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PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]

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Executive summary

This paper presents the evidence and experience that underpin the legislative initiatives proposed under the New Pact on Migration and Asylum. It is based on publicly available EU data and statistics as well as experience gathered by the Commission services and EU agencies.

It points to the key challenges in relation to migration faced by the European Union and provides an overview of the legislative and non-legislative proposals that seek to address the gaps and inefficiencies identified.

Overview of the current situation

Since the migration crisis of 2015, the number of arrivals and composition of flows have changed significantly, both between and along the different migratory routes. Additionally, there is significant variation of migratory pressure across countries and in terms of the tools applied to address it.

The number of **irregular arrivals to the EU dropped by 92% between 2015 and 2019**, with Afghan (24% of the total), Syrian (17%), unspecified sub-Saharan nationals (10%) and Turkish (6%) as the most prominent nationalities.

In addition, the share of migrants from countries of origin whose nationals have a low chance of being granted international protection has increased. From a peak of 56% in 2016, the EU-wide first instance recognition rate fell to 30% at the end of 2019.

Asylum applications have not followed the decreasing trend in irregular arrivals, meaning the ratio of asylum applications to irregular arrivals is higher today than it was in 2015. While there were 1,2 million first-time asylum seekers applying for international protection in the EU and 374,314 registered irregular border crossings on the three main routes in 2016, there were 612,685 first-time asylum seekers applying for international protection and 124,023 registered irregular border crossings in 2019. The discrepancy between consistently high asylum applications and the decreasing number of irregular arrivals can be explained by a number of factors, such as the increased number of first time asylum applications from citizens of visa-free countries, several asylum applications made in parallel within the same or another EU Member State, unauthorised movements and applications not immediately lodged at the external border.

With a consistently high number of asylum applications in the past years, **the pressure on national asylum systems remains high**, especially in certain Member States, which can find it a challenge to rapidly process all asylum applications. At the end of 2019, there were more than 540,000 cases still pending at first-instance, up by 20% from a year earlier, half of which were pending for more than six months.

Migrants disembarked following search and rescue (SAR) operations represent a significant share of arrivals, reaching 50% of total arrivals by sea in 2019. These arrivals

have a direct impact on the EU's migration and asylum systems, as well as on the effectiveness of integrated border management, due to the fact that Member States cannot apply the same tools that are applied for irregular crossings by land or by air. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry.

Member States requested the Commission to coordinate relocation to other Member States in 51 SAR cases since the beginning of 2019. The Commission was able to coordinate the relocation process at operational level for 39 of those requests.

The number of third-country nationals found to be irregularly present in the EU substantially decreased by 70% from 2015 to 2019. However, the number of third-country nationals who returned decreased by only 3% and the number of actually returned third-country nationals decreased by 18% between 2015 and 2019. This means that, in 2019, only **32% of irregular third-country nationals actually returned**, either voluntarily or forcibly.

Against this background, the Commission has identified a number of challenges that prevent the EU's current system from being fit to address the realities of migration, able to ensure international protection for those in need and effective and humane return of irregular migrants, fair in terms of solidarity and sharing of responsibility between Member States as well as ready for use in times of crisis and situations of *force majeure*.

Challenges faced by the EU

(1) First, there is a ***lack of an integrated approach at the EU-level*** that is effectively translated into national asylum and migration policies.

Notwithstanding the assistance by EU agencies, notably the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex), as well as support from relevant EU funds, reliable and effective structures for coordinating the policies falling under the responsibility of different national authorities in the area of asylum and migration management are still wanting.

Despite increased cooperation in the implementation of the Common European Asylum System (CEAS), **Member States' asylum and return systems operate mostly separately**. The recent increase in the share of asylum applications by nationals of countries with a low recognition rate increases the importance of linking up these procedures. There are a number of loopholes as regards return and asylum procedures that facilitate absconding and unauthorised movement of migrants across the EU, hamper returns and put a heavy burden on national administrative and judicial systems.
These loopholes include, notably, return and negative asylum decisions being issued separately, inefficient rules in case of subsequent asylum applications or of applications submitted during the last stages of return. Another loophole is that only 10-15% of return decisions are followed up with a readmission request or a request for identification and re-documentation to the third country concerned. The existing **readmission instruments and**

tools for cooperation with third countries are not yet used to their full potential. At the same time gaps remain in the predictability and reliability of readmission processes that require a more fruitful engagement by third countries.

There is also potential for improving the effectiveness of programmes to facilitate the voluntary return and reintegration to irregular migrants. Some Member States offer assistance only to certain categories of irregular migrants, while others do not disseminate sufficient information about the availability of such programmes or lack appropriate funding. Procedures are often long and inefficient, and can be better tailored to match the needs of irregular migrants. Improving the way assistance is offered to migrants may also lead to increased voluntary return, which is more acceptable for third countries and sustainable for the migrants themselves. These identified weaknesses in national programmes present opportunities for the improvement of the effectiveness and sustainability of return.

Procedures upon arrival, which are the basis for determining the next steps, are not sufficiently streamlined across the EU. Member States currently have **different approaches to arrivals at the EU's borders** and there are no harmonised procedures for carrying out identity checks, heath checks, security checks or determining vulnerability as regards persons requesting international protection nor for persons entering irregularly.

The **use of accelerated and border procedures** by Member States is still limited due to current rules on appeals, difficulties relating to returns, and the lack of the necessary infrastructure. Particularly, using these procedures for the examination of applications lodged by nationals of third countries with a low share of positive decisions on applications for international protection, including from visa-free countries, is currently not sufficiently streamlined.

(2) Second, ***fragmented and voluntary ad hoc solidarity between Member States*** has put an disproportionate strain on Member States of first entry, threatened the political cohesion among Member States and put migrants in vulnerable situations at risk.

Until today, the relocation of asylum seekers based on the 2015 Council Decisions[1] has been the only time Member States were obliged to offer their solidarity in terms of relocation. However, mainly because of the changing migratory flows during the implementation of the Decisions and **limitations in relation to the scope of asylum seekers eligible for relocation**, it was not possible for Member States' authorities to identify the number of eligible persons foreseen in the Decisions. Additionally, the Decisions did not include legal

[1] Council Decisions (EU) 2015/1523 and 2015/1601 of 14 and 22 September 2015 respectively on establishing provisional measures in the area of international protection for the benefit of Italy and of Greece entered into force on 16 September and 25 September 2015 respectively (hereafter 'Council Decisions on Relocation' or 'Council Decisions'). By virtue of the Council Decisions on Relocation Member States have an obligation to relocate from Italy and Greece the number of persons allocated to them agreed in the Resolution of 20 July 2015 of the Representatives of the Governments of the Member States meeting in Council and as per Annexes I and II to Council Decision (EU) 2015/1601. The Council Decisions are binding on all EU Member States, except on DK and the UK.

provisions for the Member States to **provide other forms of solidarity support to those Member States still under pressure.**

Since then, Member States have engaged in *voluntary* exercises of relocation of migrants disembarked following search and rescue (SAR) operations, e.g. the Joint Declaration of Intent on a controlled emergency procedure discussed among France, Germany, Malta and Italy in September 2019, and the relocation exercise of vulnerable and unaccompanied minors from the Greek hotspots, agreed with several Member States in March 2020. However, relocation efforts have revealed several difficulties with such *ad hoc* and temporary formats of cooperation, with sometimes prolonged periods of time to find agreements to allow for disembarkation, and with only relatively few Member States contributing to relocation. This points to the need for a more comprehensive, effective and sustainable relocation system.
Member States have also shown solidarity to those Member States under major pressure by means of other forms of voluntary contributions, including targeted support to Greece and cooperation with third countries to address the root causes of migration. Member States have also provided support by deploying their experts through the EU Agencies where needed most.

While these measures point to a willingness of Member States to look at solidarity in a broader context and step up to assist those under major pressure, it also highlights the need for a **structured and permanent framework for solidarity**.

(3) A third challenge concerns the ***lack of effective rules for sharing responsibility for asylum applicants*** across the EU. This is linked to several deficiencies and weaknesses of the current Dublin III Regulation, and its implementation.

The **current rules on the shift of responsibility provide an incentive for unauthorised movements** and allow applicants for international protection to influence this shift. The shift of responsibility occurs when the time limits to send a transfer request expire, including when an applicant has evaded the transfer for over 18 months. Similarly, if an asylum seeker crosses a Member State's external border irregularly, and applies for international protection in another Member State more than 12 months after entry, the Member State of first entry can no longer be held responsible, resulting in the Member State of first application becoming responsible.

These procedural inefficiencies of the current Dublin system also create a **significant administrative burden** on Member State's asylum and reception systems. These include the burden to send take back and take charge requests, which are often ineffective, and the difficulties in obtaining and agreeing on evidence proving the Member State's responsibility.

Inefficient data collection and processing make it impossible to establish a clear picture of onward movements and of the Member States' burden. The Dublin Regulation only allows for statistics that count transfer requests received by a specific Member State, without specifying for which reason the request was made, in relation to unauthorised movements (e.g. following irregular entry, previous residence permits and visas), or for other reasons (e.g. following requests for family reasons, dependent persons or humanitarian grounds). Additionally, the current architecture of the Eurodac Central System does not allow for counting the applicants but only for applications, which makes it impossible to identify any multiple counting of international protection applications in the system.

(4) Fourth, there is ***no dedicated mechanism to address crisis situations and situations of force majeure***.

Every well-managed system needs to have a framework for dealing with extreme situations or situations of *force majeure*, where the regular response under an otherwise well-functioning legislative model is insufficient. These are situations when, in one or more Member States, **normal procedures and safeguards become effectively inoperable or otherwise seriously deficient** with respect to the situation at hand, thus threatening the functioning of the Union migration and asylum management system as a whole. Furthermore, these situations can risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union.

Despite the improvements put in place after the 2015 crisis, **the EU is still unprepared to address crisis situations**, such as an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations. In such situations, the effectiveness of the response can be greatly improved by effective foresight and preparation, moving from a reactive mode to one based on preparedness and anticipation. A dedicated mechanism is necessary as part of the effort to make the current migration management system more resilient and responsive in case of sudden events and one that enables Member States to take immediate measures to deal with extreme situations as they arise.

Similarly, in light of the **lessons learned from the COVID-19 pandemic**, flexibility is also needed with respect to registration deadlines and carrying out public-facing services in situations of *force majeure* that do not relate to the migratory situation as such but nevertheless present serious challenges to migration and asylum management systems.

(5) Importantly, the lack of a fair and effective migration system hinders the **access of migrants to the asylum procedure, equal treatment in all Member States as regards the procedural safeguards for asylum-seekers' rights and legal certainty of asylum decisions.**

People seeking international protection who enter the EU need fair and quick access to asylum procedures, such as the right to seek asylum and the principle of *non-refoulement*[2]. Also, the fundamental rights of those who are not in need of international protection need to be fully respected, in particular the right to seek asylum and the principle of *non-refoulement*.

Based on experience, special attention needs to be given to migrants rescued in SAR operations. A ship-by-ship approach has proven to be unsustainable and puts vulnerable migrants at risk.

In recent years, there have been allegations of use of force and violence directed at those crossing the EU external borders both by land and by sea. While Member States have the obligation to protect the EU's external borders, border control must respect fundamental rights, such as the principle of *non-refoulement*. Any use of force must remain proportionate

[2] Principle of international law. Ensuring that nobody is sent back to persecution.

and used as a last resort. Guidelines to better translate and mainstream fundamental rights to all activities carried out by European Border and Coast Guard at EU and national level could be provided in the framework of the Multiannual Strategic Policy Cycle for the European integrated border management of which fundamental rights are overarching components.

Experience also point to the need to reinforce the right to family reunification and strengthen the rights of unaccompanied minors.

Addressing the challenges

- **A more efficient, integrated and seamless migration management system**

In order to address the lack of a unified approach to implementing European asylum and migration policies, the **proposal for a Regulation on Asylum and Migration Management** sets out a common framework based on integrated policy making. It provides a comprehensive approach to migration management, including a new and wider approach to solidarity, in particular to address in a meaningful way situations where Member States are faced with migratory pressure and to take into account the specificities of search and rescue operations.

The proposal sets out the different elements that comprise the comprehensive approach that underpins migration management and puts forward a common framework for Member States to implement such policies in a manner that ensures mutual trust. The key principles of integrated policy-making and solidarity and fair sharing of responsibility underpin this approach and ensure that the challenges of migration management, ranging from ensuring a balance of efforts in dealing with asylum applications, ensuring a quick identification of those in need of international protection or effective returns for those who are not in need of protection and managing irregular arrivals, should not have to be dealt with by individual Member States alone, but by the EU as a whole

The proposed system provides for a governance and monitoring structure based on Member States' reports on the implementation of the common framework, which will feed into a new European Strategy on Asylum and Migration Management. This will allow for comprehensive view of the situation at EU level and an early identification of gaps that require solidarity contributions. In addition, the proposed Regulation will ensure that Member States integrate the results of their national monitoring mechanism established by the Screening Regulation in their national strategies foreseen by this proposal.

Furthermore, the new Pact introduces a coordinated, effective and rapid screening of persons apprehended in connection with unauthorised crossing of external borders, disembarked following SAR operations or who request international protection at border crossing points without fulfilling entry conditions. It proposes that all such third-country nationals are immediately screened, with identity and health checks and registration in Eurodac. Member States are not expected to screen irregular migrants who are not subject to the obligation to collect biometric data pursuant to the Eurodac rules. On the other hand, Member States are also expected to screen persons apprehended within the territory, subject to certain conditions.

This proposal aims to ensure rapid legal certainty for those migrants concerned on their status, including their rights and responsibilities and to help national authorities to effectively

channel individuals into the asylum or return procedure. Those apprehended at or near external borders without the right to enter the EU could, upon screening, be to immediate return in line with the procedures which respect Return Directive. The screening shall be carried out in full respect of fundamental rights as enshrined in the Charter of Fundamental Rights of the EU. A monitoring mechanism is foreseen in the screening regulation to ensure that rules are being applied by the Member States in line with legal obligations in relation to the screening. The monitoring mechanism should concerns also the application of the national rules on detention during the screening as well as the compliance with the principle of *non-refoulement*.

The information collected during the screening procedure would be used later on in the asylum or return process as in the outcome of the screening persons are channelled to a relevant procedure (the border procedure or the regular procedure) to be applied. In addition, the screening phase would also contribute to a better implementation of the Eurodac regulation. The collection, processing and storage of personal data, as well as data sharing among competent authorities, would be carried out in full respect of the migrants' right to data protection and confidentiality, as well as taking into account any vulnerabilities and other relevant personal circumstances.

Additionally, the Commission also proposes **a seamless asylum-return procedure and to bring together the rules on the asylum and return border procedure in a single legislative instrument**. It allows for an accelerated assessment of asylum requests that are abusive or inadmissible, or that have been lodged by applicants from low recognition rate countries, in order to swiftly return those without a right to stay in the EU. A stronger border procedure makes return procedures more efficient as it ensure stronger links between the procedures and prevents the irregular entry into the territory of those not in need for international protection.

An individual assessment of each asylum application, as well as full respect of the fundamental rights, such as principle of *non-refoulement*, must always be ensured.

The proposal also addresses the **loopholes in the existing asylum and return procedures** by a new requirement to issue negative asylum decisions and return decisions together as part of the same act, allowing for only one level of appeal in a border procedure, with the same court looking at a rejection decision and return decision and with reduced possibilities during that time for an applicant to remain in the Member State. Joining the two appeal procedures will prevent deficiencies or a heavy burden in individual Member States' asylum and return systems from leading to unauthorised movement and further unwanted effects for the Schengen area. Member States can receive EU financial and operational support to ensure that the asylum and return border procedures are closely connected.

- **A fairer, more comprehensive approach to solidarity and relocation**

The proposal on asylum and migration management also introduces a fairer and more comprehensive approach to solidarity. It introduces new forms of solidarity, by widening the scope of relocation and including return sponsorship schemes through which a Member State commits to support returns from another one and, if the efforts are not successful, to transfer the irregular migrant.

Relocation and return sponsorship are therefore the main pillars of this new approach to solidarity. Such a compulsory mechanism would be triggered through a holistic qualitative assessment evaluating whether a situation of migratory pressure has occurred according to a number of criteria. In certain cases, Member States under pressure may receive bilateral contributions in the field of capacity building, operational support and in the external dimension from other Member States instead of relocation or return sponsorship.

The solution proposed responds to the need of broadening solidarity beyond the relocation of asylum seekers, and also to include the relocation of other categories of migrants and cater for a wider range of situations. In addition, in order to address the challenges related to migrants rescued at sea, it is proposed to extend the **principle of solidarity to SAR operations**, building on *voluntary* contributions with a mechanism that may become compulsory in case such an approach is insufficient to put in place a more sustainable and reliable European migration management approach.

By means of an implementing act the Commission will establish the measures to be taken by each Member State for the benefit of the Member State under pressure. Member States would be obliged to contribute through measures relating either to relocation or return sponsorship or a mix of both. The share of such contributions will be calculated on the basis of to a distribution key based on 50% GDP and 50% population. In addition, where there are specific needs identified, other solidarity measures aimed at strengthening its capacity in the field of asylum, reception or return or, operational support or measures in the area of the external dimension in order to address migratory flows, may be contributed as long as such measures do not amount to over 30% of the required number of persons to be relocated or subject to return sponsorship. In case of such a situation, the Commission will ensure that the Member States that initially have indicated to provide other solidarity measures will have to contribute half of their share to either relocation or return sponsorship.

For SAR operations, an implementing act setting out a solidarity pool of contributions will also be foreseen based on indications by Member States of the type of measures they intend to take from among relocation of persons not in the border procedure or measures in the field of capacity building. Where the indications are sufficient to deal with the situation, this shall be reflected in an implementing act to be proposed by the Commission. Where the indications by Member States fall short of the needs identified in the Migration Management Report the Commission will adopt an implementing act setting out the shares of each Member State according to the distribution key (50% GDP and 50% population). If, however, the indications from Member States to take measures other than relocation amount to more than 30% of the required number of persons to be relocated, the Commission will ensure that these Member States will have to contribute half of their share to relocation. In these situations Member States may also chose to contribute through return sponsorship instead of relocation.

Throughout the year as disembarkations take place, the Commission will use the pool and prepare lists to distribute the persons to be relocated or each disembarkation or group of disembarkations to the contributing Member States. Where the solidarity pools risk being insufficient due to an increasing number of disembarkations, the Commission will amend the implementing act setting out an additional amount of projected measures for relocation. In addition where a Member State of disembarkation risks coming under migratory pressure its

solidarity pool may be used for the purpose of relocating persons quickly until the implementing act foreseen for situations of pressure is adopted. The pools of other Member States of disembarkation may also used for this purpose as long as this does not jeopardise the functioning of their pool.

Where the Migration Management Report identifies that Member States of disembarkation have particular challenges due to the presences of third-country nationals who are applicants for international protection, the solidarity pool may also be used for the purpose of quickly relocating such vulnerable persons.

- **Simplified and more efficient responsibility rules for robust migration management**

Simplified and more efficient rules for sustainable sharing of responsibility for asylum applicants across the EU are proposed to be put in place through a number of measures in the new Proposal.

The **current responsibility criterion linked to first entry** remains but the proposal adds a criterion on responsibility for examining an application registered after entry following a SAR operation to better reflect in the asylum acquis the obligations stemming from the International Convention on Maritime Search and Rescue. While the responsibility rules are the same for the two criteria, they will lead to a more accurate picture of the composition of migratory flows in the EU, as well as reflecting the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular border crossings into a Member State by land or air.

For rules concerning shift of responsibility, it is proposed to delete the rules allowing for cessation or shift of responsibility based on the behaviour of the applicant – absconding or leaving the territory of the Member States – while keeping the current rule that responsibility ceases if a person is effectively returned. In addition, by introducing a system of take back notifications instead of the existing take back request system for cases where responsibility has already been established, the proposal also introduces a simplification of the take back procedure and improves procedural efficiency.

In terms of respect for fundamental rights, the changes proposed by the Commission reinforce the right to family reunification, strengthen the rights of unaccompanied minors and makes them a priority for relocation. The scope of the right to an effective remedy is limited to an assessment of whether the family criteria have been correctly applied, or whether the transfer represents a risk of inhuman or degrading treatment as prohibited by Article 4 of the Charter of Fundamental Rights of the EU. In order to prevent unauthorised movements, the Proposal also limits the right to material reception conditions to the Member State where the applicant is required to be present.

- **A targeted mechanism to address extreme crisis situations and situations of *force majeure***

Notwithstanding the proposal set out above, even the best-prepared and well-managed system needs to have a framework within which to deal with crises or situations of force majeure where the response under the various legislative instruments is insufficient. A new instrument is needed that provides Member States with the tools to deal with the various and different

causes of migration but also the need for immediate measures to deal with the extreme pressure stemming from such situations.

Therefore, for the migration management system to be truly comprehensive it also needs to provide a framework for a response in situations where one or more Member States are faced with a mass influx or risk of such influx that renders its asylum system inoperable and thus threatens the functioning of the Union as a whole. Flexibility in situations of force majeure also need to be introduced in light of the lessons learned from the COVID-19 pandemic.

The **proposal for a Regulation establishing procedures and mechanisms addressing situations of crisis** aims to ensure that the Union has at its disposal specific rules that can be applied to ensure effective solidarity in situations of crisis in national asylum and return management systems, as well as to allow for possible derogations from the applicable EU *acquis* on asylum and return. Such specific rules should be rapidly triggered in respect of any Member State or Member States that experience crisis situations and of force majeure of such a magnitude as to put under significant strain even well prepared and functioning asylum systems.

The proposed system distinguishes between crisis situations that are caused by a mass influx of third-country nationals or stateless persons arriving irregularly being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional. It would cover situations where there is an imminent risk of such arrivals which risk having serious consequences for the functioning of the Common European Asylum System and the migration management system of the Union. Finally, situations of force majeure in the field of asylum and migration management are also addressed, including situations recently experienced by Member States due to the COVID-19 pandemic.

The objective is to provide for the necessary adaptation of the rules on asylum and return procedures as well as the solidarity mechanism established in the Regulation on Asylum and Migration Management in order to ensure that Member States are able to address situations of crisis and force majeure in the field of migration and asylum within the EU. For this purpose, a wider scope for relocation is foreseen by including also applicants for international protection who are in the border procedure as well as irregular migrants with shortened timeframes for triggering the compulsory solidarity mechanism procedure foreseen for situations of pressure in the Regulation on Asylum and Migration Management.

Given that this proposal and the proposal for a Regulation on Asylum and Migration Management include specific rules for relocation in situations of crisis, the Commission intends to withdraw its proposal of 2015 on the Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013.

The asylum and return procedures in this proposal provide Member States with the tools to respond to crisis situations that render it impossible to fulfil certain obligations under the Asylum Procedure Regulation or the Return Directive, allowing for certain derogations such as a broader application of the border procedure to third-country nationals and stateless persons, and a longer deadline for registering applications for international protection.

This proposal also foresees the introduction of a faster procedure to grant immediate protection to groups of third-country nationals who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are

unable to return to their country of origin. To that effect, it is proposed to repeal the Temporary Protection Directive (Council Directive 2001/55/EC).

- **More efficient data collection and processing**

In order to address the identified data gaps, new rules are needed that improve and clarify the processing of data. **The amended proposal for a Regulation on the establishment of 'Eurodac**' aims to provide for more efficient data processing and contribute to providing a clearer picture of secondary movements. The new solidarity measures foreseen in the proposal for a Regulation establishing a common framework for the European Union's asylum and migration management include, amongst others, relocation of persons including those that are disembarked following SAR operations. A dedicated category in Eurodac will distinguish persons who are disembarked on a Member State's territory due to international obligations from persons having crossed the external borders irregularly. While the responsibility rules for this new category are the same as the rules for persons who enter irregularly, the distinction is relevant in relation to the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular crossings by land or air. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry. Moreover, this will also lead to a more accurate picture of the composition of migratory flows in the EU. In addition, in order to respond to the challenge of have a clearer picture of unauthorised movements, the amended Eurodac proposal also provides the possibility to count "applicants" as opposed to "applications". It will also allow Member States to record the granting of assistance for voluntary return and reintegration to prevent abuses of such system.

A fresh start on migration and asylum

In 2016, the European Commission presented a set of legislative proposals to complete the reform of the Common European Asylum System, with the aim to move towards an efficient, fair and humane asylum policy framework that can function effectively also in times of a sudden increase in numbers of arrivals or rapidly changing types of migration.

In 2017, the European Parliament and the Council reached a broad political agreement on five out of the seven CEAS proposals, namely as regards the setting-up of a fully-fledged European Union Asylum Agency, the reform of Eurodac, the review of the Reception Conditions Directive, the Qualification Regulation, and the EU Resettlement framework. However, the Council did not reach a common position on the reform of the Dublin system and the Asylum Procedure Regulation. While the Commission is proposing amendments to some of these proposals, it has been supporting a quick adoption of the proposals on which a political agreement has been reached by the co-legislators.

In 2018, the Commission proposed a recast of the Return Directive in response to the existing obstacles to an effective return policy. The recast aims at making the EU rules fit for purpose in successfully addressing the risk of absconding, providing assistance to voluntary returns, ensuring proper monitoring of national procedures, and streamlining administrative and judicial procedures. In 2019, the Council reached a partial general approach on the text,

except regarding the border procedure for returns. In the European Parliament, work to reach a negotiation mandate continues.

The Commission believes that the developments and challenges described in this paper can only be addressed by making the European asylum and migration system more efficient, comprehensive and sustainable. As deficiencies or challenges in one part of the system affects the system as a whole, a new set of interlocking policies and rules that provide for more robust and simple cooperation between Member States as well as seamless links between all stages of the migration management process is needed.

The New Pact on Migration and Asylum contains a number of solutions through new legislative proposals and amendments to pending proposals to put in place a system that is both humane and effective, representing an important step forward in the way the Union manages migration.

List of abbreviations

AMIF: Asylum Migration and Integration Fund

AVRR: Assisted Voluntary Return and Reintegration

CEAS: Common European Asylum System

CSOs: Civil society organisations

DG HOME: Directorate-General for Migration and Home Affairs

EASO: European Asylum Support Office

EBCGA/Frontex: European Border and Coast Guard Agency

EU+: European Union Member States plus Norway and Switzerland

IBC: Irregular border crossings

LIBE: European Parliament Committee on Civil Liberties, Justice and Home Affairs

RR: Recognition rate

SAR: Search and rescue

SCIFA: Strategic Committee on Immigration, Frontiers and Asylum

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1. INTRODUCTION

This analytical document accompanies the legislative proposals proposed under the New Pact on Migration and Asylum: the *proposal for a Regulation on asylum and migration management*; the *amended proposal for a Regulation on establishing a common procedure for international protection in the Union*; the *amended proposal for a Regulation on the establishment of 'Eurodac'*; the *proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817; disembarked following search and rescue (SAR) operations or who request international protection at border crossing points*; as well as the *proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum*. Its aim is to look comprehensively at the evidence and experience available to European Commission (hereinafter 'Commission') services, which underpin the above-mentioned legislative initiatives. The document also addresses some key issues raised during the negotiations of the recast Return Directive.

1.1 Political context

The 2016 asylum reform consisted of seven legislative proposals: the *recast Dublin Regulation*[3], the *recast Eurodac Regulation*[4], the *Regulation establishing the European Union Agency for Asylum*[5], the *Asylum Procedure Regulation*[6], the *Qualification Regulation*[7], the *recast Reception Conditions Directive*[8] and the *Union Resettlement Framework Regulation*[9]. In September 2018, the Commission also tabled an amended proposal to the *Regulation establishing the EU Agency for Asylum and a recast Return Directive*.

Whereas significant progress and provisional political agreement among co-legislators was reached on the *Qualification Regulation*, the *Reception Conditions Directive*, the *Union Resettlement Framework Regulation*, the *Eurodac Regulation* and the first *proposal establishing the EU Agency for Asylum*, less progress was achieved on the *Dublin* and the *Asylum Procedures Regulations*, mainly due to diverging views within the Council. As there was no agreement on moving forward with only some of the proposals, the reform came to a stalemate, until the new institutional set-up brought about by the European elections in May 2019 and the new European Commission and European Council presidencies provided the opportunity for a fresh start and new common ground.

With the New Pact and the accompanying legislative and non-legislative initiatives, the Commission is proposing to develop a new, comprehensive and sustainable approach to managing migration, taking into account the current migratory situation and trends.

Albeit the number of irregular arrivals to the EU has dropped by 92% since 2015, structural challenges still exist, which put Member States' asylum, reception and return systems under

[3] COM(2016) 270 final.
[4] COM(2016) 272 final.
[5] COM(2016) 271 final.
[6] COM(2016) 467 final.
[7] COM(2016) 466 final.
[8] COM(2016) 465 final.
[9] COM(2016) 468 final.

strain. These are notably due to shortcomings in processing asylum applications efficiently; the lack of a system for fair sharing of responsibility amongst Member States; the difficulties in dealing with migrants disembarking following SAR operations; the lack of a solidarity mechanism; and the lack of a wider toolbox for crisis management and prevention.

In addition, recent events such as the COVID-19 pandemic highlighted the need for the EU to be prepared to address situations of *force majeure* and broader crises, which have an impact on migration and asylum management systems. The COVID-19 outbreak also highlighted the social and economic vulnerability of extra-EU workers[10], as well as their crucial contribution to Europe's coronavirus response. [11] In such contexts, it is essential to preserve free movement in the Schengen area, the functioning of asylum and return systems and the openness of some legal pathways (e.g. for seasonal workers, for instance, in the agricultural sector[12]). All whilst ensuring that all relevant health safeguards are in place and that crises are managed in full respect of basic rights for all.

As regards return, every year, between 400,000 and 500,000 foreign nationals are ordered to leave the EU because they have entered or have been staying irregularly. However, on average only one third of them go back to their home country, or to another third-country through which they travelled to the EU. Ensuring the return of irregular migrants is essential in order to enhance the credibility and sustainability of the EU and Member States' policies in the field of migration. For this purpose, on 12 September 2018 the Commission tabled a proposal for a recast Return Directive[13], which consists of targeted amendments aimed at maximising the effectiveness of EU return policy, whilst safeguarding the fundamental rights of irregular migrants and ensuring the respect of the principle of *non-refoulement*.

