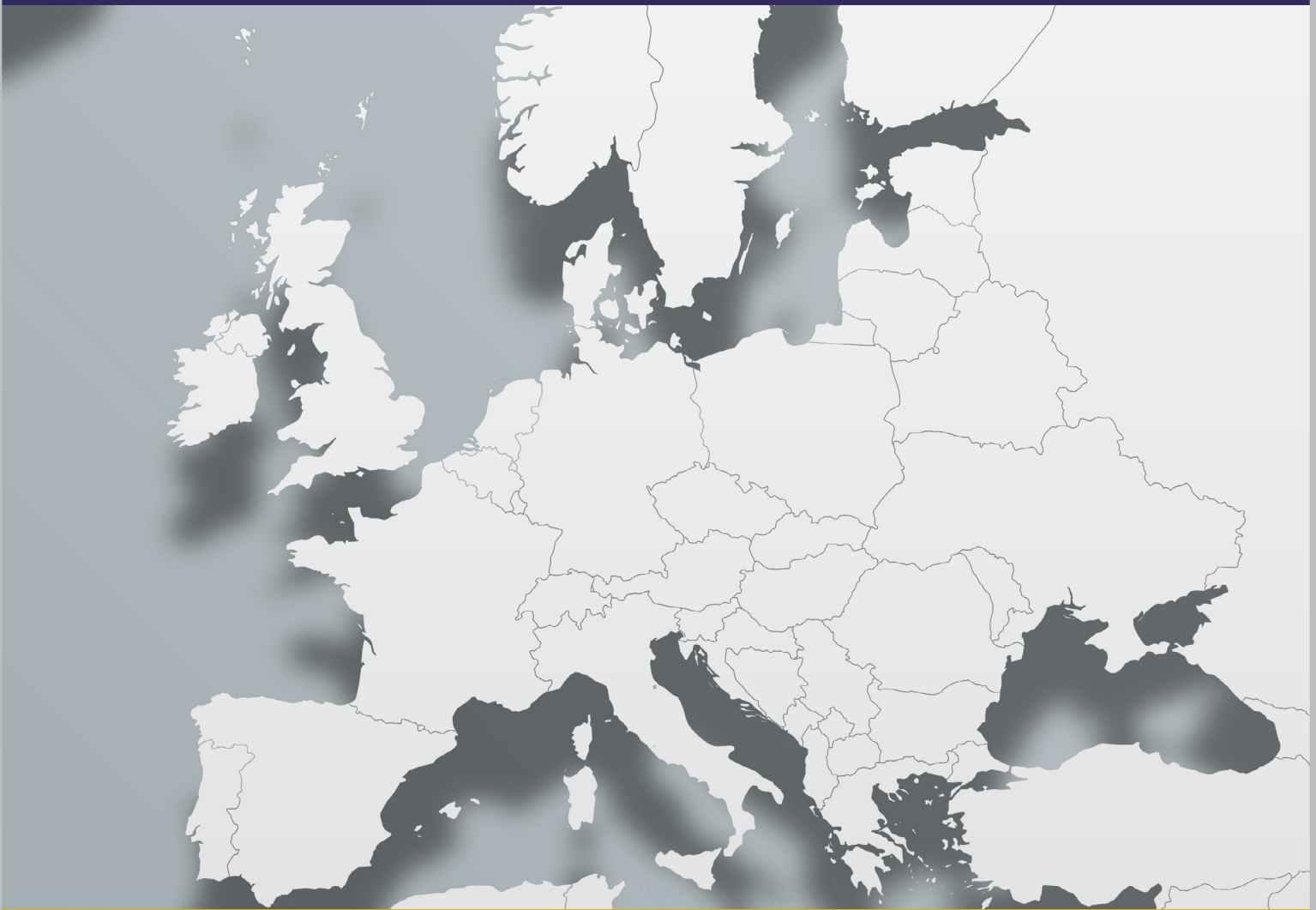


Cracked Foundation, Uncertain Future

Structural weaknesses in the Common European Asylum System

By Hanne Beirens



Making Asylum Systems Work in Europe initiative

CRACKED FOUNDATION, UNCERTAIN FUTURE

STRUCTURAL WEAKNESSES IN THE COMMON
EUROPEAN ASYLUM SYSTEM

By Hanne Beirens

March 2018

| BertelsmannStiftung

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CONTENTS

- PREFACE: MAKING ASYLUM SYSTEMS WORK IN EUROPE..... i**
- EXECUTIVE SUMMARY1**
- I. INTRODUCTION2**
- II. MAPPING THE STRUCTURAL WEAKNESSES OF ASYLUM SYSTEMS3**
 - A. Registration 4*
 - B. Reception 8*
 - C. The asylum procedure 12*
 - D. Adjudication 17*
- III. DIAGNOSING AND REMEDYING SYSTEM WEAKNESSES.... 20**
 - A. The dominance of legal perspective(s) 20*
 - B. The elusive systems perspective 21*
 - C. Whose voice matters when assessing the performance of asylum systems?..... 23*
- WORKS CITED 26**
- ABOUT THE AUTHOR 33**

PREFACE: MAKING ASYLUM SYSTEMS WORK IN EUROPE

The Common European Asylum System (CEAS) is greatly in need of reform. Its deficiencies became fully evident amid drastic increases in the number of people seeking refuge in Europe during 2015 and 2016. Beyond huge pressures placed on southern EU Member States Italy, Greece, and Spain by the Dublin Regulation, flaws in the other CEAS pillars worsened as well.

Reception conditions and asylum procedures, for example, have varied widely from Member State to Member State, contributing to secondary movements of asylum seekers to just a few countries within Europe. Recognition rates differ vastly as well.

Even as the number of asylum seekers crossing the Mediterranean decreased significantly in 2017, the shortcomings of the CEAS remain.

This report systematically examines the shortcomings and interlinkages present in the current EU regulations and directives that constitute the CEAS. It marks the launch of the ‘Making Asylum Systems Work in Europe’ initiative led by the Migration Policy Institute Europe and Bertelsmann Stiftung, in cooperation with the Calouste Gulbenkian Foundation, the Migration Studies Delegation, the International Centre for Migration Policy Development, and the Institute of Public Affairs.

The initiative’s goal is to contribute to the capacity building of national asylum systems so they can function more effectively. Through a pair of overarching reports and several country case studies, the initiative will identify common challenges and obstacles preventing EU Member States from effectively transposing EU asylum legislation into operational on-the-ground action. The series also will analyse national asylum policies, practices, and mechanisms that have been used successfully at the national level to address obstacles, with a view to their transferability. Finally, the initiative aims to promote exchange and cooperation in Member States to facilitate the harmonisation of asylum policies and practices across Europe. You can learn more about the initiative by visiting www.migrationpolicy.org/programs/mpi-europe/making-asylum-systems-work-europe.

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EXECUTIVE SUMMARY

In 2014 and 2015, as more than 1 million asylum seekers travelled to Europe in search of safety, national reception systems faltered, the European Union failed to coordinate a rapid and effective response, and many asylum and social-support systems reached a breaking point. Yet the number of arrivals alone, while historic, was not solely to blame. Structural deficiencies—both legal and operational—are baked into the very DNA of the Common European Asylum System (CEAS) and have long undermined Europe’s ability to manage asylum flows in a humane and efficient manner. As EU and national policymakers seek to reform asylum systems across the bloc to improve their operability and stress-resilience, it is essential that they take due account of these weaknesses.

The deficiencies of the CEAS are spread across the four stages of asylum systems but are intimately linked, as delays and irregularities one phase have knock-on effects in others. At the registration stage—the gateway to the asylum system—some Member States have been unable or unwilling to register all those who enter their territory, due at times to migrants’ refusal to provide fingerprints and at others to a lack of capacity. In the reception stage, several national governments fail to translate EU legal provisions into practice, with some asylum systems suffering chronic underinvestment and many lacking the flexibility of design to react to changing inflows. Under the strain of rising numbers of applications, some Member States have also struggled to swiftly and consistently apply the asylum procedures laid out by the CEAS, resulting in growing backlogs, long wait times, and inconsistencies in which type of asylum procedure is applied to which cases—both between and within individual Member States. And finally, Member States diverge significantly in their adjudication of asylum claims, with applicants of a shared nationality nearly certain to obtain asylum in one Member State and with only a very slim chance in another. Afghans, for example, had a recognition rate of 1.7 per cent in Bulgaria in 2016, but 97.0 per cent in Italy the same year.

Structural deficiencies—both legal and operational—are baked into the very DNA of the Common European Asylum System.

The implications of these deficiencies are far-reaching. When Member States are unable to follow through on stringent legal provisions, a gap develops and widens between law and practice, resulting in even worse conditions for asylum seekers as they move through inefficient systems. Delays in the registration or adjudication of asylum claims can bar applicants from accessing basic services such as health care and education. For those eventually granted asylum, these delays can have a profound impact on their ability to integrate into the host society. Inefficient and inconsistent asylum processes have also led European publics to lose faith in the ability of their governments to manage asylum flows and have prompted crisis-driven decisions (such as the temporary suspension of free movement in some parts of the Schengen Area) that run counter to fundamental principles of the European Union.

The blind spots of the CEAS that were thrown into sharp relief by the 2015–16 crisis were, in most cases, not new to on-the-ground actors. And many of these structural weaknesses continue to go unaddressed. Attempts at reform generally target the legal blueprint of the CEAS and fail to address the yawning gap between law and practice. Indeed, the striking differences in recognition rates across Europe for applicants of the same nationality demonstrate just how varied the treatment of asylum cases is in practice. Legal fixes have also done little to make asylum systems more flexible and able to accommodate fluctuations in arrivals from one year to the next. This will require a different and more operational set of tools than is generally presented in discussions of reform.

While the emergency response to the refugee crisis led to a widespread loss of confidence in the CEAS, it also sparked innovation in some corners. If carefully and critically evaluated, some of these operational practices may contribute to the development of a more flexible, stress-resistant system. The creation of hotspots, for example, allowed Member States to quickly scale up their registration capacity with the help of the European

Asylum Support Office (EASO), Europol, and Frontex. With this added capacity, officials in Italy were able to register 2,000 persons per day, and those in Greece, up to 11,000. Within the context of these hotspots, experts from other Member States and asylum support teams from EASO not only helped speed up the processing of asylum claims, they also increased consistency in adjudications. Through cross-government committees and distribution policies, national authorities also took steps to better coordinate the roles and responsibilities of different actors within the asylum system, including by tying the asylum process more directly to integration programming. Yet these pilot programmes were not without their limitations. Many may have been too short to have a lasting impact, and this type of transnational cooperation stoked tensions over how much national sovereignty Member States in clear need of help were prepared to cede to outside actors when it came to making decisions on asylum cases. Greater agreement on the course of action to be taken in times of crisis and by which (lead) actors is thus crucial.

With a new set of proposed reforms on the table ... it will be important not to lose sight of these enduring structural challenges.

