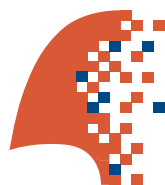




# Sharing responsibility

A PROPOSAL FOR A EUROPEAN ASYLUM SYSTEM BASED ON SOLIDARITY



Adviescommissie voor  
Vreemdelingenzaken

ADVISORY REPORT

# *Sharing responsibility*

A PROPOSAL FOR A EUROPEAN ASYLUM SYSTEM  
BASED ON SOLIDARITY

Sharing responsibility  
A proposal for a European Asylum System based  
on solidarity  
Summary on page 9

THE HAGUE, DECEMBER 2015

## The ACVZ

The Advisory Committee on Migration Affairs (ACVZ) in the Netherlands is an independent body that advises Government and Parliament on immigration law and policy. English summaries of all advices can be found on the website.

## Colophon

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onderwerp Aanbieding advies "Delen in verantwoordelijkheid. Voorstel voor een solidair Europees asielsysteem"

Geachte heer Dijkhoff,

Bij brief van 30 maart 2015 heeft u de Adviescommissie voor Vreemdelingenzaken (ACVZ) verzocht u te adviseren over een EU-verdelingsmechanisme voor asielverantwoordelijkheden. Met de aanbieding van dit rapport voldoet de commissie aan dit verzoek.

In het rapport komt de ACVZ tot de onderstaande conclusies.

Er is op dit moment onvoldoende sprake van een solidair Gemeenschappelijk Europees Asielsysteem (GEAS). Het is noodzakelijk dat de verplichtingen die uit het GEAS voortvloeien, meer dan nu het geval is, worden uitgelegd in het licht van het beginsel van solidariteit.

Er is geen sprake van een billijke verdeling van asielverantwoordelijkheden. Daartoe ontbreekt een mechanisme. De ACVZ bepleit de Dublinverordening aan te passen, waardoor het mogelijk wordt voor lidstaten die verantwoordelijk zijn voor een onevenredig hoog aantal asielverzoeken, om asielzoekers over te dragen aan lidstaten waarin onevenredig weinig asielzoekers zijn geregistreerd.

Ten slotte heeft de adviescommissie de voorwaarden beschreven waaraan verder moet worden voldaan om een verdelingsmechanisme te laten leiden tot een duurzaam billijke verdeling van asielverantwoordelijkheden.

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## Adviescommissie voor Vreemdelingenzaken

De ACVZ heeft haar uiterste best gedaan om dit advies af te ronden voordat het EU voorzitterschap van Nederland op 1 januari 2016 begint.

Dit betekent evenwel dat de tekst die u krijgt aangeboden nog een enkele redactionele onvolkomenheid kan bevatten. De finale versie van het advies zal begin januari 2016 officieel publiek worden gemaakt via de website van de adviescommissie.

Uiteraard is de adviescommissie desgevraagd bereid een nadere toelichting op het advies te geven.

Hoogachtend,

mr. dr. Hans Sondaal  
Waarnemend Voorzitter

mr. Wolf Mannens  
Secretaris

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# Summary

## Background and reasons for the advice

For some years there has been considerable criticism of the uneven distribution across the Member States of the European Union (EU) of asylum applications and the responsibilities related to them. There are substantial differences between Member States in the number of asylum applications received, both in absolute and relative terms. Furthermore, the way the Member States deal with asylum seekers and asylum applications varies. This is remarkable, considering that the standards governing the treatment of asylum applications are identical in the majority of Member States, and are laid down in binding EU directives. The uneven distribution of responsibilities has led to tensions within the EU. For this reason the State Secretary for Security and Justice asked the Advisory Committee on Migration Affairs (ACVZ) for advice on how the Common European Asylum System (CEAS) could be transformed into a system based on solidarity, in which the responsibilities of the Member States vis-à-vis asylum seekers and permit holders can be shared fairly among them.

In its report, the ACVZ proposes a permanent mechanism enabling Member States to share asylum responsibilities. The Advisory Committee understands the term ‘asylum responsibilities’ as including not only the responsibility for processing asylum applications and providing reception during the application process, but also for the integration of asylum seekers whose application is accepted and for returning or dealing with those whose application is dismissed.

As a result of the large number of asylum seekers arriving in the EU this year, the debate on the unequal distribution of asylum responsibilities has flared up, leading to the introduction of several measures at EU level. One example is the decision of the European Council to reallocate a total of 160,000 asylum seekers whose asylum application has a good chance of success from Italy and Greece to other Member States. However, the implementation of these measures has not been without difficulties and is responsible for even greater tension between Member States. It is therefore highly questionable whether this advisory report can count on broad political support in all EU countries. Nonetheless, the ACVZ deems the creation of a permanent responsibility-sharing mechanism to be inevitable. It has therefore attempted to forge a proposal that is both legally viable and practically feasible.

## Starting points and legal framework

### *The goal of the European asylum policy*

The goal of European asylum policy is laid down in article 78 of the Treaty on the Functioning of the European Union (TFEU). It states that the EU will develop a common policy aiming to offer appropriate status to all third-country nationals in need of international protection and to ensure compliance with the principle of non-refoulement. This means that refugees and persons in need of subsidiary protection are eligible for international protection. The Qualification Directive determines which persons qualify for international protection in the EU, while the Procedures Directive describes how the need for protection is to be established in the asylum procedure. The right to asylum does not oblige a Member State to grant a residence permit to all third-country nationals who are present on its territory and in need of protection. The right to asylum permits the transfer of asylum seekers to another Member State of the EU, or safe third



countries, as long as compliance with the principle of non-refoulement is guaranteed in that state and appropriate status is offered to those in need of protection.

#### *How to attain this goal*

Article 80 of the TFEU stipulates that the asylum policy of the EU is governed by the principle of solidarity and a fair sharing of responsibility between the Member States. However, the content and meaning of the principle of solidarity is not defined. The relevant literature and case law of the Court of Justice of the EU offer some elements of a definition, which the ACVZ has taken as its starting point. These are:

1. solidarity in an international context requires at the very least that countries cooperate;
2. this cooperation is aimed at achieving shared goals that go beyond the interests of the individual sovereign state;
3. this requires a considerable investment by all cooperating states in sharing in the fate of others, which means that every participating state commits to the results of collective decision-making;
4. failing to adhere to the norms resulting from the shared decision-making process undermines the legal order of the EU.

The Advisory Committee applied these elements to the CEAS, so as to interpret the responsibilities arising from them, to a greater extent than before, in the light of the principle of solidarity. As a result, these responsibilities are seen as shared, as well as collective. In other words, all EU Member States have a shared duty to fulfil the responsibilities stemming from the CEAS, while no Member State may evade these responsibilities, leaving it up to other Member States, or institutions of the EU to achieve them. Member States must work together to ensure that the CEAS is properly implemented throughout the EU. In its report, the ACVZ describes how this principle relates to the following aspects of the CEAS: 1) border control, 2) registration, 3) responsibility allocation, 4) status determination, 5) return and integration, and 6) monitoring compliance with the CEAS.

#### *Who is responsible for processing an asylum application?*

The Dublin Regulation sets out the criteria for identifying the Member State responsible for examining an application. It does not contain a mechanism enabling Member States to distribute these responsibilities between them. The underlying premise of the Regulation is that the Member State that played the largest role in the asylum seeker's entry into, or stay in the EU, taking account of his or her personal situation, is responsible for the asylum application. It is no secret that the Dublin Regulation does not fulfil all its objectives. Criteria are not always applied, or applied incorrectly. In the Advisory Committee's view, complete and correct compliance with the Dublin Regulation would in itself result in a different distribution of asylum responsibilities. This would require a much greater focus on the ties an asylum seeker has with a specific Member State, which in turn demands improved and more generous application of the criterion that the presence of family members should be taken into account. To achieve a fair sharing of responsibilities however, additional measures are necessary.

## A proposal for a permanent mechanism for responsibility sharing

To achieve a fair sharing of responsibilities, a distribution mechanism should not be the exception – as is the case in the EU’s current reallocation plans – but the standard situation. In Chapter 4, the ACVZ offers a detailed proposal to this effect. A fair sharing of responsibilities will not be achieved without some form of coercion. To this end, the Advisory Committee proposes amendments to articles 3 and 13 of the Dublin Regulation. Article 13 determines that when no Member State can be held responsible for the asylum application under one of the other Dublin criteria, the Member State where the asylum seeker entered ‘Dublin territory’ is responsible for examining the application. When it is impossible to establish where the asylum seeker entered this territory, Article 3 of the Dublin Regulation stipulates that the Member State where the application is lodged becomes responsible for the application. In the Advisory Committee’s view, these articles should be supplemented with a provision stating that when a Member State is confronted with a disproportionately large number of asylum applications, responsibility for future asylum applications in that state can be transferred to another Member State which up to that point has received a disproportionately low number of applications. The latter state would be obliged to accept the transfer. The above provisions should also refer to two new provisions to be added to the Dublin Regulation.

First, the European Council should be given the power to adopt a distribution key to establish a fair sharing of responsibilities. This key can then be used by the European Commission to determine, on an annual basis, the percentage of the total number of asylum applications each Member State should be responsible for. Member states should provide the European Commission with the necessary data through Eurostat.

Second, the European Commission must be given the power to determine, every three months and on the basis of the distribution key, the desired distribution of asylum applications across the Member States. This means that the EU agency responsible for the EURODAC database (eu-LISA) in which all persons who apply for asylum are registered, should provide the European Commission with quarterly reports on the total number of asylum seekers registered in the EU and in each Member State. The European Commission can then determine which states have received a disproportionate number of applications, and how many asylum seekers may be transferred by these Member States to those with disproportionately few applications. Basing distribution on the number of registered asylum seekers creates a built-in incentive for Member States to register all asylum seekers.

### Conditions

Chapter 5 of the report describes the conditions that have to be fulfilled if the permanent distribution mechanism is to function properly. These are: 1) further harmonization of the CEAS, 2) creation of future prospects for asylum seekers, and 3) continuing work on the external dimension of EU asylum policy.

#### *Further harmonization*

The Advisory Committee believes that further harmonization of the CEAS is essential. Asylum applicants have to be confident that their application will receive equal treatment in any of the Member States. In other words, the outcome of the application should not depend on which Member State processed the application. Without that confidence, the asylum seeker cannot be expected to accept the decision that the asylum application will not be dealt with in the country of his or her choice. This would lead to an increase in secondary migration flows. Further harmonization requires the European Commis-

sion to adopt a more active and strategic enforcement approach towards Member States who fail to meet their obligations. In addition, it can reward states that take active measures to increase asylum capacity, or offer unused capacity to other Member States, with extra funding. However, the Member States themselves are primarily responsible for the correct and timely implementation of EU legislation. They should be willing to raise shortcomings in other Member States in European Council meetings. As a last resort, it should even be possible to exclude Member States from benefiting from the distribution mechanism. Finally, the ACVZ is of the opinion that in the future certain aspects of the CEAS could be implemented at European level. Examples include shared country of origin reports, cooperation between Member States in decision making and the registering of asylum seekers by EU personnel.

#### *Future prospects*

The ACVZ proposal does not afford much freedom to the asylum seeker in the choice of Member State. This could give rise to secondary flows of asylum seekers who are unhappy about the Member State they have to apply to. The Advisory Committee proposes to compensate for this lack of choice by offering the prospect of mobility throughout the EU to permit holders after two years and subject to certain restrictions.

#### *The external dimension*

Distributing asylum responsibilities between the Member States will not influence the total number of asylum seekers seeking international protection in the EU. The Advisory Committee therefore also addresses the need to work on the external dimension of EU asylum policy.

## **Conclusions and recommendations**

The conclusions and recommendations of the ACVZ to the State Secretary for Security and Justice are as follows:

#### Conclusions:

1. At present, the CEAS is not sufficiently based on the principle of solidarity. Member states should concentrate their efforts on offering international protection to all who qualify for it. This means that, to a greater extent than has been the case, appropriate status determination should be guaranteed in all Member States in an equal manner. This requires the provisions of the CEAS to be viewed as collective responsibilities, demanding full compliance.
2. Asylum responsibilities are not shared fairly between the Member States. This will not be achieved without amending the Dublin Regulation and Dublin system.
3. A fair and durable distribution system requires measures to further harmonize the CEAS and to offer the prospect of integration to all permit holders.
4. A distribution mechanism is not the answer to migration crises. External solidarity is also needed. A distribution mechanism does have the potential to enlarge the 'protection capacity' of the EU as a whole.

## Recommendations:

1. Advocate incorporating the standards laid down in the Qualification and Procedures Directives in an EU Regulation, emphasising the fact that these standards should be applied equally in all EU Member States.
2. Emphasise the collective and shared mission of Member States to offer international protection. Advocate an interpretation of CEAS responsibilities that is more in line with the principle of solidarity. Urge the European Commission and the Member States to take firmer measures against Member States that fail to meet their obligations.
3. Advocate amending articles 3 and 13 of the Dublin Regulation and supplementing the existing responsibility criteria in such a way that Member States with a disproportionately large number of applications will be able to transfer future asylum applications to Member States with a disproportionately low number of applications, regardless of whether such applications fall under the responsibility of the latter state under the Dublin criteria. This distribution mechanism could be activated by the European Commission and should operate under its authority. The European Asylum Support Office (EASO) or a new EU distribution agency should coordinate and support the distribution process.
4. Advocate the further harmonization of the CEAS. This means that Member States and the European Commission will have to call to account Member States that fail to meet their obligations and make greater use of political and legal instruments to call these states to heel. In addition, some aspects of the CEAS could in due course be implemented at European level.
5. Urge the European Commission and Member States to offer asylum seekers and permit holders future prospects. Since asylum seekers will no longer be able to influence in which they will have to submit their application, and following the determination of their status will be obliged to integrate, they should be offered the prospect of mobility throughout the EU, subject to conditions and after a certain time. This will help prevent irregular secondary migration flows, and better regulate intra-EU mobility.
6. Promote greater use of resettlement by Member States and the European Commission as well as the creation of safe legal avenues for migration to the EU. Such measures will be all the more important if the external borders are closed and agreements are reached with third countries to reduce asylum migration. Efforts should also be made to make more effective use of common measures for the return of failed asylum seekers.



## INTRODUCTION

### 1.1 Background and reasons for the advice

In the course of the past few years, there has been a lot of criticism regarding the disproportional distribution of the number of applications for asylum and the related responsibilities among Member States of the European Union (EU). The disproportional distribution of asylum applications causes tension in the EU. The Dutch government has also identified this disproportionate distribution. The Dutch government strives to achieve a balanced distribution of responsibilities. For his purpose, the State Secretary of Security and Justice has asked the Advisory Committee on Migration Affairs (ACVZ) on 30 March 2015 to review the options for drawing up a distribution mechanism for asylum responsibilities.<sup>1</sup>

The Advisory Committee understands asylum responsibilities of the Member States in the context of this advisory report to mean not only the responsibility for the asylum procedure and the reception linked to it, but also all responsibilities that are connected with or stem from the submission of an application for asylum. So, this also includes the consequences of the granting or rejection thereof. Therefore, the Advisory Committee also understands ‘asylum responsibility’ to mean the responsibility for the integration of asylum seekers who have been admitted and the return of rejected asylum seekers, and dealing with asylum seekers who unlawfully reside in the territory of the Member State after the final rejection of their asylum application.

### 1.2 Problem definition

A disproportionate distribution of the numbers of applications for asylum, both in absolute terms and relative terms. When looking at the distribution of asylum applications among the Member States in the years from 2008 to 2014 inclusive, it is noteworthy that those numbers vary greatly from Member State to Member State.<sup>2</sup> In 2014, a total of 660,000 asylum applications were submitted throughout the EU. Most asylum applications were submitted by asylum seekers from Syria, the Western Balkans, Eritrea, Afghanistan, and Pakistan. The countries with the most inhabitants generally received also the largest numbers of applications for asylum, with a number of clear exceptions. Sweden, as a relatively small country (in terms of inhabitants), receives e.g. relatively many applications for asylum.<sup>3</sup> Even though it is a large country, Spain receives relatively few asylum applications. What is also noteworthy is the recent increase in the number of applications for asylum in Bulgaria and Hungary. To be able to contextualise the numbers and to make a more meaningful comparison between Member States, the Dutch Immigration and Naturalization Service (Immigratie- en Naturalisatiedienst, IND) will publish a summary of the number of asylum seekers per Member State twice per year on the basis

1 See Appendix 1.

2 For an illustration of the absolute numbers of applications for asylum in the Member States in the period 2008-2014, see the website of Eurostat: <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/statistics-illustrated>, consulted on 8 December 2015.

3 Sweden received the most asylum applications in proportion to the size of the population: 4,780 applications per million inhabitants, 7 times more than the EU average, which was 686 asylum applications per million residents in the second half of 2014. Hungary and Austria follow at a distance in the second and third place with respectively 5.1 and 3.1 times the EU average. The Netherlands occupies the eleventh place and approaches the EU average with 676 asylum applications per million inhabitants. Spain received only 72 asylum applications per million people. This is 0.1% of the average (source: IND trends second half 2014, <https://ind.nl/Documents/Asylum%20Trends%20Juni.pdf>, consulted on 8 December 2015).

of Eurostat data and relate this number to the population size, the land area, and the Gross National Product (GNP) of the Member States of the EU.<sup>4</sup> It should be noted that these figures pertain to the number of submitted applications for asylum. Whether the Member State also handles the asylum applications substantively is an entirely different question. For instance, the number of decisions in Member States is in some cases considerably lower than the number of submitted applications for asylum. Table 1 compares the number of first asylum applications (first half of 2015) consecutively with the area of the territory of the concerned Member State, the number of inhabitants, and the GNP.

**Table 1. Number of applications for asylum in the first half of 2015 in relation to land area, population size, and GNP.**

	Rank	Country of asylum	Number of Applications	% share in EU	Country area (sq km)	% share in EU	Inhabitants (million)	% share in EU	GDP	% share in EU
EU	1	Germany	154,105	39%	357,134	8%	80.8	16%	2,624	20%
	2	Hungary	65,480	16%	93,023	2%	9.9	2%	170	1%
	3	Italy	30,140	8%	301,339	7%	60.8	12%	1,541	12%
	4	France	29,450	7%	543,966	12%	65.8	13%	1,830	14%
	5	Austria	27,110	7%	83,880	2%	8.5	2%	281	2%
	6	Sweden	25,745	6%	438,575	10%	9.6	2%	314	2%
	7	United Kingdom	14,920	4%	248,530	6%	64.3	13%	1,742	13%
	8	Netherlands	8,695	2%	41,542	1%	16.8	3%	548	4%
	9	Belgium	8,510	2%	30,526	1%	11.2	2%	339	3%
	10	Bulgaria	7,240	2%	110,898	3%	7.2	1%	87	1%
	11	Spain	6,585	2%	498,511	11%	46.5	9%	1,125	9%
	12	Greece	5,470	1%	131,958	3%	10.9	2%	213	2%
	13	Denmark	4,010	1%	42,895	1%	5.6	1%	180	1%
	14	Poland	3,205	1%	312,679	7%	38.0	8%	673	5%
	15	Finland	2,565	1%	338,433	8%	5.5	1%	156	1%
	16	Ireland	1,480	0%	69,798	2%	4.6	1%	149	1%
	17	Cyprus	830	0%	9,251	0%	0.9	0%	19	0%
	18	Malta	725	0%	316	0%	0.4	0%	10	0%
	19	Romania	710	0%	238,394	5%	19.9	4%	278	2%
	20	Czech Rep.	635	0%	78,865	2%	10.5	2%	216	2%
	21	Luxembourg	515	0%	2,586	0%	0.5	0%	37	0%
	22	Portugal	430	0%	89,089	2%	10.4	2%	203	2%
	23	Latvia	150	0%	64,562	1%	2.0	0%	35	0%
	24	Estonia	115	0%	45,227	1%	1.3	0%	25	0%
	25	Lithuania	105	0%	65,300	1%	2.9	1%	56	0%
	26	Slovenia	85	0%	20,272	0%	2.1	0%	44	0%
	27	Slovak Rep.	80	0%	49,037	1%	5.4	1%	106	1%
	28	Croatia	60	0%	87,661	2%	4.2	1%	66	1%
<b>EU-Total</b>			<b>399,150</b>	<b>100%</b>	<b>4,394,247</b>	<b>100%</b>	<b>506.8</b>	<b>100%</b>	<b>13,068.743</b>	<b>100%</b>
Not-EU		Switzerland	11,160	3%	41,285	1%	8.1	2%	326	2%
		Norway	4,300	1%	323,779	7%	5.1	1%	250	2%
<b>Not-EU</b>			<b>15,460</b>	<b>4%</b>	<b>365,064</b>	<b>8%</b>	<b>13.2</b>	<b>3%</b>	<b>575.674</b>	<b>4%</b>

Source: IND trends first half 2015 based on Eurostat.

<sup>4</sup> Eurostat is a Directorate-General that supplies statistical data to the EU.

Table 2 shows the number of asylum seekers per Member State compared on the basis of all three of the above factors. It also specifies the extent to which those numbers differ per Member State from the EU benchmark set at 1, if there is a difference at all. Every factor has been assigned an equal weighting. The picture revealed by the table is, other than often suggested in the media and by the popularity of the Mediterranean and Aegean sea route, that the southern Member States, except for Malta, did not experience the highest 'asylum pressure' in 2015. The North-Western Member States, such as Sweden and Germany, experienced relatively the largest asylum pressures. The Baltic States and Member States in the south and east of the EU experienced the least asylum pressure on the basis of this table.

**Table 2. Overview of asylum pressures in the first half of 2015, weighting land area, population size, and GNP.**

Rank	Country of asylum	Application per 1000 sq km	In relation to Total EU 28 = 1	Number or Applications	Country area (sq km)
1	Malta	2,294	25.8	725	316
2	Hungary	704	7.9	65,480	93,023
3	Germany	432	4.8	154,105	357,134
4	Austria	323	3.6	27,110	83,880
5	Belgium	297	3.1	8,510	30,526
6	Netherlands	209	2.4	8,695	41,542
7	Luxembourg	199	2.2	515	2,586
8	Italy	100	1.1	30,140	301,339
9	Denmark	93	1.0	4,010	42,895
	<b>Total -28</b>	<b>91</b>	<b>1.0</b>	<b>399,150</b>	<b>4,481,908</b>
10	Cyprus	90	1.0	830	9,251
11	Bulgaria	65	0.7	7,240	110,898
12	United Kingdom	60	0.7	14,920	248,530
13	Sweden	59	0.7	25,745	438,575
14	France	54	0.6	29,450	543,966
15	Greece	41	0.5	5,470	131,958
16	Ireland	21	0.2	1,480	69,798
17	Spain	13	0.1	6,585	498,511
18	Poland	10	0.1	3,205	312,679
19	Czech Republic	8	0.1	635	78,865
20	Finland	8	0.1	2,565	338,433
21	Portugal	5	0.1	430	89,089
22	Slovenia	4	0.0	85	20,272
23	Romania	3	0.0	710	238,394
24	Estonia	3	0.0	115	45,227
25	Latvia	2	0.0	150	64,562
26	Slovak Republic	2	0.0	80	49,037
27	Lithuania	2	0.0	105	65,300
28	Croatia	1	0.0	60	87,661
	Norway	13	0.1	4,300	323,779
	Switzerland	270	3.0	11,160	41,285

Source: IND trends first half 2015 based on Eurostat.