Legislative negotiations between the European Parliament and the Council are ongoing. This proposal builds on and complements several other policy and legislative initiatives launched in the last 5 years, aimed at strengthening the effectiveness of return. A major milestone in this context is the new mandate of the European Border and Coast Guard (EBCG) Agency (Frontex)[14], which provides Frontex with its own operational arm (i.e. 10,000-strong standing corps by 2027), and reinforces the agency's cooperation with EU and non-EU countries in the management of external borders and returns. In addition to this, the wider use of the Schengen Information System (SIS) in the area of return[15] will ensure a better monitoring of return decisions' enforcement across the EU and facilitate return decisions' mutual recognition.

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[10] *A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic*, KCMD, 2020, available at: https://publications.jrc.ec.europa.eu/repository/handle/JRC120730.

[11] *Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response*, KCMD, 2020, available at: https://ec.europa.eu/knowledge4policy/publication/immigrant-key-workers-their-contribution-europes-covid-19-response_en.

[12] *Meeting labour demand in agriculture in times of COVID 19 pandemic*, KCMD, 2020, available at: https://ec.europa.eu/jrc/en/publication/annual-reports/meeting-labour-demand-agriculture-times-covid-19-pandemic.

[13] COM(2018) 634.

[14] Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019, p. 1.

[15] Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, p. 1.

To facilitate a more effective return of migrants with no right to stay, the EU has also engaged over the last 5 years in a sustained dialogue with main third countries of origin on the readmission of their nationals. Twenty-four readmission agreements and arrangements are now in place[16]; an additional one will come into force in 2020, formal negotiations are ongoing with three other countries while with others the EU is engaging in broader migration dialogues.

1.2 Persistent pressure on Member States' external borders and asylum systems

Building partnerships with third countries and reinforcing the EU's capacity to effectively protect its external borders, manage returns and respond to disproportionate migratory pressures, notably thanks to the establishment of the EBCG Agency and the central role played by its Agency, have helped reduce the number of irregular migrants arriving to the EU.

Nevertheless, migratory pressure not only remains high along certain routes, but is now significantly different with respect to the one that characterised 2015-2016. Arrivals on the Eastern Mediterranean route are heavily influenced by the current political implications of the EU-Turkey Statement, while the increasing number of arrivals and the increase of complex asylum cases continues to be a challenge. The Central Mediterranean route takes in the majority of arrivals by SAR operations, which add a level of complexity to the sharing of responsibility among Member States. Finally, whilst cooperation with the EU's neighbouring countries has shown concrete added value on the Western Mediterranean route, asylum applications lodged by nationals of visa-free countries pose an increasing challenge.

Furthermore, today a large share of migrants arriving irregularly are unlikely to receive protection in the EU. The average EU recognition rate[17] in 2019 for first time applications was just 30%[18] in the EU-27. Member States are therefore not only faced with an increased burden to process asylum applications, but also have to return a higher number of irregular migrants with inadmissible or rejected asylum claims.

The lodging of successive applications either in the same Member State (subsequent applications) or in a different Member State (secondary movements) also continues to be a challenge for Member States. According to Eurostat, out of a total of 676,250 asylum applicants in 2019, 612,685 were first-time asylum applicants[19] and 63,565 were repeated applications.

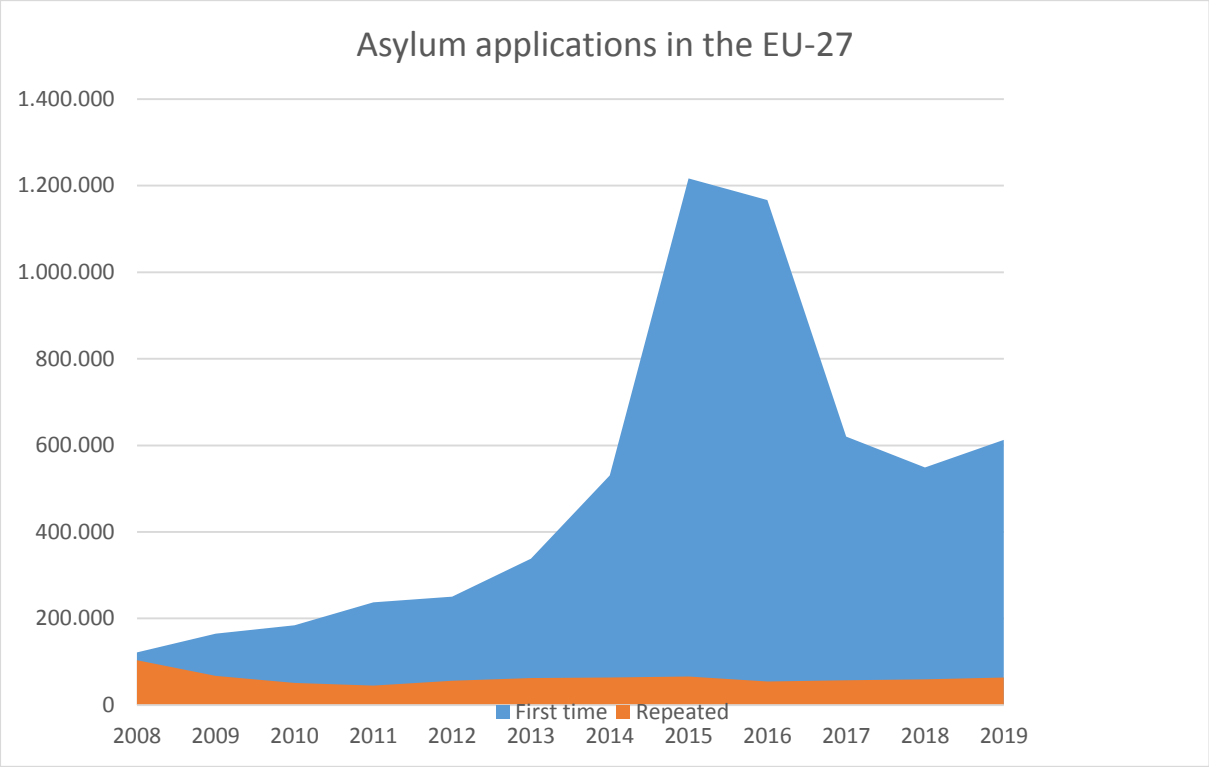
[16] Readmission agreements: Hong Kong, Macao, Sri Lanka, Albania, Russian Federation, Ukraine, North Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde, Belarus; arrangements: Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, Ivory Coast.

[17] For the purposes of this paper, recognition rate is meant as the share of positive decisions at first instance resulting in the granting of refugee status or subsidiary protection status over the total number of asylum decisions at first instance.

[18] Eurostat online data code: migr_asydcfsta

[19] First-time applicants in a given country.

Figure 1.2: *First-time and repeated asylum applications in the EU-27*



Source: DG HOME based on Eurostat data

Partially due to the additional burden caused by subsequent applications, the stock of pending asylum cases has also remained high between 2017 and 2019. At the end of December 2019, in the EU+, 911,430 cases were pending at all instances and around 500,000 were pending at first instance in January 2020[20], despite the decrease in irregular border crossings. This is a general problem in all Member States, which may also translate into pressure concerning the return caseload. In Germany, for example, according to the information collected by the Commission, there is a slight, but persistent increase in the number of persons obliged to leave the country (about 250,000). Another group of around 250,000 people is still in the asylum procedure, but has received a first negative decision, which will likely translate into return caseload.

1.3 Deficiencies in the current asylum and return systems

There are important structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy. Member States' asylum and return systems remain largely not harmonised, thus creating inefficiencies and encouraging the movement of migrants across Europe to seek the best reception conditions and prospects for their stay. Migration management can be seen through the perspective of different policy areas, each with their own focus and actors. Each policy area seeks to address individual challenges, without considering the overall framework of migration management. This results

[20] EASO, *Latest Asylum Trends January 2020*, available at: https://www.easo.europa.eu/latest-asylum-trends. While use EASO figures here, Eurostat data are slightly different: according to Eurostat, it was 842,490 in EU-27 and 898,675 in EU-28 (end of January 2020 also available: 842,785 in EU-27, 891,820 in EU-28

in an overall lack of integrated policy-making, bringing together the different policies into a coherent whole, thus ensuring cost-effectiveness and sustainable implementation, including in times of crises.

Another structural weakness of the Common European Asylum System (CEAS) is the absence of a functioning system for the fair sharing of responsibility among Member States. The current Dublin system is not aimed at ensuring the fair sharing of responsibility, but rather at objectively allocating the responsibility to examine an application for international protection to a specific Member State. Moreover, the effectiveness of this system is undermined by the fact that current rules can be abused to provide for a shift of responsibility among Member States after a given time. For example, if an applicant absconds for long enough in a Member State to avoid being effectively transferred, this Member State will eventually become responsible.

Furthermore, the lack of a coherent EU approach to the link between the termination of legal stay due to a negative asylum decision, and the beginning of a consequent return procedure, including requesting readmission to third countries, decreases the effectiveness of the entire migration management system. Whilst the process of analysis is frustrated to an extent by a lack of insufficient or unreliable data to properly analyse the situation, the Commission has worked on the basis of all the data and information sources that are available. In January 2020, the Commission's Directorate-General for Migration and Home Affairs (DG HOME) asked Member States for statistics concerning the intensity of unauthorised movements observed in their country. Whereas quantitative data from Member States was scarce, contributions from nineteen Member States regarded the number of asylum applications received and, in some cases, the number of incoming/outgoing Dublin transfer requests, instead of unauthorised movements per se.

The persistently low rate of enforcement of return decisions reveals structural challenges for Member States in this context, among which is absconding[21]. A study of the European Migration Network shows[22] that a significant number of Member States (15) considers the risk of absconding one of the main challenges linked to voluntary departure. According to the interviews conducted with a sample of twelve Member States for the purpose of this document, both the rate of absconding and the moment in which irregular migrants are more likely to abscond vary significantly across Member States[23]. The Commission also observed in several Schengen evaluations that national authorities have difficulties in and lack measures for monitoring the whereabouts of irregular migrants and the implementation of

[21] A significant number of Member States (15) considers the risk of absconding one of the main challenges linked to voluntary departure. Source: European Migration Network Study, *The effectiveness of return in EU Member States*, 2018. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_return_study_synthesis_report_final_en.pdf

[22] European Migration Network Study, *The effectiveness of return in EU Member States*, 2018. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_return_study_synthesis_report_final_en.pdf

[23] Generally, it seems that irregular migrants tend to abscond early on in the process (e.g. following a negative asylum decision, or during the period for voluntary departure following the issuing of a return decision) when in Member States that are considered 'transit countries', and much later (e.g. when final appeal is rejected, or when flight details are shared with third country nationals) when in Member States that are considered 'destination countries'. Although reliable data on absconding is not available, during the interviews it appeared that the rate of absconding can be estimated at around 30% in some Member States.

migration-related procedures, particularly where two different authorities are responsible for issuing negative asylum decisions and return decisions respectively. This also allows irregular migrants to prolong their irregular stay for long periods, even several years, before return is carried out.

Return procedures are also made more cumbersome by the fact that irregular migrants subject to return and third countries' authorities responsible for their identification and re-documentation are often unwilling to cooperate with competent national authorities in the EU. In addition, returnees might be able to frustrate the system by lodging several appeals, which grant a suspensive effect against negative asylum decision, and by making subsequent and unfounded asylum applications to suspend the return procedure.

1.4 Consultations with European Parliament, Member States and civil society

The Commission consulted the European Parliament, the Member States and representatives of civil society on a number of occasions, to gather their views on a future Pact on Migration and Asylum.

European Parliament

The European Parliament's LIBE Committee expressed, in a letter to Vice-President Schinas and Commissioner Johansson (January 2020) the importance of a holistic approach to a sustainable asylum and migration policy, highlighting that the Parliament had adopted a mandate for all the 2016 CEAS proposals, which should be taken into account for any new initiative the Commission intends to launch.

Several political groups (European People's Party, Greens/EFA, Renew Europe) presented position papers in which they expressed their views calling for a swift conclusion on the proposals for migration and asylum. In the current context of coronavirus pandemic, it is important that measures are taken to avoid a humanitarian crisis and ensure that the EU puts in place long-term solutions and strong solidarity on asylum measures.

In a context of mixed-migration flows, the various political groups supported a holistic approach to migration, which takes into account the EU external dimension, the ability to tackle the root causes of migration and develop new partnerships with third countries, a stable search and rescue mechanism, and one that supports resettlements and legal pathways and integration measures. These political groups, as well as the Socialists and Democrats, also called for a system of compulsory solidarity that includes relocation.

Ahead of the launch of the New Pact on Migration and Asylum, the Commission has kept the European Parliament regularly informed of the latest development in this area. In her speech at the European Parliament Plenary Session in November 2019, the President of the Commission Ursula von der Leyen reiterated her commitment to ensure that the EU will always provide shelter to those who are in need of protection, while ensuring that those who do not have the right to stay are returned to their country of origin.[24]

[24] https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

At their respective LIBE Committee hearings, on 1 and 3 October 2019, the then Vice-President-elect Schinas replied to questions on migration and asylum policy, while the then Commissioner-designate Johansson clarified how she planned to build consensus on reforming the asylum system. On 7 May 2020, Commissioner Johansson presented the development of the work on the Pact as well as on the voluntary relocation exercise of the unaccompanied minors from Greece. In this context, the European Parliament asked the Commission to ensure the adequate implementation by Member States of the relevant asylum acquis. In this context, LIBE held a hearing on 19 February 2020 on the implementation of Dublin regulation[25]. The Commission kept the LIBE Committee[26] regularly informed on concrete measures taken to support Member States in preventing the spread of the coronavirus and ensuring continuity of asylum, return and resettlement procedures in line with fundamental rights and international obligations.

EU Member States

The Romanian, Finnish and Croatian Presidencies have held both strategic and technical exchanges on the future of various aspects of the EU's migration policy, including asylum, return, relations with third countries on readmission and reintegration. These consultations showed support for a fresh start to urgently address the flaws in the CEAS, to improve the effectiveness of the return system, to better structure and equip our relations with third countries on readmission and to ensure the sustainable reintegration of returning migrants.

Vice-President Schinas and Commissioner Johansson held consultations with all Member States in their first 100 days in office. The aim of the consultations was to gather views and ideas on the future Pact on Migration and Asylum. Member States engaged actively in these consultations, presenting their ideas and suggestions for the upcoming proposals, with common ground emerging on the need for unity, for gradual progress in solving the weaknesses of the current system, for a new system of fair sharing of responsibility to which all Member States can contribute, for strong border protection, and on the importance of the external dimension of migration and improved returns. The Commission reaffirmed its commitment to work towards an agreement on the whole package as part of the comprehensive approach to migration. It strives to strike balance between responsibility and solidarity, taking into account the comprehensive approach set out by the June 2018 European Council; as well as the different positions expressed by the Member States in the discussions of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Friends of Presidency.

The fresh and comprehensive approach to migration management includes a new way of burden sharing. The Commission's intention of finding new forms of solidarity was welcomed at several instances. A number of workshops and discussions were organised during the Finnish Presidency in various Council fora. Overall, Member States welcomed the

[25] EPRS, European Implementation Assessment: Dublin Regulation on international protection applications, February 2020.

[26] Briefing of 23 April 2020, "The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU", prepared by the Policy Department for Citizens' Rights and Constitutional Affairs upon request of the LIBE committee Monitoring Group on Democracy, Rule of Law and Fundamental Rights. It focuses on the measures adopted by EU Member States to fight Covid-19 and their impact on democracy, the rule of law and fundamental rights in the EU.

intention of the Commission to find new forms of solidarity, underlined that solidarity measures should go hand in hand with responsibility measures, and highlighted the urgent need to fight unauthorised movements within the EU and to enforce the return of those who are not in need for international protection. The Ministers who participated to the Salzburg Forum underlined the importance of balancing responsibility and solidarity in the reform of the CEAS, to ensure its sustainability.

Specifically on the external dimension of return, the Commission took full account of the discussions with Member States in various fora, including the SCIFA, the High Level Working Group on Asylum and Migration (HLWG), the Irregular Migration and Expulsion working party (IMEX) and other relevant working and expert groups, such as the European Migration Network and the Readmission Expert Group. In these discussions, using leverage from other policy areas emerged as a necessary element to improve cooperation with third countries, as did the need to enhance assisted voluntary return schemes and tools to increase take up by returnees and to ensure sustainable reintegration in countries of origin, the need to promote a more strategic and better coordinated approach to readmission, through wider political engagement, effective procedures and operational capacity.

Civil Society

Civil society was also engaged through a number of meetings and conferences, since the proposed 2016 CEAS package. The Tampere 2.0 conference, held on 24-25 October 2019 in Helsinki, aimed to facilitate the future negotiations by conducting a series of thematic discussions on why a common system is necessary and on how the current rules should be amended. The resulting recommendations focus, amongst others, on the root causes of migration, on the management of unauthorised movements, on issues arising from the lack of trust among Member States, and on the necessary trade-offs to establish a balanced framework of responsibility and solidarity, as a basis for a fully functioning CEAS.

Commissioner Johansson held targeted consultations with civil society organisations (CSOs) on 14 February 2020, and with representatives of the Initiative for Children in Migration on 27 January 2020. Moreover, during her visits to Member States Commissioner Johansson regularly consulted with relevant local non-governmental organisations. Commissioner Johansson discussed also with social-economic partners and civil society on the essential role played by migrants in European economic recovery from COVID 19[27] and how to match European recovery needs on the labour market with the skills and talents from abroad and foster successful integration policies in the Pact. Commission services also held consultations with civil society on different aspects of the Pact. For instance, a meeting with CSOs on asylum, legal pathways and integration aspects took place on 21 February 2020; and a meeting on SAR operations and humanitarian assistance, notably in the Central Mediterranean, and broader aspects of humanitarian assistance to irregular migrants, was held on 3 March 2020. In this consultation process, specific recommendations focussed on a common approach to child-specific standards, following to the Communication of 2017 on

[27] https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/statement-following-meeting-social-partners-and-civil-society-role-migrants-economic-recovery_en

Children in Migration[28]. Civil society has also been consulted in the process of the Consultative Forum set up by EASO, on topics such as the initial steps in the asylum procedure (2019).

The Commission has taken into consideration many recommendations of national and local authorities[29], non-governmental and international organisations, such as the United Nations High Commissioner for Refugees (UNHCR)[30], the International Organization for Migration (IOM)[31], as well as think tanks and academia, on how to address the current migration challenges in accordance with human rights standards. In their view, a fresh start on the reform should revise certain rules for the determination of responsibility and provide for a permanent mechanism of solidarity, including for persons disembarked further to a SAR operation[32]. Non-governmental organisations also advocated for a common understanding of responsibility among Member States and called for the revised Dublin rules to include a more permanent relocation mechanism[33]. For instance, the European Council on Refugees and Exiles (ECRE), which represents over 100 non-governmental organisations, called for a permanent and predictable relocation mechanism for asylum seekers disembarked in EU ports[34]. In the framework of the Mercator Dialogue on Migration and Asylum (MEDAM) project, in addition, the Migration Policy Centre recommended to embed a migration policy scoreboard aimed at monitoring progress on the asylum and migration at EU level[35]. At the same time, civil society called for revising the asylum procedures and standards, in order to dis-incentivise unauthorised movements. However, stakeholders also acknowledged the difficult political impasse, as Member States struggle to find a common understanding of solidarity, while protecting a European human rights based approach. Civil society called in various written contributions for the European institutions and agencies to seize the opportunity to lead by example and tackle the Covid-19 crisis by leaving no one behind and called for action to be taken in the spirit of solidarity and human rights[36].

There have equally been exchanges with the Fundamental Rights Agency, in particular on questions related to key fundamental rights affected by the proposed regulations, such as the

[28] The Initiative for Children in Migration called for a common approach to address the issue of missing (unaccompanied and separated) children, to establish effective mechanisms to tackle the risks of trafficking, and the adoption of child-specific standards for asylum procedures.
[29] For example, Berlin Action Plan on a new European Asylum Policy, 25 November 2019, signed by 33 organisations and municipalities.
[30] UNHCR Recommendations for the European Commission's proposed Pact on Migration and Asylum, January 2020.
[31] IOM Recommendations for the new European Union Pact on Migration and Asylum, February 2020.
[32] See also IOM-UNHCR Proposal to the European Union for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons Rescued at Sea, June 2020.
[33] CEPS Project Report, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?*, June 2019.
[34] ECRE, *Relying on relocation: ECRE's proposal for a predictable and fair relocation arrangement following disembarkation*, January 2019.
[35] EUI Policy Brief, *Migration policy scoreboard: A Monitoring Mechanism for EU Asylum and Migration policy*, March 2020.
[36] Advocacy Letter, *An emergency which knows no borders - Europe must lead by example and 'leave no one behind'*, 7 May 2020. Available at: https://www.refugeesinternational.org/reports/2020/5/8/call-for-the-eu-to-protect-displaced-people-during-the-covid-19-crisis

right to liberty and the right to an effective remedy. Monitoring options have also been looked at, in particular as regards the screening and the asylum and return border procedure.

Contributions and studies by the European Migration Network[37] were also taken into account. These were either launched by or with the support of the Commission, and covered topics such as the effectiveness of return in EU Member States, unaccompanied minors in migration, effective alternatives to detention, assisted voluntary return and reintegration schemes, as well as detention and material detention conditions, legal assistance in detention facilities and several other topics related to migration and asylum. The tools, studies and analysis of the Knowledge Centre for Migration and Demography[38], which provides independent scientific evidence for EU policymaking in migration and demography related fields, were also taken into consideration, and notably its comprehensive Atlas on Migration[39].

Feedback received following the publication of Roadmap on the New Pact on Migration and Asylum

The preparation of the Commission's initiatives under the New Pact has also benefitted from the feedback received following the publication of Roadmap on the New Pact on Migration and Asylum. The Roadmap was available for stakeholders' comments on the Commission's 'Have your say' portal between 30 July and 27 August 2020. It generated in total 1829 replies from 1753 unique respondents.[40] Out of these 1753 unique respondents, 1657 were citizens, fifty were organisations, six were public administrations and forty fell under the 'other' category. The vast majority of respondents came from Germany followed by Estonia, Austria, Hungary, Sweden, Belgium, the Netherlands, France, Italy and the United Kingdom (see graph 1.3 below).[41]

[37] All studies and reports of the European Migration Network are available at: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en

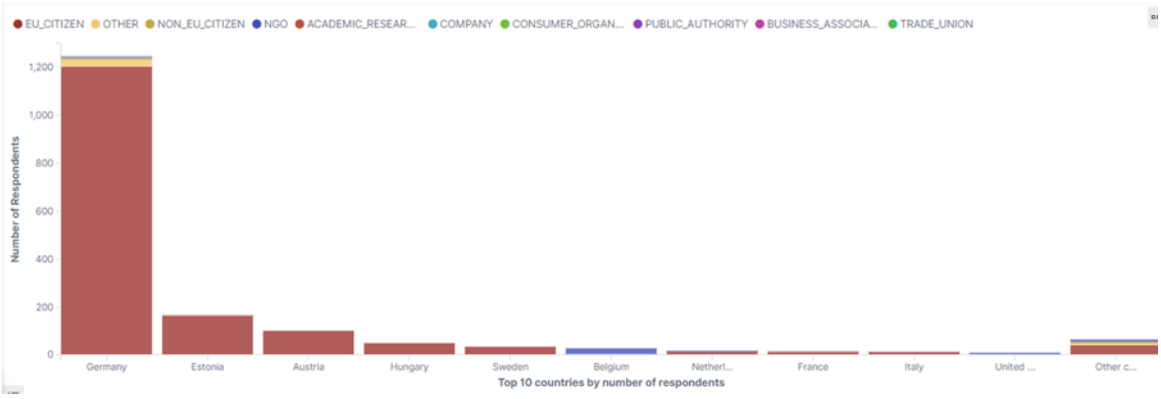
[38] All studies and reports of the Knowledge Centre for Migration and Demography (KCMD) of the Joint Research Centre are available at: https://ec.europa.eu/knowledge4policy/migration-demography_en.

[39] The KCMD Atlas on Migration is available at: https://ec.europa.eu/knowledge4policy/atlas-migration_en.

[40] Individual responses can be visited here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12544-New-Pact-on-Migration-and-Asylum/feedback?p_id=8267580

[41] Germany (1205 EU citizens, 9 non-EU citizens, 3 NGOs, 2 academic research institutes, 2 companies, 27 other respondents), followed by Estonia (165 EU citizens), Austria (101 EU citizens), Hungary (50 EU citizens), Sweden (35 EU citizens), Belgium (23 NGOs, 2 other respondents), the Netherlands (14 EU citizens, 4 NGOs), France (13 EU citizens, 1 academic research institute, 1 other respondent), Italy (13 EU citizens, 1 NGO) and the United Kingdom (5 EU citizens, 5 NGOs).

Figure 1.3: Breakdown of respondents to the Roadmap on the New Pact on Migration and Asylum



Overall, in terms of the tone/attitude of the replies towards the New Pact, the largest number were mostly neutral, followed by negative, positive and mixed replies[42]. Respondents were mainly concerned about borders, including their protection and the return of migrants. Illegal migration and the scale of migration were also recurrent concerns in the replies received. Respondents highlighted the integration of migrants who arrive to Europe, mentioning legal migration and pathways to Europe to a lesser extent. Finally, some respondents were concerned about solidarity and rescue at sea.

Non-governmental organisations and academic research institutes stressed the need to reform the Dublin Regulation and improve the implementation of the rest of the asylum acquis. They also underlined the need for safeguards in the asylum acquis, especially for women, children and other vulnerable groups. Some of them warned against the externalisation of migration policy, the introduction of a screening phase and the extension of the border procedure. They called for expanding legal channels to the EU and increased social inclusion. Regarding the external dimension of migration, some NGOs called for policy coherence and coherence with the UN Global Compacts.

2. THE CURRENT MIGRATION SITUATION

2.1 Changing composition of migratory flows and differences according to migratory route

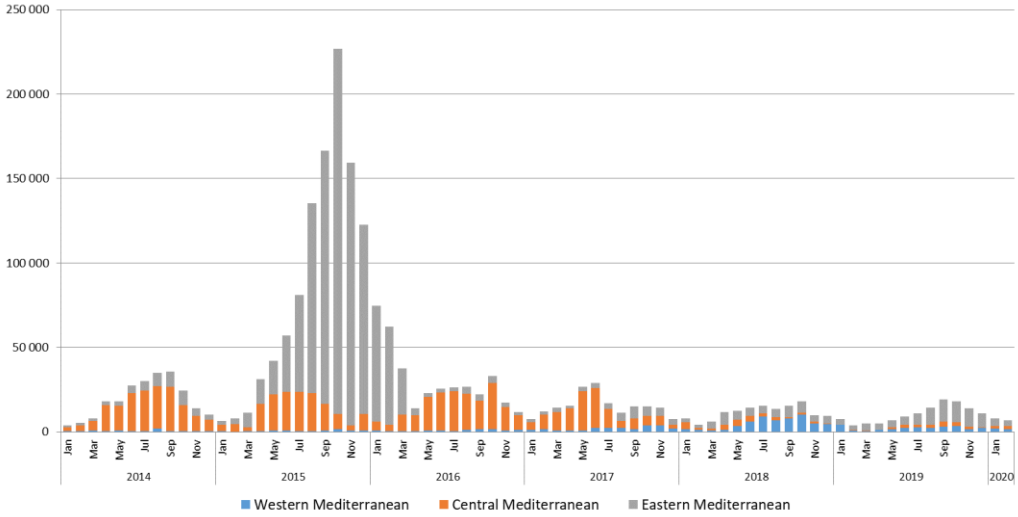
Since the migration crisis of 2015-2016, irregular migration to the EU has been gradually declining.

Overall, the number of irregular arrivals to the EU went from over 1.8 million in 2015 to around 142,000 in 2019,[43] a decrease of 92%. On the Central Mediterranean route, the number of irregular migrants dropped by 40% in 2019 (roughly 14,000) as compared to 2018, with most migrants coming from Tunisia and Sudan. The total number of irregular migrants on the Western Mediterranean route, including the Western Africa route, (roughly 27,000 people) dropped by 54% as compared to 2018, most of them coming from Morocco and

[42] 898 neutral, 749 negative, 42 positive and 41 mixed replies
[43] EBCGA data.

Algeria[44]. In contrast, there were significantly more arrivals in 2019 compared to 2018 via the Eastern Mediterranean (around 83,000; 47% more) and via the Western Balkan routes (around 15,000; 159% more). Nevertheless, these figures are still much lower than those of the 2015-2016 crisis.

***Figure 2.1 (a)**: Irregular border crossings via the three main routes*



***Source**: DG HOME based on EBCGA data*

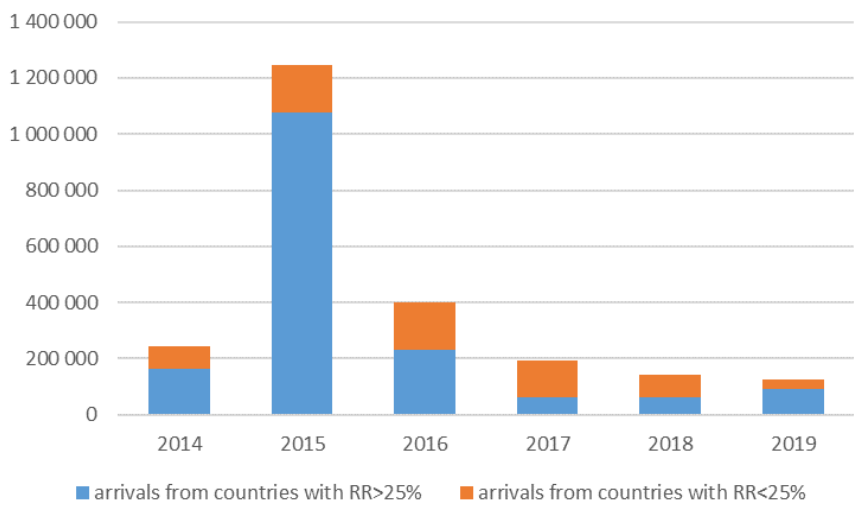
The most frequent nationalities of irregular migrants on all routes in 2019 were Afghan (around 34,000 persons, 24% of the total), Syrian (24,000, 17% of the total), unspecified sub-Saharan nationals (14,000, 10% of the total), Moroccans (8,000, 6% of the total) and Turkish (also 8,000, around 6% of the total). Frequent other nationalities also include Iraqi, Algerian, Pakistani, Palestinian, Iranian and Somali nationals, but with a smaller share of the total.

