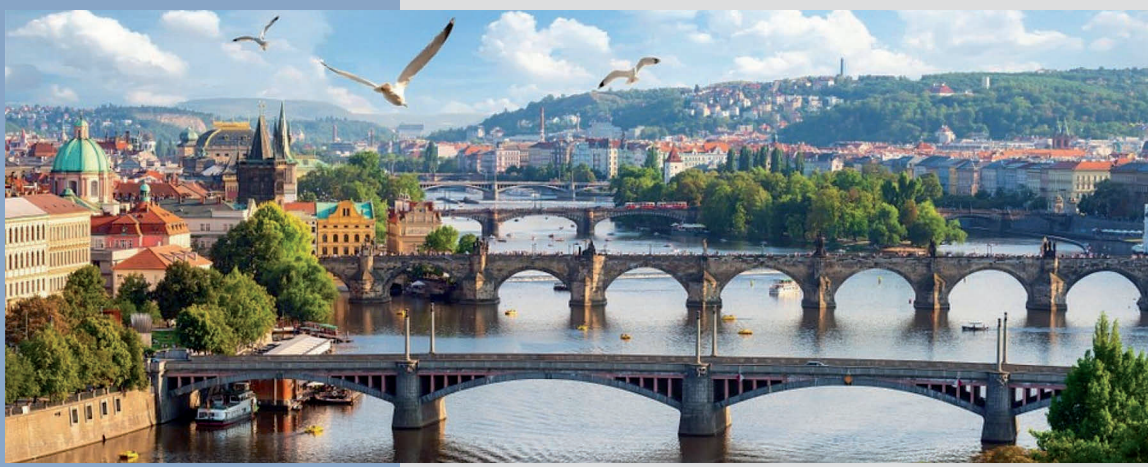
COMMON EUROPEAN ASYLUM SYSTEM IN A CHANGING WORLD

(INTRODUCTION)

Textbook for Prague Summer School on Migration and Asylum Law

2020



4eu+

CHARLES UNIVERSITY

Common European Asylum System in a Changing World

(Introduction)

Textbook for the Prague Summer School on Migration and Asylum Law

(within the initiative EU4+ project organized
by Charles University Faculty of Law,
in cooperation with the University of Warsaw
and University of Copenhagen)

https://4eu.prf.cuni.cz/

2020

Drafting team of experts

The drafting team consisted of **Lenka Pítrová**, ed. European Law Department and Administrative Law Department, Faculty of Law, Charles University, Prague (chapter 1, 5, 7.2, 7.3) **Jana Plaňavová-Latanowicz**, Centre for Europe, Warsaw University (chapter 2), **Nataša Chmelíčková** is the Head of Unit for Asylum Legislation in the Department for Asylum and Migration Policy, Ministry of the Interior of the Czech Republic (chapter 3, 7.1, 7.2), **Magdaléna Svobodová**, European Law Department, Charles University Prague and Metropolitan University Prague (chapter 4), **Harald Christian Scheu**, European Law Department, Faculty of Law, Charles University, Prague (chapter 7.4), **Daniel Burda**, Administrative Law Department, Faculty of Law, Charles University, Prague (chapter 6).

Acknowledgements

Comments on the draft were received from **prof. JUDr. PhDr. Michal Tomášek, DrSc.**

All these comments were taken into consideration by the editorial team in finalizing the text for publication and we are grateful for all the comments.

ISBN: 978-80-7630-003-3

Authors:

Assoc. Prof. JUDr. Lenka Pítrová, CSc., Department of European Law and Department of Administrative Law, Faculty of Law, Charles University, Prague, member of the Legislative Council of the Czech Government

Jana Plaňavová – Latanowicz has been lecturing in European law at the Centre for Europe, Warsaw University since 1997. From 1997 until 2003 she was a partner at Schaffer & Partner Law Firm, Prague. She became a member of the Czech Bar in 1994. She graduated summa cum laude from the Faculty of Law Charles University, Prague, where she also received her PhD in public international law and worked in the early 90s. She is an author and co-author of numerous books and articles and has engaged in speaking and training activities for lawyers, government officials and business groups alike. Her field of specialisation is: human rights, EU law, comparative contract law, and international commercial arbitration. She has acted as sole arbitrator or as chairman of tribunals of three arbitrators on numerous occasions. These include ICC arbitrations and arbitration under UNCITRAL Arbitration Rules. Having spent over two decades in Poland, she works in Polish as well as in English and her native Czech. She is fluent in Slovak, French, and Russian as well.

Nataša Chmelíčková is the Head of Unit for Asylum Legislation in the Department for Asylum and Migration Policy, Ministry of the Interior of the Czech Republic. She has extensive experience with the negotiations on EU asylum acquis and its national implementation, she has also chaired the Asylum Working Party during the Czech Presidency of the Council of the EU.

JUDr. Magdaléna Svobodová, PhD., graduated from Charles University, Faculty of Law in 1999, and completed her Ph.D. at the same faculty in 2006. She has been a member of the Czech Bar Association since 2012. She teaches EU law and public international law at Charles University and Metropolitan University Prague.

doc. Mag. phil. Dr. iur. Harald Christian Scheu, Ph.D., educated at the University of Salzburg (Dr. iur., 1995, Mag. phil., 1996) and the University of Prague (Ph.D., 1997, Doc., 2006). He has received numerous fellowships (Max-Planck-Institut für ausländisches öff entliches Recht und Völkerrecht in Heidelberg, University of Bern, European University Institute in Florence, University of Zürich, University of Vienna) He is a member of the Council of the Government of the Czech Republic for Human Rights (since 2013) and a member of the Czech Government's Legislative Council (since 2014). From 1997 to 2006 he lectured at the Department of International Law and since 2006 at the Department of European Law of the Law Faculty of Charles University in Prague. From 2005 to 2006 he served as a diplomat at the Austrian Embassy in Prague. He teaches and conducts research in the fields of International and European Law and International Human Rights Law. Since 2015 he is a member of the Management Board of the European Union Agency for Fundamental Rights.

Daniel Burda, student of Ph.D. programme on the Department of Administrative Law and Administrative Science, Faculty of Law, Charles University. At the same time, he works as an assistant to a judge at the administrative section of the Municipal Court in Prague. In the past, he has dealt e.g. with the development of constitutional justice in France. In his diploma thesis he focused on the possible reform of the jurisdiction of courts in deciding on compensation for damages caused by public authorities.

PREFACE

Today, in 2020, it seems that the peak of the migration crisis in Europe is over, but what are the lessons learnt and what should be measures supported by the Member States in future to avoid failure of EU migration management? The European Commission recognizes that migration and border security are common challenges that are best addressed jointly by EU Member States and it has proposed a number of measures to reform migration management and border protection across the EU. Among other measures, migration crisis highlighted the need to reform EU asylum rules.

The Common European asylum system (CEAS) sets minimum standards for the treatment of all asylum seekers and applications across the EU. Migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the ESC and by other international obligations entered into by European states. Under the current rules, asylum seekers are not treated uniformly across the EU and the share of positive asylum decisions also varies greatly. As a result of this asylum seekers travel around Europe and apply for asylum in the countries where they believe they will have a higher chance of receiving international protection. It is clear, that the system needs modernization.

The European Parliament and the Council are examining seven legislative proposals made by the European Commission to improve EU asylum rules which aim to:

- make the system more efficient and more resistant to migratory pressure
- eliminate pull factors as well as secondary movements
- fight abuse and better support the most affected Member States

But – is there a common consensus how to modernize these rules? On the contrary, the issue of European solidarity continues to divide the bloc at a time experts are warning of a repeat of the migrant crisis due to the conflict in Syria and instability in Africa. Lack of consensus on how to interpret solidarity, as enshrined in Article 80 TFEU, was already apparent during the 2015 emergency relocation exercise. Despite most Member States' willingness to relocate asylum-seekers, some, Czech Republic, Hungary and Poland, objected to the scheme. They challenged the Council's decision adopting the scheme before the Court of Justice of the EU, which rejected their case in a judgment of September 2017 (C-643/15 and C-647/15). Other disagreements regarding the CEAS were reflected in the 2018 'disembarkation crises', when Italy and Malta repeatedly prevented NGO and other vessels that were conducting search and rescue activities in the Mediterranean from disembarking the people they had rescued at sea in their ports.

It seems quite clear, that the consensus over European asylum rules cannot be reached merely by a political decision at the EU level. It must be supported by EU citizens of all Member States and that is why the bottom up approach is crucial. Legitimate decisions should be based on common understanding how the European asylum system works or should work in European and international context. One of the path how to support this understanding is to promote lectures of EU migration and asylum law especially at the law and social science faculties throughout Europe in a manner that would enable to share national experience, to debate different positions and solutions. Cooperation of European universities – within the 4EU Initiative – to which the project on Common European

Asylum System and this textbook forms a part – creates a unique opportunity to establish a platform for such debate.

Prof. JUDr. PhDr. Michal Tomášek, DrSc.

Vice-Dean for Research and Publication Activities
Head of Department of European Law
Charles University, Faculty of Law

CONTENTS

EDITOR'S INTRODUCTION

It is expected that this textbook will serve as a supplemental text to undergraduate courses in European asylum law, designed especially for the courses lectured at the Prague Summer School for Immigration and Asylum law. This book should also provide a useful guidance for those students, who are interested in legal framework of international and European protection of refugees and its practical consequences. The textbook can be also accessed as a digital book or e-book intended to serve as the text for distance courses.

The aim of the Prague Summer School for Immigration and Asylum law is to critically reflect upon legal aspects of the so-called "refugee crisis" in Europe and the measures adopted to respond at the EU, international, and national levels in the last three years. As the primary, but not exclusive, focus being the Common European Asylum System, this textbook should help the participants (students and PhD. students) to understand changes and developments of CEAS as a future challenge for the European Union in the migration agenda.

The textbook is primarily intended for use by students of law and social science. The textbook is designed as a training manual to support lectures on European asylum law and to provide an introduction to the Common European Asylum system (CEAS). It should assist law and social sciences students to understand the legal framework of CEAS better. It provides:

- an overview of international instruments of refugee law;
- an overview of the legal basis of the CEAS, including its establishment;
- an overview of the CEAS legislative instruments;
- an introduction to modernization of CEAS as proposed by EU Commission;
- and an introduction to interpretation of the legislative provisions of the CEAS,
- including the examples of important CJEU interpretative rulings

The textbook is supported by a compilation of jurisprudence and appendices having a specifc bearing on the CEAS. They list not only relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope but also essential case law of the CJEU, the ECtHR and the courts and tribunals of EU Member States.

To ensure that the relevant legislation and case law is easily and quickly accessible to readers, QR codes and hyperlinks have been utilized.

Lenka Pítrová
editor

1. PILLARS OF HUMAN RIGHTS PROTECTION IN EU ASYLUM LAW

1.1 International instruments

> Encyclopedia Britanica online:
>
> Asylum, in international law, the protection granted by a state to a foreign citizen against his own state. The person for whom asylum is established has no legal right to demand it, and the sheltering state has no obligation to grant it. …
>
> https://www.britannica.com/search?query=asylum+

States have been granting protection to individuals and groups fleeing from persecution for centuries; however, modern refugee law is mostly a phenomenon of the second half of the twentieth century. Nevertheless, like international human rights law, modern refugee law has its origins in the atmosphere of the aftermath of World War II as well as the refugee crises of the interwar years that preceded it. In response to the horrors of war and with the effort to prevent them many international humanitarian treaties were concluded, most of these modern human law instruments of universal or regional character reflect the concept of international protection of refugees. Fundamentally, it is the Universal Declaration of Human Rights.

> *Article 14 UDHR*
>
> 1. *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
> 2. *This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

Article 14(1) of the **Universal Declaration of Human Rights** (UDHR), which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions." It is one of the outstanding achievements of the twentieth century in the humanitarian field that the refugee problem is perceived as a matter of concern to the international community which must be addressed in the context of international cooperation and burden-sharing. We can mention at least some of those international treaties:

Universal and regional legal instruments relating to refugees:

- 1951 Convention relating to the Status of Refugees
- 1967 Optional Protocol relating to the Status of Refugees
- American Declaration on the Rights and Duties of Man (Article 27)
- American Convention on Human Rights (Article 22)
- Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Cartagena Declaration)

- African [Banjul] Charter on Human and Peoples' Rights (Article 12)
- OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa
- Arab Charter on Human Rights (Article 28)
- Cairo Declaration on Human Rights in Islam (Article 12)
- European Convention on Human Rights (arts. 2, 3, and 5)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3)
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
- Convention on the Rights of the Child (Article 22)
- It is necessary to mention the UN Compact on Refugees, adopted in 2018 by the United Nations General Assembly, which builds on existing international law and standards, including the 1951 Refugee Convention and human rights treaties, and seeks to better define cooperation in order to share responsibilities. This Compact has not been ratified by many EU Member States.

In the European context it is the **Common European Asylum System**, which is the most complex regional system of refugee law regulation (see below).

1.2 United Nations Convention relating to the Status of Refugees

At the universal level, the most comprehensive legally binding international instrument, defining the standards for the treatment of refugees is the United Nations Convention relating to the Status of Refugees. Grounded in Article 14 of the Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries, this United Nations Convention relating to the Status of Refugees (hereinafter 1951 Convention) adopted in 1951, became the **cornerstone of international refugee protection** together with its 1967 Optional Protocol relating to the status of Refugees (1967 Optional Protocol). The 1951 Convention establishes the definition of a refugee (Article 1) as well as the principle of non-refoulement (Article 33) and the rights afforded to those granted refugee status. The 1957 Convention provides an international legal framework, currently applying to 148 states parties, who are bound to cooperate with the UN Refugee Agency (UNHCR).

✓ **Refugee definition**

Article 1(A)(2) of the 1951 Convention:

> An individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.[1]

[1] Internally displaced persons (IDPs) are not considered refugees but UNHCR provides protection to IDPs and stateless individuals in addition to 1951 Convention refugees, see also African Union Convention African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

✓ **Exclusion and Cessation Clauses**

Article 1(D) excludes individuals already receiving protection or assistance from another UN organ or agency[2]

Article 1(F) excludes individuals with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Individuals who voluntarily avail themselves of the protection of their country of nationality or habitual residence or individuals who have received protection in a third country are also not considered refugees.

✓ **Refugee Rights**

Refugee law and international human rights law are closely related even if governments are not always able and willing to respect them in practice. In addition, refugee law also interferes with international humanitarian law in cases where the fear of persecution or threat to life or safety arises in the context of an armed conflict. The list of the rights listed below cannot be therefore exhaustive and the rights of refugees must be interpreted in its complexity.

o **Non-refoulement**

The obligation of States not to refoul, or return, a refugee to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Article 33(1) of the 1951 Convention[3]

There are two important exceptions (Article 33(2)):

- where there are "reasonable grounds" for regarding the refugee as a danger to the national security of the host country
- where the refugee, having been convicted of a particularly serious crime, constitutes a danger to the host community

o ***Freedom of movement***

o ***Right to liberty and security of the person***

o ***Right to family life***

o ***Other rights***

---

[2] This exclusion applied to Koreans receiving aid from the United Nations Korean Reconstruction Agency (UNKRA) and Palestinians receiving aid from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and continues to apply to the latter.

[3] For the application of the non-refoulment principle within the framework of EU asylum acquis see *Case of M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011, Judgment of 21 January 2011.

The 1951 Convention also protects other rights of refugees, such as the rights to education, access to justice, employment, and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties – Article 16 (refugees are to be granted equal access to the courts), Article 17 (refugees are to be afforded the same access to wage-earning employment as foreign nationals), Article 13 (refugees are to be afforded the same rights to moveable and immoveable property as foreign nationals).

Claiming asylum

In general, the adjudication of asylum claims is reserved for individual States based on the principle of procedural autonomy. Nevertheless, some States, namely Member States of the European Union, have made an effort to adopt a uniform asylum system (CEAS – see below).[4]

1.3 Council of Europe

The Council of Europe was established in 1949 as a regional integration organization with the aim to bring together the states of Europe to promote the rule of law, democracy, human rights, and social development. For this purpose, it adopted the European Convention on Human Rights (ECHR) in 1950. The European Court for Human Rights (ECtHR) was set up under Article 19 of the ECHR to ensure that the states observed their obligations under the Convention.

Regarding the refugee law the ECHR contains few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents (for example, Articles 2, 3, and 4 of Protocol 4 to the ECHR and Article 1 of Protocol 7). Nevertheless, in practice, migration and asylum issues have generated a complex body of ECHR case law. These cases are mostly related to articles 3, 5, 8 and 13 of the ECHR. (See selected cases in Chapter…)

Article 1 of the ECHR requires states to secure the ECHR rights to **"everyone within their jurisdiction"**. A State's jurisdiction is primarily territorial (with some exceptions), this means that the human rights enshrined in this Convention must be respected by states and their authorities also vis-a-vis foreigners unless they are limited to nationals or lawful residents.[5]

> Article 3 of the ECHR stipulates:
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment …

Article 3 of the ECHR is relatively general and it does not deal directly with asylum or refugees. Nevertheless, it is the key provision which is used to interpret the scope and limits of international refugee protection. The ECHR is not a special international instrument concerned with the protection of refugees as such nor is Article 3 thereof, but this article

[4] In the case of States who host large number of refugees but who are not a party to the 1951 Convention and 1967 Optional Protocol or who do not have laws to address asylum claims, refugee status determinations are carried out by field offices of the United Nations High Commissioner for Refugees (UNHCR). (Some countries in the Middle East and Asia)

[5] See The Guide on Article 1 of the Convention – Obligation to respect human rights – Concepts of "jurisdiction" and imputability, Council of Europe/European Court of Human Rights, 2019

provides an effective means of protection against all forms of return to places where there is a risk that an individual would be *"subjected to torture, or to inhuman or degrading treatment or punishment".*

In the light of interpretation of the ECHR Article 3 can be invoked in cases the refugee status has been rejected or revoked. It can be used for those, who do not fulfil conditions for the refugee status but who are in need of international protection. It can be used in situations of *refoulement*, any type of return, expulsion, deportation or extradition.

It is clear from the comparison below that the scope of application of Article 3 of the ECHR and Article 33 of the 1951 Convention is different:

Article 33 of the 1951 Convention prohibits:
refoulement to the frontiers of territories where a refugee's "life or freedom would be threatened" on account of his/her race, religion, nationality, membership of a particular social group or political opinion.
article 3 of the ECHR prohibits:
torture, inhuman or degrading treatment or punishment of anyone, irrespective of their immigration status.

Article 5 establishes the right to liberty and security of person and the conditions of its limitation. The ECHR's interpretation of this right in asylum cases often concerns any restriction of liberty and movement, detention for the purpose of asylum proceeding or removal, transit zones and airport regimes applicable within asylum procedures.

Article 8 deals with the right to respect for private and family life and is often interpreted by ECHR in asylum cases not only in the context of the right to family reunification. As the decisions in asylum procedure often have an important impact on the family life interpretation of this right and its hierarchy is subject of ECHR jurisdiction including, notably, the best interest of the child.

Article 13 of the ECHR establishes the right to an effective remedy, which is also important in asylum proceedings. This right is reflected at the union level in Article 47 of the EU Charter and in the constitutional traditions of the Member States.

There are, of course, other provisions of the ECHR which can be invoked in asylum cases.

To conclude, we should also mention the European Social Charter, adopted in 1961 and revised in 1996, which complemented the ECHR in the area of social rights (locus standi for organisations etc.).

1.4 EU Asylum Acquis

(EU primary law – TFEU, TEU, EU Charter)

The Common European Asylum System (CEAS) represents one of the most complex systems of regional refugee law. It has been developed since the 1990s based on a legal framework designed to create a more uniform system of asylum law in the European Union. CEAS is based on the following key principles:

- clear determination of the state responsible for the examination of an asylum application,
- common standards for a fair and efficient asylum procedure,
- common minimum conditions of reception of asylum seekers, and
- the harmonization of rules on the recognition and content of the refugee status.

The legal framework of CEAS[6]

The European Union has been working on the CEAS and its improvement since 1999. At the moment the CEAS is based on the primary law provisions (TFEU and TEU), human rights enshrined in the EU Charter of Fundamental Rights, relevant international treaties, and EU secondary legislation which contains namely the following directives and regulations:

- The revised Dublin Regulation
- The revised EURODAC Regulation
- The revised Qualification Directive
- The revised Asylum Procedures Directive
- The revised Reception Conditions Directive

From the human rights perspective, it is important to stress that the CEAS legal framework is interpreted by the Court of Justice of the European Union (CJEU) and by national courts not only in the light of EU *acquis* but also in the light of contemporary humanitarian law.

Treaty on Functioning of the European Union (TFEU)

The Common European Asylum System forms a part of the Area of Freedom, Security and Justice in the **TFEU.** In this chapter, particular attention is paid to respect for ***"fundamental rights and the different legal systems and traditions of the Member States."*** (See Chapter I, General Provisions, Article 67 TFEU.) According to the division of competencies between the EU and the Member states (Article 4 of the TEU) the Area of Freedom, Security and Justice is defined as the shared competence.

Article 67(2) of the TFEU is the legal bases for the EU competence to *"ensure the absence of internal border controls for persons"* and *"frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals."* As this is the area of shared competence, the EU Member States are able to legislate and exercise their competence where the EU does not exercise, or has decided not to exercise, its own competence. Moreover, these general provisions do not affect Member States responsibility for law and order and safeguarding internal security (Article 77 TFEU). This, of course, affect the scope of CJEU jurisdiction in the human rights area, as the EU Charter applies to the Member States only when implementing EU law (see below).

The specific legal basis for EU asylum law is now contained in Chapter 2 TFEU in Article 78, with Articles 77 and 79-80 providing the legal basis for related areas.

[6] Reference should be made at this place to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area.

Based on the Treaty provisions mentioned above, the respective secondary legislation has been constantly developed and the so-called EU asylum acquis has resulted in a "Common European Asylum System (CEAS)" (see in more details in Chapter 2 and 3).

Relevant International treaties

Neither the TFEU nor the EU Charter provides a definition of the terms "asylum" or "refugee", but both refer explicitly to the 1951 Geneva Convention and its Protocol. EU common rules on the asylum process are therefore based on the international refugee protection regime.[7] The key principles of this Convention mentioned above – such as the principle of non-refoulement – are reflected in EU asylum *acquis*.

What are the "*other relevant treaties"* referred to in Article 78(1) TFEU?

They are not defined in this provision but it may be inferred from recital (34) QD (recast) that they encompass both the ECHR and other international human rights treaties.[8] In the context of the EU asylum law the following treaties should be mentioned:

As the principal UN international human rights instruments are usually mentioned:

- Universal Declaration of Human Rights, 1948;
- International Covenant on Civil and Political Rights (ICCPR), 1966 (and its Optional protocols);
- International Covenant on Economic, Social and Cultural Rights, 1966;
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966;
- Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- Convention against Torture, 1984;
- Convention on the Rights of the Child, 1989;
- Convention on the Rights of Persons with Disabilities, 2006; and
- International Convention for the Protection of all Persons from Enforced Disappearance, 2006.

There are other international law instruments relevant for the interpretation of the CEAS such as those treaties explicitly or implicitly referred to in Articles 12 and 17 recast QD governing exclusion from refugee status and subsidiary protection. (Charter of the United Nations 1945; Convention on the Prevention and Punishment of the Crime of Genocide 1948; four Geneva Conventions 1949, and their Additional Protocols I and II 1977; International Convention on the Suppression and Punishment of the Crime of Apartheid 1973; and Rome Statute of the International Criminal Court, 1998.)

It is to be noted that other instruments, such as the Statutes of the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) are relevant for

---

[7] All EU Member States are signatories of the Geneva Convention, which they implement through national legislation.

[8] Recital 34 of the QD states the aim to introduce a common criteria in relation to the recognition of subsidiary protection status which *"should be drawn from international obligations under human rights instruments and practices existing in Member States",* see Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

the interpretation of the exclusion clauses. The resolutions of the United Nations Security Council and General Assembly, and resolutions combating terrorism are also relevant.

Like the ECHR and the Refugee Convention, the principles of these international treaties should be respected in the application of asylum acquis not only at the EU level but also to the degree to which they are relevant to the application of the national law of Member States.

Treaty on European Union (TEU)

Apart from the general provisions of Articles 2 and 3 which enshrine the principal values of the EU and its Member States, the provisions of Article 6 TEU are those of greatest relevance to the CEAS as they clarify the scope of application of the EU Charter and its relation to ECHR.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

EU Charter

The EU Charter was incorporated into EU primary law by the Lisbon Treaty. Thus, the Charter is the EU's 'Bill of Rights' and has made a significant contribution to improving the EU system of fundamental rights protection. Some of the provisions of the EU Charter, esp. Article 18 and Article 19, directly refer to the right of international protection.

Article 18 of the EU Charter explicitly guarantees the right to asylum with *"due respect for the rules of the Geneva Convention."* According to this provision the right to asylum is guaranteed in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. This wording reflects the principle of conferral and the fact that the EU competencies in the area of asylum, as defined in the Treaties, are shared with the Member States.

Article 19 of the EU Charter reflects the principle of *non-refoulement.* It includes a prohibition to return a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment (See more in Chapter 5 CJEU case law.)

Moreover, there are other EU Charter provisions relevant in the context of asylum and migration. The following articles of the EU Charter are mentioned not only in the recitals of secondary CEAS legislation, but also in CJEU case law in the context of asylum issues. (Some of the relevant cases referred to in Chapter 5 are mentioned in the table below to illustrate respective articles of the EU Charter in the context of common asylum policy.)

Article 1 human dignity (Saciri and others, **C-79/13**, Haqbin, **C-233/18**)
Article 4 prohibition of torture and inhuman or degrading treatment or punishment,
Article 6 right to liberty and security (MEHMET ARSLAN V POLICIE ČR **C-534/11**)
Article 7 respect for private and family life,
Article 11 freedom of expression and information,
Article 14 right to education,
Article 15 freedom to choose an occupation and right to engage in work,
Article 16 freedom to conduct business,
Article 18 right to asylum (CJEU asylum cases referring to 1951 Geneva Convention and non-refoulement principle see Chapter 5)
Article 19 protection in the event of removal, expulsion or extradition (CJEU asylum cases referring to 1951 Geneva Convention and non-refoulement principle see Chapter 5)
Article 24 non-discrimination,
Article 23 equality between woman and men,
Article 24 the rights of the child (A & S, **C-550/16**)
Article 34 social security and social assistance (AYUBI, **C-713/17)**
Article 35 health care,
Article 47 right to an effective remedy and a fair trial (TORUBAROV **C-556/17)**

The list of articles cited is not exhaustive. Other provisions of the charter which are also of particular relevance to the CEAS include:

Article 2: right to life;

Article 3(1): right to physical and mental integrity,

Article 5(3): prohibition of trafficking in human beings;

Article 10: freedom of thought, conscience and religion;

Article 41: right to good administration;

As far as the scope of application of the EU Charter is concerned, it must be stressed that not all national measures in the asylum area may be examined in the light of the EU

Charter, but only those that fall within the scope of EU law. As the president of the CJEU K. Lenaerts said: Metaphorically speaking, the Charter is the "shadow" of EU law.[9]

Relation between EU law and ECHR

As mentioned above, the primary EU law contains some interpretative provisions concerning relationship of EU law and ECHR. The most important is Article 6 of the TEU (cited above). Article 6(3) TEU confirms that fundamental rights recognized by the ECHR constitute general principles of EU law.