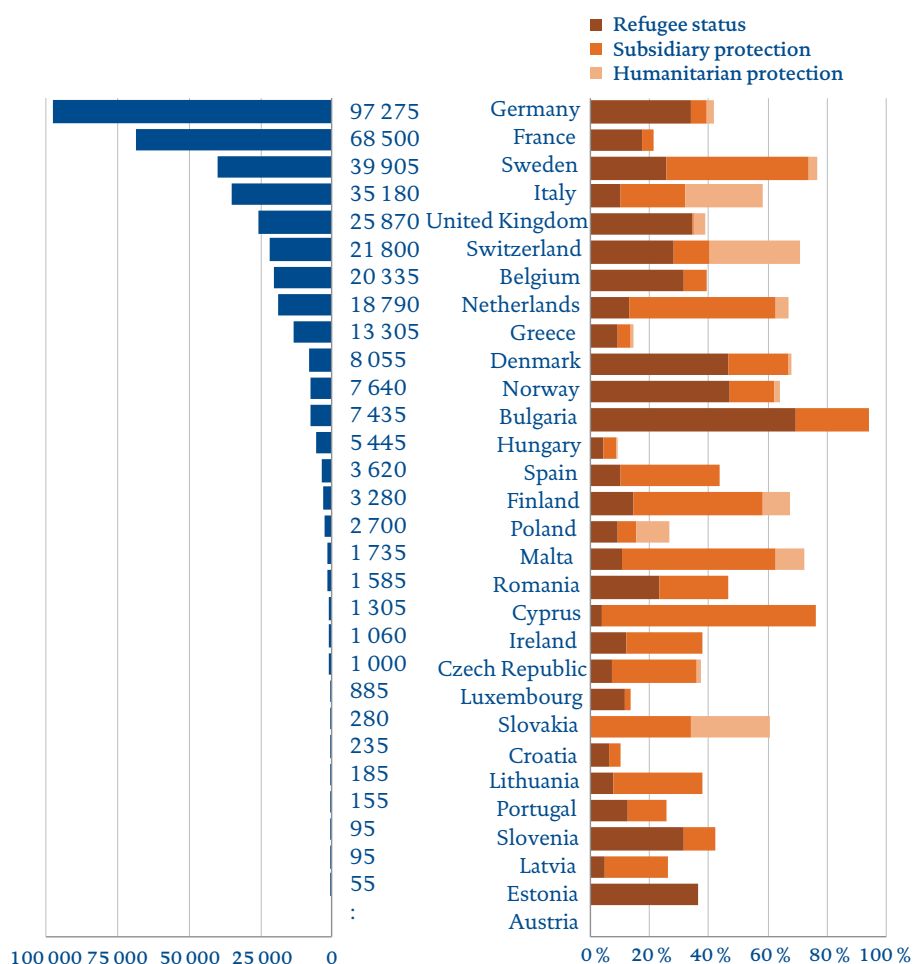


The above figures show that the asylum responsibilities are distributed unequally. What is furthermore noteworthy is that many Member States without land or sea border to the east or south of the EU area, such as Sweden and Germany, receive relatively many asylum applications, based on most indicators. Based on the large number of persons travelling the Mediterranean and Aegean sea routes, this means that many asylum seekers are not being registered as such in the country where they arrived or that not everyone is submitting an application for asylum in the same Member State immediately after registration. This constitutes a strong indication that the secondary flows of asylum migration within the EU are enormous.

#### Unequal approval percentages

Not only does the number of applications for asylum vary considerably between Member States. The outcome of the processing of all those applications does also differ significantly among Member States. For example, with approximately 90%, Bulgaria had the highest approval percentage of the EU Member States in 2014.<sup>5</sup> With more than 60%, the Netherlands was well above the average. Greece, Hungary, and Croatia had particularly low approval percentages (less than 10%, see Table 3).

Table 3: approval percentage applications for asylum (refugee, subsidiary protection or humanitarian status) in 2014.

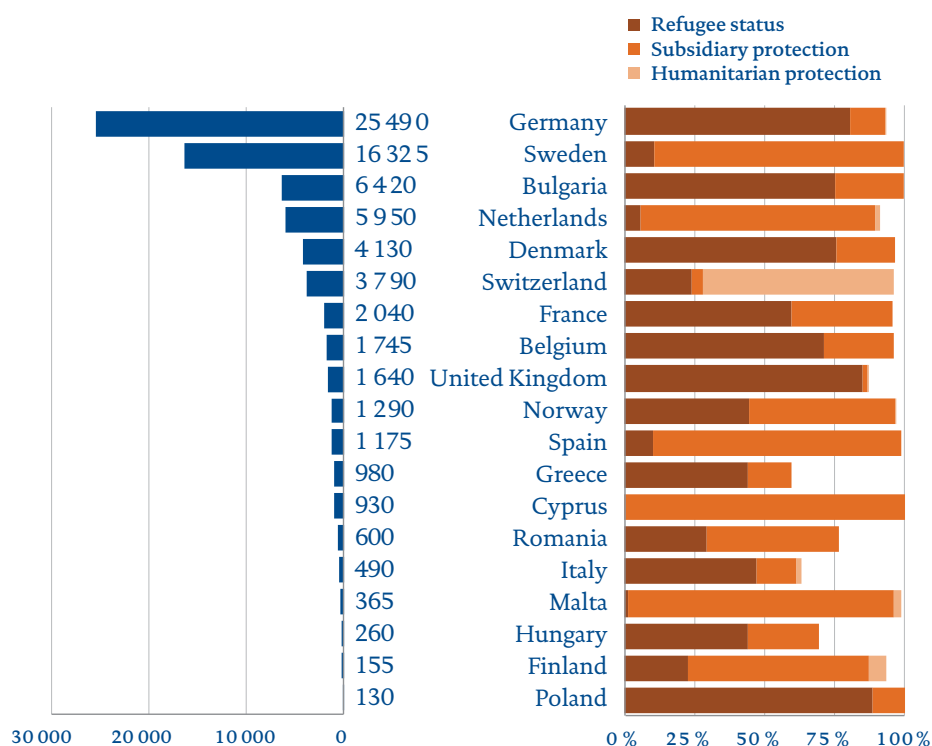


Source: EASO Annual Report 2014.

5 The approval percentage pertains to the total number of asylum requests granted. This is the total of the qualification as a refugee, recognised subsidiary protection or humanitarian status.

Although these differences can partly be explained by the differences in the country of origin of the asylum seekers in the Member States, they also are an indication that the asylum procedures in the Member States do not lead to comparable results in comparable cases. The approval percentages vary widely among the countries of origin.<sup>6</sup> What stood out in the 2014 Annual Report of EASO was mainly the difference between the Member States in the percentages of recognised applications for asylum of Afghan asylum seekers. According to the annual report, those percentages varied from 20% to 95%. Not only did the approval percentages vary, the type of permit granted to persons of whom it has been ascertained that they need protection differs greatly among the Member States. The United Kingdom grants refugee status to virtually every Syrian asylum seeker who receives protection, while the Netherlands provides Syrian asylum seekers mainly with subsidiary protection. This is an indication that the asylum practice in the EU has not yet been harmonized.

**Table 4: approval percentages and grounds for approval of Syrian asylum seekers in the EU Member States in 2014.**



Source: EASO Annual Report 2014.

<sup>6</sup> See EASO Annual Overview 2014: <https://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-2014.pdf>, consulted on 8 December 2015.

The ACVZ notes that, in the current situation, there is no fair or proportionate distribution of asylum applications and therefore also not of the responsibilities arising from an asylum application. Moreover, the chances of asylum seekers obtaining protection in the Member States are not equal. That is not only detrimental to asylum seekers, who are not able to trust that they will receive a correct assessment of their asylum application in each Member State. It also creates a threshold for the Member States in terms of their confidence in each other's asylum system and therefore their acceptance of the consequences of the decisions of other Member States.

#### *Earlier plans for a distribution mechanism*

Plans for a distribution or relocation mechanism surface regularly in the EU.<sup>7</sup> Although the terms resemble each other, this advice makes a clear distinction between them. Relocation pertains to the situation in which an asylum seeker will be transferred to another Member State, whereby the responsibility for processing the asylum application will be transferred at the same time. Distribution refers to the situation in which the responsibility for processing the asylum application has not yet been allocated to a Member State. Plans for distribution or relocation are invariably presented as instruments for intra-EU solidarity, meaning solidarity between the Member States. Except for two small-scale temporary projects in Malta between 2009 and 2013<sup>8</sup>, such plans were, however, never implemented. The evaluation of the projects in Malta, carried out by EASO, revealed that these projects were unsuccessful and that it is difficult for Member States to effectively implement solidarity measures. The projects were based on a double voluntarism. Both the permit holder and the Member State had to consent to relocation. In retrospect, it appeared that relocation cannot be realised on a large scale based on these conditions. The evaluation shows that many Member States questioned the benefit of intra-EU relocation after the projects' conclusion. The main argument against relocation of the asylum seekers in Malta was that asylum practices are not the same in all Member States. Asylum procedures are organised differently in the respective Member States, leading to different results. Moreover, the rights granted to asylum seekers also differ. In addition, EASO writes, intra-EU relocation has 'complex political, financial, and legal consequences'.<sup>9</sup> Finally, most Member States emphasised that relocation should primarily be carried out on a voluntary basis.

#### *The so-called 'migration crisis': the discussion on relocation and distribution is gaining momentum*

Although the influx of asylum seekers into Europe had already been considerable last year in comparison with previous years, the influx has only increased further since then. Never before have so many asylum seekers made the voyage to the EU in order to apply for asylum as in 2015. The ongoing civil war in Syria and the lack of prospects in the region have made many decide to travel to Europe for protection. Furthermore, a significant number of Eritreans are still escaping the dictatorship of that country. In addition, large groups of people from the Balkan countries have travelled to the EU to apply for asylum for various reasons. In total, to date in 2015, already more than a million persons have been registered in the EU as asylum seekers, of whom almost 180,000 in October alone<sup>10</sup>. These figures therefore do not yet contain the current registration backlogs in

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7 See Doc.no. 7773/94 ASIM 124, for instance. It is also known as the German proposal. This proposal contained plans for a distribution mechanism, including a proposal for a distribution key. In 2006, Finland submitted a proposal: <http://www.intermin.fi/intermin/bulletin.nsf/vwSearchView/193D43D0A68D3A43C22571F0003B0632>.

8 <https://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO11.pdf>, consulted on 8 December 2015.

9 <https://easo.europa.eu/wp-content/uploads/EUREMA-fact-finding-report-EASO11.pdf>, p. 16.

10 Source: EASO. <https://easo.europa.eu/wp-content/uploads/Latest-Asylum-Trends-snapshot-October-2015.pdf>. Consulted on 8 December 2015.

various Member States. The vast majority of these asylum seekers arrived in the EU in an irregular manner and largely via the risky routes on the Mediterranean and Aegean Seas. According to the UNHCR, 866,484 persons have made the crossing to Europe via the Mediterranean and Aegean Seas in this year alone. In addition, in accordance to the UNHCR, at least 3,510 people perished, or went missing.<sup>11</sup> The persons who have made the crossing to Europe, entered the EU mainly in Greek and Italian territory, or were rescued or intercepted in Greek or Italian territorial waters. A large part of the asylum seekers arriving in Greece then travel on, via East and Central European Member States, such as Hungary, Croatia, and Slovakia, namely to Germany and Sweden.

All this exerts enormous pressures on the immigration and reception authorities in different Member States. The authorities must register all asylum seekers and assess who among them is entitled to protection. Moreover, they have to provide for their reception. It also demands much of the residents of the Member States who are being confronted with an increasing number of reception centres in their municipality or region. The Netherlands as well as other Member States have continuously been working hard in the past months to ensure a proper reception of the high numbers of asylum seekers. At the European level, various measures were taken to assist those Member States that could no longer fulfil their obligations by themselves, with the registration of asylum seekers, the protection of the external borders, and the provision of initial reception. However, there are also Member States who have made very little effort.

*The political discussion on the relocation and distribution mechanisms*

Since March 2015, there have been many, sometimes contradictory, plans formulated within the EU that can more or less rely on the loyal cooperation of the Member States. Due to the so-called ‘refugee crisis’, or formulated in a more neutral manner, the ‘migration crisis’, the— until then slumbering—discussion about the distribution or relocation of asylum seekers in the EU has gained momentum this year.

The political discussion within the bodies of the EU on the distribution issue is focused on two concepts: solidarity and responsibility. As described in the following chapter, solidarity is a core principle of the EU and also of the European asylum policy. The way in which the political negotiations are being reported in the media shows that that Members States are not very confident in each other’s fulfilment of all their responsibilities. For example, border controls at various interior borders, such as between Italy and France and Italy and Austria and Denmark and Germany, have been intensified, while Hungary has threatened to suspend the Dublin Regulation.

The concepts of solidarity and responsibility are often bracketed together in the political debate.<sup>12</sup> Member States in North-West Europe have said that they will show more solidarity with Member States at the eastern and southern external borders of the EU, only if the latter fulfil all their obligations in the context of the Common European Asylum System (CEAS). The North-Western Member States thus reproach the Member States in Southern and Eastern Europe for not acting in solidarity. The Member States at the external borders of the EU emphasise that they can fulfil all their responsibilities only once the other Member States meet them by taking solidarity measures. Therefore, they reproach the other Member States for a lack of solidarity. A third block of mainly East- and Central-European Member States currently receives few applications for asylum and does not seem enthusiastic to change this situation. This group generally does not seem

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11 <http://data.unhcr.org/mediterranean/regional.php>, consulted on 26 November 2015.

12 For more information about the concept of ‘solidarity’, see paragraph 2.2.

to consider dealing with asylum migration as a shared responsibility. Ireland, the United Kingdom, and Denmark are not bound by all European agreements on asylum.<sup>13</sup> It is therefore all the more remarkable that Ireland, in the summer of this year, nevertheless opted for making a commitment to accept asylum seekers in the context of the relocation plans.

In 2015, a start was made with the implementation of the first emergency measures for the relocation to other Member States of asylum seekers who, on the basis of their nationality, have a chance of 75% or higher to be granted a residence permit by Italy and Greece.<sup>14</sup> These measures were not adopted without a struggle and their implementation was started only hesitantly. On 7 December, only a total of 160 of the 160.000 asylum seekers had been relocated from Italy and Greece.<sup>15</sup> No unanimity could be reached on these measures, meaning that the plans were adopted by the Council by qualified majority. For that reason, some Member States allege that these measures were forced upon them. For example, Slovakia and Hungary have begun proceedings before the European Court of Justice for the purpose of challenging the decision on the relocation. These measures are also being fought at the highest political level in the EU. The President of the European Council, Donald Tusk, said on 3 December 2015 in an interview with various newspapers that the plan to relocate 160,000 ‘refugees’ out of Italy and Greece was imposed by the European Commission (EC) and the German Federal Chancellor. Tusk stated that he is convinced that there is currently no majority to be found in the EU for a relocation system:

*“Let’s avoid hypocrisy: it is not a question of international solidarity any more, but a problem of European capacities. Europeans would be less reluctant if the EU’s external border was really under control.”<sup>16</sup>*

It is therefore very much the question whether a recommendation for a permanent distribution mechanism can currently muster a broad political level of support in all Member States, certainly not as long as the number of people coming to the EU to apply for asylum continues to be high. Nevertheless, the Advisory Committee believes that it has written an advisory report for a permanent distribution mechanism, which is legally feasible and practically enforceable. ACVZ deems the development of a permanent distribution mechanism inevitable in the future. In addition, the asylum capacity in the EU will only be increased further, once all Member States participate. According to the ACVZ, this will lead to a fair distribution of the asylum responsibilities, independent of the level of the influx of asylum seekers, if there is a political will to adopt and then implement the advice.

### 1.3 Research question and delineation

In this review, the ACVZ focuses on the following question:

*How can the Common European Asylum System (CEAS) develop into a system based on solidarity, in which the responsibilities of Member States of the EU are distributed fairly in respect of asylum seekers and permit holders?*

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13 However, they are bound to the Dublin Regulation.

14 This chance is calculated on the basis of the average approval percentages of asylum applications in the Member States of applications for asylum.

15 [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/index_en.htm), consulted on 9 December 2015.

16 <https://euobserver.com/migration/131363>, consulted on 8 December 2015.

To answer this question, the following sub-questions will be answered:

1. What are the European Union Law characteristics of a system based on solidarity?
2. To what extent and why is there an asylum system based on solidarity in the current situation?
3. What is a fair distribution of responsibilities in respect of asylum seekers and permit holders?
4. To what extent and why is there a fair distribution in the current situation?
5. How can a system based on solidarity and with a fair distribution be achieved?
6. Which terms and conditions must be fulfilled to make a system based on solidarity and with a fair distribution function?

This advisory report deals with the question of how the Member States of the EU can implement the common asylum policy in a manner based on solidarity in respect of the asylum seekers who are in the EU and how the asylum responsibilities of the Member States in this area can be distributed fairly among the Member States. The Advisory Committee has not written this advisory report in order to offer a solution for the current ‘migration crisis’, but it contains proposals pertaining to the question as to how the internal dimension of the European asylum policy should be developed further and how the internal solidarity can be further strengthened. As these proposals are not completely independent from the external dimension of the European asylum policy, this aspect therefore is also briefly dealt with in paragraph 5.3.

## 1.4 Method and composition sub-committee

A review of literature and case law has been performed to determine the starting points for this advice. In addition, the Advisory Committee has attended an international seminar on the meaning of the principle of solidarity for the European right to asylum. Conversations were conducted with a number of experts in European Union Law and the right to asylum and an expert meeting was held with experts in European Union Law, refugee law, and experts with socio-scientific knowledge of migratory flows, in order to verify the starting points set by the ACVZ for this advice and to prepare a proposal for a distribution mechanism.<sup>17</sup>

The members of the sub-committee for the advice were Adriana van Dooijeweert (up to 1 September), Tom Claessens, Evelien Brouwer, Minze Beuving, Conny Rijken, and Hans Sondaal (chair). The project group of the secretariat consisted of David de Jong, Huub Verbaten, and Ralph Severijns (project leader).

## 1.5 Reader’s guide

The starting points used by the ACVZ for this advice, are described in Chapter 2. Chapter 3 describes the measures taken by the European Member States and the EC in response to large numbers of asylum seekers currently coming to the EU. In Chapter 4, the Advisory Committee is elaborating a proposal for a permanent mechanism for a fair distribution of asylum responsibilities in the EU. Chapter 5 describes the necessary conditions that must be worked on, to strengthen the internal solidarity among Member States and to establish a sustainable and effective system of responsibility distribution. Chapter 6 ends with conclusions and recommendations.

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17 See Appendix 2.



## Starting points and legal framework

This Chapter lists the starting points considered by the ACVZ to be the guiding principle for this advisory report. These basic principles arise from the Refugee Convention, the European Convention on Human Rights (ECHR), and European Union Law. Moreover, inspiration was drawn from socio-scientific literature on factors that affect migratory movements and use was made of the outcome of an expert meeting organised by the ACVZ.

### 2.1 International protection in the EU

This advisory report is focused on the European Union Law perspective, which will be discussed in detail in this paragraph. Article 78 of the Treaty on the Functioning of the EU (TFEU) provides the legal basis for the asylum policy of the EU. The first paragraph of this Article reads:

*“The Union 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 Geneva Convention of 28 July 1951 (Refugee Convention) and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”*

This paragraph explains what international protection involves and who in the EU is entitled to this protection, how this should be established, and how it will be determined which Member State is responsible for providing protection.

*What does international protection entail?*

The above cited Article 78 TFEU explicitly refers to the Refugee Convention and other relevant conventions. The refugee law and the right to asylum gives rise to the obligation to offer international protection to persons who run an unacceptable risk in their own country of being exposed to serious violations of human rights.<sup>18</sup> This risk can come from the authorities in the country of origin, or from threats by others against whom those authorities are unable or unwilling to offer protection. International protection foremost entails refugees not being deported or returned to a country where they will be prosecuted for reasons of race, religion, nationality, belonging to a social group or political convictions.<sup>19</sup> Moreover, various international conventions contain a prohibition of torture or inhumane or humiliating treatment or punishment.<sup>20</sup> The prohibition of returning someone to a region where he or she risks persecution or runs a real risk of being exposed to such treatment is also called a prohibition of refoulement. The EU law not only refers to the refoulement prohibitions in the Refugee Convention and other relevant conventions, but also has its own prohibition of refoulement that is set out in Article 19 of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), which reads that ‘no one shall be removed or deported to or extradited to a State in which exists a serious risk that he or she will be subjected to the death penalty, to torture or to other inhuman or degrading treatment or punishment.’

18 J. Hathaway, *The law of Refugee Status*, Toronto/Vancouver: Butterworths 1991, p. 99 et seq.

19 Article 1 (A) (2) of the Refugee Convention in conjunction with Article 33 (1) of the Refugee Convention.

20 For example, Article 3 (1) Convention against Torture, Article 7 ICCPR, and Article 3 ECHR.



In addition to protection against refoulement, the Charter contains the right to asylum in Article 18. According to Article 18, this right must be guaranteed. Article 78 TFEU provides guidance in respect of the question of what the right to asylum at least means within the EU in addition to protection against refoulement. Article 78 TFEU states the purpose for the Member States as granting an ‘appropriate status’ to each citizen of a third country who needs international protection.<sup>21</sup> Article 2 (a) of the EU Asylum Qualification Directive<sup>22</sup> determines who in the EU is eligible for international protection. This includes both protection as a refugee (Article 13 of the EU Asylum Qualification Directive) and subsidiary protection (Article 18 of the EU Asylum Qualification Directive). The refugee status will be granted to refugees who have good reasons to fear persecution in their country of origin.<sup>23</sup> Subsidiary protection is granted to third-country nationals who run the risk of serious injury in their country of origin.<sup>24</sup> When it is established that an asylum seeker is entitled to international protection in the EU, a right of residence arises for the asylum seeker and he or she must be granted a residence permit as soon as possible on the basis of Article 24 of the EU Asylum Qualification Directive.

