Member State other than the one of first arrival to the EU (Radjenovic 2017).

According to the United Nations High Commissioner for Refugees (UNHCR), there can be justifiable reasons for onward or secondary movement, such as limits on availability and standards of protection; family separation; obstacles to the means of securing documentation; lack of comprehensive solutions; barriers to access to asylum procedures, which creates risk of refoulement; desire to join extended family and communities; lack of access to regular migration channels; and desire to find opportunities for a better future (UNHCR 2015: 2).

However, where asylum seekers lodge multiple claims in different states, move onwards after claiming asylum or receiving protection, or refrain from seeking international protection in a state where they had an opportunity to do so, secondary movements can result in inefficiencies, administrative duplication, delays and significant costs, as well as additional demands on reception capacities and asylum systems (UNHCR 2019: 1). This can have negative consequences both for the receiving countries and for the asylum

seekers themselves. States often see secondary movement as a form of misuse of the asylum system.

The various legal instruments of the CEAS often make reference to secondary movements in their preambles. For example, the recast Qualification Directive states in recital 13 that the "approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks".[25]

The scale of secondary movements of asylum seekers within the EU is difficult to measure. However, the Eurodac database, which stores asylum seekers' fingerprints to make it easier for the Member States to determine responsibility for examining an asylum application, can give an indication of the scale of secondary movements of international protection seekers. It shows when a person who has applied for asylum in one Member State lodges a new application in another Member State, or whether persons found illegally present in the territory of a Member State had previously applied for international protection in another one. The 2019 Eurodac Report shows that out of 592 691 asylum applications recorded in Eurodac in 2019, 38 percent (227 578) had already made a previous application in another Member State (EU-LISA 2020: 15, 26). The data further suggests, for example, that Germany recorded many asylum applicants that had already applied for asylum in Italy and Greece, and that France received many applicants that had previously applied in Germany or Italy (EU-LISA 2020: 26). Eurodac stores the fingerprints of asylum seekers for 10 years.

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25   Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

3.5 The European "refugee crisis" and its consequences (2015-2019)

As the number of asylum seekers rapidly and suddenly increased in 2015, with many asylum seekers, particularly Syrians, arriving in Europe via Turkey and then crossing several internal borders on their way from Greece and Bulgaria towards Western and Northern Europe, it became clear that the CEAS, as it was, did not offer credible solutions to the challenges at hand. Most importantly perhaps, the first country criterion of the Dublin Regulation had to be put aside, at least temporarily, to deal with humanitarian emergencies due to large numbers of arrivals. For example, Germany officially decided in summer 2015 that, as a general rule, it would not return Syrians requesting asylum to other EU Member States (Deutsche Welle 2015).

In response to the crisis, many EU Member States adopted a variety of national measures to address the situation in the respective countries and reduce the inflow of asylum seekers, e.g. by restricting the right to family reunification, introducing or expanding "safe country of origin" policies, switching from permanent to temporary protection, or shortening the durations of residence permits (EMN 2017b). They also re-introduced internal border controls and other restrictions to intra-EU mobility of third-country nationals (De Somer 2018; Guild et al. 2016: 15-17).

Common European responses were developed as well, such as a controversial agreement with Turkey (General Secretariat of the Council 2016) and a temporary emergency relocation mechanism for asylum seekers arriving in Greece and Italy.[26] Under relocation, around 34,700 people were relocated inside the EU from these two countries (EC 2019c: 1). Further to this, so-called *hotspots* were established in Greece and Italy with EU support and as an operational model to quickly and efficiently bring support to key locations, EU funding for migration

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

and borders was substantially increased, and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex) received an extended mandate and more tasks while it was renamed as European Border and Coast Guard Agency.[27]

The European Commission also proposed a third generation of CEAS legislation, including, among other elements, a fundamental reform of the Dublin system that would have imposed a more balanced responsibility-sharing among the Member States regarding the reception of asylum seekers, enhanced roles for EU agencies in the areas of asylum and borders (EASO and Frontex), and the transformation of the Asylum Procedures and the Asylum Qualification Directives into directly applicable Regulations (EC 2016a; EC 2016b; EC 2016c; EC 2016d). Elaborated under the impression of the crisis of 2015, these initiatives marked the start of a potential third *grand reform* of the CEAS. However, as it turned out, the Member States were unable to reach a common understanding on this package of dossiers. Not surprisingly, the main stumbling block was the Dublin reform, where some Member States refused to agree on any text that would require them to accept asylum seekers from other Member States under a solidarity mechanism (Zaun 2019; Wagner et al. 2018). The Visegrad countries (Poland, Hungary, the Czech Republic and the Slovak Republic) were particularly outspoken about their opposition to intra-EU relocations of asylum seekers, declaring that solutions introducing mandatory relocation, whether based on an ad-hoc relocation decisions or a permanent mechanism, could not be considered as effective (Visegrad Group 2016).

One idea of the Commission's Dublin reform proposal of 2016 was that once a Member State had been determined, on the basis of being

27   Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

the first Member State of irregular entry, to be responsible for examining an asylum application, this responsibility would have applied indefinitely, rather than expire one year after entry (as it does under the current Dublin III Regulation, see Peers 2020). The Commission also wanted to supplement the Dublin Regulation's criteria for determining the Member State responsible with a compulsory and automatic "corrective" allocation mechanism that, based on a reference key, would be triggered when a Member State was faced with disproportionate pressure on its asylum system (EC 2016a). This would have ensured a clear and binding system of responsibility-sharing between the Member States.

The European Parliament adopted its negotiation mandate on 16 November 2017, which included a proposal to replace the criterion of first entry and the default criterion of first application with a new allocation system where an applicant would be able to choose to be allocated to one of the four Member States with the fewest asylum applications (EP 2017). On the side of the Council, however, the Member States were unable to agree on a common approach. In early 2019, the Romanian Presidency of the Council assessed that there was "no realistic prospect of making any major progress on the Dublin reform in the short term" (CEU 2019: 3).

Where are we today?

As the Member States were unable to agree on a substantive reform of the CEAS including mandatory responsibility sharing, as proposed in 2016, the future direction of the EU's policies on asylum has been unclear. At the same time, there have been many developments, both at EU level, at national level, and in relation to neighbouring countries, that show that the search for solutions goes on.

When a new European Commission was appointed after the European elections of 2019, migration and asylum were made part of several of the new Commissioners' portfolios, which reflects the continued topicality of the issues at hand. A division of responsibilities was made between the Commissioner for Home Affairs, Ylva Johansson, and the Vice-President for "Promoting our European Way of Life", Margaritis Schinas. While Schinas was tasked to build "a consensus for a fresh start on migration" including the coordination of the Commission's overall approach and work on a *New Pact on Migration and Asylum*, Johansson was asked to "develop" this new Pact, relaunch the reform of asylum rules and "close loopholes between asylum and return rules", among other tasks (EC 2019a; EC 2019b).

The Commission's *New Pact on Migration and Asylum* (EC 2020a) was presented in September 2020. It is a renewed attempt to overcome political blockages among the Member States and revive negotiations.

4.1 The European Commission's New Pact on Migration and Asylum

Generally speaking, the Pact is a complex and comprehensive policy document that, in addition to asylum, also addresses aspects of legal migration, borders and visas. It refers to several new legislative proposals, many of which are linked to and dependent on each other.

The Pact does not restart the development of a CEAS from zero but does introduce a number of new ideas. On several dossiers, such as the qualification of asylum seekers as refugees or beneficiaries of subsidiary protection, reception conditions for asylum seekers, resettlement, a European asylum agency, the return Directive and the Blue Card Directive (for highly qualified migrants), it invites the Council and Parliament to resume negotiations on earlier proposals. At the same time, the Pact also includes amended and new legislative proposals, as summarised below.

4.1.1 Pre-screening

One of the new proposals is to introduce a mandatory "pre-screening" of asylum seekers at the external borders (EC 2020b). The screening would apply to all non-EU citizens who cross an external border without authorisation, who apply for asylum at the border (without meeting the conditions for legal entry), or who are disembarked after a search-and-rescue operation. During the screening, these individuals are not allowed to enter the territory of a Member State. The screening should take no longer than five days, with an extra five days in the event of a huge influx,[28] and comprises a health check, an identity check, registration in a database, a security check, filling out a debriefing form, and a decision on what happens next. At the end of the screening, a migrant is channelled either into a return process or into an asylum process (Peers 2020).

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28   It would also be possible to apply the proposed law to those on the territory who evaded border checks; for them the deadline to complete the screening would be three days.

4.1.2 Border procedures

According to a revised proposal for asylum procedures (EC 2020c), the pre-screening is in certain circumstances followed by a new "border procedure". This procedure is intended to allow for the fast-tracking of the treatment of asylum applications, and the general idea is that asylum claims with low chances of being accepted should be examined rapidly without requiring legal entry to the Member State's territory. This would apply to claims presented by applicants misleading the authorities, originating from countries with low recognition rates likely not to be in need of protection, or posing a threat to national security. During the border procedure, a Member State might apply the Dublin process to determine which Member State is responsible for the asylum claim. The whole border procedure must last no more than 12 weeks and can only be used to declare applications inadmissible, or for fast-tracking them. There would also be a new "return border procedure", which would apply where an asylum application covered by the border procedure is rejected.

The normal asylum procedure would continue to apply to other asylum claims and be made more efficient. For example, in order to speed up the return process for unsuccessful applications, a rejection of an asylum application would have to either incorporate a return decision or entail a simultaneous separate return decision. Appeals against return decisions would then be subject to the same rules as appeals against negative asylum decisions. The proposals on procedures also aim at achieving a greater harmonisation of the concepts of safe country of origin and safe third country by drawing up common EU lists of such countries (Peers 2020).

4.1.3 Asylum management

As one of the most important elements of the New Pact, the Commission proposed to transform the Dublin regulation into a complex "Asylum and Migration Management Regulation" (EC 2020e). The

contents of this proposal are in many ways different from the earlier (and unsuccessful) Dublin reform proposal from 2016.[29] While the responsibility-allocation criteria of the existing Dublin III regulation are preserved, new allocation criteria are added. As in 2016, the Commission still attempts to introduce solidarity components into the CEAS, requiring Member States to assist each other in different types of situations. In the new proposal, however, responsibility sharing takes a more flexible design as Member States in most circumstances can choose not to relocate asylum seekers from other Member States and instead provide assistance in other ways.

One idea behind the proposal is to strengthen family unity by extending the definition of family member. This means that when responsibility for an asylum application is determined on the basis of family members of an asylum seeker being present in a Member State, this would in the future not only include members of the nuclear family but also siblings. In addition, the possession of an educational diploma issued by a Member State is introduced as a new allocation criterion.