The text of the EU Charter contains two specific interpretative provisions regarding the interaction between the EU Charter and the ECHR which aim to ensure the consistency between the EU Charter and ECHR:

Article 52(3) of the EU Charter states, that: *"in so far as [the] Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and scope of those rights shall be the same as those laid down by the said Convention".*

Such interpretation shall not prevent a higher level of protection in the EU and ensure consistency of both human right systems without "*adversely affecting the autonomy of [EU] law and … that of the [CJEU]".*

As said in the explanations to **Article 53** which deals with the level of protection: *"This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law".*

Besides these articles - the explanations relating to the EU Charter explicitly list those corresponding fundamental rights. To mention just some of them related to asylum issues: the prohibition against inhuman or degrading treatment, the right to liberty in the context of extradition procedures, the right to freedom of conscience and religion, the right to respect for private and family life.

All these provisions aim to avoid divergences in the interpretation of human rights by the ECHR, CJEU, and national courts including those related to asylum law.

Apart from these provisions, the Lisbon treaty incorporated the EU obligation to accede to the ECHR (Article 6(2) TEU) with the same aim – to create the necessary consistence between CJEU and ECHR jurisdiction. Following the opinion 2/13 of the CJEU [10] which declared the draft agreement on European Union accession to the ECHR incompatible with the Treaty on European Union, the CJEU tried to clarify the scope of application of the EU Charter in relation to ECHR in its case law.

On the other side it is necessary to mention the **ECHR decisions** that aim to address the relationship between the obligation of the EU Member States to comply with EU law and their obligations as parties to the ERCHR. The two most important decisions for the present relationship between Community law and the ECHR are the cases of *Matthews* and *Bosphorus*.[11]

[9] K. Lenaerts and J.A. Gutiérrez–Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary,* Oxford, Hart Publishing, 2014

[10] Case C-2/13, Opinion 2/13 of the Court, 18 December 2014

[11] According to the ECtHR's decision in *Matthews*, Member States are responsible if EC primary law (in that case the EC Act on Direct Elections of 1976) violates the Convention, in *Bosphorus* the ECHR tried to

Even if the scope of application of the EU Charter and the jurisdiction of both European courts and national courts is not quite clear, we can try to give at least a general guide for differentiation:

- ECHR rules on matters which the ECtHR traditionally has qualified as being **within the 'jurisdiction' of its High Contracting Parties.**
- EU Charter – **is only binding on the Member States when they act in the scope of Union law**[12]
- **Only where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards** of protection of fundamental rights, on condition that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[13]

Due to primacy of EU law effect - where the ECHR sets out *minimum* standards, EU law *sets* the standard.

To conclude

The asylum law within Europe is regulated by a combination of national law, EU law including primary law, EU Charter and secondary legislation, the ECHR, the ESC and by other international instruments, namely the 1951 Geneva Convention, entered into by EU Member States. The asylum law interpretation falls, therefore under the jurisdiction of CJEU and Member States courts and ECHR in the area of human rights relevant in asylum cases. Despite differences at the national and regional levels, the goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

1.5 Selected case law

The key terms of the international refugee law are subject to courts interpretation. Listed below are some examples of such interpretative judgments of international and national courts in the European context

Family life

Concerning family reunification of children of foreign nationality with parents, or a parent, settled in a Contracting State in *I.A.A. and Others v. the United Kingdom* (dec.) (§§ 38-41). The criteria, including notably the best interests of the child, must be sufficiently reflected in the reasoning in the decisions of the domestic authorities *(El Ghatet v. Switzerland).*

solve the question of whether an EU Member State, in this case Ireland, could be held responsible under the Convention for the mere execution of an EU Regulation. See *Matthews v United Kingdom,* no 24833/94, ECHR 1999 and *Bosphorus v Ireland,* no 45036/98 ECHR 2005T

Membership in a Particular Social Group

- In the joined cases, *Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* [1999] (H.L.) (appeal taken from England) (U.K.), the U.K. House of Lords held that women in Pakistan constituted a social group, granting asylum to two women from Pakistan who had fled domestic violence.

Non-refoulement

- *Case of M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011, Judgment of 21 January 2011

  The ECtHR held that the Belgian government had violated an asylum seeker from Afghanistan's rights under Article 3 of the ECHR by returning him to Greece, the country he had initially transited through, to adjudicate his asylum claim because it was common knowledge that the Greek government lacked adequate asylum procedures, thus, placing the applicant at risk of being returned to Afghanistan where his life or freedom would be in danger.

- *Savran v. Denmark*, no. 57467/15 ECHR [GC] judgment, 1 October 2019

  The case deals with the question of **appropriate medical treatment in the receiving state.** A Turkish national moved to Denmark in 1991 when he was six years old. In 2007, the applicant was convicted for assault under highly aggravating circumstances and sentenced to seven years imprisonment and expulsion from Denmark. The Danish courts upheld the removal order, stating that the applicant needs regular psychiatric help. The ECHR disagreed, stated that there is "a high threshold for the application of Article 3 in cases involving the removal of migrants suffering from serious illness." The host state must verify on a case-by-case basis whether the care generally available in the receiving state is sufficient and appropriate to prevent a violation of Article 3. Factors to be taken into account in this regard are: the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care.

Exclusion Clauses

✓ ***Terrorism, war crimes and crimes against humanity***

- *A.B. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform*, [2011] IEHC 198 [2008] 667 Ir. Jur. Rep. (5 May 2011) (H.Ct.) (Ir.): The Irish High Court granted leave to apply for judicial review where the Refugees Appeals Tribunal had failed to conduct an adequate assessment of whether a former Taliban commander had personally participated in war crimes and crimes against humanity. The Court adopted the standard articulated in *Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v. B und D* [2010] ECR I-000, whereby there is a permissive presumption that any person who occupied a high position within a terrorist organization participated in the activities articulated in Article 1F of the 1951 Convention but authorities must, nonetheless conduct an assessment to determine the role the individual personally played in carrying out such acts.

✓ **Particularly serious crime**

- *Conseil d'etat [CE] [Council of State] 7 April 2010, Rec. Lebon 2010, IX-X, 319840 (Fr.)*: The Council of State granted asylum to an Iraqi national who had participated in an honour killing while still a minor, holding that the Commission des Recours des Réfugiés should have considered whether family pressure lowered his free will and whether his young age may have made him especially vulnerable to such pressure.

EXERCISE:

1. Compare Article 3 of ECHR and Article 33 of Geneva Convention and Article 21 of QD (the qualification directive)
2. Explain exemptions from non-refoulement principle Find the reference to refugee protection in the EU Charter
3. Find the reference to human rights in recitals of the qualification directive

Further reading and sources

S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary,* Oxford, Hart Publishing, 2014

Guide on the Case Law of the European Convention of Human Rights, European Court of Human Rights, Immigration, 13 August 2019

Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights, 2015 Council of Europe, 2015

UNHCR Handbook for the Protection of Internally Displaced Persons

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees

UNHCR, Asylum in the European Union: A Study of the Implementation of the Qualification Directive

UNHCR RefWorld, database for searching asylum law and cases from a variety of countries

The hyperlinks to the ECHR cases cited in the electronic version of the textbook are directed to the HUDOC database (http://hudoc.echr.coe.int) which provides access to the case law of the ECHR

2. LEGAL FRAMEWORK FOR EU IMMIGRATION AND ASYLUM POLICY (KEY POINTS)

2.1 EU Immigration Law

- An overview on visas and external border controls

The European Union's migration and asylum policy has developed in close connection by the creation of the Schengen Agreement of 1985. The abolition of border controls within it has, on the one hand, limited the competences of the Member States, but on the other it has created the need to create a single asylum control regime. Therefore, the **Schengen Implementation Agreement** of 1990 also included provisions on the examination of asylum applications by Member State authorities.

Along with the creation of the Schengen area, the **Dublin Convention** was concluded, to which the EU Member States that did not participate in the Schengen agreements were also party. The agreement merely defined the rules for determining the jurisdiction of Member State authorities for the examination of asylum applications. This was to avoid speculative choice of jurisdiction, which, prior to the convention, had the greatest burden on the Member States with the most liberal conditions for receiving asylum applications (forum shopping). The Dublin Convention entered into force after a lengthy ratification process in 1997. However, its impact on Member States' acceptance practices was modest.

On the level of primary EU law, the cooperation on immigration policy was formally introduced in the **Maastricht Treaty** which established Justice and Home Affairs as one of the EU's 'three pillars'. The Justice and Home Affairs pillar was organised on an intergovernmental basis with little involvement of the European Commission and the European Parliament.

Another milestone in the development of transnational immigration and asylum policies was the adoption of the **Amsterdam Treaty**. A new Title IIIa on visa, asylum and immigration policies has been added to the Treaty establishing the European Community. These new Treaty provisions set the legal basis for the adoption of secondary legislation in the field of immigration and asylum procedures.

The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution. Following the Tampere summit, a number of harmonization rules were adopted in order to create a minimum standard of regulation (the so-called first phase legal instrument). Only later, the **Treaty of Lisbon** was signed in 2007, which elaborated upon foundation for the European Union's common asylum policy.

Along with the development of the treaty foundations for immigration and asylum policies, institutions have been established to facilitate the implementation of these policies. The Frontex agency was established in 2004 to ensure the protection of the external borders of the Schengen States. It is based in Warsaw. The **European Asylum Support Office** (EASO), located in the Maltese capital of Valetta, has been set up to coordinate the asylum

policy of EU Member States. In addition, this European institution provides training for Member State authorities dealing with asylum applications. EASO started to work in 2010.

- The legal status of third-country nationals

From the point of view of the application of the rules on the right of movement and residence in the territory of the European Union, **citizens of non-member states** can be divided into the following groups:

a) Third-country nationals who are members of the family of a citizen of the European Union and whose **right of residence derives directly from EU law**.
b) Persons with rights derived from international agreements. These are in particular non-EU nationals who are members of the family of a national of a country belonging to the European Economic Area (**Iceland, Lichtenstein, and Norway**).[1] The European Union concluded a special agreement with Switzerland, which does not belong to the EEA, in 1999, that guarantees the Swiss citizens the right of residence and movement within the Union.
c) Short and long-term immigrants – for the purpose of work/study OR family reunification. This group includes: family members of third-country nationals, long-term residents in the EU, Blue Card holders and their family members, posted workers, researchers, students, seasonal workers, intra-corporate transferees.
d) Persons in need of protection e.g. asylum seekers, beneficiaries of subsidiary protection, beneficiaries of temporary protection, refugees, victims of human trafficking.
e) Migrants in an irregular situation: third-country nationals staying illegally.

- Irregular immigrants and regularisation of their status

There is no universally accepted definition of irregular migration. In accordance with the definition by the International Organization for Migration, it is defined as *"movement that takes place outside the regulatory norms of the sending, transit and receiving country"*. Often, the term "irregular migrants" is restricted to cases of smuggling migrants or human trafficking.

In the past, a number of EU Member States have organized regularization programs aimed at legalizing the residence of third-country nationals who meet the conditions set by the state. However, this element of migration policy is often criticized. In particular, its critics point out that in regularization programs, the right of residence is acquired by persons who have violated immigration laws, and the legalization of their residence thus encourages illegal migration.

[1] Furthermore, the group of persons who derive their rights from international treaties also includes citizens of Turkey and members of their families. Their rights derive from a special protocol to the EEC-Turkey Association Agreement (the Ankara Agreement), which was concluded in 1970 and grants Turkish citizens the right to work and reside in the European Union. The European Union has also concluded a number of bilateral and multilateral conventions with third countries. However, the extent of their rights is far from reaching the level of rights granted to Turkish citizens.

- Countering smuggling and trafficking – policy developments

Victims of trafficking or particularly exploitative working conditions may be granted residence permits on the basis of the laws implementing Anti-Trafficking Directive (2000/81). EU Member States are obliged to sanction employers involved in the exploitative process in accordance with the Employers Sanctions Directive (2009/52). Both directives were adopted by EU institutions in the context of Convention on Action against Trafficking in Human Beings.

- Law enforcement: return and readmission policy

There are two basic instruments in the area of law enforcement. The first is the Schengen Information System (SIS), which is accessible by the authorities of the Schengen member states, and its second, improved version has been in place since 9 April 2013. A ban on entry recorded in the system by a Member State's authority can be challenged. It makes sure that a banned third-country national will not come back to its territory through the territory of another Member State of the Schengen area. The second instrument for the enforcement of migration law is the Return Directive (2008/115), which applies to third-country nationals illegally staying in the territory of the European Union or the European Union Member States of the Schengen area. This Directive allows restrictions on freedom as a precautionary measure in the forced expulsion process. For individuals subject to an entry ban on the basis of the Return Directive, the ban usually does not extend beyond five years and it is accompanied by an SIS alert. During this time, they will be refused entry by the whole Schengen area. The grounds for the entry ban are state-specific and for this reason a Schengen-wide ban would be disproportionate. However, the EU Member State which has issued an entry ban will have to remove it from the SIS before any other EU Member State can grant a visa or admit the person. Entry bans issued outside the scope of Return Directive do not formally bar other states from allowing access to the Schengen area. In practice other states take entry bans into account when deciding whether to issue a visa or allow admission.

The territorial aspect of European migration policy is worth special attention. As mentioned above, the territorial scope of the Schengen Agreements is not limited to EU countries and vice versa, not all EU countries apply Schengen acquis to the same extent. Furthermore, the system of derogations is quite diverse, and even EU Member States outside the Schengen area still implement (to some extent) EU legal acts related to asylum. Great Britain and Ireland remain outside the Schengen system. The two states formed the so-called Common Travel Area but both of them only apply part of the legal instruments in the field of asylum policy, including the Dublin III Regulation. By contrast, Denmark, which is also not part of the Schengen area, applies the Dublin II Regulation (but not Dublin III), but it does not apply any of the other instruments in the area of the common asylum policy. Similarly, Dublin II. was also extended to three non-EU countries belonging to the Schengen area.

Actors involved

The reference to the EU institutions is made in **Article 13(1) (TEU)**. This Article imposes a common objective on all institutions that they should aim to promote the Union values, advance its objectives, serve its interests, and ensure the consistency, effectiveness, and continuity of its policies and actions.

PROVISIONS ON THE INSTITUTIONS

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

– the European Parliament,
– the Council,
– the Court of Justice of the European Union,
– the European Central Bank, and
– the Court of Auditors.

As per **Article 13(2) (TEU)**, each institution shall act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions, and objectives set out in them. The institutions shall practice mutual sincere cooperation.

On the basis of Article 15 TEU and Article 68 TFEU, the **European Council** shall *define the strategic guidelines* for the legislative and operational planning within the area of freedom, security, and justice. The European Council plays a crucial role in setting the EU political agenda. While it has **no** power to adopt laws, its political guidelines give direction to the EU institutions preparing policy and laws.

Based on Article 17 (TEU), **the Euroepan Commission** shall *promote the general interest of the Union* and take appropriate initiatives to that end. The European Commission has the 'right of initiative'. This means that the Commission can propose new legislation on its own initiative. The Commission is also the "Guardian of the Treaties", it makes sure that Member States apply EU legislation properly.

Based on Article 16 (TEU), the **Council of the EU** (The Council) shares the competence to adopt EU laws with the European Parliament in the ordinary legislative procedure. The Council also coordinates economic policies and approves the EU budget. In addition, it signs international agreements and develops the foreign and defence policies of the EU. In Council meetings the *Member States represent their national interests*. Decisions are taken by a simple majority, qualified majority, or unanimity.

Based on Article 14 TEU**,** the **European Parliament** (EP) shares the competence to adopt EU laws with the Council of the EU through ordinary legislative procedure. The consent of the EP is also needed when new Member States are joining the EU. In addition, the EP supervises the budget of the EU and has influence over the Commission, for example, it approves the appointment of a new Commission and examines its reports. *The EP represents the interests of the citizens of the EU.*

***Do not confuse** the **European Council** with the other institution; the **Council of the European Union**, which is one of the EU decision makers. Also, do not confuse the European Council with the **Council of Europe**. The Council of Europe, based in Strasbourg, France, is a governmental organisation separate from the EU, which includes 47 European countries. It was set up to promote democracy and to protect human rights and the rule of law in Europe.*

2.2 EU Asylum Law

2.2.1 EU primary law

- Primary EU Law (Article 78 TFUE):

o Article 78(1) TFEU – compliance with international law

Article 78(1) TFEU constitutes legal foundation of EU Asylum Policy (including temporary and subsidiary protection). The EU policy in this field must be in compliance with international law and the Treaty provision expressly refers to the Geneva Convention of 1951 and its Protocol of 1967 relating to the status of refugees. It also requires compliance with "other relevant treaties". The aim of this provision is to ensure that there is no contradiction between the obligations that EU Member States derive from international treaties and the policies of the institutions of the European Union.

o Article 78(2) TFEU – scope of EU competences

This provision limits the scope of competences of the EU. Competences related to the operation of the common European asylum system are shared by the EU and Member States and, as a consequence, they are subject to proportionality and subsidiarity principles. The use of the word "common" and not "single" in the context of European asylum system leads to the conclusion that the overall aim was to create a scheme based on a medium harmonization level and not to create a unified system. However, the use of the word "measures" does not preclude the adoption of regulations, i.e. legislation of a unifying nature, where EU institutions find it appropriate. This is the case, for example, in the regulation laying down the criteria and procedure for determining the Member

State responsible for examining asylum applications (Dublin III. or II.). However, most regulations in the field of the common asylum policy take the form of directives.

Article 78(2) strictly enumerates issues that may be regulated by EU measures. It includes the following issues:

- a uniform status of asylum
- a uniform status of subsidiary protection
- a common system of temporary protection
- common procedures
- determining which member state is responsible for examining applications for asylum and subsidiary protection
- reception conditions
- co-operation with third states

The personal scope of the provisions adopted pursuant to that provision applies only to third-country nationals and stateless persons. It therefore does not concern asylum applications submitted by European citizens in an EU Member State. Protocol No 24 to the TFEU (known as Spanish Protocol) implies that Member States consider each other as a safe country of origin for all legal and practical purposes in relation to asylum matters.

The territorial scope of Article 78 is not limited to the territory of the EU Member States. Acts issued pursuant to it may also be applied outside the EU. Procedures for receiving and processing asylum applications may take place in non-member states. This problem is related to resettlement. In this context, a proposal for the establishment of EU asylum centres outside the EU has also emerged. In this context, member states express political and legal doubts, in particular, regarding the jurisdiction of member states in these centres.

o Article 78(3) TFEU – emergency situations

The third paragraph of Article 78 contains provisions enabling institutions to take rapid action in the event of a migration crisis. Measures adopted on the basis of this treaty provision are temporary and are intended to assist the Member States concerned. This provision was triggered for the first time in 2015 as a result of migration crisis. It aimed to relocate third-country migrants in clear need for international protection from Greece and Italy into other member states. Council decision on relocation of migrants was heavily politically opposed by some Member States as it constituted temporary derogation from Dublin Regulation. Some countries opposed its adoption and implementation. It led to several proceedings before the CJEU.

o The Charter of Fundamental Rights

Similarly to the 1951 Geneva Convention the Charter of Fundamental Rights contains right to asylum (Article 18) as well as principle of *non-refoulement* (Article 19) that provides protection in the event of removal, expulsion or extradition. Article 47 of the Charter provides the right to an effective remedy in case of violation of any provision of EU law including the Charter itself. Such effective remedy comprises right to judicial protection against a refusal of access to the territory or access to the procedures involved.

The Charter of Fundamental Rights constitutes the basic standard for the promotion of mutual trust between Member States, which constitutes a prerequisite for the application of some EU legal acts.

2.2.2 Secondary EU Law: Common European Asylum System (CEAS)

- 2013 Dublin III Regulation

The Dublin III Regulation (604/2013) aims to establish a uniform system of rules for determining the Member State responsible for processing an application for international protection. The Dublin III Regulation is directly applied, not only by the Member States of the European Union, including the United Kingdom, Ireland, and Denmark, but also by four non-member states, namely Iceland, Norway, Liechtenstein, and Switzerland. The Regulation regards applications for asylum as well as applications for subsidiary protection. It lays down criteria determining the Member State's obligation to examine an application for asylum or subsidiary protection.The criteria aim to establish a uniform system of rules that determines which Member State is responsible for examining an asylum application in order to prevent such phenomena as speculative asylum shopping and "refugees in orbit", i.e. a situation in which applicants for international protection are constantly being transferred from one state to another.

The Dublin III Regulation also contains two discretionary provisions which allow a Member State to derogate from the above criteria. The first, called "the sovereignty clause", provides that any member state may decide to consider an application for international protection lodged by a third-country national or a stateless person, even if it is not competent under the criteria laid down in that regulation. The second discretionary clause, the so-called "humanitarian clause", stipulates that the Member State conducting the procedure for determining the Member State concerned or the Member State concerned may at any time before the first decision on the merits require another Member State to take over the applicant for humanitarian reasons, in particular for family or cultural reasons, in order to reunite other family members, even if that Member State is not competent.

A number of provisions of the Dublin II Regulation (predecessor of Dublin III) and Dublin III Regulation have been the subject of CJEU judgments. The most important

are the decisions in joined cases C-411/10 and C-493/10 NS, ME and others, mentioned above in connection with the EU Charter of Fundamental Rights (See Chapter…)

- 2013 EURODAC Regulation (recast)

This Regulation (603/2013) facilitates the application of the Dublin III Regulation by creating a fingerprint database. It also has an irreplaceable role in the prevention, detection and investigation of terrorist acts. The EURODAC is accessible by Member States' authorities as well as Europol.

- 2011 Qualification Directive (recast)

The purpose of this Directive (2011/95) is to lay down the standards to be met by third-country nationals or stateless persons in order to benefit from international protection, uniform status for refugees or beneficiaries of subsidiary protection and the content of protection granted.

Unlike regulations that are directly applicable in Member States, the Directive sets out the objectives to be achieved while leaving the choice of forms and methods to the Member States. Member States are therefore obliged to adopt implementing legislation.

International protection can take one of two forms: the granting of refugee status and the associated asylum right or the granting of subsidiary protection.

The conditions for recognition of a person as a refugee have been formulated in a Directive in accordance with the Geneva Convention on the Status of Refugees.

In accordance with the Qualification Directive, 'beneficiary of subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but

for whom there are serious reasons to believe that if they return to the country of origin, or, in the case of a stateless person, to the country of their previous residence, they would be exposed to a real threat of serious harm, and that person cannot or does not wish to accept the protection of the country in question.

The Directive provides for facts and circumstances to be taken into account when examining an application for international protection. In accordance with the case law, the examination of the application takes place in two steps. In the first step, a Member State's authority shall gather credible evidence which the applicant submits in support of its claims. It may request the declaration of the person themselves, or possibly of the persons of the Flies, such as documents from the country of origin or other countries. In the second step, the Member State's authority completes the legal classification of the collected material to determine whether the applicant qualifies for refugee or subsidiary protection status.

The Qualification Directive sets out that the approximation of legislation on the recognition and content of refugee status and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States due to differences in legislation while ensuring the application of the principle of non-refoulement.

- 2013 Asylum Procedures Directive (recast)

The main objective of this Directive (2013/32) is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union. Not all provisions of the Asylum Procedures Directive are mandatory, some of them are optional and Member States are free to decide whether to follow them. The Directive shall apply in respect to applications for asylum or subsidiary protection lodged in the territory of a Member State, including transit zones at airports. It does not apply to applications for international protection lodged in diplomatic missions of EU Member States in third countries. As in the case of the Qualification Directive, Member States may provide for more favourable provisions only if they do not conflict with the provisions of the Directive.

The Directive sets up basic principles and guarantees providing for access to procedures, special treatment of applications made on behalf of dependants and minors as well as access to information, counselling, legal assistance and representation. A special role is assigned to the United Nations High Commissioner for Refugees (UNHCR).

The Directive grants the right to remain pending a final decision by the determining authority in the first instance procedure. It also provides for requirements for the examination of the application including the rights and obligations of applicants and provisions as to the personal interview as a central component of the process. Furthermore,

it sets up rules regarding medical examinations as well as applicants in need of special procedural guarantees and guarantees for unaccompanied minors.

- 2013 Reception Conditions Directive (recast)

The Reception Conditions Directive (2013/33) aims to ensure the equal treatment of applicants throughout the Union with a view to limit the secondary movements of applicants influenced by the diversity of conditions for their reception. It applies during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain in the territory of the Member States as applicants.

Within three days of the date on which the application for international protection is lodged, the Member State shall issue to the applicant in their name a document certifying their status as an applicant or the fact that they are authorized to reside in the territory of the Member State for the duration of their application. This document does not have to confirm the identity of the applicant. If the applicant is not free to move within all or a part of the territory of the Member State, the document shall also certify that fact.

The Directive establishes a series of rights for an applicant for international protection. The most important is the right of movement in the territory of the Member State where the application was made. In justified cases, the Member State may detain applicants. It may do so only if the purpose of detention cannot be achieved by any other, less lenient means. In particular, the applicant may be detained for the purpose of establishing or verifying their identity or nationality, in order to determine those facts on which their application for international protection is based and which would not be obtainable without detention of the applicant, in particular in the event of the applicant absconding. In addition, it is possible to detain an applicant if appropriate proceedings are under way to decide on the applicant's right of entry into the territory or if the applicant is being detained under a return procedure under the relevant Directive in order to prepare for recovery or removal.

- 2001 Temporary Protection Directive

Temporary Protection Directive (2001/55) on minimum standards for giving temporary protection is applicable in the event of a mass influx of displaced persons. It also provides for measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof. The measures introduced under this Directive are of an **exceptional nature.**

The Directive itself was adopted in the context of the mass displacement of persons following the conflict in the former Yugoslavia in the early 1990s. The activation of proceedings under this Directive provides immediate and temporary protection for persons from third countries who cannot return to their country of origin. In particular, the mechanism under this Directive also applies where there is a risk that the asylum system will not be able to cope with this influx without adversely affecting its own effective functioning and the interests of displaced persons and other persons seeking protection.

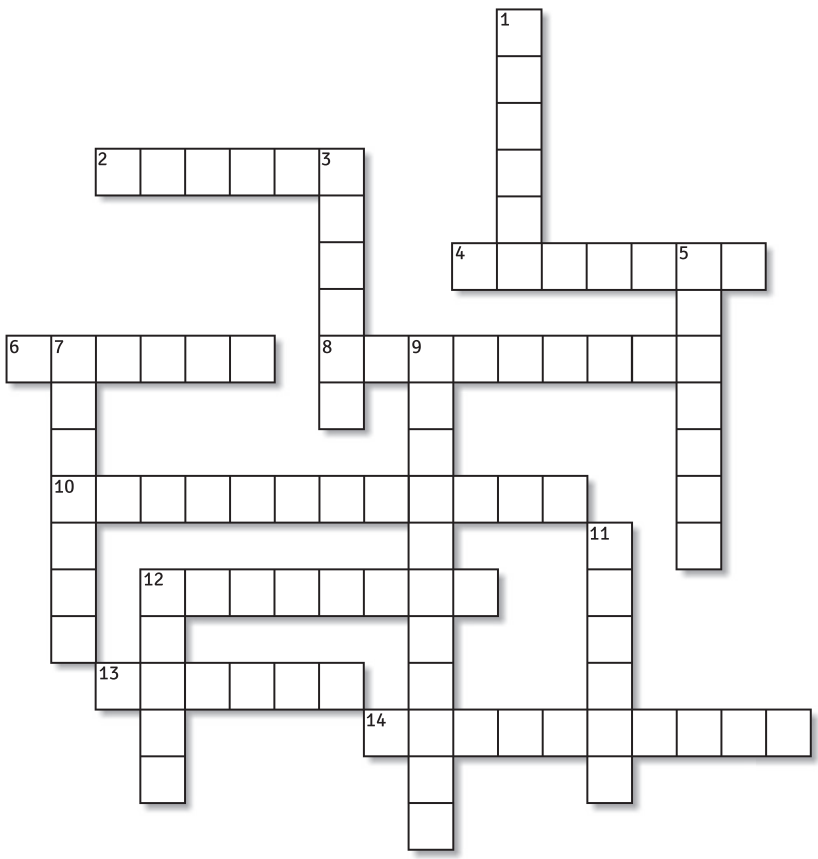
The implementation of temporary protection is a collective decision of the Council of Ministers of the EU and, therefore, Member States may not resort to it individually. The temporary protection regime established in the 2001 Directive has never been used.