The shortcomings of the CEAS cannot be viewed or addressed in a piecemeal way. Makeshift solutions that fail to look at the whole picture may in fact have a destabilising effect on asylum and related systems—especially when there is little oversight or evaluation. With a new set of proposed reforms on the table, including those that would have the EASO monitor national asylum systems and, where approved, intervene to improve their functioning, it will be important not to lose sight of these enduring structural challenges. Developing an upgraded asylum system that is able to weather unpredictable migration pressures and that fits smoothly into Schengen and other pieces of the European project depends on it.

I. INTRODUCTION

In 2014 and 2015, more than 1 million persons travelled to Europe to seek asylum. With many moving onwards to other EU destinations without registration or security checks, the European Union came face to face with its sharpest challenge since the 2008 financial crisis. National reception systems nearly collapsed under the volume of newcomers, and disagreements deepened between Member States over how to share responsibility for processing and offering protection to those in need. It soon became clear that the Common European Asylum System (CEAS)—the legal framework and set of minimum standards meant to harmonise Member State asylum systems¹—was not up to the task of coordinating a rapid and effective response to large inflows of asylum seekers.

While this period has widely been described as a ‘migration crisis,’ suggesting the disorder was the somewhat inevitable result of the sheer number of persons arriving, this might be more accurately termed a ‘systemic crisis’.² The heightened arrivals revealed structural deficiencies within the design and implementation of national asylum systems and of the CEAS. The problems the crisis brought to light may have been greater in magnitude than had previously been seen, but they were not new and, in some cases, not unknown to many a close observer.

1 For more information on the history and setup of the Common European Asylum System (CEAS), see European Commission, Directorate-General for Migration and Home Affairs, ‘Common European Asylum System’, accessed 26 February 2018, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

2 See, for example, Elizabeth Collett, *The Asylum Crisis in Europe: Designed Dysfunction* (Brussels: Migration Policy Institute Europe, 2015), www.migrationpolicy.org/news/asylum-crisis-europe-designed-dysfunction; Bernd Parusel and Jan Schneider, *Reforming the Common European Asylum System* (Stockholm: Delmi, 2017), www.delmi.se/upl/files/145454.pdf.

In fact, some of these problems reside in the very DNA of the CEAS. Some speak to gaps in the legal framework and operational blueprint that underpins the CEAS (e.g., how the system is meant to function when faced with a sudden influx of arrivals). Others relate to inconsistencies within or across the legal instruments that make up the CEAS (e.g., a child’s right to education differs across the body of EU asylum and migration law).³ This legal fragmentation and the need to add provisions to appease different negotiating parties has in some ways undermined the very logic and coherence of the CEAS. Still other problems derive from the difficulty, if not impossibility, of translating these legal provisions into practice (e.g., ensuring that national guardianship systems can quickly assign a guardian for each newly arrived unaccompanied minor, even in the case of heightened arrivals).

This constellation of problems has crippled the ability of the CEAS to function properly. However, the degree to which policymakers, researchers, and practitioners have acknowledged, documented, or sought to resolve these problems differs greatly. Indeed, some of these issues have been largely side-stepped during moments of reflection and reform and, as such, remain critical structural weaknesses.

This report provides an overview of the shortcomings that have affected the Common European Asylum System. At a time when the European Commission has tabled proposals for further reforms,⁴ it is important to emphasise that, independent of what the negotiations yield in terms of legislative change at the EU level, these structural issues merit greater attention by all those concerned with running an effective, efficient, and stress-resistant asylum system.

The report begins by mapping these weaknesses, addressing each phase of the asylum system in turn and demonstrating how a gap in one stage can have knock-on effects in others. It then outlines why these flaws have emerged and persisted over time, despite several rounds of legislative reform. Their persistence is particularly remarkable, and problematic, in light of the pressing need to address these blind spots if the CEAS is to become a fully functioning and stress-resistant system. These deficiencies affect the legitimacy of an international protection regime, the ability of Member States to move toward greater responsibility-sharing, and the emergency preparedness and ability of the European Union to maintain control over who crosses its borders—all at a time of heightened concerns about terrorism and public distrust in governments’ ability to manage migration.

II. MAPPING THE STRUCTURAL WEAKNESSES OF ASYLUM SYSTEMS

The weaknesses that plague the CEAS surface at different points in the four main phases of the asylum system: registration, reception, asylum procedures, and adjudication. These include the challenges of registering asylum applicants who refuse to have their fingerprints taken, of building reception systems that can accommodate fluctuations in arrivals, and of standardising how asylum cases are processed and decided. The degree to which these weaknesses have been acknowledged and documented varies, as do the actions that have or have not been taken to resolve them.

³ Under EU law, a child’s right to access education differs depending on their legal status; asylum-seeker children have a right to access, at a minimum, language classes in a reception centre (Reception Conditions Directive); a refugee child has a right to access the national education system on par with nationals (Qualification Directive); and a child subject to a return order has no right to continued schooling (Return Directive). This variance, however, goes against the right of all children under international law to education, which is not to be made contingent on their legal status (Convention on the Rights of the Child).

⁴ Council of the European Union, ‘Reforming the Common European Asylum System’, accessed 15 February 2018, www.consilium.europa.eu/en/policies/migratory-pressures/ceas-reform/ceas-reform-timeline/.

A. Registration

The inability or unwillingness of some Member States to register *all* third-country nationals who arrive in their territory has been the cause of much frustration among national and EU policymakers. Inconsistent registration, particularly at the height of the crisis, has raised concerns that large secondary movements of asylum seekers to other EU destinations are going undetected. And the ramifications are far greater than simply keeping track of onward movement.

EU Member States are under a legal obligation to receive and register applications for international protection, and to do so in a timely manner.⁵ They are also obliged to ensure that the authorities responsible for this process (e.g., law enforcement or border management authorities) have the necessary information and training.⁶ This initial administrative step sets the asylum process in motion (see Box 1). Without documentation that the person has registered with the proper authorities and is entitled to stay in the territory of the Member State while their claim is considered,⁷ an asylum seeker may be denied access to reception facilities, state assistance, and other forms of support.

Box 1. The link between registration and other phases of the asylum system

Receiving and registering applications for international protection has important implications for both asylum seekers and public authorities.

For the asylum seeker, it represents:

- the first step toward receiving a decision on an asylum claim;
- the grounds to remain in the country while awaiting the outcome of the asylum procedure; and
- a precondition for accessing accommodation and other types of material assistance.

For asylum authorities and other public authorities, it is necessary for:

- determining the identity of the third-country national and conducting any related criminal or security checks;
- deciding which EU Member State is responsible for processing the asylum claim (i.e., the Dublin system);
- maintaining oversight of migration inflows; and
- optimising the capacity of the asylum system by adjusting human, financial, and infrastructural resources based on changing inflows.

5 Art. 6 of the Asylum Procedures Directive stipulates that authorities must register applications promptly (within 3 days, at the latest). Exceptions are made for cases in which an application is received by an authority that is not responsible for registering it (6 days, per Art. 6(1)) or authorities receive a large number of applications (10 days, per Art. 6(5)). See 'Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)', *Official Journal of the European Union* 2013 L180/60, 29 June 2013, <http://eur-lex.europa.eu/eli/dir/2013/32/oj>.

6 See *ibid.*, Art. 4 and Art. 6.

7 'Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)', Arts. 3 and 6, *Official Journal of the European Union* 2013 L180/96, 29 June 2013, <http://eur-lex.europa.eu/eli/dir/2013/33/oj>.

1. How to enforce fingerprinting

The successful registration of newly arrived third-country nationals hinges on the ability of Member State authorities to fingerprint them⁸—a practice that has encountered both technical and legal obstacles. Gathering biometric data is critical for two reasons. First, it enables authorities to verify, check, and record their identity in migration⁹ and security¹⁰ databases. Second, it makes it possible to resolve identification questions, whether the result of fraud (e.g., using fake identity documents and/or an alias) or administrative practices in sending countries (e.g., no birth registration). These challenges have stimulated a surge of interest among policymakers and law enforcement authorities in expanding the tools and techniques used to conduct biometric registration to include, for example, those based on facial recognition or iris scans.¹¹

This eagerness to improve fingerprinting has, however, met with a number of challenges. These include legal obligations regarding respect for individuals' rights to physical integrity and human dignity while their biometric data are collected; the validity of data collected, as there is still a margin of error associated with fingerprinting techniques; and tensions related to data protection and privacy when storing this data. The latter two sets of problems have been recognised, investigated, and closely monitored,¹² with IT and database specialists making headway in terms of technology and how databases are linked up.

These challenges have stimulated a surge of interest among policymakers and law enforcement authorities in expanding the tools and techniques used to conduct biometric registration.

- 8 All asylum seekers and migrants apprehended after crossing the border without authorisation (with some exceptions) must provide their fingerprints. See 'Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of "Eurodac" for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 Establishing a European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security, and Justice', *Official Journal of the European Union* 2013 L180/1, 29 June 2013, <http://eur-lex.europa.eu/eli/reg/2013/603/oj>. The Asylum Procedures Directive provides for the possibility of accelerating the asylum procedures for applicants who refuse to provide fingerprints. See 'Directive 2013/32/EU', Art. 31(8)(i). See also European Migration Network (EMN), *2016 Annual Report on Migration and Asylum* (Dublin: EMN, 2017), http://emn.ie/files/p_2017042609111700_apr2016_synthesis_report_final_en.pdf; EMN, *Establishing Identity for International Protection: Challenges and Practices* (Dublin: EMN, 2013), http://emn.ie/files/p_201302200501572013_EMN_Synthesis_Report_IDstudy_feb.pdf.
- 9 For example, the Visa Information System (VIS) allows Schengen states to exchange visa data, and the EURODAC database records the fingerprints of all asylum seekers and irregular border-crossers.
- 10 For example, 26 European countries use the Schengen Information System (SIS) to find information about individuals and entities for the purposes of national security, border control, and law enforcement. Another shared system, the Europol Information System (EIS), contains information on serious international crimes and on suspected and convicted persons. It is used by Europol and other authorised actors to prevent, detect, and investigate serious crimes and terrorism.
- 11 The Commission's proposal to revise the EURODAC Regulation includes, among other things, a requirement that applicants provide additional biometric data (e.g., facial images). See European Commission, Directorate-General for Migration and Home Affairs, 'Identification of Applicants (EURODAC)', accessed 15 February 2018, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en.
- 12 See, for example, European Union Agency for Fundamental Rights (FRA), *Fundamental Rights and the Interoperability of EU Information Systems: Borders and Security* (Vienna: FRA, 2017), <http://fra.europa.eu/en/publication/2017/fundamental-rights-interoperability>; European Data Protection Supervisor (EDPS), 'Opinion of the European Data Protection Supervisor on the Amended Proposal for a Regulation of the European Parliament and of the Council on the Establishment of "EURODAC" for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No [...] [...] [...] (Recast Version)' (opinion, EDPS, Brussels, 5 September 2012), https://edps.europa.eu/sites/edp/files/publication/12-09-05_eurodac_en.pdf.