*How is it decided who qualifies for protection?*

Who is eligible for international protection should be decided in the asylum procedure by the decision-making authorities in the Member States. The EU Asylum Procedures Directive<sup>25</sup> contains the standards that must be met by the asylum procedure. The right to asylum means that everyone who submits an application for international protection in the EU has the right to an appropriate status determination and therefore to having his or her asylum application processed in accordance with the requirements of the EU Asylum Procedures Directive. An appropriate status determination is necessary in order to be able to guarantee that no one will be deported or returned contrary to the refoulement prohibition. These standards are equal throughout the EU, as the directives referred to apply to all Member States.<sup>26</sup>

*Which Member State is responsible for the purpose of providing international protection?*

The right to asylum does not oblige a Member State to effectively grant a residence permit to all persons who are present on its territory and in need of international protection.<sup>27</sup> Rules have been established within the EU determining which Member State is responsible for an asylum seeker who applies for asylum in the EU. The right to asylum permits the transfer of asylum seekers to another Member State of the EU, or a safe third country, where an appropriate status determination can be provided, or where protection can be offered against non-refoulement. However, this does require this option to be guaranteed in the reception (Member) State.<sup>28</sup> The Dublin III Regulation<sup>29</sup> (hereinafter: Dublin

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21 M. Reneman, *Het handvest van de grondrechten (The Charter of Fundamental Rights)*, A&MR 2010, no. 5&6, p 241.  
 22 Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, on a uniform status for refugees or on persons eligible for subsidiary protection, and on the content of the protection granted (OJ L 337).  
 23 The European Union Law definition of a refugee is set out in Chapters II and III of the EU Asylum Qualification Directive.  
 24 Article 15 of the EU Asylum Qualification Directive defines ‘serious injury’. This is subdivided in (a) the death penalty or execution; or b) torture or inhuman or degrading treatment or punishment of an applicant in his country of origin; or c) serious and individual threat to the life or person of a citizen as a result of indiscriminate violence in the context of an international or domestic armed conflict.  
 25 Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180).  
 26 Subject to the reservations made by UK, Denmark, and Ireland.  
 27 M. Reneman, *Het handvest van de grondrechten (The Charter of Fundamental Rights)*, A&MR 2010, no. 5 and 6, p. 241, by reference to H. Battjes, *European Asylum Law and International Law*, p. 114.  
 28 H. Battjes, *European Asylum Law and International Law*, p. 114.  
 29 Regulation (EU) no. 604/2013 of the European Parliament and the Council of 26 June 2013 fixing the criteria and instruments in order to determine which Member State is responsible for handling an application for international protection submitted by a citizen of a third country or a stateless person to one of the Member States (OJ L 180).

Regulation) includes criteria for the purpose of establishing the Member State responsible for the determination of asylum. The Dublin Regulation is based on the starting point of inter-State confidence.

On the basis of the inter-State principle of legitimate expectations, it has long been accepted that Member States may assume in advance that protection against refoulement and appropriate status determination is also guaranteed in other Member States. This changed in 2011. At that time, the European Court of Human Rights (ECHR) ruled in the case of *M.S.S. versus Belgium and Greece* in the context of the implementation of the Dublin system that Member States are not allowed to transfer asylum seekers if there are structural deficiencies in the asylum procedure and asylum reception in the host Member State.<sup>30</sup> This means that a transfer to a Member State is not allowed when the standards stemming from the European Reception Conditions Directive and Asylum Procedures Directive are (structurally) not complied with in that host Member State and hence the risk of a violation of Article 3 ECHR is present in that Member State. After all, in that case, an appropriate status determination and protection against refoulement can not be guaranteed in that host Member State. It could also be that the conditions of the reception in the Member State are so bad that the mere transfer to that Member State is already in conflict with the prohibition of refoulement and Article 3 ECHR.

The reasoning that Member States cannot blindly rely on another Member State fulfilling its asylum obligations was adopted in the *N.S.* case by the Court of Justice of the EU (hereinafter: CJEU). The CJEU ruled in that case that ‘Article 4 of the Charter of Fundamental Rights of the European Union [...] [must] be explained in such a manner that the Member States [...] are not allowed to transfer an asylum seeker to the ‘responsible Member State’ within the meaning of [the Dublin Regulation] when they cannot be unaware of the fact that the fundamental shortcomings of the asylum procedure and the reception facilities for asylum seekers in this Member State constitute serious fact-based grounds for assuming that the asylum seeker would run the real risk of inhuman or degrading treatment within the meaning of this provision.’<sup>31</sup> A Member State may not just assume in all cases that a Dublin transfer to another Member State is permitted, even when there are no ‘fundamental shortcomings’. In the case of *Tarakhel versus Switzerland* in 2014, with respect to a family that would be transferred to Italy by Switzerland, the ECHR ruled that Switzerland should have demanded that Italy provide ‘meaningful individual guarantees’ that the family would be receptioned and would have access to food, healthcare, training, etc., because of their vulnerability.<sup>32</sup> The case law of the ECHR and the CJEU on Dublin transfers leaves no room for doubt that Member States should not blindly assume that other Member States fulfil their obligations, certainly not when it concerns the possible transfer of vulnerable persons.

The transferring Member State does not become automatically responsible for handling the application when that Member State is not allowed to transfer an asylum seeker to the Member State that is actually responsible for processing the application for international protection in accordance with the Dublin Regulation. However, this Member State can always take over the application pursuant to Article 17, paragraph 1, of the Dublin Regulation. In the *Puid* case, the CJEU ruled that a Member State that is not allowed to send an asylum seeker back to another Member State pursuant to the (previous) Dublin II Regulation because he or she would run the risk of inhumane treatment, is not directly obliged

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30 ECHR, 21 January 2011, application no. 30696/09 (*M.S.S. vs Belgium and Greece*).

31 CJEU, 21 December 2011, case C-411/10 (*N.S.*).

32 ECHR, 04 November 2014, application no. 29217/12 (*Tarakhel v. Switzerland*):

to process this asylum application itself.<sup>33</sup> The Member State concerned has the authority to first verify whether a third Member State is responsible for processing the asylum application in accordance with one of the Dublin criteria. However, this procedure should not take unreasonably long. As to the question of how much time is ‘unreasonable’, the CJEU has not yet issued a decision. If necessary, the Member State concerned must process the asylum application itself. This opinion has now been laid down in Article 3 of the current Dublin Regulation.

#### *Intermediate conclusion*

An intermediate conclusion is that the prohibition of refoulement and the right to an appropriate status form the basis of the CEAS. It is the responsibility of the European Member States to ensure that it is determined for each asylum seeker whether he or she is entitled to international protection, on the basis of the standards in the EU Asylum Qualification Directive and the EU Asylum Procedures Directive. It is important to note that the law does not impose this obligation by definition on the Member State in which the asylum seeker is located. However, the ECHR and the European Union Law forbids Member States from transferring an asylum seeker to a Member State in which an appropriate status determination and protection against refoulement cannot be guaranteed.

In addition, European Union law opposes a transfer to a Member State in which the reception facilities do not meet the requirements laid down in the Reception Conditions Directive. In that case, that may mean that a treatment that is in conflict with Article 3 ECHR and Article 4 of the Charter awaits a person in that Member State. The transferring Member State cannot rely on this right being guaranteed in the receptioning Member State. In respect of vulnerable asylum seekers, such as families with minor children, the transferring Member State has a stronger obligation to ensure this.

## **2.2 The principle of solidarity and a fair distribution of responsibilities**

Article 78 TFEU, discussed in the previous paragraph, names the objective of the European asylum policy, namely the provision of protection against refoulement and the guarantee of an appropriate status determination. Article 80 TFEU describes the principles that govern this policy. It is:

*“Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.”*

This raises the question as to what the principle of solidarity and a fair distribution of responsibility between Member States entail. We will deal with this question in greater detail below.

#### *What does the principle of solidarity entail?*

For a further explanation of the meaning of the principle of solidarity, the ACVZ has carried out a literature study and attended a convention on the meaning of solidarity for EU law. This has revealed that the majority of academics agree that there is no unequivocal legal definition for the principle of solidarity. The discourse of the EU is full of references to the term solidarity; it is one of the core principles, both of the political ideals and of the law of the EU.<sup>34</sup> However, the term has been detailed less concretely in the case law of the CJEU than in other core principles of European Union Law, such as e.g. those

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33 CJEU, 14 November 2013, C4/11 (Puid).

34 See also paragraph 1.2.

of proportionality and subsidiarity. Yet, together with those principles, it does constitute the foundation on which the Union rests. The Preamble of the Treaty establishing the European Coal and Steel Community already contained the following phrase:

*“Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development.”*<sup>35</sup>

Over the years, this political mandate has been incorporated in an increasing number of places in the legal framework of the EU. References to solidarity can be found in many European Union Law texts, both primary and secondary EU legislation. Article 2 of the Treaty on European Union (TEU) labels it as one of the characteristics of the European society:

*“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality among women and men prevail.”*

The Union protects the solidarity among the generations and enhances the solidarity among Member States (Article 3, third paragraph, TEU), and contributes to the solidarity among peoples (Article 3, fifth paragraph, TEU). The term ‘solidarity’ is guiding in the manner in which the EU operates internationally (Article 21 TEU). Solidarity also plays a role in the economic policies of the Union (Article 122 TFEU), the energy and environmental policies (Article 194 TFEU) and the Member States have undertaken to act in solidarity in the case of a terrorist attack, natural disaster, or man-made disasters (Article 222 TFEU).

Summarised, this means that the Union Law has several forms of solidarity: ‘internal’ solidarity among the Member States; solidarity among different generations; but also an external or more international form of solidarity among peoples. In addition, the principle of loyalty (Article 4, paragraph 3 TEU) plays an important role. This requires the Member States not to take measures that stand in the way of the objectives of the Union. Various forms and dimensions of solidarity can also be distinguished on the basis of the literature study performed. Sangiovanni, for instance, makes a distinction between ‘national solidarity’, ‘Member State solidarity’, and ‘transnational solidarity’.<sup>36</sup> Kadelbach first identifies solidarity among Member States, which can be seen as an application of the principle of loyalty (Article 4 (3) TEU). Secondly, he identifies a ‘social solidarity’ imposed on Member States to guarantee basic social rights to citizens of the European Union. And as a third dimension, the agreement among states to jointly bear the burden for closer integration.<sup>37</sup> Although a clear description and delineation of these dimensions and forms is lacking, the solidarity among the Member States and the solidarity towards others (countries and peoples) is in any case of importance for solidarity within the CEAS.

The European asylum policy is also governed by solidarity in the allocation of responsibilities in accordance with Article 80 TFEU, as already cited above. It is therefore estab-

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35 [http://www.rug.nl/library/support/law-library/document-nstructions/traites\\_1951\\_ceca\\_1\\_en\\_0001.pdf](http://www.rug.nl/library/support/law-library/document-nstructions/traites_1951_ceca_1_en_0001.pdf), consulted on 8 December 2015.

36 Sangiovanni, “Solidarity in the European Union” in *Oxford Journal of Legal Studies*, (2013), pp. 1–29.

37 Stefan Kadelbach, “Solidarität als Europäisches Rechtsprinzip?” Moreover, there is also the traditional differentiation in moral, political, and social dimensions of solidarity (including Kurt Bayertz and Jodi Dean, and Carol Guild).

lished that this solidarity and a fair distribution of responsibilities are core values of the European asylum policy. Which practical and normative meaning the principle has, is much less clear. The decisions of the CJEU provide little guidance for a further explanation. The clearest vision on the principle is expressed in the judgement *Commission versus United Kingdom* (128/78).<sup>38</sup> In that judgement, the Court observed that:

“In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules, according to the aforementioned judgement (*Commission/Italy* (39/72)<sup>39</sup>. For a state to break unilaterally, according to its own conception of national interest, the equilibrium between the advantages and obligations arising from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community’s legal order.” (Ground 12)

Solidarity therefore implies primarily compliance with the agreements made. The fact that a Member State has difficulties in fulfilling its obligations does not relieve that Member State of its obligation:

*“The Community’s institutional system provides the Member State concerned with the necessary means to ensure that its difficulties be given due consideration, subject to compliance with the principles of the common market and the legitimate interests of the other Member States.”* (Ground 10)

The fulfilment of the obligations that arise from the European Union Law and to which the Member States have committed themselves may be the most important form of solidarity. In addition to this normative meaning, the principle also has a more pragmatic or instrumental meaning, namely that Member States must be in solidarity with each other as they are jointly better able to deal with common problems.<sup>40</sup> At least four elements for a definition of solidarity are given in the scientific literature.<sup>41</sup> The ACVZ has further used these elements, along with the interpretation of the CJEU, as starting points. These elements are:

1. Solidarity in an international context at least entails countries cooperating with each other.
2. That cooperation is aimed at achieving a shared objective that transcends the interests of the individual sovereign states.
3. This requirement implies significant investments by all cooperating states in order to share in the fate of the others, which means that each participant commits to the outcome of collective decision-making.
4. Non-compliance with the standards arising from this collective decision-making affects the EU’s legal order.

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38 ECJ 7 February 1979, case 128/78 (*Commission vs. United Kingdom*).

39 ECJ 7 February 1973, case 39/72 (*Commission vs. Italy*).

40 See Josef Niznik, *Democracy versus Solidarity in the EU Discourse* (2012) in Chapter II ‘European integration and the concept of solidarity’, p. 27 for further information about the normative/moral and pragmatic/instrumental meaning of solidarity.

41 See e.g. A. Mason (2000), ‘*Community, Solidarity and Belonging: Levels of Community and their Normative Significance*.’ Cambridge, Cambridge University Press. E. Thielemann (2003), ‘*Between Interests and Norms: Explaining Burden-Sharing in the European Union*’, Oxford, *Journal of Refugee Studies*, vol. 16, no. 3. And B. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, see also: <http://fdslive.oup.com/www.oup.com/academic/pdf/openaccess/9780199683123.pdf>, consulted on 8 December 2015.

This advisory report focuses on internal solidarity, hence the solidarity between Member States and the solidarity of the Member States vis-a-vis the EU, in the context of the CEAS.

#### *Application of the starting points to the CEAS*

As it cannot be unequivocally deduced from the European Union Law or from the academic literature, what the principle of solidarity entails for the European asylum policy, the ACVZ formulates in the following paragraphs how to interpret the responsibilities that the Member States have on the basis of the CEAS, in a manner that is more in accordance with the above characteristics of solidarity than is currently the case. Here, the starting principle used is that a ‘common policy’ implies both a shared and a collective responsibility. On the one hand, this means that the Member States of the EU bear the shared responsibility for the fulfilment of all the obligations arising from the CEAS, which requires that the Member States fulfil their own obligations. On the other hand, it means that no Member State can evade that responsibility and leave the achievement of the objective to the other Member States, or bodies of the EU. Member States must cooperate to effect the proper implementation of CEAS throughout the EU.

The aim of the CEAS is the further harmonization of the European asylum policy, but also the practical cooperation between the Member States and the promotion of the mutual solidarity.<sup>42</sup> When a Member State, or a number of the Member States, cannot or do not want to fulfil these obligations, then all Member States share the responsibility for finding a solution in that regard. The fact that a Member State or a number of the Member States fails to fulfil the agreements made must not be at the expense of the objectives of the Union in this area, namely the protection against refoulement and the provision of an appropriate status determination. Where a Member State is unable to fulfil its obligations, then the other Member States must make an effort to assist that Member State in doing so. When a Member State is unwilling to fulfil its obligations, then the other Member States must call on that Member State to do so. The following paragraphs outline how the relevant components of the CEAS must be developed more in accordance with the above described basic principles according to the ACVZ. The relevant components are:

1. border control,
2. registration,
3. responsibility allocation,
4. status determination,
5. return and integration, and
6. monitoring compliance with the CEAS.

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42 The reason for establishing the CEAS was lack of mutual coordination and the influx of migrants in the 1990s that confronted the EU Member States with a few problems:  
- ‘asylum shopping’: asylum applications had to be submitted per Member State, making it possible for asylum seekers to apply for asylum in different Member States;  
- disproportionate distribution: some EU Member States received more asylum applications than others, because of the chances of approval, the level of affluence, and the location of the country. A joint approach was required in order to be able to address these problems. With the entry into force of the Treaty of Amsterdam in 1999, the EU was given the power to develop policy in the areas of asylum and migration. The first phase of the CEAS was completed during the Hague Programme (2004-2009) with the adoption of various asylum directives with minimum standards for protection. In the second phase, the Stockholm Programme (2010-2014) was developed in which three pillars were defined by the EC:  
- further harmonization of the standards and procedures applied in the asylum policy of the EU Member States;  
- further coordination and practical cooperation of the EU Member States in the area of asylum policy;  
- promotion of the mutual solidarity and the feeling of joint responsibility in the EU Member States. The current programme ‘Towards an open and secure Europe’ consolidates and builds on the pillars of the Stockholm Programme (see: COM(2014)154).



These components have been selected because they deal with the question as to how asylum seekers are treated prior to the asylum procedure (border control, registration and responsibility allocation), during the asylum procedure (status determination), and after the end of the asylum procedure (integration, return, and illegal residence).

#### *Border control*

Article 67 TFEU reads: “*The Union [...] shall frame a common policy on asylum, immigration, and external border control, based on solidarity between Member States, which is fair towards third-country nationals.*” In 1990, the Member States of the European Community the Schengen Implementing Convention and the Dublin Convention. The controls at the internal borders in the Schengen area were lifted with the entry into force of the Schengen Convention in 1995. This made the monitoring of the European external borders a common interest of all Member States. In principle, each Member State with an EU external border therefore monitors this boundary in the interest of all Member States. The rules for the external border controls have been laid down in the Schengen Borders Code<sup>43</sup> and must ensure that national border guards perform this task in a uniform manner. The border control must take place with due observance of fundamental rights, including the right to asylum.<sup>44</sup> This includes that someone cannot be refused access to an asylum procedure when he or she applies for asylum at the border or within the EU, among other things.<sup>45</sup> The EU agency Frontex coordinates the monitoring of the external borders and enables Member States to monitor their borders in accordance with these standards by providing expertise and training. Frontex will contribute to this being done in the same manner in each Member State by means of training and exchange. Finally, Frontex coordinates the aid from Member States to other Member States that require assistance due to a high number of border crossings.

#### *Registration*

To implement the Dublin Regulation and to ensure that an asylum seeker can apply for asylum in only one Member State, it is necessary to register the persons that are applying for asylum in the EU. Each Member State must therefore fingerprint without delay each asylum seeker 14 years of age or older and send the relevant data without delay to the central unit (EURODAC Regulation). In principle, the Member State whose border an asylum seeker crosses to enter the Dublin countries, is responsible for the registration. This may, however, yield a disproportionate burden for some Member States due to the geographical location in particular of eastern and southern Member States.<sup>46</sup> The other Member States must therefore support these Member States, under the coordination of the EASO.

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43 Regulation 562/2006

44 Preamble 20 Schengen Borders Code.

45 Article 13 Schengen Borders Code and Article 3(b) Schengen Borders Code

46 See report eu-LISA use EURODAC for 2014. Germany recorded the highest number of transactions in EURODAC (27% of the total volume), followed by Italy with 15.6% and Sweden with 8.8%, see: [http://www.eulisa.europa.eu/Publications/Reports/Eurodac 2014 Annual Report.pdf](http://www.eulisa.europa.eu/Publications/Reports/Eurodac%202014%20Annual%20Report.pdf), consulted on 8 December 2015.

### *Responsibility allocation*

The Dublin Regulation also stipulates that there must always be one Member State where the asylum seeker can submit his or her asylum application to ensure that each asylum seeker has access to an appropriate status determination. All Member States have to operate in accordance with the EU Asylum Procedures Directive and the EU Asylum Qualification Directive, and consequently the outcome of the asylum application should not depend on to which Member State it is submitted to. In its current form, the Dublin System does not aim at and does also not lead to a fair distribution of asylum responsibilities. There must be a mechanism to distribute people among the Member States of the EU to achieve a fair distribution of asylum responsibilities. The distribution of numbers of asylum seekers among the Member States can be referred to as fair when this distribution is carried out on the basis of the actual capabilities of Member States to provide reception, status determination, and integration and when those actual capabilities are guaranteed at an equivalent level in all Member States. However, the responsibility allocation can lead to a sustainable distribution only when the standards for the allocation of the country of status determination also take into account the interests of the asylum seekers. This fosters not only the integration if the asylum application is granted, but it also reduces the risk that asylum seekers migrate on.

### *Status determination*

Each asylum seeker who reports to the borders of the EU, or who is located within the borders of the EU, is entitled to an appropriate status determination. Member States have a shared responsibility to ensure that each asylum seeker in the EU can make use of this right. Appropriate status determination presupposes that the outcome of the decision on the application for asylum does not depend on which Member State is responsible. After all, the status determination must lead to the same outcome in every Member State. Equal standards and criteria are required for the determination of the need of protection (EU Asylum Qualification Directive). The status determination must take place by means of quick, efficient, and fair procedures (EU Asylum Procedures Directive). During these procedures, asylum seekers have a right to reception, in accordance with the standards of the Reception Conditions Directive. EASO provides the Member States with assistance to enable them to fulfil their responsibility and contributes to the realisation of harmonization in practice through training programmes and the exchange of information. The EC sees to the supervision and enforcement of adopted standards of the CEAS.

### *Integration*

According to the ACVZ, a fair distribution of asylum responsibilities will not necessarily lead to a sustainable distribution of permit holders as the chances of successful integration in the Member States vary too widely and the permit holders lack prospects in certain Member States. Therefore, a real possibility to integrate must exist in each Member State. The Member States must make an effort in that regard. The Council and the Parliament can take measures for this purpose pursuant to Article 79, fourth paragraph, TFEU. The EC should propose measures that provide for each Member State offering real opportunities for integration for permit holders.



### *Return and irregular stay*

In principle, when an asylum seeker does not qualify for a residence permit, he or she must leave the EU. However, this is not always the case in practice. In order to make sure that no unfair distribution arises among Member States of asylum seekers who have exhausted all legal means to stay, there must at least be an equal treatment of the rejected asylum seekers when arranging the return to the country of origin or a third country. The EC must monitor compliance with the standards in the Return Directive. In addition, the Member States of the EU should work jointly on a more effective return policy.<sup>47</sup> Alternative forms of reception in the Member States must also be provided in an equal manner when the departure of the asylum seeker who has exhausted all legal means cannot be achieved (due to circumstances beyond his or her control). If certain Member States are more or less obliging than others in respect of illegal residents, this will probably lead to secondary migration flows.