EXERCISES:

Find abbreviations of three agencies/organizations that are relevant in the context of EU immigration and asylum policy.

F U S M U A P J G I
X T C B N V I M X O
G T Q W P L C C R F
Q I J Y S O X I L G
A A P L M I N P B B
J U N H C R H R K R
F R O N T E X H V L
W J K F O O L G C J
J I T B U K C U V N
J U R O E A S O B G

Complete the crossword puzzle below by entering the names of cities or countries associated with:



Vertical

1. UN Refugee Convention
3. Non-EU member state, member state of the European Economic Area, and the border-free zone; country that applied for EU membership
5. The city where the European Council met, laying the political foundation of the common European asylum and migration policy
7. Non-EU Member State, member of the European Economic Area, and the border-free zone, a country that has never applied for EU membership
9. Non-EU Member State, non-member of the European Economic Area, and member of the border-free zone
11. Association agreement that grants citizens of the associated country the right to reside and work in the EU
12. Protocol 24 on asylum for nationals of Member States of the European Union

Horizontal

2. EU act determining which member state is responsible for examining applications for asylum and subsidiary protection
4. The seat of the European Asylum Support Office
6. The treaty that made significant changes to the European Union's (EU) treaty structure and law-making processes including immigration and asylum law and widened European Union's competence in asylum and immigration policy
8. The treaty that granted EU institutions new powers to adopt legislation on asylum
10. Non-EU Member State, member of the European Economic Area, and the border-free zone, a country that has never applied for EU membership
12. The treaty that led most of the European countries towards the abolishment of their national borders, in order to build an area without borders
13. The seat of the European Border and Coast Guard Agency (Frontex)
14. The treaty that introduced cooperation on immigration policy in the European Union

Test question:

Which of the following terms has no relevance to international protection in the meaning of 2011 Qualification Directive:

1. asylum
2. diplomatic protection
3. subsidiary protection
4. all three above are relevant

Immigration and asylum anagrams:

abscond gin
Mira toing
antick griff
gluing msg
Cindee res
fee urge
lay sum

3. INSTRUMENTS OF CEAS (IN MORE DETAILS)

3.1 Introduction

As already explained above, the legal framework of the CEAS is based on EU law, which consists of **primary law** (the Treaties) and **secondary law** (the legal acts). The Treaties set objectives, values, rights, and rules on the functioning of the Union with which secondary law must comply. The Treaty of Lisbon, adopted on 13 December 2007 and entered into force on 1 December 2009, requires the EU's common policy on asylum to be in accordance with the 1951 Geneva Convention, the corner stone of the international protection regime, but also with other relevant international instruments. In addition, it is important to remember that EU legislation is implemented within the national legal order of Member States. In practice, the CEAS is composed of three layers; international law, EU law, and national law.

The legal acts of the Union are listed in Article 288 TFEU. They are **regulations, directives, decisions**, **recommendations, and opinions**. The latter two instruments have no binding force, the relevant legal acts constituting the CEAS are the Regulations (Dublin III and EURODAC), the Directives (Reception conditions, Qualification, and Asylum procedures) and the Decisions (for example Council decision establishing a relocation mechanism within the EU).

To summarize what you shall know about their legal nature:

- **Regulations**

Regulations are binding in their entirety and shall be directly and uniformly applicable to all EU countries as soon as they enter into force, with (generally and usually) no need to be transposed into national law. They are binding in their entirety on generally all EU countries**.**

- **Directives**

Directives require EU countries to achieve a certain result. EU countries must adopt national measures to incorporate them into national law (transpose) in order to achieve the objectives set by the directive. National authorities must communicate these measures to the European Commission.

Transposition into national law must take place by the deadline set in the directive. When a country does not transpose a directive in time or properly, the Commission may initiate infringement proceedings.

- **Decisions**

Decisions are binding in their entirety and they apply to one or more EU countries, companies or individuals. They don't need to be transposed into national law.

The Treaty of Lisbon broadened the competences of the EU in asylum issues. According to Article 78 TFEU a common policy on asylum is developed through the **ordinary legislative procedure** (i.e together with the European Parliament). There is no mention of minimum standards anymore. The Article provides the legal basis for the CEAS comprising of:

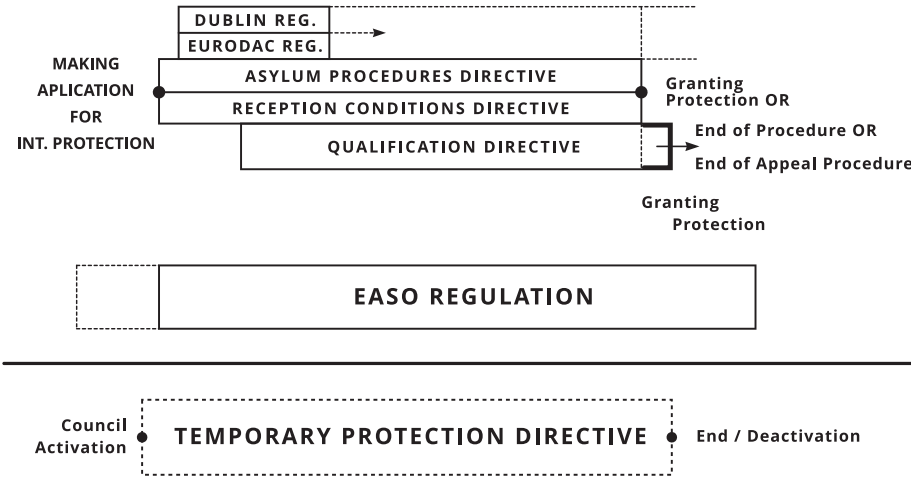
a) a uniform status of asylum, valid throughout the EU

b) a uniform status of subsidiary protection
c) a common system of temporary protections in the event of a massive inflow
d) common procedures for granting and withdrawing international protection
e) criteria and mechanisms for determining the Member State responsible for examining an application for international protection
f) standards concerning the conditions for the reception
g) partnership and cooperation with third countries in order to manage the inflows of applicants.

In this Chapter you will be introduced to the following legal instruments constituting the CEAS which reflects areas covered by Article 78(2):

- the Dublin Regulation,
- the EURODAC Regulation,
- the Asylum Procedures Directive,
- the Qualification Directive,
- the Reception Conditions Directive,
- the Temporary Protection Directive
- EASO Regulation

These building blocks comprehensively cover the asylum system **from the first moments of arrival untill the end of the procedure and in case of a positive decision, beyond** (integration) and attempt to create a common system for international protection applicable across the Member States. However, not all instruments are applicable at every moment of the asylum procedure. For more clarity see this chart:



The asylum system is not an isolated island of legislation, CEAS legislation has to be understood together with other legislative tools, especially those regarding entry into the territory of the EU, specific aspects of stay and return from the EU. For more information please check Chapter 8 which is dedicated to these accompanying tools.

❖ **Overview of CEAS instruments**

- **The Dublin Regulation** establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (i.e. which Member State shall decide on the merits, the application for international protection).
- **The Eurodac Regulation** creates a fingerprint biometric database and allows for access to more detailed information about the applicant especially for the purpose of the Dublin regulation.
- **The Qualification Directive** imposes common standards on the incorporation of the 1951 Geneva Convention refugee definition into EU law and on subsidiary protection definition and status (explains e.g. what is persecution and serious harm, who is excluded from protection, when the protection ends, which rights refugees have etc.).
- **The Asylum Procedures Directive** imposes procedural standards during the stages of the procedure from the asylum application to the final decision on international protection including court appeal procedures (brings standards e.g. for interview, decision, accelerated and border procedure or subsequent effects of the appeal).
- **The Reception Conditions Directive** brings standards of treatment during the asylum process in relation to basic socio-economic rights (e.g. accommodation, financial allowances, access to health service, access to schools, or to the labour market).
- ***The Temporary Protection Directive*** establishes minimum standards for giving temporary protection in the event of a mass influx of displaced persons. It is a sleeping instrument – it has to be activated by the decision of the Council of the EU on the basis of a proposal by the European Commission – it has never happened so far (it brings simple procedure and rights similar to those included in RCD or QD).

3.2 Dublin Regulation

Regulation (EU) 604/2013 (recast) *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*

Main aim:

- ✓ to ensure quick access of asylum applicants to an asylum procedure and the examination of an application in substance by a single, clearly determined, Member State
- ✓ to prevent two negative phenomenons:
  - o **asylum shopping:** situation where an applicant lodges more applications in various Member States and all of them examine it
  - o **refugees in orbit**: situation where none of the Member States feels responsible for the examination of the application

It replaced the Dublin II Regulation from 2003. The Dublin III Regulation brought especially enhanced procedural standards - such as the right to a personal interview, access to an effective remedy, free legal assistance, and representation in case of a review as well as regarding the length of detention. Moreover, it brought additional guarantees for unaccompanied minors, especially with regard to family reunification.

Dublin III Regulation covers these areas:

- Access to the asylum procedure in a single Member State (Article 3)

Member States shall examine any application for international protection by a third-country national or a stateless person who applies in the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a **single Member State**, which shall be the one which the criteria in the Dublin Regulation indicate is responsible.

- Hierarchy of criteria for deciding which Member State is responsible (Chapter III)

Chapter III of the Dublin Regulation lays down criteria for determining which Member State is responsible for an examination of the asylum application. The criteria for determining the Member State responsible **shall be applied in the order in which they are set out in this Chapter.**

a) Criteria of family

aa) Family members – beneficiaries of international protection

Where the applicant has a family member, who is already a **beneficiary of international protection** in a Member State, that Member State shall be responsible for examining the application for international protection. Persons concerned shall express their desire to be united in writing.

ab) Family members – applicants for international protection

If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a **first decision regarding the substance,** that Member State shall be responsible for examining the application for international protection. Persons concerned shall express their desire to be united in writing.

b) Criterion of residence permit or visa

If the applicant is in possession of a **valid residence document**, the Member State which issued the document shall be responsible for examining the application for international protection. The Regulation lays down rules for special situations such as possession of more visas or residence documents.

If the applicant is in possession of a **valid visa**, the Member State which issued the visa shall be responsible for examining the application for international protection.

In case of an expiration of residence documents this criterion remains valid for another two years, in case of visas for another six months – after these periods, criterion of lodging the application will apply.

c) Criterion of entry and/or stay

If an applicant has **irregularly crossed the border** into a Member State by land, sea, or air having come from a third country, the Member State of entry shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.

When a Member State cannot or can no longer be held responsible in accordance with the criterion of illegal entry and where it is established that the applicant — who has entered the territories of the Member States irregularly — **has been living for a continuous period of at least five months in a Member State** before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection.

d) Visa waived entry

If a third-country national or a stateless person enters into the territory of a Member State in which they do not need a visa, that Member State shall be responsible for examining their application for international protection.

This criterion is not actually applicable in practice because common visa policy exists within the EU – the EU has a common list of visa-waived countries.

e) Criterion "international airport"

If the application for international protection is made in the international transit area of an airport of a Member State, that Member State shall be responsible for examining the application.

f) Criterion "lodging application"

Where no Member State responsible can be designated on the basis of the criteria, the first Member State in which the application for international protection was lodged shall be responsible for examining it. This criterion is called the "remaining criterion".

✓ For unaccompanied minors these general rules apply:

– The Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, **provided that it is in the best interests of the minor**.
– In the absence of a family member, a sibling, or a relative the Member State responsible shall be that where the unaccompanied minor has lodged the application for international protection, **provided that it is in the best interests of the minor**.

Furthermore, the regulation also sets rules also for specific situation such as married minors or the situation where family members are present in more Member States.

The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation. In assessing the best interests of the child, Member States shall in particular, take due account of the following factors:

- ✓ family reunification possibilities,
- ✓ the minor's well-being and social development,
- ✓ safety and security considerations in particular if a minor may be subject to human trafficking,
- ✓ the views of the minor according to the age and maturity.

Member States shall ensure that a qualified representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have access to the applicant's file.

- Discretionary clauses enabling a Member State to take over the responsibility of examination of the application (Article 17)

Discretionary clauses are actually derogations from the hierarchy of criteria. Two situations may occur under these clauses:

1. **each Member State may decide to examine** an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria;
2. the Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, **may request any other Member State** to take charge of an applicant.

   The reasons of such request shall be: bringing together any family relations, humanitarian grounds based, in particular on family or cultural considerations.

✓ Notion of "systemic flaws"

Even though the Dublin system is based on the mutual trust among Member States, the case law of the ECHR and also CJEU broke this mutual trust rule (see Chapter on case law) in case of "systemic flaws". The Dublin III Regulation reflected specifically these special situations by actually forbidding transfers to those Member States where there are systemic flaws in their asylum systems.

Systemic flaws can exist both in the asylum procedure and in the reception conditions in that Member State. These flaws must be so harsh in nature that they run the risk of inhuman or degrading treatment.

It means that in case it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws, the determining Member State shall continue to examine the other hierarchy criteria in order to establish if another Member State can be designated as responsible. If no other responsible state is found, the determining Member State shall become the Member State responsible.

- Right to an effective remedy (appeal or review), including the right to apply for suspensive effect (Article 27)

The applicant shall have the right to an effective remedy

- ✓ in the form of an appeal or a review,
- ✓ in fact and in law, against a transfer decision,
- ✓ before a court or tribunal.
- ✓ reasonable period of time within which the applicant may exercise his or her right to an effective remedy shall be set,
- ✓ Member States shall also set rules for non/automatic suspensive effect of the transfer decisions,
- ✓ Member States shall ensure that the applicant has access to legal assistance and, where necessary, to linguistic assistance.

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation.

- Procedural aspects to determine which Member State is responsible

The procedure how to determine a Member State consists generally of these procedural steps:

- ✓ The Member State with which an application for international protection has been lodged may request another Member State to **take charge** of the applicant as quickly as possible and in any case within 3 months of the date of the application (in the case of EURODAC hit within 2 months). **Take back** requests must be sent to the respective Member State within 2 months from EURODAC hit (if the request is based on evidence other than EURODAC search, it may be sent within 3 months).
- ✓ The answer on the take charge request has to be sent within 2 months or in 1 month, where the urgency of the case is indicated by the requesting Member State. Take back request has to be answered within 14 days (Eurodac) and in 1 month (other evidence). Where no explicit answer is provided within the mentioned time –limits, there is an implicit acceptance including the obligation to provide the proper arrangements for arrival.
- ✓ The requesting Member State may ask the requested Member State for a re-examination in the case of a negative reply (within 3 weeks and there must be an answer within 2 weeks).
- ✓ The requesting Member State shall notify the person concerned of the decision to transfer them to the Member State responsible.
- ✓ The transfer to the responsible Member State shall be carried out within the period of 6 months (12 months where the person concerned is imprisoned, or 18 months in the case of absconding). The time limit for a transfer has to be counted from the acceptance or from the final transfer decision.

- Detention for the purpose of transfer respecting the conditions of Article 28

Member States shall not hold a person in detention for the sole reason that they are subject to the procedure established by this Regulation.

When there is a **significant risk of absconding**, Member States may detain the person concerned in order to secure transfer procedures

- ✓ on the basis of an individual assessment,
- ✓ only in so far as detention is proportional,
- ✓ other less coercive alternative measures cannot be applied effectively.

Detention shall be for as short of a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.

In regard to the **detention conditions and the guarantees** applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Reception Conditions Directive (2013/33/EU) shall apply.

- Introduction of a mechanism for early warning, preparedness, and crisis management, (Article 33)

Where, on the basis of, in particular, the information gathered by EASO **the Commission** establishes that the application of this Regulation may be jeopardised due to

- o either a substantiated risk of particular pressure being placed on a Member State's asylum system and/or
- o problems in the functioning of the asylum system of a Member State,

it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a **preventive action plan**.

The Member State concerned shall take all appropriate measures to deal with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates.

If the implementation of the preventive action plan has not remedied the deficiencies identified or where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan, the Commission, in cooperation with EASO as applicable, may request the Member State concerned to draw up a **crisis management action plan.**

EXERCISE 1:

The Dublin procedure was described in the text. The Dublin Regulation distinguishes between take back and take charge situations. Can you describe a take back and take charge situation? Which article of the Dublin Regulation is the most relevant one for this topic?

Hint: see Article 18

Answer:

The most visible differentiation between take back and take charge situations is in article 18. Article 18 letter a) concerns "take back situations" – those are situations where the foreigner already applied for international protection in the first Member State. Take back situations are covered in article 18 letters b) to d) and they concern situations where a person has applied for international protection in a second Member State but the responsible Member State can be determined on the basis of other criteria such as issuance of visa – and not on the basis of asylum application.

EXERCISE 2:

Crossword

1. The main aim of the Dublin Regulation is to determine the Member State ……
2. Other important aim is to prevent two negative phenomenons – asylum …… and
3. …… in orbit
4. A transfer to responsible Member States is forbidden when systemic …… exist in that Member State
5. …… clauses are derogations from the hierarchy of criteria
6. The first criterion is the criterion of ……
7. Detention for the purpose of transfer is possible in case there is a risk of ……
8. In case of minors attention shall be given to the principle of …… of the child.

3.3 Eurodac Regulation

Regulation (EU) 603/2013 (recast) *on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Regulation and to request comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice:*

Main aim:

- EURODAC makes it easier for EU States to determine responsibility for examining an asylum application by comparing fingerprints.
- When someone applies for asylum, no matter where they are in the EU, their fingerprints are transmitted to the EURODAC central system.
- Its primary objective is to serve the implementation of Regulation (EU) No. 604/2013 ('the Dublin Regulation') and together these two instruments make up what is commonly referred to as the 'Dublin system'.

It replaced Council Regulation (EC) No 2725/2000 of 11 December 2000.

Eurodac regulation covers these areas:

- The creation of fingerprint biometric database facilitating the application of the Dublin System and fingerprint comparison for law enforcement purposes

Eurodac consists of a Central System, which operates a computerised central database of fingerprint data, as well as of the electronic means of transmission between the Member States and the Central System.

Eurodac is at central level operated by the EU agency "eu-LISA" established by a Regulation ( ) . eu-LISA headquarters is in ( ). Currently eu-LISA is also managing other IT databases ( ) and ( ) .

? Check the internet, find the home page of eu-LISA agency and fill in the missing piece of information inside the brackets.

Solution (print bottom up)
1077/2011 (reinforced by 2018/1726), Tallinn (Estonia), Schengen IS (SIS II), VISA IS (VIS)

Why Eurodac?

1) It is necessary to **establish the identity of applicants for international protection** and of persons apprehended in connection with the unlawful crossing of the external borders of the Union. It is also desirable to allow each Member State to check whether a third-country national or stateless person

found illegally staying on its territory has applied for international protection in another Member State.

2) It is also essential in the fight against terrorism offences and other serious criminal offences for law enforcement authorities to have the fullest and most up-to-date information. The information contained in Eurodac may be necessary for the purposes of the prevention, detection, or investigation of terrorism offences. Therefore, the data in Eurodac is available, subject to the conditions set out in this Regulation, for comparison by the designated authorities of Member States and the European Police Office (Europol).

W*hich data are recorded in Eurodac?*

? Check the regulation and find the respective article enumerating which data are recorded in Eurodac.

Solution (print bottom up): Article 11
Collection, transmission and comparison of fingerprints (Articles 9-17)

- Collection, transmission and comparison of fingerprints (Articles 9-17)

Member States have to promptly **take and,** no later than 72 hours after lodging of the application for international protection, **transmit** the fingerprint data of every applicant for international protection and of every third-country national or stateless person who is apprehended in connection with an irregular crossing of an external border of a Member State, if they are at least **14 years of age**.

The existence of a match or matches by comparison between fingerprint data of a person recorded in the computerised central database and those transmitted by a Member State is called '**hit**'.

- Storage of data (article 16)

Period for the storage of fingerprint data is set for 10 years.

- Data protection (Chapter VII)

The Member State have to ensure that:

(a) fingerprints are taken lawfully;

(b) fingerprint data and other data are lawfully transmitted to the Central System;

(c) data are accurate and up-to-date when they are transmitted to the Central System;

(d) without prejudice to the responsibilities of the Agency, data in the Central System are lawfully recorded, stored, corrected, and erased;

(e) the results of fingerprint data comparisons are lawfully processed.

3.4 Qualification Directive

Directive 2011/95/EU (recast) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. The scope of the directive covers the grounds for granting international protection, and the end of protection or the refusal to grant international protection. Rights and content of the status granted are also covered by the directive.

Main aim:

- ✓ The Qualification Directive sets out criteria for applicants to qualify for refugee status or subsidiary protection.
- ✓ The Directive defines the rights afforded to beneficiaries of these statuses:
  - ➢ protection from *refoulement*,
  - ➢ residence permits and travel documents,
  - ➢ access to employment,
  - ➢ access to education, social welfare, healthcare,
  - ➢ access to accommodation,
  - ➢ access to integration facilities.
- ✓ Specific provisions for children and vulnerable persons are also contained in the Directive.
- ✓ The approximation of rules on the recognition and content of statuses should help to limit the secondary movement of applicants for international protection between Member States, where such movement is caused purely by differences in legal frameworks.

The Directive allows Member States to put in place or to keep more favourable standards than those set out in its provisions.

It replaced Qualification Directive 2004/83/EC from 2004. Some of the improvements brought by the 2011 Directive are notably the clarification of the concept of 'particular social group' with respect to gender-related forms of persecution (Article 10(1)(d)) as well as the adaptation of the concepts of 'actors of protection' to European case law (Article 7), and the explicit reference to the best interests of the child (Article 20 & Article 31).

To whom Qualification Directive does not apply:

Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for **reasons not due to a need for international protection** but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.

The notion of international protection

International protection is a tool of EU law – it has no direct basis in international law. According to the directive 'international protection' means **refugee status and subsidiary protection status.**

Qualification directive covers these areas:

- Incorporation of the 1951 Geneva Convention's refugee definition into EU law and definition of exclusion and cessation situations as well as definitions of associated terms

---

The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees. With regard to the Geneva Convention, the Qualification directive regulates:

o Who is a refugee (i.e. **"INclusion clause"**) – Article 2(d)

➢ A 'refugee' means a **third-country national** who, owing to a **well-founded fear** of being **PERSECUTED** for **reasons of race, religion, nationality, political opinion or membership of a particular social group**, **is outside the country of nationality** and **is unable or**, owing to such fear, is **unwilling** to avail themselves of the **protection of that country**, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, **and to whom Article 12** *(exclusion clause)* **does not apply.**

o Who is excluded from being a refugee (i.e. "**EXclusion clause**") – Article 12

! Check two situations of exclusion – either a person **does not need** to benefit from being a refugee OR a person **does not deserve** to be a refugee

➢ NO NEED:

A third-country national or a stateless person is excluded from being a refugee if:

a) they fall within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations (…)

b) they are recognised by the competent authorities of the country in which they have taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

➢ NOT DESERVING

A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

a) they have committed a crime against peace, a war crime, or a crime against humanity, (…)

b) they have committed a serious non-political crime outside the country of refuge prior to their admission as a refugee, (…)

c) they have been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

- Who is no longer a refugee (i.e. "**cessation clause**") – Article 11
  - A third-country national or a stateless person shall cease to be a refugee if they:

a) have voluntarily re-availed themselves of the protection of the country of nationality;

b) having lost their nationality, have voluntarily re-acquired it;

c) have acquired a new nationality, and enjoy the protection of the country of their new nationality; (…)

d) can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality; (…)

- Moreover, the directive **defines the terms** used by the Geneva Convention, for example:
  - Persecution

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights, which are sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

- Acts of persecution (…) can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (…)

- Reasons for persecution:

(a) **the concept of race** shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

(b) **the concept of religion** shall, in particular, include the holding of theistic, non-theistic, and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in a community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief; (…)

? Find the aforementioned definitions in the Directive and check their full text and details.

- Common definition of subsidiary protection (Article 2(f))

A person eligible for subsidiary protection' means a third-country national or a stateless person **who does not qualify as a refugee** BUT, in respect of whom substantial grounds have been shown for believing that the person concerned, **if returned to their country of origin**, or in the case of a stateless person, to their country of former habitual residence, **would face a real risk of suffering SERIOUS HARM** (…), **and to whom Article 17(1) and (2) does not apply**, and **is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country.**

- The main difference from the notion "refugee" is the reason for the possible harm: Refugees face the risk of **persecution**. Persons eligible for subsidiary protection face the risk of **serious harm**. What qualifies as persecution is described above and what qualifies as serious harm is defined in Article 15:5:
  a) the death penalty or execution,
  b) torture or inhuman or degrading treatment or punishment,
  c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

These types of harm may, to a certain extent, overlap from a factual perspective not only with each other but also with acts of persecution. In such a case, the **priority of granting refugee status** will apply.

In the Elgafaji judgment, the CJEU stated that Article 15(b) corresponds in essence to Article 3 ECHR. The CJEU confirmed in the same judgment that the harm defined in Article 15(c) covers a more general risk of harm than Article 15(a) and (b). According to this judgment, what is required is a 'threat … to a civilian's life or person' rather than specific acts of violence.

The content of the types of serious harm are defined by the CJEU case law (see the respective Chapter).

- As in the case of refugee status, the Directive contains cessation and exclusion clauses that are similar (but not the same!) to the refugees' exclusion and cessation clauses (Articles 16, 17, and 19).

- Content of statuses – i.e. rights attached to refugee and subsidiary protection status (Articles 20-35)

The Directive defines the rights afforded to beneficiaries of these statuses:

- protection from *refoulement* – reference to international obligations of the Member States, i.e. especially Article 3 of the ECHR, that is listed in the non-derogable provisions in the ECHR (this textbook presupposes basic knowledge of the principle of non-refoulement. If not familiar with, check the internet, e.g. https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf)
- residence permits and travel documents

Member States shall issue **residence permits** both to beneficiaries of refugee status and subsidiary protection status unless compelling reasons of national security or public order otherwise require. The difference is in the **length of a permit**: at least 3 years and renewable in case of refugees, and at least 1 year and, in case of renewal, for at least 2 years in case of subsidiary protection. The residence permits shall have the same design as required by EU law (regulation 2017/1954).

Front side

Back side

Member States shall issue to beneficiaries of refugee status **travel documents**, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

Member States shall issue to beneficiaries of subsidiary protection status *who are unable to obtain a national passport,* documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.