The problem of how to fingerprint individuals reluctant to have their identities recorded, however, remains both widespread and largely unaddressed,¹³ with EU and Member State authorities thus far unable to agree on a solution.¹⁴ Reports of asylum seekers burning or otherwise disfiguring their fingertips¹⁵ or displaying physical resistance¹⁶ have been plentiful. Often, such actions are motivated by mistrust of authorities or the wish to move to another EU country where the chance of receiving international protection and starting a new life with the support of community links is higher—and by the knowledge that, under Dublin rules, the state through which an applicant enters the European Union is required to process their claim, with only a few exceptions. There have only been a few public investigations into this matter, which included questions regarding the use of force or coercion.¹⁷ They shed little light on how states might resolve the tension between the right to physical integrity and the obligation to have one's fingerprints taken. The 2016 Commission proposal to reform the Asylum Procedures Directive, which would see it transformed into a Regulation,¹⁸ would make cooperation with the responsible authorities during fingerprinting mandatory for all applicants and sets out penalties for those who refuse, namely that all EU Member States must reject their applications.¹⁹

They shed little light on how states might resolve the tension between the right to physical integrity and the obligation to have one's fingerprints taken.

2. Ensuring the necessary capacity to register applicants

Another major obstacle to the efficient and consistent registration of asylum applicants is the need to ensure that authorities have the necessary human resources, hardware (e.g., fingerprinting machines), and infrastructure (e.g., mobile units/offices/tents). As arrivals peaked in 2015, the German police reported lacking the capacity to fingerprint all newcomers as they crossed the German-Austrian border into the country; this resulted in police referring newcomers to the nearest police station or reception centre, but without any assurance that

- 13 European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security, and Justice (eu-LISA), *Annual Report on the 2014 Activities of the Central System of Eurodac Pursuant to Article 24(1) of Regulation (EC) No 2725/2000* (Tallinn: eu-LISA, 2015), <http://data.consilium.europa.eu/doc/document/ST-10330-2015-INIT/en/pdf>; European Commission, 'Implementation of the Eurodac Regulation as Regards the Obligation to Take Fingerprints' (staff working document [2015] 150 final, 27 May 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/guidelines_on_the_implementation_of_eu_rules_on_the_obligation_to_take_fingerprints_en.pdf.
- 14 Anita Orav, 'Fingerprinting Migrants: Eurodac Regulation', European Parliamentary Research Service, 23 November 2015, <https://epthinktank.eu/2015/11/23/fingerprinting-migrants-eurodac-regulation/>.
- 15 Harriet Grant and John Domokos, 'Dublin Regulation Leaves Asylum Seekers with Their Finger Burnt', *The Guardian*, 7 October 2011, www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers.
- 16 See, for example, eu-LISA, *Annual Report on the 2014 Activities of the Central System of Eurodac*.
- 17 See, for example, EMN, 'Ad-Hoc Query on EURODAC Fingerprinting', updated 22 September 2014, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/588_emn_ahq_eurodac_fingerprinting_en.pdf; European Parliament, Directorate-General for Internal Policies, *Enhancing the Common European Asylum System and Alternatives to Dublin* (Brussels: European Parliament, 2015), www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf.
- 18 European Commission, 'Proposal for a Regulation Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' (COM [2016] 467 final, 13 July 2016), http://eur-lex.europa.eu/resource.html?uri=cellar:2c404d27-4a96-11e6-9c64-01aa75ed71a1.0001.02/DOC_1&format=PDF.
- 19 According to this proposal, the responsible authorities are obliged to discontinue the examination of the application of persons who refuses to have their fingerprints taken and to notify them in writing that their application will be rejected as abandoned unless they report to the authority within one month to provide the missing biometric data. See *ibid.*, Art. 39.

these instructions would be followed and the new arrivals registered.²⁰ Faced with the difficulties of registering fluctuating numbers of newcomers, national and EU actors have devised a variety of responses (see Boxes 2 and 3).

Box 2. Registration capacity problems in Belgium

In Belgium, the number of persons queuing for registration at the Immigration Office (Dienst Vreemdelingenzaken) increased sharply beginning in October 2015, soon surpassing capacity. In response, the office began handing out letters to people standing in line each morning, indicating the maximum number of applicants who could be seen (250 persons per day) and suggesting those past this point in line return the following day to complete the registration process. By mid-November 2015, there was a backlog of nearly 1,800 asylum seekers waiting to register, having been turned away previously.

While handing out letters successfully reduced the long lines outside of the office, preventing possible chaos or conflict, asylum seekers unable to register were left without a place to sleep at night or access to other forms of assistance mandated by EU and national law. In the weeks that followed the implementation of this system, Maximilian Park in Brussels turned into a camp where asylum seekers and other migrants slept and lived in tents. This triggered an outcry among community and civil-society groups as well as an outpouring of civilian assistance for those sheltering in the park. Under pressure, the government decided to set up 'preaccommodation' housing for those awaiting registration while also allocating resources to increase daily registration capacity. Yet the legal provisions that make asylum seekers' access to the asylum and reception system contingent on registration, even in cases where they are unable to do so because of a failure of the system, remain in place.

Sources: deredactie.be, '774 asielzoekers wachten op registratie bij Dienst Vreemdelingenzaken', updated 13 November 2015, <http://deredactie.be/cm/vrtnieuws/binnenland/1.2495475>; VluchtelingenWerk Vlaanderen, *Belgium Country Report 2016* (N.p.: Asylum Information Database, 2017), www.asylumineurope.org/reports/country/belgium.

²⁰ Deutsche Welle, 'German Police: We Can't Handle Refugee Numbers', Deutsche Welle, 13 July 2015, www.dw.com/en/german-police-we-cant-handle-refugee-numbers/a-18582235.

Box 3. The introduction of registration ‘hotspots’

One of the criteria to determine which EU Member State is responsible for processing a particular asylum application is the first point of entry into the European Union. The Dublin system stipulates that, after considering family unity, the Member State that facilitated the entry of the applicant into EU territory is responsible for assessing his/her claim for international protection. The principal method used to verify the applicant’s point of entry is his/her registration in EURODAC.

However, in 2014 and 2015, border management authorities in several Member States (e.g., Greece, Hungary, and Italy) failed to record the fingerprints of those crossing their borders and allowed them to move on to other EU countries. This breakdown in registration, alongside other factors, resulted in Germany and other Member States declaring the temporary suspension of the Dublin system.

In response—and in an attempt to prevent the permanent breakdown of the Dublin system—the European Commission proposed setting up ‘hotspots’ at key disembarkation points in Italy and Greece beginning in 2015. There, Frontex would take on the task of registering all new arrivals, including taking their fingerprints, with help from Member State officials and other EU actors, such as the European Asylum Support Office (EASO) and the EU Agency for Law Enforcement Cooperation (EUROPOL). Once fully operational and technologically equipped, the fingerprinting capacity ranged from more than 2,000 persons per day in Italian hotspots to approximately 11,000 at those in Greece.

More than two years on, policymakers continue to debate whether hotspots constitute an exceptional measure, for use only when facing a steep increase in arrivals, or whether they could become a permanent measure at key EU external border points. Making EU funding conditional on adherence to EU asylum policies, with Member States denied financing if they fail to set up a solid registration system or willfully allow third-country nationals to move onward without proper registration, is another solution debated, especially in view of discussions of the next EU budget (period 2021-2027).

Sources: ‘Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)’, *Official Journal of the European Union* 2013 L180/31, 29 June 2013, <http://eur-lex.europa.eu/eli/reg/2013/604/oj>; European Commission, ‘Implementing the European Agenda on Migration: Commission Reports on Progress in Greece, Italy, and the Western Balkans’ (press release, 10 February 2016), http://europa.eu/rapid/press-release_IP-16-269_en.htm; Statewatch, ‘Explanatory Note on the “Hotspot” Approach’ (note, July 2015), www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf; European Commission, ‘The Hotspot Approach to Managing Exceptional Migratory Flows’ (fact sheet, 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf.

B. Reception

The failure of reception capacity across the European Union during the influx of arrivals between 2014 and 2016 was not an isolated incident; indeed, flaws in the systems for receiving applicants for international protection existed long before the crisis and continue to the present day. A first structural weakness is the persistent negligence by some Member States of the funding needs of their national reception systems. A second, and potentially more important, issue concerns the operational setup of these systems, which rarely have the flexibility to adjust to the fluctuations inherent to migration flows. Tackling both shortcomings is crucial as poor reception conditions delay or obstruct applicants’ access to education, employment, and other vital sup-

port services, with significant implications for their long-term integration as well as the European societies in which they now live.

1. Chronic underinvestment in reception facilities

While many Northern and Western European Member States have longstanding experience with building and managing reception systems, much of the rest of Europe is characterised by chronic underinvestment. Successive governments have proven themselves unable and/or unwilling to disburse the funds needed to build reception infrastructure (e.g., centres) and to adequately train staff. In some cases, this is just a symptom of the broader state of public finances (i.e., limited funds or problems with corruption).²¹ In others, this underinvestment is part of a more intentional strategy to keep inflows low by dissuading asylum seekers from coming or staying in poor reception conditions. The result is a yawning gap between reception law and practice that has persisted for years in the European Union.

Over the past decade, legislators have carefully delineated the services that national, regional, and local authorities must offer persons (registered as) seeking asylum, including in terms of accommodations; material assistance (e.g., food and clothes); and access to education, vocational training, and the labour market.²² The resulting legislation requires these authorities to pay special attention to asylum seekers who need extra support to access these rights (e.g., pregnant women, unaccompanied minors), including by administering vulnerability assessments and providing suitable reception facilities.²³

Successive governments have proven themselves unable and/or unwilling to disburse the funds needed to build reception infrastructure (e.g., centres) and to adequately train staff.

But while several rounds of legal reforms have successfully expanded the range of reception conditions regulated at either the national or EU level (e.g., through the recast Reception Conditions Directive) and have raised reception standards, the ability or willingness of governments to translate these legal provisions into practice continues to lag behind. Even before the crisis, governmental and nongovernmental reports had identified a panoply of weaknesses and deficiencies in national reception systems.²⁴ These ranged from insufficient capacity in reception centres (e.g., there were 15,000 asylum seekers on a French priority waiting list in December 2013 with a 12-month average wait time, forcing many to turn to emergency and homeless shelters²⁵) to a lack of tailored accommodations for vulnerable groups (e.g., the 600 unaccompanied children stuck in the main Austrian initial reception centre of Traiskirchen in 2012 because no age-appropriate alter-

21 In 2017, police in southern Italy arrested 68 people associated with the Italian mafia accused of siphoning off 35 million euros of EU funds over the last decade, including funds intended for Cara Sant'Anna, one of Italy's largest reception centres. Centre managers were accused of not providing enough food for residents, inflating the number of persons living in the centre to access more funding, and illegally hosting 70 unaccompanied minors in an airport hangar with insufficient sanitation. See Nikolaj Nielsen, 'Italian Refugee Centre Allegedly Run by Mafia', EU Observer, 16 May 2017, <https://euobserver.com/migration/137913>.

