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# Humanitarian visas

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European Added  
Value Assessment  
accompanying the  
European  
Parliament's  
legislative own-  
initiative report  
(Rapporteur:  
Juan Fernando  
López Aguilar)

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STUDY

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European Added Value Unit  
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# Humanitarian visas

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## European Added Value Assessment accompanying the European Parliament's legislative own-initiative report (Rapporteur: Juan Fernando López Aguilar)

The European Parliament legislative own-initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union (TFEU) are accompanied by a European Added Value Assessment (EAVA). These assessments are aimed at evaluating the potential impacts and investigating the potential EU added value of proposals made in legislative own-initiative reports.

This particular EAVA accompanies the legislative own-initiative report prepared by the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Rapporteur: Juan Fernando López Aguilar (S&D, Spain)), presenting recommendations to the Commission on EU legislation on Humanitarian visas (2017/2270(INL)).

Firstly, it assesses the impacts of the status quo, in which 90 % of those granted international protection reach the European Union through irregular means. It argues that the EU and its Member States' failure to offer regular entry pathways to those seeking international protection undermines the achievement of their Treaty and fundamental rights obligations. This situation also has severe individual impacts in terms of mortality and damage to health, negative budgetary and economic impacts. Secondly, it assesses the potential added value of three shortlisted policy options for EU action in the area of humanitarian visas: a 'visa waiver' approach, limited territorial visas for asylum seeking purposes and, EU-wide international protection application travel permits. Finally, it concludes that EU legislation on humanitarian visas could close this effectiveness and fundamental rights protection gap by offering safe entry pathways, reducing irregular migration and result in increased management, coordination and efficiency in the asylum process, as well as promoting fair cost-sharing.

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## Executive summary

Humanitarian visas allow asylum-seekers to legally and safely access a third country. At present, the EU lacks a formalised humanitarian visa system. The number of persons admitted through other protected entry procedures (PEPs) and protection practices, such as resettlement programmes, community or private sponsorship schemes and 'humanitarian corridors' remains low in comparison with the need. Furthermore, resettlement caters only for those who are already declared refugees, without providing a means of access to those in need of international protection whose status is yet to be established. This means there is a lack of regular channels for those seeking international protection to reach the EU and lodge an asylum application. As a result, 90 % of those granted international protection reached the European Union through irregular means.

This European Added Value Assessment (EAVA) builds upon the two annexed research papers and identifies the impact of the lack of regular pathways to access international protection on the achievement of EU policy objectives and fundamental rights obligations. It argues that, at the moment, EU legislation does not provide clear and complete standards on admission to the EU for asylum seeking purposes and that there is no common understanding of the applicable practical arrangements. This situation calls into question the extent to which the EU and its Member States collectively fulfil their Treaty and fundamental rights obligations to guarantee the right to asylum.

This study also identifies the social, economic and budgetary impacts of the status quo at individual, Member State and EU level (the 'Cost of Non-Europe'). Beyond the denial of fundamental rights, the current situation has severe negative impacts on individuals, Member States and the EU. Individual impacts include the financial repercussions of paying smugglers, and heightened risks for trafficking, exploitation, violence and death. The EU and Member States also experience high direct costs. This is due to high levels of emergency funding, primarily allocated to border Member States, for the reception of asylum-seekers; the transfers of asylum-seekers to the Member State responsible for examining the asylum application; the processing of the asylum applications and the return of rejected asylum-seekers. The status quo also implies high indirect costs for the EU and Member States, which are related to efforts to control the inflow of migrants and asylum-seekers (e.g. border security and surveillance costs), search and rescue activities, and cracking down on criminals or members of organised crime networks that have exploited the refugee crisis for their personal gain.

This EAVA argues that a formalised humanitarian visa system at EU level would add value, by ensuring compliance with EU values, including fundamental rights. It would enhance mutual trust between Member States and confidence in the system for asylum-seekers, would provide legal certainty, predictability, uniform application and implementation of the rules. It would also result in the increased management, coordination and efficiency of the asylum process and the reduction of the above-cited status quo costs.

In particular, EU legislation on humanitarian visas would avoid fragmentation in policies and practices across the Schengen area, thereby enhancing its stability. In this context, it should be pointed out that in the absence of Union action, there has already been a dismantlement of existing PEPs at national level, due to fears that they would work as a 'pull factor' for migration. The adoption of a clear set of rules to access the Schengen area for the purposes of seeking international protection would allow for better screening of candidates, predictions of arrivals, and better preparation and coordination of post-arrival arrangements. Furthermore, EU intervention would allow for a reduction of current costs (in human lives; illicit smuggling and trafficking activity; and border and migration control and deterrence) and a reallocation of resources. Consequently, this would ensure the development of an integrated management system of the EU external borders in line with fundamental rights.

EU legislation on humanitarian visas would affect the Union's policies regarding asylum, border control and visa policy. Schengen Member States would be particularly affected, given that they have lifted internal border controls between them, barring exceptional circumstances. Different Member States' standards as regards the entry of asylum-seekers can undermine the Union's policy objectives in these areas, as has occurred in the past. The primary objective of the EU legislation on humanitarian visas would be to establish both the conditions for safe access to the Schengen space and to apply for international protection under EU law. Therefore, Article 77(2) (b) TFEU on the checks to which persons crossing external borders are subject, and (alternatively or concurrently) 78(2)(g) TFEU on partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection, would be the most appropriate legal basis.

This EAVA looks at three EU policy options that are feasible to adopt EU law on humanitarian visas, namely:

- 1) a 'visa waiver' approach;
- 2) limited territorial visas (LTV) for asylum-seeking purposes; and
- 3) EU-wide international protection application travel permits.

The expected costs and benefits of the identified options for EU legislation on humanitarian visas are determined, to some extent, by how asylum-seekers would respond to those options. A key factor to assess is whether those currently reaching the EU through irregular means will make use of the legal channel created. Applying economic theory, one may reasonably expect a significant portion of migrants travelling to the EU to seek asylum through irregular means to apply for an EU humanitarian visa, thus reducing irregular migration flows to the EU. The effect on those people of concern who would not migrate in the absence of the policy option is expected to be much smaller. Significant costs remain, even where a legal channel is opened. In any event, a controlled pilot of the preferred policy option, selecting certain refugee producing countries, categories of claimants etc., along with a robust monitoring system could provide a better picture of the practical impact on migration flows.

The visa waiver approach would have most benefits from an individual rights perspective, whereas the economic findings suggest that LTV and EU-wide international protection application travel permit options in particular would lead to increased management, coordination and efficiency in the asylum process, as well as promote fair cost-sharing across the Member States in line with the principles of subsidiarity and proportionality. An expansion of the European Asylum Support Office (EASO) staff and responsibilities could help ensure the effective implementation of these options.

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# 1. Introduction

Humanitarian visas allow asylum-seekers to legally and safely access a third country. Humanitarian visas fall within the category of protected entry procedures (PEPs).<sup>1</sup> Other PEPs and protection practices exist that meet individual or collective protection needs outside the territory of the Member States, such as resettlement<sup>2</sup> programmes, community or private sponsorship schemes,<sup>3</sup> and 'humanitarian corridors'.<sup>4</sup> A previous study suggests that as many as 16 Member States have or have had some form of PEPs in place.<sup>5</sup> Nevertheless, arrangements differ significantly between formulae and across Member States, in terms of selection criteria, referral mechanisms, procedures, status conferred, and post-arrival arrangements. Moreover, the number of persons admitted through all these schemes remains low<sup>6</sup> in comparison with the need. As a result, it has been estimated that 90 % of those granted international protection reached the European Union through irregular means.<sup>7</sup>

At present, the EU lacks a formalised humanitarian visa system. This means there is a lack of regular channels for those seeking international protection to reach the EU and lodge an asylum application. In particular as regards entry requirements it needs to be pointed out that the Schengen Borders Code (SBC) only includes generic references to the rights of refugees and persons requesting international protection and international obligations incumbent upon the Member States to guarantee these rights. The practical implications of these references for the treatment of these persons at the EU's external borders remain unclear.<sup>8</sup>

The Common European Asylum System (CEAS) instruments also remain largely silent on Member States responsibilities before the application for international protection has been made and lodged. This may lead to the erroneous dismissal of applications, or even forcing the person to return to a country or territory where he or she is likely to face persecution (refoulement). Furthermore, the CEAS is not applicable to requests for asylum submitted to representations of Member States.<sup>9</sup>

EU visa rules follow the logic of the SBC, anticipating entry controls to the stage of pre-departure. However, there is no explicit reference to the rights of those seeking international protection. To the contrary, as part of visa policy, refugee-producing countries are placed on blacklists and the applicants' intention to leave the territory before the visa expires is verified (which is per se contrary

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<sup>1</sup> For further background, also taking into account wider options for legal migration, see [Legal entry channels to the EU for persons in need of international protection: a toolbox](#), European Union Agency for Fundamental Rights, 2015.

<sup>2</sup> Resettlement consists of the selection and transfer of already-recognised refugees from a country of first asylum to a third State that agrees to admit them as refugees and grant them permanent residence; [UNHCR Resettlement Handbook](#). Negotiations concerning a proposal for a Union resettlement framework are currently ongoing (see EPRS legislative train schedule, [EU resettlement framework](#)). Moreno-Lax, section 3.1.1.

<sup>3</sup> Moreno-Lax, sections 3.1.2 and 3.1.3.

<sup>4</sup> Moreno-Lax, section 3.1.4.

<sup>5</sup> U. Jensen, [Humanitarian visas, option or obligation](#), Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2014.

<sup>6</sup> Progress report on the Implementation of the European Agenda on Migration, [COM\(2018\) 250 final](#), European Commission, March 2018.

<sup>7</sup> See [Exploring avenues for protected entry in Europe](#) Italian Council for Refugees (CIR), October 2012, p. 17; Moreno-Lax, section 1.1.

<sup>8</sup> Moreno-Lax, section 2.1.1.

<sup>9</sup> Moreno-Lax, section 2.1.2.

to lodging an application for asylum).<sup>10</sup> In accordance with the interpretation of the Court of Justice of the European Union (CJEU), Member States are currently not required to grant a humanitarian visa to persons who wish to enter their territory with a view to applying for asylum.<sup>11</sup> The SBC, CEAS and Visa Code therefore leave gaps in protection for refugees at of Member States' representations and at the EU's external borders.<sup>12</sup>

The Commission was originally favourable towards EU measures on humanitarian visas, even outsourcing a feasibility study.<sup>13</sup> As recently as 2013, the Commission was still referring to a holistic approach to maritime crossings and death at sea, including exploring the opening of legal channels to safely access the European Union.<sup>14</sup> However, since then its emphasis has shifted towards increasing border controls and cooperation with third countries, together with – limited – resettlement programmes.<sup>15</sup> In parallel with this policy shift, several Member State schemes have been abolished.

The European Parliament has however consistently called for the provision of humanitarian visas. In its 2016 resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, the European Parliament stated that persons seeking international protection should be able to apply for a European humanitarian visa directly at any consulate or embassy of a Member State, and that once granted, such a European humanitarian visa would allow its holder to enter the territory of the Member State which had issued the visa, for the sole purpose of lodging an application for international protection in that country.<sup>16</sup>

As part of the negotiations on the 2014 Commission proposal for a Visa Code,<sup>17</sup> a number of amendments aimed at the creation of a European humanitarian visa were included in the report adopted by Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).<sup>18</sup> However, during trilogue negotiations both Commission and Council opposed the inclusion of provisions on humanitarian visas in the Visa Code, with the Council refusing to continue negotiations if these amendments were not withdrawn. In September 2017, after several months of deadlock in the negotiations, Parliament's negotiating team withdrew the amendment in relation to the creation of a European humanitarian visa. Instead, a legislative own-initiative report has been drawn up (Rapporteur: Juan Fernando López Aguilar (S&D, Spain), (2017/2270(INL))), to call upon the Commission to present a separate legislative act on humanitarian visas. The legislative own-initiative report also includes recommendations as to the content of the proposal requested.

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<sup>10</sup> Moreno-Lax, section 2.1.3.

<sup>11</sup> Case [C-638/16 PPU](#), *X and X v État Belge*, March 2017.

<sup>12</sup> Moreno-Lax, section 2.2.

<sup>13</sup> G. Noll et al., [Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a Common Asylum Procedure](#), study carried out by the Danish Centre for Human Rights on behalf of the European Commission (Directorate General for Justice and Home Affairs), European Commission, 2002.

<sup>14</sup> Commission Communication on the work of the Task Force Mediterranean, COM (2013) 869, p. 2.

<sup>15</sup> A European Agenda on Migration, [COM \(2015\) 240](#), European Commission, 2015, at p. 5.

<sup>16</sup> Resolution of 12 April 2016 on the [situation in the Mediterranean and the need for a holistic EU approach to migration](#), European Parliament, para. 27.

<sup>17</sup> Proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code), [COM \(2014\) 0164 final](#), 2014.

<sup>18</sup> Draft European Parliament legislative resolution on the proposal for a [regulation of the European Parliament and of the Council on the Union Code on Visas \(Visa Code\)](#), 14 April 2016.

## 2. Impact of the lack of regular pathways towards accessing international protection

### 2.1. Legal and fundamental rights impacts

The lack of regular pathways to access international protection touches the core of EU values. Respect for these values, including fundamental rights, is underlined in various treaty articles<sup>19</sup> and the Charter of Fundamental Rights (CFR). It is also an explicit condition for external action.<sup>20</sup> This is reflected in the provisions on the Area of Freedom, Security and Justice (AFSJ), which demand these policies are developed with respect to fundamental rights.<sup>21</sup> The Treaty provisions on the CEAS underline the need to comply with the principle of non-refoulement, the Geneva Convention and other relevant treaties.<sup>22</sup> The prohibition of refoulement is covered by Article 4 of the Charter, mirroring Article 3 of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights. As discussed in the research paper by Dr Moreno-Lax, presented in full in Annex I, 'any action under EU law, such as entry rejection or a visa refusal, the consequence of which is to expose to ill treatment may well impinge upon Article 3 ECHR and Articles 4 and 19 CFR'.<sup>23</sup>

This situation calls into question the extent to which the EU and its Member States collectively fulfil their treaty and fundamental rights obligation to protect the right to asylum.

### 2.2. Individual impacts

In the research paper by Milieu, presented in full in Annex II, eight key impacts on persons in need of protection have been identified.<sup>24</sup> These impacts include:

- ✓ the risk of continued persecution of those who do not have the resources and those who are too vulnerable to seek to enter the EU through irregular means;
- ✓ the financial repercussions of paying smugglers;
- ✓ the heightened risks for mortality due to drowning, and starvation, peaking at over 5 000 deaths in 2016;
- ✓ sexual violence and trafficking; and
- ✓ poor reception conditions at arrival.

The limited legal pathways to the EU primarily affect two populations – 'other persons of concern' (see figure 1) and asylum-seekers. Other persons of concern include internally displaced persons (IDPs), who remain in the source country where they experienced persecution. Asylum-seekers to the EU account for 3 % of the persons of concern.

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<sup>19</sup> Articles 2, 6 TEU.

<sup>20</sup> Article 21 TEU.

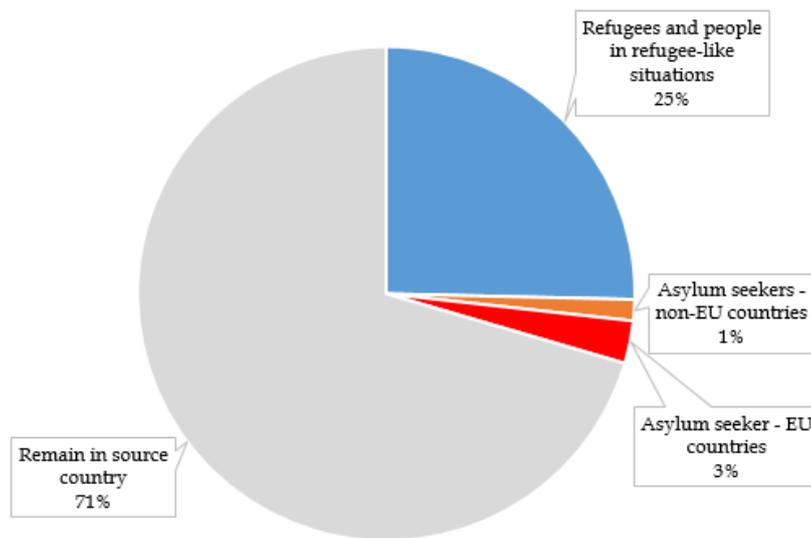
<sup>21</sup> Article 67 (1) TFEU.

<sup>22</sup> Article 78(1) TFEU.

<sup>23</sup> Moreno-Lax, section 4.2.1.

<sup>24</sup> Milieu, section 2.1 (individual impacts).

Figure 1: Persons of concern in 2016 – a global perspective



Source: Milieu, 2018, Chapter 2.

The table below presents an overview of the findings by Milieu on the impacts of the status quo on those individuals.

Table 1: Overview of individual impacts

Individuals affected	Type of impact	Assessment*
Other persons of concern	1. Risk of continued persecution (do not seek asylum).	An estimated 70 % of 'persons of concern' (47.7 million) remained in the source country in 2016. <sup>25</sup> These individuals are likely to be from vulnerable populations.
Asylum-seekers to the EU	2. Smuggler fees.	€3 050-32 000 per asylum seeker.
	3. Risk of trafficking and other exploitation.	79 % reported at least one of four human trafficking and other exploitative practices along the Central Mediterranean route; 9 % for the Eastern Mediterranean route.
	4. Mortality and health.	1.3-1.8 % estimated risk of mortality.
	5. Poor reception conditions.	97 % of arrivals to the EU in 2016 were in border Member States (Italy and Greece), causing work and cost imbalance and overload and ultimately poor reception conditions.
	6. Delays to integration.	Waiting periods delay the eventual decision on an asylum seeker's application and steps towards integration into society. For example, there is an estimated 6-12 month waiting period to lodge an asylum application in the EU.
	7. Risk of entry into the informal market.	Applicants whose application is rejected but that remain in the EU risk falling into the informal economy (estimated 24 % of applicants).
	8. Discrimination.	Lower earnings due to higher risk of assault (2-13 %) and lower probability of employment (2-8 % for racial/ethnic discrimination).

Source: Milieu, 2018, Chapter 2.

### 2.3. Impacts on the EU and Member States

The EU and Member States incur direct costs due to high levels of emergency funding under the Asylum Migration and Integration Fund, primarily devoted to border Member States for the reception of asylum-seekers, as well as transfers of asylum-seekers to the Member State responsible

<sup>25</sup> These individuals include returned refugees, internally displaced persons (IDPs), returned IDPs, persons under the UNHCR's statelessness mandate, and others of concern.

for examining the application for asylum, the processing of asylum applications and the return of rejected asylum-seekers.<sup>26</sup>

The table below presents an overview of the findings by Milieu on the impacts of the status quo on Member States.

Table 2: Overview of impacts on Member States

Type of impact	Assessment
Border security and surveillance	High burden on EU border countries (e.g. Italy, Greece)
Security and terrorism	See Cost of Non-Europe in the fight against terrorism <sup>27</sup>
Private shipping – search and rescue missions	€23 000 per year or up to €216 000 per operation <sup>28</sup>
Provision of reception	€34 per day, per individual <sup>29</sup>
Processing asylum applications	€4 834 for each application <sup>30</sup>
Cost of return	Forced return: €2 000 per individual <sup>31</sup> Voluntary return: €560 per individual <sup>32</sup>
Risk of entry into the informal market	An estimated 24 % of arrivals (approximately 300 000) disappear from the EU asylum system and remain in the EU
Complementary pathways of admission	Costs for Member States hosting refugees through national humanitarian admission programmes
Organised crime	See section III EU impacts

Source: Milieu, 2018, Chapter 2.

The review carried out by Milieu (see annex II) identified the following direct costs (2016 annual figures):

- €170 million to set up the CEAS;
- €73 million for the operation of the EASO; and

<sup>26</sup> Milieu, section 2.II (Member State impacts) and 2.III (EU impacts).

<sup>27</sup> W. van Ballegooij and P. Bakowski, [The fight against terrorism](#), Cost of Non-Europe Report, EPRS, May 2018.

<sup>28</sup> The cost depends on the type of private vessel, the distance that must be taken off-course, accessibility of the nearest port, etc. Lower bound cost sourced here: <https://fairplay.ihs.com/commerce/article/4266186/european-parliament-votes-to-protect-ship-masters-during-mediterranean-rescues>; the upper-bound figure was calculated based on the US\$50 000 mentioned here: <https://www.reuters.com/investigates/special-report/europe-migrants-ship/>. This was multiplied by the five days mentioned in delays. The figure was then converted into euro (note conversation rate based on June 2018 rate).

<sup>29</sup> Cost of Non-Europe Report in the area of asylum, EPRS, to be published in September 2018.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

- €2.3 billion for emergency funding for 'hotspots' and other supports.

The status quo also implies high indirect costs for the EU and the Member States, in terms of border security, surveillance, and search and rescue operations, as well as control of organised crime. Due to the lack of regular channels for asylum applications (and also to obtain work permits), mixed flows of economic migrants and refugees seek to access the EU at its external borders. EU agencies and Member State authorities face difficulties in distinguishing between the two categories. This also leads to a waste of financial resources. The 2014 EU budget for border control, irregular immigration deterrence, and related law-enforcement apparatus, exceeded €4 billion. The table below presents an overview of the indirect impacts of the status quo on the EU:

Table 3: Summary of indirect impacts for the EU (annual estimates)

Type of impact	Total annual cost	Assessment
1. Surveillance and border management.	€416 million	ISF: €7 million for EU actions and €73 million for emergency assistance; Frontex: €230 million; Temporary internal border controls: €106 million
2 Security and terrorism.	€13.6 billion	See Cost of Non-Europe on terrorism
3. Third country agreements.	€2.3 billion	Emergency Trust Fund for Africa: €833 million; Turkey agreement: €1.5 billion
4. Development cooperation.	€2.5 billion	Development cooperation: €1 million; Emergency funding: €2.5 billion
5. Organised crime.	€30 billion	Human trafficking: €30 billion; Europol Migrant Smuggling Centre: €5 million

Source: Milieu, 2018, Chapter 2.

Note: The cost estimates are annual estimates based on multi-year budgets spanning from 2014 to 2019.

## 3. EU humanitarian visas

### 3.1. Subsidiarity (necessity, relevance and EU added value)

Article 5(3) TEU encapsulates the principle of subsidiarity, which requires consideration of any factors that may determine the best level for measures, whether domestic or supranational, to comply with a particular Union objective. '[I]n areas which do not fall within its exclusive competence', as is the case of the AFSJ, 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

Different standards among Member States as regards the entry of asylum-seekers can and have undermined the Union's policy objectives, notably as regards the integrated management of external borders<sup>33</sup> and the achievement of a Common European Asylum System.<sup>34</sup> Several examples are mentioned in the research paper by Dr Moreno-Lax.<sup>35</sup> Most importantly they also undermine the citizens' trust in the EU's combined approach to the challenges of managing migration, achieving a high level of security, and safeguarding fundamental rights. Moreover, without a more homogenous policy approach, asylum-seekers will continue to reach EU shores through irregular, unsafe means, risking their lives in perilous voyages, collectively assimilated to the category of irregular migrants. Unless alternative pathways are opened, resettlement will, predictably, continue to be the only legal route to international protection in the EU, despite not providing a means of primary access to a durable solution, but catering only for those who have already been declared refugees. It is worth mentioning that currently resettlement numbers are quite small compared to the need.

A formalised humanitarian visa system at EU level would have added value, by:

- ✓ ensuring compliance with EU values, including fundamental rights;
- ✓ enhancing mutual trust between Member States and confidence in the system for asylum-seekers;
- ✓ providing legal certainty, predictability of application procedures, and the fair application and implementation of the rules; and
- ✓ reducing the costs of the status quo cited above.

Specifically, harmonisation of the relevant rules would avoid fragmentation in policies and practices across the Schengen area, thereby enhancing its stability.<sup>36</sup> In this context it should be pointed out that, in the absence of Union action, existing PEPs at national level have already been dismantled, due to fear that they might create a 'pull factor' for migration.<sup>37</sup> Those still in existence recently, cater to very modest numbers, as can be seen in table 4.

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<sup>33</sup> Article 77 TFEU.

<sup>34</sup> Article 78 TFEU.

<sup>35</sup> Moreno-Lax, section 5.3.1, (the necessity of EU-level intervention).

<sup>36</sup> Cf. European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, [P8\\_TA-PROV\(2018\)0228](#), paragraph 30: 'Stresses that safe, legal access to the EU, including at the external borders of the Schengen area, will help ensure the overall stability of the Schengen area'.

<sup>37</sup> Moreno-Lax, section 5.3.1, (the necessity of EU-level intervention).

Table 4: Member States with humanitarian admission programmes

Host country	Programme name	Countries targeted	Number of refugees 2013-2016
Austria	Humanitarian admission programme	Syria	1 668
Germany	Humanitarian admission programmes	Syria, Afghanistan, Palestine, Egypt, Libya, Iraq	20 047
Ireland	Syrian humanitarian admission programme (SHAP) and family Reunification HAP	SHAP – Syria FRHAP – all refugees	SHAP – 119 visas FRHAP – 530
France	Humanitarian admission programme	Syria	3 415
UK	Vulnerable persons relocation scheme (VPRS)	Syria (and, as of mid-2017, Iraq and Palestine)	10 538

Source: Milieu, 2018, Chapter 2.

Economies of scale can only materialise in an EU-wide context. The adoption of a clear set of rules to access Schengen territory for the purposes of seeking international protection would allow for better screening of candidates, predictions of arrivals, and better preparation and coordination of post-arrival arrangements. EU intervention would furthermore allow for a reduction in current costs (in human lives; illicit smuggling and trafficking activity; and border and migration control and deterrence), and a reallocation of resources. Ultimately this would ensure compliance with the obligation of developing an integrated management system for the EU's external borders in line with fundamental rights (Articles 67 and 77 TFEU).

### 3.2. Legal basis

As discussed in chapter 1, EU legislation on humanitarian visas would affect the Union's policies regarding asylum, border control and visa policy. Schengen Member States would be particularly affected, given that they have lifted internal border controls between them, barring exceptional circumstances.<sup>38</sup> The position of asylum-seekers crossing (or demonstrating an intention to cross) into an EU Member State's territory, reveals the cross-border nature of their situation, disclosing the 'EU-relevance' of the matter, and the need for EU-wide intervention to deal with the issue.

The primary objective of EU legislation on humanitarian visas would be to establish the conditions for safe access to the Schengen space to apply for international protection under EU law. Articles 77(2) (b) TFEU on the checks to which persons crossing external borders are subject and (alternatively or concurrently), and 78(2)(g) TFEU on partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection, would therefore provide the most appropriate legal basis.

### 3.3. Policy options

Next to the baseline scenario presented previously, this study has also explored three policy options:

#### Option 1: A 'visa waiver' approach

The visa waiver approach would only require a revision of the current visa lists in Regulation 539/2001 to either de-classify or suspend the visa requirement for nationals of top

<sup>38</sup>Cf. European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, [P8\\_TA\(2018\)0228](#).

refugee-producing countries, where risks to life and/or freedom are well known and freely ascertainable from publicly available and reliable sources. For an accurate selection of the countries concerned, it is proposed to draw on Eurostat and UNHCR data.

### Option 2: Limited territorial visas (LTV) for asylum-seeking purposes

A second option would be for Member State consulates to issue EU humanitarian visas allowing holders to access their territory. This would be carried out according to a dedicated legal instrument that harmonises issuing criteria and procedures, in line with the good administration and effective remedy standards set in Articles 41 and 47 CFR. The legal instrument would notably entail amendments to the LTV provisions in the Visa Code.

### Option 3: EU-wide international protection application travel permits

A third option would entail full centralisation of decision-making and distribution of applicants via specialised EASO teams making or coordinating assessments within European External Action Service (EEAS) representations abroad. However, it should be mentioned that this option would entail a number of consequences, including the adjustment of Dublin criteria; the creation of a distribution mechanism of successful applicants via predefined quotas per Member State; a preference-matching tool; a corrective system that accounts for children rights, family unity, and dependency links; and a compensatory tool to palliate any residual uneven distribution.

Whatever the option, qualification criteria must match non-refoulement guarantees, as per Articles 4 and 19(2) CFR, so that those with an 'arguable claim' of exposure to a 'real risk' of persecution or serious harm are granted a visa for asylum seeking purposes. Decisions should be taken *prima facie* and by fully competent and trained personnel. Procedural guarantees, including legal aid, information, translation, and representation must be provided, so as to preserve the right to be heard. Appeals against negative decisions and effective remedies must also be available.

## 3.4. Proportionality

Beside the principle of subsidiarity, the principle of proportionality, under Article 5(4) TFEU, requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. In this respect, there are different considerations to take into account, including the intensity of the EU action, the form it should take, and the costs it implies.<sup>39</sup>

The expected costs and benefits of the proposal for EU humanitarian visas are determined, to some extent, by how asylum-seekers would respond to the policy options. Currently asylum-seekers, by and large, have three options:

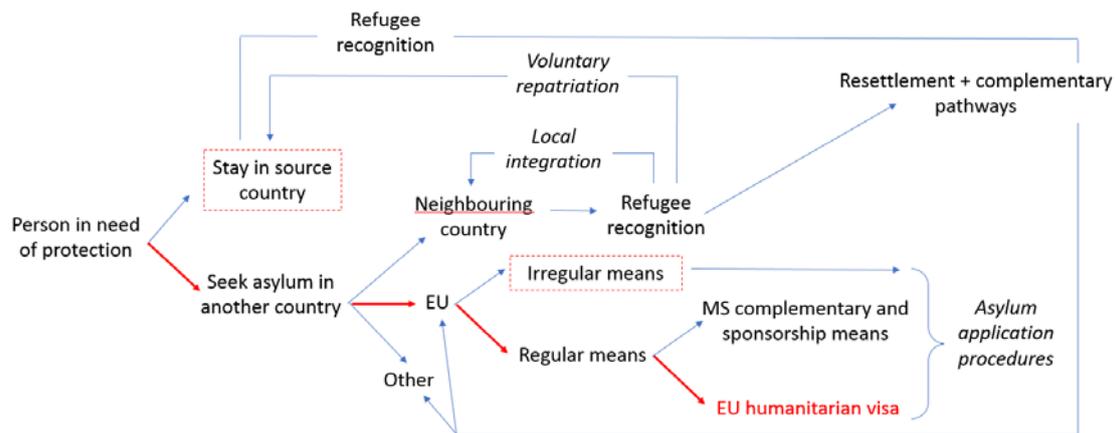
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<sup>39</sup> Better Regulation Toolbox No 5.

- 1) stay in the source country;
- 2) seek asylum in a neighbouring country; or
- 3) seek asylum in the EU through irregular means.

The introduction of EU humanitarian visas may lead to a shift in choice towards this new option. This is modelled in terms of the decision tree below.

Figure 2: Decision tree for a hypothetical person in need of protection



Source: Milieu, 2018, Chapter 3.

Since the new legal tool would reduce the cost of (and some of the risks associated with) seeking asylum, a significant portion of migrants seeking asylum in the EU through irregular means could be expected to apply for an EU humanitarian visa, thereby reducing irregular migration flows to the EU. The level of substitution may, in principle, reach up to 100 %, where all asylum seekers who would have pursued an irregular channel now pursue the new legal channel. In practice, however, the level of substitution may depend on the implementation of the policy option, its accessibility, and the perception of fairness. Under the reasonable assumption that asylum seeking is relatively 'inelastic' in cost, it is expected that the number of people who would apply for an EU humanitarian visa, among those who would have otherwise stayed in the country of origin, is relatively small. This especially applies to the LTV and EU-wide international protection application travel permit options.

However, as indicated in table 5 below, significant costs remain, which would limit the appeal of seeking asylum in the EU, even where a legal channel is offered. The stress and social costs (e.g. leaving one's community behind) would be high. The financial cost would be less, but may still be quite significant for individuals, particularly if they are from more vulnerable populations.

Table 5: Overview of costs faced by individuals in need of protection

Key types of risks/costs	Status quo		EU scheme for humanitarian visas (policy options 1-3)
	Stay in source country	Seek asylum in the EU via irregular means	
Persecution	High	Low	Low
Financial costs	Low	Very high	Medium-high
Risk of trafficking and other exploitation	Low	High	Low
Mortality and health	Medium-high	High	Low
Isolation from family and community	Low	High	High

Source: Milieu, 2018, Chapter 3

A controlled pilot of the preferred policy option, selecting certain refugee producing countries, categories of claimants etc., along with a robust monitoring system, could provide a better picture of the practical impact on migration flows.<sup>40</sup>

The visa waiver approach would have most benefits from an individual rights perspective, whereas the economic findings suggest that the visa waiver option would have the lowest set-up costs and the highest benefits for individual asylum-seekers. From the perspective of the EU and its Member States, however, the LTV and EU-wide international protection application travel permit options would offer greater benefits that stem primarily from the reduction of reception and return costs in the post-arrival phase. An expansion of EASO staff and responsibilities could help ensure the effective implementation of these options. In general these options would lead to increased management, coordination and efficiency in the asylum process, as well as promoting fair cost-sharing across the Member States that are in line with the principles of subsidiarity and proportionality.<sup>41</sup>

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<sup>40</sup> Milieu, Chapter 3; Moreno-Lax, Chapter 5.

<sup>41</sup> Milieu, Chapter 4.

Table 6: Comparative analysis of the policy options as opposed to the status quo

	Individual rights perspective	Reduction of irregular entries into the EU	Pre-arrival security and control	Legal changes required	Cost-savings
<b>Policy Option 1:</b> visa waiver approach	+++	++	+	+++	+
<b>Policy Option 2:</b> Limited territorial visas	++	+++	+++	++	++
<b>Policy Option 3:</b> EU-wide international protection application permits	++	+++	+++	+	++

Key: '--' highly negative; '-' negative; '++' highly positive; '+' positive; '=' neutral

Source: EPRS, taking account of Milieu, 2018, Table 3 (comparison of policy options with the status quo – individual's perspective), table 4 (comparison of policy options with the status quo, Member State and EU perspectives), and Moreno-Lax, table on p. 15 of the executive summary.



# ANNEX I

## The Added Value of EU Legislation on Humanitarian Visas – Legal Aspects

Research paper  
by Dr Violeta Moreno-Lax

### Abstract

The present research paper undertakes an in-depth evaluation of the added (legal) value of legislation that may be proposed for adoption by the European Parliament via its Legislative Own-Initiative Report on Humanitarian Visas. As part of this process, this research focuses on the **main issues** pertaining to **access to international protection in the EU Member States** and situates the **debate on humanitarian visas** within its **wider context**, acknowledging that up to 90% of subsequently recognised refugees and beneficiaries of subsidiary protection in the EU reach the territory of the Member States irregularly and, often, through life-threatening routes. The research finds that this is due to the **lack of clarity and completeness of the rules on admission for asylum seeking purposes under Schengen norms** and to the absence of a common understanding of the applicable practical arrangements. As a result, **Member States have developed discretionary procedures of humanitarian admission**, using different methods and based on different criteria. Against this background, the **need for a harmonised approach at EU level** is pressing, to avoid fragmentation undermining the existing *acquis*. **The Charter of Fundamental Rights, in particular the prohibition of *refoulement***, may **render the issuance of visas for seeking asylum purposes compulsory in certain circumstances**. This obligation must thus be taken into account, alongside **legitimate Member State concerns**, considering numbers, resource implications, and the workability of the ensuing EU scheme, **in devising necessary and proportionate action**. With this in mind, the study examines questions of competence, legal basis, subsidiarity and proportionality, and carries out an **assessment of the pros and cons of several policy options** at EU level.

#### **AUTHOR**

This study has been written by **Dr Violeta Moreno-Lax**, Senior Lecturer in Law, **Queen Mary University of London** at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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## ABBREVIATIONS

AFSJ – Area of Freedom, Security and Justice  
APD – Asylum Procedures Directive  
CCME – Churches Commission for Migrants in Europe  
CCV – Community Code on Visas  
CEAS – Common European Asylum System  
CFR – Charter of Fundamental Rights  
CFSP – Common Foreign and Security Policy  
CIR – Italian Council for Refugees  
CISA – Convention Implementing the Schengen Agreement  
CJEU – Court of Justice of the European Union  
CM – Common Manual  
DR – Dublin Regulation  
EASO – European Asylum Support Office  
ECHR – European Convention on Human Rights  
ECRE – European Council on Refugees and Exiles  
ETIAS – European Travel Information and Authorisation System  
FRA – Fundamental Rights Agency  
GC – Geneva Convention  
HAP – Humanitarian Assistance Programme  
ICMC – International Catholic Migration Commission  
IOM – International Organisation for Migration  
LBT – Local Border Traffic  
LTV – Limited Territorial Validity Visa  
MPI – Migration Policy Institute  
PEP – Protected-Entry Procedure  
QD – Qualification Directive  
RCD – Reception Conditions Directive  
RSD – Refugee Status Determination  
SBC – Schengen Borders Code  
TCN – Third-Country National  
TEU – Treaty on European Union  
TFEU – Treaty on the Functioning of the European Union  
UNHCR – United Nations High Commissioner for Refugees  
VCRS – Vulnerable Children’s Resettlement Scheme  
VHAS – Voluntary Humanitarian Admission Scheme  
VIS – Visa Information System  
VPRS – Vulnerable Person Resettlement Scheme

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## EXECUTIVE SUMMARY

The present research paper undertakes an in-depth evaluation of the added (legal) value of legislation that may be proposed for adoption by the European Parliament via its Legislative Own-Initiative Report on Humanitarian Visas. As part of this process, the purpose of this research is to support the European added value assessment accompanying the European Parliament's legislative initiative.

**Chapter 1** sets the general background and identifies the **main issues** pertaining to **access to international protection in the EU Member States** and situates the **debate on humanitarian visas** within its **wider context**. The main problem detected is that up to 90% of the total population of subsequently recognised refugees and beneficiaries of subsidiary protection in the EU reach the territory of the Member States irregularly and, often, through life-threatening routes. This is due to the lack of clarity and completeness of the rules on admission for asylum seeking purposes under the Schengen *acquis* and to the absence of a common understanding of the applicable arrangements. As a result, **Member States have developed discretionary procedures of humanitarian admission**, using different methods and based on different criteria. The **need for a harmonised approach at EU level** is, thus, pressing and responds to repeated calls by multiple actors to this effect. **Legitimate Member State concerns must be taken into account in this endeavour**: considering numbers, resource implications, and the workability of the ensuing EU scheme, **alongside and in the light of their obligations flowing from the Charter of Fundamental Rights**. The examination of the regulatory framework, lessons learnt from experiences at national and EU level, questions of competence, legal basis, subsidiarity and proportionality, compatibility with fundamental rights, and an assessment of the pros and cons of policy options is, therefore, necessary.

On this basis, **Chapter 2** examines how **entry requirements for asylum seekers** have been regulated in EU law, concluding these are **unclear and incomplete**. Neither the Schengen nor the asylum or visa *acquis* set the norms applicable, which has **led to asylum seekers being assimilated to** the category of **'irregular migrants'** before arrival. Although the **Schengen Borders Code (SBC)** aims to establish the norms applicable to the control of 'persons' (without qualification) crossing, or showing an intention to cross, the external borders of the Member States, the **situation of asylum seekers** has **not been fully taken into account**, neither by the general criteria in Article 6 SBC, nor by its exceptions. **Asylum seekers** are thus **placed in the impossible situation of having to show willingness and ability to return** to their countries of provenance to be allowed entry, while, at the same time, should they be capable of return, that very factor would determine their exclusion from international protection under the Qualification Directive.

Although the application of the Schengen Borders Code should be in line with 'obligations related to access to international protection' (Article 4 SBC), despite the Code being 'without prejudice to the rights of refugees and persons requesting international protection' (Article 3(b) SBC), and that refusal of entry 'shall be without prejudice to the

application of special provisions concerning the right to asylum and to international protection’ (Article 14(2) SBC), **these provisions, as currently interpreted and applied, do not provide adequate protection.** From its part, the **Community Code on Visas (CCV)**, as construed by the CJEU in *X and X*, **does not cover the situation of asylum seeking visa applicants**, who, in the Court’s view, fall outside the scope of the CCV, since the instrument intends to solely set the rules applicable to short-term visas. **The asylum *acquis* is of no avail either, as its instruments concern themselves with ‘applicants’ for international protection, who formally lodge an asylum claim, but without regulating access to the system itself.**

Against this background, **Chapter 3** explores Protected-entry Procedures (**PEPs**) at EU and domestic level. In recent times, PEPs have taken the form of **resettlement programmes, community or private sponsorship schemes, and ‘humanitarian corridors’**. Yet, **arrangements differ significantly** between formulae and across Member States, in terms of selection criteria, referral mechanisms, procedures, status conferred, and post-arrival arrangements.

	RESETTLEMENT	SPONSORSHIP	HUMANITARIAN CORRIDORS	ASYLUM SEEKER VISAS
SELECTION	Vulnerability, but also other non-protection-related criteria (e.g. integration potential, health, language skills, family links)	Vulnerability, but also other non-protection-related criteria	Vulnerability-based	<i>Refoulement</i> -based [Qualification Directive-compliant]
REFERRAL	By UNHCR	By pre-authorised community or private sponsor	By pre-authorised community sponsor	Self-referral by claimant herself
PROCEDURE	Refugee status determination (RSD) by UNHCR, security and health checks, and pre-departure interview(s) by resettling State authorities	No standard RSD, security, health and other checks, and pre-departure interview(s) by receiving State authorities	No standard RSD, security, health and other checks by receiving State authorities before arrival	Coherent with Articles 41 and 47 CFR, including procedural guarantees and effective remedies
STATUS	1951 Convention refugee status	1951 Convention refugee or other status under domestic law	Access to asylum procedures under Asylum Procedures Directive (APD)	Access to asylum procedures under APD
BASIS	Solidarity vis-à-vis first countries of asylum	Favour post-arrival integration	Solidarity vis-à-vis beneficiaries	Individual rights-based
OUTCOME	Secondary means of access to durable solution for recognised	Secondary means of access to durable solution for vulnerable	Primary means of access to RSD for asylum seekers	Primary means of access to RSD for asylum seekers

	refugees	categories		
RATIONALE	Access to 'better' protection	Varied [from family reunion to humanitarian]	Access to protection via safe and lawful channel	Access to protection via safe and lawful channel
ACCOUNTABILITY	Little transparency. Blurred responsibility between State and UNHCR. No specific remedies	Little transparency. Blurred responsibility between State and private sponsors. No specific remedies	Little transparency. Blurred responsibility between State and private sponsors. No specific remedies	Full transparency. Articles 41 and 47 CFR-compliant
SCALE	Small, but upscaling via EU framework	Small	Small	Potential for higher, EU-harmonised scale
RESOURCES	Member States / EU	Private sponsors [risk of commodification / privatisation of protection]	Private sponsors [risk of commodification / privatisation of protection]	Potential for EU only

On the **positive side**, all schemes concerned are based on the **principles of additionality and complementarity**, intending to offer **safe and regular alternatives to 'spontaneous arrivals'** other than via smuggling and trafficking routes; the programmes are **managed** and allow for a **high level of screening and control** over applicants; they garner the **support of UNHCR** and other specialised organisations; the **involvement of private and community sponsors facilitates integration** and diminishes risks of disengagement with the system by potential beneficiaries; and all programmes constitute a display of **solidarity** with beneficiaries and countries of first asylum.

On the **negative side**, though, the **numbers** catered for are small; programmes tend not to be open-ended, but quota-based, geographically bounded and limited in time; **processing periods** are long; **selection criteria** complex and not always protection-related; **few initiatives allow for self-referral** and instead rely on UNHCR or private sponsors to first identify potential beneficiaries; the involvement of private actors produces **selectivity issues**, considering the amount of **resources and expertise required**, leading to **risks of 'privatisation / commodification' of protection**; publicity, transparency, and predictability need improvement to align with **legal certainty** and rule of law standards; all schemes are based on **sovereign discretion** (as of *favour*) rather than on the legal strength of protection obligations (as of *right*); and most of them provide for a **secondary means of access to protection** by already-recognised refugees, instead of granting a primary way for unrecognised claimants to reach Schengen territory and apply for asylum on arrival.

**Chapter 4** examines **primary law**, including the EU Charter of Fundamental Rights (CFR), concluding that it **demands that safe and legal pathways be created**, even if the CJEU has not stated that explicitly yet. The Chapter thus **contests the prevailing understanding** on which PEPs are based, i.e. **that there is no obligation to grant access to Schengen domain for the purposes of seeking asylum under current rules**. Despite

the final conclusion in the *X and X* judgement, declaring the inapplicability of the CCV to asylum seeking visa applicants, it is posited that there is **no legal or rational basis to exclude asylum seekers from the generic category of ‘third country nationals’,** to whom Schengen visas are addressed under Regulation 539/2001, **or from the group of ‘persons crossing’ or ‘showing an intention to cross’ the external borders of the Member States, to whom EU admission criteria apply** under the Schengen Borders Code. The same is true at primary law level (Article 77(2)(b) TFEU). **This being the case, fundamental rights must be understood to be relevant** in this context, as per the *Fransson* ruling.

**Fundamental rights** penetrate the EU legal order *qua* **founding values** (Article 2 TEU), as **primary law** (Article 6 TEU and Charter of Fundamental Rights), **and at secondary law** level (Article 4 SBC and Recital 29 CCV). They are **all-pervasive** and **govern** the development of the **AFSJ at large** (Article 67 TFEU), including border control and visa policy, **as well as the** construction of a Common European Asylum System (CEAS), in particular (Article 78 TFEU). The CFR applies whenever a situation falls to be governed by EU law, with territoriality not being decisive. **Any time the EU or the Member States act within the scope of EU law** (Article 51 CFR), the **Charter becomes applicable**.

Crucially for current purposes, **this includes the protection against *refoulement*** contained in **Articles 4 and 19(2) CFR**, which consolidate the substance of Article 3 ECHR as interpreted by the European Court of Human Rights in its case law. As a result, **any measure**, including a rejection of entry or a visa refusal **under Schengen rules**, ‘the effect of which is to prevent migrants from reaching the borders of the [Member] State [concerned]’ may amount to *refoulement* (*Hirsi*, para. 180) and, **if it exposes the applicant to persecution or serious harm, must be forbidden**. What is more, in line with *Căldăraru*, Member States, when confronting situations representing a risk of ill treatment are **obliged to take positive action** to avert it, which, in the concrete case, if there are no other practicable alternatives, **may require the delivery of a visa**.

**Chapter 5**, drawing on the conclusion from Chapter 4 that further EU action to ensure safe and legal pathways is required, explores the **scope for EU level intervention** on this point, addressing questions of competence, legal basis, subsidiarity and EU added value, to establish the adequacy of EU action.

The chapter identifies several provisions in the TFEU, which may provide a **legal basis** for the adoption of a **EU instrument on humanitarian visas**, including: **Article 77(2)(a) TFEU**, on common visas; **Article 77(2)(b) TFEU**, on controls on ‘persons...crossing...[the EU] external borders’; **Article 78(2)(g) TFEU**, calling on the EU legislator to adopt measures, as part of the CEAS, aimed at ‘managing the *inflows* of people applying for [international] protection’; and **Article 79(2)(a) TFEU**, offering a basis for the adoption of long-term visas and residence permits to third country nationals. And it concludes that, **considering the subject matter of the issue to regulate and the primary objective pursued**, i.e. to establish the conditions for access to Schengen space to apply for international protection under EU law, **Articles 77(2)(a)-(b) and (alternatively or concurrently) 78(2)(g) TFEU are the most appropriate**.

Regarding **subsidiarity**, since uncoordinated action may upset the **well functioning of the Schengen regime**, undermining the uniform application of the common entry rules agreed in the SBC and affecting mutual trust, the **principle of pre-emption** is said to preclude individual Member State initiatives and to **require EU-level intervention** instead. A **uniform understanding of the rights / obligations at stake** is essential for the **integrity of the current *acquis***.

Regarding **EU added value**, it is observed that **economies of scale** can only be achieved at EU level. EU intervention will allow for a **reduction of current costs** (in human lives; illicit smuggling and trafficking activity; and border and migration control and deterrence) and a **re-allocation of resources** to ensure compliance with the obligation of developing an integrated management system of the EU external borders in line with fundamental rights (Articles 67 and 77 TFEU).

On the conclusion that EU level action is necessary, **Chapter 6** deals with the question of **proportionality** and identifies **three main possibilities** that are available to the EU legislator **to harmonise the criteria applicable to the admission of asylum seekers into Schengen territory**, with varying degrees and intensity of EU intervention.

1. The **visa waiver approach** is presented first. This formula only needs a **revision of the current visa lists in Regulation 539/2001** to either de-classify or suspend the visa requirement for nationals of top refugee-producing countries, where risks to life and/or freedom are well known and freely ascertainable from publicly available and reliable sources. For accuracy, the selection of the countries concerned, it is proposed, should draw on EUROSTAT and UNHCR data.
2. A different option would be for **EU humanitarian visas** to be **issued by Member State consulates abroad**, according to a dedicated instrument that harmonises issuing criteria and procedures, in line with the good administration and effective remedy standards in Articles 41 and 47 CFR. It is suggested that a **reformed set of LTV provisions** may be useful to this effect.
3. A third variant entails **full centralisation of decision-making and post-arrival distribution of applicants** via specialised EASO teams making or coordinating assessments within EEAS representations abroad. This requires **adjustment of the Dublin regime** via the creation of a **distribution mechanism** of successful applicants via **predefined quotas** per Member State, a **preference-matching tool**, a **corrective system** that accounts for children rights, family unity, and dependency links, and a **compensatory tool** to palliate any residual unevenness in the final allocation.

Whatever the option, **qualification criteria must match *non-refoulement* guarantees**, as per Articles 4 and 19(2) CFR, so that those having an 'arguable claim' of exposure to a 'real risk' of persecution or serious harm are granted a visa for asylum seeking purposes. **Decisions** should be taken *prima facie* by fully competent and trained personnel and not

replace or anticipate full RSD. **Procedural guarantees**, including legal aid, information, translation, and representation must be provided, so as to preserve the right to be heard. **Appeals** against negative decisions and **effective remedies** must also be available.

To address ‘**floodgates**’ and **resource concerns**, any of the above formulae can first be piloted in a controlled environment, **selecting** particular **countries**, specific **categories of claimants** (e.g. children or other particularly vulnerable profiles), and/or periods of **time**, prior to complete roll out; **collaborating with private service providers**, including UNHCR and specialised NGOs; and **making use of technology** and e-means to facilitate application processing.