Tip: you can check the PRADO database of passports and permits issued by EU countries: **https://www.consilium.europa.eu/prado/en/prado-start-page.html**

- access to employment, education, social welfare, healthcare,
  - the main rule is to provide the same level of treatment given to nationals of that Member State
- access to accommodation – Member States must ensure the same level of access as to other legally residing third-country nationals
- access to integration facilities – the level of harmonisation in the field of integration is low and therefore the obligations of Member states are laid down in a vague way – see Article 34 of the Directive: *"In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes."*
  - ✓ Specific provisions for children and vulnerable persons are also contained in the Directive.

EXERCISE 1:

Matching terms – match the terms that fit a refugee or person eligible for subsidiary protection or both

Refugee **Person eligible for subsidiary protection**

internal armed conflict – political opinion – access to health care – persecution – serious harm – international protection – residence permit for at least 1 year – renewable residence permit – exclusion clause – Geneva Convention

Solution

Refugee **Person eligible for subsidiary protection**

political opinion internal armed conflict
access to health care access to health care
persecution serious harm
international protection international protection
exclusion clause residence permit for at least 1 year
renewable residence permit renewable residence permit
Geneva Convention

EXERCISE 2:

Fill in missing terms

- o Who is a refugee under the Qualification Directive?
- ➢ 'refugee' means a third-country national who, owing to a …. fear of being ….. for reasons of race, religion, nationality, ……. …… or membership of a particular ….. group, is …… the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the …… of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 *(exclusion clause)* does not apply.

Solution

A 'refugee' means a third-country national who, owing to a **well-founded** fear of being **persecuted** for reasons of race, religion, nationality, **political opinion** or membership of a particular **social** group, is **outside** the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the **protection** of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 *(exclusion clause)* does not apply.

- o Who is a person eligible for subsidiary protection under the Qualification Directive?
- ➢ A 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not …… as a …… but in respect of whom …… grounds have been shown for believing that the person concerned, if …… to their ……, or in the case of a stateless person, to their country of former habitual residence,

would face a real …… of suffering …… , and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail themselves of the …… of that country.

Solution

A 'person eligible for subsidiary protection' means a third - country national or a stateless person who does not **qualify** as a **refugee** but in respect of whom **substantial** grounds have been shown for believing that the person concerned, if **returned** to their **country of origin**, or in the case of a stateless person, to their country of former habitual residence, would face a real **risk** of suffering **serious harm**, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail themselves of the **protection** of that country.

3.5 Procedural Directive

Directive 2013/32/EU (recast) *on common procedures for granting and withdrawing international protection, imposes standards of treatment from the asylum claim to the final decision on international protection*.

Main aim:

- ✓ The Procedural Directive sets standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.
- ✓ The Directive creates a coherent system which ensures that decisions on applications for international protection are taken more efficiently and more fairly, by:
  - ➢ Setting clear rules for lodging applications, making sure that everyone who wishes to request international protection can do so quickly and effectively.
  - ➢ Setting a time limit for the examination of applications, while providing for the possibility to accelerate for applications that are likely to be unfounded;
  - ➢ Training decision makers and ensuring access to legal assistance;
  - ➢ Providing adequate support to those in need of special guarantees – for example because of their age, disability, illness;
  - ➢ Providing for clearer rules on appeals in front of courts or tribunals.
- ✓ Specific provisions for children and vulnerable persons are also contained in the Directive.
- ✓ The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States.

It repealed Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status. Compared to the previous directive, this Asylum Procedures Directive provides specific rules for ensuring adequate

access to the asylum procedure (Article 6) and establishes higher standards for procedural guarantees such as: legal and procedural information free of charge in procedures at first instance (Articles 19 and 21), access to the interview report (Article 17), assessment of the needs for specific procedural guarantee (Article 24), or specific procedures for examining the application of minors (Article 25).

To whom Procedural Directive applies, may apply, or does not apply:

This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters, or in the transit zones of the Member States, and to the withdrawal of international protection.

This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States.

Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Qualification Directive (2011/95/EU).

Procedural directive covers these areas:

- Access to the procedure on international protection (Article 6)

The Directive distinguishes 3 initial steps in the procedure

1) **Making an application** for international protection - a request made by a third-country national or a stateless person for protection from a Member State, who can be understood as seeking refugee status or subsidiary protection status. This "making an application" may take various informal forms, such as a piece of paper with the word "asylum".
2) **Registration of the application** – not defined by the Directive – but understood as collecting main information on the applicant and registering in the database
3) **Lodging an application** – not defined by the Directive – but understood as collecting more detailed information about the applicant and the case.

In some Member States, all steps may happen at one moment, in other Member Steps two steps may be joint together. The directive imposes time limits for these steps.

- Requirements for the examination of applications (Articles 10, 14, 15, 16, 17, and Article 4 QD) and for the decision (Article 11)

When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.

Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an **appropriate examination**:

(a) applications are examined and decisions are taken **individually, objectively, and impartially**;

(b) **precise and up-to-date information** is obtained from various sources, such as EASO and UNHCR;

(c) the personnel examining applications and taking decisions **know the relevant standards** applicable in the field of asylum and refugee law;

(d) the personnel examining applications and taking decisions have the **possibility to seek advice**, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related, or gender issues.

Before a decision is taken by the determining authority, the applicant shall be given the opportunity of **a personal interview** on their application for international protection. A personal interview shall take place under conditions which ensure **appropriate confidentiality.** The determining authority shall ensure that the applicant is given an **adequate opportunity to present elements needed to substantiate the application**. Either a thorough and factual **report** containing all substantive elements or a transcript shall be made of every personal interview or Member States may provide for audio or audio-visual recording of the personal interview.

? Check Article 4 of the Qualification Directive (2011/95/EU)

! Other rules on how to examine the application are also contained in Article 4 of the Qualification Directive.

Decisions on applications for international protection must be given in writing. When an application is rejected

- the reasons in fact and in law have to be stated in the decision, and
- information on how to challenge a negative decision must be given in writing.

- Guarantees for applicants and their obligations (esp. Articles 12, 13, and 20)

The Directive imposes a variety of necessary guarantees applicants shall enjoy, such as:

- Information on the procedure
- Interpreting services
- Communication with a legal adviser, NGOs and UNHCR
- Notification of the decision
- Access to free legal aid under certain conditions in the appeal stage

The obligations aim at ensuring appropriate cooperation of the applicant with the determining authority – handing over the documents, address notification, etc.

- Types of procedures

The Directive distinguishes between **4 main types of procedures at first instance**:

1) **In merit examination – "founded or unfounded" applications**. This is the main path in which the majority of applications are examined. The authority examines the reasons for the application and decides whether to grant refugee/subsidiary

protection status or rejects the application. In certain cases, this procedure MAY be accelerated – e.g. the applicant is from a safe country of origin or the applicant has made statements. If the procedure is accelerated, the Directive allows Member States to mark these cases as manifestly unfounded applications – some Member States use this category in order to e.g. lay down shorter time limits for appeal etc.

2) **Inadmissible applications** – the Directive allows (MAY provision) a Member State **not to do in merit examination** ONLY in these cases:
   a) Dublin case;
   b) another Member State has granted international protection;
   c) first country of asylum for the applicant exists;
   d) safe third country for the applicant exists;
   e) the application is a subsequent application, where no new elements have arisen or have been presented by the applicant;
   f) a dependant of the applicant lodges an application, after they consented to have their case be part of an application lodged on their behalf (…)

3) **Border procedure –** in case the application is lodged at the border or in the transit zone of a Member State, the Directive allows (MAY provision) for conducting border procedure. However certain requirements apply:
   – **Only a decision either on inadmissibility or in accelerated procedure may be issued** – i.e. the aim of the border procedure is to filter out simple cases clearly without right to protection.
   – **This decision has to be taken within 4 weeks, otherwise** (other type of decision or more time for a decision needed) the applicant has to be allowed entry.

? Check the Reception Conditions Directive (2013/33/EU) and find out where the reason for detention at the border is laid down.

   – **In case deprivation of liberty (detention) is needed –** Reception Conditions Directive rules on detention apply.

4) **Withdrawal of the application –** the Directive counts either with discontinuation of the procedure or its rejection (in case there is enough information in order to do examination).

Moreover, the Directive also regulates

- the process for subsequent applications;
- the process in case a Member State would like to **withdraw the international protection granted**. Withdrawal of international protection means a decision by a competent authority to revoke, end or refuse to renew the refugee or subsidiary protection status.

A special chapter is dedicated to setting the basic rules for **appeals procedure** - Member States shall ensure that applicants have the right to an effective remedy **before a court or tribunal** against negative decisions taken at first instance.

- This effective remedy has to provide for a **full and ex nunc** *(i.e. new elements)* **examination** of both facts and points of law, including, where applicable, an examination of the international protection needs *(i.e. at least issuance of a binding opinion towards further assessment by the determining authority)* pursuant to Qualification Directive 2011/95/EU.
- The Directive also imposes rules on whether the appeal has automatic **suspensive effect** and rules for suspensive effect upon request of the applicant

---

- Safe countries concepts

The Directive regulates three main safe-countries concepts that shall alleviate Member States from examining in detail applications from those applicants where another **third country** (i.e. not an EU Member State or a state using the Dublin regulation!) shall provide protection or access to protection. .

1) **First country of asylum** – country where the applicant has already received refugee or similar protection. Such cases may be rejected as **inadmissible** after checking the conditions for first country of asylum in the Directive.
2) **Safe country of asylum** – an applicant is a national of a country where generally no risk of persecution or serious harm exists. EU countries usually dispose of national lists of these countries. Such cases may be rejected in an **accelerated procedure** after the applicant had possibility to prove that the country is not safe for them.
3) **Safe third countries** – an applicant passed through this country where they had real possibility to apply for asylum. EU countries usually dispose of national lists of these countries. The conditions that this third country has to fulfil are quite demanding so this concept is not frequently used in practice. Such cases may be rejected as **inadmissible** procedure after the applicant had possibility to prove that the country is not safe for them.

EXERCISE:

Guessing terms. Read the sentences below, each sentence represents one term used by the Procedural Directive. Guess which one.

- Quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases.
- Before a decision is taken by the determining authority, the applicant shall be given the opportunity to present the grounds for their applications in a comprehensive manner.
- Member States may provide that an examination of the application is conducted in a shorter time limit if the applicant is from a safe country of origin.

- Within this type of procedure, Member States are not required to examine whether the applicant qualifies for international protection.
- This concept will be applied if a third country has already granted refugee status to the applicant.
- In this procedure, right to effective remedy is implemented.
- The moment when the procedure on international protection begins.
- Decision by a competent authority to revoke, end, or refuse to renew the refugee or subsidiary protection status.

Solution
Determining authority
Personal interview
Accelerated procedure
Inadmissibility
First country of asylum
Appeal procedure
Making an application
Withdrawal of international protection

3.6 Reception Conditions Directive

Directive 2013/33/EU (recast) *laying down standards for the reception of applicants for international protection, imposes standards of treatment during the asylum process, including during the Dublin procedures.*

Main aim:

- ✓ Applicants for international protection waiting for a decision on their application must be provided with certain necessities that guarantee them an adequate standard of living.
- ✓ It ensures that applicants have access to housing, food, clothing, health care, education for minors, and access to employment under certain conditions.
- ✓ the Directive also provides particular attention to vulnerable persons, especially unaccompanied minors and victims of torture. Member States must, inter alia, conduct an individual assessment in order to identify the special reception needs of vulnerable persons and to ensure that vulnerable asylum seekers can access medical and psychological support.
- ✓ It also includes rules regarding detention of asylum seekers, ensuring that their fundamental rights are fully respected.
- ✓ Harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.

The current Reception Conditions Directive was adopted in 2013. It replaced Council Directive 2003/9/CE on minimum standards for the reception of asylum seekers.

To whom Reception Conditions Directive applies:

This Directive applies to all third-country nationals and stateless persons who *make an application* for international protection **in the territory**, including **at the border**, **in the territorial waters** or in the **transit zones** of a Member State, as long as they are allowed to remain in the territory as applicants, as well as to family members, if they are covered by such application for international protection.

Note: make an application – see Asylum Procedure Directive – express of the wish to ask for international protection. It means that Reception Conditions Directive's standards are applicable from the very first moment after a person asks for international protection.

Member States may introduce or retain more favourable provisions in the field of reception conditions for applicants - it means that this Directive still only regulates the necessary common minimum that has to be provided to the applicants. In practice there are still very wide discrepancies among the levels of reception conditions in Member States.

Reception Conditions Directive covers these areas:

- The right to information on benefits and obligations after the *application was lodged* (Article 5).

  Note: lodge an application – step 3 in the procedure, see Asylum Procedure Directive sheet

  Member States have the obligation to inform applicants, no later than 15 days after they have lodged their application for international protection, of the **benefits and of the obligations** with which they must comply relating to reception conditions, and of **organisations that provide specific legal assistance** on available reception conditions, including health care.

  This information shall be provided **in writing** and, in a **language that the applicant understands**, and may also be supplied orally.

- The provision of documents certifying legal stay (Article 6)

  Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in their own name certifying their status as an applicant or testifying that they are allowed to stay in the territory of the Member State while their application is pending or being examined.

- Provisions on detention including an exhaustive list of grounds, detention conditions and review (Articles 8, 9, 10, and 11)

  Applicants are generally free to move within the territory of the Member State (!not to other Member States). Nevertheless the Directive allows Member States to decide on the detention of applicants. The Directive imposes conditions upon which the detention is possible.

- There is an exhaustive list of grounds for detention – such as identity verification, protection of public order or border procedure.
- Detention has to be ordered by a proper written decision issued by judicial or administrative authorities.
- Alternatives to detention must exist (such as regular reporting) and they shall have priority.
- Detention has to be necessary and as short as possible and executed with due diligence.
- Expeditious judicial review has to be in place
- Applicants must be informed about the decision, remedy, and possibility to request free legal aid.
- Detention shall be periodically reviewed either ex offo or on request.
- Material detention conditions shall be of adequate standards (access to open air etc.)

• Access to the education system for minors (Article 14)

Member States shall grant to minor children of applicants access to the education system under similar conditions as their own nationals within three months from the date on which the application for international protection was lodged. Such education may be provided in accommodation centres.

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system.

• Access to the labour market (Article 15)

Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

• Material reception conditions including accommodation, protection of family life, access to UNHCR and other persons and organisations assisting them, as well as gender and age-specific concerns (Articles 17-19)

Member States shall ensure that material reception conditions provide an **adequate standard of living** for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means.

Where **housing** is provided in kind, it may take e.g. one of these forms: accommodation centres, private houses, flats, or hotels.

Where Member States provide material reception conditions in the form of **financial allowances** or **vouchers**, the amount thereof shall be determined on the basis of the level established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals.

Member States shall ensure that applicants receive the **necessary health care** which shall include, at least:

- ✓ emergency care
- ✓ essential treatment of illnesses and of serious mental disorders.

- Assessment of the special reception needs of vulnerable persons (Articles and 21-22)

The Directive enumerates who may be a vulnerable person: minors, unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.

Member States shall assess whether the applicant is an applicant with special reception needs and which needs are necessary to be provided to them.

- Denial, reduction, and withdrawal of material reception conditions (Article 20)

Member States may reduce or, in exceptional and duly justified cases, withdraw material reception conditions in certain cases, e.g.: (a) when an applicant abandons the place of residence without permission; or (b) when an applicant does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down by national law; or

c) when an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions.

Member States may furthermore determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.

Decisions for reduction or withdrawal of material reception conditions or sanctions referred shall be taken individually, objectively and impartially, and reasons shall be given.

EXERCISE:

Answer True/False. In case there is a specific provision in the Directive, identify it.

- Member States may reduce material conditions without a decision, but in case of withdrawal, a decision has to be issued.

Decisions for reduction or withdrawal of material reception conditions or sanctions shall be taken individually, objectively and impartially, and reasons shall be given. (Article 20/5).

- Information on benefits and obligations has to be delivered to the applicants during registration of the application at the latest.

False. Member States shall inform applicants, within a reasonable time not exceeding 15 days after they have lodged their application for international protection, of at least any established benefi ts and of the obligations with which they must comply relating to reception conditions. (Article 5/1)

- The Reception Conditions Directive requires access to health care on the same conditions as to nationals.

False. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders (Article 19).

- The Reception Conditions Directive requires access to labour market no later than 9 months from the date of lodging of the application.

True (Article 15/1).

- There is not a maximum period for detention laid down in the Directive.

True (Article 9/1).

- Only judicial authorities may decide on detention.

False. Detention of applicants shall be ordered in writing by judicial or administrative authorities (Article 9/2).

3.7 Temporary Protection Directive

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

During the 1990s, conflicts in the former Yugoslavia, in Kosovo and elsewhere demonstrated the need for special procedures to deal with mass influxes of displaced persons. The 2001 Directive was the EU's concrete response to this need. However, the provisions within this Directive, based on solidarity between EU States, have not been triggered so far.

Main aim:

- ✓ To have common processes for situations of mass influx. These processes under Temporary Protection Directive are "sleeping" and can be activated only by the Council of the EU.
- ✓ It is not possible to operate the same procedural standards in the situations of mass influx. Therefore, the Directive requires only basic procedures to be followed in case the temporary protection is active.
- ✓ This temporary protection is compatible with the Member States' international obligations in regard to refugees. In particular, it must not prejudge the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees.

Temporary Protection Directive covers these areas:

- What is temporary protection?

Temporary protection is an exceptional measure to provide displaced persons from non-EU countries and unable to return to their country of origin, with **immediate and temporary protection**.

It applies in particular when there is a risk that the standard asylum system is struggling to cope with demand stemming from a mass influx that risks having a negative impact on the processing of claims.

Who is a displaced person under this Directive?

- **displaced persons** means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular, in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention (inclusion clause), or other international or national instruments giving international protection, in particular:
  (i) persons who have fled areas of armed conflict or endemic violence;
  (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;

What is a mass influx under this Directive?

- **mass influx** means arrival in the EU of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the EU was spontaneous or aided, for example through an evacuation programme;

• Rules for the activation of the temporary protection

The Directive defines the decision-making procedure needed to trigger, extend, or end temporary protection:

The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that submits a proposal to the Council.

The Commission proposal shall include at least:

(a) a description of the specific groups of persons to whom the temporary protection will apply;
(b) the date on which the temporary protection will take effect;
(c) an estimation of the scale of the movements of displaced persons.

The duration of temporary protection is one year. It may be extended by different processes for 1 + 1 year. Temporary protection shall come to an end:

(a) when the maximum duration has been reached;
(b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that submits a proposal to the Council.

• National obligations towards persons enjoying temporary protection

The Directive foresees harmonised rights for the beneficiaries of temporary protection, including:

- ✓ a residence permit for the entire duration of the protection,
- ✓ appropriate information on temporary protection,

access to employment, accommodation or housing, social welfare, or means of subsistence,

- ✓ access to medical treatment,
- ✓ education for minors,
- ✓ opportunities for families to reunite in certain circumstances,
- ✓ guarantees for access to the normal asylum procedure.

The Directive also contains provisions for the **return** of displaced persons to their country of origin and for **excluding** individuals who have committed serious crimes or who pose a threat to security from the benefit of temporary protection.

Specific provisions have been drawn up for unaccompanied minors and for those having undergone particularly traumatic experiences (such as rape, physical, or psychological violence).

- **Solidarity between EU States**

Solidarity and a balance between EU States in receiving displaced persons is promoted through a structured mechanism. It allows for transfers of beneficiaries between EU States, based on a voluntary offer from a State and on the consent of the transferee.

? Find the respective Article on solidarity and answer these questions:

1. *Does the Directive define a key to calculate Member States quotas on reception of persons under Temporary Protection Directive?*
2. *If yes, how is the quota calculated?*
3. *If not, how shall Member States proceed?*
4. *What happens if the number of persons exceeds the capacity of Member States?*

Solution

Article 25 and 26/1.

1. No.
2. –
3. The Member States shall receive persons who are eligible for temporary protection in the spirit of Community solidarity. They shall indicate – in figures or in general terms – their capacity to receive such persons. This information shall be set out in the Council Decision on activation of the temporary protection scheme.
4. The Member States may indicate additional reception capacity by notifying the Council and the Commission. This information shall be passed on swiftly to UNHCR. When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the announced reception capacity, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.

4. COMMON EUROPEAN ASYLUM SYSTEM REFORM, TRENDS

Introduction

The Common European Asylum System (CEAS) has been established and developed in three phases: The **first phase (1999–2005)** is connected with the ratification of the **Amsterdam Treaty** which constitutes a milestone in migration and asylum policy of the EU. During this first phase, **minimum standards** on asylum were adopted in the form of regulations and directives (six main pieces of legislation).

However, in 2004, the "Hague Programme" called for adoption of new package of legislation within 5 years (by the end of 2010) going beyond minimum standards. This goal was not reached in time mostly because of non-ratification of the Treaty establishing a Constitution for Europe. **The second phase** of developing CEAS is delimited by years **2008-2013.** During this period, five key regulations and directives were proposed and adopted and they are still in force – they established **common standards**.

The third phase was launched in reply to the so-called migration crisis which culminated in 2015/2016. The European Commission immediately reacted, but hastily, in order to reform the CEAS and it proposed a package of seven legislative acts (mainly regulations) in **2016**. This draft legislation **has not been adopted** for the time being.

Apart from that, there are **other secondary legal acts** related to asylum which have been adopted or proposed, for instance EASO Regulation, Relocation Decisions, proposal for the Recast Return Directive (see *infra*).

4.1 The first phase (1999–2005) – establishing CEAS

The Common European Asylum System was established in the European Community after the entry into force of **the Amsterdam Treaty** on 1 May 1999. The Amsterdam Treaty, signed in 1997, constituted a landmark in the evolution of asylum policy in the European Community and the European Union. Asylum policy (as well as immigration policy) was already mentioned in the **Treaty on European Union** signed in Maastricht in 1992, Article K.1(1), within provisions on cooperation in the fields of justice and home affairs. This so-called third pillar of the EU was based on an intergovernmental method of cooperation between Member States.

> The Amsterdam Treaty "communitarised" this area because asylum policy (as well as immigration policy) was shifted into the so-called first pillar.

It means among others that the Member States conferred new powers on the European Community to adopt secondary law in this area. **Article 63** (ex 73k) of the **Treaty establishing the European Community (TEC**) stipulated that the Council was called to adopt **minimum standards** on asylum within a period of five years after the entry into force of the Amsterdam Treaty. However, certain "third pillar" features remained in the decision-making procedure. In line with Article 67 (ex 73o) TEC, providing for a five-year transitional period, the Council acted unanimously either on a proposal from

the Commission or on the initiative of a Member State. The procedure suffered from democratic deficit because the European Parliament was only consulted.

The European Council was summoned at a special meeting in Tampere in **October 1999** in order to elaborate on political guidelines in the area of freedom, security and justice. The conclusions of this European Council meeting are known as the **"Tampere programme"**. The European Council declared that it "agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement." Moreover, the European Council was more ambitious because it proclaimed that in the longer term, the European Community should lead to a common asylum procedure and a uniform status for those who are granted asylum (not only minimum standards mentioned in the Amsterdam Treaty).

Under the Amsterdam Treaty, the appropriate measures on asylum were supposed to be adopted by 2004. Almost all legal instruments were adopted within this period except for the Asylum Procedures Directive which was approved in 2005.

The secondary legislation adopted in the first phase is as follows (each piece of legislation was proposed by the Commission):

- **the Eurodac Regulation (2000)** – Council Regulation (EC) No **2725/2000** of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.
- **the Temporary Protection Directive (2001)** – Council Directive **2001/55/EC** of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
- **the Dublin II Regulation (2003)** – Council Regulation (EC) No **343/2003** of 18 February 2003 established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- **the Reception Conditions Directive (2003)** – Council Directive **2003/9/EC** of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
- **the Qualification Directive (2004)** – Council Directive **2004/83/EC** of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
- **the Asylum Procedures Directive (2005)** – Council Directive **2005/85/EC** of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

4.2 The second phase (2008–2013) – developing CEAS

It was already mentioned above that the European Council had a vision expressed in the Tampere Programme to go beyond the minimum standards on asylum and offer a higher degree of protection in the longer term. As a follow-up to the Tampere Programme, the European Council approved the **"Hague Programme"** for strengthening freedom, security

and justice in **November 2004.** It declares that "[t]he aims of the Common European Asylum System in its second phase will be the establishment of a **common asylum procedure** and a **uniform status for those who are granted asylum or subsidiary protection**." The European Council invited the Commission to evaluate first-phase legal instruments and submit the second-phase instruments and measures for the adoption **by the end of 2010**.

*It should be noted that the **Treaty establishing a Constitution for Europe** was signed **in October 2004** in Rome, including new legal basis for measures on asylum. **Article III-266** explicitly mentioned CEAS and foresaw laying down rules on a uniform status of asylum and subsidiary protection, common procedures for the granting and withdrawing from uniform asylum or subsidiary protection status etc. **Article III-268** introduced the **principle of solidarity** and **fair sharing of responsibility**, including its financial implications, between the Member States. Nevertheless, the so-called Constitutional Treaty was not ratified which was probably the main reason why the second-phase instruments were not adopted by 2010.*

The **Lisbon Treaty** which was signed in 2007 and entered into force on 1 December 2009, stims from of the Constitutional Treaty and comprises almost identical provisions on asylum in **Article 78 and 80 TFEU.**

The **decision-making procedure** is different in comparison with the procedure used to adopt first-phase asylum legislation, it is fully "communitarized". Already the **Treaty of Nice** (entry into force in 2003) introduced **co-decision procedure** in this area under conditions stipulated in Article 67(5) TEC, i.e. the Council acts mostly by a qualified majority together with the European Parliament. Under the Lisbon Treaty, the appropriate measures are to be adopted in **ordinary legislative procedure** which is a modified co-decision procedure.

Moreover, the Lisbon Treaty made the **Charter of Fundamental Rights of the EU** a binding document. The Charter guarantees **the right to asylum in Article 18** and thus strengthens the human rights dimension of asylum in the EU.

The European Council observed in the **European Pact on Immigration and Asylum** approved in **October 2008** that "considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes." It agrees with the creation of the European Asylum Support Office and invites the Commission to present proposals for completing, the CEAS in 2012 at the latest, (it was presumable that the 2010 goal would not be reached).