22 'Directive 2013/33/EU', Chapter II.

23 Ibid., Chapter IV.

24 See Odysseus Academic Network, *Comparative Overview of Implementation of Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States* (Brussels: Odysseus, 2006), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/pdf/odysseus_synthesis_report_2007_en_en.pdf; EMN, *Synthesis Report – The Organisation of Reception Facilities for Asylum Seekers in Different Member States* (Dublin: EMN, 2014), www.refworld.org/docid/5326b8394.html.

25 European Council on Refugees and Exiles (ECRE), 'AIDA Report on France: Shortage of Reception Places Leaves Many Asylum Seekers Sleeping Rough or Relying on Night Shelters', updated 6 June 2014, www.ecre.org/aida-report-on-france-shortage-of-reception-places-leaves-many-asylum-seekers-sleeping-rough-or-relying-on-night-shelters/.

native was available). In the latter case, the saturation of suitable housing across Austrian federal provinces meant these children could not be moved to second-line reception facilities and were, as a result, deprived of access to schools and specialist services.²⁶ Overcrowding is another recurring problem. In 2013, for example, Bulgarian reception centres were housing eight to 15 newly arrived asylum seekers in rooms equipped for a maximum of two to four persons and, when this arrangement was also overwhelmed, mattresses were placed in corridors.²⁷ Pressure on reception systems thus creates fertile ground for human rights violations, such as the separation of families with children in Bulgaria in 2013,²⁸ and the systematic detention of irregular arrivals, including asylum seekers, in Greece that same year.²⁹ Serious shortcomings in systems for receiving asylum seekers have also undermined the trust between national asylum authorities across the European Union, strain epitomised by the breakdown of Dublin procedures.³⁰

EU funds, such as the Asylum, Migration, and Integration Fund (AMIF),³¹ can partly fill this funding gap—but not without concurrent movement at the Member State level. EU actors will need to secure political commitments from in states that benefit from these funds to build reception capacity, while also devising a monitoring system to track Member State progress towards meeting their commitments. Indeed, the Commission proposal to transform the European Asylum Support Office (EASO) into the European Union Asylum Agency (EUAA) would make the agency responsible for monitoring the performance of asylum systems, including reception, and establish a procedure for reporting risks to the European Commission, European Council, and European Parliament and, where agreed, activating EASO support and intervention.³²

2. The need for flexible and responsive reception systems

The 2015–16 crisis shined a harsh light on a shortcoming some observers already recognised: European reception systems’ sore lack of flexibility. Operational actors, including state-run reception agencies, have argued that because the drivers of and fluctuations in asylum flows are largely outside of the remit of the European Union and its Member States, reception systems should be designed to rapidly, effectively, and efficiently adjust to variations in intake.³³

26 Asylum Information Database (AIDA), *National Country Report: Austria* (N.p.: AIDA, 2014), www.asylumineurope.org/sites/default/files/report-download/aida_-_austria_second_update_uploaded_1.pdf.

27 AIDA, *National Country Report: Bulgaria* (N.p.: AIDA, 2013), www.asylumineurope.org/sites/default/files/report-download/aida_bulgaria_report_-_first_update_-_final.pdf.

28 Ibid.

29 United Nations High Commissioner for Refugees (UNHCR), *Current Issues of Refugee Protection in Greece* (Geneva: UNHCR, 2013), www.unhcr.gr/fileadmin/Greece/News/2013/PCjuly/Greece_Positions_July_2013_EN.pdf; European Commission, ‘Questions & Answers: Recommendation on the Conditions for Resuming Dublin Transfers of Asylum Seekers to Greece’ (fact sheet, European Commission, Brussels, 8 December 2016), http://europa.eu/rapid/press-release_MEMO-16-4253_en.htm.

30 For example, Dublin transfers to Greece from other Member States have been suspended since 2011 following European Court of Human Rights and Court of Justice of the European Union judgments that identified systemic deficiencies in the Greek asylum system.

31 European Commission, ‘Asylum, Migration, and Integration Fund (AMIF)’, accessed 28 August 2017, https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en.

32 European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010’ (COM [2016] 271 final, 4 May 2016), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo_proposal_en.pdf.

33 Michael Kegels, *Getting the Balance Right: Strengthening Asylum Reception Capacity at the National and EU Levels* (Brussels: Migration Policy Institute Europe, 2016), www.migrationpolicy.org/research/getting-balance-right-strengthening-asylum-reception-capacity-national-and-eu-levels. The European Network of Reception Agencies has long worked on this issue, laying the foundation for the development of indicators to monitor the functioning and performance of national reception systems. This monitoring effort has been taken over by EASO (per the new proposal for the Reception Conditions Directive).

Within a few weeks of increased inflows in 2015, the reception systems in EU external border states (e.g., Greece, Hungary, and Italy) were overwhelmed. Hundreds, and soon thousands, of asylum seekers slept rough or in makeshift tents, went without food or were dependent on civilian handouts, and did not have access to running water or emergency health care.³⁴ The deplorable conditions in Idomeni camp at the Greek border and ‘the Jungle’ in Calais, France soon came to symbolise the collapse of national and EU reception systems.

However, the crisis also provided the impetus for pilot projects that aimed to improve reception conditions and enable reception agencies and other stakeholders to be more agile. In the 2015–16 period, authorities in several Member States experimented with the following practices:

- **Distribution policies.** This approach saw protection applicants and/or beneficiaries assigned to local authorities to more evenly spread the pressure on service providers (as adopted in Belgium in 2016; Germany and Sweden already had a distribution system in place prior to the crisis). Such policies proved particularly successful where they considered the accessibility of employment and education in different localities, in addition to raw numbers.
- **Cross-government committees and task forces.** Regular convenings to discuss ongoing responses to migration and asylum issues (as held by the European Commission and Belgium) were found to foster alignment between actors with a financial and executive responsibility for asylum seekers, including those involved in reception, claims processing, and integration.
- **Forecasting and real-time monitoring of reception capacity.** To better adapt reception capacity, authorities need to be able to look ahead to the demands they may face in the coming weeks, months, or years. This has involved efforts to monitor in real time the occupation rate of existing reception systems and to adjust them using future arrival estimates based on data gathered by EASO, the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM), and national statistical institutes³⁵ (as done in Belgium,³⁶ Germany,³⁷ the Netherlands,³⁸ and Sweden³⁹).
- **Sharing reception facilities.** Some reception authorities, whether at the regional or national level, have begun to draw up agreements to use each other’s facilities as a way to avoid having to create extra reception spaces in one locality while the other locality closes down its reception centre. This shared management of reception places reduces cost inefficiencies and waiting times (e.g., an agree-

34 See Human Rights Watch, ‘Fleeing Syria and Stranded in Hungary’, updated 9 September 2015, www.hrw.org/video-photos/interactive/2015/09/09/fleeing-syria-and-stranded-hungary; William Spindler, ‘Italy Reception Centres under Strain as Thousands Rescued at Sea’, UNHCR, 6 May 2015, www.unhcr.org/en-us/news/latest/2015/5/554a075a6/italy-reception-centres-under-strain-thousands-rescued-sea.html; UNHCR, ‘UNHCR Calls for Urgent European Support for Greece amid Worsening Conditions for Refugees’ (briefing notes, UNHCR, Geneva, 16 June 2015), www.unhcr.org/en-us/news/briefing/2015/6/557ffe639/unhcr-calls-urgent-european-support-greece-amid-worsening-conditions-refugees.html.

35 Ten states reportedly had such arrangements in place in 2014. See European Commission and EMN, ‘Summary of the Ad-Hoc Query on Forecasting and Contingency Planning Arrangements for International Protection Applicants’ (response to query, EMN, 20 January 2015), www.udi.no/globalassets/global/european-migration-network_i/ad-hoc-queries/ad-hoc-query-forecasting-and-contingency-planning-arrangements-international-protection-applicants.pdf.

36 For more information, see the Belgian Federal Agency for the Reception of Asylum Seekers (Fedasil), ‘Good Practices of the Belgian Reception Model’, updated 10 March 2014, www.fedasil.be/en/news/reception-asylum-seekers/good-practices-belgian-reception-model.

37 Andreas Müller, ‘The Organisation of Reception Facilities for Asylum Seekers in Germany’ (working paper 55, German Federal Office for Migration and Refugees, Nuremberg, 2013), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/10a.germany_national_report_reception_facilities_en_final.pdf.

38 Netherlands Central Agency for the Reception of Asylum Seekers (COA), ‘Bezetting’, accessed 14 February 2018, www.coa.nl/nl/over-coa/bezetting.

39 See, for example, Swedish Migration Agency, ‘Forecast: “Continual Focus on Making Decisions”’, updated 5 May 2017, www.migrationsverket.se/English/About-the-Migration-Agency/News-archive/News-archive-2017/2017-05-05-Forecast-Continual-focus-on-making-decisions.html.

ment between Austria and Slovakia, whereby Slovakia agreed to host 500 asylum seekers to address the problem of overcrowding in the reception centre in Vienna).⁴⁰

Drawing lessons from these experiments and scaling up promising practices will be the next step towards boosting flexibility systemwide.

C. *The asylum procedure*

The Qualification Directive⁴¹ and its amendments constitute a joint response to the question: who *should* receive international protection in EU Member States? However, the picture that emerges of who *does* obtain protection varies considerably across the European Union. Without convergence, it is hard to speak of a *Common* European Asylum System in which asylum applications are treated equally independent of where in the European Union they are lodged. Moreover, asylum seekers may continue to seek out the countries in which they have (or believe they have) a higher chance of gaining protection, and governments will likely continue to argue that the goals of responsibility- and solidarity-sharing within the CEAS cannot solely ride on a mechanism for allocating asylum claims.

Several factors have been identified that lead to divergence between Member State asylum procedures. These include both the process of gathering information on an asylum claim and using it to prepare the case dossier (i.e., the asylum procedure)⁴² as well as the process of deciding whether or not to grant asylum (i.e., adjudication) (see Section II.D).

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The architects of the CEAS always envisaged the establishment of common procedures that would be fair, yet efficient. And indeed, significant milestones have been reached in its pursuit. Since 2005, all EU Member States are required to operate a single procedure to examine an applicant's right to refugee status and subsidiary protection.⁴³ The Asylum Procedures Directive (APD) and its recast⁴⁴ firmly defined the series of steps that make up a 'standard' or regular asylum procedure,⁴⁵ the procedural safeguards that must be respected,⁴⁶

40 BBC News, 'Inside the Slovakian Town Hosting Austria's Migrants', BBC News, 1 October 2015, www.bbc.com/news/av/world-europe-34400918/inside-the-slovakian-town-hosting-austria-s-migrants.