The table below summarises the key considerations to bear in mind when selecting the preferred policy option:

	BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENTS	COMPLIANCE WITH FUNDAMENTAL RIGHTS	PRE-ARRIVAL SECURITY AND CONTROL	SOLIDARITY AND FAIR-SHARING OF RESPONSIBILITY
VISA WAIVER	+++	+++	+++	+++	+	++
LTVs	+	++	++	+	+++	+
EU ASYLUM SEEKER VISAS	++	+	+	++	++	+++

Chapter 6 elaborates on the individual criteria, their relative importance, and their suitability to address the problem of access to the CEAS by its addressees, while maintaining the integrity of Schengen, and the principles of mutual trust and solidarity. It concludes that the **best option** is the **visa waiver route**, followed by the EU asylum seeker visa. The Member State-issued LTV solution runs the risk of not meeting the final objective pursued, unless the scope for free riding and defaulting is offset via a robust monitoring and sanctioning mechanism that penalises non-compliance.

However, on the consideration that sufficient political consensus may not be immediately available for the adoption of the visa waiver option, a **phased approach**, combining the key benefits of each proposal is recommended, with an improved **Member State LTV regime representing the first step** towards an integrated EU-wide scheme of asylum seeker visas, and with the EU visa waiver approach marking the final destination.

## CHAPTER 1. EU HUMANITARIAN VISAS?

### KEY FINDINGS

- While a Common European Asylum System (CEAS) is being developed, currently, **up to 90% of the total population of subsequently recognised refugees and beneficiaries of subsidiary protection reach the territory of Member States and access the CEAS irregularly**, due to the very limited legal pathways the EU offers.
- For many, this leaves **no option but to risk their lives on a perilous journey**, including across the Mediterranean – where an estimated 23,000 to 33,000 persons have perished since records began.
- **Most Member States have, or have had at some point, discretionary procedures of humanitarian admission**, using different methods and based on different criteria, facilitating access to their territories for protection-related purposes.
- Neither the European Commission, nor the Court of Justice (CJEU) have interpreted there to be a basis to issue visas for the purposes of claiming asylum, ‘as European Union law currently stands’ (*X and X*, para. 51). On the other hand, the **European Parliament** and the **Commission** itself have **repeatedly called on the EU legislature to adopt legislative measures in this regard**.
- The **necessary EU intervention** to fill the **fundamental rights** protection gap should take account of the **principles of subsidiarity and proportionality**, and consider **legitimate Member State concerns** when devising appropriate action.

### 1.1 General Background and Main Issues

The problem of access to asylum in Europe remains as salient as ever.<sup>1</sup> It has been estimated that **up to 90% of the total protection seekers** granted a form of international protection in the EU,<sup>2</sup> whether refugee status or subsidiary protection as per the

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<sup>1</sup> For a thorough discussion, see Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017). See also Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012); and Gammeltoft-Hansen, *Access to Asylum* (CUP, 2011). Generally on EU asylum policy, see Peers et al., *EU Immigration and Asylum Law*, Vol. 3 (Brill, 2<sup>nd</sup> rev. edn., 2015); Hailbronner and Thym (eds) *EU Immigration and Asylum Law* (Hart/Beck/Nomos, 2<sup>nd</sup> rev. edn., 2016); Chetail, De Bruycker, and Maiani (eds), *Reforming the Common European Asylum System* (Brill, 2016).

<sup>2</sup> See Italian Council for Refugees (CIR), *Exploring avenues for protected entry in Europe* (October 2012), p. 17, at: <https://www.fluechtlingshilfe.ch/assets/asylrecht/rechtsgrundlagen/exploring-avenues-for-protected-entry-in-europe.pdf>; and European Council of Refugees and Exiles (ECRE), *Broken Promises – Forgotten*

Qualification Directive terms,<sup>3</sup> **reach the Member States through irregular channels** as irregular migrants.<sup>4</sup> The lack of safe and legal pathways to protection makes recourse to smuggling and trafficking rings a structural necessity – currently, despite the recognition of a ‘right to asylum’ in the Charter of Fundamental Rights,<sup>5</sup> there are no means to reach the EU safely and legally for the purposes of applying for international protection, as defined in the asylum *acquis*. For many, this leaves no option but to risk their lives on a perilous journey,<sup>6</sup> including across the Mediterranean—where an estimated 23,000 to 33,000 people have perished since records began.<sup>7</sup>

Some Member States (actually, more than half of them) have, at some point, entertained discretionary procedures of humanitarian admission—whether on asylum-related, medical, or purely compassionate grounds.<sup>8</sup> The typology has been diverse—ranging from emergency evacuation, to individual resettlement, and private sponsorship schemes.<sup>9</sup> Such variety of methods responds to the **sovereign discretion understood to underpin the programmes**, and upon which subsequent admission to the country concerned has been granted.

In fact, neither the European Commission,<sup>10</sup> nor the Court of Justice (CJEU),<sup>11</sup> have interpreted there to be a basis in EU law to issue visas for the purposes of claiming asylum, at least ‘as European law currently stands’.<sup>12</sup> As per its judgment in *X and X*, the latter believes that, ‘since ... no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals (TCN) on humanitarian grounds, [these measures, in their view] fall solely within the scope of national law’.<sup>13</sup> For the CJEU, the Community Code on Visas (CCV) only regulates the

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*Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004* (June 2004), p. 17, at: <[https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Broken-Promises-%E2%80%93-Forgotten-Principles-An-ECRE-evaluation-of-the-development-of-EU-minimum-standards-for-refugee-protection\\_June-2004.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Broken-Promises-%E2%80%93-Forgotten-Principles-An-ECRE-evaluation-of-the-development-of-EU-minimum-standards-for-refugee-protection_June-2004.pdf)>.

<sup>3</sup> Qualification Directive 2004/83, [2004] OJ L 304/12 (‘QD’).

<sup>4</sup> ‘Irregular migrant’ refers herein to every third-country national who enters a EU Member State without complying with the entry criteria specified in Art 6 of the Schengen Borders Code, Regulation (EU) 2016/399, [2016] OJ 77/1 (‘SBC’). In turn, ‘asylum seeker’ refers to those amongst them in need, and in search, of ‘international protection’ as defined in Art 2(a) QD. Finally, ‘refugee’ and ‘person eligible for subsidiary protection’ relates, then, to those meeting the definitions contained in Arts 2(d) and 2(f) QD respectively.

<sup>5</sup> Art 18, Charter of Fundamental Rights of the European Union, [2010] OJ C 83/2 (‘CFR’).

<sup>6</sup> Acknowledging this reality, see *Towards a Reform of the CEAS*, COM(2016) 197, p. 14.

<sup>7</sup> For relevant estimates, see IOM, *Missing Migrants Project* (March 2018): <<https://missingmigrants.iom.int/>>. Cf. UNITED, *List of 33.305 documented deaths of refugees and migrants due to the restrictive policies of Fortress Europe* (June 2017) <<http://www.unitedagainstracism.org/wp-content/uploads/2017/06/UNITEDListOfDeathsActual.pdf>>.

<sup>8</sup> For a recent survey, Iben Jensen, *Humanitarian Visas: Option or Obligation?*, PE 509.986 (September 2014) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU%282014%29509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU%282014%29509986_EN.pdf)>.

<sup>9</sup> See, e.g., FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* (March 2015) <<http://fra.europa.eu/en/publication/2015/legal-entry-channels-eu-persons-need-international-protection-toolbox>>.

<sup>10</sup> Commission Decision establishing the Handbook for the processing of visa applications and the modification of issued visas, C(2010) 1620 (‘Visa Handbook’).

<sup>11</sup> Case C-638/16 PPU, *X and X*, ECLI:EU:C:2017:173.

<sup>12</sup> *Ibid.*, para. 51.

<sup>13</sup> *Ibid.*, para. 44.

conditions and procedure for issuance of short-term visas, and visas with a view to applying for asylum ‘fall outside the scope of that code’.<sup>14</sup> Yet, the assertion requires further analysis.<sup>15</sup> Whether visa applications for the purpose of seeking international protection do ‘fall outside *the scope of that code*’, as presently drafted, implying that ‘the situation at issue...is not, therefore, governed by EU law [*at all*]’,<sup>16</sup> is examined in detail in Chapter 4.

What is certain is that, for the time being, Protected Entry Procedures (PEPs) have never been harmonised at EU level, despite several recent calls to this effect from different quarters, including the European Parliament itself.<sup>17</sup> The possibility of a dedicated EU system of admission for asylum-seeking purposes has been intimated by the Commission on several occasions. The measure was thoroughly examined in a Feasibility Study back in 2002,<sup>18</sup> resurfacing the debate again in the context of the 2006 Green Paper on Asylum,<sup>19</sup> and making the object of specific attention in the 2009 Stockholm Programme.<sup>20</sup> A commitment to a ‘holistic approach’ to deal with maritime crossings and death at sea, including the opening of ‘legal channels to safely access the European Union to be explored’, was reiterated in 2013 in the Task Force Mediterranean Communication.<sup>21</sup>

Most recently, the Communication on *An open and secure Europe*, posits that PEPs ‘could complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines’.<sup>22</sup> However, neither the guidelines nor the coordinated approach have so far materialized. In fact, the reference to humanitarian visas has disappeared from the 2015 *Agenda on Migration*, where legal channels for access to asylum have been replaced with a strategy of increased border control and cooperation with third countries to ‘prevent hazardous journeys’, rather than facilitating safe arrival.<sup>23</sup>

What is more, concrete attempts at reforming the Community Code on Visas (CCV)<sup>24</sup> for

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<sup>14</sup> *Ibid.*, para. 43.

<sup>15</sup> Cf. different views on the matter, see Opinion of AG Mengozzi in Case C-638/16 PPU, *X and X*, 7 February 2017, ECLI:EU:C:2017:93; Moreno-Lax, ‘Asylum Visas as an Obligation under EU Law: Case C-638/16 PPU, *X and X*’, Part I and Part II, *Omnia Blog*, 16 and 21 February 2017; Carlier and Leboeuf, ‘Le visa humanitaire et la jouissance effective de l’essentiel des droits: une voie moyenne? A propos de l’affaire *X et X*’, *Omnia Blog*, 27 February 2017; Brouwer, ‘The European Court of Justice on Humanitarian Visas: Legal Integrity vs. Political Opportunism?’, *CEPS Commentary*, 16 March 2017.

<sup>16</sup> *X and X* (n 11), para. 45 (emphasis added).

<sup>17</sup> European Parliament, *Resolution on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*, P8\_TA(2016)0102, 12 April 2016, para. 27. See also, *Resolution on Migration and Refugees in Europe*, P8\_TA(2015)031710, 10 September 2015, para. 13.

<sup>18</sup> Noll et al., Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure (European Commission, 2002) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/pdf/asylumstudy\\_dchr\\_2002\\_en\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/pdf/asylumstudy_dchr_2002_en_en.pdf)>.

<sup>19</sup> Green Paper on Asylum, COM(2007) 301.

<sup>20</sup> Stockholm Programme, [2010] OJ C 115/1.

<sup>21</sup> Task Force Mediterranean, COM(2013) 869, p. 2.

<sup>22</sup> *An open and secure Europe*, COM(2014) 154, p. 7-8 (emphasis added). See also *Towards a Reform of the CEAS*, COM(2016) 197, p. 16, speaking of ‘ways to promote a coordinated European approach’ regarding ‘humanitarian permits’.

<sup>23</sup> *A European Agenda on Migration*, COM(2015) 240, p. 5 (emphasis added).

<sup>24</sup> Regulation (EC) 810/2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1 (‘CCV’).

that purpose have been strongly resisted by the Council,<sup>25</sup> blocking for months the negotiation of the amendments tabled by the European Parliament,<sup>26</sup> to the point of forcing their withdrawal.<sup>27</sup> Their main concerns relate to the fear of numbers; the risk of overburdening consulates, processing and resource implications; that other refugee-specific legal pathways already exist in the form of resettlement; and the fact that the CCV's focus is on short-stay visas, making the instrument unsuitable, in their opinion, for the regulation of entry permits for asylum seekers.<sup>28</sup>

Instead, the Legislative Initiative Report launched on 6 December 2017, pursuant to Article 225 TFEU, will request the Commission to take legislative action on a separate Humanitarian Visas instrument.<sup>29</sup> As part of this process, the present assessment will undertake an in-depth evaluation of the added (legal) value of any such legislation. The purpose of this research is to support the European added value assessment accompanying the European Parliament's legislative initiative.

## 1.2 Scope, Objectives and Structure

This assessment will identify the possible **scope of EU action** regarding Humanitarian Visas (or 'Visas for Refugees', as some actors have called them<sup>30</sup>). Key recent and/or current **national experiences**, within Europe and beyond, will be analysed in Chapter 3 to distil best practices that can provide inspiration for a prospective EU blueprint initiative. The usage of Schengen Short Stay – type C Visas (LTV) and national Long Stay – type D Visas for international protection purposes, as in Italy, Malta or Portugal, will be scrutinized. Formalized refugee visa schemes from embassies and consulates, as in Switzerland or Brazil, will also be paid attention.<sup>31</sup> Community-based sponsorship mechanisms, as those piloted in Italy by Sant'Egidio's religious community,<sup>32</sup> or in the

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<sup>25</sup> Austria, France, Belgium, The Netherlands, Hungary, Sweden, Slovenia, Spain, and Portugal were against continuing negotiations, if amendments on the rules on humanitarian visas were included in the reformed version of the CCV. See Summary of Discussions, Council doc. 15602/16, 19 December 2016, p. 1.

<sup>26</sup> European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) (COM(2014)0164 – C8-0001/2014 – 2014/0094(COD)), A8-0145/2016, 25 April 2016.

<sup>27</sup> European Parliament, Towards A New Policy on Migration: Legislative Train (December, 2017), p. 75 <<http://www.europarl.europa.eu/legislative-train/pdfs/legislative-train-schedule-theme-towards-a-new-policy-on-migration-12-2017.pdf>>. See also EP Legislative Observatory, Procedure file of Union Code on Visas (Visa Code). Recast, 2014/0094(COD) <[http://eur-lex.europa.eu/procedure/EN/2014\\_94](http://eur-lex.europa.eu/procedure/EN/2014_94)> (last update: 3 October 2017).

<sup>28</sup> S&D Working Breakfast on Humanitarian Visas, Background Paper, 21 February 2018, p. 2 (on file). The European Commission appears to share the same concerns. See Non-Paper by LIBE Rapporteur Juan Fernando Lopez Aguilar, Amendments on the European Humanitarian Visas and on Strengthening Protection Considerations in the Visa Code, Draft 20 September 2016, p. 5 (on file).

<sup>29</sup> Note that, in any event, the Commission intends to withdraw the proposal to recast the Visa Code in its 2018 Work Programme, COM(2017) 650, p. 9.

<sup>30</sup> ECRE, Survey of Provisions on Travel Documents and Visas for Refugees in the European Union (October, 2000) <[https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Provisions-on-Travel-Documents-and-Visas-for-Refugees-in-the-European-Union\\_October-2000.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Provisions-on-Travel-Documents-and-Visas-for-Refugees-in-the-European-Union_October-2000.pdf)>.

<sup>31</sup> Iben Jensen (n 8).

<sup>32</sup> Sant'Egidio, Humanitarian Corridors for Refugees (undated) <<http://www.santegidio.org/pageID/11676/langID/en/Humanitarian-Corridors-for-refugees.html>>.

UK by Caritas-Salford,<sup>33</sup> following the Canadian example, will be investigated as potential alternatives including the involvement of private actors. Finally, the flexible use of existing visa categories, including reliance on (extended) family reunification schemes *qua* humanitarian admission channel for referrals and/or assistance to normally non-eligible cases under current Family Reunification Directive rules,<sup>34</sup> like the Family Assistance Programme (FAP) developed by the German Federal Foreign Office in cooperation with IOM,<sup>35</sup> will also be taken in to account.

The current **regulatory framework** will be explored in Chapter 2 to identify gaps and shortcomings in the common external borders, immigration and asylum *acquis*—considering issues of coherence (especially links to post-arrival measures, including Dublin rules). The **role of fundamental rights**, *qua* founding values of the EU<sup>36</sup> (including with regard to its external action<sup>37</sup>) and as primary law obligations,<sup>38</sup> will be examined in detail in Chapter 4. Considering the Lisbon reform, after which the EU Charter acquired ‘the same legal value’ of the founding Treaties, fundamental rights will guide the direction of the entire evaluation. **Legal basis** issues, matters of legislative **competence**, and questions of **subsidiarity and proportionality** will be dealt with in Chapter 5.

The result of this assessment will determine the **policy options available**, their **costs, benefits and limits** (from a legal perspective) as well as **regulatory and governance possibilities**. On this basis, Chapter 6 will map out the **specific modalities; the legal and operational framework** to be used per scheme, paying particular attention to the pros and cons of the different alternatives and putting forward the best option to be adopted at EU level. **Conclusions and recommendations** will be formulated in Chapter 7 for the European Parliament’s consideration, including a **model framework** attached as an Annex.

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<sup>33</sup> Caritas-Salford, Caritas Europe share the Community Sponsorship model of refugee resettlement at the European Parliament, (undated) <<https://www.caritassalford.org.uk/news/caritas-europe-share-the-community-sponsorship-model-of-refugee-resettlement-at-the-european-parliament/>>.

<sup>34</sup> Family Reunification Directive 2003/86, [2003] OJ L 251/12.

<sup>35</sup> IOM, Family Assistance Programme (April, 2017) <[http://germany.iom.int/sites/default/files/FAP/FAP\\_Infosheet\\_ENGLISH\\_2017-04-04.pdf](http://germany.iom.int/sites/default/files/FAP/FAP_Infosheet_ENGLISH_2017-04-04.pdf)>.

<sup>36</sup> Art 2 TEU.

<sup>37</sup> Art 3(5) and 21 TEU.

<sup>38</sup> Art 6 TEU.

## CHAPTER 2. REGULATORY FRAMEWORK

### KEY FINDINGS

- **Neither the Schengen nor the asylum or visa *acquis* set clearly the norms applicable to regulate the entry of asylum seekers, which in practice has led to their assimilation to the category of ‘irregular migrants’ before arrival at the external borders of the Member States, in disregard of their fundamental rights.**
- Although the **Schengen Borders Code (SBC)** aims to establish the rules on the control of ‘persons’ (without qualification) crossing, or showing an intention to cross, the EU external borders, the **situation of asylum seekers has not been fully taken into account**, neither by the general criteria of Article 6 SBC nor by its exceptions, **despite references to *non-refoulement* and to obligations related to access to international protection** in Articles 3 and 4 SBC.
- From its part, the **Community Code on Visas (CCV)**, as interpreted by the CJEU in *X and X*, **does not cover the situation of asylum seeking visa applicants**, who, in the Court’s view, fall outside the scope of the Code, since the instrument intends to solely set the rules applicable to short-term visas.
- The **asylum *acquis*** is of no avail either, as its **instruments concern themselves with ‘applicants’ for international protection in the procedural sense, who *formally* lodge an asylum claim, but without regulating access to the CEAS** by its addressees.
- The EU legislator is, thus, **yet to comply with its obligations under the Treaty and ‘shall adopt measures concerning...the checks to which [all] persons crossing external borders [including asylum seekers] are subject’ (Article 77(2) TFEU).**

### 2.1 Entry requirements for asylum seekers under EU law

The way in which EU law has regulated entry requirements for asylum seekers is unclear and incomplete.<sup>39</sup> Although their situation has been (partially) contemplated in the Schengen Borders Code, it appears to have then been disregarded in related rules. None of the visa or asylum instruments establish the specific criteria for admission applicable to them. As the next sections disclose, asylum seekers, while on transit, appear to have instead been assimilated to the category of irregular migrants. Their travel and arrival in the EU is therefore being thwarted by the measures adopted to fight against irregular

<sup>39</sup> For a thorough examination, see Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) chs 3 and 4.

movements. The compatibility of this situation with the EU Charter is doubtful, as Chapter 4 will expound in detail.

### 2.1.1 Situation under the Schengen Borders Code

The Code establishes the rules applicable to the control of ‘persons [without qualification] crossing the external frontiers of the Member States of the European Union’.<sup>40</sup> This includes ‘any person’<sup>41</sup>—encompassing: EU citizens and their family members, as ‘persons enjoying the right of free movement under Union law’, as well as ‘third-country nationals’, who either cross the border or show ‘an intention’ to do so.<sup>42</sup> Then, Article 3 SBC makes provision for two especial categories, and speaks of the scope of application of the Code as being ‘without prejudice to the rights of persons enjoying the right of free movement under Union law [and] the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’.<sup>43</sup>

However, while Article 2 SBC offers an exact demarcation of who the ‘persons enjoying the right of free movement under Union law’ are,<sup>44</sup> there is no definition of what ‘refugees and persons requesting international protection’ mean in this framework. And, whereas there is a direct reference to the EU citizenship regime in relation to the former, there is no mention of the asylum *acquis* or any other (EU or national) law with regard to the latter.

This contrasts with Article 1 of the Convention Implementing the Schengen Agreement (CISA),<sup>45</sup> pre-dating the Code. That provision did establish the meaning of the concepts of ‘asylum seeker’, ‘application for asylum’, and ‘processing applications for asylum’, *in the context of* border crossing and border control regulation. The CISA framed an ‘application for asylum’ as ‘any application submitted *in writing, orally or otherwise* by an alien at an external border or within the territory of a Contracting Party with a view to obtaining recognition as a refugee in accordance with the Geneva Convention’.<sup>46</sup> From the Commission’s Proposal of the Schengen Borders Code it is not clear why the definition of these terms as well as the notion of ‘refugees and persons requesting international protection’ has been omitted and replaced in the final version with a generic reference to ‘third-country national’, described by default as ‘any person who is not a Union citizen within the meaning of Article 20(1) of the Treaty and who is not covered by [the definition of persons enjoying the right of free movement under EU law]’.<sup>47</sup>

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<sup>40</sup> Art 1 SBC, second indent.

<sup>41</sup> Art 3 SBC, opening sentence. Confirming this reading, see Case C-606/10 *ANAFE*, ECLI:EU:C:2012:348, para. 35.

<sup>42</sup> Arts 2(5), 2(6) and 2(10) SBC.

<sup>43</sup> See also Art 4 SBC.

<sup>44</sup> Art. 2(5) SBC.

<sup>45</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual abolition of checks at their common borders, 19 June 1990, [2000] OJ L 239/19 (‘CISA’).

<sup>46</sup> Art. 1 CISA (emphasis added).

<sup>47</sup> Art. 2(6) SBC. See also Commission Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, COM(2004) 391 (‘SBC Proposal’), at pp. 14-16.

As things stand, the default position seems to be that, having been assimilated to the general category of TCNs, the general entry criteria foreseen in Article 6 SBC should apply to asylum seekers. This is what the CJEU appears to imply, when reading that Article 6 SBC ‘governs the conditions of entry of third-country nationals [in general]’, including those who lodge an asylum claim.<sup>48</sup> In its own words, those conditions are ‘in principle applicable to *all* cross-border movements by persons’.<sup>49</sup> But can persons seeking international protection meet the conditions of Article 6 SBC?

Article 6 SBC conditions includes being in possession of valid travel documents, a valid visa, justification of the purpose and conditions of sojourn, evidence of sufficient means of subsistence, proof of posing no threat to public order, national security, or the international relations of the Member States, and, crucially, proof of the intention and ability to return to the country of provenance prior to the expiry of the allowed period of stay. However, refugees cannot demonstrate willingness or ability to return to the country of provenance without thereby losing their (legal) status. There seems to be a contradiction in terms.

Indeed, the Qualification Directive, by reference to the 1951 Convention on the Status of Refugees,<sup>50</sup> defines refugees as TCNs who, owing to a well-founded fear of persecution, are ‘unwilling’ or ‘unable’ to avail themselves of national protection and therefore *cannot* return to their countries of origin.<sup>51</sup> In turn, a ‘person eligible for subsidiary protection’ is defined as a TCN who, albeit not qualifying as a refugee, *cannot* return either, due to a real risk of serious harm in the event of removal.<sup>52</sup> The return condition is, hence, impossible to fulfil for persons requiring international protection. This is why the exceptions contemplated in the Code must be examined, to determine whether there is somewhere else a satisfactory regulation of the conditions applicable to the admission of asylum seekers into Schengen domain.

During the negotiations of the Code, in recognition of the plight of asylum seekers as persons hardly in a position to fulfil the general requirements for admission, the European Parliament proposed to (partially) reintroduce the exception provided for in former Article 5(2) CISA in the text of Article 6 SBC<sup>53</sup>—which the Commission had deleted from its proposal.<sup>54</sup> As a result, Article 6(5)(c) SBC now reads that, by way of derogation from the general rule, ‘third-country nationals who do not fulfil one or more of the [general entry] conditions...may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or *because of international obligations...*’. Yet, none of these terms has been defined anywhere, so the

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<sup>48</sup> ANAFE (n 41), para. 27 ff.

<sup>49</sup> Ibid., para. 35 (emphasis added).

<sup>50</sup> Convention Relating to the Status of Refugees [1951] 189 U.N.T.S. 150 (‘Geneva Convention’ / ‘GC’).

<sup>51</sup> Art. 2(d) QD.

<sup>52</sup> Art. 2(f) QD.

<sup>53</sup> Amendment 7, Report on the proposal for a Regulation establishing a Community Code on the rules governing the movement of persons across borders, A6-188/2005, p. 74.

<sup>54</sup> For the original proposal, see draft Art. 5(6), SBC Proposal, p. 47.

sufficiency of this generic reference to ‘international obligations’ – presumably including protection-related duties – remains open to debate.<sup>55</sup>

In reality, Article 5(2) CISA comprised a second indent mentioning that entry rules ‘shall not preclude the application of special provisions concerning the right of asylum...’, but this was not included in the wording of current Article 6(5)(c) SBC. It has instead been incorporated into Article 14 SBC, in the framework of the guarantees applicable in cases of ‘refusal of entry’.

In a rather intricate formulation, Article 14(1) SBC reads that ‘[a] third-country national who does not fulfil all entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) *shall be refused entry* to the territories of the Member States’. This is, however, ‘without prejudice to the application of *special provisions* concerning the *right* of asylum and to *international protection*...’. The allusion to the ‘right to international protection’ was added at the behest of the European Parliament.<sup>56</sup> Yet, it is not entirely clear what the practical implications of this reference are, nor its exact relation to the right to protection from *refoulement*.<sup>57</sup> And the related ‘special provisions’ that may serve to preserve it have not been specified either.

Previously, in the pre-codification era, the so-called Common Manual (guiding the application of the Schengen Convention rules), established that where a TCN requested asylum at the border ‘the national laws of the Contracting Party concerned [applied] until it [was] determined who [had] responsibility for dealing with the application for asylum’.<sup>58</sup> On account of the posterior communautarisation of the Schengen *acquis* and the harmonisation of asylum norms, the Commission interpreted that the incorporation of this clause in the SBC had somehow become ‘superfluous’.<sup>59</sup> The general references in the Code to international obligations and *non-refoulement* were deemed enough.

At the same time—and probably for the same reasons—refugees and asylum seekers were also removed from the ‘certain categories of persons’ to whom ‘specific rules for checks’ applied under the Common Manual. Neither current Article 20 SBC nor its development in Annex VII SBC deals with persons requesting international protection. The same was done in relation to EU citizens and persons enjoying the right to free movement. But the reasons behind this erasure are more solid in the latter case. ‘[T]he rules on entry and residence applicable to citizens of the Union and, in general, persons enjoying the [Union] right to free movement are already laid down in the relevant provisions of [EU] law.<sup>[60]</sup> There is therefore no need to reproduce [in the Code]

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<sup>55</sup> This was, precisely, the question posed by the referring court to the CJEU in *X and X* (n 11).

<sup>56</sup> ‘International protection’ is defined in Art 2(a) QD. It covers ‘refugee status and subsidiary protection status’.

<sup>57</sup> Expressing similar doubts, see Boeles et al., *European Migration Law* (Intersentia, 2009), ch 4.2.

<sup>58</sup> Para. 6.10, Part II, Common Manual, [2002] OJ C 313/97 (‘CM’).

<sup>59</sup> Explanatory Memorandum, SBC Proposal, p. 28. This understanding may be due to the silo effect of negotiating borders and asylum measures separately within different processes, leading to a situation where secondary law does not give proper expression to obligations under primary law; a situation that the Parliament attempted to address, although only with partial success.

<sup>60</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77 (‘Citizenship Directive’).

provisions that are already contained in other [EU] instruments'.<sup>61</sup> In fact, Articles 4 and 5 of the EU Citizenship Directive reflect the particular rules applicable to entry and exit of this category of persons. By contrast, no similar EU arrangements exist for the admission of asylum seekers into the Schengen zone.

It is also noteworthy that Article 8 SBC on the regulation of minimum and thorough checks includes a proviso, whereby the regime established therein is not applicable to persons enjoying free movement rights, for whom checks 'shall be carried out in accordance with Directive 2004/38/EC'.<sup>62</sup> There is neither an equivalent exception for asylum seekers, nor a reference to a more specific EU law instrument to be followed in lieu of the Code. Yet, on the basis of the identical treatment accorded to both categories in Article 3 SBC—defining the very scope of the Code—the expectation was to find a parallel exemption with an indication of the relevant alternative regime.

### 2.1.2 Situation under the Common European Asylum System Instruments

In the absence of specific rules governing the entry of asylum seekers into the Schengen area in the SBC, implying a tacit *renvoi* to the common asylum *acquis* is also insufficient. The relevant instruments are practically silent in this regard. And the only express link between the Schengen Code and Common European Asylum System (CEAS) legislation, inserted in the 2015 version of the Schengen Handbook, merely establishes the obvious, that: 'All applications for international protection...lodged at the border must be examined by Member States in order to assess, on the basis of the criteria laid down in Directive 2011/95/EU of 13 December 2011, whether the applicant qualifies either for refugee status...or for subsidiary protection status...'.<sup>63</sup>

Other than that, CEAS instruments refer to asylum seekers in procedural terms. Instead of speaking of 'unrecognised refugees', 'asylum seekers' or 'third-country national[s] international protection' (as in Article 78(1) TFEU), they refer to the '*applicant* for international protection', defined as a 'third-country national or a stateless person *who has made an application* for international protection in respect of which a final decision has not yet been taken'.<sup>64</sup> In turn, 'application for asylum' denotes 'a request made by a third-country national or a stateless person for [international] protection from a Member State, who can be understood to seek refugee status or subsidiary protection status'.<sup>65</sup>

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<sup>61</sup> Explanatory Memorandum, SBC Proposal, at 27, referring to para. 6.1 Part II CM.

<sup>62</sup> Art. 8(6) SBC.

<sup>63</sup> See 'General Principles', in Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186, as rev. C(2008) 2976; C(2009) 7376; C(2010) 5559; C(2011) 3918; C(2012) 9330; and C(2015) 3894 ('Schengen Handbook').

<sup>64</sup> Art. 2(b) (emphasis added), Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96 ('RCD'); Art. 2(c), Regulation (EU) 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 (recast), [2013] OJ L 180/31 ('DR III'); and Art. 2(c), Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 ('APD').

<sup>65</sup> Art. 2(h) QD, to which Art. 2(b) DR III, Art. 2(b) APD, and Art. 2(a) RCD refer.

The problem is that, although ‘Member States *shall ensure* [in imperative language] that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible’, they may also subordinate the exercise of this right to specific formalities, requiring that applications ‘be lodged in person and/or at a designated place’ to be valid.<sup>66</sup> In fact, ‘an application for international protection shall [only] be deemed to have been lodged once a form submitted by the applicant or...an official report, has reached the competent authorities’.<sup>67</sup> Whereas Member States must guarantee that ‘other authorities which are likely to receive applications for international protection such as the police, border guards [etc] have the relevant information...[training] and instructions to *inform* applicants as to where and how applications...may be lodged’,<sup>68</sup> by virtue of the Asylum Procedures Directive (APD) alone, they are not strictly obliged to ‘require these authorities to forward the application to the competent authority’ – as used to be the case under the original version of the APD (before the 2013 recast).<sup>69</sup>

What is more, the APD distinguishes between the act of ‘making’ an application and formally ‘lodging’ it. When the application is ‘made’ it shall be ‘registered’, including *ex officio*, by a national authority competent to receive it, but unless the applicant ‘lodges’ the application following the relevant formalities, Member States may presume that the application has been abandoned or implicitly withdrawn after a certain time.<sup>70</sup>

In addition, the application for international protection may be dissociated from decisions on entry, where border procedures apply.<sup>71</sup> Border procedures may apply to applications submitted at the border or in transit zones, when the applicant does not meet the criteria for entry under Article 6 SBC – which, in practice, may amount to the entire asylum applicant population, considering the existential inability by persons in need of international protection to return to their countries of provenance. As these procedures may include derogations from basic procedural guarantees, including the

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<sup>66</sup> Arts 6(2) and 6(3) APD.

<sup>67</sup> Art. 6(4) APD.

<sup>68</sup> Art. 6(1) APD, third indent (emphasis added).

<sup>69</sup> Former Art. 6(5) APD. See Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13. This provision has disappeared from the recast text. See the ‘correlation table’ in Annex III PD. It is arguable, however, that this obligation continues to exist, stemming from the need to interpret the Directive in consonance with the CFR and general principles of EU law. Otherwise the APD would be incompatible with ECHR standards. In this direction, see Peers, ‘Enhancing Cooperation on Border Controls in the EU’, in Cholewinski, Perruchoud and MacDonald (eds), *International Migration Law* (T.M.C. Asser Press, 2007), p. 452. This is also the interpretation maintained by the Commission in the Schengen Handbook, Part II, para. 10.3: ‘Any application for international protection *must* be transmitted either to the competent national authority designated by each Member State for the purpose of its examination/processing or to the authority which is responsible for deciding whether to permit the applicant entry to the territory so that his/her application can be examined by the competent authority. No decision to return the applicant *must* be taken by the border guard without prior consultation with the competent national authority or authorities’ (emphasis added). But this clause has not been adopted in legal form.

<sup>70</sup> Arts 6(1), 6(2) and 28 APD.

<sup>71</sup> Art. 43 APD. Documenting Member States practice, see studies by FRA, *Fundamental Rights at Land Borders* (FRA, 2014); and *Fundamental Rights at Airports* (FRA, 2014). See also Report on the Application of Directive 2005/85/EC, COM(2010) 465; and UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (March 2010).

possibility of considering applications unfounded,<sup>72</sup> the combined effect of these provisions may lead to the erroneous dismissal of applications, if not to the *refoulement* of a person who has not yet ‘lodged’, but nonetheless ‘made’, an asylum claim.<sup>73</sup>

The risk is all the more real, considering the absence of any details on the ‘special provisions’ applicable to asylum seekers under the Schengen Borders Code and the fact that an entry refusal ‘shall take effect immediately’, with appeals devoid (‘shall not have’) of suspensive effect.<sup>74</sup> Article 14(4) SBC, establishing that ‘border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned’, heightens this risk.

The insertion in the text of the Code or the APD of the indications contained in the (soft-law) Schengen Handbook that ‘[a] third-country national must be considered as an applicant for asylum/international protection if he/she expresses—in any way—fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence’, would have been most appropriate.<sup>75</sup> It would have taken into account the declarative nature of refugee status,<sup>76</sup> and the fact that ‘the defining element is the expression of fear of what might happen upon return’.<sup>77</sup> Making clear that ‘[t]he wish to apply for protection does not need to be expressed in any particular form’ and that ‘[t]he word asylum does not need to be used expressly’<sup>78</sup> would have brought the rules on admission in line with the international human rights and refugee law standards applicable within the EU legal order, by virtue of Article 6 TEU and the Charter of Fundamental Rights, on which Chapter 4 elaborates. Moreover, it would have matched the logic behind the codification of the Schengen borders’ *acquis*, by clarifying ‘all the existing’ obligations.<sup>79</sup>

To the contrary, the asylum *acquis* above appears to assume that refugee status is dependent on recognition, so that, before an asylum application has been successfully resolved, the person concerned is placed in the interim position of ‘asylum applicant’. And until and unless the asylum application has been formally lodged, domestic authorities are legitimised to treat the person like any other TCN, thus subject to general entry requirements that may cause him/her to be classified as an ‘irregular migrant’.<sup>80</sup>

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<sup>72</sup> Arts 43(1)(b), 32(2), 31(8)(h) APD. According to these provisions, an application can be considered unfounded and its processing ‘accelerated’, where ‘the applicant entered the territory of the Member State unlawfully...and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible’.

<sup>73</sup> Cf. Art. 28(2), 3<sup>rd</sup> indent, APD.

<sup>74</sup> Art. 14(2)-(3) SBC. On the incompatibility of this clause with the CFR, see Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 10.

<sup>75</sup> Schengen Handbook, Part II, para. 10.1. Note that the Handbook is not legally binding.

<sup>76</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1), para 28. See also Recital 21 QD.

<sup>77</sup> Schengen Handbook, Part II, para. 10.1.

<sup>78</sup> *Ibid.*

<sup>79</sup> The Commission explained the advantages of codification as an operation that allows ‘all the existing *acquis* on external and internal borders to be collated in a single instrument, thus establishing a genuine [Union] Code on the rules governing the movement of persons across borders’. See Explanatory Memorandum, SBC Proposal, at 8 (emphasis added).

<sup>80</sup> Note that the ‘right to remain’ in the Member State concerned, recognized in Art. 9 APD, appears only to

The entry of the asylum seeker and the processing of the asylum claim are treated as separate and independent from one another, so that entry may be unauthorised, while the application is being processed (in the framework of 'border procedures'). And, what is worse, the current APD 'shall not apply to requests for...asylum submitted...abroad'.<sup>81</sup> So, there are no specific arrangements in the current CEAS to access the system by its addressees.

### 2.1.3 Situation under the *Visa acquis*

EU visa rules do not dispel the ambiguities detected above. They draw on the SBC, anticipating entry controls to the stage of pre-departure. The criteria to be satisfied are, therefore, the same generally required for admission. 'In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in [Article 6] of the Schengen Borders Code'.<sup>82</sup> Yet, unlike the Schengen Borders Code, the application of these criteria is not 'without prejudice to...the rights of refugees and persons requesting international protection'.<sup>83</sup> The application of the Visa Code is exclusively 'without prejudice to the rights of free movement enjoyed by third-country nationals who are family members of citizens of the Union' and 'the equivalent rights' deriving from agreements with specific third countries.<sup>84</sup>

The Visa Code thus reflects Schengen entry rules, but only in part, disregarding that '[w]hen applying this Regulation [as any other piece of EU legislation] Member States shall act in full compliance with relevant Union law, including the Charter...relevant international law, including the...Geneva Convention, [and] obligations related to access to international protection, in particular the principle of *non-refoulement*', as the SBC explicitly acknowledges.<sup>85</sup> There is no such 'saving clause' in the CCV. The only generic reference to the need to respect fundamental rights when applying the CCV Regulation is in the Preamble, but without any mention of the particular position of asylum seekers.<sup>86</sup>

This has led many to describe visas as 'the most explicit blocking mechanism for asylum flows'.<sup>87</sup> In fact, all refugee-producing countries have been placed in the 'black list' of States whose nationals require visas for entry into Schengen territory.<sup>88</sup> And, when examining visa applications, consular personnel are under an obligation to paying particular attention to 'whether the applicant intends to leave the territory of the Member

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apply 'pending the examination of the application', i.e. once the asylum claim has been formally lodged, without conferring an independent right of entry.

<sup>81</sup> Art. 3(2) APD.

<sup>82</sup> Art. 21 CCV.

<sup>83</sup> Art. 3(b) SBC.

<sup>84</sup> Art. 3(b) SBC.

<sup>85</sup> Art. 4 SBC.

<sup>86</sup> Recital 29 CCV.

<sup>87</sup> Morrison and Crosland, *Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy*, New Issues in Refugee Research, Working Paper No. 39 (UNHCR, 2001), p. 28.

<sup>88</sup> Council Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (as amended), [2001] OJ L 81/1 ('Visa List Regulation' / 'VLR').

States before the expiry of the visa applied for<sup>89</sup> – which is, precisely, what persons in need of international protection can, by the very definition of their legal position under EU rules, not do.

Article 1 CCV contemplates that its provisions ‘shall apply to *any* third country national who must be in possession of a visa when crossing the external borders of the Member States pursuant to [the Visa List Regulation]’.<sup>90</sup> In turn, the Code defines ‘third-country national’ as ‘any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty’, without differentiating or excluding those in need of international protection.<sup>91</sup> Therefore, the fact that asylum seekers applying for a visa may ‘thereafter’ (following a subsequent legal procedure under a separate legal instrument, that is, the APD) try ‘to being granted a residence permit with a period of validity not limited to 90 days’, as the CJEU objected in *X and X*,<sup>92</sup> should be without consequence, by the very wording of the Visa Code and the logics underpinning the EU entry and asylum systems.

Yet, the CJEU has interpreted instead that, since the CCV concerns only ‘visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period’,<sup>93</sup> because asylum seekers’ purpose is presumably for a longer stay, their situation ‘fall[s] outside the scope of th[e] Code’. The Court relies on ‘the objective’ of the CCV to reach this conclusion.<sup>94</sup>

On the other hand, as the Court itself recognizes, ‘the existence of “reasonable doubts as to...[the applicant’s] intention to leave the territory of the Member States before the expiry of the visa applied for” is a ground for refusal of a visa [under Article 32(1)(b) CCV] and not a reason not to apply that Code’.<sup>95</sup> The motives of an applicant serve to assess the merits of the application under Article 21 CCV, but should not determine the applicability of the Visa Code per se. Otherwise, there may be so many scopes of application of the Visa Code as there are motives (and potentially candidates) to apply for visas. Legal certainty and the rule of law oppose such an interpretation.<sup>96</sup> The applicant’s circumstances, including his/her future plans and intentions, can therefore lead to the rejection of the application (at the admissibility or merits stage), but should not be taken to constitute a basis for the a priori non-application of the relevant rules – an application that is specifically foreseen in Article 1(2) of the Code.

Another point the CJEU acknowledges is based on Article 25 CCV. The position of asylum seekers is presumably captured by the ‘international obligations’ clause contained in Article 25(1)(a) CCV on visas with limited territorial validity (LTV). The provision establishes that ‘on humanitarian grounds...or because of international

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<sup>89</sup> Art. 21(1) CCV.

<sup>90</sup> Art. 1(2) CCV (emphasis added).

<sup>91</sup> Art 2(1) CCV.

<sup>92</sup> *X and X* (n 11), para. 42.

<sup>93</sup> *Ibid.*, para. 41.

<sup>94</sup> *Ibid.* and para. 43.

<sup>95</sup> *Ibid.*, para. 46.

<sup>96</sup> Concurring: Mengozzi (n 15), para. 49 ff.

obligations' it may be 'necessary' for Member States 'to derogate from the principle that the entry conditions laid down in Article [6(1)] of the Schengen Borders Code must be fulfilled'. This reproduces the exception contained in the SBC itself. Article 6(5)(c) SBC takes account of the same 'humanitarian grounds...[and] international obligations' to open up the possibility for 'third-country nationals who do not fulfil one or more of the conditions...[to] be authorised by a Member State to enter its territory'. Accordingly, to infer that, visa applications by asylum seekers, 'even if formally submitted on the basis of Article 25 of [the Visa] Code', nonetheless 'fall outside the scope of that code' does not appear justified.<sup>97</sup> How can there be a provision in the Visa Code that, as it ensues from the legal history of Article 6(5)(c) SBC analysed above, intended precisely to cover the position of those in need of international protection and, at the same time, conclude that the Code (as a whole) is inapplicable to this category of 'third-country nationals' (defined in the same Code as including every non-EU citizen)? How can Article 25 CCV pertain to the Visa Code (and thus fall within its scope of application) and, yet, at the same time, posit that those who may possibly rely on it for the issuance of a visa fall outside the scope of application of the same instrument?

## 2.2 Overall assessment

Although the above analysis points in a different direction, providing a plausible alternative reading of the visa *acquis*, on account of the CJEU's assessment in *X and X*, the necessary implication is that asylum seekers do not fall within the scope of the current CCV. If such is the case, then the mission of the Schengen Borders Code remains yet to be accomplished. And the 'rules governing border control of persons crossing the external borders of the Member States of the Union' require additional legislation,<sup>98</sup> so as to cover the situation of one specific group 'of persons crossing' or 'showing an intention to cross' into the Member States.<sup>99</sup> Indeed, Article 77(2) TFEU, which is the legal basis buttressing the Schengen Borders Code,<sup>100</sup> and especially paragraph (b) thereof, requires that the 'European Parliament and the Council...shall adopt measures concerning...the checks to which *persons* crossing external borders [presumably all of them, including asylum seekers] are subject'. Therefore, means and criteria for the admission of persons in need of international protection into the Schengen zone need to be specified in EU law for the EU legislator to comply with its obligations under the Treaty. So, either the ambiguity of SBC rules and the CEAS *acquis* is corrected or separate rules that confront the exclusion from CCV provisions, as per the judgment of the CJEU, are adopted.

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<sup>97</sup> *X and X* (n 11), para. 43.

<sup>98</sup> Art. 1, second indent, SBC.

<sup>99</sup> Art. 2(10) SBC.

<sup>100</sup> Preamble, SBC.

## CHAPTER 3. PEPS: PAST AND PRESENT

### KEY FINDINGS

- **Member States**, in line with the ambiguous situation concerning the rules applicable to the admission of asylum seekers under current EU provisions on entry, as analysed in Chapter 2, **have usually considered** there to be **no obligation to offer or facilitate access to their territories**.
- **Discretionary**, and usually **small scale**, Protected-entry Procedures (**PEPs**) have emerged **instead**. **Experience** at supranational and domestic level is **varied** and **extensive**. In recent times, it has taken the form of **resettlement** programmes, **community and private sponsorship** schemes, and **'humanitarian corridors'**. Yet, **arrangements vary significantly** between formulae and across Member States.
- On the **positive side** of the balance, all schemes are based on the **principles of additionality and complementarity**, intending to offer **safe and regular alternatives** to **'spontaneous arrivals'** other than via smuggling and trafficking routes; the programmes are **managed** and allow for a **high level of screening and control** over entry; they garner the **support of UNHCR** and other specialised organisations; the **involvement of private and community sponsors facilitates integration** and diminishes risks of disengagement with the system; all programmes constitute a display of **solidarity** with beneficiaries and countries of first asylum.
- On the **negative side** of the balance, the **numbers** catered for are small; programmes tend not to be open-ended, but geographically bounded and limited in time; **processing times** are long; **selection criteria** complex and not always protection-related; **few initiatives allow for self-referrals** and instead rely on UNHCR or private sponsors to first identify potential beneficiaries; the involvement of private actors produces **selectivity issues**, considering the amount of **resources and expertise required**, leading to **risks of 'privatisation / commodification' of protection**; publicity, transparency, and predictability need improvement to align with **legal certainty** and rule of law standards; all schemes are based on **sovereign discretion** (as of favour) rather than on the legal strength of protection obligations (as of right); and most of them provide for a **secondary means of access to protection** by already-recognised refugees, instead of granting a primary way for unrecognised claimants to reach Schengen territory and apply for asylum on arrival.

### 3.1 Humanitarian Admission Experiences

Member States, in line with the ambiguous situation concerning the rules applicable to the admission of asylum seekers under current EU provisions on entry, as analysed in Chapter 2, have usually considered there to be no obligation to offer or facilitate access to their territories. They have rather interpreted that such matters ‘fall solely within the scope of national law’ and remain subject to their sovereign discretion.<sup>101</sup>

Out of free will, since the outbreak of the Syrian hostilities, several Member States have, nonetheless, adopted means of humanitarian admission, either in the form of ‘classic’ resettlement programmes or more tailored (and typically *ad hoc* and exceptional) measures that select individuals *prior* to having formally qualified for refugee or other protection status – making these schemes accessible to a wider range of people. The FRA has identified several examples in Austria, Germany, the UK, France and Ireland with some common traits.<sup>102</sup> And a more recent European Migration Network (EMN) survey documents practices in 17 Member States and Norway. As the analysis below reveals,<sup>103</sup> most of these assign UNHCR a role in the identification and/or referral of candidates, while final selection decisions rest with Member States. Beneficiaries are granted the same or a similar status to those recognised in-land, although domestic rules and approaches regarding qualification, reception, and post-arrival integration vary significantly.<sup>104</sup>

The tables below summarise pros / cons of each scheme, as compared to the alternative ‘asylum seeker visas’ proposed in Chapter 6, highlighting key points in colour:

PROS	CONS	Cf. ASYUM SEEKER VISAS
Managed process	No individual autonomy / Territorially limited	Combines managed process and individual autonomy, with potentially no territorial limit
Allows focus on vulnerability	Selectiveness	Coheres with QD
UNHCR support	UNHCR dependent	Accountability-proof

<sup>101</sup> X and X (n 11), para. 44.

<sup>102</sup> FRA (n 9), p. 8-10.

<sup>103</sup> This is limited to protection-specific channels. Other means have been proposed and are being tested, regarding the extension of study or labour migration routes to refugees. See, e.g. Collet, Clewett, and Fratzke, *No Way Out? Making Additional Migration Channels Work for Refugees*, Migration Policy Institute (March, 2016) <<https://www.migrationpolicy.org/research/no-way-out-making-additional-migration-channels-work-refugees>>. See also ‘IOM Releases Outcomes of Skills2Work Pilot Initiative Integrating Refugees into EU Labour Markets’, IOM Press Release, 3 March 2018 <<https://www.iom.int/news/iom-releases-outcomes-skills2work-pilot-initiative-integrating-refugees-eu-labour-markets>>.

<sup>104</sup> European Migration Network, *Resettlement and Humanitarian Admission Programmes in Europe – what works?* (November, 2016) <[http://emn.ie/files/p\\_201611221258152016\\_emn-informs\\_resettlement.pdf](http://emn.ie/files/p_201611221258152016_emn-informs_resettlement.pdf)>.

Planned integration	Only for 1951 GC refugees	Coheres with CEAS
Display of solidarity	Inter-State focus	Rights-based approach
Provides safe passage	2ary means of access	1ary means of access
Durable solution	Very small numbers	Potential for higher scale
Flexibility	Based on State discretion	Legal guarantees

Table 1: RESETTLEMENT vs. ASYLUM SEEKER VISAS

PROS	CONS	Cf. ASYLUM SEEKER VISAS
Managed process / shorter processing times than resettlement	No individual autonomy / territorially limited	Combines managed process and individual autonomy, with potentially no territorial limit
Allows focus on vulnerability	Selectiveness	Coheres with QD
Private support / civil society involvement / public-private partnership	Blurs responsibility	Accountability-proof
Planned integration / overcomes misgivings	Private resource dependent	Coheres with CEAS
Display of solidarity	Inter-community focus	Rights-based approach
Provide safe passage	2ary means of access	1ary means of access
Durable solution	Very small numbers	Potential for higher scale
Flexibility / bottom-up initiative	No legal certainty / transparency	Procedural guarantees

Table 2: SPONSORSHIP SCHEMES vs. ASYLUM SEEKER VISAS

PROS	CONS	Cf. ASYLUM SEEKER VISAS
Managed process	No individual autonomy / territorially limited	Combines managed process and individual autonomy, with potentially no territorial limit
Allows focus on vulnerability	Selectiveness	Coheres with QD

Private support / civil society involvement / public-private partnership	Blurs responsibility	Accountability-proof
Planned integration / overcomes misgivings	Private resource dependent	Coheres with CEAS
Display of solidarity	Inter-community focus	Rights-based approach
Many means of access	No harmonised process	Many means of access
Durable solution	Very small numbers	Potential for higher scale
Flexibility / bottom-up initiative	No legal certainty / transparency	Procedural guarantees

Table 3: HUMANITARIAN CORRIDORS vs. ASYLUM SEEKER VISAS

### 3.1.1 Resettlement

Together with repatriation and local integration, resettlement is one of the ‘**durable solutions**’ for refugees supported by UNHCR. It consists of the selection and transfer of already-recognised refugees from a country of first asylum to a third State that agrees to admit them as refugees and grant them permanent residence.<sup>105</sup> The main reason for resettlement is the need for ‘better’ protection of particularly vulnerable refugees who have reached a country of asylum where their situation is precarious, undignified or unsafe due to health, security or other reasons.