New mechanisms are proposed to deliver solidarity among Member States both under "normal circumstances" and in situations of migratory pressure as well as following the disembarkation of asylum seekers after being rescued at sea. Depending on the situation, solidarity contributions that Member States can be required to provide consist of either accepting asylum seekers relocated from another Member State or "return sponsorship", and there is also the possibility to contribute to measures aimed at strengthening the capacity of Member States in the field of asylum, reception and return and in the external dimension. This means that a Member State who does not want to take

29 That proposal (EC 2016c) would have preserved the Dublin III criteria for allocating responsibility for asylum claims to Member States. However, in order to ensure a more equitable sharing of responsibilities between Member States, the existing Dublin system was to be complemented with a corrective allocation mechanism. This mechanism would be activated automatically in cases where Member States have to deal with a disproportionate number of asylum seekers. When the number of applications for international protection, in addition to the number of persons effectively resettled, is above 150 percent of the reference number for that particular Member State as determined by the key, an automated allocation mechanism refers the surplus quota to other Member States. The distribution key was to be based on two criteria with equal 50 percent weighting: the size of the population of each Member State and economic power, i.e. the total GDP of a Member State. If a Member State refused to help out by accepting asylum seekers from the disproportionately affected first Member State, they would have to pay €250,000 per applicant.

charge of asylum seekers in another Member State can opt out and provide help by other means. What each Member State is required to do is calculated with a distribution key based on 50 percent GDP and 50 percent population.[30]

The proposed scope of **relocation** includes all applicants for international protection that are not subject to the border procedure. In cases of migratory pressure, relocation can also include beneficiaries of international protection for up to three years from when they were granted international protection. Under "**return sponsorship**", a Member State commits to support another Member State by carrying out activities to return third-country nationals staying illegally from the territory of that Member State. The sponsoring Member State would for instance provide counselling on return and reintegration, assist the voluntary return and reintegration of irregular migrants using their own programmes and resources, lead or support the policy dialogue with a third country for facilitating readmission or ensure the issuing of a travel document. However, if these efforts prove to be unsuccessful after eight months, the sponsoring Member State needs to take over responsibility of the persons concerned and transfer them to its own territory. In sum, rather than an automated approach to reallocate asylum seekers to the different Member States, as suggested in 2016, the new proposal provides for a choice of different possible contributions in different types of situations. Return sponsorship is an entirely new concept and perhaps one of the most surprising ideas in the Commission's Pact.

The proposed procedures are rather complicated and rely on new fora and tools such as a "Solidarity Forum" comprising all Member States, Migration Management Reports used for forecasts or projections and for the planning of relocation needs, assessments of migratory situations, the setup and management of "Solidarity Pools", implementation decisions by the Commission, solidarity response

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30 The share of the benefitting Member State shall be included in the distribution key so as to ensure that all Member States are giving effect to the principle of fair sharing of responsibility.

plans to be drawn up by each Member State, and lists to distribute the persons to be relocated from one Member State to another. The proposal also provides for financial incentives for relocation; a financial contribution of €10,000 will be paid from the EU budget for each relocated person. Generally speaking, the proposal clearly emphasises the principle of solidarity and establishes measures and procedures to ensure that Member States help each other. Solidarity contributions are to a significant degree flexible but not entirely voluntary. In the end, situations can arise where a Member State is forced to accept relocated asylum seekers even against its will.

A different new element of the asylum management proposal is that the regulation not only contains obligations for Member States but also for asylum seekers, including sanctions. For example, it states that where a third-country national or stateless person intends to make an application for international protection, the application shall be made and registered in the Member State of first entry. Asylum seekers are also requested to stay in the Member State responsible for them under the allocation criteria or the Member State of relocation. In cases of non-compliance, there are sanctions, such as the loss of certain reception-related benefits. Incentives are also used to encourage compliance, such as the possibility for refugees and persons with subsidiary protection to obtain EU long-term resident status after three years, rather than five years.

4.1.4 Eurodac

The Commission also wants to collect and store more data from asylum seekers. A revised proposal for the Eurodac database (EC 2020d) would extend Eurodac to include not only fingerprints, but also photos and other personal data; reducing the age of those covered by Eurodac from 14 to six; removing the time limits and the limits on use of the fingerprints taken from persons who had crossed the border irregularly; and creating a new obligation to collect data of all irregular migrants

over the age of six. The proposal also intends to make Eurodac inter-operable with other EU migration databases and include data on the migration status of each person (Peers 2020).

4.1.5 Crisis management

A further new instrument within the overall package is a regulation that aims at addressing situations of crisis and *force majeure* in the field of migration and asylum (EC 2020f). It goes beyond the early warning, preparedness and crisis management mechanism of the existing Dublin III regulation (article 33). As the Commission argues, such situations may occur very quickly and be of such a scale and nature that they require a specific set of tools in order to be effectively addressed. For this purpose, the proposal introduces specific rules on the application, in situations of crisis, of the solidarity mechanisms set out in the Asylum and Migration Management proposal, which provide for compulsory measures in the form of relocation or return sponsorship. For crisis situations, there would be specific rules for a wider scope for compulsory relocation, which would include all applicants, be they subject to the border procedure or not, irregular migrants, and persons granted immediate protection under this Regulation.[31] Unlike the solidarity provisions of the Management Regulation proposal, the crisis and *force majeure* proposal does not include solidarity measures in the form of capacity building, operational support and cooperation with third countries, since such measures would be of a longer-term nature.

If adopted, the proposed crisis management regulation would, according to the Commission, repeal the Temporary Protection Directive" of 2001,[32] which was never used, not even during the "refugee crisis" of 2015 (Beirens et al. 2016; Parusel and Schneider 2017: 118-120).

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31   The return sponsorship provided for in this "crisis proposal" differs from the one established in the Regulation on Asylum and Migration Management because the obligation to transfer the irregular migrant to the territory of the sponsoring Member State will be triggered if the person concerned has not returned or has not been removed within four months (instead of eight months).

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

4.1.6 Other measures

Apart from legislative proposals, the Commission also presented four soft-law measures; a Recommendation on asylum crisis management (EC 2020g); a Recommendation on legal pathways to protection in the EU, i.e. resettlement, humanitarian admission and other complementary pathways (EC 2020h); a Recommendation on cooperation between Member States on private search and rescue operations (EC 2020i); and guidance on the applicability of EU law on smuggling of migrants (EC 2020j).

The Pact also mentions that the Commission plans to use already existing legislation – in particular the Visa Code, to encourage third countries to cooperate with the EU on the return of rejected asylum seekers and irregularly staying migrants. Generally speaking, the idea is that visas would be more difficult to get for citizens of countries which don't cooperate on readmission of people, but easier to get for citizens of countries which do cooperate. The Pact also outlines strategies for legal migration, such as the admission of non-EU workers and enhanced possibilities for long-term non-EU residents to move between Member States (Peers 2020). Last but not least, the Pact highlights the importance of including and integrating migrants into European societies, stating that "part of a healthy and fair system of migration management is to ensure that everyone who is legally in the EU can participate in and contribute to the well-being, prosperity and cohesion of European societies". The Pact announces the adoption of an EU "Action Plan on Integration and Inclusion for 2021-2024" (EC 2020a: 26-28).

At the time of writing this study, negotiations among the Member States and within the European Parliament have started. As disagreements among the Member States on how to proceed have deepened over recent years, it remains to be seen if they can agree on a compromise based on the Commission's proposals, what such a compromise might look like, and whether it will resolve the existing tensions and the problems of the CEAS.

4.2 Signs of continued crisis: The asylum and migration situation in 2020

Naturally, the Commission's New Pact on Asylum and Migration does not appear in a vacuum. Although the number of asylum seekers sharply declined after 2016 (see Figure 1), there are still emergencies, crises and manifold signs of trouble, which the EU and its Member States have tried to address in various ways. The migration and asylum situation in Europe in 2020 was also strongly impacted by the Covid-19 pandemic, which among other effects, led to fewer asylum seekers in the EU, suspended Dublin transfers, and reintroduced internal border controls, intra-EU travel bans and an extra-EU travel ban (ECRE 2020a: 31-37; Carrera and Luk 2020). However, the effects of the pandemic are not given greater attention in this study as they appear, at the time of writing, likely to be of a temporary nature.

Figure 1: First-time asylum applications in the EU, 2010-2019
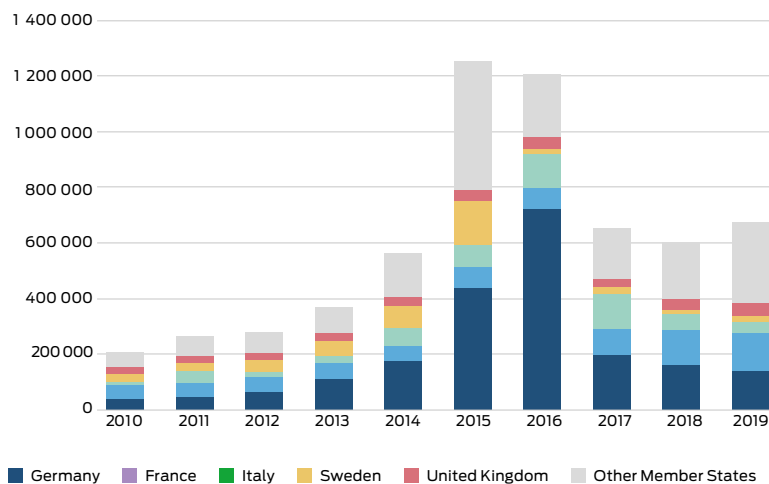
Source: Eurostat, Asylum and first-time asylum applicants by citizenship, age and sex - annual aggregated data (rounded), extracted on 6 October 2020.

To stop migrants and protection seekers from crossing the Mediterranean from Africa and the Middle East into Greece, Italy and Spain and to combat migrant-smuggling networks, the EU has since 2016 been looking more closely at the role of Turkey and countries along the North African coastline. An agreement between the EU and Turkey has since 2016 helped reduce crossings by boat from Turkey into Greece. Among other things, the EU and Turkey agreed that all new irregular migrants crossing from Turkey to the Greek islands would be returned to Turkey; that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU; and that Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU. In turn, the EU promised visa liberalisation for Turkish travellers, provided funding for the reception and integration of refugees in Turkey and promised to upgrade the EU-Turkey customs union as well as to work on Turkey's accession to the EU (General Secretariat of the Council 2016). However, the agreement never worked fully satisfactory, and it effectively broke down in February 2020 when Turkey declared it would no longer stop migrants from trying to reach Greece. This resulted in a standoff situation at the Turkish-Greek land border as refugees tried to cross and Greece forcefully refused to take them in (Stevis-Gridneff 2020; Hernàndez 2020). Greece then decided to suspend asylum applications for a month and deport those who managed to cross the border, which was criticised by the UNHCR (2020d).

Meanwhile, reception conditions for asylum seekers on the Greek islands have been extremely poor for years (Hernàndez 2020; ECRE 2020c: 157-162), and in September 2020, fires devastated the huge, overcrowded refugee camp Moria on the island of Lesbos (Bird 2020).[33] In response to this incident, the European Commission announced the establishment of a dedicated taskforce to improve the situation on

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33   According to ECRE (2020c: 157), more than 38,000 asylum seekers were living in facilities with a designated capacity of 6,178 by the end of December 2019. Reception conditions, in particular in the so-called hotspot facilities "may reach the level of inhuman or degrading treatment".

the island (EC 2020k). The fire also triggered initiatives for an ad-hoc relocation of asylum seekers and refugees to other Member States, but as with similar initiatives before, the number of Member States that offered relocation was limited, as was the amount of people that were offered a transfer (EC 2020k; Oltermann and Grant 2020).