### *Monitoring compliance with the CEAS*

Both the Member States and the EC should monitor correct compliance with the CEAS, more than is currently the case. The Member States are foremost responsible for the correct and timely implementation of EU conventions and legislation. It is up to the Member States to exert political pressure in the various European fora (mainly in the European Council) on a Member State that is evading its responsibilities, so that the agreements made under the CEAS are fulfilled after all. In addition, as the guardian of the European conventions and of the Charter of Fundamental Rights of the EU, the EC must monitor the implementation and application of EU law. The EC can act when a Member State:

- does not, not timely or inaccurately transpose the EU directives into national law and does not inform the EC without delay of the transposition measures that it has taken;
- is suspected of violating the EU legislation.

If a solution is not found at an early stage, the EC can start formal infringement proceedings and potentially refer the Member State to the Court of Justice.<sup>48</sup> The EC monitors primarily the timeliness of the implementation in the Member States. The EC can also investigate the compliance with the directives in a Member State on the basis of complaints from the Member States. At regular intervals, the EC carries out evaluations of the implementation of the regulations in the CEAS. The instrument of the (long-term) infraction procedure to enforce compliance with EU legislation is used reticently by the EC. Moreover, the EC could remind the Member States of their obligations under the CEAS much more than is currently the case, in order to harmonize their asylum practice and their asylum responsibilities. Failure to do so should after all be subject to consequences.<sup>49</sup> Finally, the Member States must also call on each other to account for inadequate compliance with the CEAS. This will be reviewed in more detail in Chapter 5.1.

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47 See action plan EC of 9 September 2015 on more effective return and the advice of the ACVZ of 25 June 2015 'De strategische landenbenadering migratie. Tussen wens en werkelijkheid' (The strategic country approach to migration. Between wish and reality), [www.acvz.org](http://www.acvz.org).

48 The EC has recently launched 40 infringement proceedings in respect of 18 Member States. Perhaps, the EC's attitude has already changed in this respect. To date, there have in any case been hardly any fines or penalty payments imposed on Member States that did not properly implement the CEAS or fines or penalty payments used to encourage better implementation or application. See: [http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements\\_by\\_policy\\_asylum\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm).

49 As the supervisory body for the CEAS, the EC failed e.g. to timely address the problem with Dublin transfers in Greece. The 'emergency system' in the Dublin Regulation 604/2013 has not yet entered into force, even though the situation in Bulgaria is closely being monitored by the EC. On 24 June 2015, Hungary announced that it wants to unilaterally suspend the system of Dublin transfers, although it reversed this decision a day later. In response to the proposal of the EC for voluntary quotas for the relocation of asylum seekers from the Member States Italy and Greece, Hungary and Austria indicated that they would not be participating. The Baltic countries, Poland, Slovakia, and Spain continue to be far below their theoretical quota. The political pressure among the Member States themselves to make an equitable contribution was therefore inadequate.

## 2.3 A fairer distribution preserving Dublin

As stated in the introduction, there is no fair distribution in the current situation of asylum responsibilities. In addition, there is no mechanism in the current CEAS on the basis of which asylum responsibilities can be (re-) distributed among the Member States of the EU. The ACVZ is advocating a further development of the CEAS in which the responsibilities are more aligned with the principle of solidarity. In this paragraph, the ACVZ explains how the CEAS may be aligned better with the basic principle of a fair distribution by means of the introduction of a permanent system of distribution of asylum responsibilities. In doing so, the ACVZ bases itself on the existing legal frameworks. According to the ACVZ, the Dublin Regulation only requires a (small) amendment to make a permanent distribution system possible. In addition, we note that an improved application of the Dublin criteria already leads to a different distribution.

### 2.3.1 The current functioning of the Dublin Regulation

On the basis of the Dublin Regulation, the responsibility for handling an asylum application resides in the first place with the Member State that played the most important role in the access to or residence in the Member States, with due observance of the personal situation of the asylum seeker. In addition, the revised Dublin Regulation 604/2013 has placed even more emphasis on the protection of children and the unity of the family as a criterion in the determination of the responsible Member State. The criteria pursuant to which the responsibility will be determined have been ranked hierarchically in Chapter III of the Dublin Regulation. This concerns the following criteria:

- the possibility of processing the applications for international protection of members of a family by the same Member State;
- the possession of a visa or a residence permit for one of the Member States;
- entry and residence in a Member State; and finally, if no responsible Member State may be designated pursuant to the other criteria,
- the Member State where the first application for international protection was submitted.

The functioning of the Dublin Regulation is not without problems. The sub-optimal performance of the Dublin Regulation can mainly be attributed to the following reasons:<sup>50</sup>

- the lack of a sound, reliable, and immediate registration of incoming migrants and asylum seekers;
- the improper use by the Member States of the (hierarchy of) responsibility criteria by placing too much emphasis on processing in the country of entry;
- the lack of evidence for the determination of the responsibility;
- disagreement between Member States about the interpretation of regulations;
- obstacles in the case of physical transfer;
- concerns about the security in other Member States.

The aspects that are most relevant for this advice are discussed in more detail hereafter.

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50 See e.g.: C. Costello and M. Mouzourakis, 'Is 'How Bad is Bad Enough' Good Enough?' *Asiel&Migrantenrecht* 2014, no. 10 and Guild, Costello, Garlick and Moreno-Lax, CEPS paper of 83/September 2015r Enhancing the CEAS and Alternatives to Dublin, 2015; ECRE report Dublin II Regulation – Lives on Hold, 2013 Valsmis Mitsilegas, Solidarity and Trust in the Common European asylum System, *Comparative Migration Studies* 2014, Vol 2, No 2, p. 181-202.

### *Absence of proper registration*

For the majority of migrants who enter the Dublin countries through the southern Member States, the only criterion applied is that the responsible Member State is the one where the foreign national has entered the Dublin countries. The other criteria are hardly being applied. However, large numbers of migrants travel on from the southern Member States to other Member States, while there is no basis for transferring the processing of the asylum applications to those Member States. In addition to restrictions on border controls and capacity, the cause resides in an incomplete registration in the Member State where the foreign national has entered the Dublin countries. Moreover, there are asylum seekers who refuse to register and try to evade registration as much as possible. Pursuant to the EURODAC Regulation, Member States have the obligation to register persons who illegally cross the external border of the Dublin countries or who submit an asylum application and to store their fingerprints in EURODAC.<sup>51</sup> When an asylum seeker is not fingerprinted, there is no evidence of his or her entry into the relevant Member State. Consequently, a request for the return of that asylum seeker, in order to process his or her asylum application, is unlikely to be successful. After all, it cannot be proven in that case in which Member State that asylum seeker has entered. When EURODAC was introduced, Member States were hoping that the number of transfers performed would increase significantly.<sup>52</sup> Although the number of returns has increased with the introduction of EURODAC, the Dublin system still does not function well as not all asylum seekers are being registered with fingerprints by each Member State after crossing the external border.<sup>53</sup> Improved registration in the Member States of entry will lead to a different distribution among the Member States of the responsibility for asylum seekers, but will not lead to a fairer distribution.

### *Improper use of the responsibility criteria and lack of evidence of responsibility*

The second problem in the application of the Dublin Regulation is that the responsibility criteria are not being applied properly. The number of requests for returns vastly exceeds the number of requests for referral. In 2013, the Member States made only 1,402 requests for referral in connection with family relationships. Implementing authorities are often not well informed about the extent of the hierarchy that exists among the responsibility criteria. The relevant information with regard to the family and relational ties of the asylum seeker is often not taken into account in the decision to request a return.<sup>54</sup> Member States have furthermore indicated that the evidence of the family relationship is an obstacle to invoking these provisions. There are Member States that request a DNA test before accepting a request for referral.<sup>55</sup> However, Article 22, paragraph 5, of the Dublin Regulation provides that, if formal evidence is lacking, the requested Member State will acknowledge its responsibility when the circumstantial evidence is coherent, verifiable, and sufficiently detailed to determine the Member State that is responsible. If the Member States act in the spirit of Article 22, paragraph 5, of the Dublin Regulation, the distribution of asylum seekers among the Dublin countries will change through referrals on the basis of family and relational ties. Nor will this lead to a fair distribution of asylum responsibilities, as it is not likely on the basis of the current composition of the influx of asylum seekers that large groups of asylum seekers will have ties with Member States that are currently still processing very few applications for asylum.

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51 EURODAC is a database in which the fingerprints are kept of each third-country national older than 14 who submits an application for asylum or who illegally crosses the external borders of the Dublin countries.

52 Italian Refugee Council, 'Odyssey Project, A Research Project on the influx of asylum seekers and displaced persons at the Italian borders and within the European Union; Training of Operators', October 2000.

53 Member States indicate that the lack of hits in EURODAC is the cause thereof. Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, SEC (2007) 742, p. 25.

54 Not adding up, The fading promise of Europe's Dublin system, MPI Europe, Susan Fratzke, p. 17.

55 Staff Working Paper accompanying the Report on the Evaluation of the Dublin System, SEC (2007) 742, p. 24.

### *Obstacles in the case of physical transfer*

A request for return or referral being accepted will by no means always lead to a physical transfer of the asylum seeker. On the basis of available statistics, we can conclude that only 3% of the total number of asylum applications in the EU have actually been transferred to another Member State in the period of 2008-2012. Only one in four Dublin claims also actually leads to a transfer to the responsible Member State. The figures for 2013 do not deviate significantly from this. Of the 76,358 requests for referral and return submitted in 2013, 56,466 (approx. 75%) requests have been accepted. This has resulted in 15,938 (28%) realised transfers. In fact, this means that most applications for asylum are nevertheless processed by the Member State in which the asylum application is submitted. The most important reason mentioned for the physical transfer not being successful is that the asylum seeker objected to the transfer, by evading supervision and by taking legal actions.

### **2.3.2 Impetus to a solution – an additional Dublin criterion enabling distribution**

According to the Advisory Committee, the most important reason why there is no fair distribution of responsibilities in the EU is that the EU has no mechanism for distributing asylum responsibilities among the Member States of the EU. The result of this is that the current distribution of asylum applications is caused in particular by the geographical location of Member States, or by the decision of the asylum seeker to submit his or her asylum application in a particular Member State. Various critics of the Dublin Regulation believe that the problem of the current disproportionate distribution of asylum responsibilities cannot be addressed without abolishing the Dublin Regulation.<sup>56</sup> The Advisory Committee is however of the opinion that there are possibilities involving maintaining the Dublin Regulation. A comprehensive and correct application of the Regulation and in particular of the above criteria of Chapter III would already lead to a different distribution, as has already been explained in the previous paragraph. A comprehensive and correct application means that much more attention must be devoted to the potential ties that an asylum seeker has with a particular Member State than is currently the case. According to the ACVZ, this can be achieved through the improved and generous application of the responsibility criterion that requires family and relational ties to be taken into account.<sup>57</sup>

A properly functioning Dublin Regulation, however, is not possible without a properly functioning CEAS. Asylum seekers have to be able to trust that their asylum application will receive a fair and equivalent chance in the Member State responsible for that application. Member States should be able to trust that each of them will implement the collective responsibilities in an equivalent manner. However, this is not enough to reduce the pressure on the Member States at the external borders of the EU, or to establish a more proportionate distribution among the other Member States. This requires additional measures. In Chapter 4, the ACVZ elaborates a proposal for that purpose.

For the legal protection of the asylum seeker, the proposal is as closely in line as possible with the already existing system of legal protection.

As stated in the previous paragraph, the ACVZ is a proponent of a permanent distribution mechanism of asylum responsibilities. On the basis of this system and after considering

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56 See e.g.: <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf/> and [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU%282015%29519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf), both consulted on 8 December 2015.

57 Article 22, paragraph 5, of the Dublin Regulation.

the Dublin criteria, the country of first arrival will become not responsible if this country has already registered a disproportionately high number of asylum seekers. In that case, the asylum seeker is transferred to a Member State that has registered a disproportionately low number of asylum seekers. The ACVZ can imagine that not every asylum seeker can agree by definition with such a transfer. However, the Advisory Committee deems such a transfer to be justified, as long as the other criteria of the Dublin Regulation are applied properly, protection against refoulement is assured, and an appropriate status determination will take place. In order to ensure that these guarantees are respected in individual cases, the asylum seeker must have the possibility to use legal remedies against his or her transfer. In this regard, the ACVZ is in favour of remaining as consistent as possible with the existing system of legal protection against Dublin transfers. If a Member State intends to transfer an asylum seeker because another Member State is responsible for the processing of the application for asylum pursuant to the Dublin Regulation, the requesting Member State will notify the concerned asylum seeker accordingly and will inform him or her of its intention to therefore not process his or her asylum application.<sup>58</sup> Pursuant to Article 27 of the Dublin Regulation, the asylum seeker has the right to effectively use a legal remedy before a judicial authority in that requesting Member State, in the form of an appeal or an objection in respect of the fact-finding and the application of the law. The ACVZ sees no reason to change this system of legal protection in respect of the transfer of an application for asylum on the basis of a distribution mechanism.

The result of this is that the responsibilities for the objection or appeal procedures against transfers will not be distributed equally among the Member States. The Member States where the most asylum seekers arrive will become responsible for the majority of these procedures. How this can be compensated for will be discussed in Chapter 4.

## 2.4 People are mobile

One of the questions asked by the State Secretary in his request for advice is how secondary migration flows can be prevented. The ACVZ believes that secondary migratory movements are inevitable when people are forced to seek or enjoy protection in a Member State where they do not want to be. There is little certainty about factors that determine the asylum seekers' choices of destinations. In 2015, the Dutch Research and Documentation Centre (Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC) had research performed into these factors.<sup>59</sup> This research revealed that the costs of the migration process for the asylum seeker play a role in the determination of the destination, as well as the perception of the economic climate in that country and the presence of existing social networks, such as family. Furthermore, the experiences and the security situation in transit countries play a role. Of course, the involvement of a people smuggler reduces the migrant's own influence. The migration policy a country conducts also has an influence, although research has indicated that asylum seekers have little knowledge of the migration policy of the country that they want to go to. Finally, research by Schapendonk shows that the choice of the country of destination is usually not made in advance. That choice is made during the migration process and depends on many factors, ranging from informal networks of information to smugglers.<sup>60</sup>

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58 Article 26, paragraph 1, Dublin Regulation.

59 K. Kuschminder, J. de Bresser & M. Siegel, *"Irreguliere Migratieroutes naar Europa en de Factoren die van Invloed zijn op de Bestemmingskeuze van Migranten (Irregular Migration Routes to Europe and the Factors that Influence the Migrants' Choice of Destination)"*, Maastricht: WODC, Maastricht University, 2015. <https://www.wodc.nl/onderzoeksdatabase/2553-lampedusa.aspx?cp=44&cs=6796>.

60 J. Schapendonk, (2012). *Turbulent Trajectories: African Migrants on Their Way to the European Union*. *Societies*, 27 – 41.

On the basis of the summary of the literature on factors that influence the choice of destination prepared by Maastricht University and commissioned by the WODC, the ACVZ concludes that the risk of secondary migratory movements can be limited in at least two ways. First of all, as stated in paragraph 2.2., the possibility of effective integration should exist in each Member State. When permit holders can successfully integrate in the host Member State, secondary migration will diminish in a later stage. This will however not prevent an asylum seeker who is dissatisfied with the fact that he or she has to have his or her asylum application processed in a Member State that is not his or her preferred destination, from deciding to try his or her luck elsewhere. Also, the absence of prospects of integration for permit holders in the host Member State can lead to secondary migration. The ACVZ advocates applying the Dublin Regulation in such situations. Another Member State will therefore not consider processing the application for asylum, as the responsibility for handling the application has already been allocated to another Member State. In order to convince as many asylum seekers as possible to abide by the allocation of responsibility, the Advisory Committee deems it important that asylum seekers are offered the prospect of being allowed to move more freely through the territory of the Union for purposes of work or study, in the foreseeable future after the permit has been granted and on certain conditions. In paragraph 5.2., the ACVZ has elaborated a proposal on the basis of which permit holders are granted limited rights of free movement.





## CHAPTER 3

# What is the EU doing with the existing instruments?

In this Chapter, we describe the current situation in the EU and discuss the measures and initiatives that the EC and the Member States have deployed to deal with the recent large numbers of asylum seekers. The discussion focusses on the internal dimension, therefore on the question of what the EC and the Member States have agreed among themselves in respect of the question of how to deal with asylum seekers who are located in the EU. The external dimension, including proposals for the realisation of more and better reception in 'the region' and the intensification of the cooperation with third countries, falls outside the scope of this chapter.

### 3.1 Relocation

During the European Council of 25 and 26 June 2015, it was decided to temporarily and exceptionally relocate 40,000 people, who 'clearly needed international protection'<sup>61</sup>, from Italy and Greece to other Member States.<sup>62</sup> Relocation is selective and applies only to asylum seekers with a nationality that has a chance of asylum of more than 75%, according to Eurostat data. The relocation applies only for asylum seekers who have applied for asylum and have been registered in Eurodac in accordance with the Eurodac Regulation, who are older than 14 years of age, and who have been fingerprinted in Italy or Greece. A person evading relocation is excluded from the relocation programme. The EC does not exclude the future application for other Member States in similar situations, such as Malta. There is a compensation for the host Member State of € 6,000 from EU funds for each asylum seeker referred. In this mechanism, the Dublin Regulation remains applicable to asylum seekers who are not subject to the relocation scheme. To prevent secondary migration flows, an asylum seeker who travels on to a Member State other than the Member State to which he or she has been allocated pursuant to the Dublin Regulation, must immediately be returned to the Member State to which the asylum seeker has been allocated. Italy and Greece, together with the EASO and any liaison officers from the Member States, select the asylum seekers to be transferred, in which priority is given to vulnerable persons. Member States can refuse to admit asylum seekers referred to them when there are objections on the basis of national security or the public order (such as Article 1F of the Refugee Convention). Moreover, Italy and Greece will be assisted by EASO and other agencies in segments of the asylum process and the implementation of the relocation procedure. Moreover, they must draw up an action plan to improve their asylum procedures. Every three months, they must also render account to the Council and the Commission about the state of affairs. The legal basis for the relocation proposal is Article 78, paragraph 3, of the TFEU.<sup>63</sup>

61 The English text reads: 'in clear need or protection,' press release Justice and Home Affairs Council, 2015-09-22.

62 As stated in the introduction, relocation pertains to the situation in which an asylum seeker is transferred to another Member State, whereby the responsibility for processing the asylum application is transferred at the same time. Distribution refers to the situation in which the responsibility for processing the asylum application has not yet been allocated to a Member State.

63 Paragraph 3 does not refer to a specific legislative procedure for the adoption of measures such as the relocation proposal.



The distribution key on the basis of which the asylum seekers should be relocated has not been included in the decision of the European Council. Nevertheless, the weighting factors used can be derived from the preceding proposal of the EC:

- 40% on the basis of the population,
- 40% on the basis of the gross domestic product (GDP) of the Member State,
- 10% on the basis of the average number of asylum applications in the previous 5 years per million inhabitants with a ceiling of 30% of the population and the GDP, and
- 10% on the basis of the unemployment rate with a limit of 30% of the population and the GDP.

On 20 July 2015, the Justice and Home Affairs Council (JHA Council) reached an agreement about a draft decision establishing a mechanism for the temporary and exceptional relocation from Greece and Italy. The Member States have agreed by consensus on the implementation of 32,256 places for people who have to be relocated. They also have agreed to update the figures at the latest in December 2015 with a view to achieving the total number of 40,000, in accordance with the commitment of the European Council on 25 and 26 June 2015. Important preconditions for this relocation mechanism are the mandatory fingerprinting by Greece and Italy and the use of a hotspot approach.<sup>64</sup> During an additional JHA Council on 9 November, it was noted that the distribution of asylum applications can only work with a sound relocation system from the hotspot, as well as adequate protection of the external borders.<sup>65</sup>

On 9 September 2015, the EC proposed to redistribute 120,000 people who ‘clearly need international protection’ from Greece, Italy, and Hungary, as an emergency measure, in addition to the 40,000 people from Greece and Italy.

On 14 September 2015, the JHA Council-Ministers adopted a decision on the determination of provisional measures of international protection for the benefit of Greece and Italy.<sup>66</sup> Because of this Decision, the relocations can commence soon. The decision will be applicable to persons who clearly need international protection and who have arrived or will arrive in the territory of Greece and Italy from 15 August 2015 until 16 September 2017.

On 17 September 2015, the European Parliament agreed to the proposal of the EC to relocate 120,000 asylum seekers from Italy and Greece. Initially, the proposal also included Hungary. Hungary has opposed this because it does not consider itself a country on the front line and does not wish to take part in the relocation mechanism.

On 22 September, the JHA Council-Ministers adopted the decision to relocate 120,000 asylum seekers from the Member States Italy and Greece by qualified majority.<sup>67</sup> Article 78, third paragraph, of the TFEU is also the legal basis for this measure. The first phase involves 66,000 asylum seekers from Italy and Greece. The remainder in the second phase will in principle also be allotted to Italy and Greece, but the decision of the Council provides for the possibility for the EC to make a proposal to enable relocation from other Member States, when those states are confronted with an emergency situation as a result of a sudden influx. The decision provides for the possibility for a Member State

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64 A hotspot is a centre for initial reception in an EU Member State with a European external border. Hotspots are discussed in more detail in the following paragraph.

65 Report of the additional JHA Council, 9 November 2015, Brussels.

66 Decision (EU) 2015/1523 of the Council (Official Journal L 239 of 15 September 2015, p. 146).

67 Decision (EU) 2015/1601 of the Council (Official Journal L248, p. 80).

to temporarily, wholly or partly, not to take part in the relocation of asylum seekers, but that Member State must then compensate for that by making a financial contribution to the Asylum, Migration, and Integration Fund (AMIF) in the amount of 0.002% of the GDP. In the case of partial participation in the relocation, this amount shall be reduced proportionally.

As far as the decisions of 14 and 22 September 2015 are concerned, the legal and procedural safeguards provided by the Dublin Regulation continue to apply to asylum seekers in respect of whom a relocation decision has been made. The asylum seeker does not have the right to select the Member State that will process his or her request. In accordance with the Dublin Regulation, he or she is entitled to an effective legal remedy against the relocation decision to safeguard the respect of his or her fundamental rights.<sup>68</sup>

The next 6 months, the EC will focus on rolling out the relocation of 160,000 asylum seekers and assistance (joint processing) at the hotspots, among other initiatives. Frontex will be given 60 additional staff members, while EASO and Europol will receive 30. For 2016, 600 million euros will be added to the EU budget for the three agencies and the affected Member States.