Between 2016 and 2019, the share of migrants from countries of origin that statistically have a low chance of being granted international protection was higher than 2015.

While the number of irregular arrivals has decreased, the share of third-country nationals arriving from countries with recognition rates[45] lower than 25% has risen from 14% in 2015 to 43% in 2016, climbed further to 67% in 2017 and 57% in 2018. For 2019, this figure is down to 26%[46]. Still in 2019, the EU-wide first instance recognition rate fell to 30% from its peak of 56% in 2016.

[44] On the Western Mediterranean route, EBCGA reported more than half of migrants as 'unspecified sub-Saharan nationals' in 2019.
[45] At first instance.
[46] DG HOME calculation based on EBCGA data.

Figure 2.1 (b): *Number of irregular arrivals to the EU from high and low recognition countries (RR = recognition rate)*



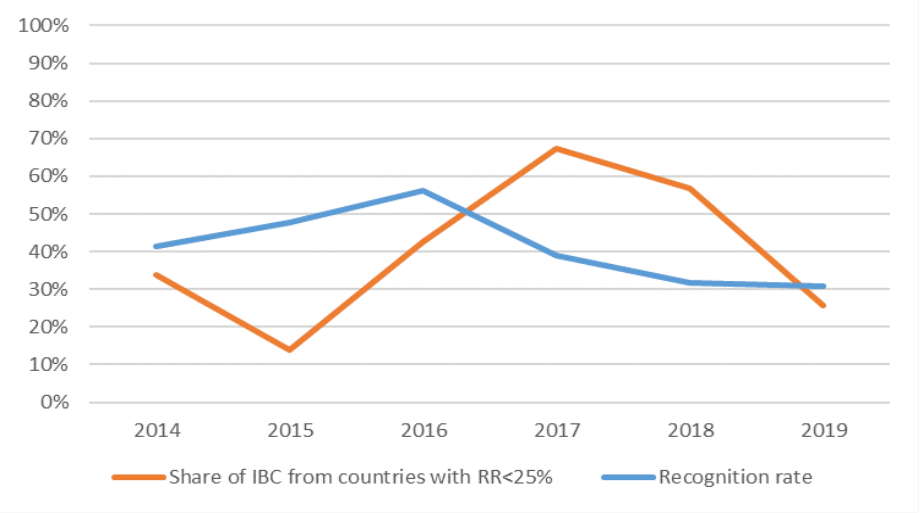
Source: *DG HOME based on EBCGA and Eurostat data. The EU recognition rate is calculated at first instance. Visa-free countries, countries with no first instance decision in the given year and migrants with unknown nationalities are excluded.*

In particular, on the **Central Mediterranean** route, the share of arrivals from countries with an EU-average recognition rate below 25% rose from 36% in 2014 to 70% in 2019. On the **Western Mediterranean route**[47] their share rose sharply from 61% in 2014 to 99% in 2018 and 2019. In Spain, barely one out of twenty applicants, just 5% of the total, received refugee or subsidiary protection status in 2019, according to data released by Eurostat. See in particular the example of Venezuelan applicants further below.

As regards the **Eastern Mediterranean** route, the arrival of third-country nationals with clear international protection needs in 2015-2016 (mostly Syrians) has been partly replaced by arrivals of persons with more complex cases, with more divergent recognition rates, in particular from Afghanistan and Iraq. The EU-Turkey statement has had a lasting effect on arrivals on this route. Four years from the EU-Turkey Statement, irregular arrivals are still 94% lower with respect to the period preceding the Statement, and the number of lives lost at sea has also decreased substantially.[48] While the Statement could be subject to challenges stemming from the geopolitical context, the EU remains committed to its implementation and continues to support Syrian refugees in Turkey through the EUR 6 billion Facility for Refugees in Turkey.

[47] Western Mediterranean route refers to Spanish land and sea borders, including Canary Islands.
[48] European Commission report on the EU-Turkey Statement, March 2020. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

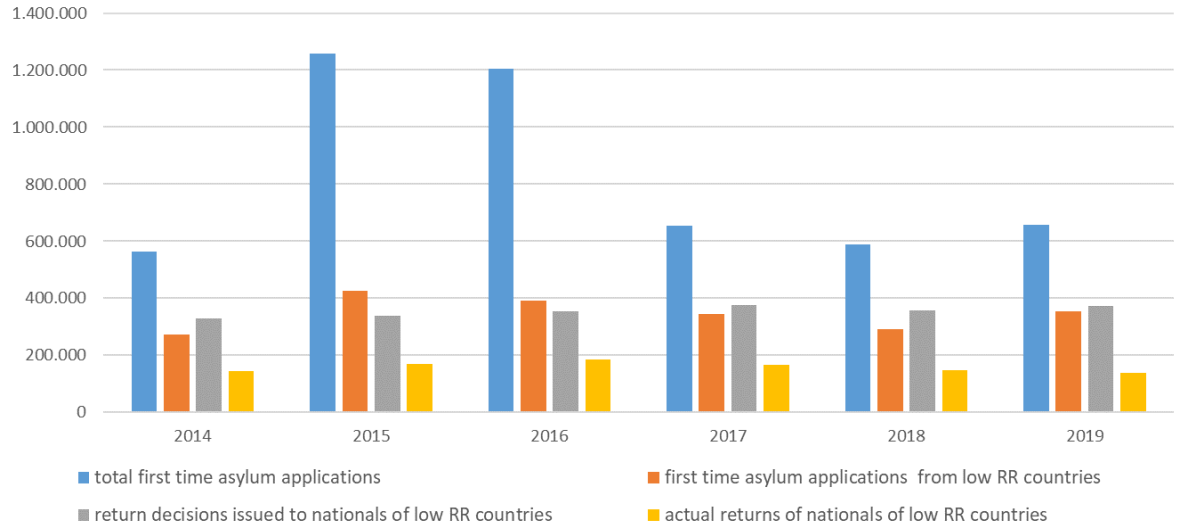
***Figure 2.1 (c)**: Share of irregular arrivals of low recognition rate nationalities vs EU-wide recognition rate (IBC = irregular border crossings) (RR = recognition rate)*



***Source**: DG HOME based on EBCGA and Eurostat data. EU recognition rate is calculated at first instance*

Processing the asylum claims and finalising the return procedure of irregular migrants from third countries with a low recognition rate create a significant burden for national authorities, which need to deal with asylum applications that are very often unfounded and lodged merely to facilitate absconding or hamper returns. The increase of unfounded asylum claims from Moldovan citizens (often subsequent applications following a rejection in another Member State), which has been weighting on national administrations and receptions centres at the beginning of the winter in 2019, is a good example of this. While these applicants knew that their chances of being recognised as refugees were low, they also knew that prolonging the procedures would have given them the opportunity to either look for (undeclared) employment or at least receive financial support during their stay in reception centres. Such instances have a negative impact on the duration of return procedures, putting additional pressure on the return authorities.

Figure 2.1 (d): *First time asylum applications from low recognition rate countries compared to the total first time asylum applications, the return decisions issued and the actual returns for these groups*



Source: DG HOME based on Eurostat data

The steady EU-wide decrease in irregular arrivals has not been followed by a decreasing number of asylum applications.

In 2016, the number of first time applications[49] was three times higher than the number of irregular arrivals on the three main routes. There were 1.2 million first time asylum applications in the EU-28, compared to 374,314 irregular arrivals on the three main routes. This ratio continued to climb in the following years. In 2017, the ratio increased, with 654,620 first time asylum applications in the EU-28 and 184,765 arrivals on the three main routes. In 2018, first instance asylum applications in the EU-28 (587,355) were four times higher than the combined irregular border crossings on the three main routes (137,613). The trend continued into 2019: there were 612,685 first-time asylum seekers applying for international protection in the EU-27, compared to 124,023 irregular border crossings on the three main routes.[50]

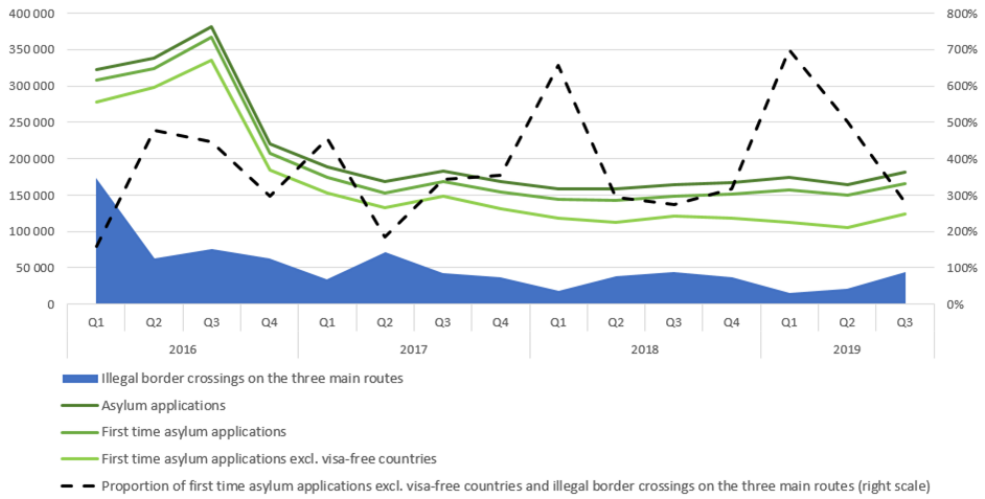
With 142,400 first-time applicants registered in 2019, Germany accounted for 23% of all first-time applicants in the EU. It was closely followed by France (119,900, or 20%) and Spain (115,200, or 19%), ahead of Greece (74,900, or 12%) and Italy (35,000, or 6%) (Eurostat[51]). These five Member States account together for more than three quarters of all first-time applicants in the EU-28. Compared with the population of each Member State, the highest rate of registered first-time applicants in 2019 was recorded in Cyprus (14,495 first-time applicants per million population), followed by Malta (8,108) and Greece (6,985).

[49] According to Eurostat, 'First time asylum applicant' means a person having submitted an application for international protection for the first time. The term 'first time' implies no time limits and therefore a person can be recorded as a first time applicant only if he or she had never applied for international protection in the reporting country in the past, irrespective of the fact that he or she is found to have applied in another Member State of the European Union.

[50] Source: Eurostat and EBCGA.

[51] Source: Eurostat News Release of 20 March 2020. Available at: https://ec.europa.eu/eurostat/documents/2995521/10554400/3-20032020-AP-EN.pdf/6ee052a9-ffb8-d170-e994-9d5107def1a8

***Figure 2.1 (e)**: Irregular arrivals via the three main routes and asylum applications at EU level 2016-2019*[52]



***Source**: DG HOME based on EBCGA and Eurostat data*

The discrepancy between the number of irregular arrivals and the high number of asylum applications is to be found in **multiple asylum applications** within the same or another EU Member State, following **unauthorised movements**[53]; in applications lodged by persons who arrive legally to the EU (e.g. third-country nationals exempt from visa requirements or having a Schengen visa); and in applications lodged by those arriving irregularly, without being apprehended at the external borders.

This has resulted in **Member States struggling to keep up with the number of lodged applications**, notably as of January 2020. Fewer first-instance decisions were issued (51,000) than applications lodged (65,000) and, at the end of November 2019, there were more than 900,000 cases pending a final decision in the EU+. Most of these cases were with first-instance asylum authorities (as opposed to with the judiciary in appeal). At the end of the year, more than 540,000 applications were awaiting a first-instance decision, up by 20% from a year earlier. Of all pending cases, by the end of the year almost one-fifth concerned applicants from visa-free countries. The overall number of pending cases for visa-exempt citizens increased in 2019 compared to 2018, despite the fact that EU+ countries issued 60 % more decisions on their cases than the year before.

As mentioned above, since the crisis of 2015-2016, there has been an **increasing number and share of first time asylum applications**[54] **from citizens of visa-free countries,** who

[52] While the graph shows the number of applications on the three main routes, it is important to note the considerable impact of onward movement towards the northwest of the EU on the overall number of applications.

[53] Secondary movements cannot be exactly quantified, as there is for the moment no one single indicator for measuring this phenomenon. Proxy indicators are used to measure the extent of secondary movements in the direction of the northwest of the EU and there are no publicly available reports to demonstrate the exact scope of the phenomenon.

[54] According to Eurostat, 'First time asylum applicant' means a person having submitted an application for international protection for the first time. The term 'first time' implies no time limits and therefore a person can be recorded as first time applicant only if he or she had never applied for international protection in the reporting

generally have little chances of receiving international protection. First instance recognition rates for nationals coming from Latin American countries ranged between 5% (Venezuelan) and 35% (Salvadoran) in 2019. Venezuelans in fact became the third largest country of origin of asylum seekers in the EU+ (following Syrians and Afghanis).

The first EASO Country of Origin Information (COI) Report on Venezuela[55] notes the deterioration of the political, security and economic situation in Venezuela which has led to the mass emigration of four million people since 2015, including over 100 000 who have sought asylum in the EU+. Applications by Venezuelan nationals in the EU+ have risen from 105 in 2013 to 45 675 in 2019; an increase of over 43 000%.

In Spain, a temporary permit to stay with a national humanitarian status has often been granted to Venezuelans, whose asylum applications lodged in this specific country increased by 103% in 2019 as compared to 2018. About 90% of all applications by Venezuelans are lodged in Spain, the vast majority of which receive humanitarian protection status. Between 2015 and 2018, the number of Venezuelans registered in Spain increased by 54% to 255,000, according to Spain's National Statistics Institute.

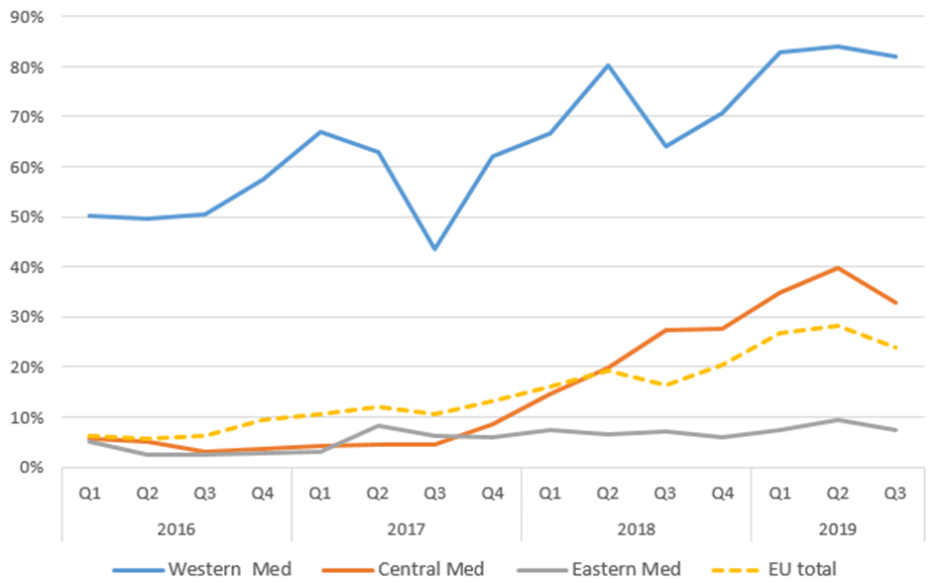
According to the 2019 EASO Asylum Trends report, Colombians lodged over three times as many applications as in 2018, and nationals of El Salvador lodged twice as many applications as in 2018. Moreover, applicants from Georgia, Honduras, El Salvador, Nicaragua and Peru also featured among the top 30 citizenships of origin, lodging more than 6,000 applications each in 2019, and at least doubling in number since 2018.

The rate of positive decisions issued for applicants from visa free countries was also low: for example, for the countries of the Western Balkans, the rate ranged from 1% for North Macedonians to 6% for Albanians and for Eastern Partnership applicants from 1% for Moldovans to 8% for Ukrainians.

country in the past, irrespective of the fact that he or she is found to have applied in another Member State of the European Union.

[55] https://www.easo.europa.eu/information-analysis

Figure 2.1 (f): *Share of visa-free countries of the total first time asylum applications*



Source*: DG HOME based on Eurostat data. Western Mediterranean includes Spain, Central Mediterranean includes Italy and Malta, while Eastern Mediterranean includes Bulgaria, Cyprus and Greece*

2.2 Migrants saved in search and rescue operations

Migrants disembarked further to SAR operations have represented a significant share of total irregular arrivals over the past years also due to the fact that most of the neighbouring countries at the Southern rim of the Mediterranean Sea - notably Libya - cannot be considered as offering adequate ports of safety in legal terms. The share was 64% in 2016 (233,158), decreasing to 52% in 2019 (54,823). The decrease corresponds to the overall decrease of 71% in irregular arrivals by sea, from 365,293 in 2016 to 106,236 in 2019, along the three main migratory routes.

The scale of SAR activities over the past 5 years has been most significant in the Central Mediterranean, although this route is also subject to high fluctuations ranging from over 170,000 persons disembarked following SAR in 2016 to less than 7,000 in 2019. Figures for the first 8 months of 2020, however, also mark a rising trend in the Central Mediterranean, with close to 5,000 persons disembarked in Italy and Malta after SAR events. This is true also for the Eastern and Western Mediterranean, albeit the overall figures remain lower.

Table 2.2: *Number of migrants rescued in SAR cases, 2016-2019*

Year	Total number of rescued migrants in SAR cases	Irregular arrivals to EU 28 by sea – three main migratory routes
2016	233,158	365,293
2017	146,168	175,667
2018	89,406	113,642
2019	54,823	106,236

Source: *EBCGA*

SAR activities arise further to international obligations of Member States, including as defined in the International Convention on Maritime Search and Rescue adopted in Hamburg, Germany on 27 April 1979.

The nature, profile, and scale of arrivals further to SAR operations have a direct impact on the EU's migration and asylum systems, as well as on integrated border management, due to the fact that Member States cannot apply to SAR disembarkations the same tools as for irregular crossings by land. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry.

Upon Member States' request, since January 2019, the Commission has been actively coordinating the operational aspects of *ad hoc* relocation exercises, which have also helped facilitating disembarkations. The fact that Member States have participated voluntarily to these exercises is the reflection of their willingness to coordinate among each other and to ensure more solidarity.

However, the current situation also demonstrates limitations stemming from the lack of a structured approach. Current exercises of coordination to relocate persons disembarked suffers from a voluntary boat-by-boat approach where Member States do not indicate in advance their contributions to solidarity and where few Member States offer contributions. This creates difficulties which would be overcome by a more predictable system to allow for the Commission to ensure a smoother process of relocation. In addition the current lack of voluntary contributions by a majority of Member States is also an issue that needs to be addressed.

2.3 Return

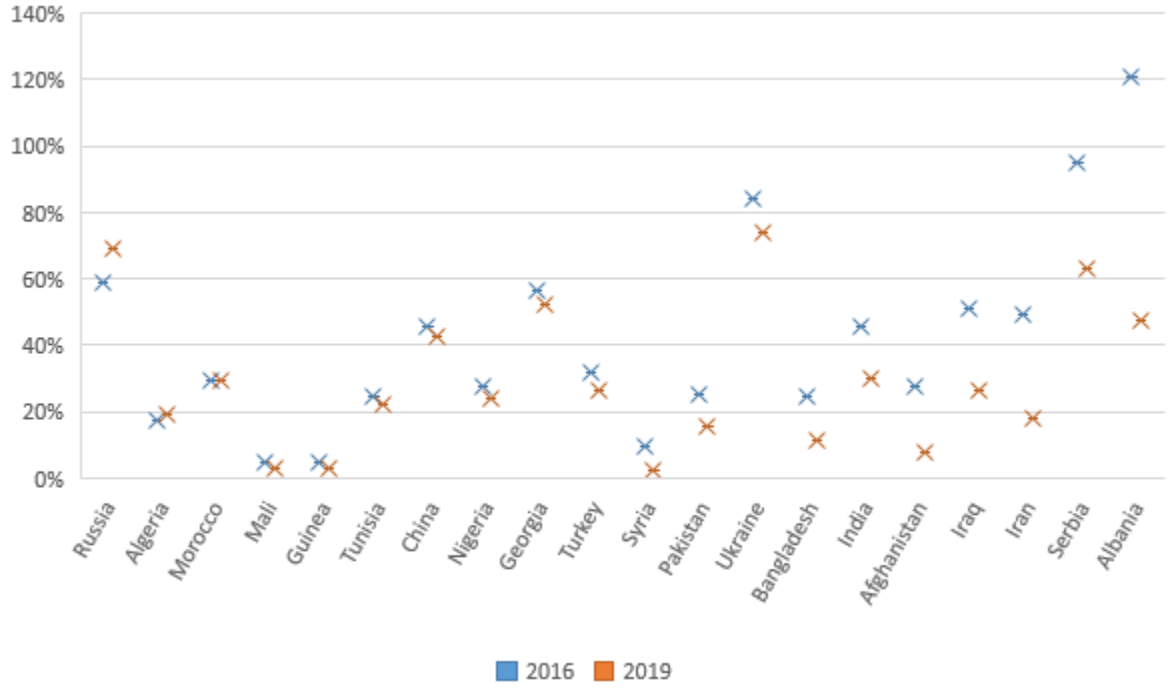
Every year, between 400,000 and 500,000 foreign nationals are ordered to leave the EU because they have entered or are staying irregularly. However, on average only one third of them goes back to their home country or to another third-country through which they travelled to the EU.

Eurostat data shows that, although the number of third-country nationals found to be irregularly present in the EU has significantly decreased by 70% from 2015 (2,155,485) to 2018 (650,175), the number of third-country nationals having been issued a return decision has only very slightly decreased in comparison (528,645 in 2015 and 513,470 in 2019, representing a 3% decrease). Furthermore, in 2015 the number of third-country nationals returned after having been issued a return decision amounted to 196,190, whereas in 2019 it amounted to 161,755, representing a decrease of 18%.

This shows that the increased caseload for Member States' return systems, and the consequent incapability to deal with a higher number of (often-complex) return cases, has a negative impact on the return rate. Furthermore, knowing a return decision is unlikely to be carried out forcibly, the subjects of the decision tend to be less prone to return voluntarily.

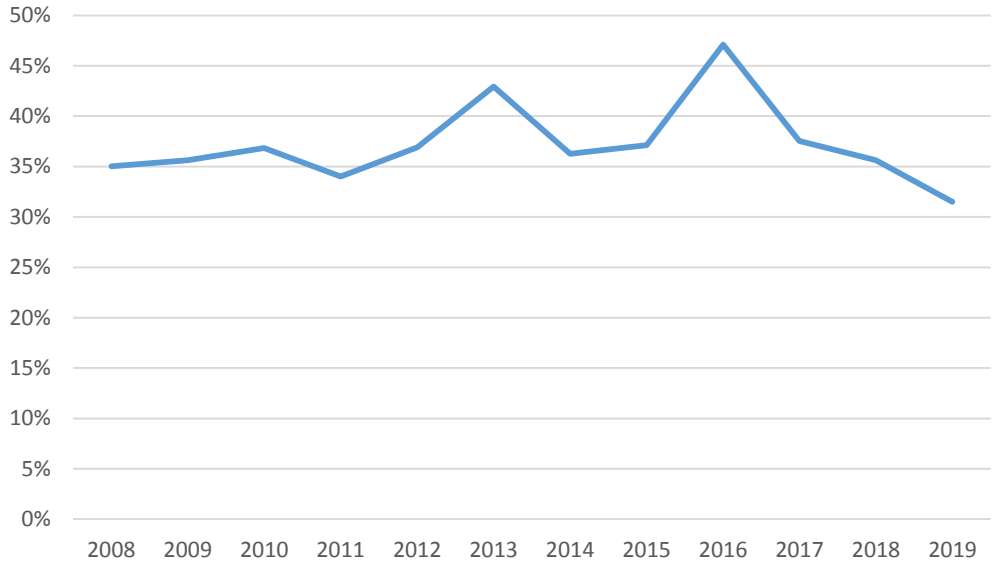
The graphs below show that despite significant financial and political efforts and the implementation of action plans, the return rate remains low and for some third countries has even decreased between 2016 and 2019.

Figure 2.3 (a): *Comparison of return rate between 2016 and 2019 for selected third countries*



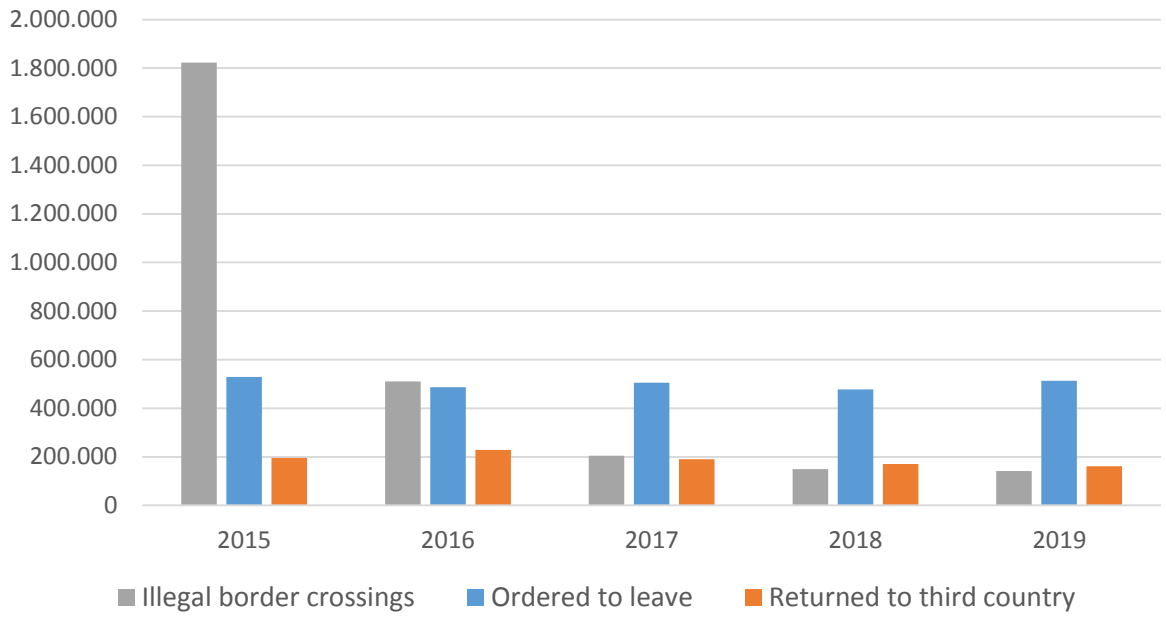
Source: DG HOME based on Eurostat

Figure 2.3 (b): *Evolution of the return rate 2008-2019 (EU-28)*



Source*: DG HOME based on Eurostat data*

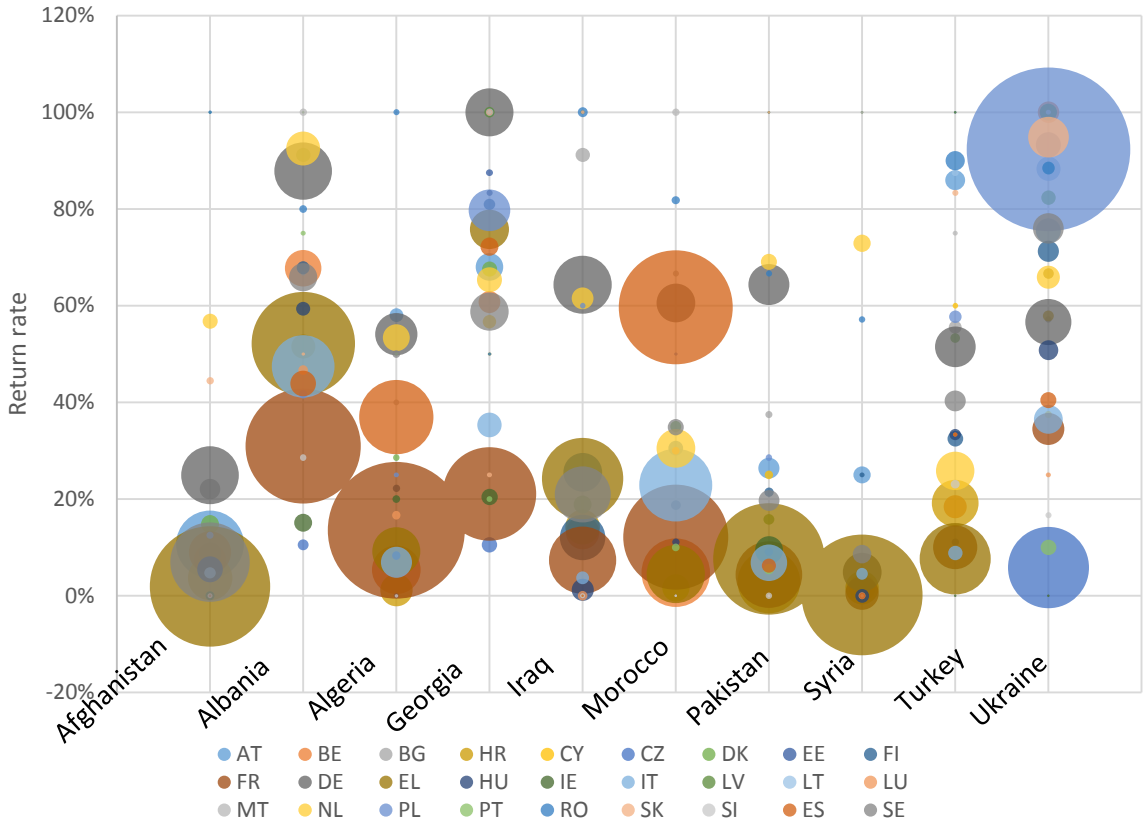
Figure 2.3 (c): *Irregular arrivals, third-country nationals issued a return decision and third-country nationals returned after having been issued a return decision*



Source: DG HOME based on EBCGA and Eurostat data

Furthermore, it is important to note that return rates from Member States to the same third country can differ substantially, as is clear from the graph below. There is a variety of factors that can help explain the divergence in return rates to the same third country. This includes bilateral relations, availability of embassies or consulates, national (political) context in Member States and differences in return systems and procedures. The divergence in return rates shows that there is room for mutual learning and coordination dialogue between Member States and for further research into these differences. The Commission and the EBCGA are engaged and actively promote cooperation and dialogue between Member States in various forums on this topic.