There are also allegations of illegal pushbacks of migrants to unsafe countries, both on the central Mediterranean route from Libya and Tunisia to Italy and Malta, and from Greece to Turkey (UNHCR 2020c; Amnesty International 2020a). At a summit in Malta in February 2017, the EU Member States had declared that they wanted to intensify their work with Libya as the main country of departures towards Europe as well as with its North African and sub-Saharan neighbours. More specifically, leaders agreed to provide training, equipment and support to the Libyan national coast guard; disrupt the business model of smugglers through enhanced operational action; support the development of local communities in Libya, especially in coastal areas and at Libyan land borders on the migratory routes from other African countries; among other measures (General Secretariat of the Council 2017).

These commitments and their subsequent effects as well as the underlying approach have met a lot of criticism, with observers arguing that Libya is not politically stable enough as a partner state. Critics argued that Libya does not have a refugee-protection system, and that those who are prevented from getting into boats and leaving Libya, or who are taken back there by the Libyan Coast Guard, are often put in unofficial detention centres where conditions are inhumane (Collett 2017; Hayden 2019). To some extent, the IOM and the UNHCR have evacuated people from Libya to Niger or – since recently – Rwanda. From there, EU Member States are expected to resettle refugees to Europe, which they however only do on a small-scale basis.[34]

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34   According to a report from the European Commission published in October 2019 (EC 2019c), over 4,000 people have been evacuated from Libya since 2017, of which around 3,000 to the UNHCR's EU-funded Emergency Transit Mechanism (ETM) in Niger. These evacuations to the ETM have also been complemented by direct evacuations from Libya to Italy (808) and an "Emergency Transit Centre" in Romania (303). Of the people evacuated to Niger, 1,856 persons have been resettled so far to Belgium, Canada, Finland, France, Germany, Italy, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States (EC 2019c: 9).

Over recent years, the EU has also operated several patrols in the Eastern, Central and Western Mediterranean. Their tasks have varied from securing external borders, rescuing migrants at risk, to fighting migrant smuggling. The military operation *Sophia* was started in May 2015 with the aim to break the business model of smugglers and human traffickers in the Mediterranean. Later, the mandate was widened to also include the training of the Libyan coastguards and navy as well as certain aims not related to migration. Operation *Sophia* ceased its activities at the end of March 2020 (Barigazzi 2020).

Due to a lack of official search-and-rescue capacity in the Mediterranean, private search-and-rescue missions run by charities as well as commercial vessels have stepped in, but they often find it difficult to be allowed to disembark the people they save in ports in Italy or Malta. Those who still manage to arrive at the EU's southern shores are sometimes distributed to a limited number of other EU countries via voluntary, ad-hoc relocation decisions (EC 2020m: 36). The exact number of these relocations and the procedures and arrangements used by participating states are not known or poorly documented (Carrera and Cortinovis 2019).

Apart from the situation in the Mediterranean, which still shows signs of crisis even if the number of irregular entries into the EU has declined from 1.8 million in 2015 to roughly 142,000 in 2019 (Frontex 2020: 59), the debate about the future of asylum also continues in other Member States. In some, such as Austria, France, Denmark and Sweden, there have been discussions about externalising the processing of asylum requests to third countries (Collett and Fratzke 2018), or to even go one step further and to replace the current "territorial" asylum system in Europe with resettlement frameworks in the sense that individuals would no longer be allowed to travel to an EU country to apply for asylum at all. Instead, refugees would be chosen and transferred to Europe from camps in first countries of refuge (Nedergaard 2018; Billström and Forsell 2017; Ruist 2015).

In sum, it is obvious that the 2015 "refugee crisis" still has deep political repercussions in many parts of Europe and continues to affect the debate about how to deal with migration and asylum. As Thorburn Stern (2016) has pointed out, migration and asylum policy can be determined by several issues in combination, including states' legal obligations towards migrants in general and those seeking international protection in particular; ethical concerns; economic conditions; but also political ideology and public opinion. A country's self-image and how it wants to be perceived by others can also influence policy and legislation, or at least how it is presented (Thorburn Stern 2016: 2). After relatively welcoming or compassionate approaches in some Member States in 2015, attitudes among European governments quickly grew increasingly negative about accepting more asylum seekers and refugees, stricter measures aimed at stopping or redirecting migration were introduced by country after country, and far-right positions as well as political parties long hostile to immigrants and minorities have consolidated their positions in many countries (Thorburn Stern 2016: 8; Banulescu-Bogdan and Collett 2015). As mentioned, some Member States have chosen to more or less openly ignore their obligations under international and European law, while others have opposed quotas for the distribution of asylum seekers in the EU or declared that they wanted to stop unsolicited non-EU immigration altogether. The "refugee crisis" has thus resulted in a vicious circle: the failure of the EU to develop credible and fair solutions has likely contributed to the rise of populist and nationalist movements and political parties in many parts of Europe. This has, in turn, has made it more difficult for the EU to find common ground.

Three main areas for reform

As this study aims to show, the signs of crisis mentioned above have their origins in a number of problems that the creation of a CEAS has so far not been able to resolve. For example, the problems surrounding search and rescue missions in the Mediterranean, disembarkations and pushbacks are not only linked to conflicts and instability in North Africa, but also to the fact that the EU and its Member States do not provide asylum seekers with legal opportunities to travel to Europe and apply for protection. As another example, the difficulties regarding ad-hoc relocations are to a great extent the result of a lack of fair and permanent responsibility-sharing for asylum seekers between the Member States and the consequences of the Dublin Regulation. Last but not least, there is the – often overlooked – problem that Member States' asylum systems lack convergence and predictability in the sense that the question who is entitled to protection and who is not lacks a credible answer. These three "root problems" of the CEAS are explored in more detail below.

5.1 The lack of legal pathways to Europe for refugees

Asylum policies have long faced a fundamental tension: while refugees have the right to apply for asylum once they arrive in a country's territory, neither international nor national law provide them legal means to

travel in search of protection. As a result, opportunities for individuals seeking protection to move legally are generally few and difficult to access (Fratzke and Salant 2017: 2).

This is also true for Europe. As shown in Chapter 3, the need for the EU Member States to cooperate on non-EU migration and asylum is linked to the principle of free movement of people within the EU, which is considered one of the great achievements of European unification, and the idea of a European Union without internal borders. A general understanding is that if the EU is to function as a common mobility space, it needs common rules on who is allowed access to EU territory from outside.

5.1.1 Visa rules as a barrier against asylum seekers

While Schengen and free movement make life easier for mobile EU citizens and nationals of other countries with valid visas or residence permits, the Schengen rules pose almost insurmountable obstacles to people who try to reach any country within the bloc to seek protection from political persecution, war or conflict. Almost all relevant countries of origin of people who frequently apply for asylum in the EU are subject to visa requirements.[35] Rather than giving access to one country only, Schengen visas are normally valid for all states participating in the Schengen free movement area.[36] They are not granted, however, if embassies or consulates have reason to believe that a visa applicant will not be willing to return to his or her country of origin when the visa expires. They are strictly temporary as well. Only in exceptional circumstances, a so-called "visa with limited territorial validity" can be issued by a Member State under the EU Visa Code on humanitarian

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35   Some relevant exceptions to this general rule were, at the time of writing, some visa-free countries in Latin America (e.g., Venezuela and Colombia) and some Eastern and South Eastern European countries such as Ukraine, Georgia and Serbia. The EU has a regulation listing the countries whose citizens must have a visa when crossing the external borders and those whose nationals are exempt from that requirement, which is regularly updated. At the time of writing, this was Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.
36   Currently all EU Member States except Cyprus, Ireland, Bulgaria, Romania and Croatia. The Schengen area also includes Iceland, Norway, Switzerland and Liechtenstein.

grounds, for reasons of national interest or because of international obligations.[37] The question whether EU Member States have a positive obligation to issue, in certain circumstances, a humanitarian visa based on the EU Visa Code has been discussed in social research and in law and has also been brought before the Court of Justice of the EU (Iben Jensen 2014; Brouwer 2017). However, the Court rejected this notion in the case X and X v. Belgium.[38] The judgement confirmed that, even if Member States can have their own rules on national humanitarian visas, the common EU visa regime serves as an effective barrier to unsolicited migrants, including asylum seekers.

Research literature has often confirmed the role of visa policies in relation to refugees and other migrants. For example, a recent study shows that many asylum seekers seem to be aware of how difficult it is to get a visa. Among Syrians who attempted to find protection in Europe in recent years, some had at first tried to get a visa for an EU country – but failed. Among other groups, such as Nigerians and Eritreans, most people did not even try (Crawley and Hagen-Zanker 2018: 27).

If getting a travel visa for Europe is impossible, people who want to apply for asylum in the EU are left with the option to apply for a residence permit for legal immigration under existing schemes for foreign workers, family members of people already residing in the EU, or students. But as the conditions for such access are often difficult to fulfil, and not always easy to understand because each Member State has its own rules on labour, family or student migration, getting a long-stay residence permit is seldom realistic for people who are fleeing conflict or persecution. And if an airline or other carrier takes people without the necessary entry permits into Europe, they can, according to the EU's Carrier Sanctions Directive,[39] be liable to sanctions if the individuals concerned are not granted protection (Baird 2017). As a result,

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37   Article 25 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).
38   Case C-638/16 PPU.
39   Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

refugees and migrants often have no other choice than to attempt reaching Europe through irregular and often very dangerous pathways, putting their lives in the hands of criminal smuggling networks. Between 2014 and 2020, the International Organisation for Migration counted at least 18,000 deaths on the Mediterranean route to Europe.[40] The number of people who went missing is unknown. Countless others have been incarcerated in unofficial detention centres, exploited and abused before even reaching European shores (IOM 2020; Hayden 2019; Amnesty International 2020b).

5.1.2 Mixed migration at the external borders

While it is important to keep in mind that both long-term migration and short-term mobility towards the EU predominantly takes place in accordance with the existing rules,[41] which means that migration and mobility in general should not be considered a problem, the situation at certain external borders of the EU is challenging. It is often described as a situation of *mixed migration*. The term *mixed migration* refers to the fact that within the group of those who arrive outside the regulated legal mobility and migration frameworks, there are refugees, other people in need of protection, but also people without any accepted grounds for protection. The latter are often referred to as "economic" or "aspirational" migrants. The International Organization for Migration (IOM) defines *mixed migration* as "complex population movements including refugees, asylum seekers, economic migrants and other migrants".[42] Indeed, contemporary migration flows often consist of people who are on the move for different reasons but who share the same routes (Kumin 2014), and mixed migration flows often defy attempts to separate refugees from other migrants (Long 2015). Refugees

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40   Up to date statistics on missing migrants along migratory routes are available at https://missingmigrants.iom.int.