Despite the benefits of resettlement as ‘a life-changing experience’,<sup>106</sup> less than 1% of the total 17 million refugees of concern to UNHCR worldwide were resettled by the end of 2016. And only a small fraction of States participate in UNHCR’s resettlement programme, with the US championing global efforts, followed by Canada, Australia, and the Nordic countries in recent times.<sup>107</sup> By contrast, EU Member States’ contribution has been slow and scarce, despite the launch of the *Joint Resettlement Programme* already in 2009.<sup>108</sup>

At the time, only 10 Member States had established annual schemes with very limited capacity and no common planning or coordination mechanism existed at EU level.<sup>109</sup> So, the programme intended to provide a framework for the development of a common approach, seeking to involve as many Member States as possible. In parallel, it was

<sup>105</sup> UNHCR Resettlement Handbook (Geneva, 2011), p. 3 <<http://www.unhcr.org/46f7c0ee2.pdf>>.

<sup>106</sup> UNHCR, Resettlement Information (undated) <<http://www.unhcr.org/uk/resettlement.html>>.

<sup>107</sup> UNHCR, Resettlement Factsheet 2017 <<http://www.unhcr.org/uk/5a9d507f7>>.

<sup>108</sup> The establishment of a Joint EU Resettlement Programme, COM(2009) 447. Underpinning the proposal see also, van Selm et al., *Study on the Feasibility of Setting Up Resettlement Schemes in EU Member States or at EU Level* (European Commission, 2003) <[http://ec.europa.eu/home-affairs/doc\\_centre/asylum/docs/resettlement-study-full\\_2003\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/resettlement-study-full_2003_en.pdf)>.

<sup>109</sup> Commission Staff Working Document accompanying the Communication of the Commission on the establishment of a Joint EU Resettlement Programme (Impact Assessment), SEC(2009) 1127.

expected that the global humanitarian profile of the EU would rise and access to asylum organised in an orderly way. On the other hand, the Commission also intended to coordinate the programme with the *Global Approach to Migration and Mobility* (GAMM),<sup>110</sup> through the identification of common priorities not only on protection reasons, but also on the basis of broader migration policy considerations, using resettlement in a 'strategic' way to curtail irregular entry into the EU—the European Commission has, in fact, recently affirmed (albeit adducing no evidence to back the claim) that EU resettlement efforts should contribute to 'reducing irregular migration', 'to disrupt migrant smuggling networks', and 'to a better overall management of the migratory situation'.<sup>111</sup>

The European Refugee Fund was amended in 2012 to support resettlement efforts.<sup>112</sup> Nonetheless, the results achieved were minimal. During the Arab Spring only 700 resettlement places were offered EU-wide, while UNHCR had estimated the need for at least 11,000.<sup>113</sup> The replacement of the ERF with the current Asylum, Migration and Integration Fund (AMIF) 2014-2020,<sup>114</sup> with increased provisions, was expected to attract significant pledges. But this has yet to fully materialise. Individual efforts at domestic level have improved in some countries.<sup>115</sup> Still, the Commission's **2015 plan** for a **20,000 places** scheme to respond to the **Syrian crisis**, proposed as part of the *European Agenda on Migration*,<sup>116</sup> has not been entirely executed.<sup>117</sup> And that, even after the Relocation Decisions were amended to make it possible for Member States to fulfil their obligations in relation to 54,000 applicants via resettlement of Syrians from Turkey instead.<sup>118</sup>

Nevertheless, **in September 2017**, a **further** commitment to resettle **50,000 refugees** 'over the next two years' was tabled, 'as part of the Commission's efforts to provide viable safe and legal alternatives for those who risk their lives at the hands of criminal smuggling networks' across the Mediterranean.<sup>119</sup> To facilitate the transition into a permanent framework, the Commission adopted a new Recommendation at the same time, inviting Member States to take a 'stronger engagement', focusing primarily on the MENA region

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<sup>110</sup> The Global Approach to Migration and Mobility, COM(2011) 743.

<sup>111</sup> Commission Recommendation of 27 September 2017 on enhancing legal pathways for persons in need of international protection, C(2017) 6504, Recitals 1, 4 and 13.

<sup>112</sup> Decision 281/2012/EU amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013, [2012] OJ L 92/1.

<sup>113</sup> Statement by Cecilia Malmström on the results of the Ministerial Pledging Conference 12 May, MEMO 11/295, 13 May 2011 <[http://europa.eu/rapid/press-release\\_MEMO-11-295\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_MEMO-11-295_en.htm?locale=fr)>.

<sup>114</sup> AMIF Regulation 516/2014, [2014] OJ L 150/175.

<sup>115</sup> EASO Annual Report 2013, p. 71 and Annex C.14; EASO Annual Report 2014, p. 8 and 81-82; EASO Annual Report 2015, p. 8 and 26; and EASO Annual Report 2016, p. 26, all available at: <<https://www.easo.europa.eu/easo-annual-report>>.

<sup>116</sup> Commission Recommendation on a European resettlement scheme, C(15) 3560.

<sup>117</sup> European Commission, 'European Agenda on Migration: Continuous efforts needed to sustain progress', Press Release, 14 March 2018 <[http://europa.eu/rapid/press-release\\_IP-18-1763\\_en.htm](http://europa.eu/rapid/press-release_IP-18-1763_en.htm)>.

<sup>118</sup> Council Decision 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L 268/82. Further on the Relocation Decisions, see Guild, Costello and Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, PE 583.132 (March 2017) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)>.

<sup>119</sup> State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy, Press Release, 27 September 2017 <[http://europa.eu/rapid/press-release\\_IP-17-3406\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_IP-17-3406_en.htm?locale=FR)>.

and, especially, on 'key African countries along and leading to the Central Mediterranean migration route, including Libya, Niger, Chad, Egypt, Ethiopia, and Sudan'.<sup>120</sup> Therein, it also calls for a commitment with UNHCR's new '**temporary mechanism for emergency evacuation of the most vulnerable migrants from Libya**'<sup>121</sup> – the implementation of which has equally been slow and at a tokenistic scale so far.<sup>122</sup>

If the **July 2016** proposal for a permanent **EU Resettlement Framework**,<sup>123</sup> proposing a unified procedure and common selection criteria, is finally adopted, it will replace the current *ad hoc* initiatives and facilitate the attainment of the Commission targets with a harmonised approach.<sup>124</sup> Nevertheless, the essential nature of the system as State-driven and grounded in sovereign discretion, rather than a rights-based understanding of access to protection, will remain.

### 3.1.2 Community Sponsorship

In parallel to resettlement, community and private sponsorship initiatives, following the **Canadian model**,<sup>125</sup> have proliferated in several EU countries – but there is no EU-wide equivalent. The EMN has identified **six Member States**, including Germany, Ireland, Italy, Poland, Slovakia, and UK, **following different approaches**.<sup>126</sup>

In terms of **eligibility criteria**, most countries select on vulnerability grounds, but Poland and Slovakia target victims of persecution for religious reasons – especially with a Christian background. The content of **protection statuses** also varies. In Germany, sponsored individuals receive a two-year extendable permit with an immediate right to work. In contrast, Ireland accords them a specific humanitarian status allowing beneficiaries to work, invest, or establish a business. In Poland they are granted refugee status, while in Slovakia they receive asylum on national terms. In all cases, **most of the costs are born by the sponsor**, including travel, medical and maintenance costs upon

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<sup>120</sup> Commission Recommendation of 27 September 2017 on enhancing legal pathways for persons in need of international protection, C(2017) 6504, Recitals 10, 14-15 and para. 3(a)-(c).

<sup>121</sup> Ibid., Recital 18 and para. 3(c).

<sup>122</sup> Molinari, 'Groundbreaking first evacuation of 162 vulnerable refugees from Libya to Italy', UNHCR News, 23 December 2017 <[http://www.unhcr.org/news/latest/2017/12/5a3e3d155/groundbreaking-first-evacuation-162-vulnerable-refugees-libya-italy.html?utm\\_source=ECRE+Newsletters&utm\\_campaign=ff8195c031-EMAIL\\_CAMPAIGN\\_2018\\_02\\_23&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-ff8195c031-420552073](http://www.unhcr.org/news/latest/2017/12/5a3e3d155/groundbreaking-first-evacuation-162-vulnerable-refugees-libya-italy.html?utm_source=ECRE+Newsletters&utm_campaign=ff8195c031-EMAIL_CAMPAIGN_2018_02_23&utm_medium=email&utm_term=0_3ec9497afd-ff8195c031-420552073)>.

<sup>123</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework, COM(2016) 468. See also JHA Council Conclusions, 12-13 October 2017, Council doc. 13029/17, p. 7; LIBE Report on the proposal for a regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council (COM(2016)0468 – C8-0325/2016 – 2016/0225(COD)), 23 October 2017; and EC Press Release, 'EU resettlement framework: Council ready to start negotiations', Press 664/17, 15 November 2017.

<sup>124</sup> See Juncker's Statement to this effect, *Ensuring Legal Pathways to Europe*, 13 September 2017 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927\\_factsheet\\_ensuring\\_effective\\_legal\\_pathways\\_to\\_europe\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_factsheet_ensuring_effective_legal_pathways_to_europe_en.pdf)>.

<sup>125</sup> Government of Canada, Sponsor a Refugee, 9 August 2017 <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program.html>>.

<sup>126</sup> European Migration Network, *Resettlement and Humanitarian Admission Programmes in Europe – what works?* (November 2016) <[http://emn.ie/files/p\\_201611221258152016\\_emn-informs\\_resettlement.pdf](http://emn.ie/files/p_201611221258152016_emn-informs_resettlement.pdf)>, p. 7. France has indicated an interest in developing similar initiatives.

arrival.<sup>127</sup> And this is part of the main challenges the programme gives rise to, as it constitutes a form of **'privatisation of protection'**, shifting certain responsibilities away from public authorities, that may lead to excessive selectivity (if not discrimination) of candidates for reasons unrelated to protection needs. Other obstacles relate to the **complexity and length of procedures, logistical and coordination flaws** between multiple actors, **lack of adequate pre-departure information and orientation, difficulties in obtaining travel documents, and security issues** in the country of residence.<sup>128</sup>

The **UK Vulnerable Person Resettlement Scheme (VPRS)** and **Vulnerable Children's Resettlement Scheme (VCRS)**,<sup>129</sup> targeting respectively **20,000 refugees fleeing conflict in Syria and 3,000 minors from the MENA region**, illustrates further difficulties.<sup>130</sup> The programme allows only registered charities, community interest companies, or religious organisations to act as sponsors accredited by the Home Office,<sup>131</sup> upon signature of a 12-month declaration, approval by the relevant local authority, and a guarantee of £9,000, committing themselves to a plethora of obligations: They need to actively participate in every step of the process and, on arrival, provide accommodation for two years, initial orientation assistance, and help with access to welfare services. This requires significant resources and expertise, considerably limits accessibility to the scheme, and reduces potential impact. In fact, as of July 2017, only 7,000 refugees had arrived in the UK.<sup>132</sup>

At individual level, it is unclear which conditions are specifically required. Relevant documentation simply states that '[t]he UK sets the criteria and then UNHCR identifies and submits potential cases for consideration', so sponsors cannot name preferred candidates themselves. There is a security screening and a pseudo-exclusion process upon which cases may be rejected on 'war crimes or other grounds' – but without taking account of other exclusion clauses in the Qualification Directive and, most importantly, without providing for any legal remedies or procedural guarantees. On completion of the screening phase, a full medical assessment is undertaken by IOM, which also provides with pre-departure and travel support. On confirmation of eligibility, an initial three-

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<sup>127</sup> Ibid., p. 7-8

<sup>128</sup> Ibid., p. 8.

<sup>129</sup> UK Home Office, Syrian vulnerable person resettlement programme (VPRS) fact sheet, 28 October 2015 (updated 21 July 2017) <<https://www.gov.uk/government/publications/syrian-vulnerable-person-resettlement-programme-fact-sheet>>; and 'New scheme launched to resettle children at risk', 21 April 2016 <<https://www.gov.uk/government/news/new-scheme-launched-to-resettle-children-at-risk>>.

<sup>130</sup> UK Home Office, Syrian Vulnerable Persons Resettlement Scheme (VPRS) - Guidance for local authorities and partners (July 2017) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631369/170711\\_Syrian\\_Resettlement\\_Updated\\_Fact\\_Sheet\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631369/170711_Syrian_Resettlement_Updated_Fact_Sheet_final.pdf)>.

<sup>131</sup> The first Syrian refugees under the programme arrived in Manchester in November 2015, through the sponsorship of Caritas Salford. See 'Caritas Europe share the Community Sponsorship model of refugee resettlement at the European Parliament', Caritas Salford (undated) <<https://www.caritassalford.org.uk/news/caritas-europe-share-the-community-sponsorship-model-of-refugee-resettlement-at-the-european-parliament/>>.

<sup>132</sup> UK Home Office, Refugees of all nationalities fleeing Syria are now eligible for resettlement in the UK, 3 July 2017 <<https://www.gov.uk/government/news/refugees-of-all-nationalities-fleeing-syria-are-now-eligible-for-resettlement-in-the-uk>>. The IMO webpage provides a revised figure, speaking of 'Over 10,000 Refugees Resettled in UK Under Flagship Scheme', Press Release, 23 February 2018 <<https://www.iom.int/news/over-10000-refugees-resettled-uk-under-flagship-scheme>>.

month entry visa is issued for travel, followed by a five-year Refugee Leave permit granted on arrival.<sup>133</sup> The whole process takes substantial time, which has translated in long waits and the programme stalling for several months after launching.<sup>134</sup>

### 3.1.3 Private Sponsorship

Private sponsorship is a slightly different mechanism from community sponsorship schemes. It typically **enables private citizens**—such as ‘groups of five’ in Canada<sup>135</sup>—**to support individual arrivals** by family members and extended kin. The **first programme emerged in Canada** in 1979 and has resettled nearly 300,000 refugees since.<sup>136</sup> The target quota for 2017 was 16,000.<sup>137</sup> The cost, however, is considerable. It has been estimated to be around C\$13,500 for one individual and C\$30,900 for a family of five, rising criticism for its **privatisation / commodification impact on protection**.<sup>138</sup> On the other hand, the government provides for healthcare, education and integration schemes and applicants are exempted from visa fees. Access to social security benefits is allowed from the second year upon arrival.<sup>139</sup>

In 2016, the Canadian model **inspired the UNHCR-led Global Refugee Sponsorship Initiative**, designed to support other countries to adopt similar schemes.<sup>140</sup> **Australia**, for instance, launched its **Community Support Programme (CSP) on 1<sup>st</sup> July 2017**,<sup>141</sup> after a four-year pilot,<sup>142</sup> permitting individuals, businesses and community groups to sponsor eligible cases. The numbers, however, are small, with a yearly quota of 1,000.<sup>143</sup> And requests must go through one of the few registered ‘Approved Proposing Organisation’. Eligibility conditions include protection-related criteria, such as being outside the country

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<sup>133</sup> Syrian Vulnerable Persons Resettlement Scheme (VPRS) - Guidance for local authorities and partners (July 2017), p. 6.

<sup>134</sup> ‘UK community refugee scheme has resettled only two Syrian families’, *The Guardian*, 18 January 2017 <<https://www.theguardian.com/uk-news/2017/jan/18/uk-community-refugee-scheme-has-resettled-only-two-syrian-families>>.

<sup>135</sup> Government of Canada, Groups of Five - Sponsor a Refugee, 15 March 2018 <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program/groups-five.html>>.

<sup>136</sup> Asylum Insight, ‘Private Sponsorship’, 14 September 2017 <<http://www.asyluminsight.com/private-sponsorship/#.Wq-c9q10f3A>>.

<sup>137</sup> Government of Canada, Notice - Supplementary Information 2017 Immigration Levels Plan, 31 October 2016 <<https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-supplementary-information-2017-immigration-levels-plan.html>>.

<sup>138</sup> See e.g. Canadian Council for Refugees, 2017 Immigration Levels - Comments (undated) <<http://ccrweb.ca/en/2017-immigration-levels-comments>>, critiquing that ‘[a]s a principle, government resettlement numbers should always be higher than the numbers resettled by civil society. However, according to the 2017 levels plan, privately sponsored refugees will make up 64% of the total number of refugees resettled to Canada’.

<sup>139</sup> Government of Canada, Guide to the Private Sponsorship of Refugees Program, 26 May 2017 <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program.html>>.

<sup>140</sup> The Global Sponsorship Refugee Initiative (2018) <<http://refugeesponsorship.org>>.

<sup>141</sup> Australian Department of Home Affairs, The Community Support Programme (undated), <<https://www.homeaffairs.gov.au/Trav/Refu/Offs/community-support-programme>>.

<sup>142</sup> Australian Refugee Council, Community Proposal Pilot and Community Support Program, 6 October 2016, <<https://www.refugeecouncil.org.au/getfacts/seekingsafety/resettlement/community-support-program/>>.

<sup>143</sup> Australian Minister for Immigration and Border Protection, 2017 Budget, Media Release, 9 May 2017 <[http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5266893/upload\\_binary/5266893.pdf;fileTy pe=application%2Fpdf#search=%22media/pressrel/5266893%22](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5266893/upload_binary/5266893.pdf;fileTy pe=application%2Fpdf#search=%22media/pressrel/5266893%22)>.

of origin and subjected to persecution, but also require applicants to fall within Australia's settlement priorities and meet specific health and character standards. And those with an offer of employment or likely to become financially independent in the short term are given priority. Sponsors must cover airfares, medical assessment expenses, visa fees, and post-arrival costs, including social security payments, for the first year, which virtually shifts responsibility for material subsistence and community integration to the private sector.<sup>144</sup> The government has, in fact, projected savings of A\$ 26.9 million over four years, showing no intention of reinvesting gains into other publicly-funded resettlement opportunities.<sup>145</sup>

One key drawback of the Australian scheme is that, unlike the Canadian experience, is not based on the principle of additionality. Sponsored places are integrated within the general government resettlement targets of 16,250 places in 2017-18 and 18,750 places in 2018-19,<sup>146</sup> instead of creating additional protection capacity. The scheme thus reduces the overall spaces available under the general Humanitarian Programme.<sup>147</sup> On the other hand, processing times seem to be faster than under alternative routes, prompting criticism that it is serving wealthy applicants purchasing 'priority access' to asylum.<sup>148</sup>

In the EU, some countries have also followed the Canadian example. The **German Humanitarian Admission Programme (HAP)**,<sup>149</sup> for instance, facilitates family reunion with Syrian relatives affected by the conflict. Since 2013, more than 20,000 visas have been issued for the purpose—and the programme is open-ended.<sup>150</sup> The criteria require relatives (either German citizens or legal residents) to sign a binding declaration assuming personal liability for all travel and accommodation expenses up to five years upon arrival in Germany—excluding medical care costs, integration programmes, and education and vocational training expenses. The referral is done directly by the sponsoring kin and the beneficiary is then issued with a two-year renewable permit on humanitarian grounds. Yet, a subsequent successful asylum application will not release the sponsor of his/her obligations. Visa applications are processed and issued by German representations abroad, which has proved challenging given the high number of applications received, translating into strained capacity and long waiting periods of up to

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<sup>144</sup> Australian Department of Home Affairs, The Community Support Programme (undated), <<https://www.homeaffairs.gov.au/Trav/Refu/Offs/community-support-programme>>. See also Global Special Humanitarian visa (subclass 202) <<https://www.homeaffairs.gov.au/Trav/Visa-1/202->>.

<sup>145</sup> Australian Government, Budget Measures - Budget Paper No 2 (2017-18), 9 May 2017, p. 15 <<http://www.budget.gov.au/2017-18/content/bp2/download/bp2.pdf>>.

<sup>146</sup> Ibid.

<sup>147</sup> Hoang, 'Risks and rewards in Australia's plan for private sponsorship', UNSW Kaldor Centre for International Refugee Law, 16 May 2017 <<http://www.kaldorcentre.unsw.edu.au/publication/risks-and-rewards-australias-plan-private-sponsorship>>.

<sup>148</sup> Kneebone, Hirsch and Macklin, 'Private resettlement models offer a way for Australia to lift its refugee intake', *ABC News*, 19 September 2016 <<http://www.abc.net.au/news/2016-09-19/private-resettlement-a-way-for-australia-to-lift-refugee-intake/7857988>>.

<sup>149</sup> Humanitarian Assistance Programme (HAP) is an umbrella term including UNHCR-referred cases and flexible family reunification programmes for refugees.

<sup>150</sup> ICMC, Private Sponsorship in Europe - Expanding Complementary Pathways for Refugee Resettlement (September 2017), p. 27 <<https://www.icmc.net/sites/default/files/documents/scoping-paper-icmc-europe-2017.pdf>>.

1.5 years.<sup>151</sup> This is why, since June 2016, IOM ‘service centres’, located in close proximity, have provided individual assistance in purpose-built facilities to alleviate pressure on German Consular Offices (in Turkey, Iraq and Lebanon), accelerating processing times and releasing German authorities of application-preparation and pre-departure orientation tasks, allowing the programme to run smoothly.<sup>152</sup>

### 3.1.4 Humanitarian Corridors

Italy and France have experimented with humanitarian visas, based on the LTV provisions of the CCV or on domestic long-term visas rules, in the form of ‘humanitarian corridors’.<sup>153</sup> As the map below illustrates, up to 14 other EU countries have had similar schemes in the past.<sup>154</sup>

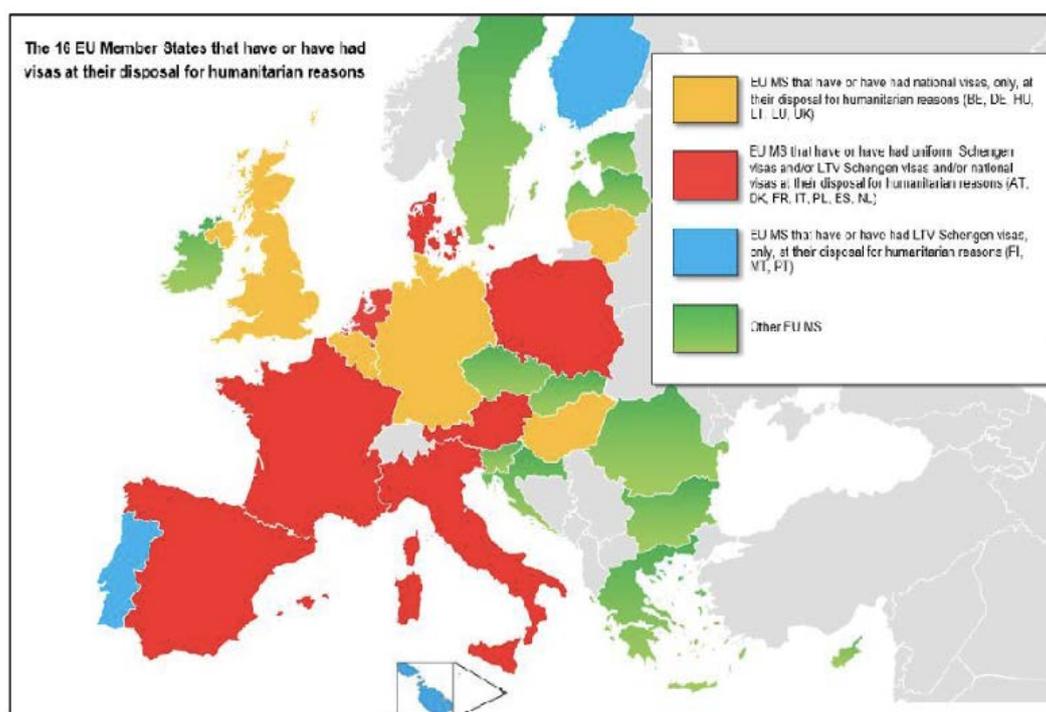


Table 4: PEPs Map. European Parliament, IPOL Study, Humanitarian visas: option or obligation? (Sept. 2014), p. 49

In Italy, a coalition of several religious groups, including the Community of Sant’Egidio, the Federation of Evangelical Churches (FCEI), and the Waldensian Board, signed a Memorandum of Understanding with the Italian Ministries of Interior and Foreign Affairs in December 2015 for a 2-year pilot programme, ensuring safe access to protection for 1,000 cases – in addition to the parallel resettlement scheme of the Italian government. The rhythm of implementation has been swift, with almost 90% of the quota filled by

<sup>151</sup> Ibid., p. 28 and 29.

<sup>152</sup> German Federal Foreign Office, IOM’s Family Assistance Programme, 4 April 2017, <[http://germany.iom.int/sites/default/files/FAP/FAP\\_Infosheet\\_ENGLISH\\_2017-04-04.pdf](http://germany.iom.int/sites/default/files/FAP/FAP_Infosheet_ENGLISH_2017-04-04.pdf)>.

<sup>153</sup> ICMC (n 150), p. 17-23.

<sup>154</sup> Iben Jensen (n 8), p. 41-49.

August 2017.<sup>155</sup>

Candidates are Syrian refugees coming from Lebanon and Morocco. They are identified on a *prima facie* basis and referred by the sponsors' local networks considering special vulnerability, in consultation with UNHCR—targeting, especially, 'victims of persecution, torture and violence, as well as families with children, elderly people, sick people, persons with disabilities'.<sup>156</sup> But the project does not distinguish between refugees and others. It rather focuses on 'individual cases determined by personal situation, age and health status which are not a priority in the Geneva Convention'.<sup>157</sup> Candidates are interviewed and after an (unspecified) screening process by the Consular authorities, a LTV visa is extended on 'humanitarian grounds' for entry, for the sole purpose of lodging an asylum application in Italy immediately upon arrival. And, thus far, all cases have qualified for international protection following expedited procedures. Yet, costs relating to accommodation, subsistence, and access to services pertaining to refugee and subsidiary protection status have been covered by the sponsoring organisations for an initial period of up to two years after recognition—thus deviating from the normal Qualification Directive arrangements. Each organisation has developed its own approach according to individual capacities, which has led to uncertainty as for the quality and duration of settlement assistance in individual cases.<sup>158</sup> Nevertheless, the overall assessment by participating organisations has been very positive and a new Memorandum has been signed in February 2017 for an extra 500 places until the end of 2018—this time targeting Eritrean, Somali and Sudanese refugees in Ethiopia and hence expanding the initial focus on Syrian exiles.<sup>159</sup>

In March 2017, **France** followed Italy's example and opened a corridor from Lebanon for 500 Syrian and Iraqi refugees until the end of 2018. The Memorandum was signed by five promoting organizations, including the St. Egidio Community, the Protestant Federation of France, the French Bishops' Conference, *Entraide Protestante* and *Secours Catholique*.<sup>160</sup> The scheme is not based on the LTV provisions of the CCV, but on domestic long-stay visa regulations, whereby the candidate is delivered a 'visa pour asile' and granted permission to travel to France to apply for asylum on arrival. A prior Humanitarian Visa programme, running from 2012 until 2016, allowed for the self-referral, mostly via

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<sup>155</sup> ICMC (n 150), p. 17.

<sup>156</sup> Humanitarian Corridors for Refugees, Sant'Egidio (undated) <<http://archive.santegidio.org/pageID/11676/langID/en/Humanitarian-Corridors-for-refugees.html>>.

<sup>157</sup> Lyneham, 'Humanitarian Corridors are Saving Lives', Info Migrants, 10 November 2017 <<http://www.infomigrants.net/en/post/6020/humanitarian-corridors-are-saving-lives>>. See also Mallardo, 'Humanitarian Corridors: A Tool to Respond to Refugees' Crises', Border Criminologies, 3 May 2017 <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/05/humanitarian>>.

<sup>158</sup> ICMC (n 150), p. 20.

<sup>159</sup> First African refugees to Italy via humanitarian corridors, ANSA, 30 November 2017 <[http://www.infomigrants.net/en/post/6338/first-african-refugees-to-italy-via-humanitarian-corridors?utm\\_source=ECRE+Newsletters&utm\\_campaign=ff8195c031-EMAIL\\_CAMPAIGN\\_2018\\_02\\_23&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-ff8195c031-420552073](http://www.infomigrants.net/en/post/6338/first-african-refugees-to-italy-via-humanitarian-corridors?utm_source=ECRE+Newsletters&utm_campaign=ff8195c031-EMAIL_CAMPAIGN_2018_02_23&utm_medium=email&utm_term=0_3ec9497afd-ff8195c031-420552073)>.

<sup>160</sup> Humanitarian corridors: France joins Italy; Hollande and Giro, 'step forward against globalization of indifference', *ONU Italia*, 14 March 2017 <<http://www.onuitalia.com/2017/03/14/humanitarian-corridors-france-joins-italy-hollande-giro-step-forward-globalization-indifference/>>.

relatives, of 8,900 Syrians and Iraqis. But this has now been discontinued.<sup>161</sup>

Similarly to the Italian scheme, the sponsor assumes a number of responsibilities for travel, accommodation, settlement, and integration support for one year. But, unlike the Italian experience, the programme can also accommodate applications from persons with family or other links to France.<sup>162</sup> The sponsor carries out scoping interviews, submits a list of candidates and a complete visa application for each of them to the French consular authorities in Beirut. Embassy personnel, in consultation with the Ministry of Interior, undertake a security check and then issue a Visa D within two months. Candidates have 15 days to apply for asylum after arrival and asylum services 3 months to reach a decision. In the meantime, applicants do not have the right to work. Care, throughout this period, is provided by the sponsor.<sup>163</sup>

A variant from the Italian and French examples has been tried out at **EU level** on a very small scale. Back in 2002, a **CFSP Common Position** was adopted—drawing on former second pillar provisions, instead of those regarding JHA—**concerning the transfer and temporary reception of 13 Palestinian nationals evacuated from the Church of the Nativity of Bethlehem**, following an agreement with the Government of Israel, the Palestinian Authority, and other parties.<sup>164</sup> The initiative was taken ‘on a temporary basis and exclusively for [undefined] humanitarian reasons’.<sup>165</sup> Entry decisions fell, nonetheless, within the sole competence of each receiving Member States—comprising Belgium, Greece, Spain, Ireland and Portugal—deciding on a sovereign basis.<sup>166</sup> The purpose of the Common Position was to ensure ‘a common approach at the level of the European Union’, to ensure ‘comparable treatment’ and cater for common ‘security concerns’.<sup>167</sup>

With that in mind, participating Member States ‘shall’ issue a national permit allowing entry into their territory and stay for up to 30 months—a period that has been renewed several times; the latest in April 2016 for a further 24 months starting from 31<sup>st</sup> January 2016.<sup>168</sup> That does not mean that the issuance of these permits may not be ‘submitted to specific conditions to be accepted by the Palestinians concerned before their arrival’, as each Member State sees fit.<sup>169</sup> In any event, Member States shall ‘take account of the public order and security concerns of other Member States’, despite that the permit’s

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<sup>161</sup> ICMC (n 150), p. 21.

<sup>162</sup> *Ibid.*, p. 22.

<sup>163</sup> *Ibid.*, p. 23.

<sup>164</sup> Council Common Position of 21 May 2002 concerning the temporary reception by Member States of the European Union of certain Palestinians, 2002/400/CFSP, [2002] OJ L 138/33 (as amended by Council Common Position 2003/366/CFSP, [2003] OJ L 124/51, and Council Common Position 2004/493/CFSP, [2004] OJ L 181/24). However, note that the practice of regulating migration issues via CFSP instruments is legally doubtful. See Martenczuk, ‘Policy Migration and EU External Relations’, in Azoulai and de Vries (eds), *Migration and EU Law and Policy* (OUP, 2014) 69, at 100.

<sup>165</sup> Common Position 2002/400/CFSP, Recital 3, Preamble, and Art 1.

<sup>166</sup> *Ibid.*, Recital 4, Preamble, and Art 2.

<sup>167</sup> *Ibid.*, Recitals 4-6, Preamble.

<sup>168</sup> *Ibid.*, Art 3, first indent, and Council Decision (CFSP) 2016/608 of 18 April 2016 concerning the temporary reception by Member States of the European Union of certain Palestinians, [2016] OJ L 104/18, Preamble and Art 1.

<sup>169</sup> *Ibid.*, Art 3, second indent.

validity ‘shall be limited to the territory of the Member State concerned’<sup>170</sup>—which is reminiscent of the Italian practice based on the current LTV provisions of the CCV, although using longer-term permits, as in the French example. Upon arrival, receiving countries must ensure ‘the personal security of the Palestinians received’, while, regarding accommodation and integration matters, each can apply their respective national provisions—instead of the Qualification Directive regime.<sup>171</sup>

A further experience with humanitarian corridors at **EU level** will be the future **Voluntary Humanitarian Admission Scheme (VHAS)**, adopted for the implementation of the **EU-Turkey Statement** arrangements.<sup>172</sup> The system aims not only to provide safe access to Syrian refugees to international protection in a Member State and demonstrate solidarity, but also to reduce the number of irregular crossings from Turkey.<sup>173</sup> In fact, ‘the number of persons to be admitted...[will] be determined regularly taking into account [inter alia]...the sustainable reduction of numbers of persons irregularly crossing...into the European Union’.<sup>174</sup> Admission is thus **subordinated to Turkey’s** success in **halting unwanted arrivals**, rather than premised on the candidates’ protection needs—actually, the document includes a section on the ‘prevention of secondary movements’ that corroborates this approach, making pre-departure orientation and support targeted to informing candidates ‘in particular’ of ‘the consequences of onward movement’.<sup>175</sup>

If such is the case—however the Member States may come to reach that ‘common conclusion’,<sup>176</sup> the system is to be deployed, based on a double-referral process by Turkey and UNHCR and only with regard to displaced persons ‘who have been registered by the Turkish authorities prior to 29 November 2015’—which substantially reduces the pool of potential beneficiaries.<sup>177</sup> The end result should be a grant of subsidiary protection—not refugee status—or an ‘equivalent temporary status’, which the Commission fails to define, with a minimum duration of one year.<sup>178</sup> Considering that participation in the scheme is strictly voluntary, it is unclear why participating countries ‘should take into account...absorption, reception and integration capacities, the size of the population, total GDP, past asylum efforts, and the unemployment rate’ when accepting applicants<sup>179</sup>—a distribution key only makes sense in cases where pre-defined, compulsory quotas are at play.

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<sup>170</sup> Ibid., Recital 6, Preamble, and Art 3, second indent.

<sup>171</sup> Ibid., Arts 4 and 6.

<sup>172</sup> The scheme was proposed in 2015, but the Commission has recently spoken of it as a ‘future’ mechanism, yet to be implemented on the ground. See Commission Recommendation of 15 December 2015 for a Voluntary humanitarian admission scheme with Turkey, C(2015) 9490; and Commission Recommendation of 27 September 2017 on Enhancing legal pathways for persons in need of international protection, C(2017) 6504, Recital 14.

<sup>173</sup> Ibid., Recitals 3 and 6, Preamble.

<sup>174</sup> Ibid., Recital 10, Preamble, and para. 3.

<sup>175</sup> Ibid., paras 12-13.

<sup>176</sup> Ibid., para. 6.

<sup>177</sup> Ibid., para. 2.

<sup>178</sup> Ibid. and para. 11.

<sup>179</sup> Ibid., para. 4.

The Commission proposes a ‘standardised’ admission procedure with several elements, including identity and registration checks, security and medical screenings, a vulnerability evaluation ‘according to UNHCR standards’, an assessment of possible family links (limited to ‘the participating States’, instead of the entire EU), alongside a ‘preliminary assessment of the reasons for fleeing from Syria’, rather than a full status determination process. Candidates can also be excluded on the basis of ‘reasons for exclusion from international protection’.<sup>180</sup> The process should be run through a ‘collaborative effort of the participating Member States, Turkey, UNHCR and EASO’, who should adopt standardised operating procedures—in consultation with the Commission and IOM.<sup>181</sup> Nevertheless, the final decision, to be adopted within six months, rests solely (and without appeal) with the Member States.<sup>182</sup>

To foster cooperation between the authorities of participating Member States, the Commission also suggests that ‘common processing centres and/or mobile teams’ be developed, ‘where staff of one participating State is authorised to represent another participating State for the purpose of conducting whole or part of the selection process on behalf of that other State’. The idea is that this takes place ‘either at the representation or in the province where the admission candidate is registered’.<sup>183</sup> But the procedures to follow, the regulatory framework applicable (whether the CCV or otherwise), and any good administration and effective remedy guarantees are not specified.

## 3.2 Overall assessment

**PEP experience** in the EU, at supranational and domestic level, is **varied** and **extensive**. The **numbers**, in some cases, are **symbolic**, but there is no reason why they could not be upscaled, especially if a EU-wide instrument is adopted. This is precisely another **drawback** of practices so far; they are all **founded on the sovereign discretion of the Member State concerned**, rather than on an understanding that recognises the legal force of the protection rights of individuals, as Chapter 4 elucidates. Equally, the predominance of resettlement and resettlement-inspired sponsorship initiatives disregard the fact that these programmes **provide secondary channels to access protection** to those who have *already* been recognised as refugees, failing thus to provide a primary route for those whose status has yet to be formally established. They cater for specific categories of vulnerable refugees and **as of favour or good will**; not for the general class of asylum seekers holding a *right* to protection from persecution and serious harm.

Other challenges concern the **long processing times** taken by some schemes, the **excessive selectivity of qualification criteria**, and **accessibility issues**—in particular regarding community and private sponsorship programmes, which entail the transfer of

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<sup>180</sup> Ibid., para. 7.

<sup>181</sup> Ibid., para. 8.

<sup>182</sup> Ibid., paras 9 and 10.

<sup>183</sup> Ibid., para. 9.

costs to private actors. Although this type of initiative may ensure better integration and acceptance of beneficiaries within local receiving communities, they require an **amount of resources and expertise** that most individuals and private organisations lack, thereby further obstructing access, unduly outsourcing responsibility to non-State actors, and exacerbating the **risk of privatisation of protection**. The **publicity** and **transparency** of these initiatives should also improve to **enhance predictability and legal certainty**, helping applicants and sponsors manage expectations and develop trust in the system.

On the **positive side** of the balance, all programmes (in EU Member States) have been developed with the **principles of additionality and complementarity** in mind. They do not intend to provide exclusive avenues of access to protection, but to offer alternatives to ‘spontaneous’ arrivals other than via smuggling and trafficking routes. The only initiative that openly links humanitarian admission to irregular migration reduction aims, using the latter as a means to enhance control capacity, is the yet-to-be implemented Voluntary Humanitarian Admission Scheme (VHAS) from Turkey. The unsuitability (legally and ethically) of trading one for the other is to be noted and rejected in the development of a comprehensive humanitarian visa scheme. Article 1 CFR, encapsulating the ‘inviolable’ right to human dignity, calls for an alternative approach. Compliance with fundamental rights under EU law, as the next chapter expounds, is not optional or dependent on the achievement of desirable policy outcomes. The CFR must be observed as a matter of law, and the entitlements thereunder of TCNs honoured on their own right and without discrimination.<sup>184</sup>

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<sup>184</sup> See further Costello, *The Human Rights of Migrants in European Law* (OUP, 2015).

## CHAPTER 4. THE PLACE OF FUNDAMENTAL RIGHTS: Are Humanitarian Visas a Matter of Discretion?

### KEY FINDINGS

- Even if current CCV provisions have been held to provide insufficient basis for the mandatory issuance of humanitarian visas, it is clear that **asylum seekers are covered by relevant treaty provisions regarding those crossing external borders** (Article 77(2) TFEU). This being the case, **relevant fundamental rights standards need to be complied with** in the development and implementation of EU law in the area.
- **Fundamental rights** penetrate the EU legal order as **primary law** (Article 6 TEU and Charter of Fundamental Rights), including *qua* founding values (Article 2 TEU), **and** at **secondary law** level (Article 4 SBC and Recital 29 CCV). They are **all-pervasive** and **govern** the development of the **AFSJ at large** (Article 67 TFEU), including border control and visa policy, **as well as the** construction of a Common European Asylum System (**CEAS**) in particular (Article 78 TFEU).
- The Charter of Fundamental Rights (CFR) applies whenever a situation falls to be governed by EU law (*Fransson*). **Any time the EU or the Member States act within the scope of EU law** (Article 51 CFR), the **Charter becomes applicable**.
- **This includes the protection against *refoulement*** as per **Articles 4 and 19(2) CFR**, which consolidate the substance of Article 3 ECHR as interpreted by the European Court of Human Rights. As a result, **any measure**, including a rejection of entry or a visa refusal **under Schengen rules**, ‘the effect of which is to prevent migrants from reaching the borders of the [Member] State [concerned]’ may amount to *refoulement* (*Hirsi*, para. 180) and, **if it exposes the applicant to persecution or serious harm, must be forbidden**.
- What is more, Member States, when confronting situations representing a risk of ill treatment are **obliged to take positive action** to avert it (*Căldăraru*), which, in the concrete case, if no other practicable alternatives are available, **may require the delivery of a visa**. And, **in the absence of harmonised rules** to this effect, **Member States must lay down the pertinent procedure** (Article 4(3) and 19 TEU).

## 4.1 Fundamental rights and access to protection in the EU

The consideration of the regulation of access to international protection in the EU as a matter of Member State discretion, as Chapter 3 has illustrated, derives from the prevailing understanding that visas for asylum seeking purposes constitute a situation which is ‘not...governed by EU law’.<sup>185</sup> This is the conclusion arrived at by the CJEU in *X and X*. It is the result of considering the ‘purpose of [such] application’ – so as to reach the external borders of the Member States to *subsequently* lodge a separate claim for international protection – as ‘the defining feature of the situation’, thereby implying that, because that purpose differs from the key (policy) objective of the Code – which is ‘that of [establishing the procedures and criteria for issuing a] short-term visa’ – the situation becomes extraneous to the EU legal order.<sup>186</sup>

However, this is a consequentialist reasoning, justifying exclusion from the scope of application of EU law, based on the projected (and presumably undesirable) results of inclusion (from a policy, rather than legal, perspective). In fact, the Court posits that recognising the situation of asylum seekers, intending to approach Schengen territory by means of a visa, as falling within the scope of application of EU law, ‘would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice’. In the eyes of the Court, this is something to be avoided, since it ‘would [apparently] undermine the general structure of the [Dublin] system’.<sup>187</sup> Yet, it is the Dublin Regulation that includes, among the criteria for apportioning responsibility for the examination of asylum applications between Member States, the ‘possession of a valid visa [presumably including those issued following CCV rules]’.<sup>188</sup> As a norm, ‘[w]here the applicant is in possession of a valid visa, the Member State which issued the visa *shall* be responsible for examining the application for international protection’, unless other preceding criteria in the list of Chapter III DR are to be applied first.<sup>189</sup> So, this very situation is already part and parcel of the current Dublin provisions for allocation of responsibility in the present state of EU law. It does not add anything new that may upset the current Dublin order.

Moreover, such a reading disregards the full implications of the fact that a visa application and an application for international protection are two distinct procedures under EU law. It neglects that ‘applications for visas...[even if] with a view to applying for asylum...*thereafter*’, are independent.<sup>190</sup> Each application is subject to specific criteria

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<sup>185</sup> *X and X* (n 11), para. 45.

<sup>186</sup> *Ibid.*, para. 47.

<sup>187</sup> *Ibid.*, para. 48.

<sup>188</sup> Art 12(2), Regulation (EU) No 604/2013 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), [2013] OJ L180/31 (‘Dublin Regulation’ / ‘DR’).

<sup>189</sup> According to Art 7(1) DR, ‘[t]he criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter [i.e. Chapter III DR]’.

<sup>190</sup> *X and X* (n 11), para. 42 (emphasis added).

and separate rules, and is not part of the same legal action. The asylum seeking visa applicant under the CCV simply aspires to ‘reach the territory of the [Member State] which issued the visa’.<sup>191</sup> His/her *subsequent* stay, upon lodging an asylum claim, will pass to be governed by the asylum *acquis*. And it will be by virtue of Article 9 APD that ‘applicants *shall* [then] be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision’.<sup>192</sup> So, what he/she needs, while still abroad, is not ‘long-term visas and residence permits...on humanitarian grounds’, which have not been adopted ‘to date’ by the EU legislature.<sup>193</sup> This also differs from ‘requests for diplomatic or territorial asylum submitted to representations of Member States’, which are excluded from the current APD.<sup>194</sup> What the asylum seeking visa applicant requires is a means of reaching the external borders of the Member States, like other third-country nationals subject to the condition of being ‘in possession of a valid visa, if required pursuant to [the Visa List Regulation]’,<sup>195</sup> so as to be able to cross into Schengen territory legally and safely to lodge an asylum application.<sup>196</sup>

As clarified in Chapter 2 above, there is no legal or rational basis to exclude asylum seekers from the generic group of ‘third country nationals’ to whom Schengen visas are addressed, and even less so from the category of ‘persons crossing [or showing ‘an intention to cross’] the external borders of the Member States of the Union’ to whom admission criteria apply.<sup>197</sup> The fact that these rules are to be implemented ‘without prejudice to...the rights of refugees and persons requesting international protection’ and ‘in full compliance with...fundamental rights’, including under the CFR, the Geneva Convention, and observing ‘obligations [specifically] related to access to international protection’ substantiates this point.<sup>198</sup>

Therefore, the conclusion, in *X and X*, that the Visa Code ‘must be interpreted as meaning that an application for a visa...on the basis of Article 25 [CCV]...does not apply within the scope of that code’ is puzzling.<sup>199</sup> The presence of Article 25 CCV *within* the Code, allowing Member States to derogate from general admission conditions to issue LTV visas, points in the opposite direction. It is the very CCV that includes Article 25 and regulates the conditions of its application—to be issued ‘exceptionally’ and ‘when...consider[ed] necessary’ by the Member State concerned. The ‘discretionary power’ it contemplates, as the CJEU concluded in *N.S.* in the context of the Dublin system, ‘forms part of the mechanisms [provided for in the CCV] for [issuing visas] under that regulation and, therefore...a Member State which exercises that discretionary

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<sup>191</sup> Mutatis mutandis, Art 18 CISA.

<sup>192</sup> Such a change of circumstances may also occur, for instance, when someone arrives irregularly or overstays a visa and then marries a EU national, thus becoming a family member whose rights are then to be determined under the EU Citizenship Directive (n 60). See, e.g. Case C-127/08 *Metock* ECLI:EU:C:2008:449.

<sup>193</sup> *X and X* (n 11), para. 44.

<sup>194</sup> Art 3(2) APD.

<sup>195</sup> Art 6(1)(b) SBC.

<sup>196</sup> Art 1, second indent, SBC.

<sup>197</sup> Art 1(2) CCV; and Arts 1 and 2(10) SBC.

<sup>198</sup> Arts 3(b) and 4 SBC.

<sup>199</sup> *X and X* (n 11), para. 51.

power must be considered as implementing EU law'.<sup>200</sup> The issuance of LTV visas under Article 25 CCV is a faculty covered by the express provisions of the Visa Code. As a result, the situation it explicitly contemplates cannot be said 'not [to] fall within the scope of that Code'.<sup>201</sup> If Article 25 applies, that perforce implies that the CCV, wherein the provision is contained, governs the situation at hand.

And, even if the interpretation excluding asylum seeking visa applicants from the scope of application of the CCV was retained, that cannot alter the fact that they remain covered *qua* 'persons crossing [or showing 'an intention to cross'] the external borders of the Member States of the Union'<sup>202</sup> by the Schengen Borders Code and *qua* '[n]ationals of third countries...[whom] shall be required to be in possession of a visa when crossing the external borders of the Member States' as per Annex I to the Visa List Regulation.<sup>203</sup> They belong to the group of 'persons' contemplated in Article 77(2) TFEU, subject to checks when 'crossing external borders'. This being the case, it ensues that fundamental rights become relevant to their position, since 'situations cannot exist which are covered...by European Union law without...fundamental rights being applicable'.<sup>204</sup>

#### 4.1.1 EU Founding Values

'[R]espect for human rights' belongs to the set of values on which the 'EU is founded'.<sup>205</sup> Its importance is all-pervasive. It forms part of 'its spiritual and moral heritage' of the organisation.<sup>206</sup>

Fundamental rights not only govern the internal dimension of EU policies and actions, but have also an impact on their external effects,<sup>207</sup> such that '[i]n its relations with the wider world, the Union shall uphold and promote its values'. In particular, '[i]t shall contribute to the protection of human rights'.<sup>208</sup> As Article 21 TEU reiterates, '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world', and this includes 'the universality and indivisibility of human rights and fundamental freedoms'.

To that end, '[t]he Union shall seek to develop relations, and build partnerships with third countries, and international, regional or global organisations' and 'shall [also] promote multilateral solutions to common problems' in line with those values.<sup>209</sup> In parallel, '[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to...consolidate and

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<sup>200</sup> Joined Cases C-411/10 and C-493/10 *NS & ME* ECLI:EU:C:2011:865, para. 68.

<sup>201</sup> *X and X* (n 11), para. 44.

<sup>202</sup> Arts 1 and 2(10) SBC.

<sup>203</sup> Art 1(1) VLR

<sup>204</sup> Case C-617/10 *Fransson* ECLI:EU:C:2013:105, para. 21. See also *NS & ME* (n 200), paras 68-69.

<sup>205</sup> Art 2 TEU.

<sup>206</sup> Recital 2, Preamble, CFR.

<sup>207</sup> Art 21(3) TEU.

<sup>208</sup> Art 3(5) TEU.

<sup>209</sup> Art 21(1), second indent, TEU.

support...human rights'.<sup>210</sup> And it 'shall [too] ensure consistency between the different areas of its external action and between these and its [internal] policies'.<sup>211</sup> The observance of fundamental rights is, thus, omnipresent in everything and anything the EU or the Member States do 'when they are implementing Union law'.<sup>212</sup> They constitute key standards of validity and legality of EU acts.<sup>213</sup>

#### 4.1.2 The AFSJ and the CEAS' Aims

Like all Union policies, the Area of Freedom Security and Justice (AFSJ), which '[t]he Union shall offer its citizens',<sup>214</sup> also 'places the individual at the heart of its activities',<sup>215</sup> and must hence be equally built 'with respect for fundamental rights'.<sup>216</sup> Fundamental rights therefore penetrate 'policies on border checks, asylum and immigration', as a matter of EU primary law.<sup>217</sup>

In particular, the construction of the CEAS is subordinate to compliance with fundamental rights. Article 78 TFEU makes clear that the Union 'shall develop a common policy on asylum...ensuring compliance with the principle of *non-refoulement* [and] in accordance with the Geneva Convention...and other relevant treaties'.<sup>218</sup>

These are the general parameters governing the treatment of third-country nationals in need of international protection, in respect of whom '[t]he Union shall develop a common policy on asylum...with a view to offering appropriate status', in accordance with fundamental rights.<sup>219</sup> This obligation (established in 'shall' terms) constitutes the ultimate objective of the CEAS.