Figure 2.3 (d): *Return rates from EU Member States to selected third countries*



Source: DG HOME based on EASO data

2.4 Hotspots: Increased support to Member States

Identified under the 2015 European Agenda on Migration, and further defined in the Regulation on the EBCG, hotspots were established as an operational model to bring integrated support to key locations at the EU's external borders, in Member States disproportionately impacted by large migratory flows – notably Greece and Italy – upon their request and with their agreement.

Operationally speaking, hotspots allow for cooperation among national authorities, European agencies and international and non-governmental organisations, in implementing identification, registration, fingerprinting, screening and debriefing procedures for large numbers of migrants upon their first arrival in the EU. From a structural point of view, a hotspot is a designated area, usually in proximity of a landing place, where the above-mentioned procedures and very first accommodation are provided. Five hotspots are operational in Greece and four in Italy.

Through the hotspots in Greece, the EU has provided extensive funding and technical support, effectively contributing to increasing reception capacity, upgrading infrastructure, delivering cleaning services and non-food items, reinforcing medical care and accelerating asylum procedures on the islands. However, the partially ineffective legal framework and the significant increase in arrivals to the Greek islands in the second half of 2019, has had an adverse impact on the Greek system, which, despite the improvements registered over the last 4 years, was still not crisis-resilient. This has led to an overcrowding of the Greek hotspots,

which, by the end of 2019, hosted more than 38,000 people in the Reception and Identification Centres (RICs), whose nominal capacity is 6,178 places.

Furthermore, the lack of sufficient reception capacity in the mainland and the limited number of medical staff necessary for the vulnerability assessment, the increased arrivals in Greece resulted in the deterioration of living conditions, major delays in the asylum procedure and very slow pace of returns from the islands under the EU-Turkey Statement[56].

This experience has not only shown the key role of adequate resources, administrative capacity and effective coordination of all actors on the ground to ensure the correct implementation of existing rules, but also the necessity of improvements to the legal framework. On this basis, a new law on international protection entered into force in Greece in January 2020, aiming to make the asylum procedure more efficient and increasing returns.

During the peak of sea arrivals to Italy between 2015 and mid-2018, migrants rescued at sea or autonomously arriving by boat were not only channelled through hotspots, but also through a series of ports functioning like hotspots. This was due to the fact that the capacity of the Italian hotspots during those years was never enough to channel more than 1/3 of all arriving migrants, which limited tangibly their operational added value, notably in terms of systematic registration, identification and fingerprinting. Nevertheless, the considerable reduction in arrivals over the past 2 years has led to a significantly improved functioning in the Italian hotspots, with migrants generally spending less than the standard 72 hours for their registration and transfer to other reception structures. Moreover, in 2019 less than 50% of arrivals were channelled through the hotspots[57], with the majority of autonomous landings being dealt with by national law enforcement authorities.

In this context, in order to ensure high levels of registration, fingerprinting and access to procedures, it is key that the hotspot approach is applied consistently as a working method, even when migrants do not physically pass through the hotspots. The Commission, together with relevant agencies, continues to support Italy in updating arrivals procedures and their follow up.

Hotspots can be helpful in ensuring the systematic identification, registration and fingerprinting of migrants, checking data against relevant security databases, and channelling migrants to the asylum or return procedure, as relevant. However, it is also evident that the hotspot approach needs to be complemented by appropriate and efficient follow-up procedures, i.e. national asylum application, relocation to another Member State or return. Unfortunately, the implementation of these procedures is often slow and subject to various bottlenecks, which can have repercussions on the functioning of the hotspots[58].

[56] This is also due to the fact that the Statement does not provide for returns from mainland Greece to Turkey.

[57] In 2019 47% (5,384) migrants were channelled through the four existing hotspots (Lampedusa, Messina, Pozzallo and Taranto), including 3,725 that arrived at Lampedusa.

[58] In 2017 the European Court of Auditors has recognised the value-added of the hotspots approach and made recommendations to improve its functioning, in particular as regards reception capacity (Special Report 06/2017). A second report from 2019 (special Report 24/2019) has acknowledged improvements made including by addressing previous recommendations, while outlining persisting deficiencies and issuing new recommendations for future action.

Finally, the hotspots experience has also shown that flexibility in terms of the type and scale of support provided in a given country is essential, alongside combined internal and external action, solidarity and synergies among EU and national actors.

2.5 Key developments on resettlement

Resettlement continues to be a safe and legal alternative to irregular and dangerous journeys for refugees, and a demonstration of European solidarity with non-EU countries hosting large numbers of persons fleeing war or persecution. Since 2015, 70,000 persons in need of protection have been resettled in the EU in the framework of EU-sponsored resettlement schemes. Member States have responded to the Commission's call to continue resettling in 2020 by pledging almost 30,000 resettlement places for 2020. This confirms Member States' continued commitment to resettlement as a safe and legal pathway into the EU.

3. THE CHALLENGES FACED BY THE EU

Given the current migration situation, this chapter describes the resulting challenges faced by the EU: the lack of an integrated approach to the implementation of European asylum and migration policy; inefficiencies in national migration and asylum management systems and lack of harmonisation at EU level; absence of a broader mechanism for solidarity reflecting the migratory flows; inefficiencies in the Dublin system; and the lack of targeted mechanisms to address extreme crisis situations.

A sustainable system, which works for all Member States, has not been put in place so as to ensure immediate and real reactivity to external factors, including, or especially so, in times of crisis. There is no structured solidarity mechanism in the current Dublin system or in the CEAS in general, whereas the pressure on individual Member States can vary greatly, especially when that pressure is measured against total population or GDP.

3.1 Lack of an integrated approach at European level

The EU Agencies, such as EASO and the European Border and Coast Guard (EBCG) Agency, play a key role in supporting EU Institutions, Member States and other bodies regarding the further development of the CEAS, and overseeing the effective functioning of border control at the EU external borders. EASO specifically provides permanent, special or emergency support – addressing situations where asylum and reception systems are under particular pressure. Frontex provides technical and operational assistance to Member States to support the border protection and assist them in returns. It also supports, as part of the European Border and Coast Guard, for the effective implementation of European integrated border management.

Among the existing funding programmes, the Asylum, Migration and Integration Fund (AMIF) promotes the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration. With a EUR 3.31 billion initial allocation for 2014-2020, its budget has been increased to over EUR 6.6 billion. The Internal Security Fund (ISF), with a total of EUR 3.8 billion for

seven years, supports the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the Union's external borders.

However, the EU Agencies' support and the funding instruments alone do not provide a sufficient response to structured solidarity and responsibility needs. Despite significantly increased cooperation in the implementation of the EU's common migration and asylum systems, significant structural weaknesses and shortcomings still exist.

Member States' asylum and return systems operate mostly separately, creating inefficiencies and encouraging the movement of migrants across Europe. There is a lack of coordination and streamlining at all stages of the migration management process, from the arrival to the processing of asylum requests, provision of reception conditions and handling of returns.

Member States are exposed to different types and degrees of migration pressure, which might have an impact on one or several aspects of their asylum and migration systems. Migratory pressure might mean having to run more efficient asylum procedures, in terms of staff, for example, or ensuring sufficient reception capacity, also taking into account vulnerable applicants and limiting backlogs in asylum authority decisions.

The lack of an integrated approach leads to an unlevel playing field across Member States, which subsequently hampers efforts to ensure a fair and swift process that guarantees access to procedures, equal treatment, clarity and legal certainty. At the same time, it reduces the capacity to return people who do not qualify for international protection, by increasing obstacles within the EU and to third countries' cooperation on readmission.

The lack of an integrated approach is also manifested in Member States lacking sufficient preparedness and contingency plans in order to ensure sufficient capacity in case they are confronted with increased or rapidly changing migration pressure. Alternatively, where it exists, contingency planning is fragmented and lacking of the necessary structures to coordinate an efficient response of national authorities responsible for asylum and migration management.

Furthermore, there are challenges related to the lack of harmonisation at the EU level in the implementation of CEAS rules. According to the 2016 Communication outlining the European Commission approach to the reform of the CEAS: 'there [were] significant structural weaknesses and shortcomings in the design and implementation of the European asylum and migration policy'. The political impasse on the reform package, and the changes occurring in the nature and composition of the flows, highlighted other different weaknesses related to the lack of harmonisation at EU level. It became apparent that there are no harmonised rules for arrivals, nor screening and there are loopholes between the asylum and return procedures as well.

3.1.1 Challenges of the return and asylum nexus

The low EU average recognition rate (30% in 2019 in the EU-27) makes strengthening the links between asylum and return procedures of vital importance for the proper management of migration in the EU. Many rejected asylum applicants, representing around 370,000

people in the EU every year[59], need to be channelled into the return procedure. According to the statistics available to the Commission, this represents around 80% of the total number of return decisions issued every year[60]. The low recognition rate therefore significantly contributes to the overall high return caseload and an increasing strain on return systems.

Member States regularly report to the Commission that they face a significant burden in dealing with unfounded, inadmissible or fraudulent asylum applicants who, through the use of procedural and legal loopholes in the national asylum systems, are able to delay or prevent their return.

These loopholes relate, for instance, to the issuance of return decisions to rejected asylum seekers, the separation of the appeals procedures for asylum and return, the rules applicable in case of subsequent asylum applications and notably those made during the last stages of return procedure. The existence of these loopholes facilitates absconding and hampers returns, putting a heavy burden on national administrative and judicial systems.

Separate return and negative asylum decisions

Part of the problem is that in some Member States asylum and return decisions are not issued together.

A significant share of Member States[61] (16) do not issue return decisions together with rejected asylum applications. It is observed that in several Member States, third-country nationals first appeal the negative asylum decision and will then lodge an appeal against the return decision once the proceedings on the negative asylum decision will have been concluded. However, since the finalisation of appeals can take months, if not years, this facilitates the absconding of irregular migrants and lead to significant and unnecessary delays in return procedures and unauthorised movements within the Schengen area. This situation is further exacerbated by significant gaps, in certain Member States, in the timely transmission of information about the case from asylum to return authorities.

There are clear indications, mostly collected through the assessment of the national return systems through Schengen evaluations, that **weak links between asylum and return procedures negatively affect the capacity of Member States to perform returns.**

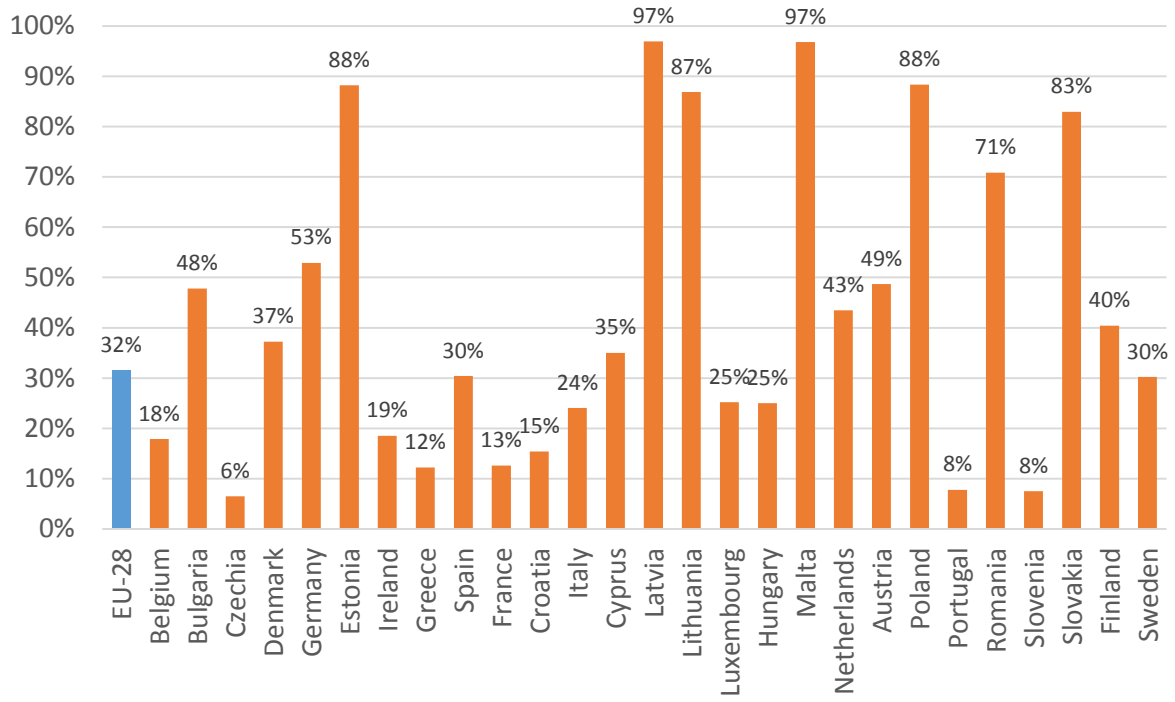
Having separate decisions on asylum and return increases the legal possibilities for applicants to hamper their return, for instance by increasing the duration of legal proceedings by appealing, as allowed by national laws, both decisions at separate times. In practical terms, this means that first a rejected asylum seeker will have the possibility to lodge an appeal at several appellate levels. Once the decision becomes final, the return decision is issued, which the irregular migrant will be able to challenge also at several levels of appeal. In the meantime, irregular migrants have the possibility to abscond in order to avoid return procedures.

[59] The average of negative asylum decisions at first instance in 2015-2018 in the EU-27.
[60] The ratio between the average number of negative asylum decisions and the average number of return decisions issued in the period 2015-2018 (447.982,5) is 89.2% of the total number of return decisions issued.
[61] BE, BG, CY, CZ, EE, FR, EL, IT, LV, MT, PL, PT, RO, SK, SI, ES

Furthermore, appeals to asylum and return related decisions require significant administrative capacity and time from – often already overstrained – authorities and courts. Having a multiplicity of decisions and possible appeals per third-country national also multiplies the burden on these institutions, which risks causing delays.

Moreover, the return rate of countries where return decisions are issued in the same legal act as negative asylum decisions tend to have higher levels of return efficiency compared to countries that have separate systems.

Figure 3.1.1: *Return rate per Member State (EU28)*



Source*: Eurostat*

The above graph shows that ten Member States (BE, CZ, IE, EL, ES, FR, IT, HU, PT, SI) have a return rate that is equal to or lower than 25%. Of these, eight Member States (BE, CZ, EL, ES, FR, IT, PT, SI) do not issue return decisions together with negative asylum decisions.

In Member States where negative asylum decisions and return decisions are issued in separate acts by different authorities, appeal proceedings against both decisions follow different rules and path. In all Member States[62] that do not issue a return decision together with a rejected asylum request, appeals are not dealt with at the same time and appeal proceedings run separately.

[62] BE, BG, CY, CZ, EE, FR, EL, IT, LV, MT, PL, PT, RO, SK, SI, ES.

Current rules on subsequent applications hamper returns

In twenty-three Member States the asylum appeal procedure has automatic suspensive effect, while in sixteen Member States the return appeal procedure has suspensive effect, thus automatically stopping returns.[63] According to the EBCGA, for example, last minute subsequent asylum applications are the second reason for cancellations of returns on scheduled flights. Furthermore, in response to a questionnaire sent out by EBCGA and EASO on last minute asylum applications, many Member States reported that this is a frequent issue. In one Member State, it is estimated that 50% of all return operations cancellations is due to last minute asylum applications.

If a subsequent last minute asylum application has suspensive effect, the application has to either be processed before the flight departs, or the removal procedure has to be stopped. Third-country nationals may ask for asylum also while still boarding the plane. As asylum processes, including appeals, are complex and time-consuming, removal is usually stopped even when it may appear evident at first sight that the application does not bring forward any new substantial element. This is expensive and burdensome for Member States as regards for instance tickets and escorts costs, but also for subsequent asylum reception costs. Moreover, it may give third-country nationals time to find other ways to hamper their return.

There is no EU obligation to ensure that asylum and return decisions are subject to the same effective remedy before a court or tribunal and within the same time limits. As a result, the time limit for lodging appeals varies significantly between countries, ranging from 5 to 90 days depending on the Member State and on the specific situations.[64]

Readmission arrangements are not used to their full potential

On average only 10-15%[65] of return decisions are followed up with a readmission request or a request for identification and re-documentation to the third-country concerned.

Whereas readmission agreements with neighbouring countries (Western Balkans and Eastern Partnership) are used by Member States to their full potential, agreements with other third countries, including the more recently agreed **readmission arrangements[66], are not yet**

[63] WK 9596/2019 INIT`, Questionnaire on the link between the asylum and return procedure: Summary and compilation of the answers' - Brussels, 16 September 2019. For this query all Member States as well as Iceland, Norway, Liechtenstein and Switzerland provided answers. For summary, see ANNEX 1.

[64] WK 9596/2019 INIT`, Questionnaire on the link between the asylum and return procedure: Summary and compilation of the answers, 16 September 2019. For this query all Member States as well as Iceland, Norway, Liechtenstein and Switzerland provided answers. For summary, see ANNEX 1.

[65] Official statistics submitted by Member States to EUROSTAT under the current legislative framework do not include the number of readmission requests submitted to third countries and the number of requests accepted by third entries. So far, Member States have provided the Commission on voluntary and informal basis with such information as well as a qualitative assessment of the level of cooperation in preparation of technical meetings with third countries. As of 2020, under the new Visa Code art 25a, the Commission will make at least once a year an assessment of the level cooperation on readmission by relevant third countries based on quantitative and qualitative data provided by the Member States along more granular indicators defined in the Code, such as number of readmission requests per Member State accepted by the third country as a percentage of the number of such requests submitted to it.

[66] The EU has recently concluded 6 readmission arrangements with Afghanistan (2016), Bangladesh, Guinea (2017), Ethiopia, The Gambia and Ivory Coast (2018).

used by all Member States. For the effective implementation of readmission processes, Member States recognise[67] the need for a very close follow up on cases and the added value of existing **tools created at EU level, such as readmission case management systems and liaison officers.** In addition to ensuring the availability of migrants for return, Member States indicate further obstacles, such as the lack of political prioritisation and of sufficient resources to follow up on cases systematically, in particular when it comes to unresponsive third countries.

Third countries' unwillingness or lack of capacity to cooperate on readmission of own nationals is an additional challenge. Readmission of own nationals is an obligation under international customary law, however, in practice many countries do not cooperate effectively on readmission. Even though the substantial Commission efforts to engage the interest of third countries in this respect over the past four years have brought some improvement, overall readmission cooperation remains a challenge.

3.1.2 Limited use of assisted voluntary return programmes

Voluntary return is the preferred way of returning irregular migrants. In fact, it is a more cost-effective process than forced return, it is better accepted by third countries that then cooperate more effectively on readmissions, and moreover, it allows for a more dignified return for migrants.

The share of voluntary returns from the EU, as reported by the Member States[68], has gradually increased from 20% in 2015 to 27% in 2019.[69] Based on this data, the percentage of migrants ordered to leave who chose to depart voluntarily has increased from 7% to 9% during this period.[70] As such, there is scope to increase the use of voluntary returns and improve their effectiveness, including through additional investments.

The Schengen evaluations conducted during the years 2015-2019 have shown that there are discrepancies in the design, organisation and implementation of national schemes for assisted voluntary returns. For instance, Member States may offer assistance only to certain categories of irregular migrants (e.g. rejected asylum seekers only, irregular migrants coming from specific third countries, migrants who are not detained, migrants subject to a return decision issued only by one of the national competent authorities for return). In addition, in some cases Member States do limited efforts to disseminate information about the availability of

[67] Member States' interventions in relevant Council Working Groups, such as the Irregular Migration and Expulsion working Party, the Strategic Committee on Immigration, Frontiers and Asylum, the High Level Working Group on Migration and expert meetings such as the monthly Readmission Expert Meeting.
[68] Reporting on the number voluntary returns to Eurostat is voluntary for Member States. Over the 2015-2018 period, 19 to 21 Member States have reported on this specific category. On the other hand, during the same period, 27 to 28 Member States have reported on the number of total returns.
[69] Eurostat data on voluntary return 2015 to 2019:
https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirt_vol&lang=en
https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn&lang=en
[70] Eurostat data on return:
https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirt_vol&lang=en
https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en

such programmes and lack appropriate funding. Furthermore, their procedures for setting up the programme and processing requests are very long and inefficient, and they are sometimes applied only in some parts of the country.

Currently, there is no common EU policy on assisted voluntary return and reintegration (AVRR). Member States and the EU have their own approaches to AVRR, which has led to significant fragmentation and lack of coherence and complementarity between the actions. Various gaps and inconsistencies exist concerning financing AVRR activities, available information, cooperation between the various stakeholders, provision and content of support, monitoring and evaluation of current programmes and further referring returnees to other projects.

The need for an EU approach on AVRR has been called for by Member States and discussed in several Council Working Groups. A vast majority of Member States have been supportive and vocal for a more harmonised approach and the need for complementarity between all relevant policy sectors at EU level and in line with a whole-of-route approach.

On the side of the countries of origin, they are reluctant to cooperate on return especially if they have a weak capacity to reintegrate the returnees back into their societies and local economy. Most reintegration projects currently running in third countries rely heavily on implementing partners (international organisation) with insufficient involvement of national and local authorities and often no strategic links with other national development projects, structural community support or employment strategies. There is a need to increase third countries' capacities to deliver reintegration services but also to support ownership over a more strategic approach to reintegration which links to other national policies and plans.

An additional problem is the phenomenon of 'AVRR shopping', referring to the practice of unrightfully benefiting from AVRR funds. It can refer to returnees attempting to benefit from AVRR programmes in a Member State different from the one from which they should be returned. This behaviour can be triggered by disparities in AVRR programmes in the EU, which might induce returnees to attempt to benefit from AVRR programmes in Member States where the assistance is greatest. On the other hand, the term 'AVRR shopping' is also used to describe the behaviour of those returnees who have already returned to their country of origin with AVRR assistance and who then come back to the EU and attempt to benefit from the assistance again.

Understanding the size of this phenomenon is difficult because there is no repository or database that collects information on the AVRR assistance granted to third-country nationals across the EU, therefore national authorities do not know whether a person has already obtained assistance from another Member State.

3.1.3 Lack of streamlined procedures upon arrival

Currently, there are different procedures that can be applied at the EU's land or sea borders. Asylum seekers reaching the EU's land borders and applying for international protection are admitted to the EU's territory and are directed either to the asylum or to the return procedures. Migrants who are apprehended at the EU's land borders and do not request asylum should be channelled to procedures which respect Return Directive. Finally, migrants

who are rescued at sea go through an identification and screening process, which determines whether they will be directed to either the return or the asylum procedure.

There is currently little coordination in handling unfounded claims and in returning irregular migrants to third countries among all relevant national authorities involved in assessing applications for international protection. Such lack of coordination is one of the factors of absconding of applicants for international protection after having been admitted to the EU's territory. When coordination and information sharing among different actors is increased, such as through the work of the EU Regional Task Forces in countries where hotspots are implemented, benefits are tangible.

The EU additionally lacks common screening rules to efficiently control the crossing of external borders. There are no harmonised procedures for carrying out identity, health, vulnerability and security checks on persons apprehended in connection with irregular crossings by land, sea or air of the external border of a Member State. Along with the fact that asylum seekers are *de facto* authorised entry to the territory irrespective of whether they pursue their request for international protection in the country of first entry or abandon it, these are other factors influencing the risk of absconding.

This lack of coordination also undermines the coherence of the asylum system. UNHCR has highlighted the usefulness of a streamlined process upon arrival for asylum seekers, including those arriving irregularly. Swift identification, registration, and the frontloading of resources to support referral to appropriate procedures will, in their view, also ensure access to the asylum procedure[71].

3.1.4 Delays in accessing the appropriate asylum procedure and slow processing of applications

The lack of streamlined procedures upon arrival also creates delays in accessing the territory and in accessing the appropriate asylum procedure.

Based on latest available data[72] from November 2019, there were more than 900,000 cases pending at all instances in the EU+. Overall, there was a high pressure on first-instance authorities: at the end of 2019, some 540,559 cases were pending, up by 20% from a year earlier, and the highest since July 2017. At the end of 2019, half of all first-instance cases were pending for more than six months.

If asylum applicants are able to swiftly reach the relevant asylum authorities, a more fair, effective and tailor-made asylum process can be ensured. Focus therefore needs to be on the early stages of the procedure. Early collection of information facilitating a swift channelling of applicants to the most appropriate asylum procedure is crucial. More straightforward criteria are also needed to quickly decide on which procedure to apply, be it a normal procedure, accelerated procedure or a border procedure. Therefore, the use of accelerated and border procedures should be facilitated by foreseeing to apply such procedures for the

[71] UNHCR Recommendations for the European Commission's proposed pact on migration and asylum, January 2020.
[72] EASO, Asylum Trends Annual Overview 2019.

examination of applications where the applicants are nationals of third countries for which the share of positive decisions on applications for international protection in the total number of decisions is low, including from visa-free countries.

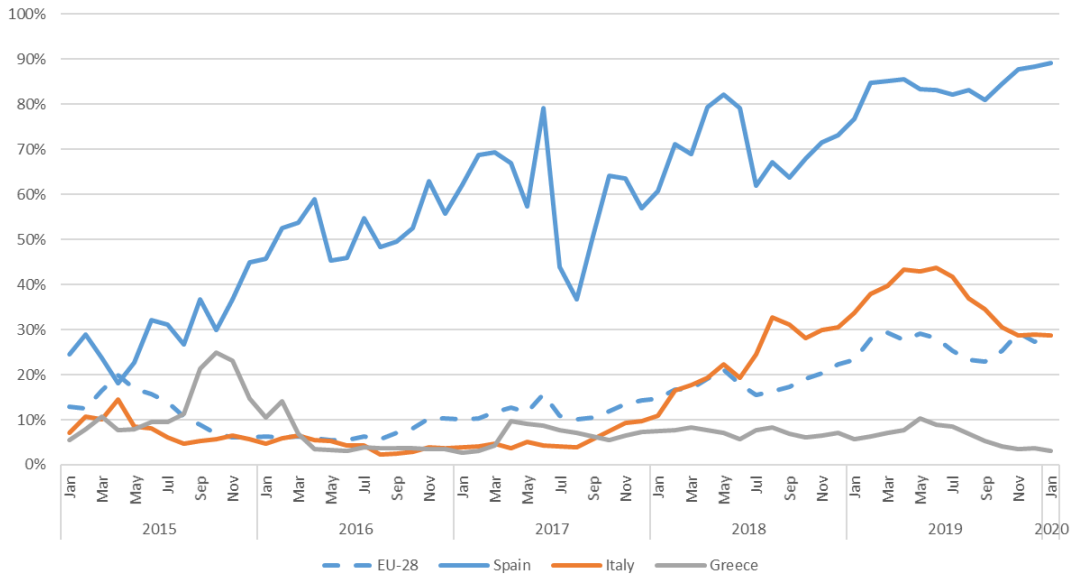
Despite a lack of complete data at EU level concerning processing times of asylum applications, existing data indicate that applications from applicants from low recognition rate countries, in particular from visa-free countries, tend to be decided more swiftly. Therefore, such applications should be dealt with in an accelerated/border procedure, ensuring that those receiving a negative decision can be returned more swiftly, provided that there is cooperation from third countries.

It should be noted that, from the data available, the processing times seem to vary considerably between Member States. While countries issuing fewer decisions typically have shorter processing times, there does not appear to be a systematic relationship between the magnitude of administrative decisions issued and processing time.

3.1.5 Difficulty in using the border procedure

The purpose of the border procedure, set out in the current Article 43 of the Asylum Procedures Directive, is to identify asylum applicants with abusive or inadmissible asylum requests early in the process, in order to facilitate their quick return. The border procedure is particularly effective as a migration management tool when a large share of asylum applicants are citizens of countries with a low EU recognition rate (first instance). Based on available data, in the period 2014-2018, the recognition rate for decisions issued through the border procedure ranged from 10% to 12%. Considering the increasing trend of such applicants, including those from visa-free countries (see graph below), the relevance of the border procedure is also increasing.

Figure 3.2.5: *Share of citizens of visa-free countries from first time applications (2015-2020)*



Source: *DG HOME based on Eurostat data*

16 Member States currently have border procedures or specific procedural arrangements at the border in place, but only very few Member States report data on decisions taken in the border procedure. Looking at available data, the use of the border procedure also seem to have been marginal in the period 2014-2018. The share of decisions taken by border procedure did not go beyond 0.6% in 2018.

Currently, at the level of national legislation EU Member States do not have a uniform way of shaping the border procedure provided by the recast Asylum Procedures Directive (APD) and as a result, national border procedures are not necessarily comparable nor applied in a similar number of cases.[73]

It should however be noted that it is likely that some Member States report decisions taken through border procedure as taken under the normal, accelerated or the admissibility procedure. The use of the accelerated procedure also fluctuates at a relatively low range - between 3% and 8% in the period 2014-2018 - and the use of the admissibility procedure between a mere 0.5% and 1% in the same period.

Indeed, various types of border procedures have been in use in EU+ countries for a long time, often preceding the EU-level harmonised arrangements laid out in the respective Directives (dating from 2005 and 2013). That testifies to the importance of border procedure as an instrument in managing applications for international protection overall and specifically in improving the efficiency of the procedure (time-wise and resource-wise) in regard to applicants who are already physically present at the border or in the transit zone where they are applying for international protection.[74]

Member States generally have different reasons for the limited use of the border procedure. The first relates to difficulties in quickly assessing whether an applicant could qualify for processing in the border procedure, and the need in the meantime to keep the applicant at the border. The second reason relates to the fact that appeal procedures take too long so that the deadline for completing the border procedure expires before a decision, which is no longer subject to an appeal, can be taken on the application. Third, Member States also point to the fact that border procedures, in particular in case of significant arrivals, require important investments and resources in terms of infrastructure for the processing of applications and for accommodating applicants, as well as in terms of staff and equipment. Finally, Member States increasingly underline the difficulty and usefulness in applying the border procedure in cases where there are no prospects of returning the rejected applicant to a third-country (e.g. where there is no readmission agreement in place).

3.2 Absence of a broad and flexible mechanism for solidarity

Since the peak of the crisis in 2015, the focus of discussions and actions on solidarity were almost exclusively focussed on relocation.