41   In 2018, the 28 EU Member States granted over 3.2 million residence permits for purposes such as work, studies, family reunification, and protection, thus enabling legal immigration of non-EU nationals to a substantial extent. (Complete figures for 2019 were not yet available at the time of writing.) In addition, the Member States of the Schengen area issued 14.3 million visas for short stays in 2018. Sources: Eurostat, European Commission.

42   The main characteristics of mixed migration include "the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved" (IOM 2008; Murphy 2014).

have a well-founded fear of persecution but may also be motivated to move as a result of poverty. While migrants may not reach the threshold required to qualify for protection as a refugee, they may still be seeking to escape violence or an oppressive regime in their country of origin.

According to a recent estimate by the UNHCR, approximately 28 percent of the people who had crossed the sea from Libya to Europe between January and May 2020 were likely to be in need of international protection. In addition, many others using this route are likely to have specific needs on account of their experiences during the journey, including in Libya, due to having been victims of trafficking, sexual and gender-based violence, or being unaccompanied children that may require temporary protection and assistance (UNHCR 2020b).

5.1.3 Alternatives to irregular migration: humanitarian visas and resettlement

So far, the institutions of the EU have been unable, or unwilling, to address the issue of the lack of legal entry pathways for asylum seekers, although the European Parliament has formally requested the Commission submit a proposal for a regulation establishing a "European Humanitarian Visa" (EP 2018). In Sweden, a government-commissioned inquiry has made a similar demand, calling on the European Commission to explore whether it is possible to present a proposal for a new legal instrument in the EU for entry permits for the purpose of seeking asylum as a complement to resettlement and spontaneous asylum applications (Utredningen om lagliga asylvägar 2017). However, a more systematic approach or a new system for granting legal entry visas for humanitarian and protection purposes has so far been ruled out, mostly because political leaders are generally afraid of the possible consequences as more opportunities for legal access could mean more migration.

For the time being, the only well-established legal pathway for people in need of protection is state-organised resettlement, whereby refugees are selected in transit countries or counties of first asylum and brought

to a safe third country where they can stay and start a new life. In the EU, some Member States have recently increased their national resettlement quotas, such as Sweden, Germany, Ireland, Italy, France, and the Netherlands. Others, like the Baltic countries, started resettlement programs from zero just a few years ago, but ended or downscaled these programs soon again. Betts (2017) has remarked that many of the more recent European resettlement efforts are little more than small-scale "knee jerk responses" to the 2015 "refugee crisis". There are also countries, notably Denmark but also Austria, which used to accept resettled refugees but abandoned their commitments when the number of asylum seekers increased.[43] A general, and unsatisfactory, observation is that in most cases, those EU countries that offer resettlement spots generally receive relatively many asylum seekers, too. Those who have opposed responsibility-sharing for asylum seekers are generally reluctant to resettle refugees as well.[44]

Nevertheless, the EU as a whole has started to be more active in the area of resettlement, and over recent years, EU Member States resettled more people than before. The total annual figure increased from just around 8,000 resettled individuals in 2015 to approximately 24,000 in 2017 and almost 27,000 in 2019. Still, this is a small number compared to the number of people who are granted protection after themselves making the journey to Europe and applying for asylum. In 2019, the ratio between resettled refugees and positive first-instance asylum decisions in the EU was roughly 1:8 (see Figures 2 and 3). This means that the irregular entry and asylum channel is, despite the enormous risks and dangers for those who undertake the journey, still a more realistic way of getting to stay in Europe than waiting for one of the still relatively few resettlement spots on offer.

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43   According to Eurostat, Denmark resettled between 355 and 575 refugees annually during 2010-2015 (Eurostat, Resettled persons by age, sex and citizenship Annual data (rounded), extracted on 31 October 2020). In November 2016, the Danish Minister of Integration suspended the resettlement quota until further notice (Syppli Kohl 2016).
44   Poland, Hungary, the Czech Republic and the Slovak Republic are example of countries which have opposed refugee responsibility-sharing and which, during 2016-2019, have not resettled any refugees (Source: Eurostat, Resettled persons by age, sex and citizenship Annual data (rounded), extracted on 31 October, 2020).

Figure 2: Refugees resettled to EU Member States, 2010-2019
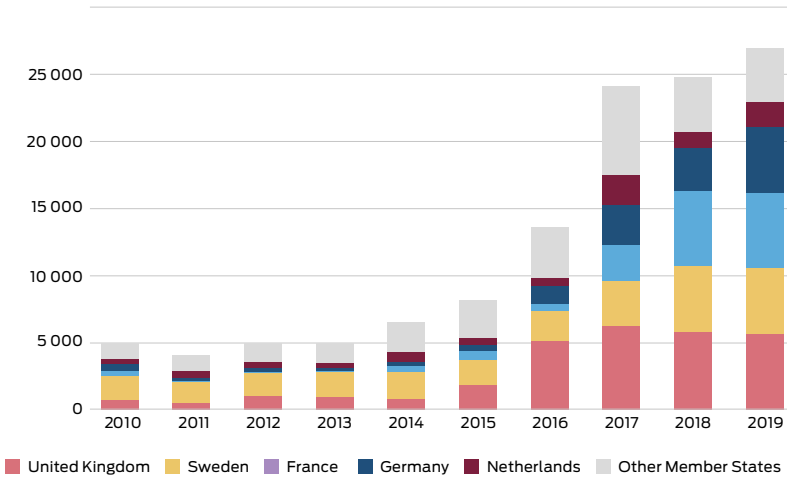
Source: Eurostat, Resettled persons by age, sex and citizenship – annual aggregated data (rounded), extracted on 25 August, 2020.

Figure 3: Positive decisions* on asylum applications in the EU, 2010-2019
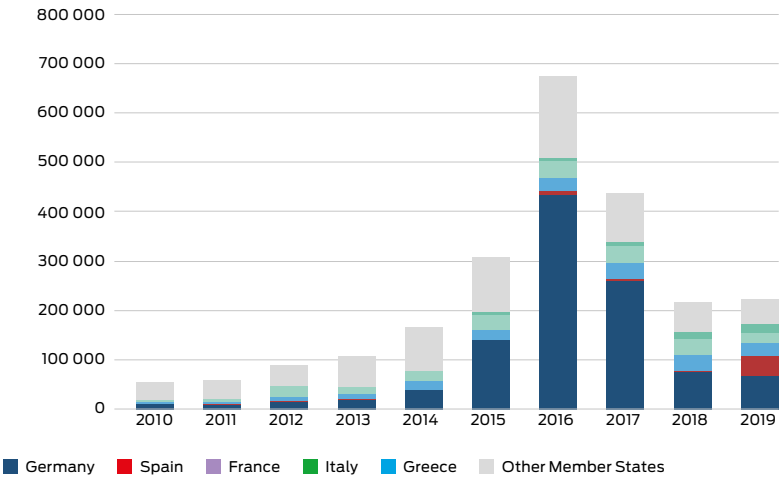
Source: Eurostat, First instance decisions on applications by citizenship, age and sex – annual aggregated data (rounded), extracted on 1 October 2020.

* Positive decisions include refugee status, subsidiary protection and humanitarian grounds.

When considering whether resettlement can work as an alternative to travelling to the EU irregularly and applying for asylum, it is also important to keep in mind that there are fundamental differences between these two ways of getting protection. The statuses granted might be the same (usually refugee status or subsidiary protection), but there is no right to be resettled, and an individual cannot apply for resettlement. If and how many refugees a country accepts as resettled refugees essentially depends on their good will and political choices. Consequently, resettlement can serve as a complement to the territorial right to asylum, but never replace it.

Besides traditional resettlement, some Member States have experimented with different humanitarian admission programmes, "humanitarian corridors" or private sponsorship (EMN 2017a).[45] Usually, such programmes have had a limited scope so far.

There has been a debate among experts and policymakers about whether more legal migration channels for people in need of protection, such as resettlement and humanitarian admission, could channel more people from dangerous and illegal pathways towards legal routes. Some have argued that efforts could be made to ensure that refugees can access existing legal migration pathways and/or take advantage of existing regional freedom-of-movement protocols. Receiving states could also develop refugee-focused labour migration programmes, especially in areas where there is a clear correlation between refugees' skills and recruiting states' labour market needs (Long 2015). Others have said that admitting refugees under labour immigration frameworks could be useful but that the existing frameworks would need to be adapted to the needs of refugees (Ruhs 2019).

Overall, there does not seem to be proof that more legal channels can indeed reduce pressure on irregular routes. At the same time, the EU and its Member States have never really tried. Expanding resettle-

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45   Private sponsorship means that a person, group or organisation assumes responsibility for providing financial, social and emotional support to a resettled person or family, for a predetermined period (usually one year or even longer) or until the person or family becomes self-sufficient (EMN 2017: 51).

ment and other legal pathways is therefore very topical, and as many have argued, such systems do have many advantages: They can serve as protection tools, but also serve as a form of burden-sharing with countries of first asylum or transit, whose cooperation on migration issues the EU so desperately needs. Resettlement also allows receiving states to better plan and forecast the need for places at reception facilities, accommodation arrangements, social services, and other resources.

5.2 Unequal responsibility sharing for asylum seekers across the EU

The number of people who have applied for asylum in the individual Member States of the EU has always been unequal. While this was not necessarily seen as a problem in times of relatively low numbers of arrivals, it has been a concern for some Member States more than for others, and in times of higher pressures on the asylum routes to Europe, the unequal burden-sharing did get considerable attention (Wagner et al. 2016; Bovens et al. 2012; Schneider et al. 2013). Especially some of the Southern European EU Member States, such as Cyprus, Greece, Spain, Italy and Malta, have criticised the current CEAS as "unfair" (Cyprus, Greece, Spain, Italy and Malta 2020). Fairer responsibility-sharing has also been advocated by other countries, such as Sweden (Government Offices of Sweden 2019).

During the European "refugee crisis" in 2015, some countries were disproportionately affected by rapidly and strongly rising numbers of asylum seekers, while others barely noticed any such developments. According to Eurostat (2016), and as shown in Table 2 below, the highest number of new asylum applicants were registered in Germany (with 441,800 first time applicants), which represents a share of 35 percent of all first-time applicants in the EU that year (1.25 million). Hungary came second with a share of 14 percent,[46] followed by Sweden

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46   The high number in Hungary was a temporary phenomenon, however, as most asylum applicants registered there quickly left the country again and applied for asylum in Germany, Austria, Sweden and other Member States.

(12 percent) and Austria (7 percent). These are absolute numbers, but when compared to each country's share of the total EU population, a somewhat different, and more worrisome, picture emerges. Per capita, the highest number of registered applicants in 2015 was recorded in Hungary (17,699 first time applicants per one million inhabitants), ahead of Sweden (16,016 per million inhabitants), Austria (9,970), Finland (5,876) and Germany (5,441). At the other end of the scale, Croatia only had 34 applicants per million inhabitants, Slovakia 50, Romania 62, Portugal 80 and Lithuania 93 (Eurostat 2016). Thus, the countries that were most affected by arrivals of asylum seekers were either countries that perhaps had a positive reputation among people seeking asylum, like Germany or Sweden, or happened to be situated at the main irregular entry routes to Europe, like Hungary.