#### 4.1.3 The Charter for Fundamental Rights

'The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter',<sup>220</sup> which after the entry into force of the Lisbon Treaty 'shall have the same legal value as the Treaties'.<sup>221</sup> This is what the CJEU concluded in its *Fransson* decision. The only threshold criterion for the application of the Charter relates to the 'EU-relevant' character of the situation at hand. If there is a connecting link making EU law relevant to the case, then the Charter provisions become applicable. There are no separate scopes of application of one and the other. If a specific circumstance falls to be governed by EU law, that very fact triggers the action of the Charter of Fundamental Rights.<sup>222</sup>

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<sup>210</sup> Art 21(2)(b) TEU.

<sup>211</sup> Art 21(3), second indent, TEU.

<sup>212</sup> Art 51(1) CFR.

<sup>213</sup> Art 6 TEU and Art 263 TFEU.

<sup>214</sup> Art 3(2) TEU.

<sup>215</sup> Recital 2, Preamble, CFR.

<sup>216</sup> Art 67(1) TFEU.

<sup>217</sup> Heading of ch 2, Title V, TFEU.

<sup>218</sup> Art 78(1) TFEU.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Fransson* (n 204), para. 21.

<sup>221</sup> Art 6(1) TEU.

<sup>222</sup> For an elaboration, see Moreno-Lax and Costello, 'The Extraterritorial Application of the Charter: From

The Explanations to the Charter make this clear, when they establish that '[t]he aim of Article 51 [CFR] is to determine the scope of the Charter', and that, in relation to the conduct of Member States, the Charter applies 'when they act in the scope of Union law'.<sup>223</sup> The scope of the Charter is the same of EU law.<sup>224</sup> And, as specified below, territoriality is not determinative in this connection—as EU visa policy, typically implemented from abroad, illustrates.

The Charter includes several provisions with particular relevance to the issue of access to international protection in the EU. The most relevant of all is the principle of *non-refoulement*, which is scrutinized in detail in the next section.

## 4.2 The Prohibition of *Refoulement*

The principle of *non-refoulement* forms part of the fundamental rights *acquis* as an absolute protection.<sup>225</sup> The substance of Article 3 ECHR has been 'absorbed' within the EU legal order in different ways. *Non-refoulement* forms part of the general principles of EU law.<sup>226</sup> It has been codified in primary law, in Articles 4 and 19(2) CFR. And it has equally entered the text of EU acts of secondary law regarding external borders.<sup>227</sup> The principle thus penetrates the Union system all-pervasively—in line with its nature as a customary international law,<sup>228</sup> if not a *jus cogens* norm.<sup>229</sup>

Focusing on its concrete manifestation as a rule of primary law, drawing on the Charter Explanations, '[t]he right in Article 4 [CFR] is the right guaranteed by Article 3 of the ECHR', while Article 19(2) CFR 'incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR'.<sup>230</sup> Articles 4 and 19(2) CFR must, therefore, be read as including the substance of the protection enshrined in Article 3 ECHR as interpreted by the Strasbourg Court—and, it is posited, also that of Article 33

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Territoriality to Facticity, the Effectiveness Model', in Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014) 1657. See also, Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 8.

<sup>223</sup> Explanations relating to the CFR, [2007] OJ C 303/17, p. 32. Note that, according to Art 6(1), third indent, TEU, 'the Charter shall be interpreted in accordance...with due regard to the explanations referred to in the Charter'.

<sup>224</sup> Cf. Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para. 29, where the CJEU seems to distinguish certain 'fields covered by Union law', as per the wording of Article 19(1) TEU, 'irrespective of whether the Member States are [considered to be] implementing Union law, within the meaning of Article 51(1) of the Charter'. On the other hand, the Court refers to the right to an effective remedy in the CFR as being co-extensive to '[t]he principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU', which it considers to be 'now reaffirmed by Article 47 of the Charter' (para. 35). So, in light of this, and in the absence of any reference to *Fransson* (n 204) and its possible reversal, it would be too quick to conclude to a complete departure from that precedent.

<sup>225</sup> Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, para. 80.

<sup>226</sup> Case C-465/07 *Elgafaji* ECLI:EU:C:2009:94, para. 28.

<sup>227</sup> Arts 3(b) and 4 SBC.

<sup>228</sup> Bethlehem and Lauterpacht, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 87.

<sup>229</sup> Allain, 'The *jus cogens* Nature of *non-refoulement*' (2001) 13 IJRL 533.

<sup>230</sup> Charter Explanations, pp. 18 and 24.

of the Geneva Convention (GC) by virtue of its express mention in Articles 78 TFEU and 18 CFR. This ‘cumulative standards’ approach,<sup>231</sup> understands Charter provisions to ‘reaffirm’ individual rights ‘as they result, in particular, from the constitutional traditions and *international obligations common to the Member States*’,<sup>232</sup> including those flowing from the ECHR and the GC taken concurrently – this is also the interpretative technique generally followed in EU asylum case law.<sup>233</sup> According to AG Trstenjak in her Opinion on *N.S.*, ‘[e]ven though an infringement of the Geneva Convention or the ECHR... must be distinguished strictly, *de jure*, from any associated infringement of EU law, there is, as a rule, a *de facto* parallel in such a case between the infringement of the Geneva Convention or the ECHR and the infringement of EU law’.<sup>234</sup> As a result, Member States’ ‘legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded *by these conventions*’.<sup>235</sup>

#### 4.2.1 Personal Scope of Application

The restrictions concerning the **personal scope of application** attached to Article 33 GC are not directly transposable to Articles 4 and 19(2) CFR.<sup>236</sup> Unlike Article 33 GC, which contains a limitative clause in paragraph 2, excluding from *non-refoulement* protection refugees in relation to whom ‘there are reasonable grounds for regarding as a danger to the security of the country in which [they are], or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country’, the prohibition contained in the Charter covers everyone without exception.

Both the wording of Articles 4 and 19(2) CFR speak of ‘no one’ as the subject of protection against ill treatment; both generally and in the event of removal, expulsion or extradition.

#### 4.2.2 Territorial Scope of Application

In relation to its **territorial reach**, the scope of Articles 4 and 19(2) CFR is the same as that of the Charter as a whole and depends solely on Article 51 CFR. The ECHR, and arguably also the GC, too, work as a minimum floor of protection below which the CFR cannot descent. But they should not be taken to prevent the more extensive coverage that EU law can, and does, provide in several respects.<sup>237</sup> ‘[T]he interpretation of [EU standards] must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR [and the GC]’.<sup>238</sup>

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<sup>231</sup> Moreno-Lax, *Assessing Asylum in Europe* (OUP, 2017) ch 7.

<sup>232</sup> Recital 5, Preamble, CFR (emphasis added).

<sup>233</sup> See, e.g., Case C-175/08 *Abdulla* ECLI:EU:C:2010:105, paras 51-53.

<sup>234</sup> Opinion of AG Trstenjak in Joined Cases C-411/10 and C-493/10 *NS & ME*, 22 September 2011, ECLI:EU:C:2011:611, para. 153.

<sup>235</sup> *Mutatis mutandis*, ECHR, *Amuur v. France*, Appl. 19776/92, 25 June 1996, para. 43 (emphasis added); confirmed: *M.S.S. v. Belgium and Greece*, Appl. 30696/09, 21 January 2011, para. 216.

<sup>236</sup> Resisting similarly limitative, automatic transplants from international humanitarian law, focusing instead on the text, context, and purpose of EU law, see Case C-285/12 *Diakité* ECLI:EU:C:2014:39.

<sup>237</sup> Art 52(3) CFR. Concurring: Mengozzi (n 15), paras 97-101.

<sup>238</sup> *Elgafaji* (n 226), para. 28, regarding Art 15(c) QD in relation to 3 ECHR.

The incorporation of foreign, unwritten limitations into the Charter would violate the principles of legality and narrow interpretation of exceptions under EU law,<sup>239</sup> and go equally against the autonomous construction of EU notions as per the independent requirements of the system, constraining their application on the basis of restrictions imposed elsewhere and for purposes alien to the CFR—whose ultimate goal is explicitly to ‘strengthen the protection of fundamental rights’.<sup>240</sup> Hence, the temptation to interpret the phrase in Article 52(3) CFR, providing that ‘the meaning and scope of [CFR] rights [which correspond to ECHR rights] shall be the same as those laid down by the [ECHR]’, as entailing the assimilation within Articles 4 and 19(2) CFR of the territorial constraints applicable to Article 3 ECHR, due to the separate Article 1 ECHR, should be resisted.

The opposite would negate the specific nature and objectives of the Charter within the (distinct) EU legal order and break the coherence governing the entire system—fractioning the territorial scope of Charter provisions depending on exogenous conditions originating in a different legal regime, so that CFR rights drawing on ECHR rights would depend on Article 1 ECHR to define their scope of territorial application, while the remit of other CFR provisions would be determined by Article 51 CFR alone. This would contravene the explicit terms of Article 51 CFR, which, as its title clearly indicates, is *the* provision (*lex specialis*), within the Charter system, governing its (entire) ‘field of application’. Constraining the territorial application of Articles 4 and 19(2) CFR to Article 1 ECHR, through a selective interpretation of Article 52(3) CFR (which explicitly foresees that ‘this provision *shall not* prevent EU law providing more extensive protection’), sidelining the literal tenor of Article 51 CFR, constitutes a *contra legem* interpretation that is unsustainable under EU law. Paraphrasing the Strasbourg Court, to accept this and ‘to afford [Articles 4 and 19(2) CFR in line with Article 1 ECHR dispositions] a strictly territorial scope, would result in a discrepancy between the scope of application of the [Charter] as such [as governed by Article 51 CFR] and that of [Articles 4 and 19(2) CFR], which would go against the principle [of coherence]’, demanding that the Charter ‘be interpreted as a whole’.<sup>241</sup>

A similar move was attempted in the context of the *Bank Saderat Iran* case, where the EU General Court refused the import of limitations ensuing from Article 34 ECHR in the interpretation of CFR provisions (in an extraterritorial case), chiefly on the ground that ‘Article 34 ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union’.<sup>242</sup> The same should occur regarding the import of Article 1 ECHR constraints on Article 3 ECHR (and equivalent interpretations of Article 33 GC) when appraising visa-issuing proceedings, or any other extraterritorial EU measure, under the CFR.

Otherwise, if the CJEU or the EU legislature decided to break the coherence of Charter

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<sup>239</sup> Art 52(1) CFR.

<sup>240</sup> Recital 4, Preamble, CFR.

<sup>241</sup> ECtHR, *Hirsi v. Italy*, Appl. 27765/09, 23 February 2012, para. 178.

<sup>242</sup> Case T-494/10 *Bank Saderat Iran* ECLI:EU:T:2013:59, para. 36.

provisions and accept a reduction of the territorial scope of application of Articles 4 and 19(2) CFR due to ECHR conditions, it would still be confronted with the fact that visa issuance, as chief responsibility of consulates in other countries, gives rise to extraterritorial *de jure* jurisdiction under Article 1 ECHR. Indeed, 'recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad...In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State'.<sup>243</sup> Precisely, according to Article 5(d) Vienna Convention on Consular Relations,<sup>244</sup> visa issuance cannot but be considered part and parcel of those 'activities', being explicitly listed as consular functions exercised on behalf of the issuing State and, as such, as a manifestation of its sovereign right to control entry by foreigners into territorial domain. Thus, even in the event of the territorial scope of Articles 4 and 19(2) CFR being taken as subjected to Article 1 ECHR, the extraterritorial applicability of EU *non-refoulement* to the case of asylum seeking visa applicants abroad remains inescapable.

#### 4.2.3 Material Scope of Application

Regarding the **material scope of application** of the prohibition, following the Strasbourg Court, any measure 'the effect of which is to prevent migrants from reaching the borders of the State [concerned]' may amount to *refoulement*, if it exposes the applicant to ill treatment, and must therefore be forbidden.<sup>245</sup> There is no need to prove direct causation, as the matter is one of *prospective* harm; foreseeability of a 'real risk' suffices in this regard.

So, any action under EU law, such as entry rejection or a visa refusal, the consequence of which is to expose to ill treatment may well impinge upon Article 3 ECHR and Articles 4 and 19(2) CFR. The fact that the applicant may have (in the abstract) a possibility to address his/her request to a different State is immaterial, particularly because 'this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in'<sup>246</sup> – as was the case in *X and X*.

Regarding the possible margin of appreciation left to Member States to assess the circumstances in which entry refusal, via visa rejection or other extraterritorial activity covered by EU law, may lead to *refoulement*, one needs to consider the absolute (non-derogable and non-limitable) character of the prohibition.<sup>247</sup> Where there is a 'real risk' of exposing the applicant to irreversible harm, no discretion is left.<sup>248</sup>

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<sup>243</sup> ECtHR, *Bankovic*, Appl. 52207/99, 12 December 2001, para. 73; confirmed: *Al-Skeini v. UK*, Appl. 55721/07, 7 July 2011, para. 134.

<sup>244</sup> Vienna Convention on Consular Relations, [1963] 596 U.N.T.S. 261 ('VCCR').

<sup>245</sup> *Hirsi* (n 241), para. 180; confirmed: *Sharifi v. Italy and Greece*, Appl. 16643/09, 21 October 2014, paras 112 and 115.

<sup>246</sup> *Amuur* (n 235), para. 48; confirmed: *M.S.S.* (n 235), para. 216.

<sup>247</sup> *Schmidberger* (n 225), para. 80.

<sup>248</sup> Concurring: Mengozzi (n 15), paras 121, 129, 131.

As a rule, the exercise of discretionary clauses in EU instruments is subject to Member States' obligations under the Charter. Thus, before rejecting entry or refusing a visa, account must be taken of the consequences under Articles 4 and 19(2) CFR. If the action/omission of the Member State concerned (via entry rejection, visa refusal or anything else) leads to a 'real risk' of exposing the applicant to ill treatment, the *option* contemplated in Article 25 CCV should be understood to turn into an *obligation*, so as to avoid the risk from materialising.<sup>249</sup> This remains the case even if Article 25 CCV didn't exist. By necessity, by the very hierarchical relationship between EU primary law and EU secondary law,<sup>250</sup> the application of EU legislation (be it the Visa Code, the Schengen Borders Code, or the provisions of the Visa List Regulation) is subordinated to compliance with Fundamental Rights.<sup>251</sup> So, if there is no other practicable alternative to guarantee (in law and in practice) the *effet utile* of *non-refoulement*, the issuance of a visa (*qua* permission to travel to the external borders of the Member State concerned) becomes compulsory (whether under the Visa Code, the Schengen Borders Code, or the Visa List Regulation), to avoid the infringement of Articles 4 and 19(2) CFR.<sup>252</sup>

### 4.3 Overall assessment

Any other construction different from the above would render 'practically impossible or excessively difficult the exercise of rights conferred by [Union] law',<sup>253</sup> contrary to the aspiration of the Charter to 'guarantee real and effective...protection'.<sup>254</sup> In such cases, a negative obligation not to *refouler* enjoins Member States to engage in positive action. As per *Căldăraru*, 'it follows from the case-law of the ECtHR [incorporated into Article 19(2) CFR<sup>255</sup>] that Article 3 ECHR [which shares 'the same meaning' as Article 4 CFR<sup>256</sup>] imposes, on the authorities of the [Member] State[s]...a positive obligation' to ensure compliance with the prohibition of ill-treatment in every case.<sup>257</sup>

Thus, the fact that, under the current asylum *acquis*, there is no codified procedure—'on the basis of Article 78 TFEU' or otherwise—'to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country',<sup>258</sup> does not exclude the necessity of having to give effect to the prohibition of *non-refoulement* whenever relevant. One should not be too quick to assume that '[a]sylum issues that the Directives did not aim to harmonise will fall outside the scope of EU law and therefore remain out of the reach of EU fundamental

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<sup>249</sup> *Ibid.*, paras 132 ff.

<sup>250</sup> Art 6 TEU; Art 51 CFR.

<sup>251</sup> Case C-305/05 *Ordre des Barreaux* ECLI:EU:C:2007:383, para. 28.

<sup>252</sup> Concurring: Mengozzi (n 15), paras 3 and 163.

<sup>253</sup> Case C-432/05 *Unibet* ECLI:EU:C:2007:163, para. 43.

<sup>254</sup> Case 14/83 *Von Colson* ECLI:EU:C:1984:153, para. 23.

<sup>255</sup> Charter Explanations, p. 24.

<sup>256</sup> Charter Explanations, p. 18; and Art 52(3) CFR.

<sup>257</sup> Joined Cases C-404/15 and C-659/15 PPU *Căldăraru* ECLI:EU:C:2016:198, paras 90 and 94.

<sup>258</sup> *X and X* (n 11), para. 49.

rights'.<sup>259</sup> On the contrary, in the absence of harmonised rules on the matter, it is for the domestic legal system of each Member State to lay down pertinent procedural rules to safeguard EU rights in accordance with the applicable standards. As established by the CJEU, 'Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law'.<sup>260</sup>

This was explicitly recognised in the CEAS' context. In *H.N.*, concerning Ireland and the absence of a single procedure there, to which the APD would have otherwise applied to adjudicate refugee status and subsidiary protection claims, the CJEU asserted that 'in the absence of EU rules concerning the procedural requirements attaching to the examination of an application for subsidiary protection, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements'. The key, in these circumstances, is to ensure that 'fundamental rights are observed and that EU [rights] remain fully effective'; to ensure that potential beneficiaries 'are actually in a position to avail themselves of the rights conferred on them'. '[G]enuine access' to EU rights (both in law and in practice) must be guaranteed.<sup>261</sup>

The Court's conclusions relate to the principle of loyal cooperation, by virtue of which, all national authorities have a legal obligation not to deprive EU rights of their useful effect. According to Temple Lang, the principle entails both 'a duty to help, and a duty not to obstruct' the effectiveness of EU law.<sup>262</sup> Article 4(3) TEU explicitly provides that 'Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the [EU] institutions'. The duty to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives' is also expressly stated. And the procedural dimension of this obligation is made explicit in the Treaties. Indeed, Article 19 TEU mandates 'Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection' in relation to *any* of the rights recognised by EU law, and in *any* situation in which they may be at stake.<sup>263</sup>

So, either Member States proceed alone, and provide for safeguards within their domestic legal systems that guarantee the observance of the prohibition of *refoulement* in the context of entry and visa decisions under Schengen rules, or harmonization is agreed at EU level to ensure the uniform implementation of the relevant norms, elaborating upon the 'special provisions concerning the right of asylum and to international protection' in the realm of border and pre-border controls'.<sup>264</sup> Considering the EU-wide implications of

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<sup>259</sup> Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart, 2014), p. 14; and Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006), p. 88.

<sup>260</sup> *Associação Sindical dos Juizes Portugueses* (n 224), para. 34. See also Case C-453/99 *Courage* ECLI:EU:C:2001:465, para. 29; and Case C-13/01 *Safalero* ECLI:EU:C:2003:447, para. 49.

<sup>261</sup> Case C-604/12 *H.N.* ECLI:EU:C:2014:302, paras 41-42 and 45.

<sup>262</sup> Temple Lang, 'The Principle of Effective Protection of Community Law Rights', in O'Keefe (ed.), *Judicial Review in European Union Law* (Kluwer, 2000) 235, p. 252.

<sup>263</sup> *Associação Sindical dos Juizes Portugueses* (n 224), para. 34. For analysis, see Dougan, *National Remedies Before the Court of Justice* (Hart, 2004), pp. 4-5.

<sup>264</sup> Art 14(1) SBC.

the matter and its repercussions for the integrity and uniform application of the relevant *acquis*, the following two chapters examine in detail the scope for EU action, exploring possible legal bases, questions of subsidiarity and proportionality, and EU added value.

## CHAPTER 5. THE SCOPE FOR EU HUMANITARIAN VISAS

### KEY FINDINGS

- **LEGAL BASIS:** There are several provisions in the TFEU, which may provide a **legal basis** for the adoption of a **EU instrument on humanitarian visas**, including: **Article 77(2)(a) TFEU**, on common visas; **Article 77(2)(b) TFEU**, on controls on persons crossing the EU external borders; **Article 78(2)(g) TFEU**, calling on the EU legislator to adopt measures, as part of the CEAS, aimed at ‘managing the *inflows* of people applying for [international] protection’; and **Article 79(2)(a) TFEU**, offering a foundation for the adoption of long-term visas and residence permits to TCNs.
- **OBJECTIVE:** **Considering the subject matter to regulate and the primary objective pursued**, i.e. to establish the conditions for access to Schengen territory by TCNs in need of a visa but practically and legally impeded to show willingness or ability to return to the country of provenance, without thereby forfeiting the international protection to which they are entitled under EU law, **Articles 77(2)(a)-(b) and 78(2)(g) TFEU appear to be the most suitable choices.**
- The AFSJ is a field of shared competence, which entails consideration of the **principles of subsidiarity and proportionality** of any EU action to be adopted.
- **PROBLEM:** Since uncoordinated action upsets the **well functioning of the common regime**, drawing from experience during the 2011 Arab Spring and the 2015 ‘refugee crisis’, undermining the uniform application of the common entry rules and affecting the mutual trust at the core of the Schengen and Dublin systems, according to the **principle of proportionality, EU-level intervention is required. A uniform understanding of the rights/obligations at stake** is essential for the **integrity and effectiveness of the current *acquis*.**
- **EU ADDED VALUE:** Regarding EU added value, **economies of scale** can only be achieved at EU level. EU intervention will allow for a **reduction of current costs** (in human lives; illicit smuggling and trafficking activity; and border and migration control and deterrence) and a **re-allocation of resources** to ensure compliance with the obligation of developing an integrated management system of external borders in line with fundamental rights (Articles 67 and 77 TFEU).

## 5.1 Competence

According to the explicit provision of the Treaties, the constitution of an AFSJ is a field where the EU 'shall share competence with the Member States'.<sup>265</sup> As such, conformity with the principles of subsidiarity and proportionality is required. This is the case in all areas 'which do not fall within its exclusive competence'.<sup>266</sup>

But, before matters regarding the nature and scale of EU intervention are established, a decision must be taken regarding the appropriate 'legal basis' sustaining the action. Linked to the issue of competence, is therefore the question of identifying its appropriate grounding within the Treaties.

## 5.2 Possible Legal Bases for EU Action

As EU law stands, there is sufficient competence under the Treaties to adopt dedicated humanitarian visas legislation. The legislator can draw on Articles 77, 78 and/or 79 TFEU to this effect. The choice of the most appropriate legal basis must be made taking account of the nature of the predominant content and the objective pursued by the action at hand.

**Article 77(2)(b) TFEU** is one of the legal bases underpinning both the Schengen Borders Code as well as the CCV,<sup>267</sup> which objectives are, respectively, to lay down the 'rules governing border control of *persons* crossing [or showing 'an intention to cross'] the external borders of the Member States of the Union',<sup>268</sup> and to establish 'the procedures and conditions for issuing visas...to any third-country national who must be in possession of [one] when crossing the external borders of the Member States pursuant to [the Visa List Regulation]',<sup>269</sup> which includes the nationals of all refugee-producing countries. The same clause in Article 77 TFEU could well be employed to elaborate on the 'special provisions concerning the right of asylum and to international protection' foreseen in Article 14 SBC, thus allowing for the adoption of uniform arrangements for the regulation of exceptions to the rules on refusal of entry (and pre-entry) contemplated by the Code.

That asylum seekers come within the remit of 'persons' in the sense of the SBC, and under the terms of the CCV, alluding to 'any third-country national who must be in possession of [one] when crossing the external borders of the Member States pursuant to [the Visa List Regulation]',<sup>270</sup> has been elucidated in Chapter 4 above. This being the case, by logical extension, they should also be deemed to fall within the scope of 'persons' in the wording of Article 77(2)(b) TFEU, calling on the EU legislature to 'adopt measures

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<sup>265</sup> Art 4(1) and 4(2)(j) TFEU.

<sup>266</sup> Art 5(3) and 5(4) TEU.

<sup>267</sup> Opening statement, Preamble, SBC; and opening statement, Preamble, CCV.

<sup>268</sup> Art 1, second indent, and Art 2(10) SBC.

<sup>269</sup> Art 1(1)-(2) CCV.

<sup>270</sup> Ibid.

concerning...the checks to which *persons* crossing external borders are subject'. As a result, Article 77(2)(b) TFEU can be used as legal basis for the adoption of a dedicated humanitarian visas instrument within EU law.

**Article 77(2)(a) TFEU** may also be appropriate. It provides for measures concerning 'the common policy on visas' and has been used to buttress the rules on local border traffic (LBT) adopted under Regulation 1931/2006.<sup>271</sup> The regime constitutes an autonomous system, derogating from the general norms governing visas and border controls on persons, according to both the CJEU and the EU legislator,<sup>272</sup> easing frontier formalities for 'border residents' with 'legitimate reasons frequently to cross an external border'.<sup>273</sup> With this in mind, 'local border traffic permits' may be issued to those having lawfully resided in a 'border area' – extending no more than 30 kilometres from the EU external border – for at least one year to cross into the Schengen zone repeatedly and stay for up to three consecutive months each time.<sup>274</sup> Although, there is strictly no unconditional entitlement to LBT permits, neither in the EU Charter nor in the LBT Regulation itself,<sup>275</sup> it is remarkable the CJEU considers access to them a matter of 'right'.<sup>276</sup> Transposing this approach to prospective refugees, entitled both to a right to asylum and to protection against *refoulement* under Articles 4, 18, and 19 CFR that they should be capable to exercise, the LBT regime could serve as inspiration for a Humanitarian Visa Regulation.

Alternatively (or complementarily), **Article 78(2)(g) TFEU** can be said to provide specific grounding for such an instrument, as it foresees that: the Union legislator 'shall adopt' measures for a Common European Asylum System including those aimed at 'managing *inflows* of people applying for [international] protection'. This wording is particularly apt to accommodate the situation of asylum seekers attempting to reach the external borders of the Member States to exercise their rights under EU law. And it does not affect 'the right of Member States to determine volumes of admission', as per Article 79(5) TFEU, governing immigration policy, since the persons concerned cannot be considered as 'third-country nationals coming...in order to seek work', but rather as 'third-country national requiring international protection', as per Article 78(1) TFEU.

A final option to contemplate is the one suggested by the CJEU in the case of *X and X*. Therein the Court seems to propose that the right legal base is **Article 79(2)(a) TFEU**.<sup>277</sup> However, that provision concerns the delivery of 'long-term visas and residence permits...on humanitarian grounds', presumably separate from (already existing) protection obligations under the Charter. Indeed, reliance on the generic immigration policy clause, in the presence of the more specific provisions regarding border-crossing

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<sup>271</sup> Regulation (EC) No 1931/2006 of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L 405/1 ('LBT').

<sup>272</sup> Recital 3, Preamble, LBT; and Case C-254/11 *Shomodi* ECLI:EU:C:2013:182, para. 24.

<sup>273</sup> Recital 4, Preamble, LBT.

<sup>274</sup> Recital 5, Preamble, and Art. 5 LBT.

<sup>275</sup> Art. 4 LBT, listing the issuing conditions.

<sup>276</sup> *Shomodi* (n 272), paras 25-26.

<sup>277</sup> *X and X* (n 11), para. 44.

and asylum contained in Articles 77 and 78 TFEU, appears inadequate, especially because the CJEU seemingly assumes this to be detached from any form of legally-binding duty.<sup>278</sup> Yet, as elaborated upon in Chapter 4, the EU prohibition of *refoulement* may well require Member States to engage in positive action to avoid exposure to ill treatment<sup>279</sup> – including in the context of Schengen entry (and pre-entry) controls.<sup>280</sup>

The inadequacy of Article 79(2)(a) TFEU stems also from the fact that, as explained in Chapter 2, asylum seeking visa applicants only require a means that guarantees that they can reach the territory of the Member States safely and legally, so as to ‘thereafter’ lodge an application for international protection under the APD.<sup>281</sup> The idea is not ‘to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country’.<sup>282</sup> The facilitation of extraterritorial processing of asylum claims is not the ultimate goal – this entails very considerable risks of disconformity with human rights guarantees and has been widely criticized by specialists.<sup>283</sup> The objective, instead, is to provide a means to travel to access protection rights (already recognised) under EU law.

Thus, it appears that Articles 77(2)(a) and (b) TFEU, whether alone or jointly with Article 78(2)(g) TFEU, are the most suitable bases, especially in the presence of wording in the SBC to the effect that, when taking decisions on the refusal of entry, Article 14(1) requires that this ‘shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection’. The need to apply the Schengen entry (and pre-entry) regime in line with the EU fundamental rights *acquis*, as stated earlier, derives from the very hierarchy of sources of EU law, to which both visa and border policy are subjected<sup>284</sup> – by virtue of Articles 6 TEU and 67 TFEU – a fact that is also unambiguously acknowledged in Article 4 SBC.

### 5.3 Subsidiary and EU Added Value Questions

Once the question of the most appropriate legal basis has been clarified, given the fact that the AFSJ is an area of shared competence under the Treaty, the principles of subsidiarity and proportionality, as per Article 5 TEU, become relevant to establish the appropriate level and scale of any action. The current section addresses the issue of subsidiarity and EU added value, while the concrete proportionality questions will be explored in detail in the next chapter, where specific policy options will be contemplated.

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<sup>278</sup> *Ibid.*, para. 49.

<sup>279</sup> *Căldăraru* (n 257), paras 90 and 94.

<sup>280</sup> Art 4 SBC; Recital 29, Preamble, CCV.

<sup>281</sup> *X and X* (n 11), para. 42.

<sup>282</sup> *Ibid.*, para. 49.

<sup>283</sup> See, e.g. Red Cross EU Office, *Europe in Crisis: Facilitating Access to International Protection, (Discarding) Offshore Processing and Alternatives for the Way Ahead*, (February 2016) <<https://redcross.eu/positions-publications/europe-in-crisis-facilitating-access-to-protection-discarding-offshore-processing-and-mapping-alternatives-for-the-way-forward>> and references therein. See also (n 354) below.

<sup>284</sup> To which the Preambles of both Codes allude: Recital 29, Preamble, CCV; and Recital 36, Preamble, SBC.

### 5.3.1 The Necessity of EU-level Intervention

Article 5(3) TEU encapsulates the **principle of subsidiarity**, which requires consideration of any factors that may determine the better level of action, whether the domestic or supranational, to comply with a particular Union objective. '[I]n areas which do not fall within its exclusive competence', as is the case of the AFSJ, 'the Union shall act *only if* and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

The position of asylum seekers crossing (or showing an intention to cross<sup>285</sup>) into a EU Member State's territory – *qua* 'persons',<sup>286</sup> in general, and 'third-country national[s] who must be in possession of [one] when crossing the external borders of the Member States pursuant to [the Visa List Regulation]',<sup>287</sup> in particular – within the Schengen scheme, reveals the cross-border nature of their situation, disclosing the 'EU-relevance' of the matter, and the need for EU-wide intervention to deal with it.

Non-intervention at EU level is bound to undermine the well functioning of the Schengen cooperation towards an 'integrated management system for external borders'.<sup>288</sup> Different standards can, and have proliferated, in relation to the interpretation of the rules applicable to the entry of asylum seekers,<sup>289</sup> undermining faith in the Schengen system, both on the part of asylum seekers themselves and between the Member States. Recent examples illustrate how unilateral action by individual Member States unravels.

In the aftermath of the Arab Spring, a diplomatic standoff occurred between Italy and France. France accused Italy of abusing the Schengen system through the issuance of temporary residence permits and travel documents to migrants fleeing violence in North Africa in the knowledge that many would subsequently attempt to reach France. In response, several hundreds were blocked in Ventimiglia and pushed back, provoking a crisis.<sup>290</sup> Several Member States supported either France's or Italy's position, whereas Denmark announced the unilateral reintroduction of custom controls at its borders with Germany and Sweden, supposedly to fight cross-border crime and tax evasion, but with a direct impact in practice on traffic through intra-EU frontiers.<sup>291</sup> Fifteen of the 27

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<sup>285</sup> Art 2(10) SBC.

<sup>286</sup> Art 1, second indent, SBC.

<sup>287</sup> Art 1(1)-(2) CCV.

<sup>288</sup> Art 77(1)(c) TFEU.

<sup>289</sup> See, extensively, the reports by the Fundamental Rights Agency of the EU (FRA) per type of border: FRA, *Fundamental rights at land borders: findings from selected European Union border crossing points* (November 2014); FRA, *Fundamental rights at airports: border checks at five international airports in the European Union* (November 2014); and FRA, *Fundamental rights at Europe's southern sea borders* (March 2013) <<http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-surveying-border-checks-selected/publications>>.

<sup>290</sup> For the analysis and further references see Carrera et al., *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Working Papers, April 2011 <<http://www.ceps.eu/book/race-against-solidarity-schengen-regime-and-franco-italian-affair>>.

<sup>291</sup> See letter by J.M. Barroso to the Prime Minister of Denmark of 13 May 2011, warning him that if his country

Member States backed the changes proposed by the European Commission for a mechanism 'to handle situations where either a Member State is not fulfilling its obligations to control its section of the external border, or where a particular portion of the external border comes under unexpected and heavy [migratory] pressure due to external events'.<sup>292</sup> These were eventually incorporated in the Schengen Code recast, allowing for the coordinated and temporary reintroduction of internal border controls.<sup>293</sup> So, it is the breakdown of the mutual trust on which the system is based what provoked the legislative reform.

A similar situation ensued in 2015 due to the 'refugee crisis', leading to the closure of the so-called 'Balkan route',<sup>294</sup> the introduction of the 'hotspot approach', and the launch of the relocation scheme.<sup>295</sup> As a consequence, the Dublin regime was brought into question and partly derogated from, kickstarting the process of revision currently underway.<sup>296</sup> For Greece, it has also meant the collapse of inter-State trust and the imposition of intra-EU border controls to stop secondary movements of asylum seekers northwards, with particularly deleterious effects for the country and the system as a whole.<sup>297</sup>

Besides undermining Schengen and Dublin, the absence of EU-level regulation on admission for asylum purposes has also resulted in the unilateral dismantlement of existing PEPs at national level.<sup>298</sup> 'Pull factor' or disproportionate pressure grounds have been adduced in the past to justify the action, reinforcing the perception that 'asylum seeking visas' are always optional, disregarding the extraterritorial protection-related obligations existing in current EU law, as disclosed in Chapter 4.

Without a more homogenous policy approach, asylum seekers will continue to reach EU shores through irregular, unsafe means, risking their lives in perilous voyages, assimilated to the category of 'irregular migrants'.<sup>299</sup> Unless alternative pathways are

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persisted in its intention to introduce controls in a 'intensive and permanent way' the Commission 'will take all necessary steps to ensure the full respect of the relevant law' <<http://www.statewatch.org/news/2011/may/eu-com-letter-Barroso-Danish-pm.pdf>>.

<sup>292</sup> Communication on Migration, COM(2011) 248, p. 8. The JHA Council 'welcome[d] the Commission's intention' and 'invite[d] it to present its proposal' in Council Conclusions on Borders, Migration and Asylum, 9-10 June 2011, para. 12.

<sup>293</sup> Arts 25-35 SBC. For commentary see Jones, *Commission Communication on Migration: Adapting the Schengen Border Code*, Statewatch Analysis, May 2011 <<http://www.statewatch.org/analyses/no-129-schengen-boder-code.pdf>>.

<sup>294</sup> For details, see Žagar, Kogovšek Šalamon and Lukšič Hacin (eds), *The Disaster of European Refugee Policy: Perspectives from the "Balkan Route"* (Cambridge Scholars, 2018).

<sup>295</sup> Guild, Costello and Moreno-Lax (n 118).

<sup>296</sup> Dublin IV Proposal, COM(2016) 270. See also European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), 6 November 2017. Cf. New Dublin: Reversing the Dynamics, Council doc. ST 7674 2018 INIT, 9 April 2018.

<sup>297</sup> For the latest list of Temporarily reintroduced border controls, see <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)>. For analysis, see Guild, *Internal border controls in the Schengen area: Is Schengen crisis-proof?*, Study PE 571.35 (European Parliament, 2016).

<sup>298</sup> Iben Jensen (n 8), pp. 41 ff.

<sup>299</sup> (n 2).

opened, resettlement will, predictably, continue to be the only legal route to international protection in the EU, despite that it does not provide a means of primary access to a durable solution, but caters only for those who have already been declared to be refugees.<sup>300</sup> And the numbers will probably continue to be small. Economies of scale can only materialize in a EU-wide context. No single Member State, considering current rules for the allocation of responsibility for asylum applications, will take the risk of providing alone for a significant amount of asylum seeker visas—this is proven by the limited spaces offered by the ‘humanitarian corridors’ in Italy and France, as shown in Chapter 3.

Finally, to ensure that there is a uniform understanding of the rights at stake and of the situations in which the issuance of ‘visas for asylum seekers’ may be required, there is a need for common, coordinated action at EU level. Otherwise, legal certainty, foreseeability, and the similar application and implementation of the relevant rules cannot be guaranteed. Mutual trust between Member States and confidence in the system by asylum seekers depends on the existence of a level playing field, which Member States acting alone cannot provide.

Arguably, the **principle of pre-emption** is at stake in this context.<sup>301</sup> With the EU having adopted the Schengen Borders Code, including a set of uniform criteria to allow entry across the ‘common’ external frontiers of the Member States, only another piece of EU legislation will ensure the integrity of the common system. Member States cannot regulate the matter on their own, as that will undermine the common *acquis*. The only way to avoid fragmentation in policies and practices across the Schengen area is through the harmonisation of the relevant rules. This was also the basis in the early 2000s for the adoption of what became the subsidiary protection provisions in the Qualification Directive, communitarising disparate approaches to the protection duties deriving from *non-refoulement* obligations arising in relation to asylum seekers reaching the territory of the Member States.<sup>302</sup> The question now is how to regulate the extraterritorial reach of those same obligations in a way concordant with the objectives pursued by the Treaty of building ‘an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration’,<sup>303</sup> in light of and ‘with respect for fundamental rights’,<sup>304</sup> including an ‘integrated management system for external borders’,<sup>305</sup> where ‘the checks to which [all] persons crossing external borders are subject’

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<sup>300</sup> Ch 3 above.

<sup>301</sup> On the principle of pre-emption regarding non-exclusive EU competence, see Arena, ‘The Doctrine of Union Preemption in the EU Internal Market: Between *Sein* and *Sollen*’ (2010) 17 *Columbia Journal of European Law* 477.

<sup>302</sup> Spijkerboer, ‘Full Circle? The Personal Scope of International Protection in the Geneva Convention and the Draft Directive on Qualification’; Noll, ‘International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive’; and Julien-Laferrière, ‘Le statut des personnes protégées’, in Dias Urbano de Sousa and De Bruycker (eds), *The Emergence of A European Asylum Policy* (Bruylant, 2004) 167, 183, and 195.

<sup>303</sup> Art 3(2) TEU.

<sup>304</sup> Art 67(1) TFEU.

<sup>305</sup> Art 77(1)(c) TFEU.

are clear and in conformity with the rule of law.<sup>306</sup> Regulating access to the *Common European Asylum System* can only be undertaken via *common* rules.

### 5.3.2 EU Added Value Considerations

Beside the principle of subsidiarity, further **EU added value considerations** demonstrate the requirement of intervention at EU level. The current situation is one of persistent lack of clarity in the legal framework that leaves persons in need of international protection without alternatives, but to embark on irregular, unsafe journeys to find asylum in a Member State. And, although it may appear that the maintenance of the status quo is without expense, there are several points to bear in mind.

The human cost of inaction has been estimated at about 30,000 border-related deaths since the early 2000s.<sup>307</sup> In addition, the turnover of the migrant smuggling and human trafficking businesses has been calculated in the billions of dollars per year – up to \$32 billions for human trafficking, and from \$7 to \$10 for migrant smuggling, depending on the estimates, which equates the yearly humanitarian aid expenditure by the US and the EU taken together, according to UNODC.<sup>308</sup> Neither outcome seems compatible with the objective of orderly migration, conformity with EU values, and respect for the rights and protection-related obligations deriving from EU law. So, consideration of alternative options to facilitate dignified access to asylum in Europe is necessary.

This will also rationalize spending. The EU and Member States' investments in the border control, irregular immigration deterrence, and the related law-enforcement apparatus, just considering the EU budget, exceeds EUR 4 billion for 2014-20.<sup>309</sup> The annual figure will be trippled, following Commission plans to establish a 10,000-strong permanent corps of border guards and new infrastructure to combat irregular immigration, reaching EUR 5 billion per year. The total spending announced for 2021-27 is EUR 35 billion.<sup>310</sup> A clarification of the norms applicable to the entry into Schengen territory of a considerable

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<sup>306</sup> Art 77(2)(b) TFEU and Art 2 TEU.

<sup>307</sup> For relevant estimates, see IOM, *Missing Migrants Project* (March, 2018): <<https://missingmigrants.iom.int/>>. Cf. UNITED, *List of 33.305 documented deaths of refugees and migrants due to the restrictive policies of Fortress Europe* (June 2017) <<http://www.unitedagainstracism.org/wp-content/uploads/2017/06/UNITEDListOfDeathsActual.pdf>>.

<sup>308</sup> New UNODC campaign highlights transnational organized crime as a US\$870 billion a year business, UNODC, 19 July 2012 <<https://www.unodc.org/unodc/en/frontpage/2012/July/new-unodc-campaign-highlights-transnational-organized-crime-as-an-us-870-billion-a-year-business.html>>. Cf. Migration Data Portal (14 December 2017) <<https://migrationdataportal.org/themes/smuggling-migrants>>. See also, UNODC, *Global Study on Smuggling of Migrants* (June 2018), p. 5 <<https://www.unodc.org/unodc/en/data-and-analysis/glosom.html>>.

<sup>309</sup> This includes the Internal Security Fund (ISF) 2014-20, totalling EUR 3.8 billion for police action and the management of external borders, including visa policy <[https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police\\_en](https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police_en)>; and the Return Fund, integrated within the Asylum, Migration and Integration Fund (AMIF) 2014-20, which in total exceeds EUR 3 billion <[https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en)>.

<sup>310</sup> 'EU to triple spending to €5bn a year targeting illegal migration', *The Guardian* (12 June 2018) <<https://www.theguardian.com/world/2018/jun/12/eu-5bn-a-year-targeting-illegal-migration-border-infrastructure>>. See also 'European Commission wants 10,000 border guards', *EU Observer* (2 May 2018) <<https://euobserver.com/justice/141731>>.

portion of the 'persons',<sup>311</sup> who may cross the external borders of the Union, including all of the 'third-country national[s] who must be in possession of visas when crossing the external borders of the Member States pursuant to [the Visa List Regulation]',<sup>312</sup> will allow for the rationalization and the re-allocation of funds to ensuring that the Union 'develop[s] a common policy on asylum...offering appropriate status to any third-country national requiring international protection' and builds a system of 'immigration and external border control...which is fair towards third-country nationals'.<sup>313</sup>

In addition, clarity will not diminish control. On the contrary, the adoption of a clear set of rules for Schengen entry for the purposes of accessing the CEAS under the terms of the APD will allow for better screening of candidates, the predictability of arrivals, and better preparation and coordination of post-arrival arrangements. Currently, it is 'spontaneous arrivals' that are out of control. There is no foreseeability of when and how they may occur and no prior vetting of their circumstances. Inclusion on the EURODAC database occurs only *ex post*.<sup>314</sup> The elaboration of a harmonised system will also be in line with the underlying rationale of the ETIAS proposal, whereby even TCNs from countries on the visa 'white list' will be enrolled on the ETIAS database.<sup>315</sup>

With this in sight, several policy options and types of instrument can be explored. The next chapter deals with proportionality issues and identifies three main possibilities to resolve the admission of asylum seekers into the Schengen zone, so that Member States comply with their obligations under the EU Charter in an effective way.

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<sup>311</sup> Art 1, second indent, SBC.

<sup>312</sup> Art 1(1)-(2) CCV.

<sup>313</sup> Arts 78(1) and 67(2) TFEU.

<sup>314</sup> EURODAC Regulation (EU) No 603/2013, [2013] OJ L 180/1.

<sup>315</sup> Proposal for a Regulation establishing a EU Travel Information and Authorisation System (ETIAS), COM(2016) 731.

## CHAPTER 6. POLICY OPTIONS

### KEY FINDINGS

- **Several possibilities** are available to the EU legislator to **harmonise the criteria applicable to the admission of asylum seekers into Schengen territory**, with varying degrees and intensity of intervention necessary at EU level.
- The **visa waiver approach** only needs a **revision of the current visa lists in Regulation 539/2001** to either de-classify or suspend the visa requirement for nationals of top refugee-producing countries, where risks to life and/or freedom are well known and freely ascertainable from publicly available and reliable sources. The selection of the countries concerned should draw on EUROSTAT and UNHCR data.
- A different option would be for **asylum seeker visas to be issued by Member State consulates abroad**, according to a dedicated instrument that harmonises issuing criteria and procedures, in line with the good administration and effective remedy standards contained in Articles 41 and 47 CFR. A **reformed set of LTV provisions** would be required to this effect.
- A third variant entails **full centralisation of decision-making and distribution of applicants** via specialised EASO teams making or coordinating assessments within EEAS representations abroad. This option requires **adjustment of Dublin criteria**, the creation of a **distribution mechanism** of successful applicants via **predefined quotas** per Member State, a **preference-matching tool**, a **corrective system** that accounts for children rights, family unity, and dependency links, and a **compensatory tool** to palliate any residual unevenness in distribution. Some of these elements could complement the above options to align them with Article 80 TFEU.
- Whichever the option (or combination) preferred, **qualification criteria must match non-refoulement guarantees** as per Articles 4 and 19(2) CFR, so that those having an 'arguable claim' of exposure to a *prima facie* 'real risk' of persecution or serious harm are granted a visa for asylum seeking purposes in EU Member States.
- **Decisions** must be taken by fully competent and trained personnel. **Procedural guarantees**, including legal aid, information, translation, and representation must be provided, so as to preserve the right to be heard. **Appeals** against negative decisions must also be available. But *prima facie* assessments must not derive into full RSD.
- To address '**floodgates**' and **resource concerns**, any of the above formulae can first be piloted in a controlled environment, **selecting** particular **countries** and periods of **time**, and/or focusing on particularly vulnerable applicants prior to full roll out; **collaborating with private service providers**, including UNHCR and specialised NGOs; and **using technology** and e-means to facilitate application processing.

## 6.1 Proportionality: The Scale and Intensity of Policy Action

The **principle of proportionality**, under Article 5(4) TFEU, requires that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. In this respect, there are different considerations to take account of, including the intensity of EU action, the form it should take, and the pros and cons it implies.<sup>316</sup>

Several possibilities are available to the EU legislator to harmonise the criteria applicable to the admission of asylum seekers into Schengen territory, with varying degrees of intervention necessary at EU level. The following explores three main proposals, ranging from the one requiring the least changes to current rules, to the one entailing the construction of an elaborate, centralized system of EU asylum seeking visas, necessitating a dedicated legal and institutional machinery set up abroad. Before selecting the preferred option in Section 6.2, the advantages and disadvantages of each of the three possibilities identified are considered in detail, taking account of what is needed to solve the original problem and meet the objective of the initiative, as concluded in Chapter 5.

The first option, the ‘**visa waiver**’ approach, needs only a revision of the current visa lists that already exist. The second option, the ‘**asylum seeking visas**’ formula, entails the adoption of new legislation, perhaps taking inspiration from the current LTV provisions in the CCV – which some EU countries have already been using for this purpose, as the Italian ‘humanitarian corridors’, recounted in Chapter 3, indicate. But it does not necessitate the centralization of the visa issuing process. Finally, the third option, the ‘**uniform international protection application travel permits**’, issued by EU-wide visa application centres in third countries, requires the adaptation and further elaboration of the current *acquis*, on the substantive, procedural, and institutional fronts.

### 6.1.1 The ‘Visa Waiver’ Approach

The easiest option, entailing the least intervention at EU level, is to either permanently or temporarily suspend visa requirements imposed on nationals coming from unsafe third countries, where threats to life and persecution are well-known realities, until the circumstances change.

The ‘black list’ in the **Visa List Regulation** includes all refugee-producing countries.<sup>317</sup> And, as explained in Chapter 2, apparently asylum seekers are expected to abide by normal Schengen admission criteria, which constitute the basis for obtaining a visa.<sup>318</sup>

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<sup>316</sup> European Commission, Better Regulation Toolbox (undated), Tool #5 Legal Basis, Subsidiarity and Proportionality, p. 30 <[https://ec.europa.eu/info/better-regulation-toolbox\\_en](https://ec.europa.eu/info/better-regulation-toolbox_en)>.

<sup>317</sup> Cf. Annex I and Annex II VLR. See also EUROSTAT, *Asylum Statistics*, 12 December 2017 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report)>; UNHCR, *Asylum Levels and Trends in Industrialized Countries*, covering the 1999-2014 period <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&skip=0&cid=49aea93aba&comid=4146b6fc4&keywords=Trends>>; and UNHCR, *Statistical Yearbook 2015* and *Statistical Yearbook 2016* (February 2018) <<http://www.unhcr.org/uk/statistical-yearbooks.html>>.

<sup>318</sup> Art 21 CCV, referring to Art 6(1) SBC.

Yet, persons in need of international protection, *by definition*, cannot demonstrate willingness or ability to return to the country of origin—which has been configured as one key element to deliver one. Both the legal characterisation of ‘refugee’ and ‘beneficiary of subsidiary protection’ in the Qualification Directive imply that persons escaping persecution or serious harm cannot justify that they will ‘return to [the] country of [provenance]’,<sup>319</sup> without thereby losing their status.<sup>320</sup>

Therefore, **abolishing visa requirements** for refugee-producing countries would be the most immediate and effective way of ensuring unobstructed access to protection to those in need – much more than resettlement or private sponsorship schemes, since it would be based on the individual initiative of the person concerned, involve no referral mechanism by any intermediary, and no pre-arrival processing at all. Technically, there is no real risk of irregular immigration by refugees, since, by virtue of Article 31 of the Geneva Convention, they are exempt from ‘penalties’ regarding unauthorised entry or stay,<sup>321</sup> which is the main reason for classification of a State within the visa ‘black list’.<sup>322</sup> De-classification of the top refugee-producing countries would thus be in keeping with stated goals of EU visa policy and in line with the new proviso inserted in the Visa List Regulation in 2014, requiring ‘considerations of human rights and fundamental freedoms’ to be taken into account when drawing up the lists.<sup>323</sup>

In any case, fundamental rights must anyway be observed. Once again, subjection to EU primary law does not require specific assertion to this effect in secondary law. Its primacy is constitutionally scheduled in the Treaties and in case law. The very structure of EU sources mandates subordination of rules of secondary law to the dispositions of primary law.<sup>324</sup> As the Court of Justice has consistently held in its judgments, where ‘the wording of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty’.<sup>325</sup> This same tenet has been reiterated in the asylum context, with the Court making clear that ‘Member States must...make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law’.<sup>326</sup>

Short of abolition, other **alternatives** could be explored to avoid potential violations of *non-refoulement* and regulate access to the territory of the Member States for asylum seeking purposes. The first is the possibility of establishing a mechanism to **suspend visa requirements for a period of time**, until the root causes/push factors of forced

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<sup>319</sup> Art 6(1)(c) SBC (emphasis added).