### 3.2 The hotspot approach

In a hotspot, the EU agencies, Frontex, EASO, EUROPOL, and Eurojust provide operational support to the Member States in accordance with their mandate in the areas of security of the external borders of the EU, the processing of applications for international protection, and the fight against organised crime, such as the facilitation of irregular migration. This working method is referred to in the EU as the hotspot approach. The aim of the hotspot approach is to create a platform for the EU agencies to be able to quickly intervene in Member States on the exterior border with an integrated approach. The approach is applied when there is a crisis as a result of specific and any disproportionate migratory pressures at the exterior border of the relevant Member State, consisting of a mixed migration flow, and the Member State asks for support and assistance to deal with the pressure. There is evidence of tailored support, the assistance offered depending on what the relevant Member State needs, and the evolution of the situation.

The decision to begin operating in accordance with the hotspot approach is based on the assessment of the Member State and the risk analysis of the relevant EU agencies, in particular Frontex and EASO. A hotspot will only be set up after a request in that regard has been submitted by a Member State. The relevant Member State must substantiate the request and must make clear to the EC and the relevant EU agencies what support is needed. The operational coordination will be carried out by a regional EU task force (EURTF). This task force is responsible for the coordination of the various teams of experts and for coordinating the activities of the teams of experts with the national authorities.

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68 See recital 35 of both decisions referred to in the above two notes.

Assistance provided by agencies may consist of the following.<sup>69</sup>

1. Registration and screening of irregular migrants by Frontex for the purpose of determining the identity and nationality of migrants. The provision of information about the asylum procedure. The fingerprinting and registration in EURODAC will be carried out by the national authorities. Upon request, the national authorities can be assisted in doing so by EU agencies and specialised teams of experts of the Member States.
2. Assistance in the interviews of migrants at the border by Frontex, with the intention to gain an understanding of travel routes and the way of operating. In addition, information is collected about secondary migratory movements, among other things, with the aim of contributing to the investigation of smuggler networks and for making analyses.
3. Setting up investigations, the exchange of information and intelligence into the facilitation of irregular transit and residence in the EU.
4. Assistance in the assessment of asylum applications, in accordance with the concept of 'joint processing'. A part of this is that asylum seekers are channelled into the asylum procedure and assistance is provided in the registration of asylum seekers and the creation of asylum files. Together with the UNHCR, EASO teams focus on persons who are clearly dependent on international protection, for the purpose of having these persons complete the asylum procedure swiftly and potentially having them relocated.
5. Coordination of the return of migrants without lawful residence in the EU. The assistance is aimed at support for return and the coordination of return flights. Assistance in the acquisition of travel documents of countries of origin, including the creation of teams from countries of origin in order to administer interviews and to speed up the issue of travel documents. In addition, other Member States can provide assistance in establishing contacts with countries of origin or in the return with assistance from Frontex.

The hotspot approach must, by a cohesive and targeted assistance to the Member States at the external borders of the EU by the relevant EU agencies, contribute to a promotion of the implementation of relocation on the basis of Article 78(3) TFEU. This approach also provides for efforts to tackle people smuggling on the basis of an analysis of the current situation. At the same time, this approach will contribute to strengthening the return policy. At present, the hotspot approach is being applied in Greece and Italy. A hotspot is planned on the Italian mainland in Taranto, in the heel of the Italian boot. There are four hotspots planned on Sicily: Trapani, Pozzallo, Augusta, and Porte Empedocle. In Greece, hotspots are planned on the islands of Chios, Samos, Leros, and Kos, close to the Turkish coast. These hotspots are gradually put into service.<sup>70</sup>

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69 *Explanatory Note on the "Hotspot" approach* (July 2015), p12: <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf> (consulted on 9 December 2015).

70 For an up-to-date summary of the progress of the hotspots, refer to the website of the EC: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf).

### 3.3 What happened to the Temporary Protection Directive?

The Temporary Protection Directive<sup>71</sup> lays down minimum standards for the provision of temporary protection in case of a mass influx of displaced persons from third countries who are unable to return to their country of origin. In addition, the Directive must promote a balance between the efforts of the Member States for the reception and for bearing the consequences of the reception of displaced persons. The mass influx of displaced persons will be determined by a decision of the Council that is adopted by qualified majority on a proposal of the Commission, which reviews each request of a Member State for submitting a proposal to the Council.

The reason for the preparation of the Directive was the civil war in the former Yugoslavia between 1991 and 1999. In 1992, the UNHCR introduced the concept of temporary protection in its 'Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia.'<sup>72</sup> The negotiations on the Directive were short, from May 2000 to 28 May 2001. The Directive entered into force on 7 August 2001.<sup>73</sup>

Following the entry into force of the Directive, various crises have occurred, including the war in Iraq and the crisis in North Africa in 2011. In March 2011, Malta submitted a request to the EC for the application of the Directive. However, most Member States judged that there was no mass influx of displaced persons in that case. In her dissertation on the Directive, Franssen refers to different reasons why this never is applied.<sup>74</sup> These reasons are: 1) the definition of a mass influx is defined broadly, 2) a qualified majority is required to apply the Directive, 3) Member States are potentially afraid that the application of the Directive is a pull factor for other foreign nationals to come to the EU and for most Member States, it is often more attractive to apply the Dublin Regulation, so that they can pass the responsibility for processing asylum applications on to other Member States. None of the Member States have requested the entry into force of the Directive also in response to the current high influx of asylum seekers.

In summary, it can be said that the Temporary Protection Directive can be considered, as yet, a 'dead letter'. Instead of applying the Directive, the EU has opted for creating new measures: relocation of asylum seekers from Italy and Greece and the use of a hotspot approach.

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71 Directive 2001/55/EC.

72 UN High Commissioner for Refugees, A Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia, 24 April 1992, HCR/IMFY/1992/2, par. 12 and 13

73 On that date, the Directive was published in the Official Journal of the EC.

74 Karina Franssen, "*Tijdelijke bescherming van asielzoekers in de EU*" (Temporary protection of asylum seekers in the EU), Den Haag: Boom Juridische uitgevers, 2011.



## CHAPTER 4

# Proposal for a permanent and sustainable distribution mechanism

The starting points of this advice are described in Chapter 2. This chapter describes that it is the objective of the EU to protect each asylum seeker who has entered the territory of the EU against refoulement and to provide an appropriate status determination. When it is found that an asylum seeker qualifies for protection on the basis of the EU Asylum Qualification Directive, he or she is granted a residence permit under the same Directive. This objective must be achieved in a solidary manner and the asylum responsibilities must be distributed fairly among the Member States. In the introduction, it is explained that there is currently not yet such a situation, which has been made painfully clear by the current ‘migration crisis.’ The measures described in Chapter 3 taken by Member States in an EU context in response to large numbers of asylum seekers at the moment are also insufficient to achieve a fair distribution of responsibilities. In this chapter, the ACVZ therefore proposes a permanent distribution mechanism that may lead to a fair distribution of asylum responsibilities. The proposal corresponds as closely as possible to already existing instruments and measures. The basic principles adopted in that regard is that Member States take their international and European legal obligations serious.

### 4.1 A distribution mechanism that is the norm, not the exception

Realising a fair distribution of asylum responsibilities requires a distribution mechanism that is the norm and not the exception, as is the case for the current EU relocation agreements. The Advisory Committee sees this proposal for a distribution mechanism therefore expressly not as an emergency measure, but rather as a new standard situation. In Chapter 2, it is described that the Advisory Committee wants to make possible a permanent distribution mechanism within the context of the Dublin Regulation. Article 3 and Article 13 of the Dublin Regulation must be amended in order to have the distribution mechanism become the norm. Article 13 provides that if no Member State is responsible for handling the asylum application pursuant to the other Dublin criteria, then the Member State where the asylum seeker has entered the Dublin countries becomes responsible for processing the asylum application. If even that cannot be established, Article 3 provides that the Member State in which the asylum application is submitted is responsible for the handling of that request. According to the Advisory Committee, these provisions must be supplemented with a provision that makes it plain that the authority for asylum seekers in a Member State can be transferred to a Member State that has received a disproportionately low number of asylum applications (deficit Member State), when the former Member State is being confronted with a disproportionately high number of asylum applications (surplus Member State). The host Member State is obliged to accept this transfer.<sup>75</sup> Of course, the surplus Member State can always opt for processing the asylum applications itself.<sup>76</sup> Here, two aspects are important.

1. How is it determined whether a Member State has a surplus or a deficit?
2. In which situation will the distribution mechanism enter in force?

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75 As is the case now already pursuant to Article 18 of the Dublin Regulation.

76 Article 17 of the Dublin Regulation.

These aspects should be provided for in the amended Dublin Regulation. As long as there is no surplus, the current criteria remain in effect unchanged.

*How is it determined whether Member States have a surplus or a deficit?*

In order to determine whether there is a deficit or a surplus, it is important that Member States register all asylum seekers who enter their territory in EURODAC. At this moment, eu-LISA, the EU agency responsible for the management of the EURODAC database, reports annually on the number of asylum seekers that are registered in EURODAC.<sup>77</sup> This frequency of one year provides insufficient insight into the current distribution of asylum seekers among the Member States to serve as the basis for a distribution mechanism. The ACVZ therefore believes that eu-LISA should publish a summary of the number of registrations of asylum seekers at least four times per year. On the basis of this registration, the EC should determine how many asylum seekers can be transferred by the surplus Member State to which deficit Member States in the following quarter to mitigate the unfair distribution. The distribution key used constitutes the reference framework in this regard. For this purpose, the European Council should be given the authority in the Dublin Regulation to determine the distribution key. The ACVZ proposes to use the distribution key that has also been used in the relocation plans of the EC.

The additional benefit of this working method is that it constitutes an incentive for all Member States to work towards the full registration of asylum seekers. When Member States allow asylum seekers to reside in their territory unregistered, or to travel through unregistered, then the quarterly reports will show that they have registered a disproportionately low number of asylum seekers, in proportion to the established distribution key. The result is that surplus Member States will be permitted to transfer asylum seekers to that Member State in the following quarter. The current system offers a negative incentive for registration because it causes the risk that the registering country becomes responsible for the asylum procedure to be significant and real. The system proposed by the ACVZ makes it also easier for the Member States to assess which capacity they will require per quarter. Fluctuations in the influx are reduced as a peak in the number of applications for asylum in the EU can quickly be distributed among all Member States.

*Automatic distribution in the case of significant surplus*

An important question is which situation would warrant proceeding with distribution? The ACVZ deems it undesirable and infeasible to strive for a completely proportionate distribution of asylum applications and advocates only proceeding with distribution once there is a significant surplus in a Member State. What qualifies as significant is a question on which the EU Member States should reach agreement. The ACVZ believes that, in any case, there should be a threshold consisting of a deviation by a few percentages before the distribution mechanism kicks in. The distribution mechanism would then come into effect automatically, pursuant to the Dublin Regulation, when the quarterly reports show that a Member State has such a significant surplus.

Furthermore, according to the Advisory Committee, Member States should have the option to indicate independently from the quarterly reports that they are confronted with an unexpected increased influx of asylum seekers. For this purpose, this can be aligned with the 'mechanism for early warning, preparedness, and crisis management' included in Article 33 of the Dublin Regulation. That Article provides that the Commission can determine, on the basis of information of the EASO, that there is 'a clear risk of exceptional pressure on

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77 European Agency for the operational management of large-scale IT systems in the area of freedom, security, and justice. See: <http://www.eulisa.europa.eu/Pages/default.aspx>, consulted on 8 December 2015.



the asylum system of a Member State and/or because problems occur in the functioning of the asylum system of a Member State'.<sup>78</sup> If this is at issue, the 'Member State concerned' will inform the Council and the EC of whether it intends to present a preventive action plan for surmounting the pressure on its asylum system and/or the problems in its operation, and it will at that occasion also request that the protection of Fundamental Rights of applicants for international protection be guaranteed.<sup>79</sup> If a Member State suddenly experiences a high influx, this Member State can therefore ask the EC to determine whether it genuinely concerns such a situation. If that is the case, then the EC should establish how many asylum seekers should be transferred to deficit Member States, to maintain a fair distribution of responsibilities.<sup>80</sup> In such a case, this number should be evident from the number of registrations in EURODAC. Ideally, EURODAC information should therefore also be available in 'real time'.

#### *Who will carry out the plans?*

The ACVZ proposes to give the distribution mechanism shape within the Dublin Regulation. This will make it a part of the 'normal' Dublin procedure that is now already in effect. In principle, the Member States must therefore implement the distribution mechanism, in the same way as Dublin procedures are being implemented currently. However, if problems arise in a Member State causing the Member State to be unable to handle the registration of asylum seekers, the EC can ask that Member State to set up a 'hotspot' that will take over the registration of asylum seekers, as is currently being done in Italy and Greece.<sup>81</sup> These hotspots operate under the coordination of EASO and make use of experts from different Member States. These hotspots take over the coordination of the transfers out of that Member State from the national Dublin authorities. Acting in solidarity means that Member States will subsequently also cooperate in this regard. Yet, the responsibility for the decision-making does remain with the national authorities. The EC must monitor the proper implementation of the distribution mechanism by the responsible Member States, in particular the national Dublin authorities. EASO or a 'distribution agency' to be newly created could support the national Dublin authorities and hotspots in the coordination and execution of these transfers.

#### *Who will take in the asylum seekers pending distribution?*

Each registered asylum seeker must be receptioned in accordance with the standards of the Reception Conditions Directive. In this regard, the Member State that is responsible for the registration of the asylum seeker is also responsible for reception. If a situation arises in a Member State in which the Member State cannot handle the influx of asylum seekers, then that Member State can ask the EC to set up a hotspot. Reception will then have to be linked to that 'hotspot'. This reception too must meet the standards of the Reception Conditions Directive.

## 4.2 Consequences for the Member States

The ACVZ considers it important to properly embed the distribution mechanism in regulations, in particular in the Dublin Regulation. A system that is dependent on repeated political decision-making on quotas is after all too vulnerable. This has become clearly apparent due to the current state of affairs in respect of the decision-making on the distribution plans.

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78 Article 33, paragraph 1, Dublin Regulation.

79 Article 33, first paragraph, Dublin Regulation.

80 For more info about the current functioning of the mechanism, see: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/non-paper\\_art33\\_dublin\\_regulation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/non-paper_art33_dublin_regulation_en.pdf), consulted on 8 December 2015.

81 See Chapter 3.

Implementation of this proposal means that no Member State can unilaterally decide how many asylum seekers it will give the opportunity to complete the asylum procedure in its territory, which is currently also impossible for that matter. Each Member State will be responsible for a proportional part of the total number of applications for asylum in the EU, which will create a fair distribution. This proposal can only work in practice if all Member States accept that they have a collective and shared responsibility for offering asylum protection and an appropriate status determination. It also requires all Member States to honour their commitments made in an EU context. This basic principle of the EU should be completely self-evident, but is currently insufficiently lived up to. Intentionally not honouring commitments undermines the solidarity and should have political or other, e.g. financial, consequences, according to the ACVZ. If a Member State has good reasons for not fulfilling its obligations, then the other Member States must assist that state in doing so. These conditions are elaborated further in paragraph 5.1.

### **4.3 Who will be distributed to the Member States?**

The basic principle of the Advisory Committee is that the asylum responsibilities are distributed fairly among the Member States. This includes therefore also the responsibilities in respect of the return or the illegitimate stay of asylum seekers of whom it is determined that they are not entitled to asylum. The Advisory Committee therefore proposes to focus the distribution efforts on all registered asylum seekers for whom a responsible Member State cannot be designated on the basis of one of the Dublin criteria other than the country of first entry. In the current relocation proposals of the EC, only those asylum seekers are divided that have a high chance (75%) of receiving a residence permit on the basis of their nationality. The rationale behind this is that asylum seekers who are very likely to qualify for protection, can also enjoy this protection as soon as possible and that, in addition, asylum seekers who do not qualify for protection, do not stay needlessly long in the territory of the Union.<sup>82</sup> This will not lead to a fairer distribution of the responsibility for return procedures. This objection would be the same when it is decided to redistribute only the permit holders. In both cases, a situation can arise in which certain Member States are disproportionately burdened with the responsibility for ‘disadvantaged’ asylum applications, or rejected asylum seekers. By distributing asylum seekers as soon as possible after their registration, without distinction as to nationality or their chance of a residence permit, all responsibilities associated with an asylum application and the consequences of granting or rejecting the application are automatically distributed fairly among the Member States. Additional arguments that call for distributing asylum seekers shortly after their registration are that integration in the host Member State has not yet taken place and that any potentially necessary further investigation into the identity and nationality of the asylum seeker for the purpose of the asylum procedure remains in the hands of the Member State that has to carry out the asylum procedure, so that that Member State can carry out the asylum procedure fully on its own responsibility.

### **4.4 Who will select the asylum seekers for the distribution?**

The ACVZ rejects a system in which Member States can impose conditions on the type of asylum seeker that they want to receive. The Member States of the EU have undertaken to protect each third-country national who qualifies for protection in accordance with the EU Asylum Qualification Directive and to grant access to status determination to anyone who claims international protection. Making a distinction according to e.g. religion, such as some Member States are currently proposing, is not in accordance with that basic prin-

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82 [http://europa.eu/rapid/press-release\\_MEMO-15-5597\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm), consulted on 8 December 2015.

ciple.<sup>83</sup> Once it is noted that a certain Member State has disproportionately more asylum seekers on the basis of the quarterly reports of eu-LISA, the EC will determine how many asylum seekers can be transferred to which deficit Member States, to achieve again a fair distribution. The asylum seekers who are registered from that moment and who do not have to be allocated to a Member State on the basis of another Dublin criterion are subsequently distributed among the deficit Member States pursuant to a normal Dublin procedure without discrimination. In the situation in which a hotspot has been set up in a surplus Member State, the necessary steps for the realisation of a Dublin transfer can be prepared by the hotspot. EASO or a 'distribution agency' to be newly created must coordinate and support this process.

## 4.5 The position of the asylum seeker

In Chapter 2, it is explained that offering protection constitutes the foundation of the right of asylum. This means that it must be guaranteed that each asylum seeker is provided with an appropriate status determination, so that it can be determined whether he or she requires protection. The ACVZ believes it justifiable that a distribution mechanism does not (yet) take into account the preference of an asylum seeker for submitting his or her asylum application in a certain Member State. After all, offering a decisive choice will not lead to a fair distribution of responsibilities. However, it should of course take into account his or her interests as already embedded now in the criteria of the Dublin Regulation.

The implementation of the current relocation proposals shows that it is difficult to have asylum seekers opt for relocation to certain Member States on a voluntary basis.<sup>84</sup> Several causes for this can be conjured up: the perceived, but also the actual, chances of a permit vary considerably and the socio-economic situation also differs greatly per Member State. The ACVZ therefore deems it inevitable to choose for a mechanism that mandatorily and exclusively grants the responsibility for asylum seekers to one of the Member States. Just as in the current proposals, the Dublin Convention must then serve as a tool to transfer asylum seekers who decide after all to apply for asylum in another Member State to the responsible Member State. The sustainable success of this system requires that the Member States make a sincere effort for a harmonized CEAS. Mandatory distribution will lead to a high number of secondary migratory movements if the chances of an asylum residence permit and the chances of integration continue to differ considerably between Member States.

But the criteria of the Dublin Regulation should be applied correctly in the distribution, much more than is currently the case. For this purpose, it is necessary to gather in the registration phase the information required in order to be able to decide whether one of the Member States is responsible for the application for asylum on the basis of those criteria, e.g. because the asylum seeker has family in that Member State or because he or she has stayed legitimately in that Member State before. In time, if the system functions properly, it is recommended to ascertain whether the preferences of asylum seekers can progressively be taken into account. For example, by using 'preference matching', a system in which the preferences of asylum seeker and host Member State can be tailored more to each other.<sup>85</sup> Aspects that can then be taken into account are e.g. language, the possibility to follow a specific study programme or labour market prospects.

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83 <http://www.volkskrant.nl/buitenland/slowakije-wil-alleen-christelijke-vluchtelingen-a4126170/>, consulted on 8 December 2015.

84 See Report additional JHA council, 9 November 2015, TK 705151, 24 November 2015.

85 Guild e.a., 'Enhancing the common European Asylum System and Alternatives to Dublin', *Study for the European Parliament*, LIBE Committee, 2015.

## 4.6 Which key will be used?

The ACVZ believes the key as proposed by the EC and described in paragraph 3.1. is usable as a starting point for a permanent system of distribution. The use of this key will, however, result in Member States that are currently still processing relatively few applications for asylum, suddenly becoming responsible for a significantly higher number of applications for asylum, as shown in the table below in which the influx distribution proposed by the EC is applied to the average influx of asylum seekers of the period from 2010 to 2014.

Member State	Key	De facto asylum applications (mean 2010 – 2014) Applications based on key	Applications based on key	Deviation from quota	
				in applications	in %
Austria	2.05%	17,710	8,081	9,629	119%
Belgium	2.58%	26,236	10,140	16,096	159%
Bulgaria	0.92%	4,305	3,610	695	19%
Croatia*	0.61%	765	2,392	-1,627	-68%
Cyprus	0.16%	1,856	615	1,241	202%
Czech Republic	1.69%	833	6,641	-5,808	-87%
Denmark	1.53%	7,421	6,030	1,391	23%
Estonia	0.21%	85	840	-755	-90%
Finland	1.35%	3,322	5,313	-1,991	-37%
France	13.66%	60,418	53,805	6,613	12%
Germany	17.99%	101,879	70,828	31,051	44%
Greece	1.80%	9,364	7,089	2,275	32%
Hungary	1.39%	13,526	5,491	8,035	146%
Ireland	1.19%	1,316	4,669	-3,353	-72%
Italy	11.46%	31,800	45,113	-13,313	-30%
Latvia	0.30%	236	1,184	-948	-80%
Lithuania	0.45%	501	1,754	-1,253	-71%
Luxembourg	0.25%	1,443	966	477	49%
Malta	0.07%	1,548	294	1,254	427%
Netherlands	4.11%	16,086	16,173	-87	-1%
Poland	5.51%	9,491	21,687	-12,196	-56%
Portugal	1.75%	336	6,880	-6,544	-95%
Romania	2.65%	1,631	10,453	-8,822	-84%
Slovakia	0.85%	506	3,354	-2,848	-85%
Slovenia	0.36%	313	1,406	-1,093	-78%
Spain	8.51%	3,768	33,497	-29,729	-89%
Sweden	2.51%	48,257	9,871	38,386	389%
United Kingdom	14.12%	28,806	55,583	-26,777	-48%
Total	100%	393,758			

\* Data for asylum applicants in Croatia for the five-year period is estimated based on data from 2013 and 2014.