After 2015, responsibilities have tended to shift from countries in Northern and Western Europe towards Southern Member States with sea borders, such as Greece, Cyprus, Malta, Italy and Spain (see Table 2 below). Eurostat data for 2019 show that in the EU as a whole, there were 1,279 first-time asylum applicants per million population. The highest number of registered first-time applicants in 2019 relative to the population of each Member State was now recorded in Cyprus (14,495 first-time applicants per million population), ahead of Malta (8,108) and Greece (6,985). Luxembourg was now number four, with 3,585 applications per million inhabitants, followed by Spain (2,454) and Sweden (2,260). In contrast, the lowest numbers were recorded in Slovakia (39 applicants per million population), Hungary (48), Poland (73), Estonia (76) and Latvia (93) (Eurostat 2020).

Table 2: First time asylum applicants in the EU Member States

	2015		2019	
	Number of first-time applicants	**First-time applicants per million population**	**Number of first-time applicants**	**First-time applicants per million population**
EU (including UK)	1 257 150	2 470	675 885	1 279
Belgium	39 065	3 463	23 140	2 017
Bulgaria	20 160	2 800	2 075	296
Czechia	1 240	117	1 575	148
Denmark	20 855	3 679	2 645	448
Germany	441 900	5 441	142 510	1 716
Estonia	225	172	100	76
Ireland	3 270	707	4 740	967
Greece	11 370	1 047	74 915	6 985
Spain	14 610	314	115 190	2 454
France	70 570	1 063	138 290	1 789
Croatia	145	34	1 270	311
Italy	82 790	1 369	35 005	580
Cyprus	2 105	2 486	12 695	14 495
Latvia	330	165	180	93
Lithuania	275	93	625	223
Luxembourg	2 360	4 194	2 200	3 585
Hungary	174 435	17 699	470	48
Malta	1 695	3 948	4 015	8 108
Netherlands	43 035	2 546	22 540	1 301
Austria	85 520	9 970	11 010	1 216
Poland	10 255	270	2 765	73
Portugal	870	80	1 735	169
Romania	1 225	62	2 455	126
Slovenia	260	126	3 615	1 738
Slovakia	270	50	215	39
Finland	32 150	5 876	2 455	443
Sweden	156 195	16 016	23 150	2 260
United Kingdom	39 970	591	44 315	664

Sources: Eurostat, Asylum and first time asylum applicants by citizenship, age and sex - annual aggregated data (rounded), extracted on 1 November, 2020; Eurostat 2016: Eurostat 2020.

In some Member States, such as the Baltic countries and the Slovak Republic, the arrival of asylum seekers has been a relatively marginal phenomenon before the crisis of 2015, during the crisis, and even afterwards. While some countries experienced strongly rising numbers between 2013-2015, increased flows did not affect the whole EU and some countries (e.g., Romania, Croatia, Slovenia, Lithuania and Latvia) even received fewer applicants in 2015 than they did in 2014 (Parusel and Schneider 2017: 67-70).

5.2.1 The impact of the Dublin Regulation on responsibility sharing

When we think about responsibility sharing, solidarity and the distribution of asylum seekers across Europe, the Dublin Regulation inevitably comes to our minds. After all, it is an instrument that establishes responsibility and allocates asylum seekers to Member States. However, the Dublin Regulation was never intended to achieve an equal distribution of asylum seekers across the participating states. This is because it does not take into account questions of overall numbers, capacity or other criteria that might produce homogenising outcomes. Instead, responsibility is allocated on the basis of qualitative criteria, which run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly, or regularly (see Infobox 1).

Already in 2017, when the European Commission presented a Green Paper on the Future of the Common European Asylum System, it suggested that "the Dublin System may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location" (EC 2007: 10). So, even if the EU institutions saw the problem of unequal responsibility sharing, they have done little about it.

Meanwhile, a growing body of literature and analysis shows that the Dublin system effectively aggravates the existing disparities in terms of responsibility and solidarity, instead of alleviating them (e.g., Fratzke 2015). Several Western and Northern European Member States transfer many more asylum seekers to other Member States than they receive from them, for example Germany, France, the Netherlands, Austria and Belgium (ECRE 2020a: 8). In 2019, Italy received more than ten times as many asylum seekers from other Member States than it managed to transfer to others. For Greece, the situation would be similar or worse if transfers had not been effectively suspended (ECRE 2020a: 26).

5.2.2 Models for better responsibility sharing

The quest for more balanced responsibility sharing and a more equal distribution of asylum seekers across Europe has produced a number of theoretical models and distribution keys, both from governments and EU institutions, and from researchers and think tanks across Europe.

Amidst the refugee emergency in 2015, the European Commission designed a model for dispersing a predefined quota of asylum seekers in clear need of international protection from overburdened Member States (Italy and Greece) to other Member States (EC 2015a). To distribute relocated asylum seekers fairly across the various destination countries, the Commission calculated a key that was supposed to "reflect the capacity of the Member States to absorb and integrate refugees" (EC 2015a: 19). This distribution key encompassed four factors that were given different weight: Economic strength of the Member State, measured in GDP (40 percent); size of the population (40 percent); unemployment (10 percent) and average number of asylum applications and number of resettled refugees per 1 million inhabitants over the previous five years (10 percent). This last indicator was supposed to reflect the efforts made by Member States in the recent

past. According to this calculation, Malta needed to take fewer than 1 percent of all asylum seekers to be relocated, while the greatest share (18 percent) was foreseen for Germany (EC 2015a). A slightly modified version of this model was used when the Commission proposed, later in 2015, to establish a permanent crisis relocation mechanism (EC 2015b).

These Commission models for fair responsibility sharing have similarities with a proposal by Schneider et al. (2013), who suggested that a fair distribution of asylum seekers across the EU could be based on each country's economic strength (40 percent), population (40 percent), area (in square kilometres, 10 percent) and unemployment rate (10 percent).

When the European Commission proposed a new Dublin Regulation as part of the CEAS reform package launched in 2016, it abandoned the somewhat complicated calculation of fair sharing on the basis of four different factors. Instead, it now suggested a simpler distribution key for calculating a fair share for each Member States under the proposed "corrective allocation" of asylum seekers in situations of disproportionate pressures on one or more Member States. According to this, the economic strength and the population of a Member States would each be given 50 percent weight (EC 2016a).

Other solutions have circulated in the policy discourse as well, such as the German *Königstein key*, which is used to distribute incoming asylum seekers across the 16 German federal states (Parusel and Schneider 2017: 57-58; Thym et al. 2013). This key is also based on economic power and population, but the economic factor is more significant (two-thirds) than the population factor (one-third). As Parusel and Schneider (2017: 58-65) have shown, several Member States received much fewer asylum applicants in 2016 than they would have done if there had been a fair distribution system in accordance with any of the above-mentioned models while others received disproportionately more.

5.2.3 Consequences of unequal responsibility sharing

In theory, a system that mainly places responsibilities on countries with relatively well-developed asylum systems and decent standards for asylum procedures as well as integration on the one hand, and countries of first entry on the other hand, can trigger a *race to the bottom* for asylum in Europe. When countries feel disproportionately affected and strive to reduce the number of incoming asylum seekers, they will try to become less attractive and to deter as many potential arrivals as possible by lowering their standards.

This is not only a theory, but can also be observed in reality. In Sweden, for example, the Parliament passed a law in 2016 that explicitly aimed at temporarily reducing the number of people applying for asylum by lowering the national standards to a minimum level as required by EU and international law. The law included, for example, restrictions to the right to family reunification, the granting of temporary instead of permanent residence permits to beneficiaries of protection, and the discontinuation of certain non-EU harmonised, humanitarian protection statuses (Parusel 2016). The Swedish government has argued that this law contributed to a reduction of the number of asylum seekers (Regeringen 2019: 55). While Sweden took a disproportionately large share (12.4 percent) of all asylum seekers coming to the EU in 2015, the Swedish EU share was below four percent in 2019 (Migrationskommittén 2020: 117-118). However, the extent to which this numerical development can indeed be related to domestic policy changes in Sweden, or if a direct relationship between the Swedish EU share and policy changes exists at all, is unclear (Migrationskommittén 2020: 119-121, 377-378).

Apart from Sweden, there are many more examples of countries that tightened their rules on asylum and family reunification after 2015 to become less-attractive destinations (EMN 2017b). Unequal responsibility sharing and the feeling of being left with disproportionate pressures also explains some of the harsh policies towards boat migrants

that we have recently seen in some Southern EU Member States (see Section 4.2). Thus, it can be argued that unfair responsibility sharing and a lack of solidarity can have negative effects on national asylum standards. It is also likely that the EU would be much more resilient to shifting, and rising, numbers of asylum seekers if all countries were to take their fair share, based on their population and economic strength.

5.3 The European "Asylum lottery"

While the future of the Dublin system is uncertain, there is likely to be at least some reform of the rules on allocation of responsibility, probably through *corrective* solidarity mechanisms. This raises another important issue, the question whether it is fair to spread asylum seekers across Europe and permanently assign them to a specific country, even against their will. If asylum seekers would receive the same treatment in all EU countries, if material reception conditions would be the same, and the chances of getting a job or an education at least comparable, this would perhaps work. But what if the conditions for residence and integration were fundamentally different between those countries? What if an asylum seeker would be recognised as a person in need of protection in Member State A but not in Member State B?

The most important aspect with regard to the fairness of a dispersal and responsibility-sharing system is certainly that an asylum applicant should have the same, or at least similar, chances of receiving some form of protection regardless of where in the EU the application is made. A fair system therefore requires a harmonisation or approximation of the criteria and definitions that the EU Member States use to determine whether or not an asylum seeker is entitled to be granted refugee status or other types of protection.

In fact, the idea that harmonised asylum rules should be an essential component of a Common European Asylum System is all but new. Already in 1999, the European Council decided that it would work

towards a system that includes an "approximation of rules on the recognition and content of the refugee status" (European Council 1999).

Five years later, when the first binding EU Directive on this topic was adopted, the objective to harmonise national asylum rules was widened. The Directive not only aimed at establishing common criteria for the adjudication of refugee status, but also for the granting of subsidiary protection. In Recital 6, the Directive states that "to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection" was a main objective. Furthermore, the Directive also sets out that the "approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks".[47]

Given the importance that already then was attributed to a harmonised decision-making practice, based on common standards and definitions, one could expect that in the course of more than a decade, some progress had been made. Such an expectation would be reasonable also because the EU has tried to facilitate the approximation process through practical cooperation and EU-funded fora for practitioners from national asylum agencies to exchange experiences on how to evaluate and decide on asylum applications by protection seekers from specific countries or with certain profiles. In 2002, a "European Union Network for Asylum Practitioners" (EURASIL) was established as a new network after the dissolution of its predecessor, the "Centre for Information, Reflection and Exchange on Asylum" (CIREA). The aim of EURASIL was to intensify the working relations between practitioners with the aim of bringing about greater convergence at EU level by facilitating the exchange of information on the asylum situation in relevant countries of origin and transit, including practical case stud-

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

ies and comparisons of national and EU case-law on selected countries of origin (Vink and Engelmann 2012: 547-548). In 2011, the work of EURASIL was taken over by the then established European Asylum Support Office (EASO), which got a mandate to "increase convergence and ensure ongoing quality of Member States' decision-making procedures (...) within a European legislative framework".[48] Among other activities to this aim, the EASO produces country of origin reports that Member States' authorities are encouraged to use as part of their guidelines on how to decide on asylum applications (EASO 2016).