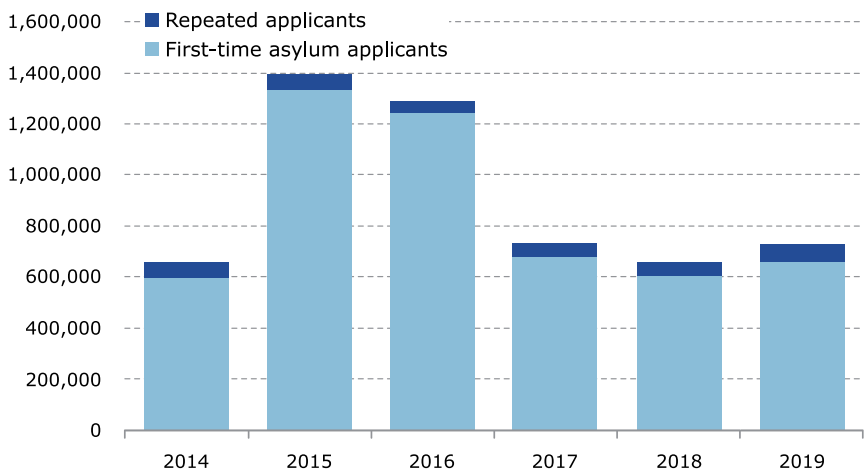
Subsequently, the Commission put forward its proposals into legislative process at the end of 2008 and in 2009, most of them were adopted in 2013. **The second-phase legal instruments are as follows** and they are **still in force:**

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

- **the Eurodac Regulation –** Regulation (EU) No **603/2013** of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.
- **the Dublin III Regulation –** Regulation (EU) No **604/2013** of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
- **the Reception Conditions Directive –** Directive **2013/33/EU** of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
- **the Asylum Procedures Directive –** Directive **2013/32/EU** of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

All the first-phase secondary acts were subject to recast except the Temporary Protection Directive. These instruments are crucial legislative acts foreseen by the primary law. Furthermore, other related acts were adopted, e.g. **EASO Regulation** – Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a the European Asylum Support Office.

4.3 The third phase (2016–?) – reforming CEAS as a reply to the migration crisis



Source: European Asylum Support Office and Eurostat

In In 2015 and 2016 there was an enormous number of migrants coming to the European Union. In 2015, EU countries (plus Switzerland, Norway, Iceland, and Lichtenstein) recorded 1,392,155 applications for international protection. In 2016, there was only a slight decrease, 1,291,785 applications were submitted. The **unprecedented influx** of migrants to the European countries starting **in 2015** is often called a **"migration crisis"**[1].

One of the major problems of the migration crisis was the **situation at the external borders of the EU (especially in the south)**. Under the Dublin III Regulation, Member States of the first entry are often responsible for examining the application for international protection (Article 13). Thus, Italy, Greece and other countries were overburdened by a high number of applications since many applicants were coming by sea. As a result, they were not able, and sometimes not willing to examine the applications and they let the applicants move to other EU Member States. This led to the **secondary movements** especially to Germany or Sweden as the "dream" countries which were subsequently overburdened by applications as well. To sum up, there was **a serious infringement both of the Dublin III Regulation and Schengen rules**.

4.3.1 Relocation Decisions

Consequently, the European Commission and certain Member States argued that **more emphasis should be put on the principle of solidarity and fair sharing of responsibility** between the Member States expressed in Article 80 TFEU. The efforts were put into the **equal distribution of applicants**. **Council Decision (EU) 2015/1523** of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and **Council Decision (EU) 2015/1601** of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece were adopted in order to provide for fair burden sharing among the Member States – they are called *"relocation decisions"*. Both relocation decisions were based on Article 78(3) TFEU allowing the Council to adopt provisional measures in an emergency situation characterised by a sudden inflow of nationals from third-countries. While the Decision 2015/1523 originates from of the **voluntary principle**, the other Decision 2015/1601 provides for **compulsory relocation** and stipulates concrete numbers of applicants to be relocated from Italy and Greece to the territory of the other Member States.

However, the relocation mechanism did not prove to be very effective. In spite of the fact that transfer of 160,000 applicants in total was envisaged by the Relocation Decisions (40,000 by Decision 2015/1523 and 120,000 by Decision 2015/1601), only around 30,000 applicants were really relocated – there was a mix of reasons which caused such a low percentage. Furthermore, the Decision 2015/1601 was controversial because some Member States did not support it and voted against it in the Council. Slovakia and Hungary then contested the Decision before the Court of Justice (joined cases C-643/15 and C-647/15) but their actions were not successful.

Nevertheless, the Commission included a **permanent relocation system** called "corrective allocation mechanism" in its **proposal for the Dublin IV Regulation of 2016** (see *infra*) which forms a part of the general reform of the CEAS. This mechanism

[1] People coming irregularly during migration crisis were both refugees or foreigners in need of subsidiary protection and economic migrants without reasons for protection – this mix of arriving persons is called „mixed flows".

would be activated automatically in cases when Member States would have to deal with a disproportionate number of asylum seekers. It is not surprising that allocation mechanism is not supported by all members of the Council and the Council has not reached agreement on this issue so far.

4.3.2 European Agenda on Migration

In the **European Agenda on Migration** issued in **May 2015,** i.e. at the beginning of the migration crisis, the Commission stressed the priority to ensure a full and coherent implementation of the CEAS. The transposition and implementation of recently adopted second-phase legislation on asylum should be enforced by means of infringement procedure. The Commission also presented its idea of the **completion of the CEAS**, including the common Asylum Code, mutual recognition of asylum decisions, and a single asylum decision process in order to guarantee equal treatment of asylum seekers throughout Europe. It did not have an the idea to reform the whole system.

However, its position later changed and in **April 2016**, it published a communication named **"Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe"**. The Commission states among others that the current CEAS is characterised by **differing treatment of asylum seekers**, the length of asylum procedures or reception conditions across Member States, which encourages secondary movements. Such divergences result in part from the often discretionary provisions contained in the second-phase legislation. Therefore, it introduces **five priorities:**

1. Establishing a sustainable and fair system for determining the Member State responsible for asylum seekers (revision of the Dublin III Regulation);
2. Reinforcing the Eurodac system;
3. Achieving greater convergence in the EU asylum system (new Asylum Procedures Regulation, new Qualification Regulation, modifications of the Reception Conditions Directive);
4. Preventing secondary movements within the EU;
5. A new mandate for the EU's asylum Agency.

4.3.3 New legislation package

Subsequently, **the Commission put forward a package comprising seven pieces of draft legislation on asylum.** First, on **4 May 2016**, it proposed the following acts:

- Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final – **the Dublin IV Regulation;**
- Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country

national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM/2016/0272 final/2 – **the Recast Eurodac Regulation**;

- Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM/2016/0271 final – **the Asylum Agency Regulation**.

Second, on **13 July 2016**, the Commission proposed the following acts:

- Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final – **the Asylum Procedures Regulation**;
- Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents;
- COM/2016/0466 final – **the Qualification Regulation**;
- Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 final – **the Recast Reception Conditions Directive**;
- Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final – **the Resettlement Framework Regulation**.

The Commission submitted the proposals to the European Parliament and the Council during the 8th parliamentary term (2014-2019), **reforming basically the whole CEAS**. The reform concerns crucial legislation which constitutes **the core of the CEAS**: the Dublin III Regulation, the Asylum Procedures Directive, the Qualification Directive, and the Reception Conditions Directive. It does not concern the Temporary Protection Directive adopted in 2001 which was not affected even by the second-phase harmonisation because the Temporary Protection Directive has not been applied in the EU.

4.3.4 Difficulties of the third phase of building CEAS

The Union bodies chose a **"package approach"** to the reform of the CEAS which means that no proposal is adopted before an agreement is reached on all proposals. Due to this approach, **none of the proposals have been adopted** for the time being (January 2020).

In particular, the proposals for **the Dublin IV Regulation and the Asylum Procedures Regulation remain controversial** which prevented the Council from adopting a negotiating mandate for the trilogue negotiations.[2] The Dublin IV Regulation is contentious on the

[2] **Trilogues** are informal direct negotiations between a limited number of representatives of the European Parliament, the Council and the Commission who meet usually shortly after the Commission initiated the ordinary legislative procedure. The representatives try to reach an agreement on the wording of the proposed

issue of solidarity because it introduces the corrective allocation mechanism which is strongly opposed by certain Member States. As to the Asylum Procedures Regulation, the safe country concepts and border procedure have been primarily debated. When it comes to **the other five proposals, a compromise was reached to certain extent** at the stage of trilogue negotiations between the European Parliament and the Council but some disputes have still exist.

4.3.5 Next steps

It follows from the foregoing that the Union bodies did not manage to adopt the proposed legislation on asylum before the end of the 8th parliamentary term. Thus, after **the European Parliament elections in May 2019**, the Commission proposals on the CEAS fall into **"unfinished business"** in line with the Rules of Procedure of the European Parliament (8th parliamentary term) and their future is unclear.

Under the rule 229, "[a]t the end of the last part-session before elections, all Parliament's unfinished business shall be deemed to have lapsed, subject to the provisions of the second paragraph." The second paragraph stipulates that at the beginning of each parliamentary term, the Conference of Presidents of the EP shall take a decision on requests of parliamentary committees or other institutions (including the Commission and the Council) to resume or continue the consideration of such unfinished business.

In other words, the legislative process concerning the CEAS reform was finished at the end of the 8th parliamentary term and has to start all over again after the elections, unless the Conference of Presidents makes a decision to continue. Such a decision shall be taken upon a request of either a parliamentary committee (probably the LIBE Committee – the Civil Liberties, Justice and Home Affairs Committee – because the proposals on the CEAS reform were assigned to it), the Commission or the Council. The decision in question has not been taken yet (January 2020) mainly due to the fact that the new Commission did not take office until 1 December 2019. It is also worth noting that the composition of the European Parliament changed after the elections in 2019, which may affect the decision whether to continue debating the proposals on the CEAS. In particular, the European People's Party together with the Socialists and Democrats no longer have a majority in the European Parliament (they have 336 members out of 751 members of the EP).

There are many issues concerning particular proposals on the CEAS reform. As to the reform as a whole, it is apparent that the migration crisis revealed shortcomings of the functioning of the current CEAS and, thus, modifications are necessary. On the other hand, one may have several **conceptual objections** to the proposed reform:

- **First**, already the current CEAS includes a legal instrument designed for a mass inflow of migrants into the European Union, namely the Temporary Protection Directive adopted during the first phase of harmonisation in 2001. Nevertheless, the Commission decided to thoroughly reform the CEAS although this Directive has not been applied at all. Furthermore, the number of applications significantly decreased in 2018 (see *supra*) even without a reform of the CEAS. Therefore, the question is whether an extensive reform of the whole system is really necessary.

legislation which has to be then approved by the plenary of the EP and the Council. Trilogues are very effective and facilitate adoption of even controversial pieces of legislation. However, they are criticised for not being stipulated by the founding Treaties (TEU, TFEU) and being non-transparent since they are not open to the public.

- **Second**, the reform was not prepared with due diligence. The deadline for the transposition of the Asylum Procedures Directive and the Reception Conditions Directive passed on 20 July 2015. The Commission submitted the first package of its proposals on 4 May 2016, i.e. less than one year after the transposition deadline. Therefore, there was very little experience with the application of the new rules on asylum in the Member States which the Commission decided to revise and the revised legislation was hastily drafted.
- **Third**, the Commission contends there is poor implementation of the current CEAS in the Member States. However, revised asylum rules cannot guarantee proper implementation either. It follows that the Commission should put more effort into the enforcement of current rules first before reforming it.
- **Fourth**, in the Commission's view, divergences in treatment of asylum seekers between Member States remain as a result of too much discretion that the States possess. It's aim is to reduce the discretion, all proposed secondary law has a form of a regulation except for one (the Recast Reception Conditions Directive). Nevertheless, some scholars point out that the Member States tend to lean toward the intergovernmentalism instead because of the deadlock in negotiations on the CEAS reform, especially on the revision of the Dublin system (Pollet, 2019).

Lastly, it should be added that the Commission submitted other proposals which are not included in the CEAS reform but they are closely related to it, for instance, the proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final. This draft **Recast Return Directive** deals with the significant issue of returning irregular migrants, i.e. not just failed asylum seekers, staying on the territory of the EU Member States.

QUESTIONS:

1. Are there any other legal options for regulation in case that the secondary legislation reforming the CEAS is not adopted?
2. What are the consequences of replacing directives (the Asylum Procedures Directive, the Qualification Directive) by regulations? Explain pros and cons.
3. Explain the approach of the EU to the principle of solidarity mentioned in Article 80 TFEU. What are the issues? Are there other options to accomplish the principle of solidarity besides the distribution of asylum seekers?

EXERCISES:

1. Tracking legislative procedure in the area of CEAS

Legislative procedure in the EU is a very complex and complicated process. Its main actors are: the European Commission which has nearly exclusive legislative initiative, and the European Parliament and the Council as the two co-legislators. A legislative act cannot be adopted without participation of these two co-legislators which participate in this process in various types of legislative procedures. The most frequent is a common legislative procedure. In this type of procedure, the Commission proposes the legislation, the European Parliament

co-decides with the Council in which the representatives of the Member States decide by qualified majority. This type of procedure is also used in the area of CEAS.

In the area of shared competence, which is also the case of CEAS, the proposal is also sent to the national parliaments which can express in an eight-week period their reasoned opinion on the compliance of the proposal with the principle of subsidiarity.

The aim of this exercise is tracking the legislative procedure in case of a competed and adopted proposal in the CEAS area and to get a better understand the legislative procedures and the role of the European institutions. The legislative observatory of the European Parliament will allow you to accede various legislative documents at various stages of the process.

Tracking a legislative process in CEAS

Legislative proposal	Follow the legislative process of a legislative proposal in CEAS area (for example Qualification directive 2009/0164(COD) or Dublin III regulation 2008/0243(COD)
Aim	To gain a better understanding of how legislative decision-making procedures evolve in practice. To learn how to navigate the EP's Legislative Observatory as well as get acquainted with Pre-lex.
Introduction	In this exercise you will follow the legislative track of a piece of legislation adopted under the ordinary legislative procedure in the area of CEAS. You will use the European Parliament website that allows "legislative train" of a proposal and gives you access to relevant legislative materials in every stage of the procedure.
Steps	• Go to the EP's Legislative Observatory search form: • http://www.europarl.europa.eu/oeil/search/search.do# • Leave the search field empty and press OK • You will now get a list of all documents and on the left there is a menu allowing you to refine your search. • Under Parliamentary Term select '7th term' • Under Type of legislative act select 'Regulation' or 'Directive' • Under Procedure Status select 'Completed' • Click on any of the decisions adopted. You will now get an overview of the different stages and summaries for every stage. (There may also be a link to Pre-Lex, the Commission's database. This allows you to further scrutinize the stages of the procedure.)
Questions	Describe the different steps in the procedure Using Oeil (and if necessary Pre-Lex). You can use the "legislative train" to describe the process To what extent has the original proposal been modified by the Council and/or EP? Make use of the summaries offered on the Oeil website in order to answer this question.
Links	http://www.europarl.europa.eu/oeil/ http://ec.europa.eu/prelex/apcnet.cfm?CL=en

This exercise was inspired by Herman Lelieveldt and Sebastiaan Princen's Politics of the European Union textbook, published by Cambridge University Press and the site which accompanies it: Navigating the EU exercises:

2. How difficult is it to reach consensus with 27 Member states? Simulation of negotiations in the Council

The aim of this exercise is to simulate negotiations in the Council to better understand how difficult it is to reach consensus and what the role of individual actors is.

In the Council (Article 16 TEU) there are representatives of each Member State at ministerial level who are authorized to commit the government of that state. That is why the Council is often called "a voice of the Member States" among European institutions. The Council negotiates in different formations – one of them in the Justice and Home Affairs Council, which deliberates on proposals in the CEAS area. The important role is played by the Presidency – one MS which presides the given formation for 6 months, on the principle of equal rotation (except for the Foreign Affairs Council, which is presided by a permanent High Representative of the Union for foreign affairs).

The ordinary legislative process (Articles 289 and 294 TFEU)

- The COM submits a proposal
- First reading
  - The EP adopts a position and the Council decides by a qualified majority whether it can approve it.
  - If not, its divergent position is adopted and send to EP. COM comments.
- Second reading
  - EP can, within three months, approve the Council position → adoption or
  - reject → not adopted or
  - propose amendments – council can approve all or, if that is not the case, a meeting of a conciliation committee is convened.
- Conciliation
  - Reach agreement on a new text or
  - The act cannot be adopted

Treaty basis for CEAS

Article 77-80 TFEU on asylum and immigration

Article 77 – Schengen cooperation

Ensure absence of controls when crossing internal borders & preform checks and effective monitoring at external borders.

Schengen Borders Code (2006) & technological and other systems and instruments in place.

Article 78 forms a legal basis of the second phase CEAS, see later slides

Article 79 – Common immigration policy

As stated above, according to Article 80, these policies shall be governed by the principle of solidarity & fair sharing of responsibility between Member States (including financial implications).

Article 78 – Legal basis of the second phase CEAS

Paragraph 1 – The EU shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Refugee Convention & other relevant treaties.

Paragraph 3 – If one/more MS are confronted with an emergency situation characterized by a sudden inflow of nationals of third-countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the MS(s) concerned.

5.2 Simulation of the negotiations within the Asylum Working Party in the Council of the EU

Actors:

European Commission

Presidency

Member States

General Secretariat of the Council incl. Legal Service

General Secretariat:

European Commission:

- its role is to introduce the proposal and to advocate it throughout the negotiations
- comments on all compromise proposals made by the Presidency
- in favour of reasonable compromises
- red lines: **mandatory** allocation mechanism, simple reference key (*position quite flexible*), limited possibility for MS to buy-out *(positions flexible both to the amount per applicants or % of buy outs)*

Presidency: Finland

- leads the negotiations in the Working Party
- collects positions of MSs and prepares the compromise proposals
- tries to reach compromise among MS and the European Commission (but also tries to satisfy national interests)

Member States:

- defend national interests

Hypothetical examples of Member States positions

Poland:

AIM: no mandatory allocation mechanism, but in case there is one – more objective reference key – more criteria (like unemployment, cultural ties with the applicants). 36/3 – prefer even stricter rule – only applicants with relevant chance to be granted protection. Reasonable buyout for all allocations – EUR 250,000 is not reasonable.

Hungary:

AIM: no mandatory allocation mechanism at all *(no flexibility)*. Sanctions to MS who do not control their external border controls effectively. MS have to have sufficient resources to help themselves as HU has and is able. No pathways further from MS of first entry. 100% buy out – EUR 250,000 is not reasonable.

Germany:

AIM: mandatory allocation mechanism for all MS. 36/3 important to keep – MS of first entry shall have certain obligations. Reference key shall reflect number of applications Germany is still facing. Threshold % – flexible but only on condition that MS of first entry fulfil their obligation like registration and security checks. Flexible on buy out (EUR 250,000 is not reasonable) but no to 100% allocations buy-out.

Sweden:

AIM: mandatory allocation mechanism for all MS. Accent on solidarity – threshold % too high. Flexible in many areas such as 36/3, but no buy out.

Greece:

AIMAIM: mandatory allocation mechanism for all MS. Allocation of all applicants – 36/3 problem. 150% threshold problem – too high, crisis prevention needed. Reference key – further criteria needed. No buy out.

France:

AIM: mandatory allocation mechanism for all MS but flexible in many areas in order to reach compromise, ie. only partial obligation. Threshold % – flexible. 36/3 – prefer even stricter rule – only applicants with relevant chance to be granted protection. Flexible on reasonable buy out (EUR 250,000 is not reasonable), ideally only to certain % of allocations.

Italy:

AIM: mandatory allocation mechanism for all MSs. Allocation of all applicants – 36/3 problem. 150% threshold problem – too high, crisis prevention needed. Reference key – further criteria needed. No buyout.

Netherlands

AIM: at least partial mandatory allocation mechanism for all MS. 36/3 important to keep at least as it stands – the MS of first entry shall have certain obligations. Reference key flexible. Threshold % – flexible but only on condition that the MS of first entry fulfil their obligation like registration and security checks. Flexible on reasonable buyout (EUR 250,000 is not reasonable).

Additional source:

Positions of other Member States can be also searched in the Interparliamentary EU information exchange (IPEX).

Council of the European Union

Brussels, 26 August 2016
(OR. en)

8715/1/16
REV 1

Interinstitutional File:
2016/0133 (COD)

ASILE 11
CODEC 613

PROPOSAL

No. Cion doc.:	COM(2016) 270 final/2
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

Delegations will find attached a **new version** of document COM(2016) 270 final.

Encl.: COM(2016) 270 final/2

EUROPEAN
COMMISSION

Brussels, 4.5.2016
COM(2016) 270 final/2

2016/0133 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- Reasons for and objectives of the proposal

…

Recent experience has however shown that large-scale uncontrolled arrivals put an excessive strain on the Member States' asylum systems, which has led to an increasing disregard of the rules. This is now starting to be addressed with a view to regaining control of the present situation by applying the current rules on Schengen border management and on asylum, as well as through stepped up cooperation with key third-countries in particular Turkey. However, the situation has exposed more fundamental weaknesses in the design of our asylum rules which undermine their effectiveness and do not ensure a sustainable sharing of responsibility, which now need to be addressed.

… the migratory and refugee crisis exposed significant structural weaknesses and shortcomings in the design and implementation of the European asylum system, and of the Dublin rules in particular. The current Dublin system was not designed to ensure a sustainable sharing of responsibility for applicants across the Union. This has led to situations where a limited number of individual Member States had to deal with the vast majority of asylum seekers arriving in the Union, putting the capacities of their asylum systems under strain and leading to some disregard of EU rules. In addition, the effectiveness of the Dublin system is undermined by a set of complex and disputable rules on the determination of responsibility as well as lengthy procedures. In particular, this is the case for the current rules which provide for a shift of responsibility between Member States after a given time. Moreover, lacking clear provisions on applicants' obligations as well as on the consequences for not complying with them, the current system is often prone to abuse by the applicants.

The objectives of the Dublin Regulation – to ensure quick access of asylum applicants to an asylum procedure and the examination of an application in substance by a single, clearly determined, Member State – remain valid. It is clear, however, that the Dublin system must be reformed, both to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States' asylum systems are faced with disproportionate pressure.

This proposal is a recast of 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 ("the Dublin III Regulation").

In particular, this proposal aims to:

- enhance the system's capacity to determine efficiently and effectively a single Member State responsible for examining the application for international protection. In particular, it would remove the cessation of responsibility clauses and significantly shorten the time limits for sending requests, receiving replies, and carrying out transfers between Member States;

- ensure fair sharing of responsibilities between Member States by complementing the current system with a corrective allocation mechanism. This mechanism would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers;
- discourage abuses and prevent secondary movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and remain in the Member State determined as responsible. This also requires proportionate procedural and material consequences in case of non-compliance with their obligations.

…

II. Corrective allocation mechanism

The recast Regulation establishes a corrective mechanism in order to ensure a fair sharing of responsibilities between Member States and swift access of applicants to procedures for granting international protection, in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under the Regulation. It should mitigate any significant disproportionality in the share of asylum applications between Member States resulting from the application of the responsibility criteria.

- **Registration and monitoring system**

  An automated system is established that will allow for the registration of all applications and the monitoring of each Member State's share of all applications. The Union's Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) will be responsible for the development and technical operation of the system. As soon as an application is lodged, the Member State shall register that application in the automated system, which will record each application under a unique application number. As soon as a Member State has been determined to be the Member State responsible, this will also be included in the system. The automated system will also indicate, in real time, the total number of applications lodged in the EU and the number per Member State, as well as – when a Member State responsible has been determined – the number of applications that each Member State must examine as the Member State responsible and the share which this represents, compared to other Member States. The system will also indicate the numbers of persons effectively resettled by each Member State.

- **Triggering the corrective allocation mechanism**

  The number of applications for which a given Member State is responsible and the numbers of persons effectively resettled by a Member State are the basis for the calculation of the respective shares. This includes applications for which a Member State would be responsible under the inadmissibility check, safe country of origin and security grounds. Calculations take place on a rolling one-year basis, i.e. at any moment, based on the number of new applications for which a Member State has been designated as responsible in the system over the past year and the number of persons effectively resettled. The system continuously calculates the percentage of applications for which each Member State has been designated as responsible and

compares to the reference percentage based on a key. This reference key is based on two criteria with equal 50% weighting, the size of the population and the total GDP of a Member State.

The application of the corrective allocation for the benefit of a Member State is triggered automatically where the number of applications for international protection for which a Member State is responsible exceeds 150% of the figure identified in the reference key.

- **Allocation of applications through a reference key and cessation**

  Once the mechanism is triggered, all new applications lodged in the Member State experiencing the disproportionate pressure, after the admissibility check but before the Dublin check, are allocated to those Member States with a number of applications for which they are the Member State responsible that is below the number identified in the reference key; the allocations are shared proportionately between those Member States, based on the reference key. No further such allocations will be made to a Member State once the number of applications for which it is responsible exceeds the number identified in the reference key.

  The allocation continues as long as the Member State experiencing the disproportionate pressure continues to be above 150% of its reference number.

  Family members to whom the allocation procedure applies will be allocated to the same Member State. The corrective allocation mechanism should not lead to the separation of family members.

- **Financial solidarity**

  A Member State of allocation may decide to temporarily not take part in the corrective mechanism for a twelve-months period. The Member State would enter this information in the automated system and notify the other Member States, the Commission and the European Agency for Asylum. Thereafter, the applicants that would have been allocated to that Member State are allocated to the other Member States instead. The Member State which temporarily does not take part in the corrective allocation must make a solidarity contribution of EUR 250,000 per applicant to the Member States that were determined as responsible for examining those applications. The Commission should adopt an implementing act, specifying the practical modalities for the implementation of the solidarity contribution mechanism. The European Union Agency for Asylum will monitor and report to the Commission on a yearly basis on the application of the financial solidarity mechanism.

- **Procedure in the transferring Member State and the Member State of allocation**

  The Member State which benefits form the corrective mechanism shall transfer the applicant to the Member State of allocation and shall also transmit the applicant's fingerprints in order to allow security verification in the Member State of allocation. This aims to prevent any impediments to allocation that was experienced during the implementation of the relocation decisions. Following the transfer, the Member State of allocation will do the Dublin check to verify whether there are primary criteria, such as family in another Member State, that apply in the case of the applicant. Where this should be the case, the applicant will be transferred to the Member State which would consequently be responsible.

↓ 604/2013

2016/0133 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

⇩ new

CHAPTER VII

Corrective allocation mechanism

Article 34

General Principle

1. The allocation mechanism referred to in this Chapter shall be applied for the benefit of a Member State, where that Member State is confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under this Regulation.

2. Paragraph 1 applies where the automated system indicates that the number of applications for international protection for which a Member State is responsible is higher than 150% of the reference number for that Member State as determined by the key referred to in Article 35.

…

4. The automated system shall inform Member States, the Commission and the European Union Agency for Asylum once per week of the Member States' respective shares in applications for which they are the Member State responsible.

5. The automated system shall continously monitor whether any of the Member States is above the threshold referred to in paragraph 2, and if so, notify the Member States and the Commission of this fact, indicating the number of applications above this threshold.

6. Upon the notification referred to in paragraph 5, the allocation mechanism shall apply.

Article 35

Reference key

1. For the purpose of the corrective mechanism, the reference number for each Member State shall be determined by a key.

2. The reference key referred to in paragraph 1 shall be based on the following criteria for each Member State, according to Eurostat figures:

(a) the size of the population (50 % weighting);

(b) the total GDP (50% weighting);

…

Article 36

Application of the reference key

1. Where the 150% threshold is reached, the automated system referred shall apply the reference key to those Member States with a number of applications for which they are responsible below their share (35/1) and notify the Member States thereof.

2. Applicants who lodged their application in the benefitting Member State after notification of allocation shall be allocated to the Member States referred to in paragraph 1

3. Applications declared inadmissible or examined in accelerated procedure shall not be subject to allocation.

4. On the basis of the application of the reference key, the automated system shall indicate the Member State of allocation. …

Article 37

Financial solidarity

1. A Member State may…enter in the automated system that it will temporarily not take part in the corrective allocation mechanism.