Source: International Centre for Migration Policy Development, An effective Asylum Responsibility-Sharing Mechanism, Thematic Paper, Updated Version October 2015, p. 25.<sup>86</sup>

<sup>86</sup> The report of the ICMPD provides a summary of different distribution keys proposed previously and then applies these keys to the influx of asylum seekers in the last years. See: [http://www.icmpd.org/fileadmin/ICMPD-Website/News-letter/October\\_2015/ICMPD\\_TP\\_Responsibility\\_Sharing\\_Update2015\\_1007.pdf](http://www.icmpd.org/fileadmin/ICMPD-Website/News-letter/October_2015/ICMPD_TP_Responsibility_Sharing_Update2015_1007.pdf), consulted on 8 December 2015.

It is unlikely that the asylum systems, such as the reception facilities and the asylum authorities, are currently adequately equipped to handle those numbers. The ACVZ advises sparing these Member States in the initial phase. This can be done by initially assigning a heavier weighting to the factor GNP in the first years. This should however be matched by specific commitments of Member States that are being spared to invest considerably in their capacity. By working in phases towards a distribution as proposed in the distribution key of the EC, Member States that currently still have little experience with the handling of applications for asylum and the integration of permit holders can begin developing this capacity and knowledge.

Furthermore, the ACVZ recommends funding more costs linked to the processing of applications for asylum from the Migration Fund. The Member States will have to increase their contribution to this fund for this purpose. The allocation of these funds should then be made dependent on the actual distribution of asylum responsibilities.

#### *Legal protection*

It has already been described in Chapter 2 how the ACVZ envisions the legal protection against a transfer decision. In this advisory report, transfer in the context of the distribution mechanism comes down to a transfer on the basis of the Dublin Regulation. In such a case, the transferring Member State will not take the asylum application of the asylum seeker into consideration for processing. Of course, the asylum seeker can resort to a legal remedy against this decision, in the same manner in which an objection or appeal can currently be lodged against a Dublin procedure. In this procedure, it must in any case be determined whether the criteria of the Dublin Regulation are applied properly. In addition, the fundamental rights of the asylum seeker, such as the right to family life (Article 7 Charter, Article 8 ECHR), the prohibition of inhumane treatment (Article 4 Charter and 3 Article ECHR), and the rights of the child (Article 24 Charter and Article 3 Convention on the Rights of the Child), must be protected.

The alignment with the existing national system of legal protection will mean that certain Member States will experience a disproportionately large burdening of the judiciary. This could be compensated by also partly funding the costs of Dublin procedures from the Migration Fund.

## **4.7 Summary: description of the distribution process**

In summary, the proposal of the ACVZ is as follows:

When an asylum seeker enters the Dublin countries, he or she must contact the authorities as soon as possible to announce his or her application for asylum. If a hotspot is active in the country of first arrival, then the asylum seeker must go there. The responsibility for the registration of the (whether or not irregularly border-crossing) asylum seeker resides primarily with the country of first arrival, unless a hotspot has been set up there. Following the registration, the national Dublin authorities in the country of first arrival, or the hotspot, investigate which Member State is responsible for processing the asylum application. The currently applicable Dublin criteria are being used for this purpose. Dublin III has a hierarchic list of criteria for allocating the responsibility for an application for asylum to a Member State.<sup>87</sup> If no responsible Member State can be designated under Articles 8 to 12 of the Dublin Regulation, the country of first arrival will become responsible for processing the asylum application pursuant to the current Article 13, first

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87 Article 7 of the Dublin Regulation.

paragraph, of the Dublin Regulation. Moreover, Article 3, paragraph 2, of the Dublin Regulation provides that the Member State where the application for international protection is initially submitted is responsible, if no responsible Member State can be designated on the basis of the described criteria. The amendment proposed by the Advisory Committee in this advisory report consists of supplementing the Dublin Regulation in such a manner, that the text of the Articles 3 and 13 reflects that the country of first arrival or irregular border crossing (Article 13, first paragraph) or first asylum application (Article 3, second paragraph) will not become responsible when it receives a significantly excessive number of applications. Articles 3 and 13 of the Dublin Regulation will have to determine that a deficit Member State will become responsible when there is a case of disproportionately large numbers. That Member State is obliged to accept that responsibility on the basis of Article 18 of the Dublin Regulation.

The supplemented Articles 3 and 13 of the Dublin Regulation will also have to refer to two new provisions that must be added to the Regulation. Firstly, the authority of the European Council to establish a distribution key with which a fair distribution can be determined must be created in the Dublin Regulation. On the basis of the selected distribution key, the EC can annually determine the percentage of asylum applications for which each Member State will become responsible in that year. For this purpose, it is necessary for the EC to annually receive, via Eurostat, the information from the Member States that is necessary for making the calculations on the basis of the criteria of the distribution key. For example, the current population, the GNP, employment figures, etc. Which information this is, depends on the distribution key selected.

Secondly, the EC must be given the authority to determine the desired percentage-wise distribution of asylum applications per quarter, on the basis of the established distribution key. For this purpose, the EC must quarterly receive a report from the EU agency eu-LISA. Those reports must specify the total number of asylum seekers registered in the EU, as well as the number of asylum seekers registered per Member State. On the basis of this information, in combination with the established distribution key, the EC can determine which surplus Member State can transfer how many asylum seekers to which deficit Member State in the following quarter. EASO or a 'distribution agency' to be newly created must coordinate and support this process.

If on the basis of the amended Dublin Regulation, another Member State is responsible for handling the application for asylum, then the asylum application will not be considered for processing by the authorities of the Member State in which the asylum seeker is situated.<sup>88</sup> The asylum seeker is informed in writing that the responsibility for his or her asylum application has been taken over by another Member State. A legal remedy can be used against the decision, as is currently already possible against a return or referral decision in the context of the Dublin Regulation.

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88 Article 26, paragraph 1, Dublin Regulation.



## CHAPTER 5

# Conditions

In the previous chapter, the ACVZ made a proposal for a permanent distribution mechanism, which can ensure the sustainable fair distribution of asylum responsibilities. In this chapter, we describe the conditions deemed necessary by the ACVZ to make it possible for the proposed distribution mechanism to function. These conditions are 1) further harmonization of the CEAS, 2) creating future prospects for asylum seekers, and 3) working on the external dimension of the European asylum policy. In this chapter, the ACVZ offers a summary of existing possibilities and of a number of plans proposed earlier by other organisations that make it possible for the EU and its Member States to meet these conditions. In addition, the ACVZ itself proposes a number of measures. The aim of this chapter is to describe a coherent package of measures, which makes it possible to fulfil the conditions necessary for the functioning of the distribution mechanism.

### 5.1 Further harmonization of the CEAS

Chapter 2 describes how the responsibilities arising from the CEAS should be interpreted. According to the ACVZ, they should be brought more in line with the listed characteristics of solidarity than is currently the case. In this paragraph, we will discuss the question as to how to realise the further harmonization of the CEAS and what its significance is for the distribution mechanism. First of all, the ACVZ notes that the existing European Directives adopted in the CEAS are not minimum standards, but mandatory conditions for the Member States. It should not matter in which Member State an asylum application is submitted for the outcome of that application. That practice proves otherwise has already been described in the introduction.

According to the ACVZ, the further harmonization of CEAS is of crucial importance to the success of the distribution mechanism. The reason for this is that asylum seekers have to be able to trust that they will receive an equivalent treatment of their asylum application in each Member State, in which the outcome of the procedure is not affected by the Member State in which the application will be processed. Without that trust, the asylum seeker can hardly be expected to accept the decision to process his or her asylum application in a Member State that he or she does not prefer and this will increase the risk of secondary migration.

An objective formulated in the CEAS is that, at completion of the second phase of the harmonization of asylum, the asylum systems of the Member States have converged towards each other to such an extent that a person who needs international protection has the same chance in all Member States.<sup>89</sup> With the implementation of the revised EU Asylum Procedures Directive and the Reception Conditions Directive (at the latest July 2015), the second phase of the CEAS has moved into its final phase. According to the ACVZ, the Member States have progressed considerably on paper, but there is no 'level playing field' between them in practice.<sup>90</sup> This requires further harmonization of the CEAS, which has two advantages. Firstly, the incentives for asylum seekers are removed for travelling on to a Member State where the perceived chances of asylum are greater.

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89 This is the purpose referred to in the Stockholm Programme (2010-2014). This programme ended in 2014. The current programme, 'Towards an open and secure Europe', builds on the Stockholm Programme.

90 See also the introduction.



Secondly, the level of support among Member States is increased for the recognition of each other's asylum decisions and for working together better than is currently the case. This support is necessary to make the distribution mechanism permanent. According to the ACVZ, the harmonization of the CEAS means that, in practice, the efforts of the EU and the Member States should be intensified in the following areas:

1. Border control;
2. Registration;
3. Asylum Procedure;
4. Integration;
5. Return and illegal residence.

The ACVZ is aware that the powers to make policy in certain areas reside primarily with the Member States (such as integration, border management, and partly registration and return) and that a far-reaching transfer of tasks to the institutions of the Union in these areas is currently politically controversial. In the course of 2015, the EC and the Member States made proposals in the areas of registration, border control, and return.<sup>91</sup> In order to achieve further harmonization in the CEAS in this and other areas, the ACVZ is making a number of practical proposals, which can be realised in the short term without a further transfer of powers from the Member States to the Union.

Options for the European Commission to enforce compliance with the CEAS  
The EC can act when a Member State:

- does not, not timely or inaccurately implement the EU directives into national law and does not inform the EC of the transposition measures that it has taken;
- is suspected of violating the EU legislation.

If a solution is not found at an early stage, the EC can launch formal infringement proceedings and potentially refer the Member State to the Court of Justice of the EU pursuant to Article 258 TFEU. The EC currently monitors mainly the promptness of the implementation in the Member States, but does not thoroughly evaluate the enforcement in the practice of the Member States. If the Member States do not timely notify the EC that a Directive has been transposed into national legislation, infringement proceedings will follow automatically. The EC also publishes the names of the Member States against which such infraction proceedings are ongoing.<sup>92</sup> The EC can also investigate the fulfilment of a regulation or directive in a Member State on the basis of complaints by civilians or NGOs in the Member States.<sup>93</sup> Subsequently, the EC corresponds with the government of that country in order to find a solution (pre-infraction). This is a good means of leverage. Also, Article 7 of the EU treaty ultimately provides the possibility to deprive

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91 In the migration agenda of the EC of May 2015, the plan was announced to revise the Frontex Regulation (EC) no. 2007/2004 and to expand the powers. Frontex is an agency that assists Member States in the implementation of the Schengen acquis in which Ireland and the United Kingdom do not participate. On 23 September 2015, the EC announced a number of solutions for the short and medium term. In the outlook, the EC refers to the completion of the CEAS, a shared management of the European border and a new model for legal migration. [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_nl.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_nl.pdf), consulted on 8 December 2015.

92 On 23 September 2015, the EC announced that it was launching 40 infraction proceedings against various Member States. Most infraction proceedings concern the untimely transposition of guidelines into national legislation. See: <http://statewatch.org/news/2015/sep/eu-com-infringement-refugees.pdf>, consulted on 8 December 2015.

93 The EC remains dependent on properly substantiated complaints from the Member States. Whether civil society follows the implementation of the CEAS sufficiently critically differs from Member State to Member State. Moreover, the EC has a limited capacity and the authority not to handle complaints and to reject them without justification, with as a result that the EC cannot fully enforce the implementation of the CEAS in practice.

a Member State of certain rights.<sup>94</sup> The EC is aware of the limits to the use of its current instruments.<sup>95</sup>

According to the ACVZ, the EC could use its enforcement instruments more actively and strategically.<sup>96</sup> The ACVZ would like to see that the EC pursues a ‘zero tolerance’ policy regarding non-compliance with the CEAS by the Member States, as is the case with the regulation of the internal market. Member States that intentionally do not make any investments to transpose the CEAS correctly into national practice can ultimately receive a sanction (‘the stick’). A link to the budgetary control of the EC in other areas than migration should not be excluded according to the ACVZ. In the vision of the ACVZ, the EC must therefore make extensive use of its enforcement instruments.

In addition to the enforcement instruments (‘the stick’), the EC can also reward the Member States (‘the carrot’). The ACVZ proposes that the EC rewards a Member State that is taking specific actions to increase its asylum capacity or offering its excess capacity to other Member States by using funding from the Union Funds. Additional financing can, for example, be provided via the AMIF, but also from other funds.<sup>97</sup> The ACVZ proposes investing not only in Member States that are currently not conforming to the full implementation of the CEAS, such as Greece, Hungary, and Italy, but also investing in setting up reception and procedural capacity in other Member States that are currently receiving relatively few asylum seekers. This increases the capacity to permanently redistribute asylum seekers and strengthens the level of support in other Member States.

In order to decide whether ‘the carrot’ or the ‘stick’ should be used, the EC must monitor the situation in the different Member States more frequently, preferably per quarter. This can be achieved by making use of the ‘European rule of law monitor’, which remains to be developed.<sup>98</sup> The ACVZ believes that the rule of law monitor must also take into account the manner in which the CEAS is implemented in practice by the Member States. The aim of the monitor is to make a benchmark of the fundamental rights situation and asylum capacity in the various Member States. There is also the European Union Agency for Fundamental Rights (FRA) that publishes thematic reports among other publications. Reports of this agency can be presented and discussed in the Council. In this respect, the ACVZ also refers to the Schengen evaluation mechanism, revised in 2013, in which the implementation of Schengen instruments are evaluated and controlled more strictly than before, as a ‘best practice’.<sup>99</sup> Partly on Dutch initiative, this

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94 On 15 October 2003, the EC published a communication, in which it provides frameworks within which the Commission will check the provisions of Article 7 TEU, see COM (2003) 606. The EC has the option to deprive a Member State of the voting rights in the Council of Ministers as well as other rights when that Member State is restricting the freedom, democracy, human rights or equality of rights in its own country (flagrant violation of Article 2 TEU). This concerns a cumbersome procedure under Article 7 TEU, which has not yet been used in practice.

95 In his annual State of the Union given to the EP in September 2012, President Barroso said: “We need a broader range of instruments that provide us with more options than merely the ‘soft power’ of political persuasion and the ‘nuclear option’ of Article 7 of the Treaty”.

96 According to the ACVZ, NGOs, such as human rights organisations and networks of lawyers or judges, play an important role in the detection of defects in the CEAS as source of objective, independent information on developments in the CEAS in the implementation in practice. Regulation (EC) no. 168/2007 establishing a European Union Agency for Fundamental Rights provides for cooperation with civil society including NGOs (see Article 4, paragraph 1 (a) and Article 10 of the Regulation).

97 For example, the European Regional Development Fund (ERDF) and the European Social Fund (ESF).

98 See proposal of the EC to the Council and the EP of 11 March 2014, ‘A new EU Framework to strengthen the Rule of Law’, COM (2014) 158 final, <http://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:52014DC0158&from=EN>. See also the advice of the Dutch Advisory Council on International Affairs (Adviesraad Internationale Vraagstukken) of 25 February 2014 ‘De rechtsstaat: waarborg voor Europese burgers en fundament van Europese samenwerking’ (The rules of law: guarantee for European citizens and foundation of European cooperation): <http://www.tweedekamer.nl/kamerstukken/detailPid=2014D07214&did=2014D07214>.

99 See [http://europa.eu/rapid/press-release\\_MEMO-13-536\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-536_en.htm), consulted on 8 December 2015.

has also made it possible to test on rule of law practice in Member States in applying the Schengen acquis. The EC will report twice a year on the functioning of the Schengen area. The ACVZ proposes to create in the same manner also a stricter evaluation mechanism for the functioning of the CEAS with a significant role for the EC and the Council.<sup>100</sup> Finally, we must also refer to reports of the European Parliament (EP). The EP reports regularly on the fundamental rights situation in the EU and the state of affairs of the CEAS. As a result of the reports, the EP can adopt resolutions, to which the EC can attach consequences.

#### *Options for the Member States to enforce compliance with the CEAS*

The ACVZ takes the view that the Member States are themselves responsible for the correct and timely implementation of EU laws and regulations.<sup>101</sup> The starting-point is that all Member States offer protection in accordance with international and European-law standards. This does not provide the asylum seeker with a guarantee of an equal outcome in the asylum procedure in the different Member States, but it does, however, provide the asylum seeker with the guarantee that his or her application will be assessed on the basis of the same European standards and safeguards. Non-fulfilment of the agreements in the CEAS is an important detrimental factor when it comes to solidarity. According to the ACVZ, the EC is not the only one responsible for the supervision of a correct application of the CEAS in a Member State. The Member States should also call on each other in the event of a failure to fulfil agreements in the CEAS.

Naturally, there is a difference between not being able to and not wanting to fulfil the obligations in the CEAS. If a Member State temporarily experiences shortcomings in its asylum capacity due to unforeseen circumstances, then there is the option of requesting assistance from the EC and other Member States and using Union Funds, as stated above. This is different if it concerns an unwillingness to fulfil the obligations. In that case, one option is the use of 'peer pressure' in the Council pursuant to Article 70 TFEU.<sup>102</sup> On the basis of evaluations such as those prepared by the EC (or EASO), Member States should call on each other in the Council to account for the failure to fully comply with the CEAS. According to the ACVZ, this can lead to the exclusion of the Member State from using the distribution mechanism) when it experiences a surplus of asylum applications (and from making another Member State responsible) and likely also to a budgetary measure. In that situation, the Member State will remain responsible for the asylum seekers who travel in the territory of the Member State. As an ultimate remedy, the regime of Article 7 of the EU Treaty can be applied.<sup>103</sup> As such, a positive incentive for properly registering asylum seekers and continuing to take part in the distribution mechanism will continue to exist.

#### *Elements of the CEAS that can be implemented jointly*

The ACVZ believes that the joint responsibility for certain tasks and their joint implementation automatically result in a more equal application of the CEAS in the Member States. In this regard, the ACVZ refers to:

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100 The EC plays a big role in the Schengen evaluations, but the Council adopts the recommendations resulting from the evaluations. All Schengen countries are evaluated every five years, on the basis of questionnaires and working visits by staff members of the Commission as well as experts to be appointed by and from the Member States. Furthermore, a passage in the evaluation reports about the functioning of authorities that apply the Schengen rules has been included. The Council finds it important that this aspect is also monitored in the evaluation mechanism.

101 The Member States will implement EU law, see Article 291 of the TFEU.

102 On a proposal of the EC, the Council can adopt measures that provide for the Member States, in cooperation with the EC, performing an objective and impartial evaluation of the implementation, by the authorities of the Member States, of the CEAS. The European Parliament and the national parliaments are informed of the content and results of that evaluation.

103 See Note 88.

- the preparation of EU country reports;
- the collaboration between the Member States for the assessment of asylum applications;<sup>104</sup>
- the registration of asylum seekers by the EU.

In the medium term, these tasks can be carried out by the EASO. The EASO currently prepares European country reports to a limited extent.<sup>105</sup> In the future, the ACVZ foresees that policy decisions may also be taken by the EC on the basis of these reports, e.g. by designating certain areas in countries of origin where there is a situation that warrants international protection.<sup>106</sup> The Member States can cooperate more by exchanging national asylum officials. Such an exchange is currently taking place on a limited scale.<sup>107</sup> These initiatives may be further expanded and elaborated, resulting in an exchange of ‘best practices’ and therefore an investment is made at the same time in a more equal implementation of the CEAS. In addition, EASO could also play an important role in the preparation of the parameters of the CEAS in the European rule of law monitor.

Finally, EASO can provide on-site support for the registration of asylum seekers at certain ‘hotspots’ in a pilot project.<sup>108</sup> The ACVZ proposes that EASO will assume this task itself in the course of time (within 5 years) in a Member State that shows shortcomings. The ACVZ realises that the possibilities for the agency are currently limited. Therefore, the Council will first have to make a decision to make more resources and personnel available to the EASO. In the vision of the ACVZ, the agency should evolve from a supporting role into an executive one. For this purpose, the mandate of the EASO, which currently has no operational authority, will have to be expanded in phases in the course of time (within 10 years).

104 A group of national asylum officials made available by the Member States to EASO can be deployed in another Member State in so-called joint processing teams. The cooperation may consist of 1) exchange of experience and information 2) practical support by asylum officials from another Member State or 3) the joint processing of the procedure on the responsibility of the concerned Member State. In this context, the term ‘joint processing’ will be used for different forms of cooperation. According to the ACVZ and in the context of this advice, it concerns the support for the registration at the ‘hotspots’ and the joint implementation of the Dublin Regulation (the amendment to Article 13 of the Regulation) on the responsibility of the relevant Member State.

105 The revised EU Asylum Procedures Directive obliges Member States to use the country information of the EASO as one of the sources on which they base their asylum decisions. This makes the EASO country information important for all Member States. EASO does not yet fulfil the role that it has been assigned. See the article by H.M. van den Bergh ‘Landeninformatie in een Europees perspectief. De rol van EASO’ (Country information in a European perspective. The role of EASO), A&MR 2014 No. 04.

106 The question of whether there is a situation as referred to in Article 15, preamble and under c, EU Asylum Qualification Directive, differs for each time period and region in a country of origin, partly in view of the differences in the administration of justice in the Member States.

107 In February 2013, the EC published a study into the feasibility of joint processing, ‘Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU’, DG Home Affairs, HOME/2011/ERFX/FW/04. See also a study of the EP of October 2014, ‘Policy Department C: New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’, 2015, p. 47-50, 79 and 107-108.

On 4 December 2013, the EC mentions the setting up of a pilot by EASO, see COM (2013) 869, action point 5.4. In 2014, EASO launched 6 pilot projects within the framework of the Task Force Mediterranean that pertain to the joint processing of asylum applications (e.g. unescorted minor asylum seekers, COI, Dublin) and a pilot project on the facilitation of persons in need of international protection. 11 Member States are actively involved in the pilot projects. In 2015, EASO has also a number of active joint processing pilot projects.

108 EASO currently sends national asylum officials to the ‘hotspots’. For the Dutch EASO input and support of Hungary, we refer to the letter of the Dutch State Secretary of Security and Justice to the Dutch Lower House of 24 November 2015, Parliamentary Papers II, 2015-2016,32 317, no. 359.