5.3.1 Comparing national asylum-recognition rates

Despite these efforts, the available asylum statistics show that the EU is still far from a unified system where the chances of individuals to receive protection are harmonised and comparable across the Member States. Analysing national recognition rates in the various Member States for selected countries of origin (Syria, Afghanistan, Iraq, Pakistan and Kosovo), Parusel and Schneider (2017) found that a measurable approximation of national asylum outcomes has not been achieved over the period studied (2008-2016). Extreme variations have persisted over these years, especially in the cases of Afghanistan and Iraq. In 2016, the chances for an asylum seeker from Iraq to receive a positive first-instance decision on an asylum application was below 13 percent in Hungary and the United Kingdom, while it was 100 percent in Spain and Slovakia. The case of Afghanistan was even more outstanding, with protection rates for Afghans in the various Member States oscillating between 1.7 percent and 97 percent. A somewhat higher degree of harmonization, although still not a satisfying one, was found for countries that generally had a very low (e.g., Kosovo) or a very high protection rate (e.g., Syria).

If we repeat the analysis of national decision making for the years 2017-2019 on the basis of the same methodology as used by Parusel

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48   Recital 5 of Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

and Schneider (2017),[49] there are few signs of any significant progress since 2016. The degree of harmonisation is still very limited. For example, asylum seekers from Syria had a 40.1 percent chance of receiving protection in Hungary in 2017, but protection rates of more than 90 percent, sometimes 100 percent, in several other Member States. In 2018 and 2019, Malta and Belgium, respectively, had the lowest protection rates for Syrians (65.7 percent in Malta 2018 and 61.8 percent in Belgium 2019), while a number of other Member States had protection rates well above 90 percent.

Compared to Afghanistan and Iraq, however, asylum outcomes for Syrians appear relatively well harmonised despite these differences. As concerns decisions on asylum seekers from Afghanistan, protection rates varied between 1.4 percent in Bulgaria and 97.3 percent in Luxemburg in 2017, 4.7 percent in Bulgaria and 94.1 percent in Luxemburg in 2018, and 3.1 percent in Hungary compared to 93.8 percent in Italy in 2019. As Table 3 shows, even if Bulgaria and Hungary on the one hand, and Italy and Luxembourg on the other, are regarded as exceptions and therefore excluded from the analysis, there are still extreme disparities between Member States' practices, and the situation does not seem to have improved over the years.

The same is true for Iraq. The recognition rates for Iraqi asylum applicants varied from 66.8 percent in France and 67.5 percent in Greece to 8.3 percent in Denmark, 17.2 percent in Sweden and 21.6 percent in Finland.[50]

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49   The authors retrieved data on first-instance asylum decisions from the public Eurostat database in and disaggregated them for different countries of origin of the persons affected by these decisions, as well as for types of decisions and years (2008-2016). Positive decisions were then calculated as percentages of the respective total number of decisions taken by each Member State, to produce comparable protection rates for all Member States and the EU as a whole. Positive decisions include refugee status, subsidiary protection and humanitarian statuses.
50   Eurostat, First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded), extracted on 30 August, 2020.

Table 3: Protection rates* 2017-2019, Afghanistan

	2017	2018	2019
European Union (including UK)	46,6%	46,2%	54,4%
Belgium	58,7%	50,5%	32,3%
Bulgaria	1,4%	4,7%	4,1%
Denmark	17,8%	20,0%	27,6%
Germany	46,6%	43,4%	44,4%
Ireland	:	93,8%	93,3%
Greece	75,6%	74,6%	72,5%
Spain	83,3%	85,7%	76,5%
France	84,0%	66,9%	62,6%
Croatia	6,3%	7,7%	:
Italy	91,6%	87,5%	93,8%
Luxembourg	97,3%	94,1%	78,6%
Hungary	32,2%	37,8%	3,1%
Netherlands	35,4%	33,8%	24,6%
Austria	40,5%	34,5%	57,0%
Romania	45,8%	27,3%	41,2%
Finland	41,9%	62,6%	32,9%
Sweden	37,1%	31,7%	37,7%
United Kingdom	36,1%	43,3%	64,1%

Source: Eurostat, First instance decisions on applications by citizenship, age and sex – annual aggregated data (rounded), extracted on 30 August 2020.

* The protection rate is the share of positive decisions among all decisions taken. Positive decisions include refugee status, subsidiary protection and humanitarian statuses.

":" means that the number of decisions taken by the respective Member State in the given year was less than 50 or that no data were available. Member States that did not take 50 or more decisions on applications from Afghanistan in any of the years 2017-2019 are not displayed in the Table.

Three main areas for reform

Recognition rates have also varied for asylum seekers from Turkey. In 2019, for example, almost all applicants (more than 90 percent) from Turkey were granted international protection in the Netherlands, Norway and Switzerland, compared to 51 percent in Germany and 26 percent in France (EASO 2020: 72).

Sometimes, the differences between certain EU Member States express themselves also when recognition rates for a certain nationality of applicants develop in opposite directions. For example, in Italy – which issues more decisions to asylum applicants from Nigeria than any other country – the recognition rate for Nigerian applicants decreased from 24 percent in 2018 to 18 percent in 2019. In contrast, the United Kingdom granted refugee status to more Nigerians, with the recognition rate rising from 24 percent in 2018 to 36 percent in 2019 (EASO 2020: 72).

The available statistics also show us that there are differences between the various Member States not only on overall protection rates for the various nationalities, but also in terms of the exact protection status granted. If people from a certain country of origin are granted protection, they are likely to receive refugee status in some countries but likely to receive subsidiary protection or as humanitarian status in others (Parusel and Schneider 2017: 107-111; ECRE 2020b).

5.3.2 Consequences of and reasons for unfair decision making

While strong variations of this kind are problematic from a general-fairness perspective, the Dublin system certainly makes the situation particularly worrisome. What country an asylum seeker is allocated to has a major impact on this person's chances to receive protection. This challenges the legitimacy of the Dublin rules and any further development of these rules that would perpetuate mandatory responsibility allocation. The fact that asylum decision making varies greatly between the various states also incentivises secondary movements of asylum seekers within Europe (see Infobox 2). In recent years, for example, there have been

reports of Afghan asylum seekers being rejected by Sweden, who – sometimes after several years in the Scandinavian country – eventually moved on to France or Germany and applied for asylum again there. Particularly in France, the recognition rate has been much higher for Afghans than in Sweden (Parusel 2019; de la Reguera 2020).

Why Member States' asylum decision-making differs is impossible to explain using a statistical analysis alone. Explaining high or low rates would require an analysis of the contents and reasoning in asylum decisions as well as national legislation and political oversight of asylum decision-making authorities in all EU Member States. Still, we can assume in general terms, that differences could be related to divergent understandings in the various Member States of concepts, such as refugee status, subsidiary protection, or protection for humanitarian or other reasons. While refugee status and subsidiary protection are defined in the Qualification Directive, humanitarian and other grounds for protection are not harmonised at EU level; Member States are still allowed to use their own national criteria to grant residence permits on the basis of an individual's health condition, personal circumstances, or obstacles to return.[51] Furthermore, asylum seekers' grounds for protection, the reliability and credibility of evidence or testimony they present, and the security situation in their countries of origin, might also be assessed inconsistently among the Member States, which can explain inconsistent asylum outcomes across the EU. Other possible factors are heterogeneous national laws and practices concerning the implementation of the concepts of *safe third countries* or *safe countries of origin*, or possible political interference with the decision-making of national authorities. Such interference can be direct, i.e. when a government openly or secretly instructs decision-making authorities to proceed in a certain manner, or indirect, when asylum authorities react to a more or less compassionate (or hostile) political climate or public opinion towards refugees in general or asylum seekers from a specific country in particular.

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51   For an overview of national humanitarian statuses and non-harmonised protection statuses, see EMN 2020.

5.4 Other issues

While the lack of legal entry pathways, the tensions over a fairer sharing of responsibilities among the Member States and the wide variation of national asylum decision making certainly represent key problems of the CEAS today, any progress to be made in the future also depends on other elements of asylum policy, such as asylum procedures; reception conditions; the prevention of irregular migration in cooperation with non-EU countries; the competencies and capabilities of a common executive EU Agency on asylum; and a common approach towards the return of rejected asylum seekers.

5.4.1 Reception conditions, asylum procedures and post-status rights

For the proper functioning of the CEAS, both reception conditions and asylum procedures are important parameters, not least because they can have an impact on responsibility sharing and asylum decision-making. If there are wide differences between the Member States regarding material reception conditions, this may affect the preferences of asylum seekers as to where to apply for asylum, and encourage secondary movements (Zaun 2017: 74; Brekke and Brochmann 2015). Disparities between national asylum procedures and their length can produce such effects as well (Bertoli et al. 2020). In addition, procedural differences can affect asylum decisions, as discussed in the previous Section: for example, if Member States have different understandings of what constitutes a *safe country of origin* or a *safe third country*, this can mean that one Member State considers an asylum application by a person from a given country (or who has transited through a given country) as inadmissible, while another does not. As a result of this, there are good reasons to aim at a further harmonisation of conditions and standards as the CEAS is reformed. A further important element are the rights of asylum seekers after they are granted protection. Post-status rights and conditions, such as the right to be joined by fam-

ily members, to access labour markets and welfare systems, and the duration of residence permits issued to beneficiaries of protection can influence asylum seekers' choice of destination and their propensity to stay in one Member State or to move on to another (Migrationskommittén 2020: 97-138).

5.4.2 Cooperation with non-EU countries of origin and transit

How the EU and its Member States can work together with transit and origin countries of asylum seekers and people migrating irregularly has over recent years become an increasingly important field of expertise, policymaking and research. The policy discourse is predominantly framed by a restrictive approach in the sense that, rather than emphasising the positive effects of migration, the EU wants its foreign partner countries to help control migration flows to Europe, reduce irregular crossings and facilitate the return of irregular migrants and rejected asylum seekers to where they have come from. For example, in response to the "refugee crisis" of 2015, the EU created an "Emergency Trust Fund for Africa" to address the root causes of instability, forced displacement and irregular migration and to contribute to better migration management (EC 2020l). Under this instrument, EU funding has been provided to numerous projects in 26 countries (Kipp 2018).

A different, but particularly relevant, example of cooperation with third countries is the EU-Turkey statement of March 2016 (General Secretariat of the Council 2016). Even if, as shown in Section 4.2, not all elements of the agreement have worked as anticipated, for example the return of asylum seekers from Greece back to Turkey, it has certainly helped reduce boat crossings from Turkish shores to Greek islands. EU policymakers have tried to replicate all or at least some aspects of the agreement with Turkey in other countries (Collett 2017). For example, the EU now provides training and equipment to the Libyan coast guard to put Libya in a position to hinder crossings

towards Malta and Italy. In response to the poor living conditions of irregular migrants and refugees in Libya, it has also supported evacuations of migrants and refugees from Libya to Niger and committed to receive some of the evacuated people as resettled refugees in the EU (El Zaidy 2019).