…

3. …the automated system shall communicate to the Member State not taking part in the corrective allocation mechanism the number of applicants for whom it would have otherwise been the Member State of allocation. That Member State shall thereafter make a solidarity contribution of EUR 250,000 per each applicant who would have otherwise been allocated to that Member State during the twelve-month period. The solidarity contribution shall be paid to the Member State determined as responsible for examining the respective applications.

…

LITERATURE:

Kris Pollet. *All in vain? The fate of EP positions on asylum reform after the European elections.* 23 May 2019, available at: http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/ [Accessed: 18 May 2019].

Sarah Léonard, Christian Kaunert. *Refugees, Security and the European Union*. London: Routledge, 2019.

5. THE ROLE OF THE COURTS

5.1 CJEU, ECHR and national courts

Article 19 of the TEU

The CJEU *"shall ensure that in the interpretation and application of the Treaties the law is observed."*

Article 19 (3) of the TEU

The CJEU *"give[s] preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions"*

The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) is responsible for ensuring that union law is interpreted and applied uniformly in all Member States.

Based on **Article 19 (TEU),** the court ensures that the interpretation and application of the Treaties are observed through rulings on cases brought before it. The most common types of cases are:

- **Preliminary rulings**: If a national court wants to clarify the interpretation or validity of an EU law, it can ask the Court through this specific procedure.
- **Infringement proceedings**: This proceeding can be launched on the Commission's or on a Member State's initiative against a national government when it has failed to comply with EU law.
- **Actions for annulment** – Member States, the Council, the Commission, and in some cases the European Parliament can launch this action before the Court when there is a suspicion of a violation of EU treaties or fundamental rights. In case of infringement, the Court has the power to annul the act.

Under certain conditions, individuals may refer an action to the CJEU if they are concerned directly and individually by the contested act. Overall, the conditions for individuals to directly challenge an EU act before the CJEU are very rarely met, no examples exist in asylum-related cases today.

The reference for a **preliminary ruling** is a key mechanism aimed at enabling the courts of the Member States to ensure uniform interpretation and application of the EU law. Under Article 267 procedure, the CJEU does not actually decide the substance of the case, does not decide in rem. The case is returned back to the national court for a decision based on the interpretation provided by the CJEU. Decisions of the CJEU are binding on EU Member States.

As said above, the CJEU not only focuses on the object and purpose of the relevant provisions of the primary law and secondary legislation but also those of the EU regime

as a whole, relying on the human rights standards contained in the EU Charter and the founding values of the Union.

The CURIA case law database provides free access to ECJ/CJEU case law: https://curia.europa.eu/jcms/jcms/j_6/en/ – section "Case law".

The European Court of Human Rights

The European Court for Human Rights (ECtHR) hears complaints by individuals and references by States against acts or omissions by a public authority violating the ECHR. These complaints may be brought against any of the 47 Member States of the Council of Europe including all 27 EU Member States.

Note: ***Protocol No. 16 to the Convention*** *allows the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 came into force on 1 August 2018 in respect of the States which have signed and ratified it.*

The ECtHR is an international court set up in 1949 in the framework of the Council of Europe and rules on alleged violations of the civil and political rights secured in the European Convention on Human Rights (ECHR). Judgements made by the ECtHR are binding on the States parties concerned. Both states and individuals can apply to the court.

ECtHR case law is of great importance and has made the Convention a powerful living instrument.

The ECtHR protects all individuals within the jurisdiction of any of its 47 states, regardless of their citizenship or residence status.

In order to lodge a complaint a number of **admissibility requirements** needs to be met. Primarily: all effective domestic remedies must have been exhausted and that a claim must be brought before the ECtHR within six months of the final domestic decision[1]. The case should be "substantially new", not violating ECHR provisions or manifestly ill-founded, or an abuse of the right of application (Article 35 of the ECtHR). Unlike the CJEU, ECHR decides the case before it *in rem* and where required, includes factual findings. Its judgments are binding on the parties to the application made.

The HUDOC database provides free access to ECtHR case law: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=

National Courts

Member States' courts hear complains against acts or omissions by an EU Member State violating EU (or of course domestic) law. They are under an obligation to ensure that EU law is correctly applied and may – and sometimes must – refer the case to the CJEU for a preliminary ruling on the interpretation of the EU provision concerned. They

[1] Check the Protocol 15 to the Convention

should respect general principles of EU law such as primacy, direct effect and indirect effect. National courts and authorities should take into account the case law of the CJEU in keeping with the principle of homogeneous interpretation of the CEAS a*cquis*. They must also respect at all times the relevant international standards including the 1951 Geneva Convention, the CAT, the CRC and the ECHR, in light of the case law of the respective monitoring bodies.

5.2 Selected case law

The importance of the CJEU interpretative judgments for the jurisdiction of national courts in the area of EU asylum acquis can be illustrated by CJEU statistics. The statistics on the activity of the CJEU on cases completed by judgments, by opinions, or by orders including judicial determination by subject matter of the action during 2013–2017 shows that the greatest number of cases in the area of freedom, security and justice are due to numerous migration and asylum cases.[2]

Year	2013	2014	2015	2016	2017
Area of freedom, security and justice	46	51	49	51	61

The following sections present an **overview of selected case law relevant for interpretation of legislative instruments of the CEAS** and concepts used in European asylum law. This overview of relevant jurisprudence is not intended as an exhaustive list. It only aims to provide practical direction to students by referring to some of the most relevant provisions and case law. The references below are organized by respective legal instruments and by topic. Where possible, the case law is hyperlinked for ease of reference.

5.2.1 Determination of the state responsible for examining an asylum application ("Dublin Regulation")

In keeping with the preamble of the Dublin III Regulation, and as attested by the case law of the CJEU since the *Ghezelbash* judgment[3], human rights should be mainstreamed fully in the Dublin practice. The interpretative judgments of the CJEU are therefore of utmost importance for clarification of various criteria and rules of the Dublin procedure.

Selected relevant CJEU case law

Dublin Regulation

Council Regulation (EC) N° 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application

Kastrati, C-620/10

The **withdrawal of an application** for asylum within the terms of Article 2(c) of DR, which occurs before the Member State responsible for examining that application

[2] See: Court of Justice of the European Union Annual report on judicial activity 2017, pg. 107

[3] C-63/15 Ghezelbash

has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable. In such a case, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to this being placed in the applicant's file.

N.S. and M.E. – Joined Cases C-411/10, C-493/10

The case concerned the concept of **safe country and respect for fundamental rights** of asylum seekers. The CJEU held that EU law prevents the application of a conclusive presumption that Member States observe all fundamental rights of the Union. Article 4 of the EU Charter must be interpreted as meaning that Member States may not transfer an asylum seeker to the Member State responsible within the meaning of DR where they cannot be unaware that systematic deficiencies in the asylum procedure and the reception conditions in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment.

Puid, C-4/11

The case concerns a "Dublin transfer." Mr. Puid was an Iranian national. His asylum application in Germany was declared inadmissible on the ground that he had transited via Greece, which was therefore **the country responsible for his application.** The CJEU reiterated the finding in N.S. and Others (see above) It is for the referring Court to examine whether such systemic deficiencies existed on the date on which the decision to transfer Mr. Puid to Greece was enforced.

Halaf, C-528/11

An Iraqi national applied for asylum in Bulgaria, but he had previously lodged an asylum application in Greece. The Court held that the exercise of the **sovereignty clause** in Article 3(2) of the DR is not subjected to any particular condition. Therefore, whether the Member State responsible for an asylum application under the DR has or has not responded to a request to take back the asylum seeker does not have any bearing on the possibility to use it.

MA and others, C-648/11

The case concerns three **unaccompanied minors** who applied for asylum in the United Kingdom after having previously lodged asylum applications in the Netherlands and Italy. The British authorities decided first to send them back to those countries in application of the Dublin Regulation, but later they ruled that the UK would take responsibility for their applications under the sovereignty clause. As the minors did not withdraw the appeals they had lodged against the initial return decision, the Court of Appeal (England and Wales) referred to the CJEU for a preliminary ruling: The CJEU considered the objective of Article e 6(2), which focuses particularly on unaccompanied minors as a particularly vulnerable category, and the objective of the DR, which is to guarantee effective access to an assessment of the applicant's refugee status. In light of this, the CJEU concludes that **unaccompanied minors should not, as a rule, be transferred to another Member State in order to avoid prolongation of the procedure.**

Dublin III (recast)

Regulation (EU) N° 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection

Al Chodor, C-528/15

The case relates to the interpretation of Article 28 of the DR III on **the conditions of the detention** of asylum seekers pending a transfer to another Member State. An Iraqi male and his two minor children were detained by the Czech police in May 2015 pending their transfer to Hungary pursuant to the DR and Article 129(1) of the Czech Aliens Act. The CJEU noted that the meaning of Article 6 of the EU Charter should be defined in light of the established case law of the ECtHR, which requires any measure on deprivation of liberty to be accessible, precise, and foreseeable. Article 2(n) of the Dublin III Regulation requires the criteria to establish a 'risk of absconding' to be 'defined by law'. The CJEU held that the **objective criteria to define a 'risk of absconding'** must be established in a binding provision of general application. In the absence of that, Article 28(2) the Czech Aliens Act is inapplicable and detention on this ground must be declared unlawful.

Mirza, C-695/15 PPU

The right of a Member State to send an applicant to a **safe third country** in Article 3(3) DRIII is not limited in time, operates subject to the requirements of the recast Asylum Procedures Directive, and can be exercised by any Member State, whether responsible pursuant to DRIII or otherwise. The wording of Article 33(1) of that directive does not restrict this right.

M.A. and Others, C-661/17

This case deals mainly with Brexit implication and the best interest of the child. A family (parents and a child) applied for asylum in Ireland, after having been residents in the UK for 6 years. The Irish authorities sent them back the UK, which accepted them. The applicants tried to challenge their return to the UK on medical grounds, as well as on grounds relating to the country's future withdrawal from the EU. The CJEU was asked to rule on the **relevant Brexit implications,** as well as on several interpretative issues regarding Article 17, best interests of the child and effective remedy. The finding is consistent with the recommendations stemming from the UNHCR and the European Asylum Support Office (EASO) on how to deal with the principle of the best interests of the child in asylum procedures.

Jafari, C-646/16

Two sisters from Afghanistan with their children came to Europe through Serbia to Croatia and then to Slovenia and they lodged their application in Austria, finally. The CJEU ruled in the case, that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having 'irregularly crossed' the border of the first Member State within the meaning of that provision. Article 13(1) of the Dublin Regulation III therefore applies and Croatia is deemed to be responsible for the protection claims.

A.S., C-490/16

A.S., a Syrian national, crossed from Serbia to Croatia at a designated border crossing point, accompanied by the Serbian authorities. He was then handed over to the Croatian

authorities, who did not deny him entry to Croatia, did not initiate any procedure for his return to Serbia, neither did they verify if he met the conditions for lawful entry. Furthermore, the Croatian authorities organised his transport to Slovenia, where he entered on 20 February 2016. Slovenia wished to hand him over to Austria, but the latter refused him entry. Hence, A.S. applied for international protection in Slovenia.

C.K., C-578/16 PPU

The case relates to the interpretation of Articles 3(2) and 17(1) Dublin III Regulation (DR III). The case concerns the transfer of a couple and their new-born child from Slovenia to Croatia. The CJEU ruled that even if there are no serious grounds for believing that there are systemic failures in the asylum procedure and the conditions for the reception of applicants for asylum, a transfer in itself can entail a real risk of inhuman or degrading treatment within the meaning of Article 4 EU Charter. If necessary, a Member State should suspend the transfer for as long as the applicant's health condition does not render them capable of such a transfer. The requesting Member State may also choose to examine the request itself by making use of the "discretionary clause" under Article 17(1) DR III. That provision cannot, however, be interpreted to imply an obligation for that Member State to do so. If the state of health of the asylum seeker does not allow the requesting Member State to transfer within a six-month period, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State in accordance with Article 29(2) DR III

X., C-213/17

An asylum applicant lodged multiple asylum applications in two different Member States and he was the subject of a European Arrest Warrant at the same time. The CJEU ruled that where an applicant for international protection has been surrendered by one Member State to another under a European Arrest Warrant and is staying in the territory of that second Member State without having lodged a new application for international protection there, that second Member State may request the first Member State to take back that applicant and is not required to decide on the application lodged by that applicant. In the Court's view, ruling otherwise could have the effect of deterring Member States from requesting the surrender of an asylum applicant for criminal prosecution in order to avoid having the responsibility for examining that person's application at the end of the criminal proceedings transferred to them.

Karim, C-155/15

Mr. Karim a Syrian national lodged his application for international protection in Sweden, the Swedish authorities recognized, that he had lodged another application in Slovenia before. Mr. Karim proved, that he had stayed for more than three months outside the EU in the meantime. The CJEU held that the applicant must be able to contest a transfer decision and invoke an infringement of the rule set out in subparagraph 19(2) DR III, i.e. where the applicant provides evidence that they have left the territory of one Member State, having made an application there, for at least three months and has made a new asylum application in another Member State.

H. and R., Joined Cases C-582/17, C-583/17

As the application of the criteria is limited in principle to the "take charge" phase, it is essential that comprehensive legal protection be afforded at this stage. Article 27 DR III

explicitly foresees the **right of applicants to appeal against transfer decisions,** and in this context they may raise any argument relating to the incorrect application of the

Regulation, including the wrong application of the criteria as well as a violation of the attendant procedural or evidentiary rules.

Aziz Hasan, C-360/16

The case concerns a factual situation relevant for a review by a court or tribunal of a transfer decision based on the Dublin III Regulation. Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of the Regulation and Article 47 of the Charter, must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, which provides that the factual situation that is relevant for the review by a court or tribunal of a transfer decision is that obtaining at the time of the last hearing before the court or tribunal determining the matter or, where there is no hearing, at the time when that court or tribunal gives a decision on the matter.

Adil Hassan, C-647/16

Article 26(1) of the DR III must be interpreted as precluding a Member State that has submitted, to another Member State which it considers to be responsible for the examination of an application for international protection pursuant to the criteria laid down by that regulation, a request to take charge of or take back a person referred to in Article 18(1) of that regulation from adopting a transfer decision and notifying that person before the requested Member State has given its explicit or implicit agreement to that request.

Ghezelbash, C-63/15 and C-155/15 Karim

These cases relate to the scope of the right to an effective remedy in recital 19 and Article 27(1) of the DR III.

Shiri, C-201/16

The case concerned **the right to an effective remedy** where a Dublin transfer had not been carried out within the six-month period laid down in Article 29 DRIII. It is apparent from the wording of Article 29(2) DRIII that responsibility is automatically transferred to the requesting Member State after the expiry of the six-month period, without the need of any reaction from the part of the requested Member State.

Jawo, C-163/17

The case primarily concerns the question whether the EU Charter precludes **the transfer of an applicant for international protection, pursuant to the Dublin III Regulation, to the Member State normally responsible for processing their application,** , if the applicant would be exposed to a substantial risk of suffering in that Member State inhuman or degrading treatment on account of the living conditions that they could be expected to encounter as a beneficiary of international protection (assuming that the applicant is granted such protection). In contrast to previous judgments, namely *N.S. and Others* and *C.K. and Others*, the CJEU considered the applicant's circumstances after having been transferred to the responsible Member State and granted international protection. This judgment provides another instance in which the principle of mutual trust – which is the cornerstone of the Common European Asylum System (CEAS) – can be rebutted, leading to an asylum applicant not being transferred.

Mohammad Khir Amayry, C-60/16

The CJEU ruled that Article 28 DRIII, read in the light of Article 6 of the EU Charter, does not preclude national legislation allowing for a **detention** to be maintained for no longer than two months where that detention begins after the requested Member State has accepted the take charge request, as long as the detention does not go beyond the time which is necessary to carry out the transfer. Second, that national legislation such as that in Sweden, which allows for a detention to be maintained for 3 or 12 months until the transfer is carried out, while following the DRIII and the guarantees under Article 6 of the EU Charter.

Ibrahim, Sharqawi and Others and Magamadov – Joined Cases C-297/17, C-318/17, C-319/17, C-438/17

This case deals with a **Dublin transfer and the principle of non-refoulement.** The CJEU ruled that an asylum seeker may be transferred to the Member State that is normally responsible for processing their application or that has previously granted them subsidiary protection unless the expected living conditions in that Member State of those granted international protection would expose them to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment inadequacies in the social system of the Member State concerned do not warrant, in and of themselves, the conclusion that there is a risk of such treatment.

Selected ECtHR case law

Tarakhel v. Switzerland, no. 29217/12, 4 November 2014

The case concerns **the expulsion of asylum seekers in application of the EU Dublin Regulation**. Mr. G. Tarakhel and his family, Afghan nationals, arrived to Italy by boat on 16 July 2011. They then moved to Austria, where their asylum application was rejected, and lodged a new application in Switzerland. On the request of the Swiss authorities, Italy accepted to take back the applicants in accordance with the Dublin Regulation. The applicants challenged the transfer decision before Swiss Court and then before the ECtHR. As explicitly affirmed in the *Tarakhel* judgment of the ECtHR, the transferring State has the obligation to obtain guarantees from the responsible State that families with children will not be separated once they are taken charge of or taken back.

***A.S. v. France*, no. 46240/15 (English summary), 19 April 2018**

In this case a torture victim suffering from severe posttraumatic stress disorder, and benefiting from the support of his sisters in Geneva, was to be transferred to Italy. The A.S. judgment of the ECtHR clearly implies that the principles affirmed in *Tarakhel* (see above), including the principle of family unity, apply at the very least with respect to "critically ill" transferees. Furthermore the UN Committee Against Torture has more recently affirmed the applicability of duties comparable to those stemming from *Tarakhel* to torture victims.

5.2.2 Qualification of third-country nationals as beneficiaries of international protection

Qualification directive

Council Directive 2004/83/EC on minimum standards for the qualification and status as refugees or as persons who otherwise need international protection – "Qualification Directive"

QD directive interpretation

The QD (recast) details the 'standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted' (Article 1 QD) (see above in Chapter 3)

Selected relevant CJEU case law

B & D – Joined Cases C-57/09, C-101/09

In this case the CJEU provided guidance on **how to apply the exclusion clauses**. The fact that the person concerned in this case was a member of an organisation and actively supported the armed struggle waged by the organisation did not automatically constitute a serious basis for considering his acts as **'a serious non-political crime'** or **'acts contrary to the purposes and principles of the UN'.** Both provisions would exclude him from refugee protection. A case-by-case assessment of the specific facts must be the basis for finding whether there are serious reasons for considering the person guilty of such acts or crimes. This should be done with a view to determining whether the acts committed by the organisation meet the conditions of those provisions, and whether the individual responsibility for carrying out those acts can be attributed to the person, accounting for the standard of proof required under Article 12 (2) of the directive. The Court also added that the basis for exclusion from refugee status is not conditional on the person posing an ongoing threat to the host Member State nor on an assessment of proportionality in relation to the particular case.

Minister voor Immigratie en Asiel v. X, Y and Z v. Minister voor Immigratie en Asiel – Joined Cases C-199/12, C-200/12, C-201/12

The CJEU stated that when assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal their **homosexuality** in their country of origin or to exercise reserve in the expression of their sexual orientation.

Bundesrepublik Deutschland v. Y and Z – Joined Cases C-71/11, C-99/11

The CJEU defined which acts may constitute an **"act of persecution"** in the context Article 9 (1) (a) of the QD and Article 10 of the EU Charter. Specifically, the Court was asked whether the definition of acts of persecution for religious reasons covered interferences with the "freedom to manifest one's faith". The CJEU clarified that an act of persecution may actually result from an interference with the external manifestation of freedom of religion. The intrinsic severity of such acts and the severity of their consequences on the persons concerned determine whether a violation of the right guaranteed by Article 10 (1)

of the Charter constitutes an act of persecution under Article 9 (1) of the directive. The CJEU also held that national authorities, in assessing an application for refugee status on an individual basis, cannot reasonably expect an asylum seeker to forego religious activities that can put their life in danger in the country of origin.

Abdulla E.A. – Joined Cases C175/08, C176/08, C178/08, C179/08

The case concerned **the cessation of refugee status** of certain Iraqi nationals to whom Germany had granted refugee status. The basis of the cessation was that the conditions in their country of origin had improved. The CJEU held that, for the purposes of Article 11 of the Qualification Directive, refugee status ceases to exist when there has been a **significant and non-temporary change of circumstance**s in the third country concerned and the basis of fear, for which the refugee status was granted, no longer exists and the person has no other reason to fear being persecuted. For assessing a change of circumstances, states must consider the refugee's individual situation while verifying whether the actor or actors of protection have taken reasonable steps to prevent the persecution and that they, among other things, operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution. This protection must also be accessible to the national concerned if they cease to have refugee status.

Bolbol, C-31/09

A stateless person of Palestinian origin who left the Gaza Strip and arrived in Hungary where she submitted an asylum application without previously having sought protection or assistance from the UNRWA. The CJEU clarified that, for the purposes of Article 12 (1) (a) of the Qualification Directive, a person should be regarded as having received p**rotection and assistance from a UN agency**, other than the UNHCR, only when they have actually used that protection or assistance, not merely by virtue of being theoretically entitled to it.

El Kott, C-364/11

The CJEU clarified that persons forced to leave the UNRWA operational area for reasons unconnected to their will and beyond their control and independent volition must be automatically granted refugee status, where none of the grounds of exclusion laid down in Articles 12 (1) (b) or (2) and (3) of the directive apply.

Elgafaji, C-465/07

The case concerned the return of an Iraqi national to Iraq. The CJEU assessed the granting of subsidiary protection status to an Iraqi national who could not be qualified as a refugee and based its reasoning on the meaning of "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" referred to in Article 15 (c) of the Qualification Directive. The Court held that the meaning of this provision of the directive has its own field of application which is different from the terms 'death penalty', 'execution', and 'torture or inhuman or degrading treatment or punishment' used in Article 15 (a) and (b) of the directive. It covers a more general risk of harm relating either to the circumstances of the applicant and/or to the general situation in the country of origin. Eligibility for subsidiary protection under Article 15 (c) requires showing that the applicant is affected by factors particular to their personal circumstances and/or by indiscriminate violence. The more the applicant is able to show that they are affected by specific factors particular to their personal circumstances, the lower the level of indiscriminate violence required for them to be eligible for subsidiary

protection under Article15 (c). In exceptional situations, the applicant may be eligible for subsidiary protection where the degree of indiscriminate violence of an armed conflict reaches such a high level that substantial grounds are shown for believing that they may face a real risk of being subject to threat of harm based solely on account of their presence in the country or region of origin.

Diakite, C-285/12

The case concerns **relations between the EU legal order and international law**. Mr. Diakité, a Guinean national, who has repeatedly applied for asylum in Belgium since 2008 due to the sustained violence and repression in his home country. The Belgian authorities had denied him both refugee status as well as subsidiary protection, finding that there was no 'armed conflict' in Guinea as defined in international humanitarian law. In this case the CJEU interpreted the concept of "internal armed conflict" (Article 15(c) of the QD) for the purpose of granting subsidiary protection under EU law. The CJEU ruled that 'internal armed conflict' has a definition independent of international humanitarian law and interpreted the concept in an EU asylum law context autonomously.

Qualification Directive (recast)

Directive 2011/95/EU of 13 December 2011 standards for the qualification of persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection

F., C-473/16

F., a Nigerian national applied for asylum in Hungary, claiming that he feared persecution in his country of origin on account of his homosexuality. His application was rejected on the basis of an expert's report prepared by a psychologist that concluded that it was not possible to confirm the applicant's sexual orientation. The CJEU concluded in this case that national authorities can order experts' reports with the purpose of assisting in the assessment of the facts and circumstances relating to a declared sexual orientation of an applicant, provided that the procedures for these reports are consistent with fundamental rights. However, the examining authority, courts or tribunal must not base their decision solely on the conclusions of an expert's report and are not bound by these conclusions when assessing the applicant's statements relating to their sexual orientation.

Alheto, C-585/16

This case concerns a stateless woman from Palestine who was registered as a refugee with the UNRWA and whose application for asylum in Bulgaria was denied on grounds that she had not proven any risk of persecution under Article 1(A) of the 1951 Refugee Convention.

Where a person is registered with the UNRWA and then later applies for international protection in a EU Member State, such persons are, in principle excluded from refugee status in the EU unless it becomes evident, on the basis of an individualised assessment of all relevant evidence, that their personal safety is at serious risk and it is impossible for the UNRWA to guarantee that the living conditions are compatible with its mission and that due to these circumstances the individual has been forced to leave the UNRWA area of operations.

M. and X. X. – Joined cases C-391/16, C77/17, C78/17

The judgment concerns applicants who had been convicted of serious crimes in Belgium and the Czech Republic. CJEU ruled, that EU Member States cannot deport refugees who have committed crimes if they will face inhuman or degrading treatment upon return. Instead, Member States must allow them to remain in the country. The CJEU recognised that the Geneva Convention permits states to derogate from the principle of *non-refoulement in cases in which* ***a refugee has committed a serious crime*** *and presents a threat to the nation, or if the refugee presents a serious threat to society*. However, the EU law must conform with the European Charter on Fundamental Rights, which prohibits exposure to torture and inhuman or degrading punishment or treatment. Member States cannot return refugees to their home countries if there was a possibility that they would face such treatment.

Bilali, C-720/17

The case concerns the interpretation of Article 19 of the QD in the **revocation of subsidiary protection status.** The applicant requested asylum in Austria in 2009, submitting he was stateless, and was granted subsidiary protection status in 2010 with the assumption that he was probably Algerian. In 2012, the Federal Asylum Office revoked the status on factual grounds that emerged upon further investigation. The CJEU held that it would be contrary to the general scheme and objectives of Directive 2011/95 to grant refugee status and subsidiary protection status to third-country nationals in situations which have no connection with the rationale of international protection. The CJEU stated that if the Member State concerned was not entitled to grant that status, it must, a fortiori, be obliged to withdraw it when its mistake is discovered.

Ahmed, C-369/17

The case deals with the **serious crime concept and subsidiary protection.** The CJEU held that the national authority ruling on the application for subsidiary protection must assess the seriousness of the crime that could result in a person being excluded from the benefit of subsidiary protection. This assessment shall consist of a full investigation into the circumstances of the individual case in question and cannot be taken automatically. By applying, by analogy, its own case law on exclusion from refugee status to this subsidiary protection case, the CJEU has contributed to further aligning refugee and subsidiary protection in the direction of a single international protection status.

Ayubi, C-713/17

The case deals with the **level of social security benefits** paid to refugees by the Member State which granted that status, whether temporary or permanent, which must be the same as that offered to nationals of that Member State. The CJEU stressed that Article 23 of the Geneva Convention also requires States to provide to refugees the same treatment with respect to public relief and assistance as is accorded to their nationals. The CJEU stated that EU law precludes national legislation, which provides that refugees with a temporary right of residence in a Member State are to be granted social security benefits which are less than those received by nationals of that Member State and refugees who have a permanent right of residence in that Member State. A refugee may rely on this incompatibility of legislation with Article 29(1) of Directive 2011/95 before the national courts.

Selected relevant ECtHR case law

G.S. v Bulgaria (no. 36538/17)

Extradition to Iran to face criminal charges would risk a violation of Article 3 of the ECtHR due to a possible exposure to flogging under Iranian penal law.