[73] Border Procedures for Asylum Applications in EU+ Countries; https://easo.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf
[74] Border Procedures for Asylum Applications in EU+ Countries; https://easo.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf

Efforts to address the pressure of Member States through relocation solidarity measures dealt only with applicants for international protection. While the implementation of the 2015 Council Relocation Decisions[75] has been overall a success, the Commission recognises certain limitations of their scope, to the extent that they related to asylum seekers who were nationals of countries with an average recognition rate of 75% or higher, rather than to a wider range of asylum applicants. Mixed arrival flows to the EU make it all the more necessary to consider the widening of relocation to other categories of migrants. At the same time it is also clearly demonstrated that migratory pressure is increasingly an issue that is borne by Member States in particular with an increasing share of mixed migration flows. In such situations, relocation may not the only effective response to deal with the realities presented by such flows and should also be addressed by different forms of solidarity.

On the legislative side, negotiations on the 2016 CEAS proposals did not lead to an agreement among Member States, in particular due to divisions on the issue of compulsory relocation of applicants for international protection, which continues to be a bone of contention in the context of consultations with Member States on the New Pact on Asylum and Migration. Finding an agreement among Member States is therefore key for a more effective management of migration.

In addition, since the only form of solidarity provided was relocation, there were no legal provisions for the Member States to provide other forms of solidarity support that would have benefitted those Member States still under pressure.

Over the two years of implementation of the 2015 Relocation Decisions, 34,712 persons were relocated from Greece (21,999) and Italy (12,713) with 25 Member States[76] and Schengen associated countries participating actively in the relocation schemes. Nevertheless, the initially agreed number of relocations was eventually not met, in particular because of the changes in migratory flows during the implementation period.

The relocation schemes underperformed[77] mainly because Member State authorities were initially unable to identify all potential candidates for relocation and successfully channel them towards the process. More specifically, the scope of the 2015 Council Relocation Decisions was limited to nationals of countries with an average recognition rate of 75% or higher, rather than to all asylum applicants. Nevertheless, despite the total number of persons relocated being eventually significantly lower than foreseen, over 95% of all eligible and registered applicants were effectively relocated.

In addition, since 2018, a number of Member States demonstrated willingness to engage in solidarity by undertaking further relocations on a voluntary basis.

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[75] Council Decisions (EU) 2015/1523 and 2015/1601 of 14 and 22 September 2015 respectively on establishing provisional measures in the area of international protection for the benefit of Italy and of Greece entered into force on 16 September and 25 September 2015 respectively (hereafter 'Council Decisions on Relocation' or 'Council Decisions'). By virtue of the Council Decisions on Relocation Member States have an obligation to relocate from Italy and Greece the number of persons allocated to them agreed in the Resolution of 20 July 2015 of the Representatives of the Governments of the Member States meeting in Council and as per Annexes I and II to Council Decision (EU) 2015/1601. The Council Decisions are binding on all EU Member States, except on DK and the UK.

[76] All Members States except the Czech Republic, Hungary and Poland.

[77] European Court of Auditors Report on the migration management in Greece and Italy, Special report no 06/2017: EU response to the refugee crisis: the 'hotspot' approach.

The Commission has been coordinating and supporting the voluntary relocation from Italy and Malta since January 2019 following SAR operations. So far, over 2,000 people have been relocated from Italy and Malta to other Member States. The Commission has also continuously been calling all actors engaged in search and rescue to act in coordinated way in a spirit of genuine cooperation. But ultimately, a structural and permanent solution, embedded in a reformed Common European Asylum System is the only viable solution.

On the other hand, the majority of Member States[78] have not actively engaged in relocations from Greece or Cyprus outside of those carried out under the 2015 Council Relocation Decisions, despite the requests from Greek and Cypriot authorities and the significant migratory pressure on both countries in 2019. In light of the increased migratory pressure on Greece, especially during the summer of 2019, the Greek government asked, in September 2019, for the voluntary relocation of up to 2,500 unaccompanied minors by other Member States. For several months, no Member State made any formal offer in this respect, but the subject gained political momentum in the light of the recent migratory crisis at the border between Greece and Turkey. Ten Member States expressed their willingness to participate in the relocation of up to 1,600 unaccompanied minors and children with families from Greece[79], under the coordination of the Commission. The exercise will be inspired by the 2019 model of voluntary relocations following disembarkations in Italy and Malta.

The willingness to engage in solidarity is possibly also hampered by the fact that Member States currently lack other the means to offer solidarity support in other fields, notably in the one of return. Ensuring successful return is a challenge for many Member States and providing for solidarity in this area could be of great assistance to Member States facing arrivals of mixed migration flows. Solidarity in this field could also structurally increase the capacity to return and the return rate and could therefore potentially improve the willingness to move forward with solidarity also in this area, underlining the importance of improving return efforts at Member State and EU-level.

While there is a small but important willingness to demonstrate solidarity for persons disembarked following SAR, it is clear that relocations in the form of *voluntary* exercises alone are not sustainable. The continuous ship-by-ship approach is also proving difficult to manage, with only a few Member States contributing to relocation. This points to the need of a more structured and well-managed system able to respond to such situations in a more effective and sustainable manner.

In this light, the Joint Declaration of Intent on a controlled emergency procedure discussed among the Ministers of France, Germany, Malta and Italy at the Ministerial meeting on 23 September 2019 has provided a useful inspiration for a more structured and constant mechanism for better managing this migration reality.

[78] Only France has expressed interest so far to relocate 400 migrants from Greece by the summer of 2020.

[79] As part of the scheme organised by the European Commission, in April 2020, Luxembourg welcomed 12 unaccompanied minor migrants from Greece refugee camps of Lesbos, Chios and Samos, and 47 were welcomed in Germany.

A new, more sustainable, reliable and permanent approach to SAR, replacing existing ad hoc and *voluntary* solutions alone, has been also advocated by the European Parliament[80], international organisations[81] and other stakeholders[82].

3.3 Inefficiencies in the Dublin system

The Dublin Regulation[83] establishes the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection. In case an applicant lodges an application in a Member State that is not responsible in accordance with the Regulation, it further outlines the procedures for transferring the applicant to the responsible Member State.

However, the current Dublin Regulation has shown several deficiencies and weaknesses, concerning the existing rules and in the implementation. Even with a more efficient and stricter enforcement by all Member States of the existing rules, and with additional measures to prevent unauthorised movements, there is a high likelihood that the current system would remain unsustainable in the face of continuing migratory pressure and without a solidarity mechanism to support Member States facing migratory pressure to address their needs.

Evaluation of the implementation of the Dublin III Regulation

Following its commitment announced in the European Agenda for Migration, the Commission commissioned external studies on the evaluation of the Dublin system in 2016.[84] The evaluation assessed the effectiveness, efficiency, relevance, consistency and EU added value of the Dublin III Regulation. It examined the extent to which the Regulation addressed its objectives, the wider policy needs of the EU and the needs of the target stakeholders.[85] The evaluation included an in-depth study on the practical implementation of the Dublin III Regulation in the Member States.[86] The main findings are set out below, together with the changed migratory situation, and remain valid today.

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[80] Motion for a Resolution on search and rescue in the Mediterranean (2019/2755(RSP)); Juan Fernando López Aguilar on behalf of the Committee on Civil Liberties, Justice and Home Affairs.

[81] IOM-UNHCR Proposal for a regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued at sea, June 2018.

[82] For instance, the Research Social Platform on Migration and Asylum (ReSOMA) highlights the need for stable and durable measures, replacing the temporary ad-hoc relocations. It also considers that flexible solidarity is not adequate solidarity.

[83] 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, OJ L 180, 29.6.2013, p. 31.

[84] Evaluation and implementation reports available at: http://ec.europa.eu/dgs/home-affairs/what-wedo/policies/asylum/examination-of-applicants/index_en.htm.

[85] The evaluation was based on desk research, quantitative analysis and consultations with legal/policy advisors in a total of 19 Member States (BE, BG, CH, CY, EL, FR, HR, HU, IT, LT, LV, MT, NL, NO, PL, RO, SE, SI, SK). Information from the other 12 Member States participating in the Dublin III Regulation was not received in time to be included in the report.

[86] A broad range of stakeholders were consulted, including: Dublin units in national asylum administrations, legal/policy advisors, NGOs, lawyers/legal representatives, appeal and review authorities, law enforcement authorities, detention authorities, applicants and/or beneficiaries of international protection. A total of 142 interviews were conducted. Field visits were conducted in 15 Member States (AT, BE, DE, EL, FR, HU, LU,

The relevance of the Dublin III Regulation

The system for determining the Member State responsible for examining an application for international protection is a cornerstone of the EU asylum acquis and its objectives remain valid. An EU instrument for establishing criteria and a mechanism for determining the Member State responsible is essential as long as separate national asylum systems exist within the Union. Without this, Member States would have to rely on ad hoc agreements as in pre-Dublin times, which would make the determination of responsibility between Member States extremely difficult. The evaluation concluded that no national or bilateral instrument could provide the same effect overall, which could result in a failure to address applications for international protection falling between national jurisdictions. Mixed views were expressed regarding the actual impact of the Regulation, which should ensure a swift access to the asylum procedures for the applicant and lead to a long-term strategy discouraging multiple applications. This would further provide efficiency to the asylum system by preventing misuse and would reduce the overall costs.

In addition, the European Parliament requested the European Council for Refugees and Exiles (ECRE) to carry out a study on 'Dublin Regulation on international protection applications'[87] in February 2020. The study also confirms the need for a system where one Member State is responsible for examining an application for international protection on the basis of common criteria and related evidentiary requirements, despite its current weaknesses.

Implementation of the Regulation

- **General**

The most significant problem highlighted in the external study commissioned by the Commission, which has also been confirmed by Member States and stakeholders in the consultations held since the Commission adopted its proposal in 2016, was the lack of consistent and correct implementation across the Member States. It was further concluded that the design of the Dublin III Regulation had a number of shortcomings which made it more difficult to achieve its main objectives. The hierarchy of criteria as set out in the Dublin III Regulation does not take into account the realities faced by the migration systems of the Member States, nor does it aim for a balance of efforts. The method of allocating responsibility delays access to the asylum procedure. Under the current system applicants may wait up to 10 months (in the case of "take back" requests) or 11 months (in the case of "take charge" requests), before the procedure for examining the claim for international protection starts. This hinders the system's aim to ensure an applicant's swift access to the asylum procedure.

It is also clear that the Dublin III Regulation was not designed to deal with situations of migratory pressure or a fair sharing of responsibility across the Member States. Nor does it

IT, MT, NL, NO, PL, SE, UK, CH), whereas in 16 (BG, CY, CZ, DK, EE, ES, FI, HR, IE, LT, LV, PT, RO, SI, SK, LI) phone interviews were conducted.

[87] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642813/EPRS_STU(2020)642813_EN.pdf

take into account the situation of migration management of mixed migratory flows and the consequent pressure these flows put on Member States' migration systems.

- **Procedural guarantees and safeguards**

  Information to the applicant about the Dublin procedure significantly differs, where some Member States provide only limited, general or outdated information, all which may fall short of the requirements stipulated in Article 4(1).

  The personal interview is a standard practice when determining responsibility in nearly all Member States, but the lack of capacity in some of the overburdened countries prevented the authorities from routinely conducting interviews.

  The interpretation of the best interests of the child diverges. This has on some occasions led to communication issues and mistrust between the Member States. Furthermore, practical problems have been identified in the process of appointing a representative for the minor, especially as a consequence of high influx of arrivals.

- **Criteria for determining the responsible Member State and evidence**

  The criteria most often applied as grounds for transfer are those relating to documentation and irregular entry (Articles 12 and 13), resulting in placing a substantial share of responsibility on Member States at the external border. This has led applicants to avoid being fingerprinted, contributing to unauthorised movements.

  Several Member States indicated that the interpretation of what is considered to be acceptable evidence by the authorities in the receiving country placed an unreasonable burden of proof on the sending country. Eurodac and Visa Information System (VIS) data are accepted as proof by nearly all Member States, and is the evidence most often relied on when determining responsibility. The data obtained through interviews were generally not considered as sufficient evidence. The discretionary provision and provisions on dependent persons (Articles 16 and 17), dealing with humanitarian cases, are infrequently used, with the exception of only a small number of Member States.

  The criteria relating to family links were also less frequently used, mainly due to the difficulty of tracing family or obtaining evidence of family connections. The Member States greatly differ in respect of the evidence accepted for these criteria, but a main requirement is usually documentary evidence (such as birth or marriage certificate), which is often difficult to produce for the asylum applicant. The substantial divergence on what is acceptable proof of family connections makes it difficult to determine responsibility, leading to lengthy procedures. This could be a factor in driving unauthorised movements, with applicants attempting to travel onwards.

  These conclusions are also supported by the findings in the ECRE study, where the study points out the diverging ways in which Member States interpret some of their obligations as one of the main weaknesses in the Dublin system. The study gives concrete recommendations on how to improve the provisions of the Dublin Regulation to ensure the full respect of the applicants' fundamental rights, such as improving the applicants' right to information and

promote family unity and the best interest of the child; the latter by requiring less stringent standard of proof in family cases, and by giving priority to documentary proof in the age assessment of minors. The study also underlines the need to better take into account the applicants' individual circumstances in general (e.g. meaningful links with a specific country).

- **Taking charge and taking back procedures**

  The number of "take back" requests was significantly higher than the number of "take charge" requests. Between 2008 and 2014 72% of outgoing Dublin requests were take back requests, against 28% of outgoing take charge requests. Similarly, 74% of incoming Dublin requests were take back requests compared with 26% of incoming take charge requests. Compared to the situation between 2015 and 2018, the situation has persisted. The share of take back requests represented around 70% between 2015 and 2018. This number must also be seen in relation to the increasing number of requests, which climbed from 20,988 accepted take back requests in 2012 to 65,230 in 2018.

  The timeframes stipulated for submitting and replying to these requests were mostly complied with by all Member States.

  In 2014, only about a quarter of the total number of accepted take back and take charge requests actually resulted in a physical transfer. While 2016 had an increase of an additional 10%, the trend was back at 26% by 2018. These low numbers could be partly explained by delays in the transfers, which is not captured in the annual data used in the evaluation. Another important reason for the low rate of transfers, as confirmed by many Member States, is the high rate of absconding during the Dublin procedures, resulting in a shift of responsibility between Member States. Nevertheless, it is important to keep in mind that each request is linked to an individual application, and a person could have lodged several applications in different Member States before finally being transferred to the Member State responsible.

- **Implementation of transfers**

  The timeframe for implementing the transfers varied significantly. Among the reasons indicated for delays was the extension of the time limits as per Article 29(2). Twenty Member States stated that the absconding of the applicant, allowing for a total of 18 months for transfers, was the primary explanation for delays. Furthermore, 13 Member States highlighted that transfers in general lack effectiveness, indicating that unauthorised movements are 'often' observed following a completed transfer.

- **Appeals**

  Remedies are available against a transfer decision in all Member States. In the process of appeals, all Member States have introduced time limits for an applicant to exercise their right to an effective remedy, although the interpretation of what constitutes a 'reasonable period of time' greatly vary, ranging from three to 60 days. If a case is appealed, some Member States will automatically suspend the transfer, whilst others apply Article 27(3)(c), where this has to be requested by the applicant.

- **Early Warning and Preparedness Mechanism**

  The Early Warning and Preparedness Mechanism has not been implemented to date. This procedure was considered lengthy and complicated. Alternative support measures had helped to relieve the pressure and may have obviated the need to trigger that mechanism. The European Asylum and Support Office was used as an example of support that made it unnecessary to activate the mechanism, helping to prevent or manage crises in the field of international protection.

Achieving the objectives of the Dublin III Regulation

The main findings of the external study regarding the evaluation of the Dublin III Regulation, together with the changed migratory situation, is set out below.

- **To prevent applicants from pursuing multiple applications, thereby reducing unauthorised movements**

  Notwithstanding the aim of reducing unauthorised movements, multiple applications for international protection remain a common problem in the EU. 24% of the applicants in 2014 had already launched previous applications in other Member States. In 2019, this number was 32 %. This suggests that the Regulation has had little or no effect on reaching this objective.

- **To ensure solidarity between the Member States**

  The Dublin III Regulation has limited impact on the distribution of applicants within the EU, given that net transfers in Dublin procedures are close to zero due to equal numbers of incoming and outgoing transfers. This appears to be due to: the hierarchy of criteria, which does not take Member States' capacity into account; the disproportionate responsibility placed on Member States at the external border, by mostly applying the criteria of first country of entry; and the low number of actual transfers, which suggests that applicants are able to submit claims where they choose, placing a greater responsibility on more desirable destinations. This is evident from the figures from 2019, where more than three quarters of all first-time applications for international protection were submitted in only five Member States.

  Negotiations in the Council on the 2016 proposal for a Dublin Regulation did not lead to an agreement among Member States due to divergent views on the balance between responsibility and solidarity. Issues such as relocation following mathematical calculations of pressure, the necessity of Member States of first entry to undertake an admissibility assessment and the stable responsibility proved to be the most difficult issues.

- **The reasonable cost in terms of financial and human resources deployed in the implementation of the Dublin III Regulation**

  The direct and indirect estimated cost of Dublin-related work in 2014 in Europe was approximately EUR 1 billion. The absence of such a mechanism would generate even higher costs for the EU and EEA States, but the evaluation found that the Dublin III Regulation in general lacked efficiency. The legally envisaged time to transfer an applicant is long and the rate of actual transfers small: both of these have a significant financial implication on the

indirect costs, and the overall efficiency of the system. In an attempt to counteract absconding, the cost of detention in some Member States is very high. Absconding generates other indirect costs and reduces the efficiency of the system. Absence of transfers and returns of rejected applicants in practice generates high social costs linked to irregular migration.

It is clear that the current system remains unsustainable in the context of the continuing migratory pressure and mixed flows, as proved also by the effective suspension of Dublin transfers to Greece between 2011 and 2018 as well as the suspension to other Member States ordered in some cases by national courts.

The ECRE study on 'Dublin Regulation on international protection applications'

The ECRE study on 'Dublin Regulation on international protection applications'[88], requested by the European Parliament in February 2020, confirms the need for a system where one Member State is responsible for examining an application for international protection on the basis of common criteria and related evidentiary requirements. However, the study points out several weaknesses in the Dublin system, often due to the diverging ways in which Member States interpret some of their obligations. The study also gives concrete recommendations on how to improve the provisions of the Dublin Regulation to ensure the full respect of the applicants' fundamental rights. For example, the study recommends to improve the applicants' right to information and promote family unity and the best interest of the child; the latter by requiring less stringent standard of proof in family cases, and by giving priority to documentary proof in the age assessment of minors.

3.3.1 Lack of a sustainable sharing of responsibility under the current system

The Dublin system was not designed to ensure a sustainable sharing of responsibility for asylum applicants across the EU, a shortcoming that has been highlighted by the 2015 crisis. In practice, the main criterion for allocating responsibility for asylum claims is irregular entry into one Member State's territory, a criterion which links the allocation of responsibility to the obligation of Member States to protect the external border. However, the ability to effectively control irregular inflows at the external border is largely dependent on cooperation with third countries, and presents different challenges at sea and land borders respectively.

In addition, the experience of recent years has shown that, especially in situations of mass influx via specific migratory routes, the current system places responsibility for the vast majority of asylum seekers on a limited number of Member States, a situation that would stretch the capacities of any Member State. These are not only the Member States of first entry, but also the Member State of first application in the large majority of cases where it is not possible to identify the Member State of first entry. Migrants often refuse to lodge asylum applications or comply with identification and registration obligations in the Member State of first arrival, in order to move on to the Member State where they wish to settle and apply for asylum. These unauthorised movements have resulted in many asylum applications in Member States that are not those of the first point of entry – a situation that has in turn been a contributing factor for several Member States to reintroduce internal border controls to manage the influx.

[88] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642813/EPRS_STU(2020)642813_EN.pdf

3.3.2 Current rules on the shift of responsibility contribute to unauthorised movements

As a main rule under the current Dublin system, the shift of responsibility applies when the time limits to send a transfer request, including take back requests in case of multiple applications lodged in different Member States, and to transfer the applicant to the Member State responsible, expire. The time limits expire also after an applicant has evaded the transfer for over 18 months, in which case the Member State initially determined as responsible ceases being responsible, and shifts the responsibility to the Member State that failed to respect the transfer time limit.

Similarly, if an asylum seeker crosses a Member State's borders irregularly, but applies for international protection in another Member State more than 12 months after his/her entry, the Member State of first entry can no longer be held responsible, resulting in the Member State of first application becoming responsible. The same goes for asylum seekers having been issued a visa or residence permit by a Member State, who then apply for international protection in another Member State 6 months or 2 years after the expiry of the visa or residence permit respectively.

These rules provide an incentive for unauthorised movements and allow applicants for international protection to influence the shift of responsibility.

3.3.3 Inefficient data processing

It is currently impossible to get an accurate picture of migrants' unauthorised movements for the purpose of seeking international protection (e.g. to lodge subsequent applications, or various parallel applications in more than one Member State). This is because unauthorised movements are analysed via three proxy indicators, related to administrative procedures rather than to international protection applicants:

- Dublin decisions, namely decisions on outgoing Dublin requests and decisions to apply the discretionary clause;
- Withdrawn asylum applications, mainly implicit withdrawals due to absconding; and
- Eurodac hits[89].

As far as Dublin decisions are concerned, the main issue is that, according to the way data is collected, it is difficult to distinguish between decisions taken in relation to unauthorised movements (e.g. following irregular entry, previous residence permits and visas), and those taken for other reasons (e.g. following requests for family reasons, dependent persons or humanitarian grounds)[90]. Moreover, when reading together Dublin decisions and Eurodac hits it is important to consider that:

- It is currently impossible to identify the double counting of international protection applicants in the system, since data are collected per application and not per applicant;

[89] Eurodac hits means where the fingerprints obtained from a registration site and the fingerprint database are matching.

[90] Data collected by EASO under EPS for Dublin decisions do not contain the Dublin article under which the request is made.

- Eurodac hits do not cover applicants under 14 years of age (the 2016 proposal however lowers this to 6 years of age);
- Not all Dublin requests are triggered by a Eurodac hit, other evidence is possible;
- Not all Eurodac hits result in a Dublin request;
- There could be 'missed hits' in Eurodac, for example when the country of irregular entry does not appear as a hit, due to the delayed transmission of data to the system;
- The Dublin Regulation has certain limits for the application of the first entry criterion (e.g. the criteria are not applicable if the application was lodged more than 12 months after first entry).

The way information is currently collected under Dublin and Eurodac – notably the fact that the Dublin Regulation only allows for statistics that count transfer requests received by a specific Member State, and that Eurodac does not allow for counting the applicants each Member State is responsible for – makes it impossible to get a complete and credible picture of the migratory situation in Europe, including the extent of onward movements and of the Member States' burden.

A look at statistics that are provided from Eurodac demonstrate this point. Statistics from the 2019 eu-LISA report demonstrates that in 2019, Eurodac processed a total of 592,691 applications for international protection. Of these, 32% were multiple applications (190,201), meaning that the persons applied for international protection more than once (whether it is twice, three times, or above, it is still counted as 'multiple'). This share was exactly the same in 2016 (32%), whereas the years between 2016 and 2018 showed an increasing trend (37% in 2018 and 36% in 2017); and the lowest was in 2015 with 22%. The number of multiple applications is at EU level and it includes both applications made in the same Member State and in other Member States.[91]

Discrepancies between irregular border crossings and registration in Eurodac

Total irregular border crossings or unauthorised entries of third-country nationals above the age of 14 recorded in Eurodac (CAT 2)[92] do not correspond to the number of total irregular border crossings detected by the EBCGA between the period 2016-2019.

The share of unregistered third-country nationals in the table below does not necessarily correspond to persons under the age of 14 and this indicates that persons arriving irregularly are not systematically registered in Eurodac. Between 22% and 31% of irregular arrivals have not been registered, or are presumed to be registered at a later stage.

This leads to a discrepancy that results in an inaccurate picture of movements and numbers, and shows the importance of a new screening phase where the fingerprinting obligation can be fully implemented.

Table 3.4.3 (a): *Irregular border crossings as registered by EBCGA, Eurodac (CAT 2) and*

[91] Multiple applications are counted based on number of hits (CAT1 against CAT1). 'Local hits' where for example DE got hit against DE record (multiple application was done in DE), or 'foreign hits' where DE got hit against record from any other MS. 305 543 represents total number of CAT1 hits in results of CAT1 searches.

[92] Third country national or stateless person, aged 14 or older, apprehended when irregularly crossing the external border of a Member State.

unregistered

Irregular border crossings	2016	2017	2018	2019 to be added
Registered by EBCGA	511,047	204,654	149,036	
Registered in Eurodac (CAT 2)	370,418	160,816	103,333	
Unregistered	140,629 (28%)	43,838 (22%)	45,703 (31%)	

The Dublin system does not allow for the counting of applicants

The Dublin statistics below relating to transfer requests and actual transfers demonstrate the need for a clearer picture on the cohort of actual applicants as opposed to applications.

Table 3.4.3 (b): *Number of accepted Dublin requests (as reported by the country accepting the request)*

EU 28	2012	2013	2014	2015	2016	2017	2018
Accepted take charge requests	*6,963*	*10,828*	*14,314*	16,423	15,908	32,871	29,167
Accepted take back requests	*20,988*	*36,534*	*31,863*	32,990	44,458	55,851	65,230
Total requests	***27,951***	***47,362***	***46,177***	**49,413**	**60,366**	**88,722**	**94,397**

Source: *Eurostat*

A take charge request is sent when the applicant applies for international protection in a Member State for the first time, but there is proof or circumstantial evidence that another Member State is responsible due to the application of the responsibility criteria (family relations, issuance of residence documents or visas, or irregular entry into the EU).
A take back request is sent when the applicant lodges an application in a Member State and there is proof or circumstantial evidence that he or she has previously lodged an application in another Member State. However, it is important to highlight that, since an applicant often absconds before the Dublin transfer is carried out and can lodge a third application in a third Member State, several of the accepted take back requests can relate to the same applicant.

Table 3.4.3 (c): *Number of incoming transfers (transfers effected)*

EU 28	2012	2013	2014	2015	2016	2017	2018
Total transfers	*8,862*	*13,770*	*10,935*	10,014	21,084	24,835	24,662

Source: *Eurostat*

The share of actual transfers as compared to requests vary considerably over the years but has never increased above 35% since 2012 and was as low as 20% in 2015.

Table 3.4.3 (d): *Share of transfers*

EU 28	2012	2013	2014	2015	2016	2017	2018
Share of transfers	32%	29%	24%	20%	35%	28%	26%

Source: *Eurostat*

However, as stated above, while a request is linked to the application, the actual transfers is linked to the person. Since the number of requests does not necessarily correspond to a specific person, but one person may nevertheless apply several times in several Member States before one Member State successfully carries out the transfer, the statistics will not show how many multiple requests correspond to actual transfers.

3.3.4 Procedural inefficiencies of the Dublin system create an administrative burden

The procedural inefficiencies of the current Dublin system also create a significant administrative burden on Member States authorities, and on their asylum and reception systems.

As seen above, take back requests represent an average of over a two-thirds share out of all requests. This indicates that multiple applications repeated in several Member States create a considerable administrative burden for both Member States involved. On the one hand, the Member State where the application is lodged must carry out the Dublin procedure and give the applicant access to the reception system, even though it is not responsible for the applicant. On the other hand, the Member State responsible must reply to all incoming requests, sometimes multiple times for the same person, and make the necessary arrangements in relation to incoming transfers. As the responsibility can shift if the time limits for sending requests are not respected, this also implies that Member States are engaging in sending transfer requests even where they are aware that an actual transfer is unlikely to follow. This places a burden on the asylum system, and tends to be costly.

Other procedural inefficiencies also include the difficulties in obtaining and agreeing on evidence proving a Member State's responsibility for examining the asylum application, which lead to an increase in the number of rejections of transfer requests of applicants. Even where Member States accept transfer requests, only about a quarter of such cases result in effective transfers, and, after completion of a transfer, there are frequent cases of unauthorised movements back to the transferring Member State.

The considerable burden on the asylum and reception systems of the Member States is further demonstrated by the diversity in the time taken for implementing the Dublin transfers. The Evaluation[93] from 2015 shows that the estimated time for implementing the transfers could take from three days (IE), to six months (most Member States). However, six Member States stated that few to very few transfers were implemented before the expiration of the 6-month time limit. Twenty Member States stated that the absconding of the applicant, allowing for

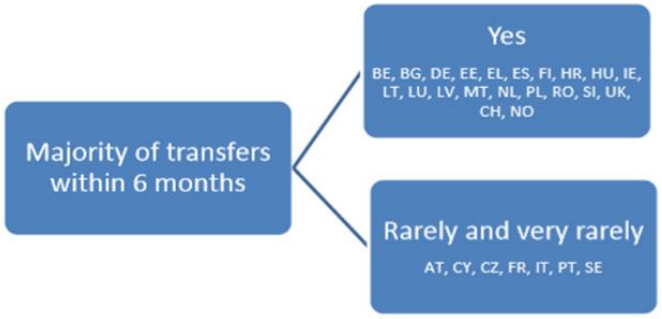
[93]Evaluation of the Dublin III Regulation, DG Migration and Home Affairs, Final report, 2015. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf

the extended transfer time limit, was the primary explanation for delays. These divergent practices create legal uncertainty for all parties, including the applicant, as well as practical problems. In addition, Member States also highlighted that transfers in general lack effectiveness, indicating that unauthorised movements are 'often' observed following a completed transfer.

This situation also comes at a high cost. According to the *Cost of Non-Europe in Asylum Policy* study by the European Parliamentary Research Service (EPRS), the above-mentioned rules for determining the Member State responsible, coupled with the lack of solidarity, lead to:

- High number of transfer requests that are rejected (cost of EUR 186-236 million per year);
- High numbers of appeals against Dublin transfers (estimated cost of EUR 74-87 million per year);
- Accepted transfer requests that are not implemented (EUR 390 to 509 million per year);
- Transfers without a distributive effect (EUR 16 million per year).