## 5.2 The creation of future prospects for asylum seekers

In the previous paragraph, it was emphasised that asylum seekers must be able to trust that they will receive an equal treatment of their asylum application in accordance with Community rules in each Member State. In this paragraph, the ACVZ proposes to create more prospects on mobility for asylum seekers in time. The proposal entails intentionally restricting the freedom of choice or input of the asylum seeker for a specific Member State at the front end of the permanent distribution system, so that the registration and distribution can be handled efficiently. As a compensatory measure at the back end of the system, the asylum seeker can be offered in time the prospect of mobility throughout the EU after obtaining a permit. The reason for this is that this prevents irregular secondary migration flows in the EU as much as possible and puts regular intra-EU mobility on the right track. This can induce the asylum seeker to await the processing of his or her asylum application in a Member State that is not his or her preference.

The ACVZ proposes to offer the right to 'free movement', in time and on conditions, to permit holders. The term 'free movement' is however not always applied uniformly in European Union law. It can be the collective name for a complex legal concept that encompasses at the least the rights of freedom of movement and of residence for EU citizens.<sup>109</sup> This is in contrast with the customary terminology in directives that provide for the status of citizens of a third country and that provide for the 'free access' to the territory of a Member State.<sup>110</sup> Here, the ACVZ uses the concept of 'free movement' that pertains to the right of residence and movement of permit holders who enjoy international protection to a Member State other than the Member State that has granted the permit. It is therefore the intra-EU mobility of the permit holder. According to the ACVZ, the current Directive concerning the status of third-country nationals who are long-term residents (2003/109/EC) offers insufficient prospects and results in insufficient mobility.<sup>111</sup>

In paragraph 2.4, it was already noted that the ACVZ is proposing to create prospects on mobility for asylum seekers, in the sense that they will be able to move more freely through the territory of the Union for purposes of work or study, in the foreseeable future after the permit has been granted and on certain conditions. The ACVZ supports the idea of the Committee Meijers to amend the EU legislation and to grant the right to intra-EU mobility to permit holders already after a stay of two years in the Member State, instead of five years such as is the case now on the basis of Council Directive 2003/109.<sup>112</sup> The ACVZ proposes to make obtaining the right to intra-EU mobility available for the purpose of work and study after a stay of two years in a Member State. The ACVZ hereby points to a potentially applicable analogy with the existing *aquis* for intra-EU mobility in the Directive 2009/50/EC (Blue

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109 Examples are Article 3, paragraph 2, TEU, the heading of Title IV of Part III of the TFEU, Article 26, paragraph 2, TFEU, Article 45, paragraph 1, TFEU, Articles 46 and 48, TFEU.

110 See Article 11, paragraph 1, under (h), of Directive 2003/109/EC; Article 14, paragraph 1, under (h), of Directive 2009/50/EC; Article 22, under (b), of Directive 2014/36/EU, and Article 17, under (b), of Directive 2014/66/EU.

111 In the report of the EC to the EP on the application of Directive 2003/109/EC of 28 September 2011, the EC pointed out that it is regretful that the Directive has little effect in many Member States and cannot achieve its ambitious objective. The available data showed that, so far, only a few nationals of third countries with the status of long-term resident have made use of this new avenue for mobility within the EU (less than 50 permit holders per Member State), among other things, see COM (2011) 585 final, p. 10. The Amending Directive 2011/51/EU of 11 May 2011 extended the scope of the Directive to the beneficiaries of international protection. The provisions in the directive that pertain to the mobility of third-country nationals to a second Member State have, however, remained unchanged and have been subjected to significant stipulations, see Article 14 to 18 inclusive of the Directive.

112 See the advice of the Committee Meijers to the EC of 18 June 2015, <http://www.commissie-meijers.nl/en/comments/386>, consulted on 8 December 2015.



Card).<sup>113</sup> This means that residency in the other Member State will be subject to conditions, such as a minimum requirement of means and health insurance and no threat to public order, safety or health, but without an obligation of a work permit and with a guarantee that both the main person (permit holder who works or studies) and his or her family members can move together to a second Member State (and are able to work or study also there). According to the ACVZ, this can be achieved by making small amendments in the EU legislation. This entails changing small parts of the existing Directive 2003/109/EC, so that an intermediary step can be taken towards more rights of free movement for permit holders who enjoy international protection than is currently possible.

In the course of time (within 10 years), a fully sustainable prospect of intra-EU mobility must be offered through the progressive development of the EU legislation. Various organisations, e.g. ECRE, UNHCR, and the European Parliament, have made similar proposals that refer to the promise in Article 78, paragraph 2 (a), of the TFEU to provide for a uniform status for nationals of third countries that applies throughout the Union.<sup>114</sup> The ACVZ supports this and proposes that the EU legislation be further developed, for example by granting a uniform asylum status fully including the rights to ‘free movement’ possessed by a EU citizen to permit holders who enjoy international protection after a total of 5 years of legal residency in the EU (in various Member States). This means the application of the principle of mutual recognition of asylum decisions. The ACVZ realises that much is needed in order to achieve this in the future and that this may encounter political as well as legal objections, but finds this an inevitable development. A political objection is that it will no longer be the Member States that will be authorised to decide on the admission to its own territory of the person granted international protection from another Member State, but that this will be fully governed by the EU law. A legal objection is that a justification must be found for the unequal treatment of persons granted international protection and of long-term resident ‘regular’ third-country nationals who fall under Directive 2003/109/EC and who have a stringently stipulated right to circulation in the EU after at least 5 years of legal residency in a Member State.<sup>115</sup> It is possible that a more far-reaching adaptation of the EU legislation is required. After all, the amendment to Directive 2003/109/EC to include the persons granted international protection in Directive 2011/51/EU was partly already present in the prohibition of discrimination in Article 21, Charter of the EU. This could possibly mean that each third-country national must be granted free movement rights after at least 5 years of lawful residence in the EU. These rights granted to third-country nationals can, of course, not entail more than the free movement rights currently applicable for EU nationals. For that matter, the permit holder can currently obtain those rights also in other ways (often after long-term legal residency in one Member State) if opting for naturalisation and the EU citizenship is obtained.

113 The idea of intra-EU Mobility for third-country nationals was, however, the main focus of the plans of the Blue Card Directive. See e.g. S. Groen & T. de Lange, “De Europese Blue Card. Verblijfsvergunning voor hooggeschoolde arbeidsmigranten (The European Blue Card. Residence permit for highly educated labour migrants)”, A&MR 2011, p. 338-348 (aff. 8). In this contribution, the authors conclude that attention is being paid to intra-EU mobility, a comparison with the Group Directive and the derogations from the Long-Term Resident Directive, the right to family reunification, and the right to equal treatment. The Blue Card scheme is currently being revised in negotiations between the Council and the European Parliament.

114 ECRE points out that the discussion that has been put on the agenda by the EC since 2008 has reached a standstill. It would resolve the anomaly of the Member States recognising each other’s negative asylum decisions, but not the positive ones. The mutual recognition of the permit holders who enjoy international protection and the transfer of international protection to another Member State is the logical next step in the CEAS. ECRE proposes to develop a uniform asylum status in Article 78, paragraph 2 (a), TFEU. See report ECRE Common Asylum System at a Turning Point: Refugees caught in Europe’s solidarity crisis, dated 31 August 2015, p. 52-53 <http://www.ecre.org/component/downloads/downloads/1038.html>. UNHCR encourages the development of a uniform status, see observations of the UNHCR on the proposal on the adaptation of Directive 2003/109/EC, p. 6 <http://www.unhcr.org/4c6017189.pdf>. The study of the European Parliament mentions both the proposal for mutual recognition of the asylum status in the EU and the alternative proposal for the adaptation of Directive 2011/51/EU with the right to intra-EU mobility after two years, Policy Department C: Enhancing the Common European Asylum System and Alternatives to Dublin, 2015, p. 10. [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf).

115 See Article 14 to 18 inclusive of Directive 2003/109/EC.

### 5.3 Working on the external dimension of solidarity

The establishment of a distribution mechanism in the EU concerns the development of internal EU solidarity. A distribution mechanism may offer a solution for a better distribution of asylum responsibilities in the EU. However, according to the ACVZ, this cannot be seen as separate from the developments in the external dimension of solidarity of the EU. After all, the distribution mechanism has no impact on the number of asylum seekers seeking protection in the EU. The above paragraphs describe the conditions that must be fulfilled according to the ACVZ to make the distribution mechanism function. In this paragraph, attention will be requested for the external dimension of the solidarity in the EU with the aim of regulating migration and addressing the causes of migration flows.

#### *Improving reception in the region*

The ACVZ points to the initiatives for offering humanitarian aid and improving the circumstances of the reception in the region, such as e.g. the financial assistance committed by the EU to the reception of refugees outside the EU.<sup>116</sup> The EU is investigating whether safe and sustainable reception capacity can be developed in the region, partly with a view to return.<sup>117</sup>

#### *Lasting investment in resettlement*

The UNHCR has called on the EU to devote more effort to resettlement.<sup>118</sup> The EU Task Force Mediterranean also recommends focusing more on resettlement and legal routes to prevent tragedies in the Mediterranean Sea.<sup>119</sup> On 20 July 2015, the JHA Council agreed to resettle 22,504 asylum seekers from outside the EU. Some NGOs call on the EU to perform more resettlements.<sup>120</sup> The ACVZ believes that a permanent and more sizeable investment, in addition to the distribution mechanism, in the resettlement of refugees from states that offer large numbers of them accommodation for a long time, such as Jordan, Lebanon, and Turkey, is necessary. This can lead to a greater capacity and willingness in the region to continue to protect the remaining refugees and to find other sustainable solutions for them. Just like in the previous years, the Netherlands has recently promised that it will resettle a total of 2000 persons within the next 4 years.

#### *Improving the legal channels for migration*

The ACVZ points to the developments in the EU for the creation of improved legal channels for migration. This means that safe legal routes to the external borders of the EU are being kept open, which can be used by asylum seekers to reach the external border of the EU in order to submit an application for asylum. This reduces the risk of loss of lives at sea and ensures that asylum seekers no longer depend on people smuggling to apply for asylum in the EU. It also enables the Member States to better manage the number of asylum seekers admitted at the border. Both the EC and the EP are in favour of the development of legal channels for migration. For example, in the agenda for migration, the EC has asked for

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116 See EC Decision of 24 November 2015 'The Refugee facility for Turkey', C (2015) 9500 final, <http://www.state-watch.org/news/2015/nov/eu-com-turkey-refugee-crisis-funding-decision-24-11-2015.pdf>

117 See conclusions of the Council of 9 October 2015, paragraph 17 <http://www.consilium.europa.eu/nl/press/press-releases/2015/10/08-jha-conclusions-return-policy/>.

118 See UNHCR 12 March 2015, <http://www.unhcr.org/55019bce6.html>.

119 See report of the EC to the EP and the Council on the Task Force Mediterranean, COM (2013) 869 final of 4 December 2013, action point 3.3.

120 See e.g. the study of the International Catholic Migration Commission (ICMC) of June 2015, [http://resettlement.eu/sites/icmc.ttp.eu/files/10%25%20of%20Refugees%20from%20Syria\\_compressed\\_LR.pdf](http://resettlement.eu/sites/icmc.ttp.eu/files/10%25%20of%20Refugees%20from%20Syria_compressed_LR.pdf).



attention to the proper management of legal migration and the visa policy.<sup>121</sup> The EC is also assessing future possibilities of 'Protected Entry Procedures' and is examining the feasibility of setting up external processing.<sup>122</sup> In 2010, the ACVZ provided advice on the feasibility of external processing.<sup>123</sup> The EP has made proposals in a number of resolutions for a holistic approach to migration and believes that further possibilities of legal migration must be investigated.<sup>124</sup> The EP calls for the swift establishment of legal and safe routes to the EU for asylum seekers by means of measures such as the issue of a humanitarian visas at EU embassies and consulates in third countries and large-scale resettlement schemes.<sup>125</sup> The EU Agency for Fundamental Rights (FRA) too supports the development of legal channels for migration.<sup>126</sup>

#### *Intensify the cooperation with third countries on return*

On 9 October 2015, the JHA Council adopted conclusions with respect to the future of the return policy.<sup>127</sup> In the Council's conclusions, the Council concludes that an effective return policy is an essential part of the European migration policy. The main bottleneck of the relatively low return ratio<sup>128</sup> is the limited willingness of third countries to cooperate in forced return. The action plan of the EC of 9 September 2015 emphasises the scaling-up of cooperation with those third countries in accordance with the 'more for more' principle.<sup>129</sup>

The Council recognises the importance of return for the proper functioning of the national asylum systems in the general sense, and explicitly for the hotspots. According to the ACVZ, this applies also to the proper functioning of a sustainable distribution system. The Member States emphasise the need to place return in the context of the broad contacts and cooperation of both the Union and of the Member States. This is in line with the recommendations of the ACVZ to the government in the advice 'The strategic country approach to migration: between wish and reality.' The ACVZ advises the government to invest in the long-term relationship with countries of origin and to continue focusing on the promotion of (forced) return in the EU context.<sup>130</sup>

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- 121 See the communication of the EC to the Council and EP 'A European agenda on migration' of 13 May 2015, COM (2015) 240 final. The EC is revising the Directive on students and researchers and must offer these groups new opportunities for mobility and work. For example, talented persons can be attracted in the next seven years with European programmes such as Horizon 2020 and Erasmus+. Also, the Blue Card Directive is being reviewed in which the target group will be expanded. Finally, the visa policy is being modernised. The EC can make proposals for abolishing the visa requirement for some nationalities on the basis of reciprocity and for reintroducing it for other nationalities. These will take into account the ongoing political dialogues about migration and mobility with important countries.
- 122 See EC SWD (2014) 173 definitively of 22 May 2014 and COM (2013) 869 final of 4 December 2014.
- 123 See ACVZ advice from 2010 'External Processing. Conditions applying to the processing of asylum applications outside the European Union.', [www.acvz.org](http://www.acvz.org). The conclusions are still valid.
- 124 See e.g. resolution of the European Parliament of 17 December 2014 about the situation in the Mediterranean region and the necessity of an holistic EU approach to migration (2014/2907/RSP).
- 125 See resolution of the European Parliament of 7 September 2015 about migration and refugees in Europe (2015/2833 (RSP)).
- 126 See the report of the Fundamental Rights Agency (FRA), 'Legal entry channels to the EU for persons in need of international protection: a toolbox', [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf).
- 127 See <http://www.consilium.europa.eu/nl/press/press-releases/2015/10/08-jha-conclusions-return-policy/>.
- 128 Approximately 40% of the return decisions issued in the EU leads to return.
- 129 See Council Document no. 11846/15, <http://data.consilium.europa.eu/doc/document/ST-11846-2015-INIT/en/pdf>.
- 130 See the advice of the ACVZ of 25 June 2015 'The strategic country approach to migration: between wish and reality.', [www.acvz.org](http://www.acvz.org). See also the government's response of 5 November 2015, <https://zoek.officielebekendmakingen.nl/kst-29344-128.html>. The government shares the vision of the ACVZ that the building up and maintaining of relations with countries of origin is an important condition for improving cooperation in forced return. It emphasises the importance of investments in the diplomatic representation in countries of origin, mutual visits at the political and (high) official level, and projects in the context of migration and capacity development. The government also supports the necessity of an integrated approach at the strategic EU level, and refers to the EU Action Plan for return in which the principle of 'more for more' has been included.



## Conclusions and recommendations

This advisory report is focused on the question of how the Common European Asylum System (CEAS) can develop itself into a system based on solidarity, in which the responsibilities of Member States of the EU in respect of asylum seekers, including the consequences of granting or rejecting the application for asylum, are distributed fairly. In order to answer this question, the ACVZ has conducted research into the sub-questions described in the introduction. On the basis of this research, the Advisory Committee reaches the following conclusions and recommendations:

**Conclusion 1: At present, the CEAS is not sufficiently based on the principle of solidarity. Member states should concentrate their efforts on offering international protection to all who qualify for it. This means that, to a greater extent than has been the case, appropriate status determination should be guaranteed in all Member States in an equal manner. This requires the provisions of the CEAS to be viewed as collective responsibilities, demanding full compliance.**

In paragraph 2.2, we have examined what the characteristics are of the European legal principle of solidarity. The examination shows that there is no unequivocal legal definition of this principle, but that it entails, in any case, an important political mandate of the EU that has been incorporated in many Union law texts. On the basis of the literature studied, the ACVZ identifies the following elements of a definition of the principle. These are:

1. Solidarity in an international context entails at least countries cooperating with each other.
2. That cooperation is aimed at achieving a shared objective that transcends the interests of the individual sovereign states.
3. This requirement implies (in the EU) significant investments by all cooperating states in order to share in the fate of the others, which means that each participant commits to the outcome of collective decision-making.
4. Non-compliance with the standards arising from this collective decision-making affects the EU's legal order.

In paragraph 2.2, these basic principles are applied to the asylum policy of the EU, of which the objective is described in paragraph 2.1. This objective is to protect refugees and third-country nationals who need subsidiary protection against refoulement and to provide them with an appropriate status and a residence permit. The manner in which this obligation must be fulfilled by Member States has been laid down in the CEAS. One of the objectives of the CEAS is to achieve a harmonized asylum policy. This is currently hardly the case. Although the standards on paper are the same in all Member States, the states' asylum practices are still considerably divergent from each other. This indicates that not all Member States are fulfilling their obligations in a correct manner. This requires a strengthening of the legal basis.

**Recommendation 1: Advocate incorporating the standards laid down in the Qualification and Procedures Directives in an EU Regulation, emphasising the fact that these standards should be applied equally in all EU Member States.**

Article 80 of the TFEU prescribes that the Member States must carry out this objective in a solidary manner. According to the ACVZ, this means that the Member States must in any case already comply with all their responsibilities. In addition, they do have the obligation to collectively realise the objectives of the CEAS. This means that they must not let asylum seekers become the victims of the circumstance that one or more Member States do not or not properly implement the CEAS. In order to achieve a CEAS based on solidarity, the ACVZ advises advocating in the EU for interpreting the obligations arising from the CEAS in accordance with the principle of solidarity, more than is currently the case, and not to interpret and implement them dryly in function of the states' own national interest. How the ACVZ envisions this itself, is described in paragraph 2.2. This involves both the EC and the Member States making more use of their ability to exert pressure on Member States that knowingly and wilfully fall short in fulfilling their obligations, among other things. In addition, it entails the EC and the Member States providing more assistance to Member States that are not able to fulfil their obligations.

Recommendation 2: Emphasise the collective and shared mission of Member States to offer international protection. Advocate an interpretation of CEAS responsibilities that is more in line with the principle of solidarity. Urge the European Commission and the Member States to take firmer measures against Member States that fail to meet their obligations.

**Conclusion 2: Asylum responsibilities are not shared fairly between the Member States. This will not be achieved without amending the Dublin Regulation and Dublin system.**

The rules for the allocation of responsibility for applications for asylum and therefore also for all responsibilities arising from an application for asylum are laid down in the Dublin Regulation. The Dublin Regulation has no provision that makes it possible for the Member States to distribute asylum responsibilities among the Member States of the EU. In addition, the criteria for the responsibility allocation are being applied insufficiently and incorrectly. There is too much emphasis on the criterion of Article 13 of the Dublin Regulation, which provides that the Member State where a third-country national crosses the border of the Dublin countries for the first time becomes responsible for processing the asylum application. The consequence of this is that certain Member States, such as Italy and Greece in the current situation, are (or should be) responsible for a disproportionate share of the asylum applications because of their geographical position. This situation has turned out to be no longer tenable. The ACVZ does not see any possibilities to achieve a fair distribution of responsibilities, without a mandatory and permanent mechanism of distribution of responsibility. According to the ACVZ, this solution can be found within the Dublin system. The manner in which the Dublin Regulation should be adapted and in which a distribution mechanism can be further designed is described in Chapter 4.

Recommendation 3: Advocate amending articles 3 and 13 of the Dublin Regulation and supplementing the existing responsibility criteria in such a way that Member States with a (significant) disproportionately large number of applications will be able to transfer future asylum applications to Member States with a disproportionately low number of applications, regardless of whether such applications fall under the responsibility of the latter state under the Dublin criteria. This distribution mechanism could be activated by the European Commission and should operate under its authority. The European Asylum Support Office (EASO) or a new EU distribution agency should coordinate and support the distribution process.

**Conclusion 3: A fair and durable distribution system requires measures to further harmonize the CEAS and to offer the prospect of integration to all permit holders.**

The ACVZ advocates a distribution mechanism that leads to a sustainable and fair distribution. Secondary migratory movements should be restricted in order to achieve this objective. For that purpose, it is essential that asylum seekers can trust that they will receive an equal treatment of their asylum application in each Member State. Without that trust, the asylum seeker can hardly be expected to accept the decision to process his or her asylum application in a Member State he or she does not prefer and this will increase the risk of secondary migration. At present, the CEAS is being implemented insufficiently equivalently in practice.

Recommendation 4: Advocate to the European Commission and the Member States the further harmonization of the CEAS. The measures referred to in paragraph 5.1 are necessary for the establishment of a sustainable distribution.

It cannot be denied that the chances of integration and work are not the same in every Member State. The socio-economic situation differs too much between Member States for that to be the case. The ACVZ therefore advocates providing asylum seekers with prospects of intra-EU mobility subject to conditions and in time. The reason for this is that regulated intra-EU mobility prevents irregular secondary migration flows in the EU as much as possible. This can induce the asylum seeker to await the processing of his or her asylum application in a Member State that is not of his or her preference and to make an effort to work on his or her integration in that Member State after receiving his or her residence permit.

Recommendation 5: Urge the European Commission and Member States to offer asylum seekers and permit holders future prospects. The measures referred to in paragraph 5.2 are necessary for establishment of a sustainable distribution.

**Conclusion 4: A distribution mechanism is not the answer to migration crises. External solidarity is also needed. A distribution mechanism does have the potential to enlarge the ‘protection capacity’ of the EU as a whole.**

The discussion about relocation, but also about the distribution of asylum responsibilities, is governed by the large numbers of asylum seekers at this moment. The high influx of asylum seekers has led to much political debate. The support for providing international protection varies greatly depending on the Member State. Moreover, there is growing discontent with the unequal distribution of asylum responsibilities. Nevertheless, both the political debate and the practical implementation of the relocation mechanism proposed by the EC appear to have come to a dead end. The ACVZ deduces from this that there is currently little support for the introduction of a permanent distribution mechanism. Yet, the Advisory Committee is convinced that the introduction of a mechanism as proposed in Chapter 4 will be inevitable in the long term. The introduction of this mechanism will lead to a fair distribution of asylum responsibilities.