Sh.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia (no. 14165/16; English summary)

Detention conditions in Greek police stations and living conditions in the Idomeni Camp in northern Greece for five unaccompanied children were found to be in breach of Article 3 of the Convention. A further violation was found in respect of Article 5 § 1 regarding the "protective custody" of unaccompanied children in police stations.

Illias and Ahmed v. Hungary (no. 47287/15)

The case concerned the detention of two Bangladeshi asylum-seekers in the border zone for 23 days as well as their removal from Hungary to Serbia. When State Parties do not examine an application for international protection in its merits based on a safe third country clause, Article 3 of the ECHR still requires that they apply a thorough and comprehensive legal procedure to assess the existence of such risk by looking into updated sources regarding the situation in the receiving third country. Hungary violated Article 3 by failing to conduct an efficient and adequate assessment when applying the safe third country clause for Serbia.

5.2.3 Procedure for granting and withdrawing refugee status

Asylum Procedures Directive

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the recast Asylum Procedures Directive) replaced the first-phase Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

The recast Directive establishes rules and common procedures for lodging asylum applications. It sets time limits for the examination of applications (in principle six months at the administrative stage), while providing for the possibility to accelerate the procedure for applications of those coming from a country of origin being considered safe or in case of subsequent applications; Member States can voluntarily apply the safe third country concept; the Directive obliges Member States to provide access to legal assistance and for training to staff of Member States' asylum administration. The Member States should provide support to those in need of special guarantees (e.g. because of age, disability, illness, etc.).

Selected relevant CJEU case law

Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status – "Procedures Directive"

Mehmet Arslan v Policie ČR, C-534/11

The case concerns **detention conditions.** The Returns Directive lays down common standards and procedures for for Member States for the removal of third-country nationals staying illegally in their territory. Those nationals may, under certain conditions, be detained for a period generally not exceeding six months. The CJEU held that an asylum seeker may, on the basis of national law, be detained for the purposes of removal on the ground of illegal stay where the application for asylum has been made with the sole aim of delaying or jeopardizing enforcement of the return decision. The national authorities must, however, examine on a case-by-case basis whether that is the case and whether it is objectively necessary and proportionate to keep the asylum seeker in detention in order to prevent them from definitively evading return.

Tall, C-239/14

A national of Senegal, Mr. Tall, made a subsequent application for asylum following the rejection of his first claim by the Belgian authorities and courts. The CJEU held that **the non-suspensive effect of a decision** not to further examine a subsequent application under Article 32 of the 2005 Asylum Procedures Directive is not in violation of Articles 19(2) and 47 of the Charter since the decision's enforcement will not lead to the applicant being removed and is therefore unlikely to expose the applicant to a risk of inhumane treatment.

Asylum procedure Directive (recast)

Directive 2013/32/EU on common procedures for granting and withdrawing international protection

A V Migrationsverket, C-404/17

The main proceedings concern a Serbian national who applied for asylum in Sweden. The CJEU held that a Member State cannot rely on the rebuttable presumption under Articles 36 and 37 of the 2013 Procedures Directive (APD) in respect of the safe country of origin concept and subsequently find **the application to be manifestly unfounded** in accordance with Article 31(8)(b) without having fully implemented and complied with the procedures under the APD relating to the designation of countries as safe countries of origin.

Ahmedbekova, C-652/16

The case concerns applications for international protection lodged separately by family members. Article 33(2)(e) of the recast APD does not cover a situation in which an adult lodges, in her own name and on behalf of her minor child, an application for international protection which is based, inter alia, on a family tie with another person who has lodged a separate application for international protection. The involvement of an applicant for international protection in bringing a complaint against their country of origin before the European Court of Human Rights cannot in principle be regarded, for the purposes of assessing the reasons for persecution referred to in Article 10 of Directive 2011/95, as proof of that applicant's membership of a 'particular social group', within the meaning of Article 10(1)(d) of that directive, but must be regarded as a reason for persecution for 'political opinion', within the meaning of Article 10(1)(e) of the directive, if there are valid grounds for fearing that involvement in bringing that claim would be perceived by that country as an act of political dissent against which it might consider taking retaliatory action. A court is not required to consider evidence during proceedings if it finds that

those grounds or evidence were relied on in a late stage of the appeal proceedings or are not presented in a sufficiently specific manner to be duly considered or, in respect of evidence, it finds that that evidence is not significant or insufficiently distinct from evidence which the determining authority was already able to take into account.

Ibrahim, Sharqawi and Others and Magamadov – Joined Cases C-297/17, C-318/17, C-319/17, C-438/17

These cases concern the option provided for in the Asylum Procedures Directive to reject applications for asylum as being inadmissible because of the prior granting of subsidiary protection in another Member State. Stateless Palestinians that resided in Syria were granted subsidiary protection in Bulgaria and a Russian national who declares himself to be Chechen was granted such protection in Poland. As the further applications for asylum that they subsequently submitted in Germany were rejected, they brought actions before the German courts. The CJEU recalls that, in the context of the Common European Asylum System, which is based on the **principle of mutual trust between the Member States**, it must be presumed that a Member State's treatment of applicants for international protection and persons granted subsidiary protection complies with the requirements of the Charter, the Geneva Convention and the European Convention on Human Rights. An asylum seeker may be transferred to the Member State that is normally responsible for processing their application or that has previously granted him subsidiary protection unless the expected living conditions in that Member State to those granted international protection would expose them to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment

X., Y. v Staatssecretaris van Veiligheid en Justitie, C-180/17

The CJEU ruled that article 46 of 2013/32/EU Procedures Directive and Article 13 of Return Directive 2008/115/EC read in the light of Articles 18, 19(2) and 47 of the EU Charter must be interpreted as not precluding national legislation which, whilst making a provision for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer on that remedy **automatic suspensory effect** even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

E. G., C-662/17

The case concerns an Afghan unaccompanied minor who arrived in Slovenia in 2015 and claimed asylum. The CJEU ruled on whether an individual could appeal a decision which refused refugee status but granted subsidiary protection status, even if the rights and benefits afforded by each international protection status are identical in national law (Article 46(2) of *Asylum Procedures Directive*).

Torubarov, C-556/17

Alexei Torubarov, who is politically persecuted by the Putin regime, has been recognized as a refugee after a long "ping-pong game" between the Hungarian asylum authority and a court in Pécs. The preliminary question of the Hungarian court was whether the court can derive power from EU law to alter an administrative decision, specifically from the recast Asylum Procedures Directive 2013/32/EU (rAPD) and Article 47 of the EU Charter. The CJEU held that the court has the right to grant protection if in

a previous appeals procedure the asylum authority ignored the court's decision. A **national court or tribunal is required to vary a decision of the first-instance determining body that does not comply with its previous judgment.**

5.2.4 Reception Conditions Directive (recast)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) replaced the first phase Council Directive 2003/9/EC on minimum standards for the reception of asylum seekers. The recast Reception Directive aims at ensuring dignified and more harmonized standards of reception conditions. It ensures that applicants have access to housing, food, clothing, health care (including medical and psychological care), education for minors, and access to employment under certain conditions. The Directive also provides particular attention to vulnerable persons, especially unaccompanied minors and victims of torture. It also includes rules regarding detention of asylum seekers, ensuring that their fundamental rights are fully respected.

Selected CJEU case law

Cimade and GISTI, C-179/11

This case concerned the legality of a circular in French law which was challenged by two organisations on the basis that it was contrary to EU Law under the Reception Conditions Directive in so far as it excludes asylum seekers from entitlement to allowances if they are in the Dublin procedure in France. The CJEU held that the Reception Conditions Directive applies in such a scenario and therefore asylum seekers in the Dublin procedure should have access to the minimum reception conditions laid down in that Directive. This obligation ceases when the person is actually transferred to another Member State.

Mehmet Arslan v Policie ČR, C-534/11

(See above)

Saciri and others, C-79/13

The CJEU ruled on asylum seekers' **"right to family housing"** and held that the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the EU Charter, preclude the asylum seeker from being deprived – even for a temporary period of time after the completion of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive. The CJEU clarified the minimum standards which Member States must observe. Despite the practical difficulties Member States face in managing their reception for asylum seekers, families cannot be left homeless or forced to live in grossly inadequate conditions by means of a refusal of support for financial assistance to obtain housing.

J. N. v Staatssecretaris van Veiligheid en Justitie, C-601/15 PPU

The case concerned a third-country national who entered the Netherlands in 1995. After the rejection of his third asylum claim in 2014 he was ordered to leave the territory of the EU, with a ten-year entry ban. He had been convicted 21 times for criminal offences and was sentenced to terms of imprisonment and fines. In January 2015 he was arrested for theft and for breach of the entry ban and was sentenced to a term of imprisonment, during which he made a fourth asylum claim. After serving his sentence he was placed in detention as an asylum seeker under domestic law transposing Article 8(3)(e) of the recast Reception Conditions Directive (RCD), on the basis that this was required for the protection of national security or public order. He challenged his detention and when the matter came before the Raad van State it referred the following questions to the CJEU under the urgent preliminary ruling procedure:

The CJEU ruled that Article 8(3)(e) of the recast Reception Conditions Directive fulfils the requirements of proportionality by virtue of the strictly circumscribed framework regulating its use. In light of Article 52(3) of the Charter, Article 8(3)(e) therefore complies with Article 5(1)(f) of the ECHR.

Haqbin, C-233/18

Zubair Haqbin, an Afghan national, arrived in Belgium as an unaccompanied minor. After having lodged an application for international protection, he was hosted in a reception centre. Later he was involved in a brawl with other residents and arrested. He was released the following day, but as a consequence, he was excluded for a period of 15 days from accommodation and further material assistance in the reception facility. The CJEU ruled, that a sanction imposed in response of serious breaches of the rules of the accommodation centre or of seriously violent behaviour on behalf of an applicant for international protection cannot include withdrawal of material reception conditions relating to housing, food or clothing, even if it is temporary. Authorities should take into particular consideration any such sanction in cases of vulnerable applicants and unaccompanied minors. **Respect for human dignity**, within the meaning of Article 1 of the EU Charter, requires that the application of Article 20(4) of the Reception Directive does not bring the person concerned in a situation of extreme material poverty that does not allow that person to meet their most basic needs such as a place to live, food, clothing and personal hygiene, that undermines their physical or mental health or puts that person in a state of degradation incompatible with human dignity.

5.3 Other CEAS related instruments

As mentioned above, the Common European Asylum Policy is a very complex issue and it cannot be limited solely to CEAS legislative instruments. The CJEU case law listed below should at least illustrate the relevance of judicial interpretation of CEAS related instruments (some of them are shortly described in Chapter 7) for asylum policy application.

5.3.1 Schengen Borders Code

E.P., C-380/18

The CJEU held that Member States should be afforded a wide margin of discretion in interpreting the definition of a **threat to public order** in the decision to revoke a short-term visa. The case concerns an Albanian national who entered the Netherlands in April 2016 on a short-stay Schengen tourist visa. In May 2016, he was detained and accused of committing a 'serious' crime. The Secretary of State ordered him to leave the territory within 28 days. The CJEU first recalled the close linkages between the SBC, the Schengen Agreement, and the Returns Directive 2008/115/EC. It recalled that Article 20 (1) of the Schengen Convention (Regulation 610/2013) details conditions a visa applicant must comply with, including not posing a threat to a Member State. When these conditions are not met, the third-country national is considered to be in the state irregularly and can be returned as provided for under Article 3 (2) of the Return Directive. It ruled that Article 6 (1)(e) of the SBC, in relation to Article 20 of the Schengen Convention, should be interpreted as meaning that in order to declare a third-country national's stay to be irregular, the national authorities do not have to justify that the individual constitutes a real, current, and sufficiently serious threat to public order. Furthermore, it held that, in principle, a threat to public order can result from the mere existence of a serious suspicion of committing a crime. Nonetheless, authorities are obliged to base their decision on concrete facts and to respect the principle of proportionality.

5.3.2 Return Directive

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

The Returns Directive (RD) has been the subject of fierce criticism. The CJEU has been called to interpret its provisions on numerous occasions (such as Kadzoev, El Dridi, and Achughbabian). In particular, with regard to Article 15 on **the detention of irregular migrants** prior to their removal, the Court has so far explained how the period of detention should be calculated and when there is a 'reasonable prospect of removal' (Kadzoev); it has precluded the incarceration of irregular migrants during the return process on the sole ground that they remain on the territory of a Member State even though an order to leave exists (El Dridi), and it has attempted to strike a balance between the right to be heard and the efficiency of the administrative procedure to extend the period of detention (G & R).

Gnandi, C-181/16

In this case the CJEU solved the question whether the principle of non-refoulement and the right to an effective remedy preclude the adoption of a return decision immediately after the rejection of an asylum application, before the legal remedies available are exhausted. The CJEU ruled that the RD does not preclude the adoption of a return decision in such cases, however, **the legal effects of the return decision are suspended pending the outcome of the appeal,** the applicant is entitled to benefit from the rights of RCD, the applicant is

entitled to rely on any change in circumstances that have occurred after the adoption of the decision which may have a significant bearing on the assessment of the decision.

Celaj, C-290/14

The case deals with the relationship between **return policy and criminal law**. The CJEU clarified, whether the RD precludes national legislation providing for the imprisonment of an illegally staying third-country national who, following return, re-entered the territory of the State in breach of an entry ban and without being subject to return procedures. The CJEU ruled that the RD does not preclude imposing a prison sentence in such cases.

Affum, C-47/15

The case concerns the question whether a third-country national is illegally staying also when only **transiting** to reach another Member State. Can a third-country national who entered illegally and to whom return procedures have not been applied, be subject to a sentence of imprisonment? Can this be done when the person can be taken back by another Member State on the basis of a bilateral agreement? The CJEU ruled that a third-country national who illegally crossed an internal border and does not fulfil the conditions for entry and stay falls within the scope of the RD. The RD precludes national legislation allowing the imprisonment of third-country nationals who illegally crossed the internal border and were illegally staying and were not subject to return procedures. This is also the case if the irregular migrant can be taken back by another EU State.

5.3.3 Family reunification directive

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

Even if the Family Reunification Directive is not a part of the CEAS instruments package, its application is closely related with the common asylum policy and its human rights dimension. The Council of Europe Commissioner for Human Rights has said that **family reunification is an essential human right** which enables refugees to resume a normal life and is crucial for their integration in the host country in intervention in the case of *Dabo v. Sweden*, which concerns the refusal to grant family reunification to the family members of a person with refugee status in Sweden (see Application No. 12510/18 *Dabo v. Sweden*). This approach is also reflected in CJEU case law.

E. v Staatssecretaris van Veiligheid en Justitie, C-635/17

The CJEU interpreted Article 11(2) of the Family Reunification Directive (2003/86/EC) in a situation where an application for family reunification was lodged by a beneficiary of subsidiary protection. Since Netherlands law has made the Directive also applicable to persons with subsidiary protection status, Article 11 of the Directive must be applied to the case at issue. According to the CJEU, authorities have to take into consideration the specific circumstances of the sponsor and the minor, including the difficulties they faced during and after their flight from their country.

A. and S. v. Staatssecretaris van Veiligheid en Justitie, C-550/16

The CJEU ruled that Article 2(f) of Directive 2003/86/EC on the right to family reunification, read in conjunction with Article 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the

time of their entry into the territory of a Member State and of the introduction of their asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a 'minor' for the purposes of that provision.

The CJEU clarified **the child's right for family reunification.** The Court held, namely, that the provision of Directive on family reunification of refugee unaccompanied children with their parents by means of visas (or residence permits) introduces an unquestionably positive obligation for the host Member State. The refugee unaccompanied children are entitled, under the conditions set out in this Directive, to have their first-degree relatives in direct ascending line reunified with them.

EXERCISES:

1. **Analysis of the CJEU case dealing with interpretation of CEAS instruments**

   Select one of the above listed cases

   Report your analysis to the others

2. **Try to find out a preliminary ruling referred by your national court**

3. Below are some examples of simple hypothetical casework scenarios to illustrate the circumstances in which inadmissibility decisions may or may not be appropriate. Every case must be examined carefully, according to the individual facts of the case. Try to solve the cases using the Dublin regulation, Qualification directive and CJEU argumentation and the national immigration rules when necessary.

   ✓ **Dublin regulation**

   A claimant from non-EU country reached the Member State A by sea and he lodged an asylum application there. Later he submitted another application in the Member State B. The responsible authorities of the state B rejected the application because he had already filed an asylum application in the state A (which is the Member State normally responsible for examining an application under the Dublin Regulation). Is there a possibility for the claimant to challenge the transfer decision and under which conditions?

   (See the CJEU cases ***Jawo* C-163/17**,) ***N.S. and M.E. – Joined Cases* C-411/10, C-493/10 above and ECHR case** *M.S.S. v. Belgium and Greece referred in Chapter 1*)

   ✓ **Qualification directive**

   A non-EU state national had been convicted of a serious crime and as a result his refugee status was revoked by the respective authorities of the host Member State in line with security exceptions under Geneva Convention and Qualification Directive. Are there any circumstances which prevent to return refugees to their home countries in such cases?

   (See **M. and X. X. Joined cases C-391/16, C-77/17, C-78/17 above**)

Further reading and sources

The HUDOC database provides free access to ECtHR case law: http://HUDOC.echr.coe.int.

Court of Justice of the European Union: CURIA case law database. The CURIA case law database provides free access to ECJ/CJEU case law: http://curia. europa.eu.

Guide on case-law of the Convention – Immigration, Council of Europe/European Court of Human Rights, 2019

The Case-Law Guides are available for downloading at *www.echr.coe.int* (Case-law – Case-law analysis – Case-law guides). For publication updates please follow the Court's Twitter account at *https:/twitter.com/ echrpublication*.

EASO Information and Documentation System on Case Law : https://caselaw.easo.europa.eu

The **European Database of Asylum Law (EDAL)**, an online database managed by the European Council on Refugees and Exiles (ECRE) and a compilation of summaries of refugee and asylum case law from the courts of 22 European states, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)

6. AGENCIES

6.1 The European Asylum Support Office (EASO)

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

"Support is our mission"

Basic information:

The EASO is the European agency formed on 1 February 2011, on the legal basis of Regulation (EU) No 439/2010 (hereinafter also referred to as 'EASO Regulation') of the precedent year, with its seat in Valetta (Malta).

The EASO is a body of the European Union with its own legal personality (Article 40 of EASO Regulation) created to help to improve implementation of the **Common European Asylum System** (the CEAS), to strengthen the cooperation of Member States ('MS') on asylum, and provide support to MS whose asylum systems are under particular pressure (Article 1 of EASO Regulation). The EASO should act as an independent and impartial centre of expertise in asylum matters. It has no decision-making powers (Article 2(6) of EASO Regulation).

The structure of the Office contains:

- Management Board
- Executive Director
- staff, which contains currently about 300 members.

The Management Board is composed of nominees of MS and of the Commission (one member is nominated by every MS, two by the Commission) and serves as a planning and monitoring authority. The Executive Director is appointed by the Management Board for five years; they are in charge of the day-to-day management. The EASO established a **Consultative Forum for a dialogue with the civil society organisations.**

Activities:

The EASO has the following main duties:

- ✓ creating a platform for exchange of best practices in asylum matters
- ✓ collecting information on countries of origin of asylum seekers (relevant for asylum proceedings) – system Country of Origin Information (COI)
- ✓ gathering and analysing the wide scope of information about migration (provided to MS and the Commission) – Early warning and Preparedness System (EPS)

- ✓ training members of national administrative bodies in charge of asylum, courts, and tribunals
- ✓ providing operational support to MS subject to particular pressure
- ✓ providing support to the third countries (near the EU, especially to Western Balkan countries, to Turkey and Middle East and North African countries)

Operational Support

Currently, one of the main tasks of the EASO is to provide, on request the operational support to MS. This support can take many forms and it is always designed according to specific needs of the MS in question. The EASO distinguishes:

- ✓ special support (capacity building, facilitation and coordination of relocation, specific support, and special quality control tools)
- ✓ emergency support, for MS subject to particular pressure (temporary support to repair or rebuild asylum and reception systems)
- ✓ joint processing activities (external help for MS)

During the last years, the EASO has provided the operational support e.g. to Italy, Greece, and Cyprus, especially for reasons of an increasing number of immigrant arrivals.

The EASO publishes many data and analyses (EPS, COI etc.) on its website. Every year the EASO also publishes a summarized Annual report on the situation of asylum in the European Union, which contains a large amount of interesting information and summarised statistical data on migration. The EASO activities can thus be valuable to academic research in the field of migration too.

EXERCISE:

Try to search in the last Annual report the responses for the following questions:

1. Which country received the most asylum applications in the last year, and how many?
2. Where do most asylum seekers come from (the first 5 countries)?
3. What percentage of applicants for international protection from these countries succeeded with their application (i.e. obtained status of refugee, subsidiary or humanitarian protection)?

6.2 The European Border and Coast Guard Agency (Frontex)

Regulation (EU) 2019/1896 *of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard*

Basic information:

Frontex is the European agency originally formed as the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union in 2004*, on the legal basis of Council Regulation (EC) 2007/2004. Later on, Frontex was reformed twice, by Regulation (EU) 2016/1624, and finally, the actual legal basis derives from Regulation (EU) 2019/1896 of 13 November 2019 (hereinafter also referred to as 'EASO Regulation'). The seat of Frontex is in Warsaw (Poland). **The purpose of the Agency is to promote, coordinate, and develop European border management.**

The The structure of the agency is similar to other agencies, such as the EASO, and contains a Management board, Executive director, their deputy, and Fundamental rights officer (Article 99 of EASO Regulation). The management board is composed of nominees of MS and of the Commission (one member is nominated by every MS, two by the Commission) and serves as the leading body of the Agency. The executive director is appointed by the management board for five years based on a proposal of the Commission which presents the list of at least 3 candidates; there is an obligatory hearing of candidates in the European Parliament. The executive director is responsible for the preparation and implementation of the strategic decisions; they e.g. also decide about rapid border intervention. The fundamental rights officer is appointed by the management board. Frontex activity is very sensitive in terms of human rights protection, the fundamental rights officer is a guarantor of respect for human rights.

Main tasks:

Frontex has the following main tasks:

- ✓ monitor and analyse migratory flows and the situation at and beyond external borders of the EU;
- ✓ coordinate and organise joint operations and rapid border interventions (assistance to MS on the external borders and at sea); for this purpose, the FRONTEX deploys the European Border and Coast Guard Teams (the pool is operatively provided by MS on request);
- ✓ search and rescue operations at sea (with Frontex-deployed vessels);
- ✓ support MS with screening, debriefing, identification, and fingerprinting of migrants; for which it deploys its staff;
- ✓ assist MS in forced returns of people, who have not legitimized their stay in the EU;
- ✓ help with preventing cross-border crimes.

Frontex also regularly publishes risk analyses in which it describes the situation at and beyond borders and eventually risks.

EXERCISE:

Compare the precedent of Frontex Regulation (No 2016/1624) to the actual one (No 2019/1896) and try to extract three significant changes.

6.3 The European Union Agency for Fundamental Rights (FRA)

Council Regulation (EC) No 168/2007 *of 15 February 2007 establishing a European Union Agency for Fundamental Rights*

"Helping to make fundamental rights a reality for everyone in the European Union"

Basic information:

The FRA is the European agency formed on 1 March 2007, on the legal basis of Council Regulation (EC) No. 168/2007 (hereinafter also referred to as 'EASO Regulation'), with its seat in Vienna (Austria). The FRA serves as an independent body of the EU with its own legal personality (Article 23 of FRA Regulation) and was established for the purpose to provide MS and other EU bodies and institutions assistance and expertise in fundamental rights, in particular those contained in the Charter of Fundamental Rights of the EU. The FRA also coordinates its activity with the Council of Europe.

The structure of the Agency is again similar to other agencies and contains a Management Board, Executive Board, Scientific Committee, and Director (Article 11 of FRA Regulation). The Management Board is composed of nominees of MS (one member is nominated by every MS), one nominee from the Council of Europe and two nominees from the Commission. It defines the work priorities of the Agency and supervises its action. The Executive Board is something like the executive group of the Management Board, it prepares its decisions. The Scientific Committee, which serves as guarantor of scientific quality, is composed of 11 people, who are independent and highly qualified in human rights. They are appointed by the Management Board. Finally, the Director is appointed by Management Board and is in charge of day-to-day management.

Main tasks:

The FRA has the following main tasks:

- ✓ define the areas in the life of society (fields of action of MS or the EU) appropriate to research and methodological support concerning human rights,
- ✓ collect and analyse data on human rights situation (in cooperation with MS and other EU bodies and institutions),
- ✓ research in the field of human rights,
- ✓ share its expertise and results of research with appropriate institutions of MS and the EU.

Multiannual framework

The Council determines the areas of activity of the FRA through multiannual framework (Article 5 of EASO Regulation), which it adopts every 5 years on a proposal from the Commission. The proposal is consulted with the European Parliament and (not obligatory) with the Management Board. The actual multiannual framework was adopted for 2018 to 2022. The FRA adopts the Programming document (currently for 2020 to 2022), which is more detailed.

The FRA regularly publishes the results of its work, also on its website.

EXERCISE:

Read one of the Agency's latest publications and briefly summarize its basic findings.

7. OTHER CEASO RELATED INSTRUMENTS

Asylum is not an isolated island and it has to be taken in relation to other migration-related areas in order to get a full comprehensive understanding. The other main migration related areas are especially:

7.1 Access to the territory

7.2 Return

7.3 Family Reunification

7.4 Integration

Of course, there are **more areas connected to asylum**, such as resettlement, trafficking in human beings, or some instruments from legal migration domain, such as rules for long-term residents. For basic information on these related areas, check the web pages of the European Commission:

Resettlement

https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/resettlement_en

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_resettlement_ensuring_safe_and_legal_access_to_protection_for_refugees_en.pdf

Trafficking in human beings

https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings_en

Long-term residents

https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/long-term-residents_en

7.1 Access to the territory

7.1.1 Schengen Borders Code

Under international law, only nationals are automatically allowed entry into a state. Other persons may be required to fulfil certain conditions for enabling their entry into foreign territory. States also have a sovereign right to control the entry and stay of non-nationals in their territory. Both EU law and ECtHR case law recognizes limits to this sovereignty.

EU law has a set of common rules applicable for entry into the EU territory and Schengen area more specifically.

It provides EU States with a single set of common rules that govern external border checks on persons, entry requirements, and duration of stays in the Schengen Area, including

a regime on internal borders. The Schengen Borders Code is a regulation and it applies to any person crossing the internal or external borders of Member States, without prejudice to:

i) The rights of persons enjoying the right of free movement under Union law.

ii) The right of refugees and persons requesting international protection, in particular as regards *non-refoulement*.

Entry conditions for third-country nationals for intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period:

(a) a valid travel document;

(b) a valid visa, if required except where they hold a valid residence permit or a valid long-stay visa;

(c) they justify the purpose and conditions of the intended stay;

(d) they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin;

(d) they are not persons for whom an alert has been issued in the Schengen Information system for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health, or the international relations of any of the Member States.

Citizens from some non-EU countries are required to hold a visa when travelling to the Schengen Area. The EU has a common list of countries whose citizens must have a visa when crossing the external borders and a list of countries whose citizens are exempt from that requirement. These lists are set out in Regulation (EU) 2018/1806.