41 'Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted', *Official Journal of the European Union* 2011 L337/9, 20 December 2011, <http://data.europa.eu/eli/dir/2011/95/oj>.

42 See, for example, UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (Geneva: UNHCR, 2010), www.refworld.org/topic.50ffbce51b1.50ffbce51d2.4bab55752.0..LEGALPOLICY.html; AIDA, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System* (N.p.: AIDA, 2013), www.asylumineurope.org/sites/default/files/shadow-reports/not_there_yet_02102013.pdf.

43 'Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', *Official Journal of the European Union* 2005 L326/13, 13 December 2005, <http://data.europa.eu/eli/dir/2005/85/oj>.

44 Ibid.; 'Directive 2013/32/EU'.

45 A 'standard' or 'regular' procedure consists of registration; lodging the asylum claim; personal interview and other measures to check the validity and reliability of the claim; first-instance decision; and, in some cases, appeal.

46 Procedural safeguards are measures that aim to ensure applicants can bring forward all elements relevant to their claims; these include the provision of sufficient information on the procedure in a language they understand, a personal interview, and the opportunity to consult with a legal representative. See 'Directive 2013/32/EU', Chapter X.

and the broad timeline in which these steps are to be completed. EU law also outlines the obligations asylum authorities and applicants must fulfil, and a cluster of sanctions is gradually forming that would guide EU responses to breaches of these obligations.⁴⁷

Yet lengthy asylum procedures and disparities in how claims are processed continue to hamper national and EU asylum systems. Even before the 2015–16 crisis, asylum seekers sometimes had to wait up to two years to hear the outcome of their asylum claim. For example, the average wait time in Germany was 11.1 months in 2014—and even longer for some applicants.⁴⁸ In 2015, Somali applicants waited an average of 22 months for a first-instance decision in Germany.⁴⁹ Waiting times were already particularly long in the main EU asylum countries (i.e., Belgium, France, Germany, the Netherlands, and the United Kingdom), and they grew further when arrivals rose in 2014. While in 2013, applicants for protection in Sweden waited on average 3.5 months to receive a first-instance decision,⁵⁰ by the end of 2015, most registered asylum applicants would only have their first interview after 6 months and receive their decision after a further 7.5 months.⁵¹ These lengthy procedures swell the pool of pending cases⁵² and slow down asylum systems unable to adapt to this increased demand.⁵³

In 2015, Somali applicants waited an average of 22 months for a first-instance decision in Germany.

- 47 The recast Asylum Procedures Directive is rather weak in terms of sanctions for stakeholders that deviate from the instrument's provisions. It does not provide for any special infringement procedure beyond the standard EU mechanisms for calling unruly Member States to order. The Dublin III Regulation, which regulates the process of determining which Member States is responsible for processing a particular asylum application, is by far the most punitive legislative instrument within the CEAS. For example, authorities that fail to notify another Member State that it is responsible for an application within a given timeframe are automatically assigned responsibility for it. See 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)', Art. 31(8)(i), *Official Journal of the European Union* 2013 L180/31, 29 June 2013, <http://eur-lex.europa.eu/eli/reg/2013/604/oj>.
- 48 ECRE, *Country Report: Germany, 2016* (Brussels: ECRE, 2017), www.asylumineurope.org/reports/country/germany.
- 49 ECRE, *The Length of Asylum Procedures in Europe* (Brussels: ECRE, 2016), www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf. In October 2015, a German court ruled in favour of a Somali asylum seeker who had waited for a decision for more than a year, finding that the application had not been processed within a reasonable time. See Welt, 'Flüchtling gewinnt Klage gegen Bundesamt für Migration', Welt, 14 September 2015, www.welt.de/politik/deutschland/article147585296/Fluechtling-gewinnt-Klage-gegen-Bundesamt-fuer-Migration.html.
- 50 AIDA, *Country Report: Sweden* (N.p.: AIDA, 2015), www.asylumineurope.org/sites/default/files/report-download/aida_sweden_second_update_final.pdf.
- 51 ECRE, *The Length of Asylum Procedures in Europe*.
- 52 Pew Research Center estimated that 1.1 million people—roughly half of the 2.2 million who sought asylum in 2015 and 2016—were still waiting for a decision on their application on 31 December 2016. See Phillip Connor, *Still in Limbo: About a Million Asylum Seekers Await Word on Whether They Can Call Europe Home* (Washington, DC: Pew Research Center, 2017), www.pewglobal.org/2017/09/20/a-million-asylum-seekers-await-word-on-whether-they-can-call-europe-home/.
- 53 For those who are granted international protection, prolonged waiting periods can also hamper integration. Access to (state-funded) education and vocation training is often more restricted for asylum seekers than for those who have received a positive decision. Other factors, such as the location of reception facilities, may also make it difficult for asylum seekers to access decent employment opportunities. See Maria Vincenza Desiderio, *Integrating Refugees in Host Country Labor Markets: Challenges and Policy Options* (Washington, DC: Migration Policy Institute, 2016), www.migrationpolicy.org/research/integrating-refugees-host-country-labor-markets-challenges-and-policy-options.

1. Adapting asylum procedures to evolving caseloads: A road to greater efficiency?

An efficient asylum system should be able to respond with flexibility to a changing caseload and promptly work through internal backlogs. Indeed, a well-defined set of asylum procedures, carefully tailored to the types of protection cases Member States (are likely to) receive, optimises the balance between fairness and efficiency. The Netherlands, for example, reformed their asylum procedures in 2010, with the aim of processing all asylum claims within eight days (with a possible extension to a maximum of 28 days).⁵⁴ And the steep increase in arrivals at the external borders of the European Union in 2015 resulted not only in the setup of hotspots (see Box 3), but also a ‘triage system’ to more swiftly process newcomers seeking asylum. Those with a high likelihood of obtaining international protection were separated from the broader group of arrivals, enabling authorities to prioritise their claims and, where applicable, relocate them to other EU Member States.⁵⁵ In some EU countries, a similar prioritisation took place when processing some claims (mostly Syrians),⁵⁶ dispersing the asylum seekers who filed them to (permanent) accommodation across localities and granting them access to the labour market and supporting integration services. This not only frees up capacity within asylum authorities and reception facilities, it also creates a more direct path for at least some asylum seekers to start their new lives in the host community.

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For this streamlining to work, however, it must be absolutely clear which cases or circumstances merit the application of which procedures. On top of that, caseworkers within the same administration and asylum authorities across the European Union must adhere to these rules in a consistent manner. Such a system stands in stark contrast with the flexibility that the legal blueprint of the CEAS currently grants its members to prioritise cases based on their own interests and system constraints. At present, EU legislation outlines two ways Member States may choose to expedite a claim:

- **Prioritised procedures.** National authorities may prioritise the examination of an application identified as potentially well founded. Several EU Member States, including Germany and Sweden, took this approach to applications filed by Syrians. This procedure does not derogate from the normal procedural time limits, principles, and guarantees.⁵⁷
- **Accelerated procedures.** Member States may fast-track the examination of an application considered potentially manifestly unfounded (e.g., Belgium and Germany have done this for applications filed by

54 All asylum applications start in the short-asylum-procedure stream. If, within eight days, the asylum authority is not able to issue a decision, the case is to be transferred to the extended procedure where a decision is to be issued within six months. For more information, see COA et al., *Your Asylum Application: Information on the Border Procedure* (Amsterdam: Dutch Ministry of Security and Justice, 2015), https://ind.nl/Documents/GP_Engels.pdf. See also VluchtelingenWerk Nederland, *Country Report: The Netherlands, 2016* (N.p.: AIDA, 2017), www.asylumineurope.org/reports/country/netherlands; Dietrich Thränhardt, *Asylum Procedures in the Netherlands* (Gütersloh, Germany: Bertelsmann Stiftung, 2016), www.bertelsmann-stiftung.de/fileadmin/files/Projekte/28_Einwanderung_und_Vielfalt/IB_Studie_Asylum_Procedures_NL_Thraenhardt_2016.pdf.

55 European Commission, ‘Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece’ (COM [2015] 286 final, 27 May 2015), http://eur-lex.europa.eu/resource.html?uri=cellar:7a15efe3-053d-11e5-8817-01aa75ed71a1.0001.02/DOC_1&format=PDF.

56 Germany, the Netherlands, and Sweden introduced the practice of ‘clustering asylum applications’ which includes the prioritisation of asylum claims from applicants likely to be granted asylum. See ECRE, *Accelerated, Prioritised, and Fast-Track Asylum Procedures: Legal Frameworks and Practices* (Dublin: ECRE, 2017), www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief-AcceleratedProcedures.pdf.

57 See ‘Directive 2013/32/EU’, Recital 19.

citizens of Balkan countries). Here, ‘shorter but reasonable time limits for certain procedural steps’ can be introduced.⁵⁸

While the Asylum Procedures Directive stipulates the conditions under which these procedures would be suitable, it allows EU Member States to choose whether or not they apply them.⁵⁹ While EU legislators decided on this approach to accommodate existing Member State procedural practices—many of which have emerged from specific historical, political, cultural, or economic contexts—the result has been that Member States have applied different procedures to claims from applicants with similar profiles. As such, the CEAS has so far not succeeded in establishing a coherent system of procedural channels or streams that could optimise the functioning of national asylum systems and make them more consistent across the European Union.

2. Insufficient capacity to implement asylum procedures

Even within regular asylum procedure, which in theory should be uniform across the European Union, asylum authorities and other stakeholders struggle—periodically or chronically—to translate national or EU law into practice.⁶⁰ Capacity problems often lie at the heart of Member States’ divergent or substandard application of these provisions. This may include a lack of infrastructure, equipment, staff with the appropriate qualifications and training, legal representatives and interpreters, guardians for unaccompanied minors, and monitoring and evaluation systems.⁶¹ Asylum authorities in several EU Member States resorted to setting up tents to remedy infrastructure gaps in the 2015–16 period. Similarly, there have been anecdotal reports of government staff using copy machines in libraries and other facilities to rapidly compile case files in Germany when equipment was lacking in their offices. Many authorities also had to rapidly recruit more caseworkers or shift and retrain administrative personnel from other departments. Understaffing has been a chronic problem for asylum authorities in several Member States, one that existed long before the crisis⁶² but that intensified from 2015 onwards (see Box 4).

58 See Ibid., Recital 20.

59 See Ibid., Art. 31(7) and Art 31 (8).

60 European Commission, ‘Report from the European Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’ (COM [2010], 465 final, 8 September 2010, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/news/intro/docs/com_2010_465_en.pdf); European Commission, ‘Proposal for a Regulation of the European Parliament and the Council Establishing a Common Asylum Procedure for International Protection in the Union and Repealing Directive 2013/13/EU’ (COM [2016] 467 final, 13 July 2016), <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

61 At present, the European Commission fulfils this role via the commissioning of transposition and implementation studies. While the Commission retains its role as the guardian of the treaty, the proposals for the CEAS reform include a revised, enlarged mandate for the European Union Asylum Agency (EUAA, currently EASO) for it to monitor and assess the performance of asylum and reception systems. See European Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010’, Art. 13.