Far beyond these recent examples of bilateral cooperation with non-EU countries, ideas to externalise migration control measures to prevent irregular arrivals in Europe, or to conduct asylum examinations in third countries, have been discussed for a long time and resurfaced again in the aftermath of the crisis in 2015. These ideas of "offshoring" the reception and processing of asylum applicants, and of organising the entry to the EU for those found to be in need of protection through legal channels, may appear attractive. In ideal circumstances, offshoring concepts would make illegal crossings as well as returns of rejected asylum seekers unnecessary and allow the final destination countries within the EU to better plan their reception and integration arrangements. People without protection needs would be rejected before even entering the EU.

However, there are a number of problematic issues around jurisdiction and responsibility, which have raised the question whether externalisation would be legal and legitimate. Critical aspects relate to which Member State or which EU or international authority would be responsible to carry out the assessment of asylum claims in external centres; whether third countries would at all be willing to host EU-run asylum centres; what country's asylum law would apply there; what safeguards there would need to be for asylum applicants; and how it could be ensured that people with protection needs can actually reach these centres (UNHCR 2010). All in all, while partnerships and migration-related cooperation with third countries can be useful for addressing the root causes of irregular migration and prevent perilous, irregular crossings, ideas to externalise asylum procedures seem risky, uncertain and difficult to organise. Moreover, there is, of course, no

guarantee that external EU asylum processing would stop people from trying to irregularly cross land or sea borders towards Europe.

At the same time, however, it needs to be acknowledged that cooperation with third countries can have positive effects if it is based on a balanced approach that also serves these countries' interests and the needs and aspirations of refugees and migrants. Providing aid and assistance to refugee-hosting states outside Europe, opening legal channels for migration into the EU for workers or students, and to admit refugees under resettlement schemes, might be useful because if this works and a fruitful cooperation is established, there can also be a more honest dialogue with third countries about the prevention of irregular migration and returns from Europe.

5.4.3 An EU Asylum Agency

Since taking up its responsibilities in 2011, the European Asylum Support Office (EASO) has supported the Member States to apply the rules of the CEAS. EASO is tasked with supporting national asylum authorities in EU Member States, providing employees of these authorities with training and instructions with the aim to contribute to the harmonisation of asylum processes and asylum decision-making. Among other activities, EASO compiles reports on the human rights and security situation in key countries of origin. It is also involved in early warning and preparedness systems for Member States that face challenges coping with influxes of asylum seekers. In addition, it has become gradually involved in operative tasks, such as the formation of *hotspots* in Greece and Italy, where asylum seekers were registered, and their applications processed (Wagner et al. 2016: 23). EASO also assisted emergency relocations of asylum seekers in 2016-2017.

As regards the harmonisation of asylum outcomes, this study has shown that significant progress is still missing. Compiling and spreading country of origin information and offering training is obviously not enough as long as the actual decision-making is under the control

of national asylum authorities that are overseen by their respective national governments. Even if the EASO is further strengthened and its mandate expanded after being converted into an EU Asylum Agency, as proposed by the European Commission in 2016 (EC 2016e), this is not likely to change. While the proposal gives the Agency the task of coordinating efforts among Member States to engage and develop common guidance on the situation in third countries of origin, it can still not impose a certain decision-making practice on a Member State. A "joint processing" of asylum applications by officials from two or more Member States and/or from EASO is not routinely provided for either. If the Agency is to continue working towards harmonised asylum outcomes, it will therefore have to rely on soft pressure. However, in the case of the CEAS becoming almost fully communitised, it would be reasonable to imagine that the Agency would carry out at least a monitoring of national decision making and issue concrete recommendations in cases in which the protection rate for a given nationality in a certain Member State falls below or exceeds a certain margin above or below a reasonable EU average protection rate for that nationality. How such a range or margin could be defined would be up to policymakers to decide, but the aim would be to at least identify, flag and monitor situations of extreme deviation from the main trend.

5.4.4 The return of rejected asylum seekers

In its New Pact on Migration and Asylum, the European Commission states that EU migration rules can be credible only if those who do not have a right to stay in the EU are effectively returned. Currently, only about a third of all people ordered to return from Member States actually leave, which according to the Commission "erodes citizens' trust in the whole system of asylum and migration management and acts as an incentive for irregular migration" (EC 2020a: 7). Consequently, it argues that a common EU system for returns is needed, which combines stronger structures inside the EU with more effective coop-

eration with third countries on return and readmission (EC 2020a: 7-8). The Commission's recipe consists of carrots and sticks. It wants to incentivise voluntary departures but also enhance enforcement measures such as detention and the prevention of absconding and "unauthorised movements" (EC 2020a: 8). It also wants to give the European Border and Coast Guard Agency Frontex more operational powers, making it the "operational arm of EU return policy" (ibid). To step up return efforts, the Pact introduces an EU "Return Coordinator" and return representatives from Member States (ibid).

The Commission's proposals certainly echo well with national priorities in the EU, as difficulties to carry out returns are a topical issue in many Member States. However, the focus on operational capacities, enforcement tools and pressure on countries of origin to take irregular migrants and rejected asylum seekers back also risks becoming one-sided. Returning people against their will has always been difficult, and promising quick improvements can direct attention away from the underlying problems. In the political discussion about the difficulty of carrying out returns, reference is often made to a lack of willingness among the asylum seekers themselves to comply with rejection decisions. Problems can also relate to a rejected asylum seeker holding no travel documents or not submitting these to enforcement agencies, refusing to disclose their identities, or evading deportation by absconding. Countries of origin sometimes refuse to readmit their own nationals, or do not issue passports (EMN 2016). While such explanations certainly hold true in many cases, there are more fundamental reasons for non-return as well. From the EU Member States' approach to asylum applicants from certain countries, as discussed above, it is not clear whether the situation in these countries is safe enough for individuals to return to. For example, some EU countries reject the majority of asylum seekers from Afghanistan while others grant them protection, which raises the question if people sometimes are denied a right to stay, who – given the lack of a realistic return option – would

actually be in need of it. There can also be cases of people who do not fulfil the requirements for asylum while at the same time they cannot return to their home countries for personal or humanitarian reasons. A realistic way of dealing with rejected asylum applicants is not always to enforce return, it can also be to legalise their stay.

Increasing pressure on countries of origin to take back their citizens has its limits as well. In many countries, families are dependent on money that migrants in the EU send home (remittances), which is one reason why deportations from Europe are not popular among these countries' governments and electorates.[52] There is certainly room for improved cooperation with countries of origin, but in reality, the EU and its Member States have to think about what they can offer in exchange for more readmissions and returns, such as aid, a better treatment of migrants in the EU, or more legal opportunities for migration for work or education.

In this context of return policy, it is also important to observe that returning rejected asylum seekers and other migrants without a legal right to stay is a Member State competence and thus not in the hand of the EU. Progress, also in terms of better relationships with third countries, essentially depends on Member States' strategies and activities. The EU and Frontex can play facilitating roles, but to promise quick success risks leading to frustration.

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52   Zanker et al. 2019 provide interesting examples from West African countries such as Gambia, Nigeria and Senegal.

Conclusions and reform scenarios

The three main areas of concern, as discussed above, are interdependent and consequently complicated to address. There is also an interplay with the other challenges mentioned. For example, harmonised asylum decisions across the EU, as well as a further approximation of asylum procedures and reception conditions for asylum seekers, are to a high degree a precondition for an effective responsibility-sharing system. The Dublin Regulation has already suffered from a lack of legitimacy because after all, it has always been unfair to allocate asylum seekers to a Member State where their chances to be granted protection are small while they would have had a better chance in another Member State. The same logic applies to variations between Member States as regards asylum procedures and reception conditions. The legitimacy of redistribution or relocation would probably not improve, perhaps even deteriorate, if the EU were to establish a new and even more comprehensive responsibility-sharing system covering all incoming asylum seekers.

At the same time, a fairer sharing of responsibilities is an urgent necessity in itself, because otherwise, it is likely that the *race to the bottom* regarding asylum standards in the Member States, which clearly

accelerated after 2015, continues. If some countries continue to receive disproportionate numbers of applicants while others remain far below their fair share, this creates incentives for becoming less welcoming. Only when there is a fair sharing will Member States work again to improve their systems to the benefit of those in need of protection and their host societies, instead of focusing on deterrence strategies.

Resolving the issue of legal pathways to protection as an alternative to irregular routes also depends on other factors. For a common EU approach on resettlement, humanitarian admission, humanitarian visas and complementary legal migration pathways, there needs to be some form of coordination and responsibility sharing. Without a common strategy, differences and disagreements between Member States will continue to resurface and obstruct progress in these matters.

In essence, the future scenarios for the three key components of the CEAS are as follows:

6.1 Legal entry pathways

The lack of legal entry pathways will most probably remain a key problem of the CEAS, regardless of the Commission's new Pact on Migration and Asylum and whether or not it is adopted. Admittedly, resettlement commitments and – to some degree – other admission programmes (such as humanitarian admission schemes, "humanitarian corridors" or private sponsorship programmes) have been somewhat expanded in recent years. Even if this positive process continues, however, the scale of these initiatives is likely to remain too small to offer credible alternatives to irregular travel and spontaneous asylum applications. As regards humanitarian visas or similar instruments, no significant progress has yet been made, and Member States will probably continue to be reluctant to change anything about this as they are afraid of unforeseeable consequences.

6.2 Resposibility sharing and the Dublin system

As regards responsibility sharing and the Dublin system, we can identify a number of possible future scenarios, ranging from failure to achieve agreement on a new system to an ambitious new system with fair quotas for the reception of asylum seekers in each Member State or a system where asylum applicants are free to choose their country of destination. In short, these scenarios are as follows:

(a) **Re-nationalisation**: This scenario means that EU Member States gradually depart from the Dublin system and resort to national solutions and/or bilateral arrangements. The existing Dublin regulation is not replaced by a new system of responsibility allocation.

As several Member States, especially Southern European countries of first arrival, oppose the current system as unfair and are eager to reform it, this scenario is not unrealistic if the EU fails to agree on a new system. Over recent years, we have already witnessed unilateral approaches and attempts to block asylum seekers' entry into the EU, such as reintroducing controls at internal borders, building barriers at external borders, making bilateral arrangements with individual third countries and pushing back migrants to unsafe third countries.

(b) **Status quo with ad-hoc solutions:** In this scenario, the Dublin system remains as it is and a limited number of asylum seekers is relocated between some Member States in particular situations of disproportionate pressure, in an ad-hoc mode, and based on voluntary commitments by individual Member States.

This is in essence what we have seen in recent years. In this scenario, the uneven exposure of the Member States to the arrival of asylum seekers is perpetuated, despite

some relocations. In the longer run, the status quo scenario entails great risks for cohesion within the EU, damages the solidarity principle and encourages desperate attempts of countries of first arrival to deter asylum seekers from reaching their shores. The scenario also causes situations of prolonged suffering among migrants who risk getting stuck in Member States with external borders and without possibility of onward mobility within Europe.