Refusal of entry on external borders

A third-country national who does not fulfil all the entry conditions shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The substantiated decision stating the precise reasons for the refusal shall be given by means of a **standard form**, as set out in Annex V.

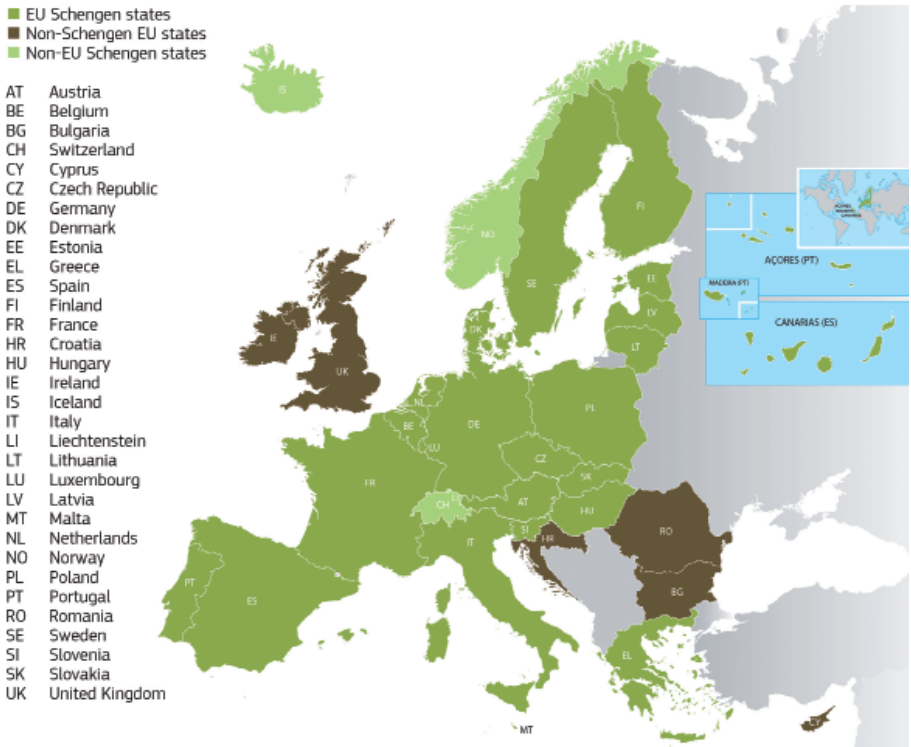
Crossing internal borders

Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. The Schengen Borders Code lays down rules for temporary reintroduction of controls on internal borders, especially in case of serious threat to public policy or internal security.

Plenty of **annexes** are attached to the Schengen Borders Code, such as the standard form for refusing entry, model signs indicating lanes at border crossing points, special rules for certain categories of persons such as heads of state or pilots.

Schengen area:

https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/schengen_visa_en



7.1.2 Visa Code

Regulation 810/2009 (latest amendment 2019/1155 entered into force on 2 February 2020).

This Regulation establishes the procedures and conditions for issuing visas for intended stays on the territory of the Member States **not exceeding 90 days** in any 180-day period.

The provisions of this Regulation shall apply to any third-country national who must be in possession of a visa when crossing the external borders of the Member States pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

General rules for lodging an application

Applicants shall appear in person when lodging an application for the collection of fingerprints and applicants may lodge their applications electronically, where available.

When lodging an application, the applicant generally shall:

(a) present an application form,
(b) present a travel document,
(c) present a photograph,
(d) allow the collection of their fingerprints,
(e) pay the visa fee – general fee is EUR 80 (EUR 40 for children 6-12);
(f) provide supporting documents,
(g) provide proof of possession of adequate travel medical insurance.

Visas granted have to be issued in a uniform format under the EU Regulation.

7.2 Returns Directive (RD)

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national

The aim

Although the Returns Directive (RD) does not form part of the CEAS, it is closely related to the CEAS instruments. The 2009 Returns Directive sets out procedures to be applied in Member States for returning third-country nationals staying illegally (Article 1). Effectively returning irregular migrants is one of the key objectives of the RD.

The scope of application

Personal scope

The RD applies to any third-country national staying irregularly on the territory of a Member State (excluding Denmark, Ireland, *and the United Kingdom*) or the four Schengen-associated states, independently of the reasons for irregular stay (Article 2).

The irregular stay is defined as "*presence on the territory of a Member State, of a third-country national who **does not fulfil**, or **no longer fulfils** the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State*".

The personal scope of the RD is defined negatively. The Return Directive does not apply:

- to asylum-seekers until a first instance decision on their application for asylum was taken (see the CJEU *Arslan* case),
- to persons enjoying the right of free movement under Union law, and
- Member States **may** choose to apply the RD to third-country nationals in two situations:

a) when they are at an external border, or have been apprehended 'in connection' with the irregular crossing of an external border

*Note: interceptions at the very time of the irregular crossing of an **internal border** or near the border are not included in this provision, even if the Member State has temporarily reintroduced internal border controls, as the CJEU in the Abdelaziz Arib case).*

b) when they are subject to an extradition or to criminal sanction other than those related to illegal entry or stay (the CJEU *Achughbabian* case).

Territorial scope

The *United Kingdom*, Ireland and Denmark opted out of this Directive – although it will *apply* to UK citizens in the participating Member States after Brexit, in the event that they are irregular migrants. The RD applies to any third-country national staying irregularly on the territory of a Member State (excluding Denmark, Ireland, and the United Kingdom) or the four Schengen-associated states, independently of the reasons for irregular stay.

The key principles of the Returns Directive

✓ **Obligation to issue a return decision**: Member States are obliged to issue a return decision to any third-country national staying irregularly on their territory and provide for the enforcement of those decisions when needed (C-38/14). Some exceptions are permitted (Article 6 (2-5)).

? Look at the Directive (Article 6) and check the situations where return decision is not issued.

✓ **Priority of voluntary over forced return:** RD prioritises voluntary over forced return, as it obliges Member States to grant returnees a period for voluntary departure ranging from 7 to 30 days (Article 7).

- Member States shall **extend that period** in specific circumstances of the case, such as the existence of children attending school or other family or social ties.

- **Exceptional cases: no period of voluntary departure, or it can be shortened:**
  a) application has been dismissed as manifestly unfounded or fraudulent; or
  b) an individual poses a risk to public policy, public security, or national security, as defined by the CJEU (C-554/13; C-240/17).

In these exceptional cases principles of proportionality and human rights must be respected. (Article 8) These exceptions are interpreted by the CJEU (e.g. the *Achughbabian* case).

✓ **Obligation to issue entry bans in certain situations**, i.e. decisions prohibiting entry to and stay in the territory of all the Member States for a certain period of time (Article 11), when adopting return decisions. As a general rule – **a maximum length of five years.**

✓ **Member States' implementation measures shall respect:**
- fundamental rights and international law (Article 1),
- principle of *non-refoulement,*
- the principle of the best interest of the child, family life, and the state of health of returnee, (Article 5, C-562/13; C-82/16)
- special regime for unaccompanied minors (Article 10) incl. special conditions for detention (Article 17).

✓ **Detention for return purposes**

Reasons for detention (Article 15):
- risk of absconding
- the person hampers the preparation of the return
  - o **Detention – ultima ratio – last resort measure** (if no other sufficient but less coercive measure can be applied (Article 15(1)).
  - o **a regular detention period cannot exceed six months**, C-146/14 PPU. Maximum detention period differs in the MSs considerably.

? Look into the directive (Article 15) and check if it is possible to prolong the detention period over 6 months.

✓ **Procedural obligations**

According to the RD, the return decision shall be issued in writing and must give the reasons justifying the decision and information concerning possible remedies (Article 12(1)). Translation shall be available upon request (Article 12(2)). The right of an effective remedy shall be ensured Articles 13(1) and (2)).

EXERCISE:

1. Where is?
   Find the following terms in the text of the Returns Directive and explain them:
   Return decision, voluntary departure, entry-ban, detention.

2. Explain the impact of a suspensive effect of judicial review and its relation to the principle of non-refoulement. (Use the two cases listed below.)

Judicial review and automatic suspension of the enforcement of the return decision is not explicitly required by the current RD. However, the CJEU clarified in the *Abdida* and *Gnandi* cases, that a judicial remedy shall be granted and that it cannot be considered effective if it has no automatic suspensive effects when there are substantial grounds to believe that removal would infringe the principle of *non-refoulement*. To the contrary, the CJEU clarified, in the *X.* and in *X. and Y.* cases, that the RD does not compel Member States to set up a second level of jurisdiction, nor to confer automatic suspensory effect on that case.

7.3 Family Reunification Directive

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

The aim

The Family Reunification Directive is a legislative instrument aimed at establishing the 'right to family reunification for third-country nationals' (recital (16)). The Directive determines the conditions under which family reunification is granted, establishes procedural guarantees, and provides rights for the family members concerned.

The scope of application

The Directive applies to third-country nationals **residing lawfully** in the territory of the Member States, including persons with refugee status. It explicitly excludes applicants for refugee status, temporary protection, and a subsidiary form of protection (in accordance with international obligations, national legislation, or the practice of Member States) as well as beneficiaries of subsidiary protection and temporary protection (Article 3(2)).

This directive applies in 25 EU Member States (excluding the *United Kingdom*, Ireland, and Denmark).

> Note: At the time when the Family Reunification Directive was adopted, the subsidiary protection regime in the QD had not yet been adopted. Therefore, the right of beneficiaries of subsidiary protection to family reunification is a matter for national law.

The Directive includes more favourable provisions for the family reunification of refugees in some respects.

Conditions

The Directive introduced a wide range of discretion for its implementation. The Member States **may** impose some conditions before allowing family reunification, they may require the sponsor (i.e. the already legally residing foreigner) to have:

- adequate accommodation,
- sufficient resources and health insurance, and
- impose a waiting period of no more than two years.

Family reunification can be refused for spouses who have not reached a required age – which can be 21 years at the highest. Polygamy is not recognised, which means that only one spouse at a time can benefit from the right to family reunification.

Member States may ask third-country nationals to comply with integration measures before or after arrival.

Finally, threat to public order, public security, or public health can lead to rejecting the application. In order to prevent abuse, consequences in the event of fraud as well as marriage, partnership, or adoption of convenience are also foreseen.

In April 2014, the Commission adopted a Communication on guidance for application of Directive 2003/86/EC on the right to family reunification.[1] It advises Member States in their implementation of the Directive in order to achieve a more consistent policy and practice across the EU.

7.4 EU and Migrant Integration

The area of freedom, security, and justice is one of the most dynamic fields of EU law. Whereas the links between migration, asylum, and external border controls have been quite clearly defined in Articles 77–79 of the Treaty on the Functioning of the European Union (TFEU), the interrelation and interdependence between migration and asylum on the one hand and migrant integration on the other has been widely neglected. Only one single provision of the founding Treaties carefully touches upon the integration of third-country nationals. According to Article 79 paragraph 4 TFEU, which has been introduced only by the Treaty of Lisbon, **the EU may establish measures to provide incentives and support for the action of Member States in the field of migrant integration. However, any harmonization of national law in this field is explicitly excluded.**

Therefore, some conceptual and practical questions related to EU involvement in the integration agenda are unclear.

Migrant integration as a legal concept

It is certainly not easy to define a concise concept of migrant integration for the purpose of national law. In its short synthesis report of 2003, the Commission found that quite different concepts and approaches existed on the national level (COM(2003)336

[1] Communication from the Commission on guidance for application of Directive 2003/86/EC on the right to family reunification, COM/2014/0210 final

final). The Commission's synthesis report identified **four basic ideas shaping the integration policies** of Member States:

- respect for the fundamental values of a democratic society,
- the right of migrants to maintain their own cultural identity,
- a comparable standard of rights and obligations for both migrants and citizens, and
- active participation of migrants in all fields of economic, social, cultural, political, and civil life.

The Commission defined integration as a two-way process based on mutual rights and corresponding obligations of legally residing third country nationals and the host society. Such process shall provide for full participation of the immigrant.

In 2004, the EU Council adopted the "Common Basic Principles for Immigrant Integration Policy in the EU", in which integration was described as a "dynamic, long-term, and continuous process of mutual accommodation" which involves adaptation by immigrants and the receiving society". Also, more recent Commission communications of 2011[2] and 2016[3] use the term process and explain that the process of integration involves a wide range of actors in different policy areas like e.g. education, employment, entrepreneurship, and culture.

EU competences within the integration agenda

As for the delimitation of competences between the EU and its member states, it has to be distinguished between **different areas of migrant integration**. The EU may influence the integration process most significantly by its measures concerning the admission of third-country nationals to the EU. The more liberal the regime for external border controls, asylum and immigration is, the higher will be the number of those who arrive to the Member States and need to be integrated into the host societies. So, how many third-country nationals will be admitted and granted residence on the territory of member states partly depends on EU legislation and its practical application.

Also, in some other fields of migrant integration, the EU disposes of concrete competences and, for example, it may adopt legislation in the fields of social policy and employment.

According to Article 149 TFEU, the EU may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of **employment policy**. Such measures include initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice. Naturally, such EU measures may relate to the employment of third-country nationals. However, it must be noted that EU action shall not lead to harmonization of national employment law.

Therefore, the EU will rather rely on its traditional sectorial approach than on a concise and coherent concept of integration policy. On the other hand, some EU legal

---

[2] Communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final.

[3] Communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: Action Plan on the integration of third country nationals, COM(2016) 377 final.

norms go beyond intersectionality. Without a doubt, EU fundamental rights law is a typical cross-cutting issue. Provisions granting e.g. the right to religious freedom and the right to education may have a clear impact on the status of migrants in the host country. The principle of non-discrimination is laid down in the EU Charter of Fundamental Rights and also in EU directives. The Race Equality Directive of 2000[4] provides migrants of different ethnic origin protection against discrimination with respect to access to employment, access to education, working conditions, social protection (including social security and healthcare), housing, and access to other goods and services which are available to the public. The Employment Equality Directive of 2000[5] declares any discrimination unlawful e.g. based on the grounds of religion.

Under specific circumstances, EU antidiscrimination norms may require positive measures.[6] However, the concrete form and the scope of such measures are not quite clear. Access to education and special language training as well as affirmative action on the labour market and the housing market depend not only on moral considerations and political will but also on the economic and financial resources of the Member State concerned. When the Commission in July 2016 presented a proposal for a new directive laying down standards for the reception of applicants for international protection,[7] it stated that there are wide divergences in the level of reception conditions in the Member States. It is undisputed that those different standards are one of the major reasons for secondary movements of asylum seekers from poorer to richer Member States. **In short, not only numbers matter but also money matters in the context of migrant integration,** and as long as Member States do not have comparable resources migrants and **asylum seekers will tend towards some kind of "integration shopping**". It is very doubtful whether the EU will be able to define common or at least similar standards of social benefits and working opportunities for migrants in all Member States.

It may be concluded that Article 79, paragraph 4 TFEU provides only a part of the picture. The supporting competences of Article 79, paragraph 4 TFEU are rounded by shared competences in the fields of migration and asylum policy, social policy, employment, and anti-discrimination policy. So, as integration is a vaguely defined process, it involves a number of different EU competences. However, there still remains significant space for autonomous national measures in the field of migrant integration, especially with a view to the concrete resources of the Member State concerned.

---

4 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

5 Council Directive 2000/79/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

6 On the concept of positive measures see e.g. Barmes, L. Equality Law and Experimentation: The Positive Action Challenge. Cambridge Law Journal, 3/2009, pp. 623-654.

7 COM(2016) 465 final.

Find below secondary EU legislation significant to the field of international protection:

2010 EASO Regulation (439/2010)

2003 Family Reunification Directive (2003/86)

2003 and 2011 Long-term Residents Directive (2003/109 and 2011/51)

2008 Returns Directive (2008/115)

2018 Returns Regulation (2018/1860)

LIST OF ABBREVIATIONS

APD	
Asylum Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
APD (recast) or rAPD	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Convention against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
Dublin Convention	Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990)
DR II	
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
DR III	
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EASO	European Asylum Support Office
EASO Regulation	Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office
ECHR	European Convention on Human Rights (formally the European Convention for the Protection of Human Rights and Fundamental Freedoms) (1950)
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EDAL	European Database of Asylum Law

EU	European Union
Eurodac Regulation	Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
Eurodac Regulation (recast)	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 [...] (recast)
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
ICCPR	International Covenant on Civil and Political Rights (1966)
Long-Term Residents Directive	Council Directive 2003/109/EC of 25 November 2003 (2003) concerning the status of third-country nationals who are long-term residents
Long-Term Residents Directive	Directive 2011/51/EU of the European Parliament and of (2011) the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection
QD or Qualification Directive	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RCD or Reception Directive	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
RCD (recast)	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967)

Returns Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

BIBLIOGRAPHY

Monographs

BATTJES, Hemme. *European Asylum Law and International Law.* Leiden: Martinus Nijhoff Publishers, 2006

BOELES, Peter. *Fair Immigration Procedure in Europe*. London-Boston-The Hague: Martinus Nijhoff Publishers, 1997

BROUWER, Evelien. *Digital borders and real rights: effective remedies for third-country nationals in the Schengen Information System*. Leiden: Martinus Nijhoff Publishers, 2008

COSTELLO, Cathryn. *The human rights of migrants and refugees in European law*. Oxford: Oxford University Press, 2016. Oxford studies in European law.

GOODWIN-GILL, Guy S.; MCADAM, Jane. *The refugee in international law.* 3rd edition. Oxford: University Press, 2007

FOBLETS, Marie-Claire, CARLIER, Jean-Yves (eds.) *Law and Migration in a Changing World, Ius Comparatum – Global Studies in Comparative Law*, Series Volume 31, 2020, Springer International Publishing

FOSTER, Michelle, LAMBERT, Hélene. *International Refugee Law and the Protection of Stateless Persons*, Oxford University Press, 2018

GRABENWATER, Christoph. *European Convention on Human Rights. Commentary*. München: C. H. Beck, 2014

HAILBRONNER, Kay. *Immigration and asylum law and policy of the European Union.* The Hague: Kluwer Law International, 2000

HAILBRONNER, Kay and THYM, Daniel. *EU immigration and asylum law: a commentary*. Second edition. München: C. H. Beck, 2016

HAILBRONNER, Kay a Daniel THYM. *EU immigration and asylum law: a commentary.* Second edition. München: C. H. Beck, 2016

HATHAWAY, James. *The rights of refugees under international law.* Cambridge: Cambridge University Press, 2005

HATHAWAY, James and FOSTER, Michelle. The law of refugee status. Second edition. Cambridge: Cambridge University Press, 2014

RENEMAN, Marcelle. *EU asylum procedures and the right to an effective remedy.* Oxford: Hart publishing, 2014. Modern studies in European law

ZWAAN, Karin (ed.). *The returns directive: central themes, problem issues, and implementation in selected member states.* Nijmegen: Wolf Legal Publishers (WLP), 2011

Others

Azoulai L. and De Vries K., *EU Migration Law. Legal Complexities and Political Rationales*, Oxford University Press, 2014

Samers M., An Emerging Geopolitics of Illegal Immigration in the European Union, *European journal of migration law*, Vol. 6, 2004.

See also, Van Ballegooij W. and Navarra C., Humanitarian Visas, European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, EPRS, European Parliament, 2018.

Dreyer-Plum, Domenica. Commitment of States, Access to Asylum, and Material Benefits: Assessing Key Legislative Battles and Their Structural Impact on the Common European Asylum System. *International Journal of Refugee Law*, 2019, Vol. XX, No. XX, pp. 1-25.

Léonard, Sarah, Kaunert, Christian. *Refugees, Security and the European Union.* London: Routledge, 2019.

Pollet, Kris. *All in vain? The fate of EP positions on asylum reform after the European elections.* 23 May 2019, available at: http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/.

Thym, Daniel. The "refugee crisis" as a challenge of legal design and institutional legitimacy. *Common Market Law Review,* 2016, Vol. 53, No. 6, pp. 1545-1573.

MULTIPLE CHOICE TEST

1. **The asylum and migration policy was "communitarised" via**
   a) the Maastricht Treaty
   b) the Amsterdam Treaty
   c) the Lisbon Treaty.
2. **Under the Amsterdam Treaty, the Council was called to adopt**
   a) minimum standards on asylum
   b) uniform standards on asylum
   c) no standards on asylum.
3. **For the time being, EC/EU secondary legislation has been successfully adopted within**
   a) one phase of harmonisation
   b) three phases of harmonisation
   c) two phases of harmonisation.
4. **In line with the Treaties in force, the secondary legislation on asylum is adopted**
   a) by the Council after consulting the European Parliament in the so-called special legislative procedure
   b) by the Commission in the so-called comitology procedure
   c) by the Council acting together with the European Parliament in the so-called ordinary legislative procedure.
5. **The Qualification Directive 2011/95/EU, the Dublin III Regulation 604/2013 and the Asylum Procedures Directive 2013/32/EU**
   a) are still in force
   b) are no longer in force
   c) were adopted within the first phase of harmonisation of asylum law.
6. **The Commission decided to reform the CEAS in 2016**
   a) because the Charter of Fundamental Rights of the EU was made legally binding
   b) because of the so-called migration crisis starting in 2015
   c) because the Treaty establishing a Constitution for Europe entered into force.
7. **"Relocation Decisions"**
   a) were based on voluntary principle of distribution of asylum seekers
   b) were annulled by the Court of Justice of the EU
   c) didn't prove to be very effective because of low percentage of distributed applicants.
8. **When drafting proposal for the Dublin IV Regulation, the Commission**
   a) didn't include any permanent relocation system due to the opposition of significant number of Member States
   b) introduced only a financial mechanism as an instrument of fair sharing of responsibility in the EU asylum policy

c) included permanent relocation system but it was later opposed by some Member States in the Council.

9. The current CEAS reform

a) has been completed

b) cannot be completed because of "unfinished business" clause in the Rules of Procedure of the European Parliament

c) has not been completed.

10. Within the framework of the CEAS reform initiated in 2016

a) the Commission decided to replace asylum procedural directive by a regulation

b) the Commission decided to replace asylum procedural regulation by a directive

c) the Commission decided to replace most asylum secondary legislation by international agreements.

11. Which acts constitute EU primary law?

a) the TEU, the TFEU and the EU Charter

b) the TEU, the TFEU

c) only the TEU as it establishes the Union

12. An EU directive is

a) a legal act that is binding in respect of its results.

b) a legal act that is binding in its entirety.

c) a binding instrument generally applicable or addressed to a limited number of people

13. The Qualification Directive imposes common standards on:

a)

- The incorporation of the 1951 Geneva Convention refugee definition into EU law subsidiary protection definition and status,
- rights of refugees and of beneficiaries of subsidiary protection

b)

- The incorporation of the 1951 Geneva Convention refugee definition into EU law,
- special procedures for the recognition of persons eligible for subsidiary protection
- rights of refugees

c)

- The incorporation of the 1951 Geneva Convention refugee definition into EU law, subsidiary protection definition and status,
- rights of beneficiaries of subsidiary protection but not of refugees, as these are regulated by the 1951 Geneva Convention

14. The policy strategies and the strategic guidelines for the legislative and operational planning of the CEAS are adopted at the level of:

a) the European Council and the Commission

b) the Commission and the Council of the European Union

c) the Council of Europe and the Commission

15. The Family Reunification Directive aims at protecting the family unity of third-country nationals

a) including refugees, beneficiaries of subsidiary protection, and asylum-seekers whose applications have not been decided yet

b) including refugees and beneficiaries of subsidiary protection

c) including refugees but not beneficiaries of subsidiary protection

16. The right to asylum and the principle of non-refoulement are explicitly enshrined in

a) the ECHR

b) the EU Charter

c) the Treaty on the Functioning of the European Union

17. The EU Charter

a) is a copy of the ECHR into an EU law instrument

b) is a totally independent instrument which creates rights which did not exist in any other human rights treaty

c) does not create new rights, but reaffirms existing rights gathered in different instruments

18. The Lisbon Treaty

a) explicitly prohibits the EU from becoming a party to the ECHR

b) instructs the Commission to look for ways to incorporate the ECHR into EU Law

c) included an obligation for the EU to become a party to the ECHR

19. The reference for a preliminary ruling is a process whereby

a) National courts can question the CJEU on the interpretation or validity of EU law

b) the European Commission requests the CJEU to confirm the validity of its legislative proposals

c) the CJEU reviews judgments by the Supreme Courts of Member States on matters of EU law

20. The origins of the CEAS lie with

a) the intergovernmental cooperation during the early development of the Schengen area in the middle of the 1980's

b) the adoption of the common standards in the middle of the 1980's

c) the Treaty of Amsterdam in 1997

21. Which of the following institutions <u>does not</u> implement EU migration and asylum policy?

a) the European Boarder and Coast Guard Agency (FRONTEX)

b) the European Asylum Support Office (EASO)

c) the Committee of Ministers of the Council of Europe

22. Which EU Member State is not part of the Schengen area?

a) Ireland

b) Denmark

c) Norway

23. Third-country nationals whose right to residence derives directly from EU law are:

a) citizens of Turkey
b) citizens of EEA states
c) family members of EU citizens.

24. Who are migrants in an irregular situation?

a) asylum seekers
b) illegally staying third-country nationals
c) illegally staying EU member states nationals

25. What is the main argument used by opponents of regularization programs?

a) they are placing an excessive burden on the recipient country's economy
b) they encourage illegal migration
c) they favour third-country nationals over EU nationals.

26. EU asylum policy must be in compliance with:

a) the Geneva Convention of 1951 and its Protocol of 1967 only
b) all relevant international documents
c) the Geneva Convention of 1951 and its Protocol of 1967 and other relevant treaties

27. What asylum applications are outside of the scope of the EU law?

a) applications of stateless persons in EU member states
b) applications of third-country nationals in EU member states
c) applications of EU citizens in EU member states.

28. The EU Charter of Fundamental Rights <u>does not</u> provide for:

a) right to asylum
b) right to subsidiary protection
c) the principle of non-refoulement.

29. Temporary Protection Directive mechanism

a) has been used in mass displacement of persons following the conflict in former Yugoslavia
b) has been successfully used during migration crisis in 2015
c) has not been used yet.

30. International protection <u>does not</u> take form of:

a) protection of victims of human trafficking
b) refugee status
c) subsidiary protection.

31. In the field of migrant integration

a) the EU exercises shared competences,
b) adopts measures providing for the harmonization of national law,
c) any harmonization of national law is excluded.

32. According to EC documents on migrant integration

a) migrants and citizens shall have the same rights and obligations,
b) migrants and citizens shall have comparable rights and obligations,
c) migrants shall have a special regime of rights and obligations.

Textbook for Prague Summer School on Migration and Asylum Law

within the initiative 4EU+ project organized by Charles University Faculty of Law, in cooperation with the University of Warsaw and University of Copenhagen

CHARLES UNIVERSITY

UNIVERSITY OF WARSAW

UNIVERSITÄT HEIDELBERG ZUKUNFT SEIT 1386

UNIVERSITÀ DEGLI STUDI DI MILANO

SORBONNE UNIVERSITÉ

UNIVERSITY OF COPENHAGEN

4eu+ EUROPEAN UNIVERSITY ALLIANCE

https://4eu.prf.cuni.cz

Prague Summer School on Migration and Asylum Law

Univerzita Karlova
Právnická fakulta
nám. Curieových 901/7
116 40 Praha 1
https://www.prf.cuni.cz

ISBN 978-80-7630-004-0
e-book