62 See, for example, UNHCR, *Current Issues of Refugee Protection in Greece*.

Box 4. Shortages of staff and guardians slow the processing of applications lodged by unaccompanied children in Greece

EU and Greek laws state that applications for asylum filed by unaccompanied minors may be prioritised by authorities for processing. They also set out that the staff who conduct personal interviews and decide on the cases of such children must be specially trained to understand the unique needs of children, use child-sensitive interview techniques, and reach decisions that are in the best interest of the child. However, minors generally are not placed in special asylum procedures in Greece as the country lacks qualified staff to deal with their claims. Instead, they are mostly processed through the regular asylum procedure.

Many of the procedural safeguards in place under the CEAS also hinge on an appointed guardian identifying and advocating for the rights, interests, and protection needs of the child. Though a legal requirement, the guardianship system in Greece reached a breaking point in 2015. The nascent network of volunteer guardians organised by the Greek NGO METAdrasi had trained 13 volunteers and was supporting 256 unaccompanied children as of November 2015, but it was unable to keep up with rising number of arrivals (e.g., 150 unaccompanied children arrived in Greece in February 2016 alone). With the capacity of this small team overstretched, new arrivals were referred to the state-run guardian system, in which the guardian/child ratio is high and children have a more limited chance of obtaining the support needed to navigate the Greek asylum system.

Source: Andriani Fili, 'Unaccompanied Minors in Greece: Passing on the Responsibility', University of Oxford, Border Criminologies, 3 December 2014, www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/12/unaccompanied; METAdrasi, *Personalized Support for Unaccompanied Minors* (Athens: METAdrasi, 2016), <http://metadrasi.org/wp-content/uploads/2016/12/Guardianship-Network.pdf>.

The European Union has sought to remedy this situation through a combination of legal reforms, training for staff from national authorities,⁶³ joint processing pilot projects,⁶⁴ and the setup of asylum support teams coordinated by EASO.⁶⁵ The latter two initiatives have national experts supporting their peers in other Member States with preparing dossiers and conducting personal interviews with applicants.⁶⁶ While these EU tools show some promise in fostering cooperation, they also have practical limitations (e.g., it may take time for of-

63 See EASO, 'Training', accessed 30 August 2017, www.easo.europa.eu/training.

64 See EASO, *Joint Processing Pilots Technical Report* (Luxembourg: EU Publications Office, 2015), <https://publications.europa.eu/en/publication-detail/-/publication/84651f96-4e3d-11e6-89bd-01aa75ed71a1/language-en>.

65 As set out in 'Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office', Art. 15(1), *Official Journal of the European Union* 2010 L132/11, 29 May 2010, <http://data.europa.eu/eli/reg/2010/439/oj>. See also EASO, 'Asylum Intervention Pool', accessed 30 August 2017, www.easo.europa.eu/operational-support/asylum-intervention-pool. This mechanism is further elaborated and strengthened in the latest proposal for the EUAA. See European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010', Art. 17-22.

66 The national experts assigned to EASO include asylum experts, resettlement experts, statistical experts, and country-of-origin-information experts. The role and qualifications of these experts depend on the specific situation and, when applicable, any agreement signed by the Member States involved. For further information, see EASO, 'Decision No1 of the Management Board of EASO of 25 November 2010 Laying Down Rules on the Secondment of National Experts (SNE) to the European Asylum Support Office (EASO)' (decision document EASO/MB/2010/3, Valletta, Malta, 2010), www.easo.europa.eu/sites/default/files/public/MB-decision-1-Secondment-of-national-experts-SNE.pdf. For a review of peer-support initiatives across Europe, see Hanne Beirens and Aliyyah Ahad, *Building Resettlement Capacity in Europe: The Role of Peer Support* (Brussels: Migration Policy Institute Europe, forthcoming).

ficials to be deployed to assist a partner country, and often their visits are too short to be truly useful).⁶⁷ Legal experts and civil-society actors have also raised concerns about the legality of the role that EASO staff⁶⁸ play in the assessment of asylum applications as it conducts interviews on behalf of and recommends decisions to, for example, the Greek Asylum Service.⁶⁹ Whether and how national sovereignty over asylum decisions may be limited in the case of a national or EU-wide crisis is the subject of heated debates, especially when the implications of those limitations are potentially severe (e.g., as is the case of the EU-Turkey agreement). EU-run hotspots are already challenging to operate in states that are willing to host them, and it is abundantly clear that a number of EU countries, such as Hungary, would not even contemplate allowing one to be built within their borders.⁷⁰ While more practical cooperation is required to improve asylum processes within and across national authorities, methods for doing so that are palatable to all involved have yet to be pinned down.

D. Adjudication

The rates at which EU countries recognise third-country nationals as in need of international protection differ greatly across Member States.⁷¹ In 2016, for example, Afghan asylum seekers had a 1.7 per cent chance of being recognised as a refugee in Bulgaria compared to a 97.0 per cent chance in Italy (see Table 1).

Table 1. Divergence in Protection Rates (%) across the European Union, by Applicant Nationality, 2016

	Afghanistan	Iraq	Kosovo	Pakistan	Syria
Bulgaria	1.7	15.8	N/A	0.0	94.5
France	82.4	81.7	15.5	7.5	97.2
Germany	60.1	76.7	0.9	4.2	99.3
Italy	97.0	95.1	45.0	36.9	98.7
Netherlands	34.4	48.2	0.0	31.8	97.0
Sweden	37.4	27.0	6.8	17.1	96.1

Source: Migration Policy Institute (MPI) Data Hub, 'Asylum Recognition Rates in the EU/EFTA by Country, 2008-2016', accessed 22 February 2018, www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2016.

- 67 This assessment is based on anecdotal evidence and on the evaluations conducted of EASO's activities. With regard to the latter, it has to be noted that the external evaluation of the EASO conducted in 2015 mainly relied on semistructured interviews and only few other (quantitative) research methods to critically assess the effectiveness of the EASO activities. See Ernst and Young, *European Asylum Support Office: Independent External Evaluation of EASO's Activities Covering the Period of February 2011 to June 2014* (Brussels: Ernst and Young, 2015), <http://statewatch.org/news/2016/mar/eu-easo-External-evaluation-of-EASO-Final-report.pdf>.
- 68 Either staff employed at EASO on a permanent basis or staff from national asylum authorities across the EU temporarily assigned by EASO through the asylum support teams.
- 69 See, for example, ECRE, 'ECCHR Asks EU Ombudsman to Inquiry into EASO's Role at Greek Hotspots', updated 5 May 2017, www.ecre.org/ecchr-asks-eu-ombudsman-to-inquiry-into-easos-role-at-greek-hotspots/.
- 70 The present European Commission proposal for the setup of the EUAA includes legal provisions that would allow EUAA to intervene in Member States if the Board approves and only in cases where severe problems with the operations of a national asylum system may jeopardise the CEAS.
- 71 AIDA, *Common Asylum System at a Turning Point: Refugees Caught in Europe's Solidarity Crisis* (N.p.: AIDA, 2015), www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf; Eurostat, 'Asylum Quarterly Report', accessed 28 August 2017, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report; Eurostat, 'Asylum Statistics', accessed 28 August 2017, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics; EASO, *Annual Report on the Situation of Asylum in the European Union 2016* (Luxembourg: EU Publications Office, 2017), www.easo.europa.eu/sites/default/files/Annual-Report-2016.pdf; Bernd Parusel, 'Solidarity and Fairness in the Common European Asylum System: Failure or Progress?' *Migration Letters* 12, no. 2 (2015): 124-36.

While these varied recognition rates for applicants with the same citizenship may be partly due to differences in individual applicants' profiles, with some subgroups (e.g., ethnic minority) arriving in larger numbers in some EU Member States but not others,⁷² most analysts agree that divergence in the decision-making process is the primary explanatory factor.⁷³ As noted above, such divergence is problematic both when it exists between Member States, but also when it occurs within national asylum systems, increasing the number of cases that may then be subject to appeals and adding to administrative backlogs.

Several well-recognised factors contribute to this divergence.⁷⁴ Firstly, the Qualification Directive, which lays down the grounds for granting refugee status or subsidiary protection, leaves considerable room for Member State discretion.⁷⁵ Secondly, the transposition of EU law into national legislation introduces another layer of judicial interpretation and, as a result, further divergence. Both elements have reduced the legislative leverage this EU instrument has to raise protection standards and even out differences between EU Member States. Thirdly, there are considerable country-to-country differences in the quality and content of the country of origin information that caseworkers and judges rely on when assessing whether an applicant's situation in the country of origin constitutes a genuine need for protection or whether they can be safely returned. Recognition of the influence these factors have on asylum outcomes has spurred a wealth of initiatives to produce higher-quality country of origin information,⁷⁶ foster convergence in the interpretation of legal provisions,⁷⁷ and propose reform of the Qualification Directive (see Box 5).⁷⁸

- 72 EASO, *Annual Report on the Situation of Asylum in the European Union 2015* (Luxembourg: EU Publications Office, 2016), www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf.
- 73 ECRE, *Refugee Rights Subsiding? Europe's Two-Tier Protection Regime and Its Effect on the Rights of Beneficiaries* (Brussels: ECRE, 2017), www.refworld.org/docid/58e1fc8e4.html; Council of the European Union, *Outcome of the 3461st Council Meeting, Justice and Home Affairs* (Luxembourg: EU Publications Office, 2016), www.consilium.europa.eu/media/22682/st08065en16.pdf; Parusel and Schneider, *Reforming the Common European Asylum System*.
- 74 See, for example, European Commission, 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection' (COM [2010] 314 final, 16 June 2010), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0314&from=EN>; Lillian M. Langford, 'The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity', *Harvard Human Rights Journal* 26, no. 1 (2013): 217–63; Luc Bovens, Chlump Chatkupt, and Laura Smead, 'Measuring Common Standards and Equal Responsibility-Sharing in EU Asylum Outcome Data', *European Union Politics* 13, no. 1 (2011): 70–93; Karin Zwaan, ed. *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen, the Netherlands: Wolf Legal Publishers, 2007), <http://repository.ubn.ru.nl/bitstream/handle/2066/37466/37466.pdf?sequence=1>.
- 75 The Member State discretion results from the use of vague terminology and of 'may' clauses that allow the Member State to decide whether or not to apply the legal provision. For example, the recast Qualification Directive on international protection needs arising *sur place* stipulates that Member State authorities *may* consider events that have taken place in the country of origin after the person left or activities that the applicant has engaged in after leaving the country in assessing whether the applicant is in need of protection. Not all EU Member States currently apply this provision. See 'Directive 2011/95/EU', Art. 5.
- 76 These include the EASO Country of Origin Information (COI) Portal and UNHCR-produced COI. In the past, initiatives have focused on, for example, nonbinding guidelines on how to produce COI (e.g., Austrian Centre for Country of Origin and Asylum Research and Documentation, or ACCORD; working groups of the Intergovernmental Consultations on Migration, Asylum, and Refugees; and Common EU Guidelines for Processing COI); training (e.g., the inclusion of a module on COI in the European Asylum Curriculum, initiatives by Red Cross); common production and/or assessment of COI (e.g., European COI Sponsorship; joint fact-finding missions; and projects funded by the Action Programme for Administrative Cooperation in the Fields of External Borders, Visas, Asylum, and Immigration, or ARGO, that bring COI units together); and the sharing of information via existing databases (e.g., ACCORD; the Migration Info Logistics, or MILo, database; and Lifos database).
- 77 For example, contact Committees where particular articles or provisions are discussed and bilateral or multilateral meetings (e.g., at IGC or the General Directors' Immigration Services Conference, GDISC).
- 78 See, for example, ECRE, *ECRE Comments on the Commission Proposal for a Qualification Regulation* (Brussels: ECRE, 2016), www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-QR.pdf; UNHCR, *UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM(2009)551, 21 October 2009)* (Geneva: UNHCR, 2010), www.unhcr.org/4c5037f99.pdf; Jonah Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive', *International Journal of Refugee Law* 24, no. 4 (2012): 765–92.