(c) **Flexible solidarity:** This means that the Dublin system stays in place but is either amended or complemented. Some of the Dublin Regulation's criteria for determining the Member State responsible for an asylum application are changed or complemented with new criteria, and as an expression of solidarity, Member States that receive fewer asylum seekers than others contribute to a common asylum system in different possible ways, such as relocating asylum seekers from countries under pressure or by offering other types of assistance or financial compensation.

This scenario would represent a modest step forward, but it would not offer a lasting remedy to the problem of unequal responsibility sharing. Contentious debates about asylum, solidarity and responsibility-sharing would probably continue.

(d) **Corrective allocation:** In this scenario, the Dublin system is complemented with an additional mechanism that ensures that Member States that receive more asylum seekers than their fair share can routinely redistribute some of the surplus to other Member States. Relocation is mandatory and cannot be replaced with other, "flexible" commitments. This scenario also means that, in the event of disproportionalities, the standard Dublin criteria can be bypassed.

This scenario is more ambitious as scenario (c) but also more unlikely. Whether or not it will be successful depends on the number of people to be redistributed as well as Member States' and asylum seekers' compliance with the system.

(e) **Fair quotas:** This scenario means that the current Dublin system is abandoned and replaced by a new system that distributes asylum seekers across the EU in accordance with a quota-based distribution key. Quotas are calculated using factors such as population and economic power. Family unity or other factors that link an asylum seeker to a specific Member State can still be taken into account.

This is the most ambitious scenario. It would resolve the problem of unequal responsibility-sharing, make the EU more resilient to shifting and increasing numbers of incoming asylum seekers, remove incentives for Member States to turn to unilateral deterrence strategies; and slow the race to the bottom as regards national asylum standards. However, it appears somewhat idealistic given the existing tensions between the Member States as regards responsibility-sharing and relocation of asylum seekers. To be legitimate, it would also require significant progress as regards convergence of national asylum decision making, procedures, reception conditions, integration arrangements for beneficiaries of protection, and other topics.

(f) **Free choice:** A further scenario, although a highly unlikely one, would be a "free-choice" model. In this scenario, which is favoured by human rights and refugee advocacy organisations, asylum seekers would be entirely free to choose their country of destination. This approach makes a strong point in referring to the impracticability of transferring or returning – normally against their wish – people to a country which

is responsible for examining an asylum application according to the Dublin Regulation. The principle of first country of arrival, which is emphasised in the European law but not to the same degree in international law, would disappear.

The main drawback of this scenario is that it would perpetuate and possibly even aggravate the unequal distribution of asylum seekers across the EU because applicants would prefer some destination countries over others. While EU funding for those Member States that receive more applicants than others could ease the problem, there is a great risk that governments and electorates alike would perceive this scenario as unfair and illegitimate.

6.3 Harmonising asylum decisions

Harmonising and approximating national asylum decisions and procedures is a process that certainly requires time and patience, but at the same time better convergence is a goal that can be reached. Progress has already been made through mutual learning, exchanges of experiences, joint asylum processing exercises and the production of common country of origin information. Such work should, and probably will, be intensified, but to make a difference, clear targets and benchmarks would need to be developed. There is also a need for follow-up, oversight and – possibly – enforcement by a Common EU Asylum Agency. Once such an Agency is in place and new regulations on asylum procedures and the qualification of asylum applicants as refugees or people in need of subsidiary protection are adopted, there would be a better opportunity to intensify the work on a harmonisation and convergence of asylum outcomes. However, EU interference with what is perceived as a national competence is politically sensitive and a closer monitoring of national decision making by supranational actors might meet resistance.

Policy perspectives

Identifying problems and thinking about possible future scenarios is a first step to finding solutions. In this sense, this study is intended to send a positive message despite all the shortcomings and challenges we have identified and discussed. What the study has primarily shown is that to find solutions, we have to look beyond the most obvious symptoms of crisis and turn towards their underlying causes.

The phenomenon of **mixed migration pressures** at the external borders of the EU, which is linked to the **lack of legal pathways** for people in need of protection, is certainly not solved with a quick fix. Radical steps to replace the current "territorial" asylum system, with a new system where asylum can only be granted when applied for in extraterritorial centres and before entry to the EU, are extremely risky and can damage the global protection infrastructure as a whole. Moreover, there is no evidence that extra-territorialisation would stop irregular crossings. Instead, the focus should be on gradually establishing legal and safe alternatives to irregular entry without compromising the right to apply for asylum at the border or after entry. For people with legitimate protection claims, such alternatives could be resettlement, similar frameworks of humanitarian admission, or pilot projects on humanitarian visas. Widening the opportunities for family reunification can also play an important role for refugees and other

individuals in need of protection who already have a close family member in the EU. For migrants who are not eligible for protection, the Member States should offer visas or residence permits for temporary or permanent work or studies, or for circular migration, linked to their respective domestic needs for foreign labour. If credible alternatives to dangerous and irregular crossings arise and evolve, mixed migration pressures could be reduced.

Achieving more convergence, coherence and predictability regarding Member States' **decision-making on asylum cases** is a process that deserves more attention. At the same time, it is a goal where methods already exist and certain steps forward have already been made, such as through joint asylum-processing exercises, mutual learning and the production of common country of origin information. Such work needs to be intensified, and it might be time to move from just exchanging experiences and providing information to work on actual convergence including binding targets and commitments. A future new EU Asylum Agency could supervise this process and be given monitoring tasks. In a similar manner as national asylum authorities in some Member States review and monitor asylum decisions taken at local or regional branch offices, to detect deviations and contradictions and to improve consistency, the EU agency could monitor Member States' decision making and perhaps even issue concrete recommendations. Ultimately, however, certain variations will always exist as long as decision-making is not transferred from national authorities to a European agency. To take such a far-reaching step now could be premature but should be kept in mind as a long-term goal.

Finally, as regards **responsibility sharing**, the European Commission's proposals from September 2020 would mean a combination of the above-mentioned scenarios c) and d), i.e. flexible solidarity and corrective allocation. The distribution criteria of the Dublin system are essentially preserved in this proposal, but complemented with new criteria; an expansion of the definition of family member and

possession of educational diplomas issued by a Member State. In different possible situations, such as disembarkation and "migratory pressure", the Member States would be required to assist each other through relocation, "return sponsorship" or other efforts, such as capacity-building. What measures each country can choose from and how much they need to offer depends on the situation at hand, which would be regularly forecast and monitored. However, the system proposed by the Commission is very complex, its impacts are difficult to assess, and whether the European Parliament and the Member States will agree on it remains to be seen.

Generally speaking, "flexible solidarity" could be an attractive and pragmatic interim solution in the light of the fierce disagreements between different Member States over asylum and refugees during the past few years. Yet in the longer run, a system where different Member States take on different roles (e.g., where some act as border guards, some carry out returns and some receive and integrate refugees) is not likely to be sustainable and can lead to further tensions and divisions as countries will inevitably question and criticise each other's roles and commitments as soon as emergencies appear. We can also expect that there would be permanent debates, both within and between the various Member States, about different solidarity contributions, the number of people that each Member State accepts, and the question whether each and every country does enough or not. Keeping the issue in the headlines and perpetuating the often toxic debate about numbers is not necessarily a desirable scenario. The same problems would arise with a system where some countries would admit asylum seekers while others would pay the bill. A better choice, especially in the longer run, would be a system where responsibilities are distributed automatically, based on objective criteria, and where each Member State has to take its fair share without being allowed to opt out.

The fact that the central problems of the CEAS today are interdependent raises the question whether these problems should be, and

can be, tackled all at once, i.e. as a package, or one after another. The European Commission has so far opted for the first option, a bold reform, both in 2016 and with the presentation of its New Pact on Migration and Asylum in 2020. More cautious voices that advocated a step-by-step approach and argued that priority should be given to consolidating and gradually improving the already existing frameworks while ensuring Member States' compliance with the common rules we already have, instead of rushing towards new grand reforms, have been overheard. Admittedly, in a situation where many Member States are profoundly unhappy with the existing rules and systems, EU decision-makers have perhaps no other option than to go *all-in* and propose major new package solutions. On the other hand, when the already existing rules and systems are difficult to enforce, it is not clear why a major systemic overhaul with entirely new procedural components and highly complex and bureaucratic instruments for responsibility-sharing would work better. The more complex and ambitious a reform scenario becomes, the harder it will be to ensure that it actually works in reality. Therefore, there seems to be a need for pragmatism and realism, or in other words, a focus on issues where progress can be made.

An alternative way of proceeding could be to accept a CEAS with different speeds and ambitions. While this may not seem an ideal way forward in terms of cohesion and unity of the EU, the depth and speed of European integration is already differentiated in important matters such as the Economic and Monetary Union and the Schengen area. In principle, it is not unthinkable that a sufficiently large group of committed Member States joins forces and establishes a responsibility-sharing system among its Members that goes beyond the current Dublin Regulation. Asylum procedures and decision making could also become more uniform within this group. Sceptics could choose to stay out. They would have greater freedom to pursue their own goals, but also miss out on the benefits of mutual assistance, closer cooperation,

help in crisis situations and sharing of resources and expertise. While the chances of the core group of CEAS members being able to move forward on legal pathways, harmonised decision making, responsibility sharing and other issues would be greater, establishing differing and competing areas of solidarity certainly also entails risks, because the outsiders might challenge, oppose and counteract policy developments in the core group.

Regardless of what political compromise we will see in the months and years to come, it is clear that a lot needs to be done to rebuild trust among the various Member States after the increased tensions and disagreements since 2015, to find common ground, and to renew the ambition to find credible solutions that safeguard the right to asylum. In this context, we should also consider the EU's role in the world. If the EU continues to fail to come up with a credible solution and silently accepts violations of its own human-rights standards by accepting or even promoting unlawful deterrence policies among its Member States, other regional and global initiatives for refugee protection and responsibility sharing, such as the UN's Global Compact for Refugees, could suffer damage as well. If the EU wants other countries to treat people in need of protection well, it needs to lead by positive example.

What might be needed most is an honest debate about, and a common European understanding of, what is at stake and what the EU wants to achieve on migration and asylum – a Europe that risks falling apart because it can't handle migration? Or a Europe that finds realistic solutions together and protects refugees?

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BERND PARUSEL

Pieces of the puzzle
MANAGING MIGRATION IN THE EU

This study investigates the future possibilities for a true common European asylum system and ways forward in managing migration in the EU. The EU is facing major challenges when attempting to achieve a sustainable and humane system, with differing political wills and irregular migratory flows putting pressure on the asylum system.

What are the central issues with the system today? How can we reach a compromise despite the increasing polarisation of European politics? How can the EU build a system that deals with migration and asylum in a sustainable way without compromising the right to asylum or international human rights standards?

With this study, ELF and FORES seek to contribute with a factually anchored account on the circumstances of the Common European Asylum System in the hope of influencing the political debate and highlighting possible solutions within a liberal framework.