Figure 3.3.4: *Time frame under which the majority of transfers is carried out in consulted Member States*



Source: Answers from stakeholder consultations in Member States

3.4 Lack of targeted mechanisms to address crisis situations

The EU is currently better prepared to address crisis situations than it was in 2015. Nevertheless, the EU is still lacking a toolbox to **address situations of crisis,** which could result from a mass influx of third-country nationals arriving irregularly capable of rendering a Member State's asylum or reception system non-functional, and have serious consequences on the functioning of the overall CEAS.

By their nature, such situations of crisis would make it difficult to ensure quick access to asylum or other procedures at the borders. There is a need to have a framework within which to deal with crises or situations of *force majeure* where the response under the other legislative instruments, which are not designed for such exceptional circumstances, would be insufficient. Member States need tools to deal with the various and different causes of migration as well as immediate measures to deal with the extreme pressure stemming from such situations.

The COVID-19 pandemic declared by the World Health Organisation on 11 March 2020 further point to areas where resilience is needed through specific rules that can be applied in situations of force majeure. For example, the rules on time limits for transfers in the Dublin

Regulation presented a number of difficulties in a situation where internal borders were closed and Member States imposed travel restrictions.

The existing measures to grant quick access to protection do not seem to be fit for purpose either, apart from the fact that it should still be possible to allow for an almost- automatic granting of protection to a group of third-country nationals at high risk. According to the Study[94] on the Temporary Protection Directive[95] (TPD), in the absence of definitions of different types of mass influx set out in the Directive, and indicators on how to measure these, stakeholders agreed that it has been hardly possible to attain Member State agreement on the possible activation of the TPD. Procedural weaknesses to activate and implement the temporary protection mechanism were also identified, pointing to a potentially lengthy and cumbersome procedure. The Temporary Protection Directive therefore no longer responds to Member States' current reality and needs to be repealed.

In addition, in crisis situations, the effectiveness of response can be heavily influenced by effective foresight and preparation, moving from a reactive mode to one based on preparedness and anticipation. This is something that is still missing at EU level, and that is necessary as part of effort to make the current migration management system more resilient and responsive.

The challenges outlined above highlight the need for specific rules on crisis solidarity, which would include a solidarity scheme for relocation with a wider scope or return sponsorship to ensure that Member States are obliged to provide a quick response to release the extreme pressure faced by affected Member States. They also call for procedural derogations that Member States can apply in their asylum and migration systems. Derogations from the asylum and return rules should ensure that Member States have the means and sufficient time to carry out relevant procedures in those fields.

3.5 Lack of a fair and effective system for migrants and asylum seekers to access their rights

The lack of a fair and effective migration system hinders the **access of migrants to the asylum procedure, equal treatment in all Member States as regards the procedural safeguards for asylum-seekers' rights and legal certainty of asylum decisions.**

Backlogs, long waiting periods, as well as asylum and return procedures not sufficiently streamlined, can have an impact on the protection of fundamental rights of those seeking international protection.[96]

People seeking international protection who enter the EU need fair and quick access to asylum procedures, such as the right to seek asylum and the principle of *non-refoulement*. This remains the case also in situations of crisis. Also, the fundamental rights of those who are not in need of international protection need to be fully respected.

[94] Carried out for DG HOME by ICF, January 2016.
[95] Council Directive 2001/55/EC.
[96] UNHCR, Recommendations for the European Commission's proposed Pact on Migration and Asylum, January 2020. Available at: https://www.refworld.org/docid/5e3171364.html

Experience also point to the need to reinforce the right to family reunification and strengthen the rights of unaccompanied minors.

Based on experience, special attention needs to be given to migrants rescued in SAR operations. A ship-by-ship approach, with long and often unpredictable times for disembarkations and relocations, has proven to be unsustainable and putting vulnerable migrants at risk and delaying access to international protection. This points to the need of clearer rules for the determination of responsibility and to provide for a solidarity mechanism that can reflect the specificities of disembarkations following search and rescue operations.

While Member States have the obligation to protect the EU's external borders, border control must respect fundamental rights, such as the principle of *non-refoulement*. Any use of force must remain proportionate and used as a last resort. Guidelines to better translate and mainstream fundamental rights to all activities carried out by European Border and Coast Guard at EU and national level could be provided in the framework of the Multiannual Strategic Policy Cycle for the European integrated border management of which fundamental rights are overarching components.

Experience also points to the need to reinforce the right to family reunification and strengthen the rights of unaccompanied minors.[97] As already highlighted in the Communication on the Protection of Children in Migration,[98] family reunification and family unity procedures are often protracted or start too late, pointing to the need to speed up family reunification procedures and prioritise unaccompanied minors.

4. THE 2016 PROPOSALS TO REFORM THE COMMON EUROPEAN ASYLUM SYSTEM

In 2016 the European Commission presented a set of legislative proposals to complete the reform of the CEAS, with the aim to move towards a fully efficient, fair and humane asylum policy which can function effectively also in times of high migratory pressure.

4.1 Towards a reform of the Common European Asylum System: the proposals recommended for quick adoption

The co-legislators reached a broad political agreement on five out of the seven CEAS proposals introduced in 2016, namely as regards the setting-up of a fully-fledged European Union Asylum Agency; the reform of Eurodac; the review of the Reception Conditions Directive; the Qualification Regulation and the EU Resettlement framework. Although a common position on the reform of the Dublin system and the Asylum Procedure Regulation was not reached, the Commission has been supporting a quick adoption of the proposals still on the table to rapidly move towards an, efficient, fair and humane CEAS. These proposals include:

[97] Save the Children, Protection beyond reach, 2020. Available at: https://resourcecentre.savethechildren.net/node/18172/pdf/report_5_years_migration_1.pdf
[98] European Commission, Communication on Children in Migration, 2017. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_communication_on_the_protection_of_children_in_migration_en.pdf

The Qualification Regulation

Replacing the Qualification Directive (Directive 2011/95/EU) with a Regulation aims at achieving more convergence in asylum decision-making, by changing the current optional rules providing common criteria for recognising asylum applicants to obligatory rules, by further clarifying and specifying the content of international protection, in particular as regards the duration of residence permits and social rights, and by establishing rules aimed at preventing unauthorised movements.

By replacing the Qualification Directive with a Regulation, protection standards will be harmonised across the EU, by creating greater convergence of recognition rates and forms of protection. The new Regulation will introduce stricter rules sanctioning unauthorised movements and strengthening integration incentives for beneficiaries of international protection. The new Regulation will clarify the criteria for granting international protection in particular by making the application of the internal protection alternative compulsory for Member States as part of the assessment of the application for international protection. The content of protection will also clarify the rights and obligation of the beneficiary of international protection.

A recast Reception Conditions Directive

The Reception Conditions Directive will ensure asylum seekers receive decent conditions throughout the EU, reduce incentives for abuse and increase the possibility for asylum seekers to be self-reliant. Member States will be obliged to have contingency plans in place to ensure sufficient reception capacity at all times, including in times of disproportionate pressure. Asylum seekers will be provided with full reception conditions only in the Member State responsible for their asylum application. This will help prevent asylum seekers from travelling from Member State to Member State. To ensure an efficient procedure, Member States will be able to allocate asylum seekers to a geographical area within their territory, assign them a place of residence and impose reporting obligations to discourage them from absconding. Asylum seekers with well-founded claims will be granted the right to work no later than six months after their application is registered. Minors will receive education within two months after their asylum request is lodged. Unaccompanied minors will immediately receive assistance and will be appointed a representative no later than 15 days after an asylum application is made.

A reinforced European Union Asylum Agency

The adoption of this Regulation will set-up a fully-fledged EU Asylum Agency and further reinforce the Agency's operational capacity, equipping it with the necessary staff, tools and financial means to support Member states throughout the asylum procedure.

An EU Resettlement Framework

An EU Resettlement Framework would establish a permanent framework with a unified procedure for resettlement across the EU. While the Member States will remain the ones deciding on how many people will be resettled each year, by coordinating national efforts and acting as a whole, the EU will have a greater impact and will be able to contribute collectively and with one single voice to global resettlement efforts.

4.2 A stronger and more effective European return policy

The recast Return Directive proposal

To improve the effectiveness of the EU return policy, on 12 September 2018 the Commission proposed a targeted revision of the Return Directive[99]. The recast of the Return Directive aims to tackle difficulties and obstacles that Member States face in return procedures, including:

- the lack of clear common rules on the definition of risk of absconding and the consequent inconsistent use of detention resulting in absconding and unauthorised movements;
- the lack of cooperation of individuals subject to return procedures;
- the insufficient monitoring of individual cases;
- the volatility of national assisted voluntary return programmes.

The revised Return Directive will allow Member States to better deal with the lack of cooperation on the part of the third-country nationals that leads to obstruct the return procedure, by setting new third-country nationals' obligations and increasing support for voluntary return.

The main elements of the proposal are:

- a new border procedure for the rapid return of applicants for international protection whose application is rejected following an asylum border procedure;
- clearer and more effective rules on the issuing of return decisions;
- stronger coherence and synergy between return and asylum procedures;
- streamlined rules on the granting of a period for voluntary departure, and a new framework for providing financial, material and in-kind assistance to irregular migrants willing to return voluntarily (assisted voluntary return);
- common list of criteria to determine the risk that an irregular migrant may abscond;
- stronger rules on preventing absconding and unauthorised movements, notably by allowing detention of irregular migrants who pose a security threat and establishing a maximum period of detention of at least three months;
- new obligation for irregular migrants to cooperate with the competent national authorities in view of facilitating identification and speeding up procedures;
- establishment of national IT systems to manage and monitor the administrative procedures and facilitate the exchange of information among competent authorities and the execution of return, including with the EBCG Agency;
- clearer rules on the possibilities to appeal against return decisions and the suspensive effect of such appeals.

4.3 Outstanding challenges

Since the 2016 legislative initiatives were put forward, new realities and trends emerged on the different migratory routes. Despite progress made on a number of the 2016 proposals,

[99] COM(2018) 634.

diverging views in the Council have prevented agreement on the full reform. In addition, there are still a number of challenges putting Member States' asylum, reception and return systems under strain. These are, in particular, the increasing proportion of asylum applicants without genuine claims, the persistent onward movements of migrants within the EU as well as the different challenges on the different migratory routes, a lack of a solidarity mechanism that can ease the pressure on Member States including on how to deal with migrants after disembarkation following SAR operations. Further tools are therefore necessary to address these challenges.

The Commission proposed a recast Return Directive in 2018 to address loopholes in the return system, while making EU rules fit for purpose in successfully addressing the risk of absconding, providing assistance to voluntary returns, ensuring proper monitoring of national procedures, and streamlining administrative and judicial procedures. At the Justice and Home Affairs meeting of 6-7 June 2019, the Council reached a partial general approach on all aspects of the proposal, apart from those relating to the border procedure for returns.

As rejected asylum seekers represent a significant number of the irregular migrants in Europe, the asylum and return procedures must flawlessly work together, to allow prompt return when asylum is denied. The targeted amendments to the new Asylum Procedures Regulation will eliminate remaining loopholes, further reducing the possibilities for abusing the asylum system and frustrating returns. Amendments to the Asylum Procedures Regulation, including on the asylum and return border procedure, should facilitate and accelerate negotiations on the Return Directive whose swift adoption is essential for an effective EU asylum and migration system.

THE CHALLENGES FACED BY THE EU

Lack of integrated approach to implement the European asylum and migration policy

- *Unlevel playing field across Member States, hampering efforts to ensure access to procedures, equal treatment, clarity and legal certainty*

National inefficiencies and lack of EU harmonisation in asylum and migration management

- *Challenges of the return and asylum nexus*
- *Limited use of assisted voluntary return programmes*
- *Lack of streamlined procedures upon arrival*
- *Delays in accessing the appropriate asylum procedure and slow processing of applications*
- *Difficulty in using the border procedure*

Absence of a broad and flexible mechanism for solidarity

- *Relocation is not the only effective response to deal with mixed flows*

Inefficiencies in the Dublin system

- *Lack of a sustainable sharing of responsibility under the current system*
- *Current rules on the shift of responsibility contribute to unauthorised movements*
- *Inefficient data processing*
- *Procedural inefficiencies of the Dublin system create an administrative burden*

Lack of targeted mechanisms to address extreme crisis situations

- *EU's difficulty to ensure access to asylum or other procedures at the borders during situations of extreme crisis*

Lack of a fair and effective system to access fundamental rights

ADDRESSING THE CHALLENGES

A more efficient, seamless and harmonised migration management system

- *A comprehensive approach for efficient asylum management (Proposal **for a Regulation establishing a common framework for the EU's asylum and migration management**)*
- *A seamless asylum-return procedure and an easier use of accelerated and border procedures (**Amended Proposal for a Regulation on establishing a common procedure for international protection in the Union**)*
- *A coordinated, effective and rapid screening phase (Proposal **for a Regulation introducing the screening of persons apprehended in connection with irregular crossing of external borders, disembarked following SAR operations or who request international protection at border crossing points**)*

A fairer, more comprehensive approach to solidarity and relocation

- *A solidarity system, allowing for compulsory solidarity with a broader scope (Proposal **for a Regulation on asylum and migration management**)*

Simplified and more efficient rules for robust migration management

- *A wider and fairer definition of responsibility criteria, reducing the cessation and shift of responsibility (Proposal **for a Regulation on asylum and migration management**)*
- *More efficient data collection/processing, allowing for counting appliants rather than applications, and including a specific category for SAR (**Amended Proposal for a Regulation on the establishment of 'Eurodac'**)*
- *Improved procedural efficiency (Proposal **for a Regulation on asylum and migration management**)*

A targeted mechanism to address extreme crisis situations

- *[...] (Proposal **for a Regulation establishing procedures and mechanisms addressing situations of crisis**)*

Improved access to fundamental rights of migrants and asylum seekers

5. ADDRESSING THE CHALLENGES

The challenges described thus far can only be addressed by making the European asylum and migration system more efficient, comprehensive and sustainable. The EU's migration management has to be seen as a set of interlocking policies and rules, where the effectiveness and shortcomings of each single part affect the system as a whole. New or more streamlined and coordinated procedures are needed to create a seamless link between all stages of the migration process. This will create a level playing field across Member States, which will reduce asylum shopping and limit unauthorised movements.

The new system should also be fair and efficient, ensuring solidarity and responsibility in situations of pressure and crisis. It should also recognise the particular characteristics and needs arising from SAR disembarkations.

In this context, the Commission is presenting the following proposals:

- Proposal for a Regulation on Asylum and Migration Management
- Amended proposal for a Regulation on establishing a common procedure for international protection in the Union
- Amended proposal for a Regulation on the establishment of 'Eurodac'
- Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817
- Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum

5.1 A more efficient, seamless and harmonised migration management system

5.1.1 A comprehensive approach for efficient asylum management

The proposed Regulation on Asylum and Migration Management introduces a common framework that contributes to the comprehensive approach to asylum and migration management.

This allows for a comprehensive view of the situation at EU level, as well for a realistic picture of the migration management system at the level of the Member States and an early identification of gaps that need to be addressed. Furthermore, widening the scope of the proposal will also enable a tangible and effective response to migratory pressure based on a wider toolbox of solidarity measures.

In order to implement such an approach, it is important to strengthen the framework with the principle of preparedness and planning. The proposal foresees a governance framework built on national strategies of Member States in order to ensure that sufficient capacity is in place to effectively manage asylum and migration policies, including on contingency planning. This will feed into a European Strategy on Asylum and Migration Management that will set out the strategic approach to managing asylum and migration at the European level and on the

implementation of asylum, migration, and return policies in accordance with the comprehensive approach.

In addition, an annual Migration Management Report published by the Commission will allow for a timely response to evolving trends in migration and include a short-term projection of the evolution of the migratory situation. This framework will be underpinned by a system of monitoring of the migratory situation through regular situational reports published by the Commission.

5.1.2 A coordinated, effective and rapid screening phase

In the context of the current mixed migratory flows, notably the high share of low recognition rate asylum applications, the EU must continue to provide protection to those eligible, while also ensuring that those who are not eligible to stay actually return.

In this context, a **coordinated, effective and rapid screening phase**, comprising of the adequate identity, security and health checks, aims to help national authorities whether to refuse entry at the external border or to direct international protection applicants towards the appropriate procedure (i.e. normal, accelerated, border or return procedure[100]). A new screening phase will also facilitate the use of fast-track procedures for applicants coming from low-recognition rate countries or those coming from safe third countries.

According to the proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, disembarked following SAR operations or who request international protection at border crossing points, all irregular migrants arriving at the EU's external borders would be immediately screened within maximum five days. The procedure aims at establishing their identity and identify any security or health concerns or vulnerabilities. The screening should also apply to all those who have been apprehended on the EU's territory, whenever there is an indication that they have not been subject to entry checks upon arrival.

In addition, swift registration in Eurodac would contribute to more accurate and more complete statistics and would ensure that third-country nationals or stateless persons do not move forward undetected. This would also help correcting the discrepancies between irregular border crossings and registrations in Eurodac, allowing for data to be sent immediately to Eurodac.

During the screening, migrants would be held by competent national authorities, who will collect the relevant information to be shared with the authorities in charge of the follow-up procedure, through a de-briefing form from border guards to the asylum authority including any elements relevant to directing persons into the accelerated or border procedure. Helping the process in this way makes the asylum or return procedure more efficient.

[100] As far as the return procedure is concerned, this should be identified as the most appropriate one only following a careful analysis of the individual cases, and ensuring compliance with the principle of *non-refoulement*.

This proposal also provides an obligation for the Member States to set up an independent monitoring mechanism in order to ensure that the Charter of Fundamental Rights and other EU and international obligations are complied with during the screening.

The monitoring under the screening would be subject to the obligation concerning the governance and monitoring of the migratory situation, resulting from the new Regulation on Asylum and Migration Management. Accordingly, Member States should integrate the results of their national monitoring mechanism established by the Screening Regulation in their national strategies foreseen in the Regulation on Asylum and Migration Management.

5.1.3 A seamless asylum-return procedure and an easier use of accelerated and border procedures

The new legislative framework has to address a number of challenges, such as provide for quick procedures for identifying the different categories, ensure that vulnerable cases are identified, and that return procedures are efficient.

Whilst asylum applications made at the EU's external borders must be assessed, they do not constitute an automatic right to enter the EU. If an asylum claim is clearly abusive or inadmissible, or if the applicant poses a threat to a Member State's security, **this should be swiftly assessed at the border**, to allow for persons with inadmissible applications to be quickly removed.

The screening is aimed at facilitating the assessment of whether a third-country national or stateless person qualifies for the border procedure. It allows for a pre-entry triage process which can identify information and objective grounds which serve as a basis for asylum authorities to subsequently apply a border procedure; in particular an identified security threat, a strong indication for an unfounded claim or the country of origin, should it indicate a low recognition rate or visa-exempt country.

In this context, the amended proposal for a Regulation on establishing a common procedure for international protection in the Union strives to make border procedures more efficient and extend their use **to cover more categories of applicants**, including those coming from countries with very low recognition rates, as mentioned above.

The proposal aims to set up a seamless procedure, with the asylum and return border procedures in a single legislative instrument. The purpose of the connected asylum-return procedure at the external border is to quickly assess asylum requests that are abusive or inadmissible, or that have been lodged by applicants from low recognition rate countries, in order to swiftly return those without a right to stay in the EU. An individual assessment of an asylum application is nevertheless always to be ensured. This is an important migration management tool, in particular where a large share of asylum applicants originate from low recognition rate countries.

In addition, the border procedure would be more flexible than it currently is, allowing for the holding of applicants not only at the border or in proximity to the border, but also at other locations, should capacity become stretched. The length of the procedure would also be extended to ensure that the asylum procedure could be concluded within the deadline. This would address the challenges identified as regards the fact that the current border procedure

has not been used to its full extent by Member States, as well as remedy the challenge presented by tight deadlines.

To serve its purpose, the border procedure needs to be easy to use. EU funds would be made available for the necessary infrastructure to keep applicants. In other cases, its application would be voluntary for the Member States to apply.

More efficient border procedures will lessen the burden on the asylum and migration authorities inland, which will be able to more efficiently assess the genuine claims, deliver faster decisions and overall contribute to a better and more credible functioning of the CEAS.

Furthermore, under the new proposal, Member States are to receive EU financial operational support to ensure that the **asylum and return phases of the border procedure are closely connected to each other**, e.g. by keeping applicants whose applications have been rejected in border facilities until the enforcement of the return decision. Irregular migrants in a return border procedure would not be subject to detention as a rule. However, when it is necessary to prevent irregular entry already during the assessment of the asylum application, or there is a risk of absconding, of hampering return, or a threat to public order or national security, they may be subject to detention, in compliance with fundamental rights and with specific safeguards in place[101].

Alongside more efficient border procedures, the Commission also proposes to issue **return decisions in the same act as the decision rejecting the asylum application,** in order to make the return process quicker and prevent the misuse of asylum procedures. Return decisions would also be appealed to the same court and with the same deadlines as the asylum ones. A system where return decisions are issued together with rejected asylum claims may reduce the burden on both administrative and judicial authorities, as it unifies two administrative and appeal procedures into a single one. More concretely, joining the two appeal procedures will prevent deficiencies in asylum and return systems from leading to unauthorised movements and creating unwanted effects for the Schengen area (i.e. migrants moving to Member States where they can best evade return). It is important to highlight that joining the two appeal procedures is still coherent with the respect of the principles on *non-refoulement* and of procedural autonomy of the Member States. Although this would have an impact on the procedural autonomy of the Member States, the measure is necessary and proportionate because it addresses the main weakness identified in the relation between asylum and return procedures. On the other hand, the procedural autonomy of Member States as regards irregular migrants who are not rejected asylum seekers remains unaffected.

The proposal would only allow for one level of appeal in a border procedure and provide for a non-automatic suspensive effect. This would mean that only one court would look at a rejection decision, and even during that court appeal, the person would only be allowed to remain (and not returned) if the Court considers (upon request) that its presence is required for the exercise of the right of an effective legal remedy. This will prohibit suspensive effects on second level or further appeals, and ensure that asylum and return decisions are subject to the same effective remedy before a court or tribunal, within the same time limits.

[101] See Section 5.6 for impact on fundamental rights.

This process supports, on the one hand, the efficient application of border procedures and, on the other hand, Member States' rapid response to subsequent applications lodged during the last phases of the return procedure, which often have the sole purpose of delaying or preventing return. By ensuring that rejected asylum seekers do not enter the EU's territory and that returnees remain available in the border area or transit zone, the return border procedure will contribute to reducing irregular entry and stay and unauthorised movements.

The proposal also takes into account the feasibility of return and provides for a derogation form the compulsory use of the border procedure by linking it to a clause in the Visa Code, which can be triggered by Member States if a third-country does not cooperate in this regard. Therefore, if such a clause is triggered vis-à-vis a third-country, which indicates that return could be challenging, Member States would not be obliged to use the border procedure vis-à-vis those asylum applicants.

Summary box 5.1 - A more efficient, seamless and harmonised migration management system

- A common framework that contributes to the comprehensive approach will allow for a more efficient asylum and migration management system and for a better prepared and resilient system. The governance system foreseen enables the Union to take a systematic strategic approach to migration and to better prepare for the short and longer term challenges. The system relies on national strategies and strategies and reports of the EU Agencies thus limiting the burden on Member States.
- A new screening phase will allow for a swift determination of whether to channel individuals into the asylum or return procedure.
- In the amended Asylum Procedure Regulation proposal, it is proposed to issue return decisions in the same act as the decision rejecting the asylum application, in order to make the return process quicker and prevent the misuse of asylum procedures.

5.2 A fairer and more comprehensive approach to solidarity

The proposal for a Regulation on Asylum and Migration Management acknowledges the challenge of mixed flows with an increasing share of irregular arrivals to the EU and addresses this reality at the EU level. This is done by promoting integrated policy-making in the area of asylum and migration management, and taking into account the effective implementation of policies in all other relevant areas, ranging from close cooperation and mutual partnerships with relevant third countries, to the effective management of the EU's external borders.

A structured solidarity mechanism is proposed to provide for better migration management by putting in place a system to address situations where Member States are faced with migratory pressure in order to give meaning to the principle of solidarity and a fair sharing of responsibility in the Treaty on the Functioning of the European Union. In addition the specificities of search and rescue operations are also addressed through the solidarity mechanism.

5.2.1 A new approach to solidarity

For solidarity to be effective and meaningful, it needs to be broadened beyond the relocation

of asylum-seekers with a very high recognition rate. This means broadening the scope to asylum-seekers that are not in a border procedure and to beneficiaries of international protection in order to ensure that the solidarity mechanism is more flexible and includes tools that can also deal with the realities of an increasing share of migrants that do not have protection needs. This means that the scope should be enlarged to include solidarity in the field of return by means of the new measure of return sponsorship, through which a Member State commits to carry out the necessary activities to return illegally staying third-country nationals from a Member State under pressure and to transfer the third-country nationals concerned if these measures have been unsuccessful after a period of 8 months (4 months in situation of crisis).

Under the proposed approach, all Member States would have to contribute while retaining the possibility to choose to contribute through relocation or return sponsorship as a solidarity measure. Member States would have to submit Solidarity Response Plans indicating which solidarity contributions they will make. The amount and nature of these contributions will be calculated according to a distribution key based on population and GDP of each Member State. This will represent the share of contributions that each Member State would be obliged to make. An approach with the built-in flexibility to choose from the measures that they would be obliged to take ensure support to Member States under migratory pressure, respecting the type of solidarity contribution indicated by individual Member States.

In certain cases needs may also be identified that require other types of solidarity in the form of capacity building or operational support or support in the external dimension that may be equally necessary in dealing with such pressure. In such cases, it should be possible for contributing Member States to provide solidarity in these areas instead of relocation or return sponsorship. Such measures could take different forms ranging from assistance with putting in place enhanced reception capacity including infrastructure or other systems to enhance the reception conditions of asylum seekers. This could also include financing directed at managing the asylum and migration situation in a specific third-country that is generating particular migratory flows to a Member State. In the field of return such measures could include, for instance, the financial or other assistance focussed on infrastructure and facilities that may be necessary to improve the enforcement of returns or providing material or transport means for carrying out operations. Where the Commission assesses that they are proportionate to the share of these Member State and in line with the objectives set out in the Asylum and Migration Fund these contributions will be specified in the implementing act.

If, however, the indications from Member States to take measures in the field of capacity, or operational support, or the external dimension amount to more than 30% of the required number of persons to be relocated or subject to return sponsorship, the Commission will ensure that the Member States will have to contribute half of their share to these measures.

A Member State may also request a reduction in its share where it can demonstrate that over the preceding 5 years it has been responsible for more than twice the EU per capita average of applications for international protection, and can request a deduction of 10% of its share. The deduction will then be distributed proportionately among the other Member States contributing through relocation or return sponsorship.

The solidarity mechanism will be triggered through a holistic qualitative assessment and evaluated according to a number of criteria, which extend beyond the asylum field to the migratory situation of Member States, as well as to that of the EU as a whole. By setting out

the broad assessment of pressure and the responses that would be necessary to deal with the situation, including on returns, the issue raised by a number of Member States that relocation can be a "pull factor" is also addressed. By means of providing for the possibility of return sponsorship it is clear that the Union is able to tackle the challenges of migration in a holistic manner.

At the same time, the new approach should also provide for other forms of solidarity contributions. Thus, a Member State may, at any time, on a voluntary basis make contributions for the benefit of that Member State, by means of relocation of applicants for international protection that are in the border procedure and irregularly staying third-country nationals.

Under the proposed Regulation establishing procedures and mechanisms addressing situations of crisis and *force majeure* in the field of migration and asylum, relocation would also be applicable to persons that have been granted immediate protection and to all applicants for international protection.

5.2.2 Addressing specific situations under the new approach to solidarity

Under the solidarity mechanism foreseen, a special focus is given to unaccompanied minors for the purposes of relocation.

Firstly, the solidarity mechanism will prioritise the relocation of unaccompanied minors which will be supported by a higher lump sum from the EU budget. In the solidarity response plans to be submitted by Member States for solidarity measures, unaccompanied minors will have a special focus.

The realities of disembarkations following search and rescue operations also need to be addressed in a comprehensive approach to migration management. An annual Migration Management Report will set out the short-term projections anticipated on all routes for disembarkations following such operations and indicating the solidarity response that would be required both in terms of relocation of applicants that are not in the border procedure or in terms of capacity needs of the concerned Member States. Other Member States shall then indicate which type of solidarity measure they intend to take from either of the measures.

Where the contributions indicated by the Member States are sufficient, the Commission shall adopt an implementing act establishing a solidarity pool. However, where the indications by Member States fall short of the needs identified in the Migration Management Report the Commission will adopt an implementing act setting out the shares of each Member State according to the distribution key (50% GDP and 50% population). Where Member States have indicated that they would intend to take measures in the field of capacity or the external dimension the Commission will establish the measure in the implementing act ensuring that they are in proportion to the share that they would have otherwise been responsible for in the case of relocation. If however the indications from Member States to take measures in the field of capacity or the external dimension amount to over 30% of the required number of persons to be relocated, the Commission will ensure that the Member States will have to contribute half of their share to relocation. In these cases a Member State may also chose to contribute to return sponsorship instead of relocation.

The proposed mechanism provides for a process whereby throughout the year as disembarkations take place, the Commission will use the pool and prepare lists to distribute the persons to be relocated or each disembarkation or group of disembarkations to the contributing Member States. Where the solidarity pools risk being insufficient due to an increasing number of disembarkations, the Commission will amend the implementing act setting out an additional amount of projected measures for relocation for the particular benefitting Member State or Member States. In addition, where a Member State of disembarkation risks coming under migratory pressure its solidarity pool may be used for the purpose of relocating persons quickly until the implementing act foreseen for situations of pressure is adopted. The pools of other Member States of disembarkation may also used for this purpose as long as this does not jeopardise the functioning of their pool.

Where the Migration Management Report identifies that Member States of disembarkation have particular challenges due to the presences of third-country nationals who vulnerable, the solidarity pool may also be used for the purpose of quickly relocating such persons.

In order to facilitate a more structured cooperation and common approach between Member States to search and rescue, besides the aspect of relocation of those rescued at sea, the Commission will set up the first European Contact Group on search and rescue matters, bringing together Member States and facilitating exchanges with all other relevant stakeholders, including private operators, EU Agencies and the International Maritime Organisation (IMO).