<sup>320</sup> Art 2(d) and (f) QD.

<sup>321</sup> Art 31(1) GC: ‘The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened...enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

<sup>322</sup> Recital 5 VLR; and Recital 3, Preamble, CCV.

<sup>323</sup> Art. -1 VLR, as amended by Regulation (EU) 509/2014, [2014] OJ L149/67.

<sup>324</sup> Art 2 TEU; Art 6 TEU; Art 51 CFR; and Art 263 TFEU.

<sup>325</sup> *Ordre des Barreaux* (n 251), para. 28.

<sup>326</sup> *NS & ME* (n 200), para. 77.

displacement have been addressed, particularly for those countries from which there are substantial flows of refugees seeking access to protection in the EU, such as Syria. One could use UNHCR and EUROSTAT data to substantiate a presumption of *prima facie* qualification for international protection to select the relevant countries. However, this should not lead to rigid approaches or to reverse assumptions that asylum seekers from *other* countries are not genuinely in need of international protection. The presumption should in no event undermine the right of ‘everyone’ to seek asylum and to have their claims individually assessed.<sup>327</sup>

Either temporary suspension or total abolition of visa requirements for refugee-producing countries would also avoid additional practical obstacles, such as the absence of consulates in certain war-torn ‘black listed’ countries, where there is no physical possibility to apply for visas. Indeed, *inaccessibility in law* is not the only concern when it comes to visas and refugees. *Inaccessibility in practice* further compounds the situation. Currently, there are **no representations of any EU Member State** in Liberia, Sierra Leone, Somalia, and South Sudan; all visa sections of existing embassies in Afghanistan, Libya, Syria, and Yemen are closed, ‘temporarily suspended’, or only cover applications from holders of diplomatic passports.<sup>328</sup> Hence, at least in these ‘black listed’ countries, obtaining a visa is both legally and physically impossible.

In such circumstances, if visa requirements are not lifted or suspended, **carrier sanctions** impede travel through normal commercial routes. Indeed, although the Schengen Borders Code is specifically without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*,<sup>329</sup> the effectiveness of these provisions is undermined by the threat of fines in case of transportation of unduly documented migrants.<sup>330</sup> The problem is one of structural design. Through the threat of sanctions, carriers have been de facto delegated to carry out travel document checks, without however being given the authority (let alone the means and necessary training) to undertake full entry controls, taking also account of the applicable exceptions under Article 14(1) SBC, in light of ‘obligations related to access to international protection, in particular the principle of *non-refoulement*’.<sup>331</sup>

As a result, carriers, concerned to avoid sanctions, usually simply refuse to carry anyone who does not have a passport and/or a visa (when required), pushing asylum seekers from ‘black listed’ countries into irregular migration routes.<sup>332</sup> If visa requirements are retained for refugee-producing countries, lifting or suspending carrier sanctions would constitute an alternative solution, transforming the possibility of safe arrival for those in

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<sup>327</sup> Case C-175/11 *HID* ECLI:EU:C:2013:45.

<sup>328</sup>List of Member States' consular presence, representation arrangements and forms of cooperation for the collection of visa applications, collection by Honorary Consuls or outsourcing of the collection of visa applications, 15 January 2018  
<[https://www.udiregelverk.no/en/documents/schengen/16202010/Annex\\_28/](https://www.udiregelverk.no/en/documents/schengen/16202010/Annex_28/)>.

<sup>329</sup> Arts 3(b) and 14(1) SBC.

<sup>330</sup> Carrier Sanctions Directive 2001/51, [2001] OJ L 187/45.

<sup>331</sup> Art 4 SBC.

<sup>332</sup> For a thorough review: Scholten, *The Privatisation of Immigration Control through Carrier Sanctions* (Brill, 2015). See also, Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 5.

need of protection and also ending the smuggling business at a stroke. Otherwise, the problem of inaccessible visas will remain in those countries where EU consulates are closed or do not exist. So, in terms of ensuring the widest coverage and highest rate of compliance with fundamental rights obligations, this policy option is the best suited. And is also the one entailing the least regulatory changes to the existing *acquis*.

Many may oppose this option as impracticable and evoke the '**floodgates argument**' – as Belgium did in the *X and X* case. However, the point is empirically unsubstantiated, as demonstrated by the numbers concerned in past experiences with other visa waiver schemes. In recent times, several neighbouring countries have been transferred to the visa 'white list', including all of the Western Balkans, in 2009 and 2010,<sup>333</sup> and the Republic of Moldova, in 2014.<sup>334</sup> Despite the wide disparities in terms of wealth, GDP differentials, quality of life, and job opportunities between these countries and Schengen partners,<sup>335</sup> the liberalisation process has not meant the emigration of the entire population of any of these countries to the EU, not even of significant portions thereof.<sup>336</sup> Plus, in case of a mass influx, the Temporary Protection Directive would provide the tools to cope.<sup>337</sup> A way to dispel fears would be to '**pilot** the policy within a controlled environment, e.g. by suspending visas or carrier sanctions for a particular country and period of time, or for a specific sub-set of nationals in particularly vulnerable circumstances (e.g. disabled, wounded applicants, and/or unaccompanied minors) before a full roll out.

Another inconvenience of this option is the impossibility it entails of carrying out **security checks** prior to arrival at the external borders, which limits, thereby, the amount of control exerted over incoming persons. Under this option, these can only be conducted at frontier posts before entry, but once the territory of the Member State concerned has been reached. The adoption of the ETIAS reform will change this landscape, since details of passengers from 'white listed' countries will need to be entered in the database, meaning that any perceived loss of control over their movement will be compensated prior to departure. The inconvenience for potential asylum seekers, however, will be the re-creation of current physical and legal barriers. Even if their countries of origin are de-classified from the 'black list', where no Member State representations are available, (in person) retrieval of their details for ETIAS purposes will become impracticable and access to regular travel foreclosed, unless carrier sanctions cease to apply or e-means are accepted as alternative course for registration. The ETIAS, therefore, has the potential of curtailing the intended effects of the visa waiver strategy as a way to provide legal access to protection in the EU.

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<sup>333</sup> Council Regulation (EC) 1244/2009 amending the Visa List Regulation, [2009] OJ L 336/1; and Regulation (EU) 1091/2010 amending the Visa List Regulation, [2010] OJ L 329/1.

<sup>334</sup> Regulation (EU) 259/2014 amending the Visa List Regulation, [2014] OJ L 105/9.

<sup>335</sup> See, e.g., UNDP, Human Development Index and Human Development Reports per country and per year: <<http://hdr.undp.org/en/data>>.

<sup>336</sup> EUROSTAT, Migration and migrant population statistics (March 2018) <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics)>.

<sup>337</sup> Temporary Protection Directive 2001/55/EC, [2001] OJ L 212/12 ('TPD').

Another inconvenience of the visa waiver scheme is that it relies on ‘natural distribution’ of applicants among Member States, coming close to a system of ‘free choice’ of destination country.<sup>338</sup> Although this situation would not be strictly incompatible with the Dublin criteria for allocation of responsibility for the examination of asylum claims,<sup>339</sup> it may undermine its underpinning deterrent rationale. A way to mitigate the effects of such an arrangement would be to adopt a mechanism of distribution and compensation along the lines of the one proposed below, as part of the third policy option.

BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENT(S)	COMPLIANCE WITH FUNDAMENTAL RIGHTS OBLIGATIONS	PRE-ARRIVAL SECURITY AND CONTROL
<p>All nationals from de-classified refugee-producing country</p> <p>or</p> <p>targeted, particularly vulnerable group thereof</p> <p>[no pre-arrival assessment required by State authorities or commercial carriers at pre-frontier stage, at least prior to ETIAS reform]</p>	<p>Total abolition or temporary suspension of visa requirements [Regulation 539/2001]</p> <p>and/or</p> <p>Total abolition or temporary suspension of carrier sanctions [Directive 2001/51]</p>	<p>None required at the pre-arrival stage</p> <p>Fear of numbers can be palliated through piloting of scheme prior to (incremental) roll out</p> <p>The Temporary Protection regime offers additional support in case of mass influx [Directive 2001/55]</p>	<p>Maximum</p> <p>[No risk of system becoming off-shore processing scheme]</p>	<p>Mimumum</p> <p>[None at pre-frontier stage; controls carried out on arrival at the border post, at least until adoption of ETIAS reform]</p>

Table 5: Overall Assessment of Policy Option 1 - ‘Visa Waiver’ Approach

### 6.1.2 Limited Territorial Validity Visas for Asylum Seeking Purposes

A different option would be for **EU humanitarian visas to be issued by Member State consulates and embassies abroad**, according to a dedicated instrument, harmonising issuing criteria and procedures. In such case, compliance with good administration and effective remedy standards would have to be guaranteed in line with Articles 41 and 47

<sup>338</sup> For an evaluation of the different distribution alternatives, see Maiani, *The Reform of the Dublin III Regulation*, PE 571.360 (European Parliament, 2016).

<sup>339</sup> It can be said to be contemplated in Art 14 DR.

CFR, including appeals, judicial protection, and fair trial guarantees.

Indeed, if no collective solutions are adopted, and both visas and carrier sanctions are maintained for refugee-producing countries, one possibility to comply with extraterritorial obligations of *non-refoulement*, as expounded in Chapter 4, is to consider individual solutions for visa subjects who are in need of international protection. The **LTV visa provisions contained in the CCV** offer a basis in that regard—as interpreted within the Italian ‘humanitarian corridor’ scheme.

According to Article 25 CCV, ‘[a] visa with limited territorial validity *shall be issued exceptionally* ... *when the Member State concerned considers it necessary* on humanitarian grounds, for reasons of national interest or *because of international obligations to derogate from... the entry conditions laid down in... the Schengen Borders Code*’ (emphasis added). The equivocal, half-compulsory / half-discretionary language used is taken from pre-Visa Code, pre-Lisbon, pre-EU Charter of Fundamental Rights documents—before it became clear that ‘[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’, whatever the policy area concerned.<sup>340</sup>

Today, applying the *Koushkaki* judgment by analogy, when the conditions of Article 25 CCV (interpreted in line with EU fundamental rights obligations<sup>341</sup>) are met, Member States should be understood to have no capacity to refuse to issue a LTV visa.<sup>342</sup> The ruling establishes that there is no discretion for Member States to ‘refuse...to issue...a visa to an applicant unless one of the grounds for refusal...listed in [the CCV] provisions can be applied to that applicant’.<sup>343</sup> So, although visas are not delivered ‘as of right’ to those requesting them, neither can they be considered as completely dependent on Member States’ whims. In our case, the binding force of fundamental rights obligations flowing from primary law, and to which the Visa and Schengen Codes refer, reinforces this interpretation.<sup>344</sup> Article 25 CCV could, accordingly, be conceived of as one of the ‘special provisions concerning the right of asylum and to international protection’ referred to in the Schengen Borders Code.<sup>345</sup> Consequently, if an asylum seeking visa applicant applied for a LTV with a particular Member State, this application should be given serious consideration, in compliance with the principles of good administration, fair processing, and effective judicial protection under Charter provisions.<sup>346</sup>

It doesn’t matter that the (soft law) Visa Handbook, guiding the application of the Visa Code, fails to contemplate the situation of asylum seekers as one specific scenario in

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<sup>340</sup> *Fransson* (n 204), para. 21.

<sup>341</sup> *Ordre des Barreaux* (n 251), para. 28.

<sup>342</sup> Case C-84/12 *Koushkaki* ECLI:EU:C:2013:862. In this line, see Peers, ‘Do potential asylum-seekers have a right to a Schengen visa?’, *EU Law Analysis* (January 2014) <<http://eulawanalysis.blogspot.co.uk/2014/01/do-potential-asylum-seekers-have-right.html>>.

<sup>343</sup> *Koushkaki* (n 342), para. 63.

<sup>344</sup> Recital 29 CCV; and Recital 36, Preamble, and Art 4 SBC.

<sup>345</sup> Art 14(1) SBC.

<sup>346</sup> See further Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 10.

which the issuance of LTVs may be justified.<sup>347</sup> Whether the list of examples it provides is intended to be exhaustive is also irrelevant, as it is the legal nature of the Handbook itself (whether as binding or non-binding). As an act of the EU (of the European Commission in this case), its interpretation and implementation remains subject to the Treaties (and the Charter). And neither the Handbook nor, ultimately, the Visa Code (including Article 25 thereof) can limit the effect of primary law.<sup>348</sup>

At present, because of LTV rules having been inherited from past époques, the related application, issuing, and appeal regime is ambiguous. First, it is unsure that a LTV can be 'applied for' separately in practice. The standard visa application appended to the Code does not specify any LTV-relevant reasons that the applicant may adduce.<sup>349</sup> It rather seems that LTV delivery depends on the appreciation of the circumstances by the issuing authority, upon reception of an 'ordinary' visa application. Then, the specific conditions and procedure to be followed to issue a LTV have not been defined by the Code. In particular, there are no signs indicating that Member States are obliged to initiate an assessment of *non-refoulement* implications *ex officio*.

According to the general rules, when consulates receive a visa application, before proceeding with a full examination of the file, they have to carry out a preliminary check to ascertain that the elements necessary to make a decision have been provided. Where these formalities are not satisfied, the application must be declared 'inadmissible' and its processing immediately discontinued.<sup>350</sup> 'By way of derogation', however, 'an application that does not meet the requirements...may be considered admissible on humanitarian grounds or for reasons of national interest'.<sup>351</sup> But the 'international obligations' to which Article 25 CCV refers, have been omitted from the wording of Article 19 CCV governing admissibility decisions. As a result, there is a gap, and a real risk that LTV applications be potentially dismissed without a 'formal' refusal. If such is the case, there is an ensuing danger that LTV applicants be deprived of the right to appeal a negative (albeit 'informal') decision on their request.<sup>352</sup>

If a **reformed LTV regime** is taken as a foundation for the development of the 'asylum seeker visa' option, the European Parliament proposed amendments to the Visa Code could be taken into account to put it together, clarifying and expanding upon the current LTV visa system, by bringing it in line with EU fundamental rights obligations and correcting the perception that 'asylum seeking visas' are (always) optional. Recognition by international courts of the existence of extraterritorial *non-refoulement* duties that may,

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<sup>347</sup> Consolidated version of the Handbook for the processing of visa applications and the modification of issued visas of 15 September 2011 based on Commission Decision C(2010) 1620 of 19 March 2010, as amended by Commission Decision C (2011) 5501 of 4 August 2011 ('Visa Handbook'), pp. 70-71.

<sup>348</sup> Case C-226/99 *Siples* ECLI:EU:C:2001:14, para. 17.

<sup>349</sup> See Box 21 of the standard application form in Annex I CCV, concerning the 'main purpose(s) of the journey'. Applicants could possibly indicate LTV-relevant reasons only under the rubric of 'other'.

<sup>350</sup> Art. 19(1) and (3) CCV.

<sup>351</sup> Art. 19(4) CCV.

<sup>352</sup> Art. 32 CCV. Expressing similar concerns, see Meijers Committee, *Note on the draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas*, COM(2006) 403 final <[http://www.commissie-meijers.nl/assets/commissiemeijers/jaarverslagen/CMjaarverslag2007\\_web.pdf](http://www.commissie-meijers.nl/assets/commissiemeijers/jaarverslagen/CMjaarverslag2007_web.pdf)>.

in practice, require States to issue visas to avoid ill-treatment (if no other options are available) should be at the heart of such initiative.<sup>353</sup>

On the other hand, the dangers of asylum seeking visas becoming a **fully-fledged system of extraterritorial processing**—involving reception centres in third countries, indefinite detention off shore, poor procedural guarantees, and insufficient long-term prospects and durable solutions, as the Australian experience illustrates—**must be avoided**.<sup>354</sup> As in the Italian humanitarian corridor case, the purpose of ‘LTV asylum seeking visas’ should be a grant of pre-arrival clearance, allowing the holder to present him- or herself to the asylum authorities of the EU Member State concerned upon reaching its territory, travelling through ordinary, commercial routes. Obviously, such solution requires that **access to embassies** be maintained, whether physically or online, so that, in turn, access to ‘LTV asylum seeking visas’ can be effectively guaranteed.

The decision on **beneficiaries** and procedural arrangements must, then, be such as to comply with existing fundamental rights obligations. Therefore, the best option is to draw on existing standards: **All those entitled to protection under the principle of non-refoulement** should thus be entitled to apply for LTV asylum seeker visas. This is in line with the Qualification Directive, which imposes an obligation on Member States under Articles 13 and 18 so that they ‘shall grant’ the relevant protection status to the individual meeting the qualification criteria defined in the Directive.<sup>355</sup> No margin of appreciation has been left in that regard.<sup>356</sup> The obligation has been acknowledged by the CJEU itself, noting in *Abdulla* that ‘[u]nder Article 13 of the Directive, the Member State is *required* to grant refugee status to the applicant if he qualifies...’.<sup>357</sup> The same applies, from *M’Bodj*, to Article 18 of the Directive, according to which ‘Member States *are to grant* that status to a third-country national eligible for subsidiary protection’.<sup>358</sup> After all, the purpose of the instrument is ‘to introduce common criteria on the basis of which applicants...are to be recognised as [beneficiaries of international] protection...drawn from international obligations under human rights instruments and practices existing in Member States’.<sup>359</sup>

The prohibition of *refoulement* plays a prominent role in this regard. Because ‘Member States *shall* respect the principle...in accordance with their international obligations’ and

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<sup>353</sup> *Hirsi*, (n 241).

<sup>354</sup> McAdam, Policy Brief 1 - Extraterritorial processing in Europe: Is ‘regional protection’ the answer, and if not, what is? (Kaldor Centre, May 2015) <<http://www.kaldorcentre.unsw.edu.au/publication/policy-brief-1-extraterritorial-processing-europe-regional-protection-answer-and-if-not>>; and McAdam, ‘Migrating laws? The “plagiaristic dialogue” between Europe and Australia’, in Lambert, McAdam and Fullerton (eds), *The Global Reach of European Refugee Law* (CUP, 2013), p. 25 ff. See also den Heijer (n 1), p. 274; and Noll, ‘Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones’ (2003) 5 *EJML* 303, pp. 338 ff.

<sup>355</sup> Note, however, that the QD acknowledges in Recital 21 that ‘[t]he recognition of refugee status is a declaratory act’.

<sup>356</sup> Recall also that the QD is not subject to the same territorial limitation of the APD and other CEAS instruments.

<sup>357</sup> *Abdulla* (n 233), para. 62 (emphasis added). It, thus, appears that the Court interprets the provision as capable of producing direct effect.

<sup>358</sup> Case C-542/13 *M’Bodj* ECLI:EU:C:2014:2452, para. 29 (emphasis added).

<sup>359</sup> Recital 34, Preamble, and Art 1 QD.

these international obligations may evolve in time,<sup>360</sup> the Qualification Directive foresees that its implementation 'be evaluated at regular intervals, *taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement*'.<sup>361</sup> Considering that, as explained in Chapter 4, the principle may be violated extraterritorially,<sup>362</sup> the criteria for issuing LTV visas for asylum seeking purposes should be the same as those giving rise to the obligation not to expose anyone to ill treatment under Articles 4 and 19(2) CFR, so as to ensure that 'nobody is sent back to persecution' or to face a real risk of 'serious harm',<sup>363</sup> construed in line with the prevailing interpretation at the relevant time,<sup>364</sup> and taking account of 'present day conditions'.<sup>365</sup>

Regarding **procedural arrangements** to apply for LTV asylum seeking visas, as they will translate rights that individuals derive from EU law, these should be established in a way that does not 'render practically impossible or excessively difficult [their] exercise'.<sup>366</sup> Full assessments of the merits of international protection claims should not be conducted extraterritorially, in light of the difficulties pertaining to providing access to dignified reception conditions, fair processing guarantees, remedies with suspensive effect, and effective judicial protection abroad.<sup>367</sup> Neither must preliminary decisions prejudice the result of prospective inland proceedings or disadvantage claimants in any other way.

The most suitable option would hence be to deliver LTV asylum seeking visas either to **those submitting an 'arguable claim'** of exposure to a real risk of serious harm or a well-founded fear of persecution, along the lines of Strasbourg case law. Under the ECHR, this means that claims raising *prima facie* issues under the relevant provisions (and, by analogy, its EU Charter equivalents) must be accepted for detailed examination.<sup>368</sup> So, those presenting an 'arguable claim' of a need of protection from *refoulement* should be delivered a LTV visa for travel to the EU Member State concerned for the purposes of lodging an asylum application and be allowed to fully substantiate their cases 'onshore' upon arrival, following normal processing arrangements under CEAS instruments (including Dublin and APD provisions). This would best reflect the declarative nature of refugee status,<sup>369</sup> and provide a real alternative to smuggling and trafficking, while avoiding the practical and legal difficulties associated with offshore processing schemes. At the same time, it will keep authorities in control of the procedure.

**Decisions** ought to be adopted by fully **competent personnel**, with sufficient knowledge and prior training, which means that either a delegation of the competent national

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<sup>360</sup> Art 21 QD.

<sup>361</sup> Recitals 48, Preamble, QD (emphasis added).

<sup>362</sup> *Hirsi* (n 241).

<sup>363</sup> Recitals 3, Preamble, QD; and Art 15 QD.

<sup>364</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, Advisory Opinion, [1971] ICJ Rep. 16.

<sup>365</sup> ECtHR, *Tyrer v. UK*, Appl. 5856/72, 25 April 1978, para. 31.

<sup>366</sup> See, among many others, *Unibet* (n 253), para. 43.

<sup>367</sup> Red Cross (n 283).

<sup>368</sup> Note that the concept of 'arguable claim' is not the same as 'admissible application'; it denotes a much lower threshold. See, e.g., *TI v UK*, Appl. 43844/98, 7 Mar. 2000, which the ECtHR considered 'arguable', but subsequently dismissed as 'inadmissible' after a thorough examination of the case.

<sup>369</sup> UNHCR Handbook (n 76).

asylum authority is deployed in consular premises to that end or application files are transferred to them by embassy staff for inshore analysis. **Legal aid, translation, and representation** will also need to be provided, so as to guarantee the **right to be heard**.<sup>370</sup> For the same reason, an **interview** with the applicant will be required – who is, anyway, supposed to ‘appear in person’ for the assessment of his/her situation and the retrieval of biometric identifiers under current visa rules.<sup>371</sup> Skype and other **technological means** may serve to guarantee the security of applicants, cater for specific vulnerabilities, and preserve the processing capacities of the national services concerned.

National authorities will need to take account of both the general and particular circumstances of the applicant concerned,<sup>372</sup> relying on published sources and taking proactive steps to ascertain the reality of the risks faced by him/her, ‘carrying out a thorough and individualised examination of the situation of the person concerned’,<sup>373</sup> ‘before any individual measure which would affect him or her adversely is taken’.<sup>374</sup> Knowledge of the circumstances will otherwise be imputed on the Member State,<sup>375</sup> and failure to adopt preventative means to spare the applicant from foreseeable harm will amount to a violation of the CFR.

In case of negative decisions, the right to an **effective remedy**, in accordance with the criteria of Article 47 CFR, must be provided.<sup>376</sup> Article 32 CCV already foresees that ‘applicants who have been refused a visa *shall* have the right to appeal’. A similar clause will have to be inserted in any visa instrument the legislator adopts for the purposes of complying with *non-refoulement* guarantees. The problem will be how to suspend the application of visa refusals. In case of a risk of irreversible harm, a remedy without **automatic suspensive effect** will not satisfy the requirement of effectiveness.<sup>377</sup> The option for applicants to obtain proper judicial protection and **interim relief** may have to translate in the issuance of a permit for **immediate evacuation** in situations of imminent danger, to safeguard the effectiveness of rights under Articles 4 and 19(2) CFR. Otherwise, while appeals are being considered by a competent judge, a system of **interim shelter** in premises subjected to diplomatic inviolability, be it an embassy or EU / UN buildings under equivalent protection, ought to be made available to the applicant for him/her to voluntarily relocate.

As with the first policy option, to avoid any detrimental effect that the adoption of these arrangements may entail, the **roll out** of LTV visas for asylum seeking purposes **could be progressive** and be **first introduced in countries where** the presence of applicants from

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<sup>370</sup> Case C-277/11 *M.M.* ECLI:EU:C:2012:744, para. 86.

<sup>371</sup> Arts 10 and 13 CCV.

<sup>372</sup> Art 4 QD.

<sup>373</sup> *Tarakhel*, para. 104; Art. 4 SBC.

<sup>374</sup> *M.M.* (n 370), para. 83.

<sup>375</sup> *M.S.S.* (n 235), para. 358; *Hirsi* (n 241), para. 121; *NS & ME* (n 200), para. 88; Mengozzi (n 15), para. 140 ff.

<sup>376</sup> Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 10 and references therein. Cf. Reneman, ‘An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?’ (2010) 12 EJML 407.

<sup>377</sup> See, among many others, ECtHR, *Sultani v. France*, Appl. 45223/05, 20 September 2007, para. 50: ‘un recours dépourvu d'effet suspensif automatique ne satisfaisait pas aux conditions d'effectivité de l'article 13 de la Convention’.

top refugee-producing States is most pressing and a presumption of unsafety / **need for protection from *refoulement* is most easily recognised** on the basis of ‘information contained in recent reports from independent international human-rights-protection associations...or governmental sources’ in the public domain, including UNHCR.<sup>378</sup> In such cases, knowledge of circumstances that expose applicants to treatment in breach of the principle shall, indeed, be assumed and imputed to the authorities of the EU country concerned.<sup>379</sup>

Opponents of this policy formula will raise the **fear of numbers** again. However, the clogging of Member State embassies is improvable. At current capacities, the number of visas issued daily in EU-28 is in the thousands, with the system having never collapsed on that count. According to the European Commission, in 2017 alone, Member States managed to issue 14.6 million Schengen visas, of a total 16 million applied for (including a mere 100,000 LTVs), without incidents.<sup>380</sup>

In any event, the fear of numbers does not constitute a *legal* argument, let alone one capable of limiting the *absolute* nature of *non-refoulement* obligations. In truth, compliance with the CFR is not optional or open to negotiation,<sup>381</sup> and given the non-limitable / non-derogable character of the right concerned, even a mass influx or other commensurate difficulties ‘cannot absolve a State of its obligations under [the relevant] provision[s]’.<sup>382</sup> Potential ‘problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State’s obligations...’.<sup>383</sup> Thus, the legislator, when deciding on how to arrange visas to avoid *refoulement* should strictly adhere to EU law, avoiding political or ideologically motivated temptations.

If a **rationalization** of the visa system were, nonetheless, desired, the CCV provides for several **options** to this effect, leaving ample freedom for Member States to manage applications electronically, for instance, or with the **collaboration of honorary consuls** or via **co-location** or **representation** by other Member States, which would still permit coordination with Dublin rules.<sup>384</sup> What must be born in mind at all times is the need for any forms of collaboration to ensure that ‘the quality of the service offered to the public is of a high standard and follows good administrative practice’. For the purpose, Member States ‘should allocate *sufficient resources* in order to facilitate as much as possible the visa application process’.<sup>385</sup> And, crucially, ‘access to consulates’ ought to be maintained.<sup>386</sup>

This formula allows Member States to keep **current levels of control** over entries at the

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<sup>378</sup> *Hirsi* (n 241), paras 118, 123, and 125-126; *M.S.S.* (n 235), paras 147 and 353.

<sup>379</sup> *Hirsi* (n 241), paras 131 and 156.

<sup>380</sup> European Commission, Complete statistics on short-stay visas issued by the Schengen States, Visa Statistics for Consulates 2017 <<https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy#stats>>.

<sup>381</sup> Art 6 TEU and Art 51 CFR.

<sup>382</sup> *Hirsi* (n 241), paras 122-23.

<sup>383</sup> *Ibid.*, para. 179.

<sup>384</sup> Recital 13, Preamble, CCV and Arts 40-42 CCV.

<sup>385</sup> Recital 7, Preamble, CCV (emphasis added).

<sup>386</sup> Art 8 CCV; and Recitals 4 and 15, Preamble, CCV.

pre-arrival stage. But it entails the **risk of diverging practices or even free riding and defaulting by Member States** attempting to avoid Dublin responsibility for those to whom they ought to issue LTVs. Confronted with potentially high (or just unpredictable) numbers of applicants, Member States may decide to adopt exceedingly strict interpretations or even misapply or chose to ignore the common rules. A notable example of this practice emerged during the 2015 ‘refugee crisis’ in relation to the relocation scheme adopted in favour of Italy and Greece that Slovakia and Hungary opposed and disregarded, supported by Poland, contesting its legality under EU law.<sup>387</sup> In less radical fashion, disparities in implementation cannot be obviated. EASO has revealed serious gaps between Member States in the ways in which CEAS rules are interpreted and applied, documenting divergences in decision practices, recognition rates, and types of protection granted<sup>388</sup> – this is precisely part of the justification to review the ‘asylum package’ and come up with more integrated formulas, thus motivating the transformation of Directives into Regulations.<sup>389</sup>

To address the risk of under-performance or non-engagement, the introduction of a robust and **independent monitoring system** will be crucial, whether by EASO, the European Commission or some other impartial actor. Cooperation with UNHCR and specialised NGOs will be key to this effect. And, to secure the integrity and credibility of the system, a **sanctioning mechanism** that penalises non-compliance should be established – similar to those in place within the Schengen scheme or as proposed in the Dublin IV reform. **Positive incentives** could also be introduced, in the form of financial and other support for countries issuing asylum seeker visas and hosting LTV arrivals, which could be entirely covered by EU funds.

Another way to foster compliance is to **break the link between allowing entry into the Schengen space and bearing responsibility for the examination of asylum claims**. This could be achieved through the amendment of the Dublin allocation criteria and the adoption of a **system of responsibility distribution that complies with the principle of solidarity**, along the lines of the one proposed as part of Option 3 below.

BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENT(S)	COMPLIANCE WITH FUNDAMENTAL RIGHTS OBLIGATIONS	PRE-ARRIVAL SECURITY AND CONTROL
Persons raising	Need for new	Need to maintain access to	Risk of becoming	Equal to

<sup>387</sup> Joined Cases C- 643/15 and C- 647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631.

<sup>388</sup> See, e.g. Annual Report on the Situation of Asylum in the European Union (EASO, 2016), pp. 26 and 48 <<https://www.easo.europa.eu/sites/default/files/annual-report-2016.pdf>>; and Annual Report on the Situation of Asylum in the European Union (EASO, 2017), p. 166 <<https://www.easo.europa.eu/sites/default/files/Annual-Report-2017-Final.pdf>>.

<sup>389</sup> Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy, European Commission Press Release, 13 July 2016 <[http://europa.eu/rapid/press-release\\_IP-16-2433\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2433_en.htm)>.

<p><i>prima facie</i> issues under Art 4 CFR</p> <p>[minimal pre-arrival assessment required by State authorities]</p>	<p>legislative instrument [possibly inspired by existing LTV rules]</p>	<p>embassies / consulates</p> <p>Need for robust monitoring / punishing mechanism to avoid defaulting</p> <p>Need to comply with Arts 41 and 47 CFR:</p> <ul style="list-style-type: none"> <li>- Competent personnel to examine requests and take substantiated decisions</li> <li>- Legal aid / representation / translation services</li> <li>- Right to be heard (possibly through e-means)</li> <li>- Right to effective remedy with suspensive effect</li> </ul> <p>Need for a system of urgent evacuation and/or interim shelter while appeals are examined</p> <p>Fear of numbers can be palliated via cooperation (representation/co-location/honorary consuls formulae) and piloting of scheme prior to full roll out</p>	<p>fully-fledged extra-territorial processing scheme</p> <p>Risk of under-performance / non-engagement by Member States willing to avoid Dublin responsibility</p>	<p>current level under CCV [Regulation 810/2009]</p>
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Table 6: Overall Assessment of Policy Option 2 – LTVs for Asylum Seeking Purposes

### 6.1.3 EU-Wide International Protection Application Travel Permits

The most ambitious plan would be for the **complete centralization** of admission procedures in joint visa centres, e.g. within EEAS representations abroad, with processing assumed or coordinated by the soon-to-be EU Asylum Agency (replacing EASO).<sup>390</sup> This would eliminate variation across Member States, ensuring a fully harmonized approach to visa issuing for asylum seekers. Yet, it would require a very high level of trust, the restructuring of the Dublin criteria for allocation of responsibility for the examination of ensuing asylum claims, and a post-arrival allocation mechanism, similar to the one governing the 2016 relocation scheme,<sup>391</sup> to guarantee compliance with responsibility-sharing and solidarity requirements under Article 80 TFEU.

<sup>390</sup> Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271.

<sup>391</sup> Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 239/146; and Council Decision (EU) 2015/1602 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248/80 ('EU Relocation Decisions').

Current visa rules already provide for the possibility of establishing ‘**Common Application Centres**’ where the consular staff ‘of two or more Member States [are] pooled in one building in order for applicants to lodge [visa] applications’.<sup>392</sup> But this formula does not entail that decisions are taken on a EU-wide basis on behalf of the Member States represented at the Common Application Centre. In reality, once there, ‘applicants shall be directed to the Member State competent for examining and deciding on the application’.<sup>393</sup> Competence rules are established in Article 5 of the Visa Code. The Member State competent for the assessment of the application is normally the one ‘whose territory constitutes the sole [or main] destination of the visit(s) [concerned]’.<sup>394</sup> If that cannot be determined, then it will be the Member State ‘whose external border the applicant intends to cross [first] in order to enter [Schengen] territory’.<sup>395</sup>

Since keeping these allocation criteria may be ‘tantamount to [subsequently] allowing third-country nationals to lodge applications for [asylum] in the Member State of their choice’, with that presumably ‘undermin[ing] the general structure of the system established by [the Dublin] Regulation’,<sup>396</sup> the EU legislator may prefer to adopt an alternative solution. And, instead of individual Member States taking visa decisions for the purposes of seeking asylum on their own, **centralize decision-making within a EU-wide structure**. This could, for instance, be a set of specially trained **EASO officials** seconded to **EEAS representations** in third countries.<sup>397</sup> Decisions would then be taken on behalf of the Union as a whole and successful candidates allocated according to a predetermined **distribution key**, which could well be inspired by the one at play within the 2016 relocation scheme, based on territory, population, GDP, protection capacities, and past/current asylum efforts.<sup>398</sup> This means that **each Member State** will have a **predefined yearly quota**, which the EASO and/or the Commission would review annually or at shorter intervals, depending on flows. The allocated Member State would count as the country of ‘first entry’ for Dublin purposes – requiring a modification of the Regulation to this effect – so that, in case of subsequent secondary movements, Dublin criteria could apply unchanged.

To minimize disruption by different levels of ‘popularity’ of Member States, possibly leading to an uneven distribution of applicants, a **preference-matching mechanism**, similar to the one developed by EASO for the implementation of relocation decisions, could be put in place.<sup>399</sup> Family, language, or cultural links could be relied upon to this effect – but avoiding them becoming ‘hidden’ qualification criteria, in violation of the principle of non-discrimination amongst refugees.<sup>400</sup> On that basis, asylum seekers, as

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<sup>392</sup> Art 41(2) CCV.

<sup>393</sup> Ibid.

<sup>394</sup> Art 5(1)(a) and (b) CCV.

<sup>395</sup> Art 5(1)(c) CCV.

<sup>396</sup> *X and X* (n 11), para. 48.

<sup>397</sup> Such powers will need to be clearly conferred in the recast version of the EASO Regulation. See Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271.

<sup>398</sup> EU Relocation Decisions (n 391).

<sup>399</sup> Guild, Costello and Moreno-Lax (n 118).

<sup>400</sup> Art 3 GC.

part of their visa application, could list, e.g., up to 5 Member States, in order of preference, providing reasons for that classification. While the quota of the top 1 country is not yet filled, the asylum seeker may be assigned to it. If already filled at that point, then, the second listed may be considered and so on. A more complex variant of this model could have Member States listing also their own preferences, which would be 'crossed' with those of applicants, prior to assigning a final destination. This will take account of legitimate interests by countries and better respect the agency of the persons concerned, while still not creating a 'right to chose' the country of destination.

A **corrector**, taking account of **children rights, family unity, and dependency links**,<sup>401</sup> will also have to be in place, so that the quotas of Member States can be 'exchanged' between themselves to meet Charter obligations. In case of a country exceeding its quota, a **compensatory mechanism**, consisting in extra funding and/or a reduced quota the following year, could be introduced to ensure compliance with Article 80 TFEU.<sup>402</sup> This will foster engagement with, and trust in, the system, while reducing chances for unnecessary uses of force that may violate fundamental rights during, or due to, forced transfers.<sup>403</sup>

Another measure to avoid the delays and disparities seen during the implementation of the 2016 Relocation scheme concerns pre-arrival **security vetting**. Under the 2015 Council Decision arrangements buttressing the scheme, security-related decisions were to be adopted by the beneficiary Member States (whether Italy or Greece), but ended up being duplicated by receiving countries.<sup>404</sup> To prevent the repetition of this scenario, security checks should be centralised as well and adopted on the basis of a common set of criteria that reflects the concerns of the Member States with EU-wide import or effects and does not go beyond what is legally permissible under current rules. There should also be a clear understanding of how far security checks can go and which consequences may ensue therefrom, so that they **do not constitute an exclusion procedure in disguise**. Crucially, Member States should bear in mind that security concerns do not release them of their *non-refoulement* obligations—even declared criminals and suspected terrorists are protected under Article 3 ECHR.<sup>405</sup> An option in such cases may be for these applicants to be placed under surveillance or received in closed reception centres upon arrival, with detention following pre-established legal norms, including judicial oversight, and

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<sup>401</sup> Case C-648/11 *M.A.* ECLI:EU:C:2013:367, para. 55; and Case C-245/11 *K* ECLI:EU:C:2012:685, paras 31, 35, 40, 48 and 54.

<sup>402</sup> In a way, this is already happening on an *ad hoc* basis. See, e.g., the EUR 4.5 billion compensation planned for Germany in the next EU budget 2012-27, to indemnify the financial burden of taking in 1.7 million refugees since 2013: 'Germany to receive compensation payments for refugees', *Deutsche Welle* (1 June 2018) <<http://m.dw.com/en/germany-to-receive-compensation-payments-for-refugees-report/a-44038746?xtref=https%253A%252F%252Fduckduckgo.com%252F>>.

<sup>403</sup> In this line, see Guild et al., *Enhancing the CEAS and Alternatives to Dublin*, PE 519.234 (European Parliament, July 2015) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf)>; and Guild et al., *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, PE509.989 (European Parliament, October 2014) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU\(2014\)509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf)>.

<sup>404</sup> Guild, Costello and Moreno-Lax, (n 118).

<sup>405</sup> ECtHR, *Soering v. UK*, Appl. 14038/88, 7 July 1989 (murderer); *Saadi v. Italy*, Appl. 37201/06, 28 February 2008 (terrorist suspect).

adopted as final recourse, when no other alternatives are available.<sup>406</sup>

And, to help palliate the effects of any possible increases in the demand for visas, like with the other options above, a piloting approach prior to full roll out can help planning and optimizing resources. **Cooperation with external service providers**, which is another modality of cooperation contemplated in current law,<sup>407</sup> could also be contemplated. Non-State entities and private actors, such as specialised international organisations and NGOs, have already been involved in recent PEP experiences, as mapped out in Chapter 3. The IOM ‘service centres’, opened in June 2016 to support the German Family Assistance Programme, are a case in point. Therein, IOM staff has been trained to offer pre-interview support in culturally sensitive and accessible ways, including for the completion of the relevant online application forms, file completeness checks, facilitation of contacts with sponsors via Skype, phone and email, scheduling and re-scheduling of interview appointments, photo-taking and photocopying services, and (in select centres) also for the enrolment of biometric data. Also, to ensure safe access to IOM premises, the organisation provides escort and shuttle bus services, and even visits to applicants’ locations. They have opened a dedicated Facebook page and Twitter account to enhance outreach, correct misinformation spread through social media, and furnish accurate data. Finally, IOM also delivers orientation and integration classes to potential beneficiaries.<sup>408</sup> A similar approach could be adopted in support of this or the above options to develop a workable, comprehensive regime of visas for asylum seeking purposes in the EU.

The **role of technology** should also be carefully pondered upon. The use of electronic media for the enrolment of data in the VIS and for most of the current pre-application operations, such as collecting the relevant information, managing appointments, and organizing communication between service providers, the applicant, and the issuing consulate, already take place through e-means. This is why the current Article 44 CCV calls for the encryption and secure transfer of sensitive data. To cater for increased pressures on visa delivery systems, the function of online services and devices could be further expanded as a way to increase processing capacities. The IOM has piloted a ‘MigrantApp’ in Central America, ‘one of the main migratory corridors in the world’, to ‘provide information to facilitate regular, safe and orderly migration using mobile devices’. The application offers ‘reliable, rapid, safe and free information in three languages on governmental, private and civil society services for migrants’, and ‘facilitates access to...more than 1,500 geo-referenced centres where migrants can receive assistance or information’.<sup>409</sup> Something similar could be developed to support the system of humanitarian visas within the EU.

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<sup>406</sup> Suspects should then be put to trial—pursuant to the *aut dedere aut judicare* principle—and subsequently released, if found innocent, or penalised according to the applicable criminal law of the receiving Member State.

<sup>407</sup> Art 43 CCV; Recitals 14-17, Preamble, CCV; and Annex 10 CCV (emphasis added).

<sup>408</sup> German Federal Foreign Office, IOM’s Family Assistance Programme, 4 April 2017, <[http://germany.iom.int/sites/default/files/FAP/FAP\\_Infosheet\\_ENGLISH\\_2017-04-04.pdf](http://germany.iom.int/sites/default/files/FAP/FAP_Infosheet_ENGLISH_2017-04-04.pdf)>. The Facebook page is <<https://www.facebook.com/IOM.Family.Assistance.Programme/>> and the Twitter account is <@IOM\_FAP>.

<sup>409</sup> IOM News, ‘UN Migration Agency Launches Mobile App for Migrants in Mesoamerica’, 10 June 2017 <<https://www.iom.int/news/un-migration-agency-launches-mobile-app-migrants-mesoamerica>>.

**Remedies** will have to be provided under this formula too. The difficulty with a centralised system where a EU body takes EU-wide decisions entails that there has to be a EU competent court or tribunal that can hear appeals in a prompt and effective way, meeting Article 47 CFR standards. This can be solved in different ways. There could be a **panel of experts**, sourced from different, independent and reliable bodies (e.g. UNHCR, ECRE, and other specialist organisations), taking on a quasi-judicial role, and being vested with enough powers and independence to review EASO decisions and afford adequate reparation for any harm done<sup>410</sup>; a **special tribunal** for asylum cases created within the CJEU, like the Civil Service Tribunal adjudicating upon EU staff cases<sup>411</sup>; or a **special procedure**, inspired by the CJEU urgent procedure for matters concerning freedom, security and justice,<sup>412</sup> or the expedited procedure applied by the General Court ‘in cases considered to be particularly urgent’ could also offer an adequate approach.<sup>413</sup> The first solution will require wording being inserted to this effect in the EASO recast Regulation. The second, in turn, may necessitate a Treaty amendment. The third approach, on the other hand, may be fulfilled with a change to the Rules of Procedure of the CJEU—the application to the General Court for the purposes of reviewing EASO decisions would be covered by the current terms of Article 263 TFEU on direct actions for invalid / illegal acts of EU organs.

For **positive outcomes**, whether at first instance or after appealing a negative decision, **travel** and other **assistance** will be crucial. A partnership with UNHCR, IOM and other organisations, as currently in existence in relation to some of the PEPs explored in Chapter 3, can facilitate **logistics** and **pre-arrival arrangements**. Accurate information as for how to proceed on arrival, whom to contact, where to file the application, etc. will be essential to the well-functioning of the system. A **mentoring mechanism** whereby successful applicants are received at the airport and accompanied to the relevant places / brought before the competent authorities would be the best formula. This is something that local NGOs could assume after landing and which is common practice within community and private sponsorship schemes.

A final point to elucidate relates to the destiny of **rejected cases** and its **relationship with ‘spontaneous arrivals’**. Since the circumstances leading to a need for protection can be very volatile, today’s rejected case may be tomorrow’s urgent situation. So, the **opportunity for re-applying** for a new visa afresh, with flexibility in terms of time elapsed between applications, avoiding rigid, automatic assumptions, and taking account of conditions *ex nunc*, will be important. In any case, the need to consider that there will, nonetheless, always be cases that cannot wait, or are not well informed, and thus take the ‘spontaneous arrival’ route. Here, Article 31 GC becomes relevant again so that those

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<sup>410</sup> The requirements of competence, permanence, impartiality, compulsory jurisdiction, and independence will have to be met. See *Associação Sindical dos Juizes Portugueses* (n 224), para 38 ff.

<sup>411</sup> EU Civil Service Tribunal <[https://curia.europa.eu/jcms/jcms/p1\\_217428/en/](https://curia.europa.eu/jcms/jcms/p1_217428/en/)>.

<sup>412</sup> Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 <[https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf)>.

<sup>413</sup> The General Court (undated) <[https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/tribunal\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/tribunal_en.pdf)>.

concerned are not punished for their irregular entry.<sup>414</sup>

A system of **monitoring, reporting, and periodic review** should also be introduced, to ensure that any flaws are addressed and any changes necessary introduced in timely fashion. **Monitoring**, to be credible and effective, will need to be entrusted to independent actors. These can be highly renowned human rights organisations (such as Human Rights Watch or Amnesty International), specialised NGOs (e.g. ECRE and/or its national partners), the members of the EASO Consultative Forum, the FRA, or a combination thereof. **Reporting** will need to take place from the ground up. Both consular personnel and asylum authorities in-land concerned with this procedure in addition to the EU bodies involved should keep the Asylum Agency (as well as the European Commission, the Council and the Parliament) well informed. On the basis of information gathered through those two channels, the European Commission should conduct a **periodic review**. Asylum capacities, distribution-key criteria, and related quotas per country will need constant short-term (probably yearly) **assessment**, while the ‘asylum seeking visas’ mechanism as a whole may be subjected to **evaluation** on a three to five years basis to guarantee fitness for purpose.

BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENT(S)	COMPLIANCE WITH FUNDAMENTAL RIGHTS OBLIGATIONS	PRE-ARRIVAL SECURITY AND CONTROL
<p>Persons raising <i>prima facie</i> issues under Art 4 CFR</p> <p>[pre-arrival assessment required by EU authorities]</p>	<p>Need for new legislative instrument, including:</p> <ul style="list-style-type: none"> <li>- EU-wide structure;</li> <li>- centralised decision-making by EASO;</li> <li>- distribution key;</li> <li>- preference-matching tool;</li> <li>- correction / compensation system</li> <li>- EU appeal system</li> <li>- pre- and post-arrival mentoring mechanisms</li> </ul> <p>Need for amendments of Dublin III and EASO Regulations</p>	<p>Need to develop EU visa centres / equip EEAS representations</p> <p>Need for robust monitoring mechanism to avoid malfunctioning</p> <p>Need to comply with Arts 41 and 47 CFR:</p> <ul style="list-style-type: none"> <li>- Competent personnel to examine requests and take substantiated decisions</li> <li>- Legal aid / representation / translation services</li> <li>- Right to be heard (possibly through e-means)</li> <li>- Right to effective remedy with suspensive effect</li> </ul> <p>Need for a system of</p>	<p>Lesser risk of becoming fully-fledged extra-territorial processing scheme</p> <p>[especially if contribution by NGOs and independent bodies]</p>	<p>Equal to current level under CCV [Regulation 810/2009]</p> <p>[Compatible with ETIAS plans]</p>

<sup>414</sup> Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 <[https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf)>.

		<p>urgent evacuation and/or interim shelter while appeals are examined</p> <p>Fear of numbers can be palliated via system of distribution and piloting of scheme prior to full roll out</p> <p>Fear of draining resources can be palliated via cooperation with specialised organisations (UNHCR / NGOs) who can assist at several points</p>		
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Table 7: Overall Assessment of Policy Option 3 – EU-Wide Asylum Seeker Visas

## 6.2 Choice of Instrument

Considering the objective pursued with the adoption of a system of visa issuing for asylum seeking purposes, in line with *non-refoulement* obligations, the most appropriate **type of instrument** is one that is **legally binding**. A non-binding recommendation will not be enough to guarantee compliance with the underlying legally binding duties under Articles 4 and 19(2) CFR.

To minimize deviation from these (already existing) common obligations under EU law, the **most suitable choice**, between a Directive or a **Regulation**, is the latter. This is also the form of the visa *acquis*, the Schengen Borders Code, and the forthcoming third-phase CEAS instruments. Allowing Member States ‘the choice of form and methods’ of implementation has proven ineffective in the past.<sup>415</sup> As the survey in Chapter 3 demonstrates, it has given rise to the emergence of different criteria and different processes, underpinned by different standards of application. To preserve the integrity and well-functioning of the current rules governing the field, the best is to adopt similar arrangements of ‘general application’ that are ‘binding in [their] entirety and directly applicable in all Member States’,<sup>416</sup> like those presently regulating visa policy, external border controls, and international protection in the EU.

As for the **preferred policy option** of the three identified above, the comparative table below should be of guidance to inform the choice, considering the strengths and weaknesses of each, and their potential to resolve the problem of access to the CEAS through legal pathways in a manageable and security-proof way. The adequacy of the policy is represented with “+” signs, from the least (“+”) to the most (“+++”) convenient, depending on the level of resources, legal amendments, compliance with obligations and possibilities to retain security and pre-arrival controls required in each case. The

<sup>415</sup> Art 288, third indent, TFEU.

<sup>416</sup> Art 31 GC (n 321).

presumption is that the *lesser* the changes and/or resource investments required, the better; and the *greater* the opportunities for compliance with fundamental rights obligations and opportunities for pre-vetting checks, the more suitable as well.

	BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENTS	COMPLIANCE WITH FUNDAMENTAL RIGHTS	PRE-ARRIVAL SECURITY AND CONTROL	SOLIDARITY AND FAIR-SHARING OF RESPONSIBILITY
VISA WAIVER	+++	+++	+++	+++	+	++
LTVs	+	++	++	+	+++	+
EU VISAS	++	+	+	++	++	+++

Table 8: Rating Policy Options – Advantages and Disadvantages in Perspective

According to this scheme, the maximum points the optimum policy option could obtain (scoring “+++” in every category) is 18, which provides a numerical representation of appropriateness to tackle the problem of the need to provide lawful access to the CEAS by its addressees and achieve the objective of a harmonized approach that respects the integrity of the Schengen cooperation and maintains mutual trust. Following these rules, the option that scores highest in the six adequacy parameters considered throughout the chapter is the visa waiver approach with 15 points. The LTV formula scores 10 points, while EU-wide asylum visas obtain 11 points.