Distributing asylum seekers after their registration, but prior to the asylum procedure, gives rise to a fair distribution of all responsibilities entailed in the CEAS in respect of asylum seekers, including those for integration or return. Moreover, a distribution mech-

anism that is based on the distribution of registered asylum seekers also offers an incentive for Member States to effectively register each asylum seeker who enters its territory. The consequence of not registering is that the non-registering Member State may be held responsible for admitting referrals of asylum seekers from surplus Member States.

As various Member States have currently been able to largely evade making efforts concerning the CEAS, involving all Member States in the distribution of asylum responsibilities may lead to an increase of the total protection capacity. However, a distribution mechanism does not have an impact on the total number of asylum seekers that apply for asylum in the EU. Other measures must be taken in order to better check the influx of asylum seekers. These measures are described in paragraph 5.3.

Recommendation 6: Promote greater use of resettlement by Member States and the European Commission as well as the creation of safe legal avenues for migration to the EU. Such measures will be all the more important if the external borders are closed and agreements are reached with third countries to reduce asylum migration. Efforts should also be made by the EU to make more effective use of common measures for the return of failed asylum seekers.

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## APPENDIX I

# Advisory request



Ministerie van Veiligheid en Justitie

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**Ons kenmerk**  
621431

*Bij beantwoording de datum  
en ons kenmerk vermelden.  
Wilt u slechts één zaak in uw  
brief behandelen.*

Datum 30 maart 2015  
Onderwerp adviesvraag EU verdelingsmechanisme

Geachte mevrouw Van Dooijeweert,

Hierbij verzoek ik uw adviescommissie een advies uit te brengen over een EU-verdelingsmechanisme voor asielverantwoordelijkheden. De afgelopen jaren is kritiek geuit op de onevenwichtige verdeling van het aantal asielverzoeken en de daaruit voortvloeiende verantwoordelijkheden van de lidstaten van de EU. Ook het Kabinet constateert deze onevenwichtigheid en streeft naar een evenwichtige verdeling.

In uw werkprogramma van 2014 is mijn verzoek opgenomen om onderzoek te doen naar de mogelijkheden voor het opstellen van een verdelingsmechanisme op basis waarvan vreemdelingen die internationale bescherming genieten (statushouders) over de lidstaten kunnen worden verdeeld.

In overleg met uw commissie heb ik besloten de vraag te verbreden naar de vraag hoe de verantwoordelijkheden ten aanzien van asielzoekers en de uit een asielverzoek voortvloeiende verantwoordelijkheden (waaronder behandeling van het asielverzoek, de asielopvang en eventuele integratie of terugkeer van de asielzoeker) billijker over de lidstaten van de Europese Unie kunnen worden verdeeld. Ik verzoek uw commissie één of meer oplossingsrichtingen uit te werken, waarbij in elk geval één oplossingsrichting uitgaat van een dwingende verdeling van personen over de lidstaten middels een verdeelsleutel om een billijke verdeling van asielverantwoordelijkheden te bereiken.

### *Toelichting*

In de afgelopen jaren zijn gezamenlijke, geharmoniseerde normen ontwikkeld over de vraag onder welke voorwaarden iemand tot het grondgebied van de EU wordt toegelaten en mag verblijven. Een bijzondere categorie van derdelanders ten aanzien van wie een pakket van voorwaarden voor toegang, toelating en verblijf op Europees niveau zijn vastgelegd zijn asielzoekers, ofwel derdelanders die in de EU bescherming zoeken tegen de autoriteiten van hun land van herkomst. Dit pakket van voorwaarden wordt het Gemeenschappelijk Europees Asielbeleid (GEAS) genoemd. De tweede fase van het GEAS is zo goed als afgerond. Dat wil zeggen dat er gezamenlijke richtlijnen zijn opgesteld waarin is gedefinieerd wie voor internationale (asiel)bescherming in aanmerking komt, aan welke normen de asielprocedure moet voldoen en aan welke normen de opvang

van asielzoekers gedurende de procedure moet voldoen. Deze richtlijnen moeten halverwege 2015 in nationale wet- en regelgeving zijn geïmplementeerd. Om ook op uitvoeringsniveau harmonisatie te bevorderen is in 2010 het European Asylum Support Office (EASO) opgericht. Hierbij is het van belang op te merken dat het GEAS, noch de Dublin Verordening, tot nu toe is gericht op, of instrumenten bevat voor het bereiken van een billijke verdeling van asielzoekers of statushouders binnen de Unie. In de praktijk blijkt ook dat het aantal asielzoekers ongelijk is verdeeld over de lidstaten van de EU en loopt ook de beslispraktijk nog steeds uiteen.

**Directoraat-Generaal  
Vreemdelingenzaken**  
Directie Migratiebeleid  
2 DMB

**Datum**  
30 maart 2015

**Ons kenmerk**  
621431

#### *Onderzoeksvragen*

In overleg met de ACVZ heb ik besloten de volgende vraag in het onderzoek centraal te laten stellen:

Hoe kan het Gemeenschappelijk Europees Asielsysteem zich ontwikkelen tot een solidair systeem, waarin de verantwoordelijkheden van lidstaten van de EU ten aanzien van asielzoekers en statushouders billijk worden verdeeld?

Ik verzoek de ACVZ ter beantwoording van deze vraag na te gaan hoe de begrippen solidariteit en een billijke verdeling van verantwoordelijkheden in de context van de EU en het EU-recht moeten worden uitgelegd. Vervolgens vraag ik de ACVZ één of meer oplossingsrichtingen uit te werken waarin wordt aangegeven hoe een dergelijk systeem kan worden bereikt. Hierbij dient uitdrukkelijk aandacht te worden besteed aan de noodzakelijke juridische en praktische randvoorwaarden voor het functioneren van de oplossingsrichting(en). In het bijzonder zullen de vragen moeten worden beantwoord in hoe de oplossingsrichtingen zich verhouden tot het in het EU-recht gewaarborgde vrije verkeer van personen en in hoeverre zowel de normen als uitvoeringspraktijk in de verschillende lidstaten ten aanzien van de omgang met asielverzoeken en asielzoekers gelijk moet zijn.

#### Termijn van advisering

Ik verzoek u mij te adviseren voor 1 september 2015.

De Staatssecretaris van Veiligheid en Justitie,

  
K.H.D.M. Dijkhoff

Advisory Committee on Migration Affairs  
attn: the Chair, mr. A. van Dooijeweert  
Turfmarkt 147  
2511 DP Den Haag  
The Netherlands

Date 30 March 2015  
re: request for advisory report regarding EU distribution  
mechanism

Dear Ms Van Dooijeweert,

I hereby ask your Advisory Committee on Migration Affairs (ACVZ) for advice on an EU distribution mechanism for asylum responsibilities. For some years, there has been considerable criticism of the uneven distribution across the member states of the European Union (EU) of asylum applications and the responsibilities related to them. The Dutch government has also identified this disproportionate distribution and strives to achieve a balanced distribution of responsibilities.

Your work programme of 2014 included my request to review the options for developing a distribution mechanism on the basis of which foreign nationals who enjoy international protection (permit holders) can be distributed among the Member States of the EU.

In consultation with your Committee, I have decided to expand my request with the question of how the responsibilities vis-à-vis asylum seekers and the responsibilities arising from an asylum application (including the processing of the asylum application, the asylum reception, and the potential integration or return of the asylum seeker) can be shared more fairly among the Member States of the European Union. I ask your Committee to elaborate one or more solutions. One of these solutions must in any case be based on a mandatory distribution of persons among the Member States by means of a distribution key in order to achieve a fair sharing of the asylum responsibilities.

#### *Explanation*

Common, harmonized standards have been developed in recent years regarding the conditions for admission to and residency in the territory of the EU. Asylum seekers, or third-country nationals who seek protection in the EU against the authorities of their country of origin, are a special category of third-country nationals for whom a package of conditions for access, admission, and residency have been established at the European level. This package of conditions is referred to as the Common European Asylum System (CEAS). The second phase of the CEAS is as good as concluded. This means that common directives have been drawn up that define who qualifies for international (asylum) protection, the standards that the asylum procedure must fulfil, and the standards that the reception of asylum seekers must

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Our reference  
621431

Please state the date and our reference in  
your reply.  
Please refer to only one case in your letter.

fulfil during the asylum procedure. These directives must be implemented in the Dutch laws and regulations by the middle of 2015. The European Asylum Support Office (EASO) was formed in 2010 to promote harmonization also at the implementation level. It is important to note in that regard that neither the CEAS nor the Dublin Regulation have until now been aimed at, or contain instruments for, achieving a fair distribution of asylum seekers or permit holders within the Union. In practice, it turns out that the number of asylum seekers is also distributed unequally among the Member States of the EU and that the decision-making practices still vary widely.

Directorate General for Aliens Affairs  
Directorate of Migration Policy  
2.DMB

Date  
30 March 2015

Our reference  
621431

#### *Research questions*

In consultation with the ACVZ, I have decided to focus the review on the following question:

How can the Common European Asylum System (CEAS) develop itself into a system based on solidarity, in which the responsibilities of Member States of the EU in respect of asylum seekers and permit holders are distributed fairly?

To answer this question, I ask the ACVZ to review how the concepts of solidarity and a fair distribution of responsibilities must be interpreted in the context of the EU and EU laws. I subsequently ask the ACVZ to elaborate one or more solutions in which it indicates the manner in which such a system can be achieved. In doing so, it must explicitly devote attention to the required legal and practical preconditions for the functioning of the solution(s). In particular, it must be determined how the solutions relate to the free movement of persons guaranteed in the EU laws and to what extent both the standards and the implementation practice regarding the handling of asylum applications and asylum seekers must be equal in the various Member States.

Term for advice

I ask that you provide me with your advisory report before 1 September 2015.

The State Secretary of Security and Justice,

[Signature: illegible]

K.H.D.M. Dijkhoff



## APPENDIX 2

### *Expert meeting participants*

Prof. mr. Dr. H. Battjes – Professor of European Asylum Law, VU University Amsterdam.

mr. R. Bruin - Head of Office, UNHCR Netherlands.

Brigadier General R. Harmsma - Head Directorate of Operations, Royal Netherlands Marechaussee.

drs. C.M.F. Mommers – Senior Officer for Political Affairs, Amnesty International.

mr. L. Reesink – Asylum Policy Officer, Dutch Council for Refugees (Vluchtelingenwerk Nederland).

dr. D. Schans - Senior Science Officer, WODC.

dr. J. Schapendonk – Universitair docent, Radboud Universiteit.

mr. dr. M.H.A. Strik – Universitair docent, Radboud Universiteit.

mr. drs. I. Swerissen – Doctoral candidate and lecturer, University of Amsterdam.



## APPENDIX 3

### List of policy advices in 2010 – 2015

#### 2015

- The strategic country approach to migration: between wish and reality (Advice 2015/42) ([http://acvz.org/wp-content/uploads/2015/07/Report\\_42-web-versie-Engels.pdf](http://acvz.org/wp-content/uploads/2015/07/Report_42-web-versie-Engels.pdf)).

#### 2014

- Reunited after flight. Advisory report on the implementation of migration policy on family members of persons who have been granted an asylum residence permit (Advice 2014/41)
- Traces of the past. An advisory report on the role of medical examination in asylum procedures (Advice 2014/40)

#### 2013

- No country of one's own. An advisory report on treaty protection for stateless persons in the Netherlands (Advice 2013/39)
- Where there's a will but no way. Advisory report on the application of the policy on aliens who, through no fault of their own, cannot leave the Netherlands of their own accord (Advice 2013/38)
- Aliens' detention or a less intrusive measure? Advisory report on the decision-making pertaining to the detention of foreign nationals (Advice 2013/37)
- Advisory report on increase of age requirement Dutch sponsor to 24 years
- Verloren tijd (Lost time). Advisory report on activities in reception facilities for aliens (Advice 2013/36)

#### 2012

- Signalering Vermaatschappelijk in het vreemdelingenbeleid. (Report on socialization in the policy on foreign nationals.) Report on the implementation of public tasks in the policy on foreign nationals by the 'civil society' (November 2012)
- Signalering gezinsmigratie. (Report on family migration.) Report on family migration with four points for attention for the policy (September 2012)
- Evaluating expertise. The role of expert advice in the asylum procedure (Advice 2012/35)
- Right to protection of human dignity. Advisory report on reception and assistance for aliens residing illegally in the Netherlands and for aliens who have residence rights but no entitlement to benefits and facilities (Advice 2012/34)

#### 2011

- For reasons of societal interest. Advisory report on involving local authorities and communities in the exercise of discretionary powers (Advice 2011/33)
- Briefadvies over beleid ten aanzien van verzoeken om voorlopige voorziening. (Advisory report on policy in respect of applications for provisional ruling.)
- Briefadvies handhaving Europees inreisverbod (Advisory report on enforcement of European entry ban.)

#### 2010

- External Processing. Conditions applying to the processing of asylum applications outside the European Union (Advice 2010/32)
- Fewer regulations for migrants. An advisory report on the reduction of regulatory pressure in the regular policy on foreign nationals (Advice 2010/31)
- The tip of the iceberg? Advisory report on combating identity and document fraud in the immigration system (Advice 2010/30)
- Briefadvies Huwelijks- en gezinsmigratie. (Advisory report on marital and family migration.)



## APPENDIX 4

# English translation of cover letter

Advisory Committee on Migration Affairs

To the State Secretary of Security and Justice  
Mr mr. dr. K.H.D.M. Dijkhoff  
Postbus 20301  
2500 EH Den Haag  
The Netherlands

Contact person R.W.J. Severijns LLM  
Direct access no. +31 (0) 6 46 84 09 11  
Date 22 December 2015  
Our ref. ACVZ/ADV/2015/019

Subject Offer advice “Sharing responsibility. A proposal for a European Asylum System based on solidarity”

Dear Mr Dijkhoff,

By means of your letter of 30 March 2015, you have asked the Advisory Committee on Migration Affairs (Adviescommissie voor Vreemdelingenzaken, ACVZ) for advice about an EU distribution mechanism for asylum responsibilities. The committee fulfils this request by offering this report.

ACVZ reaches the following conclusions in the report.

There is currently no adequate Common European Asylum System (CEAS). It is necessary to interpret the obligations arising from the CEAS in the light of the solidarity principle, more than is currently the case.

There is no fair distribution of asylum responsibilities. A mechanism is lacking in that respect. The ACVZ advocates for amending the Dublin Regulation, making it possible for Member States responsible for a disproportionately high number of asylum applications to transfer asylum seekers to Member States where disproportionately few asylum seekers have been registered.

Finally, the Advisory Committee has described the conditions that have to be fulfilled to have a distribution mechanism engender a sustainable and fair distribution of asylum responsibilities.

Of course, the Advisory Committee will gladly provide a more detailed explanation of the advice.

Yours sincerely,

[signature]  
mr. dr. Hans Sondaal  
Acting Chairman

[signature]  
mr. Wolf Mannens  
Secretary

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## Composition ACVZ

### Chair:

- mr. J.N.M. Richelle (Koos), former Director-General for employment, social affairs, and inclusion at the European Commission.

### Deputy Chair

- mr. dr. J.J.M. Sondaal (Hans), former Dutch ambassador, as last in Australia.

### Members:

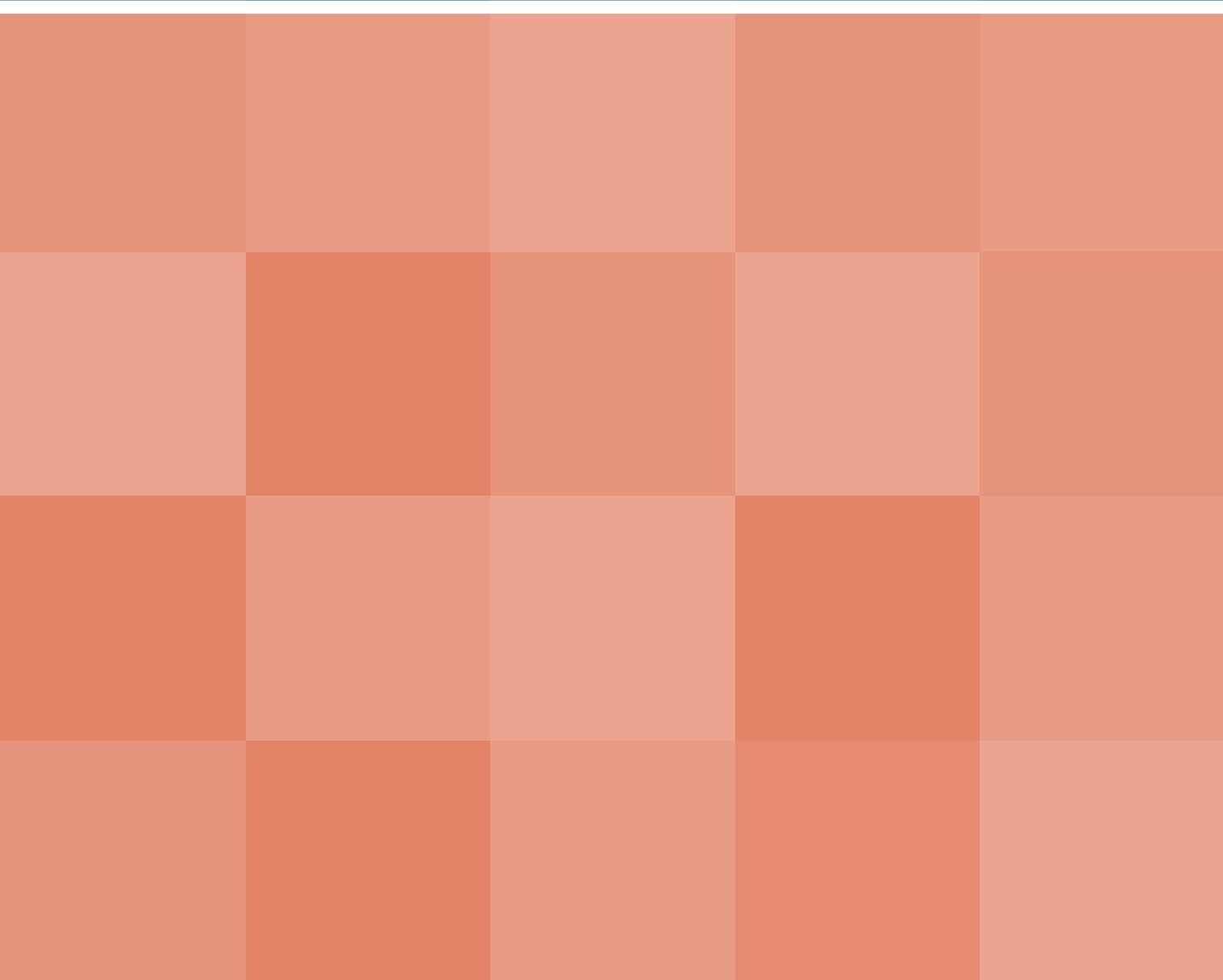
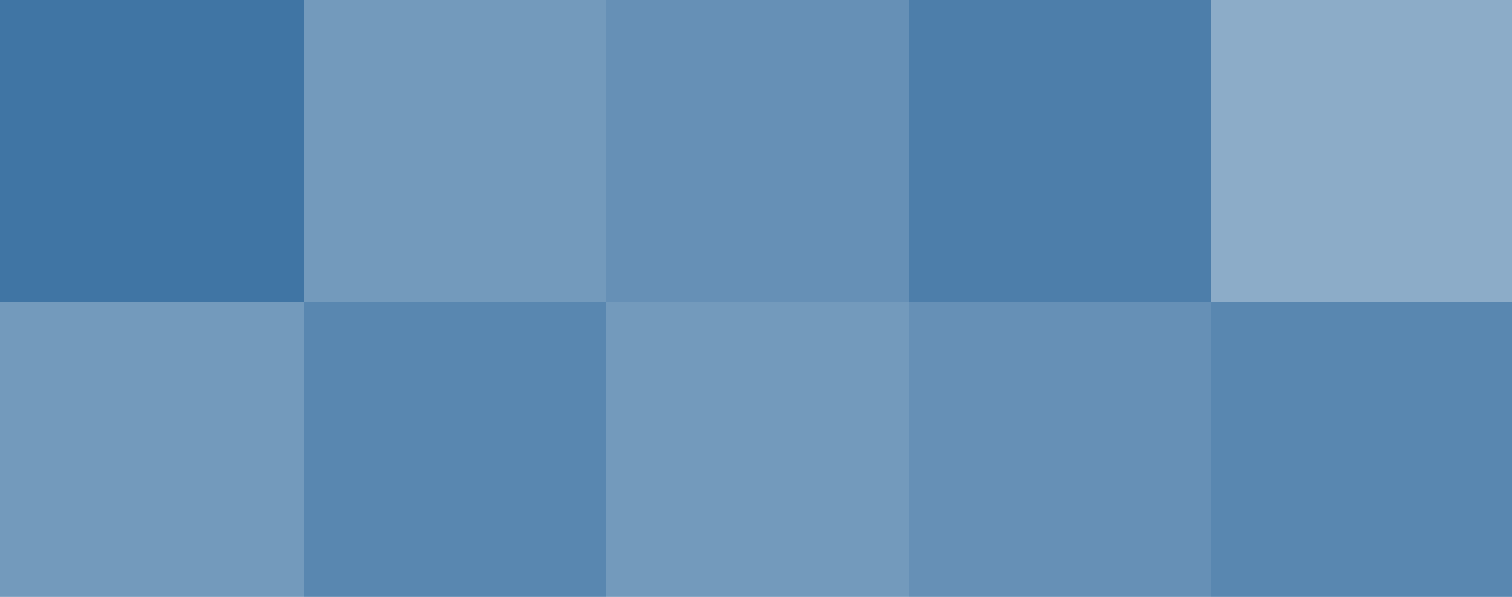
- M.A. Beuving (Minze), former chief of police, commander Royal Netherlands Marechaussee and chair management board Frontex
- Prof. mr. P. Boeles (Pieter), Professor of immigration law
- mr. dr. E.R. Brouwer (Evelien), university associate professor migration law, VU University Amsterdam
- mr. T.M.A. Claessens (Tom), ex-judge and Extraordinary State Councillor
- dr. mr. T. de Lange (Tesseltje), lecturer administrative and migration law, University of Amsterdam
- Prof dr. J.P. van der Leun (Joanne), Professor Criminology, University of Leiden
- dr. mr. C.R.J.J. Rijken (Conny), university associate professor European and international law, University of Tilburg
- mr. dr. R.J.A. Schaaf (Ramon), judge

### Secretary:

- mr. W.N. Mannens (Wolf)







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