5.2.3 Contingency planning

The proposal for a Regulation on asylum and migration management provides for a governance and monitoring structure based on Member States' reports on the implementation of the common framework, including on contingency planning. It also foresees a more structured system for planning, preparedness and prevention, including through contingency plans at both national and EU level, with the aim to prevent the build-up of migratory pressure.
A new European Strategy will enable a forward-looking perspective on the risks and opportunities present in migration management and how best to deal with them.

Summary box 5.2 - A fairer and more comprehensive approach to solidarity

- Compulsory solidarity for situations of pressure and a specific solidarity process for disembarkations following search and rescue operations through a wider scope for relocation and inclusion of return sponsorship will ensure an effective response for those Member States facing migratory pressure or dealing with the specificities of search and rescue operations.
- This widened solidarity will allow for an effective response to pressure caused by mixed flows of migration and ensure that solidarity is available to return those persons not in need of international protection, by strengthening the migration management system and addressing any possible pull factors that arise.
- The specific situation of solidarity for unaccompanied minors will also be addressed by prioritizing the relocation of such persons. In addition, the flexibility foreseen for the possibility of Member States to contribute through solidarity in the field of capacity building or external dimension will ensure a mechanism that is fit for purpose and able to respond to the needs of the particular Member State under pressure.
- The costs to Member States for such relocation (as well as the transfer resulting in case of relocation where return sponsorship is unsuccessful) will be offset by means of payments from the EU budget of EUR 10,000 for each relocation. A higher payment of EUR 12,000 per person is foreseen for relocation of unaccompanied minors.

5.3 Simplified and more efficient rules for robust migration management

The challenges related to the current Dublin system's rules on responsibility are addressed through a number of measures in the new proposal. Some of these have already been proposed in 2016 under the Dublin IV proposal[102], and some are based on the current Dublin rules but improved.

5.3.1 A wider and fairer definition of responsibility criteria

The new system foresees a wider definition of 'family member' to include siblings and families formed in transit. By extending the application of the family criteria, these will become applicable to the movements of people across borders to reunite with their family members, which today are considered as unauthorised movements.

The current responsibility criterion linked to first entry remains but the proposal adds a criterion on responsibility for examining an application registered after entry following a SAR operation to better reflect in the asylum acquis the obligations stemming from the International Convention on Maritime Search and Rescue. While the responsibility rules are the same for the two criteria, they will lead to a more accurate picture of the composition of migratory flows in the EU, as well as reflecting the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular border crossings into a Member State by land or air.

5.3.2. Reducing cessation and shift of responsibility

While keeping the current Dublin rule that responsibility ceases if the person is effectively returned in compliance with a rejection or return decision, the principle that the applicant's behaviour should not lead to a shift of responsibility, as proposed in 2016, is also maintained in the new proposal. This is done by deleting the current rules allowing for cessation or shift of responsibility where the person leaves the territory of the Member States for a minimum of three months during the examination of the application, or absconds to evade a Dublin transfer for more than 18 months. For the same reason, the criterion linked to irregular entry should be applicable up to three years after the irregular entry took place, as opposed to the current 12 months.

As proposed in 2016, the deletion of shift of responsibility when the time limit for sending a take back notification is not respected should be kept. Such shifts appear to have encouraged circumventing the rules and obstructing the procedure, as the current Dublin procedure, including the respect for the time limits, has to be applied for every time an application is lodged in a Member State.

5.3.3 More efficient data collection and processing

A specific category in Eurodac for SAR

[102] European Commission, Proposal for a [Dublin IV Regulation], COM (2016) 270, 4 May 2016.

In order to address the identified data gaps, new rules are needed that improve and clarify the processing of data. **The amended proposal for a Regulation on the establishment of 'Eurodac**' aims to provide for more efficient data processing and contribute to providing a clearer picture of secondary movements. The new solidarity measures foreseen in the Proposal for a Regulation establishing a common framework for the European Union's asylum and migration management include, amongst others, a specific process leading to relocation of persons following disembarkation from SAR operations. A dedicated category in Eurodac will distinguish persons who are disembarked on a Member State's territory due to international obligations from persons having crossed the external borders irregularly While the responsibility rules for this new category are the same as the rules for persons who enter irregularly, the distinction is relevant in relation to the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular crossings by land or air. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry. Moreover, this will also lead to a more accurate picture of the composition of migratory flows in the EU. In addition, in order to respond to the challenge of have a clearer picture of secondary movements, the amended Eurodac proposal also provides the possibility to count "applicants" as opposed to "applications". It will also allow Member States to record the granting of assistance for voluntary return and reintegration to prevent abuses of such system.

Counting applicants in addition to counting applications

The new Eurodac legislative framework also provides the possibility to link procedures to specific individuals, rather than applications for international protection, in order to have a clearer picture of unauthorised movements.

To avoid the discrepancy between incoming Dublin requests and decisions on outgoing transfers, the proposed system allows for counting *applicants* in addition to *applications*. All data sets in Eurodac belonging to one person will be linked, regardless of their category, in one sequence[103].

Furthermore, a specific provision in the Eurodac Proposal requires eu-LISA to produce statistics on the total number of asylum applicants and first-time applicants.

The linking of the data set belonging to the same person will be automatically processed by the Eurodac Central System, once the hit between data sets is confirmed by at least one Member State of origin, with minimal impact on the administration workload. This match will be automatically checked by each national Automated Fingerprint Identification System (AFIS) and a verification by a fingerprint/facial image expert will be done only in case of doubt.

Additional information to be introduced in Eurodac

In order to facilitate the implementation of these proposed solutions, several additional new elements will be introduced in Eurodac, as follows:

[103] The data protection implications for applicants are analysed in the Annex to this document.

- A new field that will allow Member States to mark when an application has been rejected and the applicant has no right to remain, in accordance with the amended proposal on the Asylum Procedures Regulation. This will also reinforce the link with return procedures and facilitate the work of national authorities dealing with an application already rejected in another Member State.

- A new field to flag whether Voluntary Return and Reintegration Assistance (AVRR) has ever been granted, to improve Member States' monitoring capacities in this field, detect possible abuses, and ultimately prevent the practice of returnees unrightfully benefiting from AVRR funds. Introducing this new field would also help gather statistics and fill the information gap about "AVVR shopping".

- A new field to mark whether an asylum seeker has been identified as a potential security threat during the screening, to allow for their exclusion from the relocation process, in conformity with the rules on relocation in the proposal for a Regulation for a common framework for the EU's asylum and migration management.

- A field to indicate the Member State that issued or extended a visa, or on behalf of which the visa has been issued, alongside the visa application number. This would facilitate the application of the responsibility criteria for those Member States/Associated Countries, which are not bound by the VIS Regulation, but are, nevertheless, affected by the issuance of a visa.

Consequential amendments on interoperability between EU large-scale information systems

As part of the new legislative framework, several consequential amendments will be introduced in Eurodac.

In 2019, the Interoperability Regulations[104] were adopted, establishing a framework for interoperability between EU large-scale information systems. This framework consists of four components: a European Search Portal (EPS), a shared Biometric Matching Service (shared BMS), a Common Identity Repository (CIR) and a Multiple Identity Detector (MID). Furthermore, the Regulations also established a Central Repository for Reporting and Statistics to support the objectives of all databases covered by the interoperability framework, by producing anonymised statistics using data from the databases.

[104] Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

In order for all the interoperability elements to function properly, amendments of the legal acts governing the respective databases are necessary. Moreover, it is also necessary to provide the possibility to produce cross-system statistics between the Eurodac, EES, VIS and ETIAS, for the purpose of assisting the control of irregular immigration to the EU, the detection of unauthorised movements within the EU's territory, and to regulate access to such statistics.

Summary box 5.3.3 – Impact on data protection

- The new provisions introduced by the amended Eurodac proposal are mainly of a consequential nature. Hence, they are necessary either to reflect and allow the implementation of the new proposal for a Regulation for Asylum and Migration Management (new SAR category, indicating if a visa has been issued, flagging a security threat) or to allow Eurodac to function in the interoperability framework.
- From a data protection perspective, most of these new provisions do not entail data collection per se, being mainly fields that will need to be checked. Persons falling under the new SAR category are already registered in Eurodac as persons crossing irregularly an external border (CAT 2) – the same data would be collected when such persons will be registered as SAR and the same safeguards and guarantees would apply.
- Finally, the change that is not of a consequential nature, meaning that is not linked to another legislative act/proposal concerns the counting of applicants. This would allow a more accurate input for better policymaking and appropriate responses in the area of asylum, especially with respect to tackling unauthorised movements. Such a linking process would not have an impact from a data protection perspective as Member States would keep ownership of and responsibility for the data and all rules and safeguards foreseen in the Regulation for data collection and data processing, including with respect to data security, would continue to apply. The data subject's rights of access, rectification, completion, reassure and restriction of the processing will not be affected and will remain as laid down in the Regulation.

5.3.4 Improved procedural efficiency

The new legislative framework introduces several measures that will alleviate the administrative burden that currently exists due to procedural inefficiencies in the Dublin system. In particular, the proposal for a Regulation for a common framework for the EU's asylum and migration management foresees an obligation to take back a beneficiary of international protection who made an application or is irregularly present in another Member State, and adds a similar (new) obligation to take back resettled persons. This obligation gives the Member States the necessary legal tool to enforce transfers back to the Member State responsible, which is important to limit secondary movements.

The proposal also introduces a system of take back notifications instead of the existing take-back request system. The notified Member State will then be able to object, within a one-week deadline, to the responsibility determination, on the grounds that the responsibility has ceased or shifted pursuant to clearer rules. This will lead to simplification and more effectiveness in the procedures, as the Member State responsible will be visible from the Eurodac search.

Summary box 5.3.4 – Simplified and more efficient rules for robust migration management

- The streamlined responsibility criteria will enhance the effectiveness of the procedure for determining responsibility for examining an application and allow for quick access to the procedures for granting international protection. By removing current obstacles and adding important elements for the procedure for family reunification, such as the widened definition of family members and the adjusted rules on evidence, the criteria will maintain and expand family unity at the top of the hierarchy and ensure a swift reunification procedure. In addition, the extended time a Member State will be responsible after issuing a residence permit or a visa, or after letting the person concerned enter the territory, will reduce the possibility for abuse of the rules.
- By improving the procedural efficiency of the Regulation, the Dublin system will be more transparent and its effectiveness enhanced. In particular, the registration in Eurodac of the Member State responsible will significantly alleviate the burden Member States currently have when applying the take back procedure, and the simple take back notifications will eliminate the current complex and lengthy procedures, which have created a disincentive for compliance with the rules by applicants. In this context, limiting the shift of responsibility will also ensure that the behaviour of applicants will not lead to a Member State becoming responsible and remove the current incentive for unauthorised movements.

5.4 Targeted procedures and mechanisms to address extreme crisis situations and situations of *force majeure*

Notwithstanding the proposal set out above, even the best-prepared and well-managed system needs to have a framework within which to deal with crises or situations of force majeure where the response under the various legislative instruments is insufficient. A new instrument is needed that provides Member States with the tools to deal with the various and different causes of migration but also the need for immediate measures to deal with the extreme pressure stemming from such situations.

Therefore, for the migration management system to be truly comprehensive it also needs to provide a framework for a response in situations where one or more Member States are faced with a mass influx or risk of such influx that renders its asylum system inoperable and thus threatens the functioning of the Union as a whole. Flexibility in situations of force majeure also need to be introduced in light of the lessons learned from the COVID-19 pandemic.

The *proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum* aims to ensure that the Union has at its disposal specific rules to ensure effective solidarity in situations of crisis in national asylum and return management systems, as well as to allow for possible derogations from the applicable EU *acquis* on asylum and return. Such specific rules should be rapidly triggered in respect of any Member State or Member States that experience crisis situations and of *force majeure* of such a magnitude as to put under significant strain even well-prepared and functioning asylum systems.

The proposed system distinguishes between crisis situations that are caused by a mass influx of third-country nationals or stateless persons arriving irregularly being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional. It would cover situations where there is a risk of such a situation. Finally, situations of *force majeure* in the field of asylum and migration management are also

addressed, including situations recently experienced by Member States due to the COVID-19 pandemic.

The objective is to provide for the necessary adaptation of the rules on asylum and return procedures as well as the solidarity mechanism established in the Regulation on Asylum and Migration Management in order to ensure that Member States are able to address situations of crisis and *force majeure* in the field of migration and asylum within the EU. For this purpose, a wider scope for relocation is foreseen with the inclusion of applicants for international protection that are in the border procedure and also irregular migrants; and with shortened timeframes for triggering the compulsory solidarity mechanism procedure foreseen for situations of pressure in the Regulation on Asylum and Migration Management. It also foresees a shorter period of time for triggering the transfer of migrants subject to return sponsorship but who did not successfully return – 4 months instead of 8 months set by the Regulation on Asylum and Migration Management.

The asylum and return crisis management in this proposal provide Member States with the tools to respond to crisis situations that render it impossible to fulfil certain obligations under the Asylum Procedure Regulation or the Return Directive, allowing for certain derogations such as a broader application of the border procedure to third-country nationals and stateless persons, and a longer deadline for registering applications for international protection.

This proposal also foresees the introduction of a faster procedure to grant immediate protection to groups of third-country nationals who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin. To that effect, it is proposed to repeal the Temporary Protection Directive (Council Directive 2001/55/EC). These persons granted immediate protection remain applicants for international protection, and are at the same time beneficiaries of immediate protection. As such, they are able to benefit from all the rights that beneficiaries of subsidiary protection enjoy.

To enable Member States and the Union to deal effectively with situations of *force majeure*, the proposed Regulation also provides for the possibility for a Member State to extend the time limits set out in the proposed Asylum Procedures Regulation for the registration of applications for international protection, and to extend certain time limits set out in the proposed Regulation on Asylum and Migration Management. This proposal also provides for an extension of the timeframe for the implementation of the obligation to relocate or undertake return sponsorship of persons when a Member State is in a situation of force majeure which renders it impossible to fulfil these obligations set out in this Regulation.

Summary box 5.4 - Targeted procedures and mechanisms to address crisis situations

- The main benefits stemming from the rules set out in the proposal include allowing Member States various ways to manage situations of crisis encompassing exceptional circumstances of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State.
- A solidarity system for relocation of all applicants and irregular migrants as well as return sponsorship and procedural derogations that Member States can apply, in situations of mass influx all contribute to alleviate pressure on Member States that would otherwise be facing non-functional asylum, reception or return systems.

5.5 A fairer and more effective system to reinforce migrants and asylum seekers' rights

The changes proposed by the legislative proposals aim to build a well-functioning Common European Asylum System that fully respects the fundamental rights of migrants and asylum seekers, by improving access to swift and clearer procedures, reinforcing family reunification, better defining the principle of best interests of the child, and ensuring respect of relevant safeguards. To do so, the Commission proposes to strengthen and clarify a number of rights through the different proposals.

- **Right to family reunification.** The measures proposed by the Commission in the proposal for a Regulation establishing a common framework for the European Union's asylum and migration management reinforce the **right to family reunification** by taking into account the current realities of many families, in particular by enlarging the scope of the Regulation to include siblings as well as families formed in transit countries.

- **Best interest of the child.** The changes also strengthen the rights of unaccompanied minors through better defining the principle of the **best interests of the child** and by setting out a mechanism for making the best interests of the child-determination in all circumstances implying the transfer of a minor. In addition, before transferring an unaccompanied minor to another Member State, the transferring Member State shall make sure that that Member State will take the necessary measures under the Asylum Procedures Regulation and Reception Conditions Directive, without delay. These changes will ensure that the unaccompanied minor experiences as few obstacles as possible due to the transfer, and can be quickly prioritised in the asylum procedure in the Member State responsible after the transfer.

- **Prioritisation of unaccompanied minors**. The priority for relocation will be given to unaccompanied minors. The Commission shall, in its recommendation for solidarity measures, give priority to the relocation of minors and in addition provide for a financial incentive (EUR 12,000 lump sum) for Member States undertaking relocation of unaccompanied minors.

- **Possibility for quicker long-term resident status.** The proposal also includes an amendment to the Long Term Residence Directive (2003/109/EC). For those who are in need of protection, the prospect of obtaining long-term resident status in a shorter period of time will be an important contribution towards facilitating the full and quick integration of beneficiaries of international protection in the Member State of residence. Beneficiaries of international protection should be able to obtain long-term resident status in the Member State which granted them international protection after three years (instead of the current 5 years) of legal and continuous residence in that Member State, while ensuring that for other conditions to obtain the status, beneficiaries of international protection will be subject to the same conditions as other third-country nationals.

A number of rights will be better defined, and in certain cases limited, in order to harmonise and speed up the different procedures. All changes fully take into account the necessary safeguards, are proportionate to the scope and in line with international legislation and the European Charter of Fundamental Rights.

- **Right to an effective remedy**. As in the 2016 Proposal, the scope of the **right to an effective remedy** is limited to an assessment of whether the family criteria have been correctly

applied, or whether the transfer represents a risk of inhuman or degrading treatment as prohibited by Article 4 of the Charter. Limiting the scope of the right to an effective remedy is expected to considerably speed up and harmonise the appeal process.

- **Right to material reception conditions.** In order to prevent unauthorised movements, the Proposal also limits the **right to material reception conditions** to the Member State where the applicant is required to be present. The limitations would be proportionate because all Member States would have to ensure a standard of living in accordance with Union law, including the EU Charter, and international obligations.

- **Suspensive effect of appeals**. The changes proposed by the Commission in the amended Proposal for a Regulation on establishing a common procedure for international protection in the Union concentrate on the wider, and in some cases obligatory use of the border procedure. Limitations to the right to remain are foreseen, in particular as regards the **suspensive effect of appeals** on subsequent applications, and those which clearly frustrate return. As regards the use of the border procedure, it implies that the appeal upon an eventual rejection of the asylum claim would not have an automatic suspensive effect, hence the person, if the Court does not grant the right to remain, can return. This means that applicants cannot wait for the decision of the court on their claim. Also, if an asylum applicant is in a border procedure, they are not granted entry to the territory of the Member State. These proposed amendments do have an impact on the **right to liberty** and the **right to an effective remedy**. These amendments are, however, necessary to discourage applicants with abusive claims to enter the Union without a valid reason. It is also important to note that the border procedure would be obligatory only in limited cases where applications are likely to be unfounded or abusive.

- **Procedural safeguards.** The assessment in the context of the border procedure should remain individual and essential guarantees, such as the **provision of legal assistance** and the right to an effective remedy, should be respected. Border procedures shall not be applied to unaccompanied minors and a proper monitoring of the compliance with the right to asylum, the respect of the **principle of *non-refoulement*** and fundamental rights should be put in place. As a complementary guarantee, the monitoring mechanism of the EUAA should certainly cover the application of the border procedure, but Member States should equally have their proper national mechanism in place in this regard.

- **Detention**. Irregular migrants in a return border procedure would not be subject to **detention** as a rule. However, when it is necessary to prevent irregular entry, or there is a risk of absconding, of hampering return, or a threat to public order or national security, they may be subject to detention. To ensure that such detention complies with Article 6 of the Charter on the right to liberty, detention could be used only in individual cases, as a last resort (no effective alternatives available), for the shortest possible period of time and provided that procedures by national authorities are conducted with due diligence, and in any case not exceeding the maximum duration of the border procedure (12 weeks for asylum, 12 weeks for return). Such maximum duration has been determined taking into account the duration of national administrative procedures of the Member States and those carried out by third countries (e.g. for consular interviews, identification, re-documentation). At the same time, to

ensure that the border procedure is applied proportionally, only irregular migrants with a reasonable prospect of return[105] would be subject to such a procedure. This determination is based on the level of cooperation of third countries, using the mechanism established by Article 25a of Regulation (EU) 2019/1155 (Visa Code).

In addition, the proposed Regulation introducing a screening takes into account the respect of fundamental rights as enshrined in the European Charter of Fundamental Rights.

The screening must be therefore carried out in full respect of fundamental rights, including the **right to human dignity** (Article 1), **prohibition of torture and inhuman or degrading treatment or punishment** (Article 4), **the right to asylum** (Article 18), the **protection from collective expulsion and *refoulement*** (Article 19), **non-discrimination** (Article 21), the rights related to the health case requiring to ensure the high level of human health protection (Article 35). This proposal fully takes into account the **rights of the child** and the **special needs** of vulnerable persons.

While not entailing the collection or storage of any new personal data, the consultation by the screening authorities of the European databases for the purpose of identifying persons or verifying their security background should be done while respecting the fundamental rights of individuals, in particular the **right to protection of personal data** (Article 8). The sharing of the information collected during the screening among competent authorities would be carried out in full respect of the migrants' right to data protection and confidentiality, as well as taking into account any vulnerabilities and other relevant personal circumstances concerning the migrants.

Furthermore, the proposal for a Regulation establishing procedures and mechanisms addressing situations of crisis and *force majeure* in the field of migration and asylum is also fully compatible with fundamental rights and general principles of Union, as well as international law.

In particular, since the relocation procedure foreseen in this proposal relate to the rules established in the proposed Regulation on Asylum and Migration Management, **better informing asylum-seekers about the procedure** of relocation and their rights and obligations within it will on the one hand enable them to better defend their rights and on the other hand will contribute to diminish the level of unauthorised movements as asylum-seekers will be better inclined to comply with the system.

The **principle of *non-refoulement*** enshrined in Article 33 of the 1951 Refugee Convention and Article 19 of the Charter of Fundamental Rights of the European Union is respected, as

[105] In the judgment on case C-357/09, *Kadzoev* (paragraph 67), in relation to the concept of "reasonable prospect of removal" (i.e. of enforced return), the Court of Justice of the European Union provided the following interpretation: "*Only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal. That reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods*".
In the Return Handbook C(2017) 6505, the Commission also stated that a "reasonable prospect" is not the same as "impossibility to enforce": the latter is a more categorical assertion and more difficult to demonstrate than absence of "reasonable prospect", which refers to certain degree of likeliness only.
The approach described above should be valid, *mutatis mutandis*, also in relation to "reasonable prospect of return".

the proposal explicitly requires Member States to always observe this principle, including through the application of the provisions of the Return Directive.

As regards the procedural parts regarding access to the asylum procedure, the proposal refers to the guarantees provided by the proposed Screening Regulation, including as regards the obligation for Member States to provide for an independent and effective mechanism of monitoring to ensure that fundamental rights are upheld.[106]

5.6 Other initiatives and measures under the New Pact on Migration and Asylum

5.6.1 Resettlement Recommendation

The Recommendation invites Member States to promote resettlement through effective implementation of the 2020 pledge and ensure continuity of resettlement efforts in the years to come. It also calls on Member States to provide more places for people in need of protection, notably through humanitarian admission schemes and other complementary pathways, such as for study or work. The Recommendation encourages Member States to promote community sponsorship schemes to involve individuals, civil society and NGOs more in the reception and integration of people in need of international protection.

5.6.2 A comprehensive operational tool to improve case management in return, readmission and reintegration procedures

To increase operational efficiency in dealing with return, readmission and reintegration processes, and relieve Member States' administrations of some of their current caseload pressure, the Commission proposes to gradually work towards a fully integrated smart case management system.

As a first and immediate step, Member States should be implementing and making full use of all existing EU tools, including SIS return, readmission case management systems with third countries, liaison officers deployed to third countries, and the EBCGA's integrated return management platform, connected with the existing national IT systems. In this initial phase, the EBCGA's assistance to Member State authorities in operational data management would alleviate the administrative burden.

In the second phase, all existing and newly created tools and resources should be brought together into an EU-wide integrated smart case management system, to ensure a continuous and efficient workflow between authorities competent for different migration processes, from registration, through asylum and return procedures, to reintegration of migrants in their country of origin. The Commission will put forward a proposal for such a system in due course.

5.6.3 A Sustainable Return and Reintegration Strategy

The voluntary return of irregular migrants to their home countries remains the preferred option, whenever possible. Existing assisted voluntary return and reintegration schemes, for

[106] Such monitoring mechanism should also ensure that the right to asylum is upheld and the *non-refoulement* principle is respected.

which significant resources have been mobilised by both the EU and Member States, have shown great potential for improving return, and have become an important part of partnerships with third countries. To improve the number of voluntary departures, as well as the coherence, complementarity, monitoring and effectiveness of various types of assistance offered to returnees, the Commission will put forward in 2020 a Sustainable Return and Reintegration Strategy, accompanied by an EU Assisted Voluntary Return Programme implemented by Frontex, complementing and enabling the efficiency of national schemes.

This will include a set of concrete tools, such as EU return counselling guidelines and an EU-wide platform facilitating the referral of returning migrants to suitable reintegration activities in the countries of return. Regarding the latter, the strategy will also look into new approaches to EU-funded reintegration actions in third countries, and better linkages with other development initiatives and national strategies, aiming to build third countries' capacity and ownership.

This more strategic, all-encompassing and better monitored reintegration projects could also provide the EU with the only realistic and legitimate way of monitoring the situation of returnees once back in their country of origin, to the extent that individuals will agree to keep in contact with reintegration service providers throughout their reintegration scheme.

5.6.4 Engaging with third countries willing to cooperate on readmission

Following the repeated call by the European Council[107], the New Pact proposes that all relevant EU policies are activated and made adaptable to changes in cooperation with third countries, starting with the effective implementation of the link between readmission cooperation and visa policy, as enshrined in the new Visa Code.

5.6.5 Structured high-level cooperation on return and readmission

To improve coordination on readmission, the Commission will work closely with Member States to monitor progress in this area, identify obstacles, and establish and implement necessary measures to overcome them. To this end, a structured, dedicated dialogue among relevant institutions will be established, which will also promote Member States' coordination on cooperation with third countries. This will build on the yearly assessment of readmission cooperation by third-country, conducted under the Visa Code, and lead to

[107] EUCO conclusions of **22-23 June 2017**: *Further efforts shall also be made to achieve real progress in return and readmission policy. Building on the Renewed Action Plan on Return, well-functioning readmission agreements and pragmatic arrangements with third countries shall be put in place at EU level without any further delay by using all possible levers, including by reassessing visa policy towards third countries, as needed. Bilateral arrangements of Member States with third countries also contribute to this objective.*
and **19 Oct 2017**: {…] *To consolidate and deepen this approach on all migration routes, the European Council further calls for the following: […] creating and applying the necessary leverage, by using all relevant EU policies, instruments and tools, including development, trade and visa, to achieve measurable results in terms of preventing illegal migration and returning irregular migrants*
18 October 2018: *More should be done to facilitate effective returns. Existing readmission agreements should be better implemented, in a non-discriminatory way towards all Member States, and new agreements and arrangements concluded, while creating and applying the necessary leverage by using all relevant EU policies, instruments and tools, including development, trade and visa.*

consider incentivising measures in other policy areas, to allow for a tailor-made approach for relations with third countries.

In addition, the New Pact proposes a new Network on return and readmission, chaired by a high-level Commission representative, which will bring together relevant Member States' representatives and the Frontex Deputy Executive Director responsible for returns. The Group will help to coordinate the identification and effective use of available measures at EU and Member States level, with potential to improve readmission dialogue and increase readmission management capacity in third countries and Member States.

Reinforcing the capacity to return irregular migrants also requires stronger and better coordination of the EU and national measures. The Commission is therefore proposing to appoint an EU Return Coordinator, supported by a High-Level Network on return and readmission, putting together high-level representatives of the Member States and Frontex; as well as observers from Schengen associated countries and other relevant EU agencies, ensuring a common strategic and coordinated approach on return and readmission among the Member States, the Commission and Union agencies. It will also serve as a forum for the exchange of views and information on matters of common interests related to return and readmission.

6. MONITORING AND EVALUATION

In line with the current requirements of Better Regulation requirements and the Inter-institutional Agreement on Better Law-Making, the proposed legislative instruments will include, where appropriate, specific monitoring and evaluation clauses regarding how the changes linked to the specific interventions will be monitored and how the legislation will be evaluated.

The aim of evaluation and monitoring clauses is to ensure that appropriate arrangements are put in place early on to track progress and evaluate the performance of EU interventions as well as define who is to collect the necessary information, how and when it is to be collected and, on that basis, when to produce the evaluation of the intervention.

Monitoring of the legislation would entail a continuous and systematic process of data collection about interventions which will generate the factual information for future evaluation and will help to identify actual implementation problems.

The proposals will ensure that the new data collection requirements will be proportionate to the scope and objectives of the intervention and only relevant data and information, which is strictly necessary for the assessment of the intervention, will be collected. Existing monitoring and reporting arrangements need to be checked, including those relating to other legislative acts in the same policy area.

A number of indicators will be defined for each initiative allowing the appropriate following of the implementation and the reporting to the European Parliament and the Council.

6.1 Proposal for a Regulation on Asylum and Migration Management

The New Pact provides for a governance and monitoring structure based on Member States' reports on the implementation of the common framework. This will allow a comprehensive

view of the EU situation and an early identification of gaps to be addressed by Member States or EU Agencies.

The Commission will adopt a European Asylum and Migration Management Strategy 18 months after the adoption of the Regulation setting out the strategic approach to managing asylum and migration at Union level and on the implementation of asylum and migration management policies. This will allow for an overarching framework to build responses to ongoing and future challenges for which the Union has to be prepared, and to identify both opportunities and challenges presented by migration.

This strategy will be built on the national strategies of Member States. The aim of these strategies is to ensure that there is sufficient capacity in place for the implementation of an effective asylum and migration system in line with the principles of integrated policy making and the principles of solidarity and fair sharing of responsibility. By means of these strategies, Member States will also inform on their contingency planning at national level and on how they are implementing the legal obligations stemming from the common framework on asylum and migration management.

At the same time, in order to ensure that an EU framework is in place to manage the realities and challenges of migration the Commission will, on an annual basis, adopt a Migration Management Report setting out the anticipated evolution of the migratory situation and the preparedness of the Union and the Member States. This will allow for the early identification of gaps that need to be addressed and implemented. This report will also include the results of monitoring undertaken by the Member States in the context of screening and propose improvements where necessary and relevant. Finally, the Commission will monitor and provide information on the migratory situation through regular situational reports and based notably on information gathered within the framework of the Migration Preparedness and Crisis Blueprint and its Network.

The proposed Regulation proposes a solidarity mechanism which contains an in-built mechanism of assessment both in terms of the migratory situation in cases of pressure or where there are arrivals of SAR operations and also for the solidarity contributions given by Member States in line with the provisions of the Regulation.