Proportionality-wise, the **visa waiver** approach is the least intrusive, adhering to the minimum intervention necessary to meet the objective pursued, while maximising the benefits of EU added value. It reaches out to a maximum number of beneficiaries, requires minimum legislative amendment, no investments in extraterritorial infrastructure, and ensures full compliance with *non-refoulement* and related fundamental rights obligations. On the down side, this option does not allow for pre-frontier security or other checks – at least until the ETIAS reform is adopted. Nonetheless, the option still offers a better opportunity for controls upon arrival at the border than in the current situation of ‘spontaneous’ entries, usually through irregular means, which makes it preferable to the status quo. The fear of numbers, from its part, would require a strategy of tailored and controlled roll out in progressive phases, selected countries, or choosing specific categories of vulnerable persons.

The other policy options allow for an increased amount of security and control at the pre-frontier stage, but have other drawbacks. The **LTV solution** requires the adoption of a new, dedicated legislative instrument that caters for the material, procedural and structural investments necessary to receive requests abroad and undertake *prima facie* processing. The need to comply with effective remedy and procedural guarantees as per the Charter of Fundamental Rights calls for consideration of matters of expertise, independence, impartiality, interim relief, and the question of provisional shelter while

appeals (with suspensive effect) against negative decisions are being examined. With the system being de-centralised, the scope for free riding and defaulting is large, unless a robust monitoring (and also sanctioning) mechanism is developed. With no accompanying review of Dublin criteria to apportion responsibility for the examination of asylum claims upon arrival, the incentives to not comply will remain high. And keeping pre-arrival security checks entirely in the hands of the Member States may lead to the development of a fully-fledged extraterritorial (dis-)qualification system ‘through the back door’ that filters out risky candidates for reasons unrelated to *refoulement*. If these flaws finally materialise, the policy objective pursued will not be attained and the original problem identified will remain unresolved, replicating the current situation of unavailability of legal pathways for access to protection in the EU Member States. Therefore, it is crucial that, should this option be pursued, the EU legislator takes the necessary precautions to offset drawbacks.



Table 9: Locating Policy Options within Rights-Security Continuum

**EU-wide Asylum Seeker Visas** sit somewhere in the middle of the two extremes, representing a compromise between the maximum adherence to fundamental rights that the visa waiver option represents and the maximum scope for Member State security and pre-arrival control that a reformed LTV mechanism would entail. The amount of legislative action and resource investments will be high, but not necessarily higher than in relation to the Frontex reform into a fully-fledged corps of European Border and Coast Guard or the creation of a European External Action Service, for example.<sup>417</sup> Thus, it cannot *a priori* be discarded as an appropriate option from the proportionality perspective. The higher investment this policy option requires cannot *a priori* be considered to exceed what is necessary to solve the original access problem for asylum seekers in a manner that achieves the objective of coherence of interpretation of entry rules for protection purposes, uniformity of practice in their implementation, and integrity of the Schengen regime and the mutual trust on which it is based. The formula will entail a certain amount of pre-departure *prima facie* assessment of *refoulement* risks run by applicants, like in the case of LTVs – with the related danger of over-disqualification, but, through centralisation, the dangers of free riding, defaulting, and ultra-securitising the system will be minimized. This policy solution is also the best suited to ensure compliance with the principle of solidarity and fair sharing of responsibility under Article 80 TFEU. The extra costs are commensurate with the objective to be achieved, they can be covered by the EU budget and through the (estimated) savings from ‘transforming’ asylum seekers’ irregular entry into lawful admission – considering this will substantially decrease the demand for smuggling services, reduce the room available to trafficking networks, and hence the costs

<sup>417</sup> On this point, see European Commission plans for the next multi-annual financial framework 2021-27, including a proposal to support a standing corps of 10,000 border guards (n 310).

associated with the EU ‘fight against irregular immigration’.<sup>418</sup> Therefore, if the visa waiver formula were discarded, due to a lack of political consensus around the matter of pre-arrival security and control, taking these advantages into account and the capacity to offset the risks of de-centralisation, the EU-wide Asylum Seeker Visa option should be preferred over a system of Member States’ LTVs.

Intermediate options or a phased approach, combining the key benefits of each proposal can also offer a sustainable way forward. Member State LTVs could represent the first step towards an integrated EU-wide system of asylum seeker visas, with the EU visa waiver approach for refugee-producing countries marking the final milestone. In such case, de-centralised LTVs should be framed within a system that guarantees compliance with fundamental rights and the principles of solidarity between Member States and non-discrimination among claimants. An ancillary distribution mechanism that ensures the fair allocation of responsibility, possibly including a preference-matching scheme and a compensation tool, alleviating pressures deriving from the ‘first entry’ rule underpinning Dublin III, would foster compliance and buttress trust among Member States and confidence by applicants. The centralisation of expenses in the EU budget, reliance on e-means to deal with applications, cooperation with NGOs and other specialised actors at the pre- and post-application stages, and the introduction of positive and negative incentives can also minimize costs and create a climate of cooperation and compliance.



Table 10: Phased approach to legal pathways for access to protection in Europe

<sup>418</sup> See Research Paper on the Added Value of Humanitarian Visas – Economic Aspects (Milieu, 2018), table 16.

## CHAPTER 7. CONCLUSIONS AND RECOMMENDATIONS

- The **problem of access** to international protection in the EU needs to be resolved. Currently, up to 90% of the total population of subsequently recognised refugees and beneficiaries of subsidiary protection reach the territory of Member States irregularly.
- How **entry requirements for asylum seekers** have been regulated in EU law is **unclear and incomplete**. Neither the Schengen nor the asylum or visa *acquis* set the norms applicable, which has led to their assimilation to the category of ‘irregular migrants’ before arrival.
- **Most Member States have**, or have had at some point, **discretionary protected-entry procedures (PEPs) of humanitarian admission**, using different methods and different criteria, facilitating access to their territories for protection-related purposes.
- **PEPs** so far have been **developed on the idea that there is no obligation** to issue visas for asylum seeking purposes. **However**, because **asylum seekers** qualify as ‘persons’ (without qualification) crossing, or showing an intention to cross, the external borders of the Member States, as per the Schengen Borders Code (SBC) and Article 77(2)(b) TFEU on which the Code is based, **their situation falls to be governed by EU law**.
- **This being the case, fundamental rights become relevant**, as per the *Fransson* decision, including **the protection against refoulement** contained in **Articles 4 and 19(2) CFR**, which consolidate the substance of Article 3 ECHR as interpreted by the European Court of Human Rights in its case law. As a result, **any measure**, including a rejection of entry or a visa refusal **under Schengen rules**, ‘the effect of which is to prevent migrants from reaching the borders of the [Member] State [concerned]’ may amount to *refoulement* (*Hirsi*, para. 180) and, **if it exposes the applicant to persecution or serious harm, is forbidden**. What is more, in line with the *Căldăraru* judgement, Member States, when confronting situations representing a risk of ill treatment are **obliged to take positive action** to avert it, which, in the concrete case, if no other practicable alternatives are available, **may require the delivery of a visa**.
- The **preservation of the integrity of the Schengen acquis** requires **EU-level action** to be adopted, rather than initiatives by Member States on their own. The best-suited legal bases to this effect are **Article 77(2)(a)-(b) TFEU**, on visas and controls on persons crossing the EU external borders, and **Article 78(2)(g) TFEU**, calling on the EU legislator to adopt measures, as part of the CEAS, aimed at ‘managing the *inflows* of people applying for [international] protection’.
- **Several possibilities** are available to the EU legislator **to harmonise the criteria applicable to the admission of asylum seekers into Schengen territory**, with

varying degrees and intensity of intervention necessary at EU level:

(1) The **visa waiver approach** only needs a **revision of the current visa lists in Regulation 539/2001** to either de-classify or suspend the visa requirement for nationals of top refugee-producing countries, where risks to life and/or freedom are well known and freely ascertainable from publicly available and reliable sources. The selection of the countries concerned should draw on EUROSTAT and UNHCR data.

(2) **EU humanitarian visas issued by Member State consulates abroad**, according to a dedicated instrument that harmonises issuing criteria and procedures, in line with the good administration and effective remedy standards contained in Articles 41 and 47 CFR. A **reformed set of LTV provisions** may be useful to this effect.

(3) The **full EU centralisation of decision-making and distribution of applicants** via specialised EASO teams making or coordinating assessments within EEAS representations abroad. This option requires **adjustment of Dublin criteria**, the creation of a **distribution mechanism** of successful applicants via **predefined quotas** per Member State, a **preference-matching tool**, a **corrective system** that accounts for children rights, family unity, and dependency links, and a **compensatory tool** to palliate any residual uneven distribution, in line with Article 80 TFEU.

- **Qualification criteria must match *non-refoulement* guarantees** as per Articles 4 and 19(2) CFR, so that those having an ‘arguable claim’ of exposure to a ‘real risk’ of persecution or serious harm are granted a visa for asylum seeking purposes.
- **Decisions** must be taken on a *prima facie* basis and by fully competent and trained personnel. **Procedural guarantees**, including legal aid, information, translation, and representation must be provided, so as to preserve the right to be heard. **Appeals** against negative decisions and **effective remedies** must also be available.
- To address ‘**floodgates**’ and **resource concerns**, any of the above formulae can first be piloted in a controlled environment, **selecting** particular **countries** and periods of **time**, prior to full roll out; **collaborating with private service providers**, including UNHCR and specialised NGOs; and **making use of technology** and e-means to facilitate application processing.
- Annex II summarises the policy options, with Annex III addressing concerns with regard to asylum seeker visas. Annex I offers a model of regulation for either LTV-based or EU-wide asylum seeker visas, while Annex IV illustrates the decision-making flow regarding applications.

- On the basis of the above and taking account of key considerations on the proportionality implications of each option, the one preferred is the visa waiver route, as it maximizes the realization of policy objectives, while keeping EU intervention to the bare minimum:

	BENEFICIARIES	LEGAL CHANGES	MATERIAL INSTITUTIONAL PROCEDURAL INVESTMENTS	COMPLIANCE WITH FUNDAMENTAL RIGHTS	PRE-ARRIVAL SECURITY AND CONTROL	SOLIDARITY AND FAIR-SHARING OF RESPONSIBILITY
VISA WAIVER	+++	+++	+++	+++	+	++
LTVs	+	++	++	+	+++	+
EU ASYLUM SEEKER VISAS	++	+	+	++	++	+++

- If sufficient political consensus is not immediately available for the adoption of this option, a phased approach, combining the key benefits of each proposal should be considered, with an improved Member State LTV regime representing the first step towards an integrated EU-wide scheme of asylum seeker visas and the EU visa waiver approach marking the final milestone.
- In such case, de-centralised LTVs should be framed within a system that guarantees compliance with fundamental rights and the principles of solidarity between Member States and non-discrimination among claimants. An ancillary distribution mechanism that ensures the fair allocation of responsibility, possibly including a preference-matching and compensation tool, alleviating pressures deriving from the 'first entry' rule underpinning Dublin III, would foster compliance and buttress trust among Member States and confidence by applicants. The centralisation of expenses in the EU budget, reliance on technology and e-means to deal with applications, cooperation with NGOs and other specialised actors at the pre- and post-application stages, and the introduction of positive and negative incentives can also minimize costs and create a climate of cooperation and compliance.

# ANNEX I

## MODEL REGULATION FOR EU-WIDE ASYLUM SEEKING PERMITS

### TITLE I GENERAL PROVISIONS

#### Article 1

##### **Purpose**

This regulation establishes the procedures and conditions for issuing uniform visas for the purposes of reaching the external borders of the EU Member States to lodge an application for international protection as defined in Directive 2011/95/EU.

#### Article 2

##### **Scope of Application**

The provisions of this regulation shall apply to any third-country national who must be in possession of a visa when crossing the external borders of the Member States pursuant to Council Regulation (EC) No 539/2001 and who is in need of protection against a real risk of being exposed to persecution or serious harm, as defined in Directive 2011/95/EU, in line with the prohibition of *refoulement* in Articles 4 and/or 19(2) of the Charter of Fundamental Rights of the European Union

### TITLE II PROCEDURES AND CONDITIONS FOR ISSUING VISAS

#### Article 4

##### **Authorities Responsible**

De-centralised	EU centralised
1. Applications shall be received by consulates	1. Applications shall be received by EEAS representations abroad.
2. Decisions on a 'real risk' of being exposed to persecution or serious harm, as defined in Directive 2011/95/EU, shall be taken by the national authorities competent to examine asylum claims as per Directive 2013/32/EU	2. Decisions on a 'real risk' of being exposed to persecution or serious harm, as defined in Directive 2011/95/EU, shall be taken by trained and competent officials of the EU Asylum Agency with EU-wide effect.
3. Such authorities shall sit in-land or a	3. Such officials shall be permanently present at EEAS representations, so as to

delegation thereof be permanently seconded to national representations abroad.	process visa applications for asylum seeking purposes.
4. Visas shall be issued on a positive decision on the existence of a 'real risk' of <i>refoulement</i>	4. Visas shall be issued on a positive decision on the existence of a 'real risk' of <i>refoulement</i>

Article 5

**Competent Member State/ EEAS Representation**

De-centralised	EU centralised
The Member State competent for examining and deciding on an application for a uniform visa for asylum seeking purposes shall be the one whose representation is the closest and/or safest for the applicant to approach, so as to minimise the risk of persecution or serious harm facing the applicant from materialising.	The EEAS representation competent for receiving an application for a uniform visa for asylum seeking purposes shall be the one which is the closest and/or safest for the applicant to approach, so as to minimise the risk of persecution or serious harm facing the applicant from materialising.

Article 6

**Eligibility Criteria**

Persons facing a 'real risk' of persecution or serious harm as defined in Directive 2011/95/EU shall be issued visas for the purposes of applying for international protection under Directive 2013/32/EU

Article 7

**Security Vetting**

De-centralised	EU centralised
1. The Member State competent for examining and deciding on the application may undertake a security vetting process to establish whether the applicant concerned constitutes a threat to the security of the EU.	1. The EASO team, within the responsible EEAS representation, competent for examining and deciding on the application may undertake a security vetting process to establish whether the applicant concerned constitutes a threat to the security of the EU.
2. Security in this framework shall be	2. Security in this framework shall be

<p>defined solely by reference to Article 1F of the 1951 Refugee Convention, so as to detect serious reasons for considering that the applicant:</p> <p>(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;</p> <p>(b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country;</p> <p>(c) has been guilty of acts contrary to the purposes and principles of the United Nations.</p> <p>3. The assessment in this regard must, however, not lead to summary exclusion from refugee status, which shall only be determined upon arrival, after thorough examination of the subsequent asylum claim, and in compliance with fair trial guarantees under the ordinary procedure regulated in Directive 2013/32/EU.</p> <p>4. The presence of security concerns will lead to the applicant possibly being escorted during travel to the Member State concerned and placed under surveillance upon arrival, with detention during the asylum application process, constituting a measure of last resort.</p> <p>5. Any of the above measures remain subject to proportionality and effective judicial oversight.</p>	<p>defined solely by reference to Article 1F of the 1951 Refugee Convention, so as to detect serious reasons for considering that the applicant:</p> <p>(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;</p> <p>(b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country;</p> <p>(c) has been guilty of acts contrary to the purposes and principles of the United Nations.</p> <p>3. The assessment in this regard must, however, not lead to summary exclusion from refugee status, which shall only be determined upon arrival, after thorough examination of the subsequent asylum claim, and in compliance with fair trial guarantees under the ordinary procedure regulated in Directive 2013/32/EU.</p> <p>4. The presence of security concerns will lead to the applicant possibly being escorted during travel to the Member State concerned and placed under surveillance upon arrival, with detention during the asylum application process, constituting a measure of last resort.</p> <p>5. Any of the above measures remain subject to proportionality and effective judicial oversight.</p>
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Article 8

**Application Procedure**

De-centralised	EU centralised
1. The Member State competent for examining and deciding on the application	1. The EASO team, within the responsible EEAS representation, competent for

<p>will grant visas on a <i>prima facie</i> basis to applicants submitting an arguable claim of a real risk of <i>refoulement</i>.</p> <p>2. Applicants can submit applications either in person or in electronic form.</p> <p>3. An interview needs to take place, either in person or via Skype, if the security or vulnerability of the applicant so requires.</p> <p>4. During the interview and throughout the preparation of the application and examination process, applicants may have access to UNHCR and other relevant organisations providing support to applicants, including in the form of information, legal aid, representation, and related services.</p> <p>5. Together with his/her individual details, photo and biometric data for VIS collection, applicants shall submit the reasons why they fear persecution and/serious harm, accompanying any specific and/or general evidence accessible to them together with the application form.</p> <p>6. National authorities will need to take account of the general and particular circumstances of the applicant concerned, relying on the application materials, the interview with the applicant, and any published sources regarding the situation in the country of origin concerned, taking proactive steps to ascertain the reality of the risks faced by the applicant.</p> <p>7. Knowledge of the circumstances shall otherwise be imputed, and the visa issued as a preventative measure to avoid incurring in a violation of the prohibition of <i>refoulement</i>.</p>	<p>examining and deciding on the application will grant visas on a <i>prima facie</i> basis to applicants submitting an arguable claim of a real risk of <i>refoulement</i>.</p> <p>2. Applicants can submit applications either in person or in electronic form.</p> <p>3. An interview needs to take place, either in person or via Skype, if the security or vulnerability of the applicant so requires.</p> <p>4. During the interview and throughout the preparation of the application and examination process, applicants may have access to UNHCR and other relevant organisations providing support to applicants, including in the form of information, legal aid, representation, and related services.</p> <p>5. Together with his/her individual details, photo and biometric data for VIS collection, applicants shall submit the reasons why they fear persecution and/serious harm, accompanying any specific and/or general evidence accessible to them together with the application form.</p> <p>6. EASO authorities will need to take account of the general and particular circumstances of the applicant concerned, relying on the application materials, the interview with the applicant, and any published sources regarding the situation in the country of origin concerned, taking proactive steps to ascertain the reality of the risks faced by the applicant.</p> <p>7. Knowledge of the circumstances shall otherwise be imputed, and the visa issued as a preventative measure to avoid incurring in a violation of the prohibition of <i>refoulement</i>.</p>
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<p>8. The benefit of the doubt must be given to the applicant, unless there is substantial and reliable evidence from independent and reputable sources justifying a refusal of the visa applied for.</p>	<p>8. The benefit of the doubt must be given to the applicant, unless there is substantial and reliable evidence from independent and reputable sources justifying a refusal of the visa applied for.</p>
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Article 9

**Decisions and Appeals**

De-centralised	EU centralised
<p>1. In case a real risk of <i>refoulement</i> has been detected, the visa shall be granted straightaway</p> <p>2. If the applicant is determined not to be at risk of <i>refoulement</i>, the application can be rejected. However, if there are signs of imminent danger or a supervening real risk of persecution or serious harm at the point the rejection decision is being taken, then, the visa must be granted, taking into account conditions <i>ex nunc</i>.</p> <p>3. A dedicated panel of experts in Country of Origin Information will be established within the national asylum service to provide bi-weekly updates of the situation on the ground. ALOs (Asylum Liaison Officers) shall be detached to top refugee-producing countries to collect first-hand information in collaboration with UN bodies and international and local NGOs.</p> <p>4. The decision shall be communicated promptly and in a language the applicant can understand, with an indication of the times and formalities to lodge an appeal.</p> <p>5. Appeals should be filed either in person or electronically, with consideration of the security and vulnerability situation of the applicant.</p>	<p>1. In case a real risk of <i>refoulement</i> has been detected, the visa shall be granted straightaway</p> <p>2. If the applicant is determined not to be at risk of <i>refoulement</i>, the application can be rejected. However, if there are signs of imminent danger or a supervening real risk of persecution or serious harm at the point the rejection decision is being taken, then, the visa must be granted, taking into account conditions <i>ex nunc</i>.</p> <p>3. A dedicated panel of experts in Country of Origin Information will be established within the EASO team delegated to the competent EEAS representation to provide bi-weekly updates of the situation on the ground, collecting first-hand information in collaboration with UN bodies and international and local NGOs.</p> <p>4. The decision shall be communicated promptly and in a language the applicant can understand, with an indication of the times and formalities to lodge an appeal.</p> <p>5. Appeals should be filed either in person or electronically, with consideration of the security and vulnerability situation of the applicant.</p>

<p>6. If there are security and/or vulnerability concerns, a system of interim shelter in premises subjected to diplomatic inviolability, be it in the embassy of the country concerned or the buildings of UNHCR, IOM, or equivalent UN or EU body under similar protection, must be available for the applicant to voluntarily relocate while the appeal is being examined.</p> <p>7. The appeal shall be immediately assessed by a competent judge, who must take a decision within three days, as for whether there is a <i>prima facie</i> case of a real risk of <i>refoulement</i>, taking into account the initial application materials, the decision adopted at first instance, and any other new information that helps take a decision on the basis of the prevailing circumstances at that time.</p> <p>8. Procedural guarantees, including the right to be heard at the appeal stage, translation, legal assistance and representation, must be in place either through services provided directly by the Member State concerned or via partnership with UNHCR or specialist NGO personnel.</p> <p>9. If the appeal is granted, this must be immediately communicated to the applicant and the consular and asylum authorities concerned. The issuance of the visa shall be automatic, for travel within the shortest practicable time that is safe for the applicant.</p> <p>10. Travel arrangements must be facilitated. In the absence of a passport, the national consular authorities of the Member States concerned shall issue a</p>	<p>6. If there are security and/or vulnerability concerns, a system of interim shelter in premises subjected to diplomatic inviolability, be it in the EEAS representation itself or in the buildings of UNHCR, IOM, or equivalent UN or EU body under similar protection, must be available for the applicant to voluntarily relocate while the appeal is being examined.</p> <p>7. The appeal shall be immediately assessed by the EU General Court, who must take a decision within three days, as for whether there is a <i>prima facie</i> case of a real risk of <i>refoulement</i>, taking into account the initial application materials, the decision adopted at first instance, and any other new information that helps take a decision on the basis of the prevailing circumstances at that time.</p> <p>8. Procedural guarantees, including the right to be heard at the appeal stage, translation, legal assistance and representation, must be in place either through services provided directly by the EASO team within the EEAS representation concerned or via partnership with UNHCR or a specialist NGO.</p> <p>9. If the appeal is granted, this must be immediately communicated to the applicant and the consular and asylum authorities concerned. The issuance of the visa shall be automatic, for travel within the shortest practicable time that is safe for the applicant.</p> <p>10. Travel arrangements must be facilitated. In the absence of a passport, the EEAS representation concerned shall issue</p>
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<i>laissez passer</i> to which the visa can be affixed for travel to its territory.	a <i>laissez passer</i> to which the visa can be affixed for travel to Schengen territory.
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Article 10

**Outcomes and Link to Dublin System**

De-centralised	EU centralised
<p>1. Regarding successful applicants, upon arrival in the Member State concerned, the determination of responsibility for examining the subsequent international protection claim will follow the criteria established in Chapter III of Regulation (EU) No 604/2013, in the order of appearance.</p> <p>2. The best interests of the child, the principle of family unity, and the protection of specially vulnerable and dependent applicants shall be taken into account when applying those criteria.</p> <p>3. The corrective allocation mechanism proposed in the recast Regulation (EU) No 604/2013 or a similar arrangement shall be adopted to compensate for any unevenness in the distribution of applicants resulting from this scheme.</p> <p>4. Any transfers necessary under Regulation (EU) No 604/2013 shall be funded through the EU budget.</p> <p>5. Rejected applicants may submit a new application as and when their circumstances in the country of origin or residence change. Whenever a real risk of persecution or serious harm emerges, they shall be able to re-apply for a visa for asylum seeking purposes.</p> <p>6. For those taking, instead, the 'spontaneous arrival' route, national</p>	<p>1. Regarding successful applicants, these will be assigned to a reception country according to a yearly quota and a preference-matching mechanism developed by EASO in consultation with the Member States and its Consultative Forum, which will serve to ensure the even distribution of applicants across the Union.</p> <p>2. For that purpose, a yearly reception quota will be calculated per Member State, taking account of territory, population, GDP, protection capacity, and past/current asylum efforts.</p> <p>3. Asylum seekers, as part of their visa application, will list up to 5 Member States, in order of preference, indicating any family or dependency reasons as relevant.</p> <p>4. While the quota of the preferred country is not filled yet, the asylum seeker may be assigned to it. If already filled at that point, then, the second listed may be considered and so on.</p> <p>5. A corrector, taking account of children rights, family unity, and dependency links, will be in place, so that the quotas of Member States are virtually 'exchanged' between themselves to meet Charter obligations and avoid unnecessary transfers under Regulation (EU) No 604/2013.</p>

<p>authorities must take account of Article 31 of the 1951 Geneva Convention and not impose penalties due to their irregular entry or stay, if they fulfil the conditions established in that provision.</p>	<p>6. In the event that a country exceeds its quota, a compensatory mechanism, in terms of extra funding and/or a reduced quota the following year, will be introduced to ensure compliance with Article 80 TFEU.</p>
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## TITLE III LOGISTICS AND SUPPORT

### Article 11

#### **Application and Pre-arrival Assistance**

De-centralised	EU Centralised
<p>1. Application and pre-arrival assistance shall be provided either directly by the Member State authorities concerned or via UNHCR, IOM, and/or a trusted NGO partner.</p> <p>2. The relevant staff must be trained to offer pre-application and interview support in culturally sensitive and accessible ways, including for the completion of the relevant application form, file completeness checks, facilitation of contacts with visa authorities, via phone, Skype and email, scheduling and re-scheduling of interview appointments, photo-taking and photocopying services.</p> <p>3. To ensure safe access to UNHCR, IOM and/or NGO partner premises, the EU will provide funding for escort and shuttle bus services, and visits to applicants' locations, if considerations of security or vulnerability so require.</p> <p>4. Accurate information on the application process as well as pre- and post-arrival conditions shall be published in the website of the consulate concerned and widely disseminated in applicant-friendly format, including via social media.</p>	<p>1. Application and pre-arrival assistance may be provided either directly by the EU authorities concerned or via UNHCR, IOM, and/or a trusted NGO partner.</p> <p>2. The relevant staff must be trained to offer pre-application and interview support in culturally sensitive and accessible ways, including for the completion of the relevant application form, file completeness checks, facilitation of contacts with visa authorities, via phone, Skype and email, scheduling and re-scheduling of interview appointments, photo-taking and photocopying services.</p> <p>3. To ensure safe access to UNHCR, IOM and/or NGO partner premises, the EU will provide funding for escort and shuttle bus services, and visits to applicants' locations, if considerations of security or vulnerability so require.</p> <p>4. Accurate information on the application process as well as pre- and post-arrival conditions shall be published in the website of the EEAS representation concerned and widely disseminated in applicant-friendly format, including via social media.</p>

<p>5. Among the services to be provided at the pre-arrival stage, applicants shall receive orientation and integration sessions, where they can familiarise themselves with the programme and any other options available for safe and legal access to the Member States.</p> <p>6. For those lacking sufficient resources for travel, the Member State concerned shall, via EU funding and/or in partnership with IOM, provide for transport itself.</p>	<p>5. Among the services to be provided at the pre-arrival stage, applicants shall receive orientation and integration sessions, where they can familiarise themselves with the programme and any other options available for safe and legal access to the Member States.</p> <p>6. For those lacking sufficient resources for travel, the EEAS representation concerned shall, via EU funding and/or in partnership with IOM, provide for transport itself.</p>
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#### Article 12

#### **Post-arrival Mentoring**

1. Upon arrival, applicants shall be matched with a mentor.
2. The mentor will guide the applicant through the subsequent asylum process, as according to CEAS instruments. Assisting her through the different steps to be taken and pointing her to the relevant services and authorities in timely fashion.
3. Mentors can either be officers of the national asylum services of the Member States, delegates from EASO, or staff from UNHCR or partner NGOs acting locally.
4. To ensure the quality and effectiveness of the service, mentors shall be trained to offer asylum process support in culturally sensitive and accessible ways.

### TITLE IV FINAL PROVISIONS

#### Article 13

#### **Monitoring, Sanctioning, Reporting and Review**

De-centralised	EU Centralised
<p>1. A system of monitoring, reporting, and evaluation will be introduced, to ensure that any flaws in the system are addressed and any changes necessary introduced in timely fashion.</p> <p>2. Monitoring will be entrusted to a panel of independent actors, sourced either from renowned human rights organisations, specialised NGOs, the FRA, or a</p>	<p>1. A system of monitoring, reporting, and evaluation will be introduced, to ensure that any flaws in the system are addressed and any changes necessary introduced in timely fashion.</p> <p>2. Monitoring will be entrusted to a panel of independent actors, sourced either from renowned human rights organisations, specialised NGOs, the FRA, or a</p>

<p>combination thereof.</p> <p>3. Consular personnel and the asylum authorities concerned with this procedure will keep the Asylum Agency, the European Commission, the Council, and the Parliament well informed, via annual reports.</p> <p>4. On the basis of this information, the European Commission will conduct a periodic review, so as to assess asylum capacities, distribution-key criteria, and propose adjustments to related quotas per country on a yearly basis.</p> <p>5. In case of non-compliance with the above provisions, the European Commission will impose sanctions on the Member State concerned that are dissuasive, effective and proportionate. The applicable amounts will be deducted from EU funding benefiting the Member State in the following financial year.</p>	<p>combination thereof.</p> <p>3. EEAS personnel and the EASO staff concerned with this procedure will keep the Asylum Agency, the European Commission, the Council, and the Parliament well informed, via annual reports.</p> <p>4. On the basis of this information, the European Commission will conduct a periodic review, so as to assess asylum capacities, distribution-key criteria, and propose adjustments to related quotas per country on a yearly basis.</p>
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Article 14  
**Evaluation**

An external evaluation will be commissioned after 3 years since the entry into force of this Regulation, and every 5 years thereafter, to assess the ‘asylum seeking visas’ mechanism as a whole to guarantee fitness for purpose.

Article 15  
**Progressive Roll Out**

1. The application of this Regulation will start in selected top refugee-producing countries according to EUROSTAT and UNHCR data, where risks of persecution and/or serious harm are well known and documented by reliable sources.
  
2. A pilot programme will be conducted for Syrian applicants in Lebanon, Jordan, and Turkey until the end of the current AMIF. Afterwards, drawing on lessons learnt, the programme will be rolled out to progressively cover applicants from other countries in other regions.

## ANNEX II

### SUMMARY OF POLICY OPTIONS

–	<p><b>SUSPENSION OF VISA REQUIREMENTS</b></p> <p>for nationals of unsafe third countries until circumstances change</p> <p>→ <i>Need to amend Visa List Regulation 539/2001</i></p>	<p><b>General application</b></p> <p><b>EU coordination</b></p> <p><b>(GROUP solution)</b></p>
	<p><b>LTV ASYLUM VISAS</b></p> <p>(modeled on reformed set of LTV provisions) allowing travel on <i>prima facie</i> basis of <i>refoulement</i> risks, issued by MS embassies</p> <p>→ <i>Inspired by Italian Humanitarian Corridor</i></p>	<p><b>Individual application</b></p> <p><b>EU harmonisation</b></p> <p><b>(PERSON solution)</b></p>
	<p><b>EU ASYLUM VISAS</b></p> <p>allowing travel on <i>prima facie</i> basis of <i>refoulement</i> risks, issued by EU Visa Centres / EEAS Delegations with EASO reviewing files on behalf of MS / UNHCR and NGOs input at pre- and post-application phases</p> <p>→ <i>Need Dublin overhaul + relocation scheme</i></p>	<p><b>Individual application</b></p> <p><b>EU centralisation</b></p> <p><b>(PERSON solution)</b></p>
+		

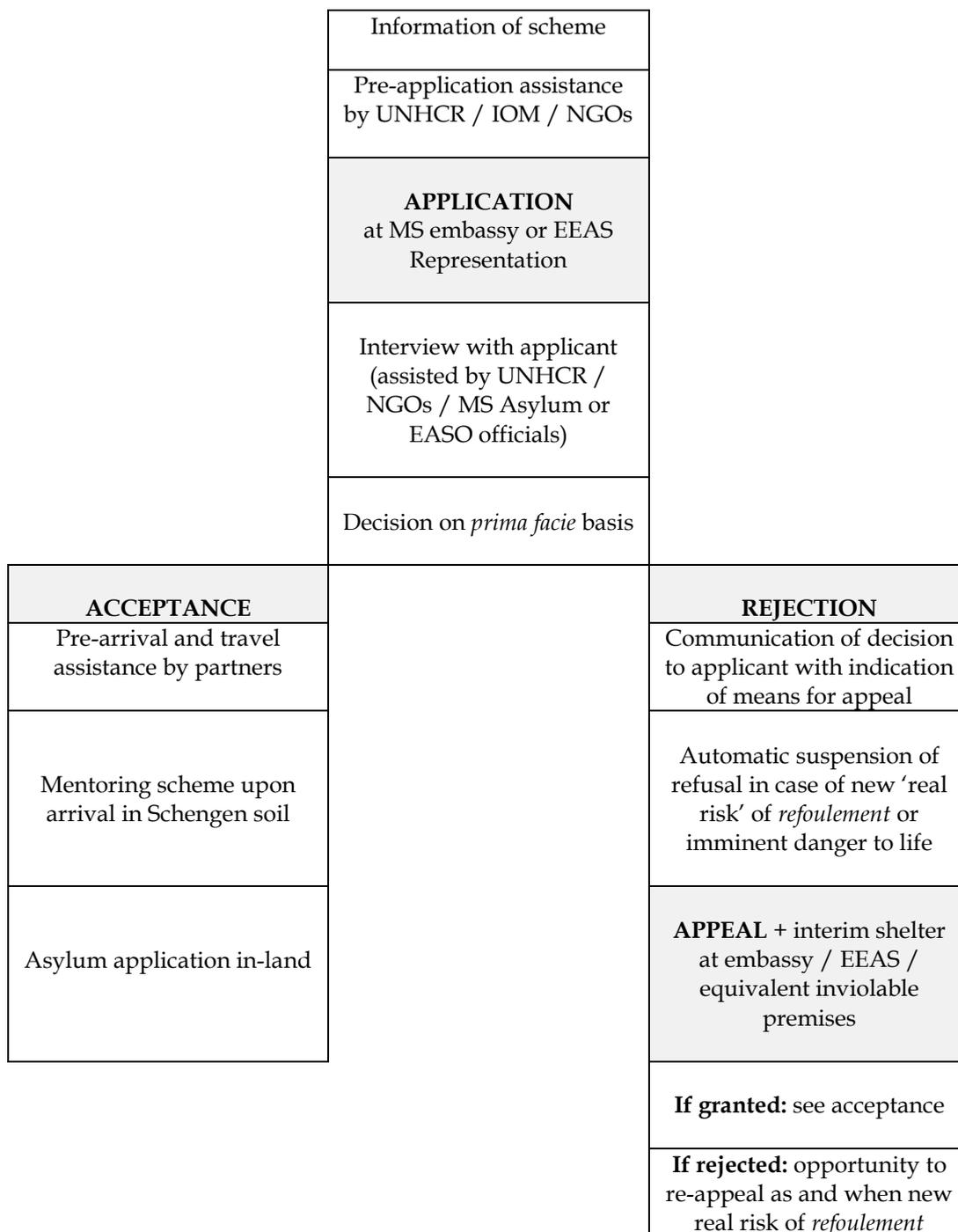
## ANNEX III

### SUMMARY OF CONCERNS REGARDING ASYLUM SEEKER VISAS

CONCERN	WIDER PERSPECTIVE
Number of applicants / floodgates	In 2017 alone, Member States issued <i>circa</i> 15 million Schengen visas without incidents
Overloading resources / straining expertise	AMIF can be used and Temporary Protection Directive is available in case of mass influx + compliance with human rights is not optional
No control of applicants / No control over arrivals	Much better situation than with 'spontaneous' arrivals / in line with ETIAS rationale
Creation of a 'right' of entry	Entry is byproduct of Articles 4, 19(2), 47 CFR + <i>Koushkaki</i> judgment
Ability of refugee to chose MS	No different from current situation (traveller choses destination MS) / a system of distribution and preference matching can help equalize allocation
Compatibility with Dublin / principle of solidarity	Pre-arrival allocation system with quotas per Member State per year (reviewable) is possible

## ANNEX IV

### FLOW CHART OF ASYLUM SEEKER VISA APPLICATIONS



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# ANNEX II

## The Added Value of EU Legislation on Humanitarian Visas - Economic Aspects

Research paper  
by Milieu Ltd

### **Abstract**

The Common European Asylum System (CEAS) offers few legal options for persons in need of protection to seek asylum in the EU. This research paper investigates the economic aspects of this gap in EU action and cooperation and assesses three policy options under consideration to introduce a Humanitarian Visa Scheme. It closely complements a separate research paper that reviews the legal elements of the policy options. The first component of this research paper identifies and assesses the economic impacts of the status quo on the EU and the Member States, as well as the impacts on individuals. The second component investigates the potential changes in migrant influx and reviews the potential costs and benefits of the policy options from the perspective of individuals, Member States and the EU. The assessment is primarily qualitative and draws on quantitative estimates when possible. The economic findings suggest that an EU Humanitarian Visa Scheme may decrease irregular migration to the EU and lead to increased management, coordination and efficiency in the asylum process. In addition, some of the options under consideration could promote fair cost-sharing across the Member States, in line with the principles of subsidiarity and proportionality. A controlled pilot of the preferred option combined with a robust monitoring plan could provide more robust and quantitative evidence regarding the policy's costs and benefits.

**AUTHORS**

This research paper has been prepared by Meena Fernandes and Brittni Geny of Milieu, at the request of the EU Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

**LINGUISTIC VERSIONS**

Original: EN

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## Executive summary

Persons in need of protection have few legal options to seek asylum in the EU. The EU legal framework focuses on resettlement of recognised refugees, with several initiatives put into place since the height of the refugee crisis in 2015. Member State efforts have also focused on recognised refugees, offering legal channels to reach the EU through humanitarian admission programmes, private sponsorship schemes and facilitated family reunification schemes. **The number of persons admitted through all of these existing schemes is low when compared to the need.** As a result, large numbers of desperate persons in need travel irregularly to the EU and face high risks for trafficking, exploitation, violence and death. This situation calls into question the extent to which the EU fulfils its legal obligations to protect the right to seek asylum<sup>1</sup>. The exorbitant number of deaths in the Mediterranean Sea is just one of a number of **significant costs, both monetary and otherwise**, that the status quo admits. In 2017 alone, an estimated 3,139 migrants died at sea in an attempt to reach the EU<sup>2</sup>. This gap in the EU legal framework is highly visible and **threatens core EU values** concerning the ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’<sup>3</sup>. Experts attest that the increased trend in migration and asylum seekers will persist in the face of protracted conflicts around the world, with drivers extending to include climate change<sup>4</sup>. The inability of Member States alone to cope with the situation underscores the **urgent need for EU action and cooperation**.

A **proposal for an EU Scheme on Humanitarian Visas** may help to address this critical gap. The idea for such a scheme is not new – in fact, it has been around for at least 15 years – and a number of Member States have experimented with such schemes on their own.

This research paper assesses the economic aspects of such a proposal. More specifically, it reviews the impacts of the status quo and the expected costs and benefits of three policy options under consideration, building on the legal analysis presented in an earlier research paper.

**Chapter 1** presents the introduction to the study and defines both of its objectives. An overview of the three policy options under consideration is presented below.

**Table 1: Overview of policy options**

Policy #	Policy option title	Policy option description
1	Visa Waiver	Revise the current visa lists in Regulation 539/2001 to de-classify or suspend the visa requirement for nationals of top refugee-producing countries.

<sup>1</sup> To date, EU Member States have resettled about 30,000 refugees. Figures for asylum seekers accepted through national schemes are not well established but are significantly lower.

<sup>2</sup> IOM Missing Migrants Project available at: <https://missingmigrants.iom.int/>, viewed 4 June 2018.

<sup>3</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), OJEU C 306/1, 17.12.2007, Article 1a, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT>

<sup>4</sup> Papademetriou, D.G., *The migration crisis is over: long live the migration crisis*, Migration Policy Institute, March 2017, available at: <https://www.migrationpolicy.org/news/migration-crisis-over-long-live-migration-crisis>

Policy #	Policy option title	Policy option description
2	<b>Limited Territorial Validity (LTV) asylum visas</b>	EU humanitarian visas issued by Member State consulates abroad through harmonised issuing criteria and procedures. These procedures would be in line with Article 41 and 47 of the Charter of Fundamental Rights (CFR) and might include a reformed set of LTV provisions.
3	<b>EU Asylum visas</b>	Full EU centralisation of decision-making and distribution of applicants via specialised European Asylum Support Office (EASO) teams within European External Action Service (EEAS) representations abroad. This would require some adjustments and the creation of several mechanisms across the EU.

**Chapter 2** investigates the first objective: *What is the impact of the status quo, i.e. the issuance of humanitarian visas by certain Member States in the absence of common EU standards?* The analysis identified impacts for individuals, Member States and the EU, quantifying them where possible. Table 2 presents an overview of the key impacts while the estimates can be found in the chapter itself. Individual asylum seekers face not only the risk of death but also exploitation and trafficking. The concentration of arrivals in border Member States places a strain on their resources while also increasing the risk of poor reception conditions for asylum seekers. One of the biggest impacts of the status quo is irregular migration, which has consequences for surveillance, border security and border management, which are competences shared between Member States and the EU.

**Table 2: Overview of key impacts identified in the status quo**

Individual	Member State	EU
Most vulnerable remain at risk for persecution in source countries	<i>Surveillance and border security</i>	<i>Surveillance and border management</i>
Smuggler fees	<i>Security and terrorism</i>	<i>Security and terrorism</i>
Risk of trafficking and other exploitation	<i>Private shipping – search and rescue missions</i>	Set up the Common European Asylum System (CEAS)
Mortality and health	Processing of asylum requests and transfers	Operation of the European Asylum Support Office (EASO)
Poor reception conditions	Uneven distribution of costs for reception	Emergency funding for ‘hotspots’ and other financial support
Delays to integration	Return of rejected asylum seekers	<i>Third country agreements</i>
Risk of entry into the informal market	Complementary pathways of admission	<i>Development cooperation</i>
Discrimination	<i>Organised crime</i>	<i>Organised crime</i>

*Note:* Impacts indicated in italics are indirect impacts.

**Chapter 3** examines the **expected changes in migrant influx** in response to the three policy options under consideration. The investigation draws on some of the findings for individual impacts in Chapter 2 as well as economic theory of consumer behaviour.

**Since the new legal tool would reduce the cost of (and some of the risks associated to) seeking asylum, one may expect a significant portion of migrants seeking asylum in the EU through irregular means to apply for an EU Humanitarian Visa, thus offering a safe access route and reducing irregular migration flows to the EU.**

The level of substitution may -in principle- be up to 100%, where all asylum seekers who would have pursued an irregular channel now pursue the new legal channel. In practice however the level of substitution may be less, depending on the implementation of the policy, its accessibility and its perception of fairness. The design and the implementation of the policy option can therefore have an impact on the extent to which the substitution effect is realized.

**Under the reasonable assumption that asylum seeking is relatively “inelastic” to its cost, it is expected that the number of people who will apply for an EU Humanitarian Visa, among those who would have otherwise stayed in the country of origin, is relatively small. This especially applies to the LTV and EU-wide international protection application travel permit options.**

**However, significant costs remain, which would limit the appeal of seeking asylum in the EU, even where a legal channel is offered.** The stress and social costs (e.g. leaving one’s community behind) would be high. The financial cost would be less, but may still be quite significant for individuals, particularly if they are from more vulnerable populations.

**Chapter 4** responds to the second objective of the research paper: *What are the possible costs and benefits of the policy options for the establishment of EU legislation on humanitarian visas?* This question was reviewed from the perspective of asylum seekers, the EU and the Member States. With regards to individual asylum seekers, all policy options would be preferred to the status quo (see Table 3 for an overview). Policy Option 1 rates more favourably in the pre-arrival stage due to the lack of costs for applying for a visa. Policy Options 2 and 3 may be preferable in the post-arrival stage due to reduced delays in the processing of the asylum application and integration. A key benefit offered by all policy options is the reduced risk of mortality, trafficking and exploitation.

**Table 3: Comparison of policy options with the status quo – individual’s perspective**

Stage	Cost	Policy Option 1 (visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
Pre-arrival	Travel costs to EU	+++	++	++
	Access to procedure for legal channel	+++	++	+
	Risk of trafficking and other exploitation	+++	+++	+++
	Risk of mortality and poor health	++	++	++
Arrival	Poor reception	0	+++	+++

Stage	Cost	Policy Option 1 (visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
	Delays to integration	0	+++	+++
	Risk of entry into formal market	0	++	++

+ = minimal positive (cost-saving) impact  
 ++ = stronger positive (cost-saving) impact  
 +++ = substantial positive (cost-saving) impact  
 - = negative (cost increasing) impact  
 0 = no change from status quo

Table 4 presents an overview of the costs and benefits of the policy options from the perspective of the EU and Member States. The assessment finds that the costs of Policy Option 1 are minimal while those for Policy Options 2 and 3 may be more substantial due to the likely need to bolster human resources for the review and processing of visa applications. The costs may include **fixed costs** to set up and maintain the required human and physical infrastructure for the policy option as well as **variable costs** incurred for each asylum seeker. The **use of technology and remote staff to support the review and issuance of visas in source countries could promote economies of scale and operational efficiencies.**

The analysis finds that all three policy options could generate substantial benefits in terms of mitigating the level of irregular migration into the EU. Policy Options 2 and 3 offer additional benefits, for example, **greater efficiency in managing inflows of asylum seekers**, enhanced control over the level of asylum seekers in the EU, greater predictability of the asylum procedure and a stronger distinction between asylum seekers and economic migrants. The assessment found that the options could also impact the costs of the asylum system in the EU itself. Specifically, the options could reduce the prevalence of Dublin transfers and returns of rejected asylum seekers, resulting in lower costs for Member States and the EU. These **benefits would be especially felt by Member States that receive a disproportionate number of arrivals or applications.**

**Table 4: Comparison of policy options with the status quo - Member State and EU perspectives**

	Policy Option 1 (visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
Costs			
Costs of implementation	0	+ / ++	+ / ++
Benefits			
Irregular migration	+	++	++
Security/terrorism	+ <sup>1</sup>	++	++
Surveillance and border management	+	++	++

	Policy Option 1 (visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
Private shipping – search and rescue missions	+++	+++	+++
Costs of asylum procedure	0	++	+++
Costs for return	0	+	+
Uneven distribution of reception costs	0	++	++
Harmonisation of asylum procedure across Member States	0	+	++
Third country agreements	++	+++	+++
Development cooperation	++	+	+
Organised crime	+	+++	+++

+ = minimal positive (cost-saving) impact  
 ++ = stronger positive (cost-saving) impact  
 +++ = substantial positive (cost-saving) impact  
 - = negative (cost increasing) impact  
 0 = no change from status quo

<sup>1</sup> Assuming that a security screening process such as ETIAS is employed.

Better implementation of the policy option may imply more costs (for example, hiring of staff at a centralised location such as EASO or in source countries), but may also generate greater benefits for the EU, Member States and asylum seekers. A **controlled pilot** of the preferred policy option accompanied by a **robust monitoring plan** could generate more evidence regarding the impacts on migration inflows, costs and benefits and support its effective implementation and scale-up.

## List of abbreviations and acronyms

AMIF	Asylum, Migration and Integration Fund
CAMMS	Common Agendas on Migration and Mobility
CEAS	Common European Asylum System
CSDP	Common Security and Defence Policy
DCI	Development Cooperation Instrument
DG ECHO	Directorate-General of the European Commission for European Civil Protection and Humanitarian Aid Operations
DG HOME	Directorate-General of the European Commission for Migration and Home Affairs
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECSA	European Community Shipowners' Association
EEAS	European External Action Service
EMN	European Migration Network
ENI	European Neighbourhood Instrument
EPRS	European Parliamentary Research Service
EPSC	European Political Strategy Centre
ETIAS	European Travel Information and Authorisation System
EU	European Union
Eurodac	European Dactyloscopy
Europol	The European Union Agency for Law Enforcement Cooperation
Eurosur	The European Border Surveillance system
EUTF	EU Emergency Trust Fund for Africa
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
IDP	Internally displaced people
IOM	International Organisation for Migration
ISF	Internal Security Fund
LIBE	Civil Liberties Justice and Home Affairs
LTV	Limited Territorial Validity
MEV	Multiple-Entry Visa (category of a USV)
MFF	Multiannual Financial Framework
MP	Mobility Partnership
MPF	Mobility Partnership Facility
MS	EU Member State
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
PEP	Protected-entry procedure
RDDP	Regional Development and Protection Programme

SAR	Search and Rescue
SIS	Schengen Information System
TFEU	Treating on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)
USV	Uniform Schengen Visas
VFA	Visa Facilitation Agreements

# Chapter 1: Introduction

## I Background

The economic analysis of policies in the arena of Civil Liberties, Justice and Home Affairs (LIBE) is a growing area of interest for EU policy makers. Traditionally, attention has focused on compliance and complementarity with existing legal obligations at the international and EU level, such as the EU Charter of Fundamental Rights CFR). Assessment of a policy through an economic lens may provide valuable insight into a range of issues, such as the reasoning behind the particular application of a legal instrument by Member States, or the failure of key stakeholders to undertake certain activities to support a policy. An economic analysis can identify if the costs associated with compliance are substantial, or if compliance activities are not harmonised with other ongoing activities. It may also shed light on other, previously unknown benefits of the policy. Such insight from an ex-ante standpoint may support the design of more effective policies that are well-implemented, achieve their intended impacts and generate greater benefits than costs for society.

Economic analysis can offer a valuable viewpoint for topics that are highly politicised and contentious, which is often the case for LIBE issues. As it typically draws on data reflecting actual costs and behaviours, economic analysis can offer balanced objectivity in the face of divergent political views. It is often the case that proponents of a policy focus on the intended objectives and the degree to which it addresses an identified problem, while its opponents express concerns about costs or feasibility. An economic analysis can help to determine if such concerns are well-founded, and facilitate constructive exchange between the two groups. All policies have associated costs and benefits, and it should be borne in mind that there are also costs associated with the status quo.

The Better Regulation Agenda, which was introduced in 2015, recognised the merits of economic analysis and has led to more rigorous analysis across all of the policy areas of the EU. In the retrospective evaluations carried out by the European Commission, economic analysis is reflected in the effectiveness and efficiency criteria, while in its prospective impact assessments, economic analysis is reflected in the assessment of the policy options in terms of social, economic and environmental impacts. Such analyses are frequently constrained by the limited availability of adequate monitoring data for the programmes or policies in question. Based on the analysis findings, the European Commission may pursue a particular policy option and either issue a legislative instrument or pursue other EU measures.