Box 5. In pursuit of consistency: Proposed reform of the Qualification Directive

In July 2016, the European Commission put forward a proposal to transform the Qualification Directive into a regulation that would, among other things, make it mandatory for all national asylum authorities to consider whether applicants might instead seek refuge in a ‘safe zone’ within their country of origin. This ‘internal protection alternative’ provision is currently optional, allowing each Member State to decide whether or not to apply it (Art. 8(1)). Of the 28 EU Member States, 25 presently apply this legal provision, whereas three (Italy, Spain, and Sweden) have chosen not to. It goes without saying that the liberty to apply this provision or not; the interpretation of the concept of internal protection alternatives; and the quality of the country of origin information that asylum authorities use to check whether this is a viable protection alternative have contributed to the divergence in who is granted protection across the European Union. This factor partly accounts for the considerably different recognition rates for asylum seekers from Afghanistan and Iraq over time and across EU Member States. By making this provision mandatory, EU policymakers hope to achieve greater convergence in decisions on who merits protection and who is to be returned.

Sources: European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents’ (COM [2016] 466 final, 13 July 2016, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf); European Commission, ‘Implementation Study of the Recast Qualification Directive’ (unpublished internal document, 2016).

The human factor in the decision-making process

While most aspects of the adjudication process have undergone meticulous review, the deliberative process through which individual caseworkers or judges decide whether a person merits international protection remains something of a black hole. Except for the odd project, such as the Quality Initiative as part of which UNHCR personnel observed the work done by caseworkers in the UK Home Office and provided training,⁷⁹ the decision-making process has received little external scrutiny.⁸⁰ Only insiders, such as caseworkers from other EU Member States and staff from EASO, have been able to observe the inner workings of asylum adjudication systems through, for example, projects that explore the feasibility of joint processing⁸¹ and, more recently, at the hotspots in Greece and Italy.

Aside from direct observation, other methods exist that could offer a window into how this process operates in different contexts. For example, different Member State authorities or departmental teams could be presented with a set of ‘vignettes’ (in this case, an asylum application) and the results of each compared. Participants could then discuss the rationale for the decisions made, shedding light on how particular profiles of asylum applicants (e.g., those at risk of persecution due to their sexual orientation) are treated across asylum authorities.

79 For more information, see UNHCR, ‘Quality Initiative and Integration’, accessed 30 August 2017, www.unhcr.org/en-us/quality-initiative-and-integration.html.

80 This is particularly remarkable in view of anecdotal evidence of caseworkers within the same asylum authorities arriving at different conclusions on a similar dossier (e.g., whether or not to grant protection and if so, what protection status to grant) and of the high rate with which appeal courts overturn first-instance decisions in particular countries or in relation to particular profiles of applicants.

81 See EASO, *Joint Processing Pilots Technical Report*.

But to date, government authorities have tended to resist this type of research, arguing it would expose sensitive information and foster abuse (e.g., that applicants might report false information about their situation in the country of origin and/or their flight to secure recognition). Yet transparency in decision-making is hardly the main cause of abuse. Rather, it is the system's inability to check the validity and reliability of claims that allow such abuse, to the degree it happens, to persist and cast a negative light on claims that are legitimate. Furthermore, without addressing this blind spot, a significant gap will remain in the information policymakers and legislators have at their disposal as they decide what needs to be prioritised to reduce this significant divergence in outcomes of asylum applications within and across asylum systems.

III. DIAGNOSING AND REMEDYING SYSTEM WEAKNESSES

The structural weaknesses of asylum systems identified in the previous section have been acknowledged, documented, and addressed to only a limited degree. A variety of legal and practical reasons exist for the persistence of blind spots or the limited effectiveness of efforts to deal with system failures. Progress and shortcomings, though they come in many forms, are generally assessed through a legal lens, somewhat limiting the picture decisionmakers have as they move ahead with proposed reforms.

A. The dominance of legal perspective(s)

The CEAS has been chiefly reviewed from a legal standpoint. With the 'right to asylum' at the heart of any international protection regime, this may not come as a surprise. The fact that efforts to build a truly *common* asylum system have centred on the adoption and amendments of laws (i.e., EU directives and regulations) and strategic litigation in EU courts has further strengthened this legal approach.

Over time, an army of lawyers and legal experts from across the European Union has constructed a legal blueprint of the CEAS. This body of legislation and legal precedent covers reception, asylum procedures, and adjudication processes as well as the rights of those granted international protection. It also mandates, among other things, the creation of a mechanism for determining which Member State is responsible for processing a particular asylum application (i.e., the Dublin system), an agency to support practical cooperation in the area of asylum (EASO), and EU-wide data collection and analysis.

Intergovernmental (e.g., UNHCR), governmental, and nongovernmental organisations (e.g., the European Council on Refugees and Exiles, or ECRE) have also dissected the CEAS to its smallest legal detail, publishing their findings and criticisms to contribute to discussions surrounding the legislative reform process.⁸² In a similar vein, the European Commission has commissioned transposition studies for each directive to check whether the legal provisions adopted at the EU level have been appropriately translated into national legislation. Even the Commission's implementation studies, which are often conducted by an interdisciplinary team of experts, start with the same fundamental question: has the legal provision, as laid down in the EU directive

82 See, for example, UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted* (OJ L 304/12 of 30.9.2004) (Geneva: UNHCR, 2005), www.unhcr.org/protect/PROTECTION/43661eee2.pdf; ECRE, *ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011* (Brussels: ECRE, 2013), www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf.

or regulation, been implemented in practice? Other nonlegal perspectives that might shed light on whether the spirit of the law has been carried out and why (or why not), are generally drowned out.

While this legal compass has successfully unveiled certain blind spots in the functioning and performance of the CEAS,⁸³ problems that concern the yawning gap between law and practice have been largely left undressed or, where acknowledged, treated with yet another legal rather than practical solution (e.g., sanctions for individuals who do not provide fingerprints). Operational challenges—such as the need to (rapidly) setup or expand a network of guardians for unaccompanied children (as in Greece), to strengthen reception-system capacity to accommodate a threefold increase in arrivals in one year (Lithuania and Romania), or to find jobs for new arrivals amid widespread unemployment (Greece, Italy, and Spain)—require a very different mindset and toolkit. The tools needed to successfully overcome these challenges may consist of, for example, efforts to identify the right actors to involve in change efforts, equip these actors with the appropriate skills and knowledge, and coordinate between stakeholders—as well as sufficient financial resources to support all of this. With the setup and implementation of hotspots and the introduction of a relocation programme, the European Commission and other EU actors have taken a crucial step towards much needed operational thinking and action. But it is primarily at the national and subnational levels that asylum actors have developed the knowhow to expand and contract infrastructure, resources, and capacity to adjust to fluctuations in arrivals. Exploring how and to what degree this knowledge can be transferred to other national and regional contexts, as well as into EU-level reflections on how to reform the CEAS, is hence essential.

It is primarily at the national and subnational levels that asylum actors have developed the knowhow to expand and contract infrastructure, resources, and capacity.

B. The elusive systems perspective

While legal experts have rightly identified a number of legal changes that could enhance the CEAS' capacity to protect those in need, holistically addressing its weaknesses requires that decisionmakers step back and view the system from multiple perspectives. The following questions can serve as a useful starting point when reviewing the performance of the CEAS as a system of interlocking parts:

- What are the main components and subcomponents of the system? And are these all present?
- Is there a clear division of labour among the component parts? And is each clear on what role it plays in the system and how it relates to the other parts?
- Who has oversight and, where needed, coordinates the operations of the different parts of the system?
- Does each component have the necessary expertise and resources to fulfil its function?
- Does the system have an emergency mechanism? In other words: Is it clear what is to be done in the case of an emergency and by whom?
- Does the system have the ability to rapidly recover from an emergency and to revert to its 'normal functioning' (whether or not this requires adapting standard functions to the changed context)?

⁸³ For example, transposition and implementation studies commissioned by the European Commission have presented evidence of how vaguely defined grounds for international protection and Member State discretion create legal uncertainty for those seeking protection.

Adopting a systems perspective to review the CEAS holds the potential to both improve understanding of the shortcomings identified in Section II and to serve as a useful framework for planning its potential reform. Once the role of a particular system component has been mapped, the implications of its malfunctioning can be easily traced throughout the system. For example, delays or failures to register asylum seekers can result in lengthy wait times for first-instance decision and access the labour market; they can also undermine the Dublin system and security checks at the EU's external borders (as described in Box 1). A systems analysis can thus help decisionmakers invest proportionate energy and attention at key moments in the asylum process and address the weaknesses detected to avoid costly knock-on effects down the road.

Adopting a systems lens can make a significant difference in how policymakers analyse the performance of national and EU asylum systems.

A systems approach also warns against a type of action that was amply observed during the 2014–16 crisis: the establishment of makeshift measures that risk both failure the destabilisation of the overall asylum system. For example, the Minniti immigration decree passed by the Italian parliament in April 2017 aimed ‘to reduce paperwork in state offices and close loopholes long exploited by irregular migrants wanting to remain in the country’,⁸⁴ yet it also created new gaps in service provision and extra work for reception centres. Migrants can now only access state health care after receiving identity documents, which may take up to six months. As a result, reception centre staff (who might otherwise focus their efforts on social work) report having to step into the gap to provide health care services and support residents with the completion of additional paperwork.⁸⁵ The crisis also saw government agencies shift personnel from one department or duty to another, often without the necessary information or training to perform their newly assigned duties. Faced with a rapid increase in the arrival of unaccompanied or separated children, for example, some local authorities in Italy improvised in how they appoint a legal guardian to each child.⁸⁶ In the absence of a well-developed voluntary guardian system, many reverted to an institutional guardianship system, in which the court appoints an institution or representative (e.g., a mayor or head of department) as the young person’s guardian. In 2015, when nearly 12,000 unaccompanied minors arrived in Italy, some social assistants in Milan were each made responsible for 50 to 60 children each and mayors in Sicily reportedly took on this role for up to 200 children.⁸⁷ This institutional guardianship quickly diminished the ability to identify and follow up on the needs, vulnerabilities, and interests of individual children.