The Commission would be empowered propose an implementing act on the basis of the measures chosen by Member States from among the measures of relocation or return sponsorship. The assessments of the situation will be undertaken on the basis of:

1. information presented by the Member State under pressure
2. the level of cooperation on migration with third countries of origin and transit, first countries of asylum, and safe third countries as defined in Regulation (EU) XXX/XXX (*Asylum Procedures Regulation*);
3. the geopolitical situation in relevant third countries that may affect migratory movements;

4. the relevant Recommendations provided for in Article 15 of Council Regulation (EU) No 1053/2013[108], Article 13, 14 and 22 of Regulation (EU) No XXX/XXX (EU *Asylum Agency*) and Article 32(7) of Regulation (EU) 2019/1896;
5. information gathered by the Commission pursuant to the Migration Preparedness and Crisis Blueprint;
6. the Migration Management Report referred to in Article 6(5);
7. the Integrated Situational Awareness and Analysis (ISAA) reports under Integrated Political Crisis Response (IPCR) arrangements, provided that IPCR is activated or the Migration Situational Awareness and Analysis (MISAA) report issued under the first stage of the Migration Preparedness and Crisis Blueprint, when IPCR is not activated;
8. information from the visa liberalisation reporting process and dialogues with third countries;
9. quarterly bulletins on migration, and other reports, of the European Union Agency for Fundamental Rights.
10. the support provided by Union Agencies to the benefitting Member State;

This will allow for a comprehensive and up to date situational analysis and allow for a constant monitoring of the situation.

Reporting obligations

In addition, the Regulation provides that by 18 months after entry into force and from then on annually, the Commission shall review the functioning of the measures set out in the solidarity Chapter of the Regulation.

As regards the entirety of the Regulation, it is proposed that by three years after entry into force, the Commission shall report to the European Parliament and to the Council on the application of the Regulation and, where appropriate, shall propose the necessary amendments. In order to make this possible, Member States are to forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.

Indicators for monitoring

The Proposal for a Regulation on asylum and migration management sets out the solidarity measures that Member States must contribute to as regards Member States that are under pressure, or where there are arrivals following SAR operations. The proposed regulation establishes a pool comprising contributions from the Member States. Member States will submit SAR Solidarity Response Plans and indicate whether they will contribute through measures of relocation of applicants not in the border procedure or through capacity building in the field of asylum, reception or return, or operational support, or support measures in the external dimension. Where such contributions are insufficient the Commission will be empowered to adopt an implementing act setting out these measures according to a

[108] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (OJ L 295, 6.11.2013, p. 27)

distribution key for all Member States. In such cases Member States may choose to contribute through return sponsorship instead of relocation.

In situations of pressure, the Member States are required to submit their contributions via Solidarity Response Plans indicating whether they will undertake relocation of return sponsorship or a combination of the two contributions. Such contributions will be calculated according to a key based on GDP and Population (50%/50%).

The solidarity contributions set out in the Regulation comprise:

a) relocation of applicants who are not subject to the border procedure;

b) relocation of beneficiaries of international protection;

c) return sponsorship in relation to illegally staying third-country nationals.

The proposed Regulation on Asylum and Migration Management foresees that a Member State may at any time respond to a request by another Member State and make voluntary solidarity contributions referred to above, or to other measures as follows:

a) relocation of applicants for international protection subject to the border procedure

b) relocation of illegally staying third-country nationals

c) persons granted immediate protection in line with the proposed Regulation (EU) XXX/XXX [Regulation establishing procedures and mechanisms addressing situations of crisis and *force majeure* in the field of migration and asylum].

Member States which have contributed or plan to contribute with solidarity measures shall notify the Commission, by providing information in a Solidarity Support Plan.

The above Solidarity Response Plans and Solidarity Support Plans provide the means to develop concrete indicators on the number of relocations, return sponsorship or capacity building measures and how such contributions have contributed to alleviate the migration pressure on a Member State or how they have assisted to address the challenges faced by Member States disembarking migrants from search and rescue operations. This will allow the Commission to monitor the application of the Regulation in particular on the solidarity mechanism proposed therein.

Expected impact

It is expected that the solidarity mechanism will have a positive impact on a migration management system that relies on a wider set of measures and can respond to the realities of migration though new forms of solidarity. The procedure for the solidarity mechanism will also allow Member States to better plan the execution of solidarity measures and allow for a better tracking of solidarity across the EU.

6.2 The amended Proposal for a Regulation on establishing a common procedure for international protection in the Union ("Asylum procedures regulation")

Reporting obligations

The Commission shall report on the application of the Asylum Procedure Regulation to the European Parliament and to the Council within two years from its entry into force and every five years after that. Member States shall be required to send relevant information for drafting

that report to the Commission and to the European Union Agency for Asylum. The Agency will also be monitoring compliance with the Regulation by Member States through the monitoring mechanism, which the Commission proposed to establish in its revision of the mandate of the Agency.[109]

Expected impact

The expected impact of the proposed new changes to the 2016 proposal for an Asylum Procedures Regulation are the streamlining of the asylum and return procedures, the enhancement of their effectiveness which strikes the right balance between the right of applicants to an effective remedy and the need to ensure that the asylum systems of the Member States are not abused by people who only aim at preventing their removal from the Union.

6.3 The amended Proposal for a Regulation on Proposal for a Regulation on the establishment of 'Eurodac'

Reporting obligations

Article 42 foresees three types of reporting obligations as follows:

- Once a year, eu-LISA shall submit to the European Parliament, the Council the Commission and the EDPS a report on the activities of the Central System (on the basis of information provided by Member States);
- Seven years after adoption and every four years thereafter, the Commission shall produce an overall evaluation of Eurodac, examining the results achieved against objectives and the impact on fundamental rights (on the basis of information provided by eu-LISA, Member States and Europol);
- Every two years, each Member State and Europol shall prepare reports on the effectiveness of the comparison of biometric data with Eurodac data for law enforcement purposes. These reports shall be transmitted to the Commission by 30 June of the subsequent year. Every two years, the Commission shall compile these reports in a report on law enforcement access to Eurodac which will be transmitted to the European Parliament, the Council and the EDPS. This report is different for the report described under the previous point.

Indicators for monitoring

The yearly report that eu-LISA will have to prepare on the activities of the Central System, will include information on the management and performance of Eurodac against pre-defined quantitative indicators (eg total number of data sets and per category, number of hits, the way Member States implement the deadlines for transmitting biometric data to Eurodac, including delays etc).

The report containing the overall evaluation of Eurodac that the Commission will need to prepare will monitor the results achieved against the objectives set by the regulation and will measure the impact on fundamental rights, in particular data protection and privacy rights, including whether law enforcement access has led to indirect discrimination against persons covered by the Eurodac Regulation.

[109] COM (2016) 271 final.

The reports on the effectiveness of the comparison of biometric data with Eurodac data prepared by Europol and each Member State will assess, among others, the exact purpose of the comparison, the grounds given for reasonable suspicion, the number and type of cases which ended with a successful identification.

Expected impact

The expected outcome of the new legal provisions will be the production of statistics on the number of applicants and first-time applicants by eu-LISA, providing an accurate picture of how many third-country nationals and stateless persons request asylum in the EU.

Furthermore, aggregating these data with other type of data, such as those regarding Dublin transfers, will supply the appropriate input for the right type of policy response in the area of secondary movements.

The cross-system statistics are expected to have a similar impact, as these will allow us to know how many of the third-country nationals were issued a short-stay visa by a given Member State or in a given third-country, proceeded to enter legally (and where) and then proceeded to apply for international protection (and where).

Three years after adoption, eu-LISA will need to conduct a study on the technical feasibility of adding a facial recognition software to the Central System for the purposes of comparing facial images, including of minors. The study will evaluate the reliability and accuracy of the results produced from facial recognition software for the purposes of Eurodac and will make any necessary recommendations prior to the introduction of the facial recognition technology to the Central System.

6.4 Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum

Reporting obligations

The proposal puts in place a system whereby, in a situation of crisis, a constant communication between the Commission and the Member States is ensured. The Member State's motivated request(s) to apply the specific rules in the proposal are assessed by the Commission on the basis of substantiated information, in particular the information gathered by EASO pursuant to Regulation (EU) No 439/2010, the European Border and Coast Guard Agency pursuant to Regulation (EU) 2019/1896 and the Migration Management report referred to in the proposed Regulation on Asylum and Migration Management.

Indicators for monitoring

The proposal requires Member States to submit motivated requests to the Commission in situations of crisis, requesting the application of one or more derogations from the rules of the Regulation on Asylum and Migration Management, the Asylum Procedure Regulation or the Return Directive. The primary indicator to measure situations of crisis is measuring the activation of the tools laid down in the Regulation and the extra pressure those tools are alleviating on the Member States that are facing a situation of crisis.

Expected impact

The proposal aims at providing various ways for Member States to manage situations of crisis encompassing exceptional circumstances of mass influx of third-country nationals or stateless persons arriving irregularly. It aims to do that above by including a relocation system for applicants in clear need of international protection, procedural derogations that Member States can apply, as well as return sponsorship in situations of mass influx all contribute to alleviate pressure on Member States that would otherwise be facing non-functional asylum, reception or return systems.

The asylum and return procedures in this proposal provide Member States with the tools to respond to crisis situations that render it impossible to fulfil certain obligations under the Asylum Procedures Regulation or the Return Directive. In such instances, Member States will be allowed to request a broader application of the border procedure or have a longer deadline for registering applications for international protection.

The proposal will also make it possible for Member States to grant a new, immediate protection status to certain third country nationals coming from a country or region with a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, unable to return to their country of origin. This temporary status will replace the one laid down in the Temporary Protection Directive (Council Directive 2001/55/EC), which is proposed to be repealed for this reason.

6.5 Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817

The proposal creates uniform frames for the identification, security and health checks of third-country nationals and stateless persons eligible to the asylum or return procedures. Such screening should be compulsory at the external borders. The Member States should be also obliged to screening persons apprehended within the territory who are not overstayers.

Reporting obligations

The proposal provides that the Commission shall report on the implementation of the measures set out in this Regulation. No sooner than [five] years after the date of application of this Regulation, and every five years thereafter, the Commission shall carry out an evaluation of this Regulation. The Commission shall present a Report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. Member States shall provide the Commission all information necessary for the preparation of that report, at the latest six months before the [five] years' time limit expires.
Furthermore, the screening at the external borders would be subject to Schengen Evaluations which in turn are subject to yearly reporting obligation to the EP.

Indicators for monitoring

At the external borders, all third-country nationals concerned should be submitted to the screening. The screening should not exceed 5 days. All the various categories of persons should be subsequently transferred to relevant asylum or return procedures.

Expected impact

The proposal is expected to positively impact the management of migration at external borders and thus it is expected to allow for achieving the objective of establishing a seamless migration management.

The Screening Regulation will ensure fast identification of the correct procedure applicable to a person entering the EU without fulfilling the entry conditions, be it asylum in the EU or return to country of origin. It will also apply to those who, while not fulfilling the conditions for entry into the EU, request international protection during border checks as well as to people brought ashore in search and rescue operations at sea. It will also apply to third-country nationals apprehended within the territory, if they have eluded controls at the external borders in the first place.

The effect of the proposed new screening rules will be monitored via the Schengen evaluation mechanism[110].

Fundamental rights monitoring mechanism

The proposal provides an obligation for the Member States to set up the independent monitoring mechanism in order to ensure that the Charter of Fundamental Rights and other EU and international obligations are complied with during the screening.

The monitoring under the screening would be subject to the obligation concerning the governance and monitoring of the migratory situation, resulting from the new Regulation on Asylum and Migration Management (AMMR). Accordingly, Member States should integrate the results of their national monitoring mechanism established by the Screening Regulation in their national strategies foreseen by the AMMR.

6.6 The role of the European Union Agency for Asylum

The new monitoring function of the EU Asylum Agency (EUAA) on the practical functioning of the Member States' asylum systems should also contribute to a regular and effective monitoring of the proposed actions, complementing the Commission's monitoring and evaluation of legislation. The Agency will improve the functioning of the CEAS through its task of regularly monitoring Member States' operational and technical application of the CEAS to prevent or identify possible shortcomings and provide relevant support.

In the proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010[111], and the amended proposal[112], which aims at strengthening the role of EASO and develop it into an agency which facilitates the implementation and improves the functioning of the CEAS, indicators for monitoring are specified[113] and include:

- Number of shortcoming found during the monitoring and assessment of the implementation of CEAS/year;

[110] Council Regulation 1053/2013.
[111] COM/2016/0271 final
[112] COM(2018) 633 final
[113] See section 1.4.4 of the legislative financial statement of the 2018 amended proposal

- Number of support (activities) for the CEAS implementation/year;
- Number of support (activities) for Member State practical cooperation/year;
- Number of operational standards, guidelines and best practices on asylum/year.

Based on these, it will be possible to ensure that any shortcomings in the functioning of the CEAS are addressed as early as possible so as to ensure an orderly management of the asylum and reception systems and also to ensure that Member States have the necessary tools in place to be able to address situations of disproportionate pressure adequately.

ANNEX: Data protection-relevant elements in Eurodac

Data protection: introductory elements

The right to the protection of personal data is established in Article 8 of the Charter and Article 16 of the Treaty on the Functioning of the European Union, and in Article 8 of the European Convention on Human Rights. As underlined by the Court of Justice of the EU[114], the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society[115].

The General Data Protection Regulation[116], with Regulation (EU) 2018/1725[117], and, where relevant, Directive (EU) 2016/680[118] apply to the processing of personal data carried out for the purposes of Eurodac by the Member States and by the EU institutions, bodies and agencies involved, respectively.

According to the Commission Communication of July 2010 on information management in the area of freedom, security and justice[119], data protection rules should be embedded in any new instruments relying on the use of information technology. This implies the inclusion of appropriate provisions limiting data processing to what is necessary for the specific purpose of that instrument and granting data access only to those entities that "need to know". It also implies the choice of appropriate and limited data retention periods depending solely on the objectives of the instrument and the adoption of mechanisms ensuring an accurate risk management and effective protection of the rights of data subjects.

In this respect, the Eurodac database is based on ***data protection by design and by default***[120] which means that:

- Data protection is embedded into the design and architecture of the Eurodac database and of the operations and procedures related to it;
- Specified purposes are clear, limited and relevant to the circumstances (purpose specification); the collection of personal information is limited to that which is

[114] Court of Justice of the EU, judgment of 9.11.2010, Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert [2010] ECR I-0000.

[115] In line with Article 52(1) of the Charter, limitations may be imposed on the exercise of the right to data protection as long as the limitations are provided for by law, respect the essence of the right and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

[116] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[117] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

[118] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[119] COM(2010) 385 final.

[120] In the meaning of Article 25 of the General Data Protection Regulation.

necessary for the specified purposes and is kept to a minimum (data minimisation); the use, retention, and disclosure of personal information is limited to the relevant purposes (use, retention and disclosure limitation);

- The security of personal information is ensured; the applied security standards assure the confidentiality, integrity and availability of personal data throughout its life cycle including, inter alia, strong access control and logging methods. In this sense, the very detailed provisions on data security set extensive obligations for the Member States and for eu-LISA in this area.

According to the Eurodac 2018 annual report, "The protection of personal data related to the individuals processed by the Eurodac central system is monitored by the EDPS in close cooperation with eu-LISA's DPO, who was directly involved in finalising the implementation of EDPS' inspection report recommendations, in accordance with the timeline established by the supervisory authority. In particular, from the DPO's perspective, emphasis was put on the establishment of the policy on personal data breach and on the data breach register."[121]

The right to data protection is not an absolute right and hence limitations to it are possible. However, in order to be lawful, any limitation on the exercise of the fundamental rights protected by the Charter, including the right to data protection, must comply with the following criteria, laid down in its Article 52(1):

- it must be provided for by law;
- it must respect the essence of the rights;
- it must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others;
- it must be necessary; and
- it must be proportional.

Therefore, the new elements of the modified Eurodac proposal should be assessed against a three-fold test:

- do they meet an objective of general interest? This objective provides the background against which the necessity of a measure shall be assessed. The objective of general interest must be defined in sufficient detail so as to enable the assessment whether the measure is necessary;
- are they necessary?
- if so, are they proportional?

Context

In 2016, the Commission put forward, as part of the package for a CEAS reform, a proposal amending the Eurodac Regulation and widening its scope. Among others, the following changes have been introduced: the age for taking fingerprints has been lowered from 14 to 6 years old, the storage period for CAT 2 data (persons crossing irregularly an external border) has been extended from 18 months to 5 years and an obligation was created to register and store for 5 years CAT 3 data (persons staying irregularly on the territory of a Member State). During negotiations, the co-legislators further expanded the scope of Eurodac by adding two

[121]https://www.eulisa.europa.eu/Publications/Reports/2018%20Eurodac%20Annual%20Report.pd, page 10.

more categories (persons registered for the purpose of conducting an admission procedure under the Resettlement Regulation and persons resettled in accordance with a national scheme) whose data should be registered and stored in Eurodac for 5 years. They also introduced provisions allowing law enforcement authorities to search Eurodac by using alphanumeric data. A provisional agreement exists between co-legislators on the majority of the provisions.

Following the reflection process on the way forward for the CEAS reform, the Commission put forward a proposal amending the 2016 proposal. While the Commission supports all the elements of the provisional agreement between co-legislators on the 2016 proposal for a recast Eurodac Regulation, the amended proposal includes from that provisional agreement only the articles that undergo significant modifications.

Several of the new elements introduced in the modified proposal for a Eurodac Regulation do not need to be assessed from a data protection perspective as they stem from adopted legislative acts (Interoperability Regulation[122], ETIAS Regulation[123]) or from legislative acts currently under negotiation (VIS Regulation). This is the case for the technical consequential amendments stemming from the Interoperability Regulation (eg references to and definition of the common identity repository and of identity data or clarifications regarding the way the stored data will be split between the common identity repository and the Central System). This is also the case for the consequential amendments stemming from the ETIAS Regulation and from the VIS Regulation which state that the ETIAS National Units and the competent visa authorities respectively should have access to Eurodac[124]. This needs to be done because the issue of access rights to the various databases remains an aspect to be dealt with in the legislative act governing the respective databases and is not catered for by the Interoperability Regulation.

The following elements will be assessed against the three-fold test explained above:

- the linking of all datasets belonging to one person in a sequence,
- the creation of a new category of persons in Eurodac, namely persons disembarked following a SAR operation,
- the addition of a new field for a security alert, and
- the provision regarding the cross-system statistics and the access rights to such statistics.

Among the elements above, the addition of a new field for a security alert does not entail collecting personal data *per se*. However, a choice was made to justify it in this paper because of its potential impact on the fundamental rights of the person concerned in the processing of an asylum application.

[122] Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum de migration and amending Regulation (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

[123] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

[124] See for example Articles 7, 22 and 75 of the ETIAS Regulation.

A final general remark concerns the fact that these changes will not impact EU citizens as Eurodac is a database containing data of third-country nationals and stateless persons.

Assessment

1. **Counting applicants (linking all datasets belonging to one person in a sequence)**

Objective of general interest

Linking all datasets of a person in a sequence would allow the counting of applicants instead of applications providing an accurate picture of how many persons have applied for asylum within the EU (and how many of these have done so for the first time). It would also provide the framework for an accurate mapping of secondary movements. These two elements are essential for an appropriate policymaking response to tackle the pressure the EU asylum system might be under at a given moment or the phenomenon of secondary movements.

Ultimately, this would allow the fulfilment of the new purpose of Eurodac introduced by the 2016 proposal and confirmed by the provisional agreement: "assist with the control of illegal immigration to the Union and with the detection of secondary movements within the Union and with the identification of illegally staying third-country nationals and stateless persons for determining the appropriate measures to be taken by Member States".

Necessity

During the past two years, discussions in various fora (SCIFA, Council preparatory bodies, Advisory Groups) clearly pointed out a set of gaps in information gathering and analysis at EU level in the field of asylum. These gaps, as explained in detail in the previous chapters of this paper, relate to the fact that currently Eurodac, the EU asylum database, is designed to count applications and not applicants and the proposal put forward in 2016 had not modified this. Therefore at present there is no possibility of knowing how many persons applied for asylum (and how many of these are first time applicants) at EU level. Moreover, there is no possibility of accurately mapping secondary movements of asylum applicants within the EU.

With respect to the latter, the various analysis attempts undertaken by different stakeholders at EU level[125] rely on assessing proxy indicators such as Dublin decisions (namely decisions on outgoing Dublin requests and decisions to apply the discretionary clause), withdrawn asylum applications (with focus on implicit withdrawals) and the number of Eurodac hits involving asylum applicants. Because such data concern administrative procedures not persons (applicants) and entail a certain amount of uncertainty, they prompt a need for caveats. Such caveats concern false positives (decisions on outgoing take charge Dublin requests for family reasons), double counting or potential omissions of cases namely cases of expired Dublin responsibility or cases of applications which are made but not lodged. Consequently, the results of analysing these data are often cautiously formulated avoiding references to quantitative indicators and exact numbers and they fail to provide a full picture of the situation.

[125] See for example to EASO's work in this area, namely the report on Secondary Movements of Asylum Seekers in the EU+ in 2018 (not public).

The recently adopted Interoperability Regulation will not provide a solution for the above problems. Despite the fact that the Common Identity Repository will contain a file for each person[126] registered in the databases covered by the Interoperability Regulation, it will not be possible to count asylum applicants because:

- the purposes of Article 17 of the Interoperability Regulation are "facilitating and assisting in the correct identification of persons registered in the EES, VIS, ETIAS, Eurodac and ECRIS-TCN", "supporting the functioning of the multiple-identity detector" and "facilitating and streamlining access by designated authorities and Europol to the EES, VIS, ETIAS and Eurodac, where necessary for the prevention, detection or investigation of terrorist offences or other serious criminal offences";
- as the common identity repository will be part of all the databases covered by the Interoperability Regulation, the file for each person which will exist in this repository will contain information from all the databases where the person is registered not only form Eurodac (even if the data of each system will be stored separately);
- the Interoperability Regulation contains no legal basis allowing the drawing up of statistics on the number of (first time) asylum applicants.

Proportionality

In order to keep the legal, technical and financial impact on Eurodac to a minimum, instead of creating a file per person, the option of linking all datasets belonging to one person, regardless of their category, in a sequence through a unique ID number was preferred. This option would not change anything in the way data are currently collected and registered in Eurodac in relation to a specific individual. This means that no extra data would be collected, and the storage periods would not be affected. The safeguards foreseen for data collection and data processing would continue to apply. The data subject's rights (right of access to, rectification, completion, erasure and restriction of the processing) would continue to apply as detailed in the Regulation.

Moreover, this option would avoid potentially challenging issues such as establishing the criteria for identifying the owner of the file or clarifying the various scenarios where ownership might shift from one Member State to another (eg depending on the oldest data set in the file). The chosen option would mean that each Member State of origin would keep ownership of its own dataset in the sequence. It would also keep responsibility for ensuring data security according to the rules laid down in the Regulation.

From a technical point of view, such a linking is feasible as it is already automatically done by the system in two situations:

- when a search is made by the authorities of a Member State with respect to a certain person, the results include all datasets relating to that person that exist in the database (notwithstanding the limitations of the current legal framework[127]);

[126] In the meaning of Article 17 of the Interoperability Regulation.
[127] The current Regulation allows only the following comparisons: CAT 1 – CAT 1, CAT 1 - CAT 2, CAT 3 – CAT 1. CAT 3 data are not stored in Eurodac.

- when international protection is granted by a Member State and all datasets belonging to the person in question must be marked accordingly, a "chain" of all relevant data is created and one single broadcast message is sent.

The technical modifications required to implement such a change would therefore be reduced to a minimum and so would the necessary costs.

The appropriate safeguards would also be foreseen as the linking of datasets in the sequence would be done only when the hit is confirmed by Member States (with verification by a fingerprint/facial image expert if necessary).

Conclusion on linking all datasets belonging to one person

Linking together all datasets belonging to one person is the crucial element that would allow the counting of applicants instead of applications. This would allow a more accurate input for better policymaking and appropriate responses in the area of asylum, especially with respect to tackling secondary movements. Ultimately, this would lead to attaining the new objective of Eurodac in relation to controlling irregular migration. Such a linking process would not have an impact from a data protection perspective as Member States would keep ownership of and responsibility for the data and all rules and safeguards foreseen in the Regulation for data collection and data processing, including with respect to data security, would continue to apply. The data subject's rights of access, rectification, completion, reassure and restriction of the processing will not be affected and will remain as laid down in the Regulation.

2. A new category of persons (persons disembarked following a search and rescue operation)

Objective of general interest

The new proposal for a Regulation on Asylum and Migration Management provides a responsibility criterion for examining an application for international protection where the application was registered after the person concerned was disembarked following a search and rescue operation (under current rules such persons are covered by the irregular entry criterion). Therefore, to facilitate the application of the relevant provisions in the proposal for a Regulation on Asylum and Migration Management, there is a need to have a separate category for these persons in Eurodac instead of registering them as persons who cross the border irregularly (as it is currently the case).

Necessity

SAR operations have been organised by Frontex and by Member States[128], but also by NGOs as a result of the obligations stemming from the International Convention on Maritime Search and Rescue adopted in Hamburg, Germany on 27 April 1979. The aftermath of the fulfilment of these obligations needs to be framed by the necessary legal provisions in the area of

[128] SAR is not direct task of the Agency but it comes as a consequence of the Agency's performance of sea border surveillance operations

asylum acquis. While the responsibility rules for this new category are the same as the rules for persons who enter irregularly, the distinction is relevant in relation to the fact that Member States of disembarkation face specific challenges as they cannot apply to SAR disembarkations the same tools as for irregular crossings by land or air. For instance, there are no official border checks for SAR arrivals, which not only means that points of entry are more difficult to define, but also that third-country nationals have no points where to officially seek entry. Therefore, such persons need to be registered separately in Eurodac. Moreover, this will also lead to a more accurate picture of the composition of migratory flows in the EU.

Proportionality

The data that should be collected for this new category however are identical to the data that should be collected for other categories in Eurodac (with the exception of data that are typical only for asylum applicants or for persons registered for the purpose of conducting an admission procedure). No extra information needs to be collected and transmitted to Eurodac. Moreover, all the safeguards foreseen in the Eurodac Regulation applicable to all the other categories would also apply to the persons disembarked following a SAR operation.

Conclusion on creating an new category of persons

Creating a new category of persons in Eurodac would not have an impact from a data protection perspective. The same data would be collected as for the other categories. If no separate category is created, such persons would in any case need to be registered in Eurodac under the category of persons who cross the external border irregularly. The new separate category would give a more accurate image of the migratory flows and would facilitate the application of the relevant provisions in the proposal for a Regulation on Asylum and Migration Management.

3. A new data field for a security alert

Objective of general interest

For the new data field that would contain a security alert following screening the objective is a three-fold one. First, it is crucial to ensure the security of EU citizens by identifying the third-country nationals and stateless persons that could represent a security threat and restricting their access to the EU. Moreover, under the new proposal for a Regulation on Asylum and Migration Management, such persons are excluded from relocation. Finally, it is important to facilitate the processing of asylum applications as security related issues are an exclusion or a rejection ground for refugees and an exclusion ground for beneficiaries of subsidiary protection.

Necessity

The aim of the screening foreseen in the XXX would be to distinguish between the various types of migrants and channel them towards the appropriate procedure. A security check would be an important part of this procedure for attaining the objectives described above. Marking in Eurodac the fact that there is a security alert would signal the fact that a

procedural step has been fulfilled and would first facilitate the implementation of relocation provisions under the new proposal for a Regulation on Asylum and Migration Management as persons who represent a security threat are excluded from relocation. Furthermore, it would speed up the processing of asylum applications. In this sense, for the applicants for whom a security problem has been flagged and marked in Eurodac, the assessment of the application could focus first on whether this is serious enough to amount to an exclusion/rejection ground. For those for whom such a problem has not been flagged in Eurodac, such an assessment could be skipped or reduced to a minimum.

Proportionality

Such a field would be a box that would need to be checked if following verifications during the screening (eg in other databases such as SIS, Europol or Interpol databases) it becomes apparent the person could represent a security threat. No data would be recorded in Eurodac following such verifications.

Conclusion on creating a new data field for a security alert

Creating a new data field for a security alert would not have an impact from a data protection perspective as this would not entail the actual collection and registration of data in Eurodac. Such a field would merely mark the fact that a procedural step has been fulfilled and would be a facilitating element for relocation and a triggering factor for a certain approach when processing the asylum application. In this sense, the existence of such an alert could focus the processing of the application first on whether the security threat amounts to an exclusion/rejection ground or not.

4. Cross-system statistics and related access rights

Objective of general interest

The addition of a new provision on cross-system statistics in Eurodac would build on the tools provided for by the Interoperability Regulations and would allow the drawing up of statistics that would provide a better quality input for the purposes of analysis and forecasting, to support evidence-based policy and decision-making at EU and Member States' levels.

Necessity

While the Interoperability Regulation foresees in its Article 39 the creation of a central repository for reporting and statistics (CRRS), the legal basis for producing such statistics and for regulating the access rights to such statistics needs to be included in the legal act governing each of the databases in question. This allows for better assessing the necessity and proportionality of such cross-system statistics. The new provision in Eurodac will therefore allow eu-LISA to draw up cross-system statistics using data from Eurodac, EES, ETIAS and VIS. The aim would be to know for example how many of the third-country nationals issued a short-stay visa by a given Member State or in a given third-country, proceeded to enter legally (and where) and then proceeded to apply for international protection (and where). This would offer the necessary background information for assessing such phenomena and for the appropriate policy response. The provision would also foresee that in addition to the Commission and the Member States, EASO and Frontex would also get access to such

statistics as both agencies, in the framework of their respective mandate, produce valuable analysis in the area of migration and asylum.

Proportionality

Such statistics would not allow for the identification of individuals and do no longer constitute personal data. Moreover, the exact content of cross-system statistics that could be produced by comparing data from those databases would be defined at a later stage via an implementing act, in accordance with the appropriate procedures.

Conclusion on cross-system statistics

The provision allowing eu-LISA to produce cross-system statistics has no impact on data protection as such statistics would not allow the identification of individuals. Moreover, the access rights to these statistics would be limited and their content would be precisely determined at a later stage. Hence, it would not be possible for eu-LISA to decide on what type of statistics to draw-up.