The European Parliament follows a similar process for Legislative Own Initiative Reports, based on Article 225 of the Treaty on the Functioning of the European Union (TFEU). These reports are accompanied by a European Added Value Assessment (EAVA) that reviews the rationale for the policy and assesses its added value. The assessment follows the approach of the impact assessment, where the added value assessment mirrors the assessment of the impacts. The relevant DG of the European Commission may respond

with a legislative proposal, which would then be subject to a larger, in-depth impact assessment.

## II. Objectives

This research paper provides an economic assessment of a Legislative Own Initiative Report for an EU Scheme on Humanitarian Visas (Rapporteur Juan Fernando López Aguilar) It feeds into an overall EU Added Value Assessment of the Legislative Initiative Report.

The research paper examines two questions:

- 1 – What is the impact of the status quo, i.e. the issuance of humanitarian visas by certain Member States in the absence of common EU standards?
- 2 – What are the possible costs and benefits of the policy options for the establishment of EU legislation on humanitarian visas?

The problem implicit in the topic of the research paper is the **limited legal pathways for asylum seekers to access the EU**, which has contributed to high levels of uncontrolled migration across EU borders, which include asylum seekers. The inflow of asylum seekers reached a peak in 2015, which has been attributed to conflicts in Syria and sub-Saharan Africa. Since then there has been a decline in arrivals but it is possible that inflows will rise again. Experts attest that the increased trend in migration and asylum seekers will persist in the face of protracted conflicts around the world, with drivers extending to include climate change (Papademetriou, 2017).

High levels of uncontrolled inflows of asylum seekers place severe strain on the EU, Member States and the asylum seekers themselves. The specifics of border control and visa policy and EU asylum policy overall are dealt with by separate Cost of Non-Europe reports. This research paper therefore focuses specifically on three options for the introduction of an EU humanitarian visas scheme, which are summarized in Table 5. Throughout the report these options will be referred to as (Policy) Option 1: Visa Waiver (Policy) Option 2: LTV asylum visas, and (Policy) Option 3: EU asylum visas.

Option 1 may foresee a security check similar to the European Travel Information and Authorisation (ETIAS) System, which is expected to be in operation by 2020<sup>5</sup>. Option 2 may call on a delegation from the national asylum authority or from EASO to bolster the capacity of the consulates. In addition, a relocation system may be envisaged to transfer asylum seekers to the Member State responsible for examining the asylum application. Under Options 2 and 3, provision should be made for legal aid, translation and representation. Any of the three options may draw on cooperation with NGOs as well as technological advances to promote efficiency and security.

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<sup>5</sup> For more information, please refer to this weblink: <https://www.schengenvisainfo.com/etias/>.

**Table 5: Breakdown of policy options**

Policy #	Policy option title	Policy option description
1	Visa Waiver	Revise the current visa lists in Regulation 539/2001 to de-classify or suspend the visa requirement for nationals of top refugee-producing countries.
2	Limited Territorial Validity (LTV) asylum visas	EU humanitarian visas issued by Member State consulates abroad through harmonised issuing criteria and procedures. These procedures would be in line with Article 41 and 47 of the Charter of Fundamental Rights (CFR) and might include a reformed set of LTV asylum visa provisions
3	EU Asylum visas	Full EU centralisation of decision-making and distribution of applicants via specialised European Asylum Support Office (EASO) teams within European External Action Service (EEAS) representations abroad. Requires several adjustments and the creation of several mechanisms across the EU.

The assessment undertook **comprehensive desk research**, including documents produced by the EU institutions, relevant recent evaluations and impact assessments, EU databases, budgetary and planning documents from related programmes and agencies, reports from NGOs and other stakeholders, and academic literature<sup>6</sup>. The impacts are quantified and monetised to the extent possible, based on a robust economic methodology. **Chapter 2** focuses on the costs of the status quo. When possible, lower and upper bounds are defined for quantitative estimates to reflect the underlying uncertainty. **Chapter 3** reviews how the influx of asylum seekers to the EU may change as a result of the policy options, as well as the implementation costs for Member States and the EU. **Chapter 4** assesses the benefits and costs of the identified policy options through a qualitative approach. Both monetary and non-monetary costs and benefits were considered. The benefits were understood to be a reduction in the overall negative impacts, including (but not limited to) reductions in the costs associated with the status quo. Both the direct and indirect costs associated with the status quo were considered, with a similar broad scope taken in the assessment of benefits.

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<sup>6</sup> The review covered reports published before May 2018.

## Chapter 2: Impacts of the status quo

### Key findings

- A small share of persons globally in need of protection seek asylum in the EU. In 2016, this share was 3%.
- The assessment identified **eight key impacts on persons in need of protection**. These impacts include the financial repercussions of paying smugglers, heightened risks for mortality, violence and trafficking, and poor reception at arrival. The impacts are more severe for vulnerable groups, including children, who represent about half of this population.
- The **EU and Member States experience significant direct costs** due to high levels of emergency funding primarily to border Member States, as well as transfers of asylum seekers to the Member State responsible for examining the application for asylum.
- The status quo also implies **high indirect costs for the EU and Member States**, which are related to efforts to control the inflow of migrants and asylum seekers (e.g. border security and surveillance), as well as the numbers of individuals at risk of falling into the informal economy including organised crime.

This chapter examines the first research question, *What is the impact of the status quo, i.e. the issuance of humanitarian visas by certain Member States in the absence of common EU standards?* The findings provide a foundation for the assessment of the policy options in Chapter 4.

The status quo can be understood as the present limited availability of legal channels for asylum seekers in third countries to pursue asylum applications in the EU. An immediate consequence of the status quo is uncontrolled migration, with impacts on asylum seekers, Member States and the EU. The **status quo is associated with significant costs**, some of which may be partially alleviated by the policy option considered in the Legislative Own Initiative Report.

This chapter reviews the key impacts on individuals (see Section I below), who are primarily asylum seekers, as well as the economic costs to Member States and the EU (see Sections II and III).

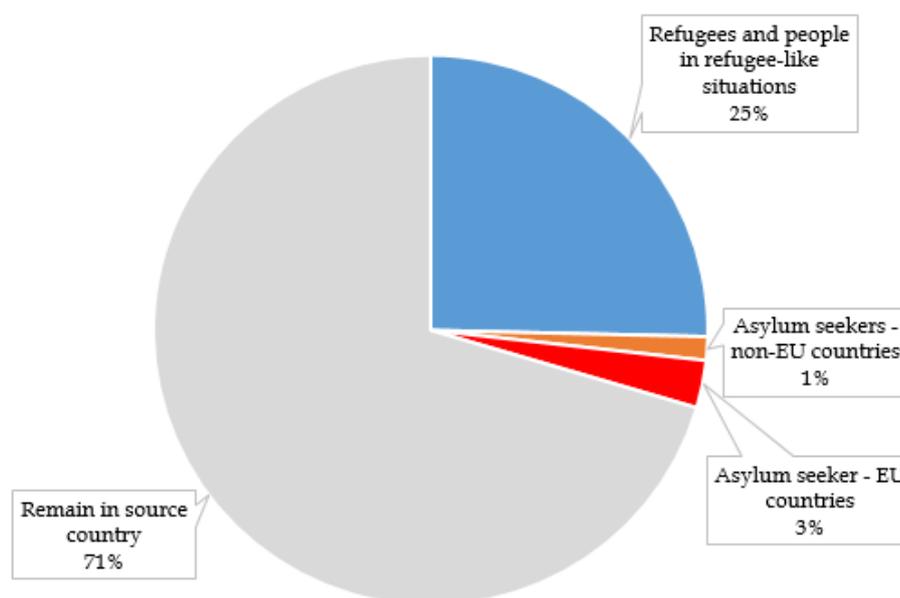
### I Individual impacts

This section considers the perspective of persons in need of protection, which includes refugees and people in refugee-like situations, internally displaced people (IDPs) and individuals seeking asylum. The United Nations High Commissioner for Refugees (UNHCR) reports an increasing trend in the size of this population, which has reached

record high levels globally (UNHCR, 2017)<sup>7</sup>. **Figure 1** presents an overview of the population UNHCR considers to be of concern, roughly half of which are minors (UNICEF, 2010).

The limited legal pathways to the EU primarily affect two populations – ‘other persons of concern’<sup>8</sup> and asylum seekers. Other persons of concern include IDPs, who remain in the source country where they experienced persecution. Asylum seekers to the EU account for 3% of the population. They experience a range of impacts stemming from the journey to the EU and following their arrival<sup>9</sup>. An overview of the source countries of asylum seekers to the EU in 2016 is presented in the Annex (see Figure 9).

**Figure 1: Persons of concern in 2016 – a global perspective**



Source: Produced by the authors based on 2016 figures from the UNHCR.

Table 6 presents an overview of the eight different types of impact of the status quo on individuals, as identified in this research.

<sup>7</sup> The global population of forcibly displaced individuals has almost doubled from 33.9 million in 1997 to 65.6 in 2016 (UNHCR, 2017). Much of the increase occurred after 2012 and was driven by the crisis in Syria.

<sup>8</sup> These individuals include returned refugees, IDPs, returned IDPs, persons under the UNHCR’s statelessness mandate and others of concern.

<sup>9</sup> The UNHCR defines this group as persons whose application has been lodged and the outcome is pending. The study estimates that about two-thirds lodged an application in 2016 (the number of asylum applications made in Member States divided by the number of pending cases in Member States).

**Table 6: Overview of individual impacts**

Individuals affected	Type of impact	Assessment*
Other persons of concern	1. Risk of continued persecution (do not seek asylum).	An estimated 70% of 'persons of concern' (47.7 million) remained in the source country in 2016 <sup>10</sup> . These individuals are likely to be from vulnerable populations.
Asylum seekers to the EU	2. Smuggler fees.	EUR 3,050-32,000 per asylum seeker; Estimated revenue of migrant smuggling networks in the EU in 2016: EUR 3.2 billion
	3. Risk of trafficking and other exploitation.	79% reported at least one of four human trafficking and other exploitative practices along the Central Mediterranean route; 9% for the Eastern Mediterranean route.
	4. Mortality and health.	1.3-1.8% estimated risk of mortality.
	5. Poor reception.	97% of arrivals to the EU in 2016 were to border Member States (Italy and Greece), causing work and cost imbalance and overload and ultimately poor reception conditions.
	6. Delays to integration.	Waiting periods delay the eventual decision on an asylum seeker's application and steps towards integration into society. For example, there is an estimated 6-12 month waiting period to lodge an asylum application.
	7. Risk of entry into the informal market.	An estimated 24% of asylum applicants are not found to have a legitimate claim yet remain in the EU.
	8. Discrimination.	Lower earnings due to higher risk of assault (2-13%) and lower probability of employment (2-8% for racial/ethnic discrimination).

Source: Author's own compilation.

\*Explanations for the figures in the table including their sources are provided below.

Impacts on the fundamental rights of asylum seekers are significant but were considered to be outside the scope of this research paper. Of the individual impacts assessed, only one type (smuggler fees) could be monetised. Nonetheless, all of the individual impacts can be understood to be substantial. Each one is described in more detail below.

<sup>10</sup> These individuals include returned refugees, IDPs, returned IDPs, persons under the UNHCR's statelessness mandate and others of concern.

## 1. Risk of continued persecution

As illustrated in **Figure 1**, only a small share (4%) of persons in need of protection seek asylum in the EU or in other countries, with **the vast majority left behind** (71%). The available evidence suggests that asylum seekers to the EU have more resources and less vulnerability than those who remain in the source country. The financial costs required to make the journey are significant (see Section 2), as are the risks faced by women and girls due to sexual violence and trafficking (see Section 3). The lack of safety may also impede other vulnerable populations, such as the elderly and/or individuals with disabilities, from seeking asylum.

These assertions are reflected in the **relatively advantaged demographic profile of asylum seekers and refugees in the EU**. About 42% of asylum applicants were males between the ages of 18 and 34 years (Connor, 2016). An estimated half of Syrians coming to the EU at the height of the crisis in 2015 had a university degree (Betts & Collier, 2017). Similarly, in 2014, an estimated 20% of refugees aged 15 to 64 had a university degree (OECD & European Commission DG Employment, 2016). Thus, there is significant selection in who is able to undertake the journey, while those who are more vulnerable and who have fewer economic means remain in the country where persecution takes place (Betts & Collier, 2017).

## 2. Smuggler fees

With the lack of legal channels for asylum seekers to enter the EU, many resort to irregular means via smuggling routes. In 2016, migrant smuggling networks generated about EUR 3.2 billion in the EU, a decrease from the estimated EUR 5.2 billion in 2015, largely due to the decline in arrivals to the EU (Europol, 2017)<sup>11</sup>. Smuggling can be used to reach EU borders, as well as to reach final destinations within Europe. The costs of these routes vary based on an asylum seeker's starting point, mode of transport, time of year, and even their race. The only constant is the level of **danger and the risk of other forms of exploitation**. To reach EU borders, sources suggest may cost anywhere from EUR 3,050 to 32,000 per person, depending on a number of factors (see Box 1).

The per-capita income in source countries is important in putting these fees into context. Recent figures show that the average annual per-capita income in Syria was EUR 1,300, in Afghanistan EUR 465, and in Iraq EUR 3,815 (World Bank, 2016)<sup>12</sup>, meaning that financing the journey to reach the EU requires years, if not decades worth of savings, and would present a sizeable barrier to the most vulnerable individuals in need of protection.

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<sup>11</sup> An average figure of EUR 3.2 billion in 2016 was calculated based on the following text from Europol, 2017: 'In 2015, migrant smuggling networks...generated an estimated EUR 4.7 billion to EUR 5.7 billion in profit. These profits have seen a sharp decline in 2016, dropping by nearly EUR 2 billion between 2015 and 2016.'"

<sup>12</sup> Amounts converted to EUR. Latest estimates for Syria were 2010, Afghanistan and Iraq 2016.

### Box 1: What do asylum seekers pay to smugglers to reach the EU?

Within the Central Mediterranean route, a boat from Libya to Italy can cost EUR 1,000 - 2,000<sup>13</sup>. These costs may vary by an individual's race. According to one news source, the same boat journey from Libya to Italy can cost a Syrian about EUR 2,000, a Moroccan EUR 1,200 and a sub-Saharan African EUR 662<sup>14</sup>. The EU also quotes higher fares to travel by cargo vessel, with smugglers believed to have earned close to EUR 7,000 per person (European Commission, 2015). Within the Eastern Mediterranean route, a boat from Turkey to Greece could also cost between EUR 1,000 and 1,200<sup>15</sup>. Land travel via the Balkan route is more expensive in comparison with Europol quoting EUR 7,000 for many Afghan, Iraqi, Pakistani and Syrian migrants to be transported to the EU (Europol, 2018). Once at the Greek border, migrants may also be smuggled to end destinations such as Germany or Sweden, costing an additional EUR 1,200-5,000<sup>16</sup>. Air travel seems to be the most costly. Afghans were quoted as paying between EUR 10,000 and 11,000 to get to Hungary by plane<sup>17</sup>. Other figures quote EUR 900-4,200 per trip per individual from Syria, Afghanistan, Iraq, Pakistan and Morocco) (IOM, 2016).

Smuggling also includes the **additional costs** of travel and accommodation to the debarking location (such as the cost of a migrant from Nigeria or Eritria to reach Libya, which can reach upwards of EUR 7,000<sup>18</sup>; or a Syrian or Iraqi to reach Turkey), as well as the cost of accommodation while waiting for the voyage or between legs of the journey to Europe. Migrants without means must stay, sometimes for years, to pay off debts to smugglers earlier in their route or to save up for the next leg of the journey.

Cost categories	Cost per person
Travel and accommodation to debarking location	EUR 50-7,000
Accommodation while waiting for voyage to EU or between legs of journey	EUR 1,000-10,000 <sup>19</sup>
Smuggler fees for entry to EU	EUR 1,000-10,000
Smuggler fees within EU	EUR 1,000-5,000
<b>Total estimated cost</b>	<b>EUR 3,050-32,000 (average EUR 17,525)</b>

<sup>13</sup> Latza Nadeau, B., 'Confessions of a Human Trafficker who smuggled desperate migrants into Europe' *Europe*, The Daily Beast, 6 May 2014. <https://www.thedailybeast.com/confessions-of-a-human-trafficker-who-smuggled-desperate-migrants-into-europe>

<sup>14</sup> Kingsley, P., 'Libya's people smugglers: inside the trade that sells refugees hopes of a better life' *life*, The Guardian, 24 April 2015. <https://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on>

<sup>15</sup> Choros, E., 'The Price of Escape: How much do smugglers charge refugees and migrants for passage to Europe?' *Greek Reporter*, 30 March 2016. <http://greece.greekreporter.com/2016/03/30/the-price-of-escape-how-much-do-smugglers-charge-refugees-and-migrants-for-passage-to-europe/>

<sup>16</sup> Stamouli, N., 'Inside the Migrant-Smuggling Trade: Escapes start at €1,000' *The Wall Street Journal*, 29 March 2016. <https://www.wsj.com/articles/european-border-crackdown-kick-starts-migrant-smuggling-business-1459260153>

<sup>17</sup> Ni Chonghaile, C. & Kingsley, P., 'People smuggling: how it works, who benefits and how it can be stopped' *stopped*, The Guardian, 31 July 2015. <https://www.theguardian.com/global-development/2015/jul/31/people-smuggling-how-works-who-benefits-and-how-to-put-stop>

<sup>18</sup> Kingsley, P., 'Libya's people smugglers: inside the trade that sells refugees hopes of a better life' *life*, The Guardian, 24 April 2015. <https://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on>

<sup>19</sup> Amounts could vary based on location and length of stay.

### 3. Risk of trafficking and other exploitation

Travel to the EU by irregular means is associated with a high risk of trafficking and exposure to violence by criminal networks, particularly for women and children (IOM, 2016). A survey conducted by IOM found that 79% of the surveyed migrants and refugees in the Central Mediterranean route (primarily Italy) experienced at least one trafficking or other exploitative practice (IOM, 2017)<sup>20</sup>. About 90% of reported cases took place in Libya, which is located in the Central Mediterranean route. Other reports have underscored the severe exposure to violence experienced by asylum seekers traveling through Libya, with testimonies of torture, kidnappings, severe detention centres and gang-rape (UNHCR, 2017; Amnesty International, 2017). In a survey of migrants who travelled through Libya, 84% experienced **extreme violence or torture**, while all but one of the women experienced sexual violence (Oxfam, 2017)<sup>21</sup>. The increased numbers of Nigerian women arriving in Italy (growing from 1,008 in 2014 to 4,371 in 2015) is particularly concerning as 80% are believed to be **victims of trafficking** who will be drawn into the prostitution market. Other reports provide reinforcing testimony (European Parliament, 2016; UNHCR, 2017). In addition, 75% of respondents from the Central Mediterranean route reported experiencing physical violence, while 36% were **forced to work** (IOM, 2017). In the Eastern Mediterranean route, a lower but still significant prevalence of trafficking and other exploitative practices was reported, with about 9% of respondents experiencing a single episode. In addition, about 5% reported being forced to work, while 1% reported being held against their will (IOM, 2017). About 80% of those incidences occurred in Turkey. Another source highlights trafficking practices stemming from the crisis in Syria (ICMPD, 2015).

### 4. Risk of mortality and poor health

A recent UNHCR report notes that, in 2017, 'As European States took increased steps to control access to their territories, those seeking international protection in Europe took even more dangerous journeys, sometimes with smugglers, or attempted alternative routes in order to reach their intended destinations' (UNHCR, 2018). These increasingly dangerous journeys via irregular channels carry a high risk of mortality. A large majority (97% of migrants in 2017) enter the EU through the Mediterranean Sea border (IOM, 2017). The number of estimated dead and missing migrants increased to over 5,000 in 2016<sup>22</sup> and decreased to 3,139 in 2017 (IOM) (UNHCR). The main causes of death were drowning, dehydration, starvation and hypothermia (IOM, 2017). These figures translate to a risk of mortality of about 1.3% in 2016 and 1.8 in 2017<sup>23</sup>, showing that while there may be a decrease in overall deaths, the likelihood of dying has actually increased.

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<sup>20</sup> In total, 5,329 interviews were conducted in Italy, Greece, Bulgaria, Hungary, Serbia and the Former Yugoslav Republic of Macedonia in May 2017.

<sup>21</sup> These findings are based on 258 testimonies from partners of Oxfam (Doctors for Human Rights and Borderline Sicilia).

<sup>22</sup> IOM figures suggest 5,143 (<https://missingmigrants.iom.int/region/mediterranean>) and UNHCR figures suggest 5,096 dead or missing in 2016 (<http://data2.unhcr.org/en/situations/mediterranean>.) Reasons for the slight variation are variations unknown.

<sup>23</sup> This figure was calculated as the number of asylum seekers killed or missing as a share of arrivals. In 2016, there were between 362,753 and 392,994 arrivals, with between 172,301 and 186,768 in 2017. Ranges are differences between UNCHR and IOM figures. Reasons for the slight variations are unknown.

In addition to the risk of mortality, there is significant **physical and psychological stress** associated with the conditions of such travel. One 2016 study investigated the health problems of asylum seekers or refugees that had experienced an emergency room visit in Greece (Pfortmueller et al., 2016). While the sample was relatively young (the average age was 34 years), many had serious health issues. Many had to undergo surgery due to the trauma experienced. Acute infectious diseases were common, as were psychiatric problems. Patients from Syria were more likely to have suffered from **post-traumatic stress disorder**.

Another study assessed the stress levels of asylum seekers by analysing the concentration of the stress hormone cortisol in hair samples (Mewes et al., 2017). The study found similar concentration levels among asylum seekers with and without a post-traumatic stress disorder diagnosis, while levels were lower among permanent settled immigrants. **Women and victims of sexual violence** in particular may suffer worse health impacts, as may children (Hebebrand et al., 2016).

## 5. Poor reception conditions

The first country of arrival for most asylum seekers is Italy, Greece or Spain<sup>24</sup>. Once in the EU, an asylum seeker becomes subject to the Dublin III Regulation, which sets forth a hierarchy of criteria to determine the Member State responsible for examining the application for asylum. Several factors (chiefly the criterion that the country of first arrival should examine the asylum application, as well as the limited number of transfers executed) have limited the redistribution of these asylum seekers to other Member States (ICF, 2015). Asylum seekers thus face a higher risk of poor reception conditions due to the mismatch in the number of asylum seekers and the capacity of the most impacted Member States to host them. Concerns have been raised about the **procedures and reception conditions in hotspots**, which were a measure taken by the EU to strengthen the capacity of the EU border countries (Danish Refugee Council, 2017). These concerns include delays in the conduct of vulnerability screenings, the limited availability of interpreters and mediation services, overcrowded facilities, and limited access to healthcare (Danish Refugee Council, 2017).

## 6. Delays in lodging an asylum application

Under the status quo, there is often a significant delay between the time of arrival in the EU and the lodging of an application for asylum. This delay can hinder the eventual integration of an asylum seeker once his or her application has received a positive decision. For example, the average waiting period to lodge an asylum application in Greece in 2016 was one year (ECRE, 2016). Some delays may be attributed to the transfer procedure of the Dublin system, specifically disagreements between Member States on the interpretation and application of the hierarchy of criteria. In total, the number of take-charge and take-back requests in 2016 was estimated to be 12% of all asylum applications (Eurostat, 2017). The estimated waiting period was 10-11 months (ICF, 2015). About 12% of transfer requests were actually executed. Delays may also result from appeals to transfer decisions.

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<sup>24</sup> As highlighted earlier, 97% of migrants arrived in the EU via the Mediterranean Sea in 2017.

## 7. Risk of risk of falling into the informal market

A high share of asylum seekers are not effectively transferred to another Member State or their application for asylum is rejected. About 42% of requested transfers were not made effectively in 2016, placing these individuals under the responsibility of the pre-transfer Member State (Eurostat, 2017). These individuals face a high risk of falling into the informal market. In 2016, there were an estimated 433,505 rejected asylum seekers at first instance (39% of the total decisions made)<sup>25</sup>. An estimated 31% of all irregular migrants leave the EU through forced or voluntary means (Eurostat, 2017). We assume that this share also applies to rejected asylum seekers, leaving an estimated 299,118 rejected asylum seekers in the EU. This is equivalent to about 24% of asylum applicants in the EU that year<sup>26</sup>.

## 8. Discrimination

Asylum seekers and refugees experience high levels of discrimination in the EU, which may hinder their social integration and potential to contribute to the formal economy. This impact may stem in part from their uncontrolled arrival through irregular means, and the conflation of their situation with economic migrants. The discrimination they experience primarily relates to the grounds of race, ethnicity, religion and nationality. Discrimination on the grounds of race, ethnicity and religion are associated with a higher risk of assault, poorer mental health and lower earnings (Van Ballegooij & Moxom, 2018).

## II Member State impacts

Member States also experience impacts from the status quo, largely relating to the reception of asylum seekers. The main direct costs are detailed in Table 7 below. Several of these costs relate to the management of irregular migration.

The OECD reports that the cost to support an asylum seeker in the first year is about EUR 10,000 (OECD, 2017). These costs typically include provision for food, accommodation, medical services and education for children. Other statistics were obtained from a recent evaluation of the **Dublin III Regulation**, a central pillar of the CEAS architecture. The costs of the Dublin system are generally variable, and depend on the level of asylum flows.

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<sup>25</sup> We combined estimates for the number of rejected applications at the first and final decision from Eurostat. There were a total of 433,505 rejected decisions as compared with 672,900 positive decisions in 2016.

<sup>26</sup> There were an estimated 1,260,910 asylum applicants to the EU in 2016 (Eurostat, 2017).

**Table 7: Overview of impacts on Member States**

Type of impact	Assessment
Border security and surveillance	High burden on EU border countries (e.g. Italy, Greece)
Security and terrorism	See Cost of Non-Europe in the area of terrorism
Private shipping – search and rescue missions	EUR 23,000 per year or up to EUR 216,000 per operation <sup>27</sup>
Provision of reception	EUR 34 per day <sup>28</sup>
Processing asylum applications	EUR 4,834 for each application <sup>29</sup>
Cost of return	Forced return: EUR 2,000 per individual <sup>30</sup> Voluntary return: EUR 560 per individual <sup>31</sup>
Risk of entry into the informal market	An estimated 20% of arrivals fall out of the EU asylum system and remain in the EU
Complementary pathways of admission	See Table 8: Member States with humanitarian admission programmes Table 8
Organised crime	See Section III EU impacts

The EU and Member States share responsibility for integrated **border control and management**, for example, to monitor illegal border-crossings at specific routes in the Eastern Mediterranean and the Western Balkans. These are considered indirect costs and relate to actions to manage the inflow of asylum seekers and economic migrants into the EU and address the root causes. More than 1.8 million irregular border crossings were detected in 2015, hindering the proper functioning of the Schengen area (European Commission, 2018). At the Member State level, this type of cost falls disproportionately on the border Member States, in particular Greece and Italy, which are the main countries of arrival. Some of the funding needs are supported by the ISF Visa and Borders Programme (see Section III EU impacts) but the level of national funds directed to the activity are also substantial, as Box 2 illustrates.

<sup>27</sup> The cost depends on the type of private vessel, the distance that must be taken off-course, accessibility of the nearest port, etc. [Lower bound cost found here:https://fairplay.ihs.com/commerce/article/4266186/european-parliament-votes-to-protect-ship-masters-during-mediterranean-rescues/](https://fairplay.ihs.com/commerce/article/4266186/european-parliament-votes-to-protect-ship-masters-during-mediterranean-rescues/) The upper-bound figure was calculated based off of the USD 50,000 mentioned here: <https://www.reuters.com/investigates/special-report/europe-migrants-ship/> This was multiplied by the 5 days mentioned in delays. The figure was then converted into EUR (note conversation rate based off of June 2018 rate).

<sup>28</sup> Cost of Non-Europe study in the area of asylum.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

## Box 2: What do border Member States pay to address the migrant crisis?

**Italy:** Between 2011 and 2013, Italy's expenditures to address the migrant crisis was estimated to be approximately EUR 5 billion, excluding EU subsidies. The table below notes Italy's costs for sea rescue and reception by year. Expenditures related to external border control was estimated via 25% of national contributions to ISF-Borders and Visa Funds. This is the maximum amount, with the national contribution range typically between 5-25%. Here, 25% was assumed, which is the percentage that goes towards 'supporting and expanding the existing capacity at national level in visa policy and in the management of the external borders...' (European Parliament & European Council, 2014).

Italy expenditures for migrant crisis						
	2011	2012	2013	2014	2015	2016
Total (EUR mln)	922	899	1,356	2,205	2,747	3,441
Border security (%)	*	*	*	*	0.4%	0.3%
Sea rescue (%)	33%	23%	35%	45%	28%	25%
Accommodation (%)	36%	44%	42%	33%	51%	58%
Healthcare and education (%)	31%	34%	23%	22%	20%	16%

Source for border security: *Programma Nazionale ISF Identificazione Delle Autorità Designate*; Source for remaining data: Italian Ministry of Finance, *Relevant factors influencing debt developments in Italy*, May 2016; \*numbers not available for these sources

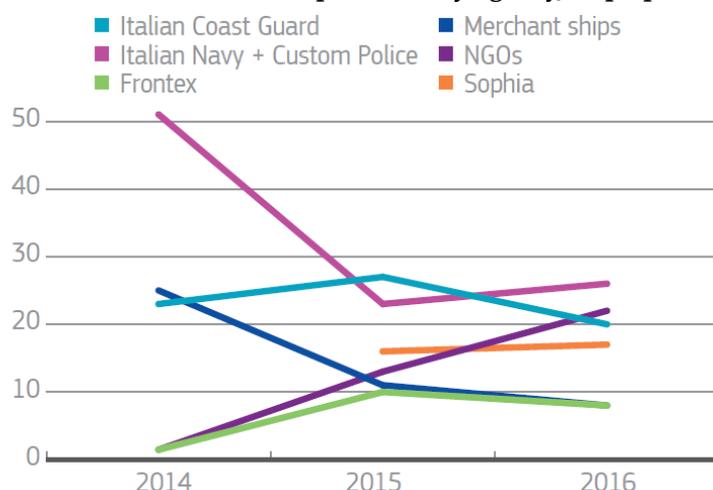
**Greece:** Expenditure for the control of external borders was also estimated via 25% of national contributions to ISF-Borders and Visa Funds. The estimated amounts were similar to those for Italy, with 2015 showing the maximum possible national expenditure of EUR 11.3 million, compared to EUR 10.6 million in 2016 and EUR 7.8 million in 2017<sup>32</sup>. However, given the considerable pressure faced by Greece, more funds were allocated to external borders, including EUR 55.8 million in ISF Emergency Assistance directly allocated to Greek authorities (European Commission- DG HOME, 2017). Costs for reception, sea rescue, etc. were more difficult to quantify. However, given the similar figures for external border costs, Greece's spending on rescue and reception is likely to be on a similar scale to that presented for Italy.

A related issue that Member States face is the engagement of **commercial ships in search and rescue missions of irregular migrants**. Sources provide conflicting information on the extent of this practice. The European Commission notes that merchant ship rescue efforts accounted for 25% of all rescues in 2014, dropping to 8% in 2016 (European Commission, EPSC, 2017). Another publication, however, quoting the European Community Shipowners' Association (ECSA), suggests that rescue efforts of commercial ships grew to 29% in the first half of 2015 (Pezzani & Heller, 2015). The European Commission has noted

<sup>32</sup> Note: 25% taken from ISF Border figures for Greece given on p. 48  
<http://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/ISF-Programme.pdf>

that NGOs have become more actively engaged in search and rescue missions since mid-2014 by moving away from Italian coasts and closer to Libyan waters.

**Figure 2: Search and rescue operations by agency/ship operator 2014-2016 (%)**



Source: European Commission, European Political Strategy Centre (EPSC), *Irregular migration via the Central Mediterranean- from emergency responses to systemic solutions*, February 2017.

Regardless of the number of rescues, costs for merchant ships were estimated to be up to EUR 216,000 per rescue operation<sup>33</sup>, in addition to delays of up to five days incurred due to issues with the closest port not accepting rescued migrants, or because the rescue ship was too big to access a particular port<sup>34</sup>. A lower estimate quotes figures ranging from EUR 23,000 to 69,000 for rescue missions in 2015<sup>35</sup>.

Member States are also looking outwards to address irregular migrant inflows, with some undertaking ongoing policy discussions to establish **hotspots in third countries**. For example, France is considering an approach to stem the flow of asylum seekers through Libya (Dastyari, 2017). No real figures are available to reflect the impact of such policies, as no economic assessments have yet been made.

Currently, some Member States offer **complementary pathways of admission** to refugees. These include humanitarian admission programmes, private sponsorship schemes or facilitated family reunification schemes<sup>36</sup>. Table 8 provides an overview of some of these programmes and the numbers of refugees they admitted between 2013 and 2016. For example, France provided more than 3,000 asylum visas to Syrian refugees, allowing them to travel to France and apply for asylum. These individuals were granted subsequent visas that permitted them to work during the asylum procedure (FRA, 2015). Other projects have

<sup>33</sup> Saul, J., 'In Mediterranean, commercial ships scoop up desperate human cargo', Reuters Investigates, 21 September 2015, <https://www.reuters.com/investigates/special-report/europe-migrants-ship/>; USD costs of 10,000-50,000 per day for rescue missions. Amount translated to EUR, according to 2015 exchange rate.

<sup>34</sup> Shettar, G., 'European Parliament votes to protect ship masters during Mediterranean rescues', Fairplay, 14 April 2016, <https://fairplay.ihs.com/commerce/article/4266186/european-parliament-votes-to-protect-ship-masters-during-mediterranean-rescues>

<sup>35</sup> *Ibid.* Idem

<sup>36</sup> For an overview of these schemes, please refer to a series of scoping papers published by the European Resettlement Network in 2017 and 2018.

been undertaken by national NGOs such as Sant'Egidio Humanitarian Corridors in Italy and the Family Migration Assistance programme run by the International Organisation on Migration in Germany (FRA, 2015; European Council of Refugees and Exiles, 2017).

**Table 8: Member States with humanitarian admission programmes**

Host country	Programme name	Countries targeted	Number of refugees 2013-2016
Austria	Humanitarian Admission Programme	Syria	1,668
Germany	Humanitarian Admission Programmes	Syria, Afghanistan, Palestine, Egypt, Libya	19,047
Ireland	Syrian Humanitarian Admission Programme (SHAP) & Family Reunification HAP	SHAP- Syria FRHAP- all refugees	SHAP- 119 visas FRHAP- 530
France	Humanitarian Admission Programme	Syria	3,415
UK	Vulnerable Persons Relocation Scheme (VPRS)	Syria (and, as of mid-2017, Iraq and Palestine)	10,538

Source: European Resettlement Network Scoping Paper, *Humanitarian Admission Programmes in Europe, Expanding complementary pathways of admission for persons in need of international protection*, 2018.

### III EU impacts

The refugee crisis also imposes costs at EU level. This review identified the following **direct costs** (2016 annual figures):

- EUR 170 million to set up the CEAS;
- EUR 73 million for the operation of the EASO; and
- EUR 2.3 billion for emergency funding for ‘hotspots’ and other supports.

Member States are expected to spend about 20% of their allocation from the Asylum Migration and Integration Fund (AMIF) on the development of the **Common European Asylum System** (CEAS). The total level of investment was estimated to be EUR 170 million in 2017 (European Parliament, 2015). In addition, the **European Asylum Support Office** (EASO) spent an estimated EUR 73 million in 2017 (EASO, 2017).

Between 2015 and 2017, EU emergency funding under the **AMIF** amounted to around EUR 4.6 billion (EUR 2.3 billion annually), allocated to 14 Member States, EU agencies and international organisations (EASO, IOM and the UNCHR) for support actions in Italy, Greece and Bulgaria (European Commission, 2017)<sup>37</sup>. Much of the emergency funding was directed towards the establishment of ‘hotspots’ to alleviate the strain on border Member

<sup>37</sup> Funding levels were estimated to be EUR 2.5 billion annually.

States (Red Cross EU Office, 2015). About EUR 150 million was provided through AMIF and ISF to support the operation of hotspots in Greece (European Commission, 2016), of which EUR 12.7 million was designated for reception facilities (European Commission-DG HOME, 2016). Funding for the **Emergency Support Instrument** is estimated to total EUR 700 million over the 2016-2019 period, or about EUR 233 million annually (European Commission, 2016). These funds also support the reception of asylum seekers in countries with high numbers of arrivals.

The assessment also identified a number of **indirect costs** stemming from the status quo. These costs are related to actions to stem the inflow of asylum seekers and migrants by addressing the the root causes, many of which lie outside the EU's borders. The central problem of the status quo touches on a host of related policies in the area of border security, development cooperation, human trafficking and legal migration. At present, there are significant challenges in differentiating between asylum seekers and economic migrants (who are subject to different legal channels), which may create uncertainty, as well as higher costs for agencies and others interacting with these two distinct populations.

Table 9 presents an overview of the key types of indirect impacts for the EU. Several relate to the management of irregular migration. Each is described in more detail below.

**Table 9: Summary of indirect impacts for the EU (annual estimates)**

Type of impact	Total annual cost	Assessment
1. Surveillance and border management.	EUR 416 million	ISF: EUR 7 million for EU actions and EUR 73 million for emergency assistance; Frontex: EUR 230 million; Temporary internal border controls: EUR 106 million
2 Security and terrorism.	EUR 13.6 billion	See Cost of Non-Europe on terrorism
3. Third country agreements.	EUR 2.3 billion	Emergency Trust Fund for Africa: EUR 833 million; Turkey agreement: EUR 1.5 billion
4. Development cooperation.	EUR 2.5 billion	Development cooperation: EUR 1 million; Emergency funding: EUR 2.5 billion
5. Organised crime.	EUR 30 billion	Human trafficking: EUR 30 billion; Europol Migrant Smuggling Centre: EUR 5 million

*Note:* The cost estimates are annual estimates based on multi-year budgets spanning from 2014 to 2019.

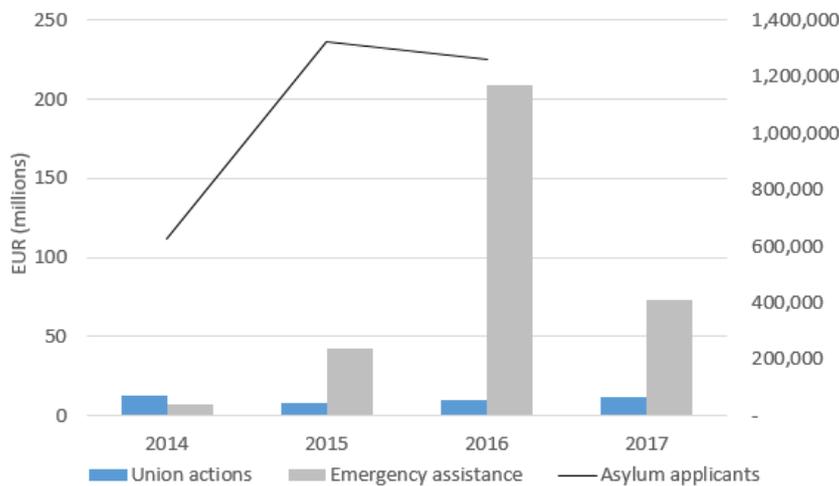
## 1. Surveillance and border management

The main EU-level actors and sources of funding include the **Internal Security Fund (ISF)** **Border and Visas** instrument and the **European Border and Coast Guard Agency (Frontex)**. Their activities may provide a barrier to both illegal economic migration and entrance to asylum seekers.

The 2014-2017 annual work programmes from **ISF - Border and Visas** provide information on the costs of EU activities promoting the harmonisation of border control measures across different actors and the Member States.<sup>38</sup> This paper found a stable outlay or fixed cost of about EUR 10 million each year for grants, procurement, training and other actions, of which an estimated 70% is related to border management (EUR 7 million)<sup>39</sup>. Actual costs are likely to be higher, due to the requirement that Member States provide co-financing and other adjustments.

The work programmes also indicate funding levels for emergency assistance, which vary significantly by year. In 2017, emergency assistance from ISF – Border and Visas was EUR 73 million. The upward trend in funding is mirrored by the increase in asylum seekers, suggesting that the refugee crisis was a driver of this source of funding (see Figure 3). Italy and Greece were the primary recipients of this financial support in 2015 and 2016<sup>40</sup>.

**Figure 3: Trends in funding levels in relation to numbers of asylum applicants**



Source: 2014-2017 work programmes for ISF –Border and Visas.

The mandate and funding for the **European Border and Coast Guard Agency (Frontex)** has increased substantially in recent years. Since 2016, the agency supports both border management and return operations. In 2017, about 20% of funding for operational activities (total EUR 270 million) was dedicated to the return of illegal migrants (see Figure 4). About 5% of the operational budget supported risk analyses, the Situation Centre, and the **European Border Surveillance System (EUROSUR)**, a drone system, satellite imaging and other technology to track migration flows into the EU. More than half of operational funds

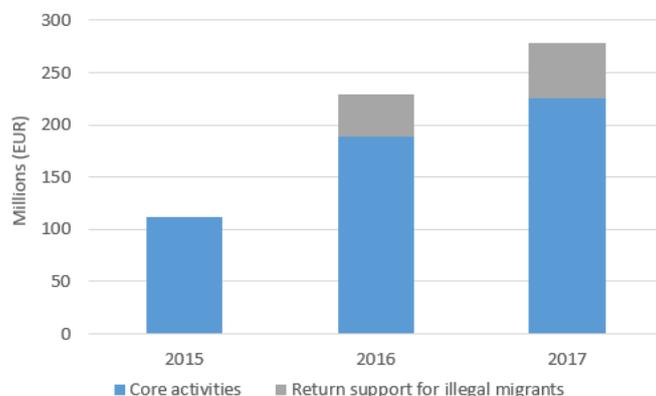
<sup>38</sup> The most recent work programme provided the basis for the review, which was conducted on 9 March 2018. These work programmes were accessed from the DG HOME website: [https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-borders/union-actions\\_en](https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-borders/union-actions_en). Activities for border management and the common visa policy share the same budget line. However, it is possible to distinguish activities supporting the different objectives through an activity-level review. ISF - Borders and Visa instrument has an initial allocation of EUR 2,760 million for the 2014-2020 period.

<sup>39</sup> This estimate is based on a review of the itemised figures included in the 2014 budget.

<sup>40</sup> Breakdown by country is not available for other years. Funds to Greece and Italy was 57% of the total in 2015 and 39% of the total in 2016.

(57% in 2017) supported joint operations with Member States, such as Operation Themis, which provides surveillance and search and rescue off the coast of Italy, and Poseidon Rapid Intervention, which focuses on the border between Greece and Turkey<sup>41</sup>.

**Figure 4: Trends in funding levels for Frontex**



Source: Frontex Amended Budget 2017 N3. Table A3 Operational Activities.

In addition to external border controls, some Member States **temporarily reintroduced internal border controls** within the Schengen Area as a means of controlling the inflow of asylum seekers (European Council of the European Union, 2016). In March 2018, there were five Member States with such measures in place (European Commission, 2017)<sup>42</sup>. A study for the European Parliament estimated that the economic costs associated with a hypothetical two-year suspension of the Schengen Area in five countries could amount to EUR 211.5 million over the two-year period (or about EUR 106 million annually) (EPRS, 2016).

## 2. Security and terrorism

The EU combats terrorism through several measures, including supporting national measures to prevent radicalisation and recruitment, address terrorist financing, regulate the possession and acquisition of weapons, and focus on security external borders. The EU also actively cooperates with third countries and international organisations, and facilitates cooperation between law enforcement authorities across Member States. Terrorism has cost the EU about EUR 13.6 billion annually<sup>43</sup>, with about 97% coming from lost GDP and 3% from lost lives, injuries and infrastructure damage (European Parliamentary Research Service Blog, 2018).

<sup>41</sup> Operation Themis was launched in February 2018 and replaces Operation Triton: <http://www.dw.com/en/frontex-launches-new-eu-border-control-mission-operation-themis/a-42417610>; Operation Poseidon began in December 2015: <https://frontex.europa.eu/news/frontex-and-greece-agree-on-operational-plan-for-poseidon-rapid-intervention-yiSxga>

<sup>42</sup> Sweden, Denmark, Germany, Austria and France.

<sup>43</sup> Yearly amount calculated by adding EUR 185 billion in lost GDP and EUR 5.6 billion in lost lives, injuries and damages since 2004 and dividing by 14.

### 3. Third country agreements

Agreements with third countries may help to manage irregular inflows to the EU. A notable example is the **EU-Turkey Statement** issued in March 2016 (Council of the European Union, 2016). In return for meeting certain conditions (such as tighter visa requirements, readmission of irregular migrants to Turkey or to the migrant's country of origin, and tighter border controls), Turkey received a budget of EUR 3 billion over two years (or EUR 1.5 billion annually) through the legal framework known as the **Facility for Refugees**. In the June 28/29 European Council summit, Council agreed to launch the second tranche of the Facility for Refugees (European Council, 2018). It was also agreed at the summit to transfer EUR 500 million from the 11<sup>th</sup> EDF reserve to the **EU Trust Fund for Africa**, which already holds EUR 3.37 billion (European Commission, 2018). These funds are dispersed mainly through the EDF, DCI, ENI, DG HOME, and DG ECHO, and amount to about EUR 833 million per year. The funds support activities such as training for the Libyan Coast Guard and Navy to enhance their capacity to perform search and rescue operations, and weaken smuggling networks. Lastly, a cooperation agreement for border surveillance and policing was established between Spain and Morocco that was partly financed by the EU (ECRE, 2018). The initiative has not, however, prevented an increase in irregular border crossings but, rather, has left migrants vulnerable and resorting to more dangerous smuggling methods, as well as increasing the risk of human rights abuses and exploitation (Carrera et al., 2016).

### 4. EU development cooperation

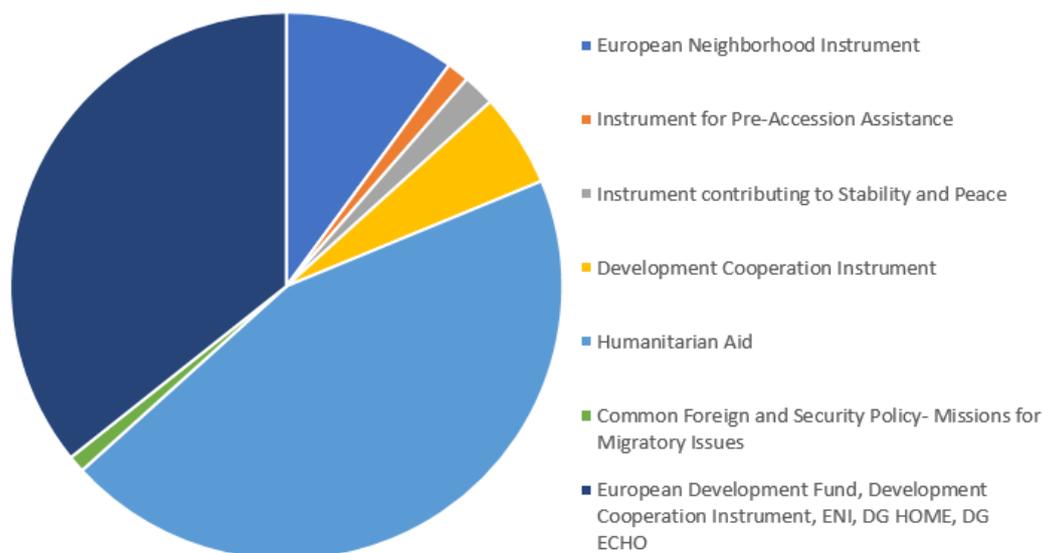
The EU has a number of instruments to foster cooperation with third countries of origin and facilitate the smooth transit of migratory flows, including Regional Development and Protection Programmes (RDPPs), Mobility Partnerships (MPs), Common Agendas on Migration and Mobility (CAMMs) and Visa Facilitation Agreements (VFAs) (Red Cross EU Office, 2015). RDPPs, for example, are designed to enhance the capacity of non-EU countries in the regions from which many refugees originate, or through which they pass in transit. In the case of Libya, the EU and its implementing partners (IOM and the UNHCR) also provide external assistance for voluntary humanitarian returns and evacuations from Libya through the Emergency Transit Mechanism and Common Security and Defence Policy (CSDP) missions (EUNAVFOR Med Operation Sophia and EUBAM Libya).

The past decade has seen the increased use of development cooperation funds to support EU migration policy objectives. In fact, most recently, EU leaders have emphasized the importance of partnership with Africa in terms of increased development funding as well as through the establishment of a new framework to enable increased private investment from Africans and Europeans (European Council, 2018). The level of funds has been estimated at EUR 1 million per year (European Parliament-LIBE, 2015). Relevant activities may include raising awareness of illegal migration and smuggling, and working with national governments to agree return programmes. These funds however, may not always be complementary to internal funds for migration and asylum (e.g. AMIF or ISF), limiting their overall effectiveness (European Parliament-LIBE, 2015). Some Member States have

reduced their development cooperation budget in order to offset the cost of migrants arriving through irregular means, as in the case of Sweden (Betts & Collier, 2017).

Development cooperation funds also include emergency funds targeting the stemming of migration flows. In total, an estimated EUR 5.1 billion was granted in 2015 and 2016, or about EUR 2.5 billion annually. A breakdown by instrument is presented in Figure 5.

**Figure 5: Breakdown of emergency funds for development cooperation**



Source: European Parliament, *EU cooperation with third countries in the field of migration*, 2015.

## 5. Organised Crime

As described in Section I, asylum seekers often resort to **smuggling networks** to facilitate their journey to the EU. In 2016, the **European Migrant Smuggling Centre** was launched at Europol, with the objective of coordinating cross-border operations to tackle smuggling. The budget for this centre was not publically available. However, we estimated it based on the number of staff in the Centre as compared with Europol overall. The estimated annual cost is estimated to be EUR 5 million (Europol, s.d.)<sup>44</sup>. Asylum seekers are also at risk for **human trafficking** during the journey. The costs to the EU of human trafficking were recently estimated to be at least EUR 30 billion (Levi et al., 2013)<sup>45</sup>.

An estimated 42% of rejected Dublin asylum applicants remain irregularly in the EU (ICF, 2015). In 2016, this translated to about 206,140 individuals. Although difficult to determine, the costs these individuals are likely to impose a substantial cost on state budgets, in terms of social service utilisation and the generation of black market activities.

<sup>44</sup> Europol's 2017 expenditure was expenditures EUR 118,284,720. A total of 45 staff members work in the centre, compared to 1,065,1065 staff in the entire organisation.

<sup>45</sup> The authors use 2013 Eurostat data to estimate the cost per trafficked woman at EUR 307,062, which was multiplied by the estimated estimate 9,528 trafficked women.