Adopting a systems lens can make a significant difference in how policymakers analyse the performance of national and EU asylum systems and how they seek to resolve issues of disfunction. This type of analysis automatically steers beyond the legal level, raising questions such as ‘how are the different parts supposed to fit together?’ and ‘how can this be achieved in practice across a very diverse set of political, economic, and sociocultural contexts?’. The proposals to reform the CEAS put forward by the European Commission already include a greater level of dedication to systems thinking than previous reform efforts. Indeed, this increased commitment to addressing how EU legal provisions are operationalised can be seen in the more coherent set of sticks and carrots these proposals introduce to incentivise action on the part of both applicants and

84 Diego Cupolo, ‘Italy’s Migrant Reception System Is Breaking’, IRIN, 15 June 2017, www.irinnews.org/special-report/2017/06/15/italy%E2%80%99s-migrant-reception-system-breaking.

85 Ibid.

86 This approach is permitted under the recast Reception Conditions Directive and the recast Asylum Procedures Directive.

87 Defence for Children International-Italy, *SafeGuard, Safer with the Guardian: National Report Italy* (Rome: Defence for Children International-Italy, 2016), www.defenceforchildren.it/files/RAPPORTO_NAZIONALE_SG.pdf; author exchange with representative, United Nations Children’s Fund (UNICEF), November 2015.

government authorities, with the aims of preventing secondary movements and more closely monitoring and managing the use of emergency measures in case of heightened arrivals.⁸⁸

By asking pertinent questions, such as ‘who maintains oversight?’ and ‘who is mandated to make key decisions and steer stakeholder actions?’, a systems approach may also help decisionmakers overcome ambiguity and disagreements over which actors hold which responsibilities within the CEAS. At the national level, the practice of convening cross-governmental committees or task forces to coordinate action on issues involving asylum seekers and other migrants fully embraces this systems perspective. As EU actors become more willing to cooperate on an operational level, including in pursuing shared border and migration-management goals, those involved will need to address the question of who is to assign tasks and coordinate activities. Possible solutions may include the appointment of a Member State official to lead operations within their country or the creation of a more permanent position, such as EU High Commissioner of Migrant Affairs. Regardless, clarity on which actors are to lead, support, and monitor cooperative efforts will boost their chances of effectively addressing operational issues that contribute to systems weaknesses.

C. Whose voice matters when assessing the performance of asylum systems?

Most of the weak points of CEAS described in Section II are neither new nor unknown. Indeed, many a social worker in EU reception centres will have been confronted with these issues. Some NGOs and civil-society organisations operating in the EU or national asylum systems have sought to communicate these problem via public statements and reports.⁸⁹

However, the power of these actors to steer the ‘performance assessment’ of the CEAS and to feed into proposals for reform is limited, especially in comparison to that of lawyers and legal experts who specialise in the topic and are well versed in how to effectively address EU institutions. While civil-society actors are traditionally consulted in the monitoring studies commissioned by the European Commission, their stories are often filtered through or moulded by the legal perspective that permeates these studies. As such, these front-line players currently have a rather muted voice in the rethinking of asylum systems.

The policy domain of migration and asylum is also deeply affected by the tension between the desire to preserve national sovereignty and the need to devise transnational responses to transnational phenomena. When in 2008–09 the European Commission investigated how to promote practical cooperation within the European Union in the area of asylum,⁹⁰ NGOs and civil-society actors were found to be leading the way in terms of cooperation across national and regional borders. Acutely aware of the common problems present across these borders and of the fact that only a common/joint approach might eventually resolve the situation, these actors

88 For example, the European Commission’s proposal to revise the recast Reception Conditions Directive would require governmental authorities to devise a plan for situations in which a disproportionate number of third-country nationals apply for international protection on their territory. Member States must also immediately notify key EU actors when these emergency procedures or practices are triggered. Alongside this, the proposed regulation to setup the new EUAA would mandate the development of an indicator system to monitor the performance of reception systems across the European Union, and the new agency would be tasked with notifying the necessary EU actors when a particular reception system is performing suboptimally and may thereby jeopardise the overall functioning of the CEAS.

89 See, for example, Marina Spyridaki, ‘Mediterranean Migration: “Refugees Sleeping on the Streets of Kos Tell Me, ‘At Home We Had War, but at Least We Had Dignity”’, Medecins Sans Frontieres, 18 September 2015, www.msf.org/en/article/mediterranean-migration-%E2%80%9Crefugees-sleeping-streets-kos-tell-me-%E2%80%98-home-we-had-war-least-we.

90 For a summary of the 2009 feasibility study, see European Commission, ‘Commission Staff Working Document Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Establishing an European Asylum Support Office—Summary of the Impact Assessment’ (SEC [2009] 154, 18 February 2009), [www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/sec/2009/0154/COM_SEC\(2009\)0154_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/sec/2009/0154/COM_SEC(2009)0154_EN.pdf).

were in the vanguard in cooperating to improve, for example, reception practices (e.g., through the exchange of personnel, infrastructure, information, and skills).

For politicians, however, real or perceived threats to control over state territory, social cohesion, and cultural identity often loom large, at times making them reluctant to agree on and/or implement crossnational migration policy initiatives. Their voices often overshadow those of civil-society actors, who may be more readily willing to explore international or interregional solutions. The call to preserve national sovereignty at all costs that has been taken up by politicians in several EU Member States has, as a result, hampered efforts to conceptualise and adopt promising solutions for particular structural weaknesses (e.g., relocation schemes).

In this respect, there is a key role to be played by external monitoring and evaluation mechanisms in identifying shortcomings as core stakeholders—whether government actors or implementing partners—may face obstacles to spotting deficiencies and communicating them to a wider audience. For example, it may not be in the interest of governments to draw attention to weaknesses in the national asylum system, potentially stoking public mistrust in their ability to manage migration, and programme administrators may risk their position if they do so without authorisation from their political partners. Placing the monitoring and evaluation function outside this web of actors, all of whom have a stake in the analysis, may thus make it possible for a variety of stakeholders to feed information on structural weaknesses into the system while also presenting potential solutions from a more neutral, external position.

The call to preserve national sovereignty at all costs that has been taken up by politicians in several EU Member States has ... hampered efforts to conceptualise and adopt promising solutions.

IV. CONCLUSIONS

The structural shortcomings of European asylum systems are not a matter of small inconvenience, insignificant details that can be ignored as policymakers contemplate changing or even overhauling the CEAS. Acknowledging and effectively resolving these weaknesses is key to fostering the credibility and sustainability of both national and EU asylum systems. Failing to do so will further cripple public trust in the ability of government to manage migration and stunt efforts to build flexibility and resilience into asylum systems, with potential knock-on effects for the integrity of other EU systems.

The structural flaws of CEAS tug at the public trust that underpins asylum systems and grants them their legitimacy. Societies most readily agree to welcome those in need of protection when they are confident that their governing authorities can accurately identify those who qualify for protection, support their integration, and swiftly return those who do not qualify. This process, in turn, relies on solid and clearly defined criteria as well as a fair and efficient procedure for examining asylum applications. The range of shortcomings present in EU asylum systems—from vaguely defined grounds for granting international protection that result in differential treatment of similar applications, to the use of accelerated procedures that restrict applicants' opportunities to provide supporting evidence, and a shortage of qualified staff to carry out procedural steps in a reliably accurate and timely manner—chip away not only at the asylum system, but also at the public perception of it as a just system.

In addition, these structural weaknesses make it difficult for asylum systems to function reliably under both normal and emergency circumstances. Variations over time in the number of asylum seekers who arrive are an inherent—and hence 'normal'—feature of refugee flows. Asylum systems must therefore be agile enough to respond to regularly changing intake numbers, as well as to full-scale emergencies. Human and financial resources are needed to implement asylum policies, but they are not sufficient on their own to achieve this nimbleness. The very design of asylum systems should include an overarching strategy for how to expand and

contract operations swiftly, specifying the respective roles of system parts and stakeholders as well as how coordination and cooperation mechanisms would work. The measures that some national authorities have adopted to streamline the asylum procedure and tackle the ongoing backlog of asylum cases reflect this type of systems thinking (e.g., Belgium, Germany, the Netherlands, and Sweden).⁹¹ The early stages of asylum systems would benefit from a similar rethink, particularly as delays in registration, failure to register potential asylum seekers, and overcrowding of reception facilities are widespread and have far-reaching consequences (e.g., breakdown of the Dublin system). Redesigning these parts of the CEAS by drawing upon practices tested at the national level (e.g., distribution policies within countries, or collaboration between Austria and Slovakia) promises to significantly raise the overall stress-resistance of the asylum system.

Finally, asylum systems do not operate in a bubble. Faults in the asylum system cannot be ‘contained’ and have, for example, profound effects on the integration potential of would-be refugees. Delays in registration and lengthy asylum procedures hinder applicants’ access to the labour market, and uncertainties over an applicant’s legal status and ability to remain in a Member State in the long term can lower employers’ willingness to recruit and hire them even where they have a legal right to work.⁹² Similarly, the city or province into which an applicant for international protection is placed during the reception phase significantly shapes their integration trajectory in terms of access to social services, health care, and education and training opportunities, as well as the availability and nature of employment opportunities. The performance of the CEAS also has knock-on effects at EU level for policy domains such as Schengen, border control and management, security, and the prevention of terrorism. While many of these areas stretch beyond the scope of this report, their significance to the survival of the European Union cannot be underestimated. Indeed, many populist, anti-EU parties have zoomed in on these areas—attributing these weaknesses to poor EU governance—to call for national referendums to exit the European Union.

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Increased attention from the policy, practitioner, and research communities to these structural shortcomings is thus imperative to the development of CEAS 2.0—an upgraded asylum system that is able to weather unpredictable migration pressures and is interoperable with Schengen and other systems essential to the European project as a whole. The experimentation by governmental and nongovernmental actors at the national, regional, and local level both before and during the 2014–16 crisis has spawned new thinking on how to tackle some of the blind spots identified in this report. The next step is to collect and critically examine these experiments to better understand their successes, failures, and potential transferability to other contexts.

⁹¹ See, for example, the concept of an ‘asylum chain’ described in Kegels, *Getting the Balance Right*.

⁹² See, for example, Desiderio, *Integrating Refugees in Host Country Labor Markets*.

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