## Chapter 3: Potential changes in migrant influx due to the policy options

### Key findings

- Under all the policy options one may expect a significant portion of migrants seeking asylum in the EU through irregular means to apply for an EU Humanitarian Visa, thus offering a safe access route and reducing irregular migration flows to the EU.
- The level of substitution may -in principle- be up to 100%, where all asylum seekers who would have pursued an irregular channel now pursue the new legal channel. In practice however the level of substitution may be less, depending on the implementation of the policy, its accessibility, its perception of fairness. The design and the implementation of the policy option can therefore have an impact on the extent to which the substitution effect is realized.
- The number of people who will apply for an EU Humanitarian Visa, among those who would have otherwise stayed in the country of origin, is expected to be relatively small. This is because significant costs would remain, which would limit the appeal of seeking asylum in the EU, even where a legal channel is offered.

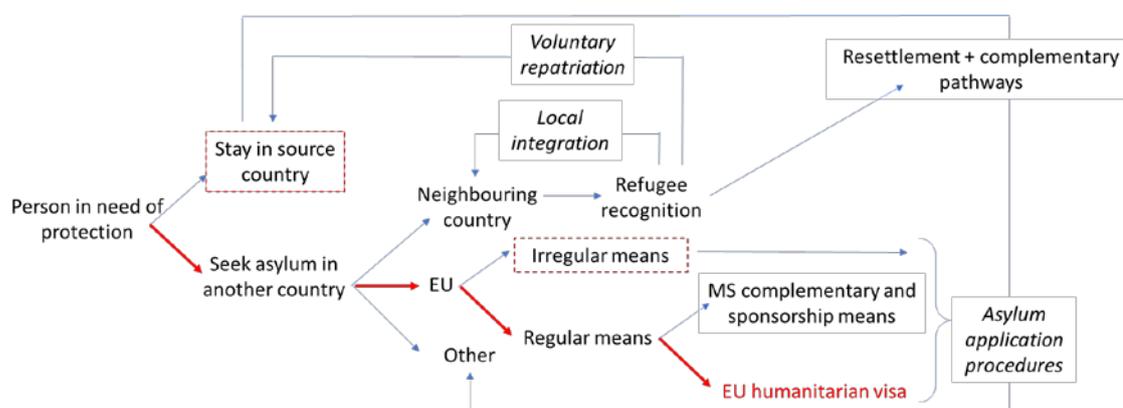
This chapter investigates how the influx of migrants may change due to the policy options. The investigation is framed by economic theory and specifically the modelling of individual choice. This is because **change in migrant influx hinges on decisions made by persons of concern, including asylum seekers**. Therefore we consider how persons of concern (including asylum seekers) makes decisions in the status quo and how the policy options may affect the process. With regards to the latter, the key question is: will the person in need consider the new legal channel to apply for asylum in the EU or not? Their response depends on several factors: (1) the choice that would have been made in the absence of the policy option; (2) the extent to which the policy option reduces the cost (monetary and non-monetary) of seeking asylum in the EU; and (3) the willingness and resources of the person in need. Thus, it is important to consider the **different types of costs and barriers** – monetary and non-monetary - that may be faced.

The options available to the asylum seeker are presented in Section I while a review of the costs presented by the policy options relative to the status quo are presented in Section II. Section III develops an economic framework to predict how asylum seekers would alter their decision-making based on the relative costs of the policy options.

### II. An asylum seeker's decision tree

The options available to a person in need of protection are presented in the form of a decision tree (see Figure 6). Each node represents a decision point for choosing from a selection of options. At the first node, for example, the person in need of protection either stays in the source country where persecution is experienced or seeks asylum in another country. In this case, the decision tree does not reflect an individual's preferred option, but rather the decision that would take place given the practical constraints, e.g. the person may want to seek asylum in another country but lack the resources to do so. The decision tree defines three options for seeking asylum in another country – a neighbouring country, the EU or another country (for example, Canada or the US). Persons who are recognised as refugees in a neighbouring country are faced with **three durable solutions**, which include resettlement, voluntary repatriation or local integration. In the status quo, persons that seek asylum in the EU may only do so through irregular means or through complementary or sponsorship pathways offered by some Member States<sup>46</sup>. Resettlement is also an option, as indicated in the decision tree.

**Figure 6: Decision tree for a hypothetical person in need of protection**



Source: Developed by authors.

Note: Red lines highlight changes due to the EU scheme on humanitarian visas.

The introduction of an EU scheme on humanitarian visas would alter the decision tree, as indicated by the red lines. It would add an option to a decision node and might change the likelihood of certain decisions being made at earlier nodes of the tree. While acknowledging the complexity of this decision tree, ultimately there are four key options, which are listed below:

- Stay in source country;
- Seek asylum in a neighboring country;
- Seek asylum in the EU via irregular means; or
- Seek asylum in the EU via regular means (*only under the policy options*).

## II. Relative costs of the policy options

<sup>46</sup> See Chapter 2, Section II for a review.

Each policy option implies different costs to the individual. These costs may be both monetary as well as non-monetary. It is also important to acknowledge that individuals also face costs in the status quo, as detailed in Chapter 2. For example, the continued exposure to persecution and violence in the source country can be understood as a cost. An individual's preferred policy option would then be determined based on an assessment of relative costs – the costs implied by the policy option as compared with the costs experienced in the status quo. While the policy option may imply lower relative costs, they may still exceed the individual's resources.

Table 10 presents a qualitative assessment of the key costs and risks faced by individuals under the status quo and under a EU scheme for humanitarian visas. The assessment finds that the seeking asylum in the EU via irregular means (as is done in the status quo) makes a trade-off between escaping persecution and a number of other costs such as the risk of trafficking and the risk of mortality. **From the individuals' standpoint, an EU scheme for humanitarian visas is clearly preferable to seeking asylum via irregular means.** However, **significant costs remain, which would limit the appeal of seeking asylum in the EU, even where a legal channel is offered.** The stress and social costs (e.g. leaving one's community behind) would be high. The financial cost would be less, but may still be quite significant for individuals, particularly if they are from more vulnerable populations.

**Table 10: Overview of costs faced by individuals in need of protection**

Key types of risks/costs	Status quo:		EU scheme for humanitarian visas (policy options 1-3)
	Stay in source country	Seek asylum in the EU via irregular means	
Persecution	High	Low	Low
Financial costs	Low	Very High <sup>1</sup>	Medium-High
Risk of trafficking and other exploitation	Low	High	Low
Mortality and health	Medium-High	High	Low
Isolation from family and community	Low	High	High

<sup>1</sup> In Chapter 2, we estimated these costs to be on the order of EUR 10,000-15,000. The financial costs and access facing individuals under a EU humanitarian visas would be less, but would vary by the policy option adopted.

From the individual's perspective, the policy options vary mainly in terms of financial costs and access. The main financial cost for seeking asylum to the EU via irregular means would be smuggler fees. Under the policy options this would include the cost of travel via normal

commercial routes (e.g. plane flight). However, the policy options may vary in terms of the financial cost faced by individuals. This is explored in the remainder of this section.

Table 11 summarises the expected monetary costs faced by individuals under each of the policy options. An applicant could expect similar costs under Policy Options 2 (LTV visas) and 3 (EU Asylum visas), while costs would be lower under Policy Option 1 (visa waiver). For Steps 3 and 5, we based our estimates on three source countries that are most highly-represented in the asylum-seeking population in the EU in 2017 (see Annex, Figure 9). These countries are Afghanistan, Iraq and Syria.

**Table 11: Financial costs faced by the individual per EU humanitarian visa**

Step	Estimated cost	Policy Option 1: Visa waiver	Policy Option 2: LTV asylum visa	Policy Option 3: EU asylum visa
1.Travel to consulate/embassy	EUR 0- 100		✓	✓
2.Prepare visa application	EUR 80		✓	✓
3.Accommodation during visa processing	EUR 425-3,225 <sup>47</sup>		✓	✓
4. Security screening (ETIAS)	EUR 7	✓		
5.Travel to the EU	≈ EUR 300-1000 by air <sup>48</sup> ≈ EUR 3,000 by sea ≈ EUR 154 by land <sup>49</sup>	✓	✓	✓

*Note:* See text below for information on the calculation of costs for each step.

The estimation of cost for each of the five steps is described below.

### 1. Travel and accommodation to consulate/embassy

The policy would require individuals to file an application in person, which would require travel to an Member State consulate (Policy Option 2) or an EEAS delegation (Policy Option 3), which are typically based in main cities and, indeed, not all. Member States have consulates in the three countries in question. Estimates for this cost category are based on

<sup>47</sup> Current EU per diem rates to Afghanistan, Iraq, Syria, 2017. Conservative estimate, assuming that the average asylum seeker would manage to find accommodation for less per day. Rates based on standard 15-day visa processing but it could go up to 30-60 days, depending on the depth of the verification process.

<sup>48</sup> Single internet search from Afghanistan, Iraq and Syria to major EU cities on 19- April 2018.

<sup>49</sup> Single internet search from Lebanon/Turkey to Greece on 26 April 2018.

the location of consulates/embassies in the individual's respective country<sup>50</sup>, or even in neighbouring countries<sup>51</sup>. The cost is likely to be limited<sup>52</sup>, with the possibility of costs rising to around an estimated EUR 100 for longer or cross-border treks by taxi. Given the political situations in these countries, travel would constitute a level of danger and risk that could be understood as a non-monetary cost. However, this cost would arguably be less than the non-monetary costs for travel to the EU via irregular means due the shorter distance, the possible reliance on friends and family during the journey, and greater familiarity within one's native country.

## 2. Prepare visa application

Having arrived at the consulate or embassy, the individual would then submit an application for a humanitarian visa. It is assumed that the standard documents, costs and processing time needed for a Schengen visa would also apply to a humanitarian visa. These would include: signed visa application form (per person; parents/guardian must complete and sign for children), an ID photo and fingerprints (taken at the time of submission of the upon application), and a EUR 80 visa fee (waived for children under six years of age). While the current visa fee is set at EUR 60, it is currently under review and may soon increase to EUR 80 to account for the influx of visas applications in recent years (European Commission, 2018). It is assumed that this increase would be in place at the time of implementation of a humanitarian visa scheme. In addition to these documents, the applicant would need to include documentation supporting his or her case for asylum. This paper assumes that the cost of preparing this documentation would be negligible, as the standard provision of a valid passport, travel medical insurance covering a minimum of EUR 30,000 and evidence of means of support and accommodation (DG HOME, s.d.) would be waived for a humanitarian visa application, whose purpose is to apply for asylum.

## 3. Visa processing

The standard processing time needed for a Schengen visa could also be expected to apply to an EU humanitarian visa. The standard processing time is set at 15 calendar days but may need to increase to the 30-60 calendar days, depending on security and verification needs (European Commission, 2011). During this time, the visa applicant would need to secure accommodation. To give an upper bound estimate, current EU per diem rates in Afghanistan, Iraq and Syria would add up to a sum of between EUR 2,775-3,225 for a 15-day stay. However, a more reasonable assumption would be that the applicant would obtain accommodation for EUR 25 per day<sup>53</sup> or about EUR 375 for the 15-day stay, plus about EUR 50 for food<sup>54</sup>. Appeals in respect of a negative decision may further extend the stay, leading to higher costs, although there would be no fee for such appeals. Another possible

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<sup>50</sup> i.e. Kabul (Afghanistan), Baghdad, Erbil (Iraq), Damas (Syria).

<sup>51</sup> E.g. Kuwait, Jordan, and Lebanon.

<sup>52</sup> E.g. travel forums suggest that bus fares between Syria and Lebanon do not exceed EUR 15 [https://www.tripadvisor.com/ShowTopic-g294004-i2871-k3966085-Syria\\_Lebanon\\_Jordan\\_transportation-Lebanon.html](https://www.tripadvisor.com/ShowTopic-g294004-i2871-k3966085-Syria_Lebanon_Jordan_transportation-Lebanon.html); Also minibuses in Afghanistan are referenced as the most affordable/common form of transport <http://www.flyafghanistan.us/blog/2013/07/29/transportation-in-afghanistan/>

<sup>53</sup> Single internet search on apartment/home-sharing websites in Kabul and Erbil on 28 April 2018.

<sup>54</sup> Estimate based on food prices in Kabul, Afghanistan 2018.

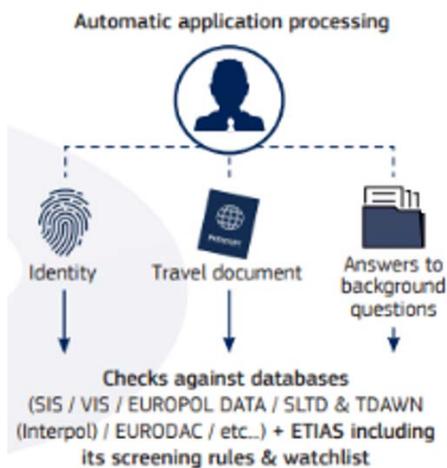
cost is lost income that the individual might have otherwise earned had she or he not travelled to the consulate or embassy.

#### 4. Security screening

All the policy options consider a security screening. Under Policy Options 2 and 3, this would occur under the existing procedures for the Schengen visa application. Each Schengen visa application goes through a security assessment which includes checking the SIS for any alerts or false identities, obtaining the prior consultation of other Member States (if applicable), and checking national databases in accordance with national legislation. In cases of strong suspicion, an applicant's criminal record may also be requested and reviewed. From these assessments, it must be verified whether the applicant represents a "genuine, present, and sufficiently serious threat to public policy and public security" (European Commission, 2011).

For Policy Option 1, a security screening under a system such as the European Travel Information and Authorisation (ETIAS) System may be foreseen. The system would allow for security checks of individuals who do not need a visa to travel to the EU. The individual would need to access the internet to complete an online form prior to travel. An overview of the approach is presented in Figure 7. It resembles the U.S. Electronic System for Travel Authorisation (ESTA), which has been in place since 2009. The system is expected to be in operation by 2020 and its website suggests that the fee would be about EUR 7 per application<sup>55</sup>.

**Figure 7: Overview of ETIAS security screening process**



Source: <https://www.schengenvisainfo.com/etias/>.

#### 5. Travel to the EU

If the humanitarian visa is granted, the consulate or embassy would then provide the applicant with information on how the visa could be used, the destination country in the

<sup>55</sup> For more information, please refer to this weblink: <https://www.schengenvisainfo.com/etias/>.

EU (whether or not there would be relocation), and how the asylum application would proceed. If the individual accepts the terms, then the consulate, embassy or a third-party would provide pre-departure assistance while the individual made arrangements to travel to the EU. Options by air, sea and/or land could be considered, depending on the individual's location. For the three countries of focus, the most practical and efficient mode of travel is by aeroplane/airplane. Standard internet searches for one-way flights from the major cities where consulates would be located in Afghanistan, Iraq and Syria to major EU cities offer a price range of EUR 300-1000 per person. Traveling by sea is the least accessible route, likely requiring further modes of transport. Prices for sea travel from Syria or Lebanon to Turkey or Greece range from EUR 140 to 3,000<sup>56</sup>. Traveling by land could be another option, with bus fares from Syria through Turkey to Greece are estimated to be about EUR 150<sup>57</sup>. As with sea options, this would require other modes of transport. These costs are substantially less than the estimates for smuggler fees reviewed in Chapter 2.

### III. Substitution and income effects

Section II finds that a EU scheme on humanitarian visas would **reduce the cost faced by individuals to seek asylum in the EU**. Following the options laid out in Section I, we can expect that the inflow of asylum seekers pursuing the policy option to generally consist of three groups:

- Group A: Individuals who would have sought asylum in the EU via irregular means in the status quo;
- Group B: Individuals who would have sought asylum in a neighbouring country in the status quo; and
- Group C: Individuals who would have remained in the source country in the status quo.

The shift in the choice exhibited by Group A – those who would have sought asylum in the EU via irregular means – reflects a substitution effect. Instead of pursuing the irregular route, they instead choose a regular route to seek asylum in the EU. The shift in choice exhibited by Groups B and C – those who would not seek asylum in the EU in the status quo but who would if the policy option existed – can be understood as an income effect. These two effects are defined in the context of the model of standard consumer theory in economics. More information about these two effects can be found in Box 3. Economic theory suggests that the strength of substitution and income effects depends on the elasticity of demand for asylum. An elastic demand means that the consumer behaviour shifts substantially in response to a shift in price or cost. An inelastic demand means that consumer behaviour is resistant to such shifts.

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<sup>56</sup> Murdock, H., 'From Syria to Europe, the price they pay', *VOA News*, 24 November 2015, <https://www.voanews.com/a/syria-europe-refugees-cost-price/3072200.html>; single internet search from Beirut to Greece on 28 April 2018.

<sup>57</sup> <https://www.rome2rio.com/map/Lebanon/Greece>

### Box 3: Economic theory – substitution and income effects

According to economic theory, an individual's demand for a good – in this case, the pursuit of asylum – varies according to its price or cost. The price (or cost) faced by an individual may include monetary and non-monetary components. The reduction in the price (or cost) of a good results in two different effects. The definition for each is presented below, together with its application to EU humanitarian visas.

Substitution effect: In selecting between two similar goods, the consumer will choose the less costly option. If the price of that good becomes more expensive relative to the other good, the consumer may decide to purchase the other good instead.

*EU humanitarian visas*: In this case, the good is the same (seek asylum in the EU), but the means are different and where the substitution occur. Rather than pursue an irregular channel, the person in question applies for a humanitarian visa, seeing it as the least costly option, and applies for asylum upon arrival in the EU.

Income effect: A consumer may purchase a certain level of a good depending on his or her income. If the price of that good falls, the purchasing power of the consumer increases. The consumer may choose to consume more of that good given its lower price.

*EU humanitarian visas*: The policy options would lower the cost of seeking asylum in the EU and consequently increase the purchasing power for persons of concern. Some individuals who would have remained in the source country or a neighbouring country in the status quo may rather seek asylum in the EU (Groups B and C).

Individuals in Group A seek asylum in the EU even in the face of steep financial and non-financial costs in the status quo<sup>58</sup>. Their behaviour suggests that their resources and need for protection are high and that their demand for asylum is elastic. Thus, we would expect a shift in their choice subsequent to the introduction of a lower cost option to seek asylum in the EU.

The level of substitution may be up to 100%, where all asylum seekers who would have pursued an irregular channel now pursue the new legal channel. In practice however the level of substitution may be less due to factors such as limited awareness of the legal channel and how it works, as well as limitations in accessing it. The design and implementation of the policy option can have an impact on the extent to which the substitution effect is realized.

We assume that individuals who did not seek asylum in the EU in the status quo had comparatively lower resources or need for protection. The cost of seeking asylum in the EU is higher for these individuals and their demand for asylum is less elastic, i.e., less

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<sup>58</sup> These costs are described in Chapter 3 Section II.

sensitive to price changes. While the policy option would reduce the financial cost associated with seeking asylum in the EU, the financial cost may still remain high for these individuals. Moreover, the non-financial costs may also be substantial – for example, the social costs associated with leaving one’s community, the challenges of learning a new language and the risks of an unknown future<sup>59</sup>. A small share of these individuals may alter their behaviour and seek asylum in the EU following the introduction of the policy option. These individuals would represent Groups B and C.

A useful benchmark to assess the financial costs is the average per-capita income in high refugee-producing countries. The average annual per-capita income in Afghanistan, Syria and Iraq is estimated to be EUR 465, EUR 1,300 and EUR 3,815 respectively (World Bank, 2016)<sup>60</sup>. In comparison, Table 11 found that the expected travel cost per person from these three countries ranged from EUR 300 to EUR 1,000.

In defining these three groups and the subsequent analysis, it is important to stress that the approach is simplified and based on theory rather than practice. For example, the decision-making of persons in need may take place in stages in a sequential fashion as highlighted to some extent in Figure 6. Also, the model assumes that individuals make decisions when in practice they may be made by families. Individuals may also leverage their social network to mitigate the costs of accessing the legal channel – e.g., staying with friends and family while awaiting a decision on a visa application for Policy Options 1 or 2.

A pilot of the preferred policy option along with a robust monitoring plan could provide greater insight as to how patterns of migration may change as a result of the policy and the driving factors. While the assessment highlights a range of possible factors (see Table 10), we are unable to rank them in order of importance. The pilot could be undertaken in a well-defined, limited geographic area to allow for further investigation into the impacts of the policy option on migrant inflows and to inform the effective scale up of the policy option.

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<sup>59</sup> In economic terms, the individual’s willingness-to-pay is less than the cost of seeking asylum in the EU. Thus, the individual falls back on a lower-cost option, which may be to remain in the source country or the neighbouring country. Costs in this case may include not only financial costs but also non-financial costs.

<sup>60</sup> Amounts converted to EUR. Latest estimates for Syria were 2010, Afghanistan and Iraq 2016.

## Chapter 4: Assessment of the policy options

### Key findings

- All the policy options would lead to a reduction in irregular migration to the EU. Benefits could be gained with respect to border surveillance and management, reception and return costs of asylum seekers, organised crime and third country agreements.
- Policy Option 1 (visa waiver) offers the lowest set-up costs and the highest benefits for individual asylum seekers.
- Policy Option 2 (LTV asylum visas) and Policy Option 3 (EU asylum visas) would imply greater costs due to the human resource needs to review and process visa applications. These policy options would offer the greatest benefits for the EU and Member States. The benefits would stem from the reduction of reception and return costs in the post-arrival phase as well as a greater distinction between asylum seekers and economic migrants.

This chapter examines the second research question: what are the possible costs and benefits of the policy options for the establishment of EU legislation on humanitarian visas?

The assessment of the policy options considers several components:

- The costs of setting up the policy options (*reviewed in Section I*);
- The benefits (or reduction in costs) from the perspective of asylum seekers; and
- The benefits (or reduction in costs) from the perspective of the EU and Member States.

Policy Option 1 emerges as the preferred option from the perspective of asylum seekers considering both monetary and non-monetary factors. Policy Option 2 emerges as the best option from the perspective of the EU and Member States. While the expected benefits would be comparable, the costs to set-up Policy Option 2 would be less.

Section I reviews the costs of the policy options for Member States and the EU during the pre-arrival stage before asylum seekers reach the EU. Section II assesses the benefits of the policy options, considering both the pre-arrival and post-arrival stages compared to the status quo.

### I Costs to set up the policy options

This section reviews the expected financial costs faced by the EU and Member States during the pre-arrival phase, to facilitate the passage of an asylum seeker to the EU through a legal channel. Table 12 presents an overview of the key fixed costs to set up the system and variable costs relating to each applicant. Policy Option 1 (visa waiver) would have

minimal costs, the key one being the ETIAS security screening. The amendment to the country list in the annex of the Visa Code would represent a small fixed cost. The overall (EU and Member State) level of costs is expected to be comparable between Policy Options 2 (LTV asylum visas) and 3 (EU asylum visas), with the costs more concentrated on the EU under Policy Option 3.

**Table 12 Expected EU/Member State costs to set up the policy options**

	Policy Option 1 (Visa waiver)		Policy Option 2 (LTV asylum visas)		Policy Option 3 (EU asylum visas)	
	EU	MS	EU	Member State	EU	Member State
Fixed costs						
Update of VIS IT system to include humanitarian visa applicants/decisions-EU VIS and interoperability with EURODAC			✓		✓	
Additional staff hired for reviewing applications			✓	✓	✓	
Development of training on processing/determining visa statuses (EASO) - EUR 139,000			✓		✓	
Training of consular staff in using/coding humanitarian visa applicants and decisions				✓	✓	
Variable costs						
ETIA system screening*	✓					
Cost of processing visa applications including security screening - EUR 22-174 per visa				✓	✓	
Legal aid and translation	✓			✓	✓	
Pre-departure assistance and counselling			✓	✓	✓	
Cost per relocation - EUR 249*			✓		✓	
Appeals - EUR 870 per appeal			✓	✓	✓	

Note: the figures in the table, including their sources, are explained below.

\* These costs would only be incurred if included in the policy option. It is assumed that the EU would cover this cost.

## 1. Fixed costs

The introduction of an EU humanitarian visas scheme (Policy Options 2 (LTV asylum visas) and 3 (EU asylum visas)) would require **updating the current VIS IT system**. Consulates, external border authorities and asylum authorities already have access to this system (DG HOME, s.d.) but capabilities would need to be added to include the EU

humanitarian visa scheme and to track the applicants, number of times an individual has applied, etc. EURODAC would need to be interoperable with VIS in order to track when a humanitarian visa holder applies for asylum, as well as possible denied visa applicants at EU borders.

In addition, the effective implementation of Policy Options 2 and 3 would require the **hiring of additional staff** to facilitate the processing of visa requests. A recent evaluation highlighted the severe strain on Member States at present to process Schengen visas (ICF, 2013). An expansion of their mandate to include humanitarian visas under Policy Option 2 could exacerbate this strain. Additional staff may be hired in the consulates of Member States for Policy Option 2 or EEAS delegations for Policy Option 3. Alternatively, this demand may be fulfilled through delegations from the competent asylum authority in the Member State (Policy Option 2) or from EASO (Policy Options 2 or 3).

EASO included 200 staff members in June 2018. At this same point in time, there were 139 EEAS delegations worldwide (EEAS, s.d.), with an estimated 2,284 staff members working in these delegations at the end of 2016. The average number of staff per delegation was estimated to be 16 persons.

The costs and feasibility of hiring additional staff should be considered in light of the proposed Multiannual Financial Framework (MFF) for 2021-2027, in which the budget for migration and border issues is three times higher than the current levels<sup>61</sup>. A strong emphasis is placed on external border protection (EUR 12 billion to FRONTEX and EU-LISA as well as EUR 9.3 billion for the new Integrated Border Management Fund) as compared with the support for asylum procedures (EUR 900 million to EASO). The proposed budget for external border protection includes funding for 10,000 border guards. In June 2018, FRONTEX employed 365 staff and 1,700 border guards (European Commission, 2017). An alternative scenario could be to reduce the number of border guards hired, and also hire additional staff for EASO and EEAS delegations. For example, the number of border guards hired could be reduced to 8,000 while allowing for the hiring of 1,000 trained and experienced staff for EASO to support the implementation of Policy Options 2 and 3 (a 500% staffing increase for the agency), and another 1,000 trained staff in the EEAS delegations or Member State consulates in the source countries. The overall costs for hiring staff would remain the same while the benefits may be enhanced due to the positive implications of the policy option for external border issues (see Section II).

Lastly, staff involved with the EU humanitarian visas scheme would require **training**. EASO could develop this programme and deliver it through its platform. According to their 2016 budget, EUR 139,000 was spent on training for EASO staff. Additional training would be needed for staff at the relevant consulates and embassies of the Member States, and for EEAS delegations. Member States may incur costs for this training in terms of the time involved to participate, and travel and accommodation for in-person training. The ISF-Borders and Visa mentions regional training for consular officials in their 2014 work

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<sup>61</sup> A budgetary increase of funds for external borders, migration and refugee flows is proposed to grow from EUR 13 billion to EUR 34 billion over the funding period. [http://europa.eu/rapid/press-release\\_MEMO-18-4127\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-4127_en.htm)

programme (European Commission, 2014). In total, EUR 1.6 million was earmarked for training and two other projects.

## 2. Variable costs

From the perspective of the EU and the Member States, the set-up costs for Policy Option 1 are minimal and mainly relate to the costs of security screening. With regards to Policy Option 2, Member State consulates already issue Schengen LTV visas, some of which are in high refugee-producing countries (see Table 13). It is also important to note that the visa application procedure includes a screening procedure<sup>62</sup>.

**Table 13: Total USV and LTV visas issued in EU Member State consulates, 2016**

Source Country	Total USV (including Multiple Entry Visas, MEVs) and LTVs issued in EU Member State consulates
Afghanistan	3,504
Iraq	36,422
Syria	275

Source: DG HOME, Schengen visa statistics

An evaluation found that the costs for processing a Schengen LTV visa averaged between EUR 22-174 (ICF, 2013). The number of LTV visas issued has increased substantially since the Visa Code came into force. This high influx has been challenging for the system, resulting in cuts in staff and training, and further compounding the backlog in processing applications (European Commission, 2018). Policy Option 2 would therefore require additional staff supporting these consulates for effective implementation. Each source country would be likely to host consulates from at least one Member State increasing access for asylum seekers as well as distributing the costs across Member States. A review of three high refugee-producing countries confirmed this assertion (see Table 14).

EEAS delegations do not at present issue Schengen LTV visas, but their mandate to do so would cover this under Policy Option 3. For this reason, the cost of visa issuance was assumed to have a higher cost under Policy Option 3 than Policy Option 2. In addition, a source country would not have more than one EEAS delegation resulting in lower access for asylum seekers.

The provision of **legal aid and translation** would facilitate the visa application process under Policy Options 2 and 3. These services may be delivered through cooperation with external service providers e.g. NGOs.

All policy options may include **pre-departure assistance and counselling**, which is presently used in the resettlement process (see Figure 8). For example, the screening stage could draw upon the UNHCR's Resettlement Handbook with regard to the identification of the most vulnerable and urgent cases, training and guidance on interviewing candidates

<sup>62</sup> According to the Visa application handbook, when a visa application is examined, they assess whether the applicant presents a risk to the security or public health of the Member States (among other things also assessed).

for visas, and pre-departure assistance and monitoring (UNHCR, 2011). Several key differences should however be noted. First, individuals who receive an EU humanitarian visa would have to finance their own travel to the EU while resettled individuals would not. Second, the recipient of an EU humanitarian visa would lodge his or her request for asylum in the EU. The application would not be lodged and processed prior to travel.

**Figure 8: Six steps in the process for resettlement**



Source: European Resettlement Network, *The resettlement process*, <https://www.resettlement.eu/journey/resettlement-process>

Policy Option 2 (LTV asylum visas) includes the possibility for relocation. This is important because not all Member States are represented in third countries, and individual asylum seekers may be more likely to apply for a humanitarian visa at the consulate or embassy of a preferred country of destination. Table 14 indicates the Member States present in the three high refugee-producing countries that can issue visas. Thus, a relocation scheme is needed to ensure that all Member States, including those not represented in the source country, also bear the responsibility of hosting a fair share of asylum seekers. Relocations would not be necessary under Policy Option 3 as the EEAS delegation would decide on the destination Member State.

Relocation costs would involve a cost per transfer (assumed to be EUR 259 per individual (ICF, 2015)) and the number of applicants who would need to be relocated. It is expected that a high share will require relocation (more than 60%).

Relocation under Policy Option 2 would differ from Dublin transfers under the status quo in one key way. In the status quo, there are significant waiting periods due to disagreements between Member States about who bears responsibility to examine the asylum application as well as other factors. Under Policy Option 2, however, a **consensual agreement** can be reached with the asylum seeker about the final destination prior to departure. By knowing and accepting the final destination Member State, the asylum seeker can make the decision about whether or not to embark on the journey. The costs associated with waiting periods for transfer, secondary movements and multiple applications could potentially be eliminated.

**Table 14: Member States and EEAS representation in the three countries of focus, 2016**

Source country	Member States represented via consulate or embassy
Afghanistan	Czech Republic, Denmark,, France, Germany, Italy, the Netherlands, Spain
Iraq	Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Spain
Syria	Czech Republic, the Netherlands, Poland

The last category of costs reviewed were **appeals to visa decisions**. The cost of appeals was assumed to be similar to the transfer appeal cost, which was estimated at EUR 870 per applicant (ICF, 2015). The rate of appeal is expected to be low, similar to the existing visa appeal rate of only 1.2% (ICF, 2013). Participants in the appeal process would be a member of EASO, a consular staff member from the Member State or the EEAS delegation in question, and a staff member of the UNHCR. Under Policy Option 2 (LTV asylum visas), the cost is assumed to be jointly covered by the EU and the Member State, whereas it would be fully covered by the EU under Policy Option 3 (EU asylum visas).

## II Benefits of the policy options from the perspective of individuals, the Member States and the EU

The policy options under consideration offer several advantages over the status quo. First of all, the policy options also offer greater management and control of asylum inflows. From the perspective of the asylum seekers, the policy options introduce **greater predictability and safety to exercise their right to seek asylum**. Policy Options 2 and 3 go a step further to promote the distinction between asylum seekers and economic migrants, which can lead to a **more effective and appropriate response to mixed inflows**. Under these two options, an asylum seeker would arrive in the EU with documentation (the visa) indicating that he or she is a candidate for asylum. Economic migrants would not arrive with such documentation. This increased clarity could potentially lead to behavioural changes among economic migrants.

Table 14 presents the **findings from the assessment from the perspective of the individual asylum seeker**. Under all cost categories, the policy options fare more positively than the status quo. In the pre-arrival stage, the greatest positive impact would be observed with regards to trafficking and exploitation. Benefits to health would also be observed primarily in terms of reduced mortality risk, but the mental stress due to the asylum application and the challenges of integration would remain.

Some differences across the policy options were noted. First, Policy Option 1 was comparable to the status quo in the post-arrival phase. This is because asylum seekers could travel to the preferred Member State rather than in accordance with a scheme to ensure fair burden sharing and responsibility across the Member States. Thus, some Member States would likely receive a high share of asylum seekers that would place a strain on reception centers and delay the integration of asylum seekers. Second, the assessment of the policy options differ slightly in terms of access to the procedure. Under Policy Option 1, individuals do not need to apply for a visa and thus access is high while Policy Options 2 and 3 require visas. The places to apply for such a visa however is more limited for Policy Option 3 (e.g. 1 EEAS delegation in the country as opposed to more than one Member State consulate under Policy Option 2). Thus, we considered Policy Option 1 to offer the greatest access while Policy Option 3 would offer the lowest access, although it would certainly be better than the status quo where there is very limited access (e.g. resettlement and Member State humanitarian visa schemes).

**Table 15: Comparison of policy options with the status quo – individual’s perspective**

Stage	Cost	Policy Option 1 (Visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
Pre-arrival	Travel costs to EU	+++	++	++
	Access to procedure for legal channel	+++	++	+
	Risk of trafficking and other exploitation	+++	+++	+++
	Risk of mortality and poor health	++	++	++
Arrival	Poor reception	0	+++	+++
	Delays to integration	0	+++	+++
	Risk of entry into formal market	0	++	++

+ = minimal positive (cost-saving) impact  
 ++ = stronger positive (cost-saving) impact  
 +++ = substantial positive (cost-saving) impact  
 - = negative (cost increasing) impact  
 0 = no change from status quo

Table 16 presents the **findings from the assessment from the perspective of the EU and Member States**. The policy options were assessed against the set of impacts considered in the assessment of the status quo in Chapter 2.

All the policy options score better than the status quo. With regards to subsidiarity, Policy Options 2 and 3 scored higher due to the substantial financial savings that could be expected due to fewer transfers, appeals, secondary movements and returns. Other benefits could also be expected in terms of lower costs related to the enhanced management of irregular migration including lower costs for shipping, security and border management. Border Member States such as Italy and Greece would benefit substantially from Policy Options 2 and 3 due to a fairer sharing of costs across the EU. **Greater efficiency would also be gained** through better differentiation between asylum seekers and economic migrants, greater control over asylum inflows and greater predictability in asylum procedures. Overall, these findings suggest that the scale of impact would be significant.

With regard to **proportionality**, Policy Option 1 emerges as the strongest option given the higher administrative costs that would accompany the introduction of Policy Options 2 and 3. A key driver of these costs is the human resources available, both in person and remotely, to review applications for EU humanitarian visas, however the number of staff needed is not known at this time. Given the potential financial gains, however, the new administrative costs may well be justified and commensurate with the objectives to be achieved. **The use of remote services and staff to support the processing of visas in source countries may promote economies of scale** and operational efficiency. Good practices may be gained from evidence from the six steps of the resettlement process. NGOs and other civil society actors may be able to contribute at specific steps, e.g. pre-departure assistance.

A pilot of the EU humanitarian visa scheme could offer greater insight into the proportionality of the additional administrative costs.

**Table 16: Comparison of policy options with the status quo – Member State and EU perspectives**

	Policy Option 1 (visa waiver)	Policy Option 2 (LTV asylum visas)	Policy Option 3 (EU asylum visas)
Irregular migration	+	++	++
Security/terrorism	+ <sup>1</sup>	++	++
Surveillance and border management	+	++	++
Private shipping – search and rescue missions	+++	+++	+++
Costs of asylum procedure	0	++	+++
Costs for return	0	+	+
Uneven distribution of reception costs	0	++	++
Harmonisation of asylum procedure across Member States	0	+	++
Third country agreements	++	+++	+++
Development cooperation	++	+	+
Organised crime	+	+++	+++

+ = minimal positive (cost-saving) impact

++ = stronger positive (cost-saving) impact

+++ = substantial positive (cost-saving) impact

- = negative (cost increasing) impact

0 = no change from status quo

<sup>1</sup> Assuming that a security screening process such as ETIAS is employed.

All policy options would support the **reduction of irregular migration** to the EU with potential to reduce the costs associated with surveillance and border management and search and rescue operations. This reduction would stem in large part from the substitution effect described in Chapter 3. A large decrease in the number of transits via the Mediterranean Sea and via smugglers may be expected with any of the policy options. As noted earlier, more than 1.8 million irregular border crossings were detected in 2015, hindering the proper functioning of the Schengen area (European Commission, 2018). In comparison, there were an estimated 1.26 million asylum applications lodged in 2015

(Eurostat, 2015). The majority of these applications would likely have been made by asylum seekers who traveled to the EU via an irregular channel. The shift of asylum seekers from the irregular to the regular channel may thus lead to a substantial reduction in irregular migration. Policy Options 2 and 3 would go an additional step to increase the **distinction between asylum seekers and economic migrants** prior to arrival in the EU and support an appropriate response for each group.

For **border security and surveillance**, it is expected that Policy Options 2 and 3 would have a positive impact, as the EU and Member States would know the identity of the individuals (including name, basic information, and fingerprints in VIS and EURODAC systems), as well as the grounds for their claim to humanitarian help. They would also have already gone through a form of security check before being issued the humanitarian visa. The expected result would be a decrease in necessary EU Border and Coast Guard Agency (Frontex) missions and national resources to handle irregular migrants, as well as a decrease in the need for temporary internal border controls. As Figure 4 shows, the Frontex budget has more than doubled since 2015 for border management operations. Policy Options 2 and 3 would allow the budget to return to 2015 figures (i.e. to reduce by over EUR 100 million) in addition to the decrease in the numbers of return operations needed. The estimated EUR 106 million for the temporary reintroduction of border controls within Schengen would also be an additional saving. This positive impact may be slightly tempered by the continued need for Frontex to handle economic migrants, as per the status quo, although these figures are not expected to surpass 2015 budget levels for Policy Options 2 and 3.

The need for **private shipping search and rescue operations** would presumably decrease under all three policy options, given the expected decrease in irregular crossings. Assuming the 2016 number of merchant ship search and rescue operations (about eight, see Figure 2) and the upper bound of cost per operation (EUR 216,000, see Chapter 2), the result would be smoothed commercial shipping flows and a cost saving of EUR 1.7 million per year. This would be compounded by continued NGO involvement in search and rescue closer to third country borders. The decrease would also benefit border state coast guards.

With regards to the **asylum procedure**, the costs would decrease under Policy Options 2 and 3 due to the pre-arrival agreement on the Member State responsible to examine the claim for asylum. The expected gain would be higher for Policy Option 3 due to the direct travel between the source and destination country, whereas under Policy Option 2 there could be a relocation mechanism. The assessment assumes that individuals with an EU humanitarian visa (Policy Options 2 and 3) will be able to **apply for asylum immediately upon arrival** from the source country or subsequent to their expedient relocation to another Member State (should relocation be included in the policy). This would differ from the *statuo quo*, where there is a high level of requested transfers, with long wait times that drive up costs for Member States and delay decisions for asylum applicants. The provision of pre-departure support, including a review of the destination country of the asylum seeker, would imply a level of consent, similar to resettlement. The building in of a consensual agreement between the EU and asylum seekers in the pre-arrival phase may also lead to a lower level of appeal, secondary movement and multiple applications, which have high associated costs (see Annex for more information).

The costs for return may decrease to some extent due to the screening process introduced by the options. Policy Option 1 would offer the lowest level of screening based solely on security risk while Policy Options 2 and 3 would offer a higher level of screening to gather information to support a claim for asylum. This screening process is assumed to identify individuals with a strong case for asylum protection, making them **more likely to receive a positive decision** and integrate more quickly into society. Thus, the screening may result in a higher recognition rate in the post-arrival phase, resulting in fewer rejected asylum applicants and lower costs for their return to the source country. A lower rejection rate also implies a lower risk of irregular stay in the EU subsequently.

The **uneven distribution of costs for reception** evident under the status quo would not be expected to improve under Policy Option 1. It is likely that asylum seekers will concentrate their arrivals on a few Member States rather than distribute evenly across the EU. Experience in the status quo shows that asylum applications are concentrated in a few Member States that are preferred over others. Under Policy Options 2 and 3, however, the uneven distribution may be rectified due to pre-arrival agreements regarding the Member State with responsibility to examine the asylum claim. This assessment is contingent on several features of the policy options. With regards to Policy Option 2, it is contingent on an effective relocation mechanism. For both Policy Options 2 and 3, the positive assessment hinges on the development and utilisation of a fair and transparent system to assign Member State responsibility to examine asylum claims.

The **harmonisation of asylum procedures** across Member States may also change as a result of the policy options. No coordination is required under Policy Option 1 and therefore the situation would remain the same. However under Policy Option 2, Member States may need to coordinate to review and accept relocation requests. Policy Option 3 would lead to the greatest level of harmonisation as it would require Member State cooperation from the time that an application is submitted. The use of EASO support under Policy Options 2 and 3 could also promote harmonisation across Member States.

The risk of **security and terrorism** would be mitigated under the policy options due to the security screening of arrivals (ETIAS for Policy Option 1 and the Schengen visa procedure for Policy Options 2 and 3). If Policy Option 1 is introduced without such a screening, the security risk may rather increase as compared with the *status quo*. Simply put, without such a procedure the option would offer no way to monitor asylum inflows nor would it provide grounds for the existence or validity of a humanitarian claim. Thus, individuals who are not asylum seekers could exploit the policy option. Policy Options 2 and 3 would lower the risk comparatively more due to the greater control they would exert on asylum inflows in terms of determining the Member State responsible for investigating the asylum claim.

**Third country agreement** costs would be expected to decrease for all options, and particularly for Policy Options 2 and 3. With humanitarian visas, there would be less of a need for EU funding to control borders or manage irregular migrants, similar to the EU-Turkey Statement. This would amount to a significant reduction in the annual EUR 1.5 billion provided under this particular deal. In addition, training third country coast guards/officials would be less necessary, given the expected decrease in search and rescue operations and irregular crossings, as experienced under the EU Emergency Trust Fund

for Africa. Here, only a portion of the EUR 833 million would decrease, as the fund also goes towards economic development and resilience programmes. Policy Option 1 would also benefit from these decreases, however, the EU may work to establish new agreements to curb possible security concerns in countries with suspended visas.

**Development cooperation** may go largely unchanged for Policy Options 2 and 3, as it would still be necessary to present humanitarian visas as a safe and preferred option to using smugglers. This would mean that much of the estimated EUR 1 million mentioned in Chapter 2 would still be need for these options. This would not be the case under Policy Option 1, as there would be no new visa processes or benefits to champion. However, the estimated EUR 2.5 billion in emergency funding aimed at stemming migration flows would significantly reduce in all three options.

Finally, the EU status quo of **organised crime** would improve across all options (although more so for Policy Options 2 and 3, given the decrease in demand for smuggling and the consequent decrease in trafficking, torture, etc.). According to estimated costs of the status quo, the EU would save billions of euro on pursuing human traffickers, as well as through the decrease in expected irregular stay migrants expected to fuel EU black market costs. Policy Option 1 provides less of an improvement on the status quo, as economic migrants (who do not qualify for asylum) may increase and grow the informal economy. However, for all options, improvements could be curtailed if issues such as denied asylum requests or exaggerated transfer delays were to become an issue for humanitarian visa holders as well.

## Conclusions

The economic assessment of the proposal for an EU scheme on humanitarian visas offers several main conclusions as presented below.

- **All the policy options, if well-designed and implemented, may lead to a reduction in irregular migration.** A large share of individuals traveling to the EU via irregular means would be expected to pursue the new legal option instead. This would generate benefits for the EU and Member States in terms of costs related to surveillance and border management, search and rescue missions and organized crime. Asylum seekers would also reap benefits in terms of reduced risks of mortality, violence and trafficking. A well-implemented policy option that offers greater access to the new legal channel could facilitate a greater decline in irregular migration.
- **The number of additional asylum seekers to the EU would be relatively small.** Under the reasonable assumption that asylum seeking is relatively “inelastic” to its cost, it is expected that the number of people who will apply for an EU Humanitarian Visa, among those who would have otherwise stayed in the country of origin, is relatively small. This especially applies to Policy Options 2 (LTV asylum visas) and 3 (EU asylum visas). Significant costs would remain, which would limit the appeal of seeking asylum in the EU, even where a legal channel is offered. The stress and social costs (e.g. leaving one’s community behind) would be high. The financial cost would be less, but may still be quite significant for individuals, particularly if they are from more vulnerable populations.
- **Under all three policy options considered, the adverse impacts faced by asylum seekers in the pre-arrival stage are practically eliminated.** These impacts include the risk of mortality, trafficking and exploitation, and payment of smuggling fees. The financial costs to seek asylum in the EU via any of the three policy options are considerably less than those of irregular entry.
- **The costs for implementing Policy Option 1 (Visa Waivers) are minimal, while the costs for the other two Policy Options (LTV asylum visas and EU asylum visas) are more substantial.** For these two policy options, the costs primarily relate to upgrading information technology, increasing human resources, and providing training. A key constraint is the availability of trained staff in the source countries, as well as remotely, to facilitate the process from visa application to security clearance to departure. Boosting the human resources of EASO could facilitate Policy Options 2 and 3. Good practices may be gained from evidence from the six steps of the resettlement process. NGOs and other civil society actors may be able to contribute at specific steps, for example, by providing pre-departure assistance. The use of technology and remote staff to support the review and processing of visa applications may also promote economies of scale and greater operational efficiency.

- **Policy Options 2 and 3 (LTV asylum visas and EU asylum visas) offer greater financial benefits to the EU on a per-asylum seeker basis.** These benefits are primarily gained from the following: 1) elimination of the waiting period associated with Dublin transfers; 2) significant reduction in secondary movements and multiple applications; and 3) higher recognition rate. Policy Option 1 would not offer financial gains along these dimensions.
- **A controlled pilot of the preferred policy option accompanied by a robust monitoring plan could generate more evidence.** Specifically, data generated by the pilot could be used to test the 'floodgates' hypothesis as well as review the costs and benefits of the policy.

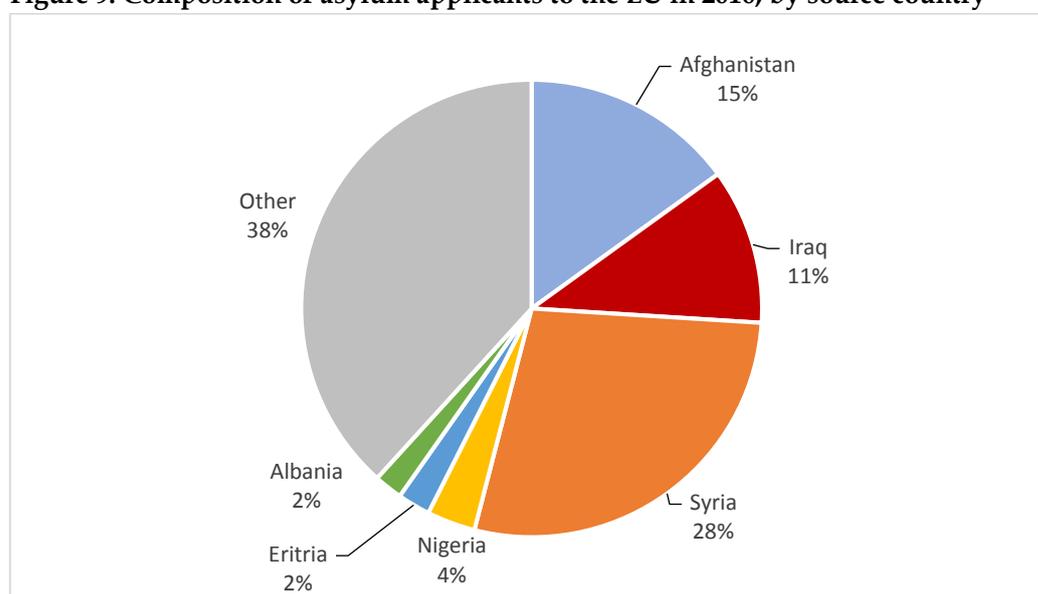
## Annex

This annex provides additional information that supported the economic assessment.

### Source countries of asylum seekers to the EU

An estimated 3% of persons of concern sought asylum in the EU in 2016 (see Chapter 2). Figure 9 presents a decomposition of this population by source country. The most common source countries in 2016 were Afghanistan (15%), Syria (28%) and Iraq (11%). Some elements of the analysis draws on specific figures from these three countries, which together represent over half of asylum seekers to the EU.

**Figure 9: Composition of asylum applicants to the EU in 2016, by source country**



Source: Eurostat, 2017.

NOTE: 'Other' is composed of nationalities with less than 2% of the total.

The assessment of several categories of benefits related to the policy options were supported by quantitative estimates (see Table 16). The costs of asylum procedure was supported by quantitative estimates of the costs related to multiple applications and the costs of processing an asylum application. The costs for returns was supported by quantitative estimates for the cost of voluntary return. The calculation of these estimates is presented below.

### Cost of multiple applications

EU-LISA, 2017 (Eurodac Statistics) provides statistics on the number of foreign hits in EU Member States in 2016. Foreign hits refer to individuals who lodged an application in one Member State and subsequently attempted to lodge an additional application in another Member State. This is referred to as multiple applications. In 2016, there were an estimated 295,171 multiple applications.

### Cost of processing an asylum application

Estimates for the cost of processing an asylum application are presented in HOME, 2013. An estimate was constructed for four anonymous countries. The estimates took 2016 values, using the consumer price index. Table 17 provides more information.

**Table 17: Cost of processing an asylum application**

	Cost, 2013 (EUR)	Cost, 2016 (EUR)
Estimate 1	2,384	2,403
Estimate 2	3,602	3,630
Estimate 3	5,200	5,241
Estimate 4	8,000	8,063
Average	4,797	4,834

Source: DG HOME, 2013

### Cost of voluntary return

The cost of voluntary return was estimated based on information from the Assisted Voluntary Return and Reintegration (AVRR) Programme managed by IOM. The AVRR 2016 Key Highlights indicated that, in 2016, 98,403 individuals received assistance. The budget line for the AVRR programme in the 2018 Programme and Budget was EUR 55,062,100. The budget was divided by the number of beneficiaries, giving an estimated figure of EUR 560 per voluntary return.

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The EU and its Member States' failure to offer regular entry pathways to those seeking international protection undermines the achievement of their Treaty and fundamental rights obligations, resulting in 90 % of those granted international protection reaching the European Union through irregular means. This situation has severe individual impacts in terms of mortality and damage to health, negative budgetary and economic impacts. Finally, EU legislation on humanitarian visas could close this effectiveness and fundamental rights protection gap by offering safe entry pathways, reducing irregular migration and result in increased management, coordination and efficiency in the asylum process, as well as promoting fair cost-sharing.

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