

STUDY

Requested by the LIBE committee



The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the LIBE Committee, provides expertise on the legal, institutional and technical implications of the UK's withdrawal from the EU in the field of international protection. More specifically, this analysis presents the current situation with regard to UK-EU cooperation in the field, the legal standards that will be applicable to the UK following its withdrawal, the areas of common interest in the field and the potential forms of future cooperation.

ABOUT THE PUBLICATION

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LIST OF ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom, Security and Justice
AMF	Asylum and Migration Fund
AMIF	Asylum, Migration and Integration Fund
API	Advance Passenger Information
CAMM	Common Agendas on Migration and Mobility
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EAOm	European Agenda on Migration
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard Agency (Frontex)
ECA	European Community Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
EMN	European Migration Network
EP	European Parliament
EU	European Union
EUAA	European Union Agency for Asylum
EURAs	European Union Readmission Agreements
Frontex	European Border and Coast Guard Agency (EBCG)
GAMM	Global Approach to Migration and Mobility
ILO	Immigration Liaison Officer
JHA	Justice and Home Affairs
MPs	Mobility Partnerships
RABITs	Rapid Border Intervention Teams
RPP	Regional Protection Programme
RSF	Regional Structural Funding
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TF50 European Commission Article 50 Taskforce

WA Working Arrangements

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EXECUTIVE SUMMARY

Background

Following the 2016 UK referendum on EU Membership, the **UK Government formally invoked Article 50 of the Treaty on European Union (TEU) on 29 March 2017**, officially notifying the EU of the UK's intent to depart the Union two years later. As such, after 29 March 2019, the UK will no longer be an EU Member State and will, instead, become a third country with a longstanding history of cooperation with the EU.

Furthermore, based on the Lisbon Treaty negotiations, the UK has been able to selectively participate in EU legislation proposed and adopted in the area of freedom, security and justice, including the legislation underpinning the Common European Asylum System (CEAS) and international protection more generally. Under this framework, the UK has opted-in to the first, but not second, phase of the CEAS Qualification, Asylum Procedure and Reception Condition Directives, which have been transposed into UK law. In addition, the UK participates in the Dublin and Eurodac Regulations, the Temporary Protection Directive (although it has never been used in practice), the Asylum, Migration and Integration Fund (AMIF) and the European Asylum Support Office (EASO). Moreover, the UK has cooperated closely with other EU Member States through Frontex operations and is part of the European Migration Network (EMN), the Immigration Liaison Officers (ILOs) Regulation and EU Readmission Agreements (EURAs).

Given the unique position that the UK is already granted through the opt-in system, the transition to a new relationship might be easier to achieve compared to other fields in which the UK fully participates. However, if no withdrawal agreement is reached by 29 March 2019, the UK will experience a 'no-deal' Brexit. In such a scenario, all EU laws not retained in accordance with the UK's European Union (Withdrawal) Act (26 June 2018) will cease to apply to the UK. However, if an agreement is reached, it will likely include a transition period lasting until 31 December 2020, as stipulated in the draft withdrawal agreement published by the EU and UK negotiators on 19 March 2018. During such a transition period the whole of the EU *acquis* will continue to apply to the UK.

Aim of this Study

The purpose of this study is **to provide expertise to the LIBE Committee of the European Parliament on the legal, institutional and technical implications of the UK's future relationship with the EU after Brexit in the field of international protection.** This is achieved by examining legal standards applicable to the UK following Brexit in light of current collaborations and areas of common interest, and by reviewing existing forms of cooperation between the EU and other third countries; in particular, considering, where relevant, the models of Norway and Switzerland. The study aims to increase awareness on the possible consequences of Brexit in the field of international protection and provide potential options for future cooperation in the areas of asylum, resettlement, return and readmission.

Main findings

To date, negotiations on the framework for the future relationship between the UK and the EU have not covered the field of international protection and it is clear that **limited focus has been placed on the topic.** The **EU institutions and, in particular, the Taskforce on Article 50 have not published anything** on the future framework of cooperation in the field of international protection. Moreover, the European Council guidelines do not explicitly provide for a mandate on the topics of asylum, resettlement, return and readmission. However, the question remains whether paragraph 9 of the Council guidelines, which states that the 'future partnership should address global challenges', could also apply to the area of international protection.

The **UK**, through its White Paper on *The Future Relationship between the United Kingdom and the European Union*, has indicated that 'it is vital that the **UK and the EU establish a new, strategic**

relationship to address the global challenges of asylum and illegal migration', echoing the wording of the European Council guidelines. This White Paper further details the UK's interest in continued cooperation, in particular with regard to Frontex, Europol, Eurodac and the development of a Dublin-like legal framework.

A primary area with significant implications in the area of international protection is the **Dublin system** and, interwoven with Dublin, access to the **Eurodac database**. In this regard, the EU and the UK both have strong interest in continued cooperation. In contrast to the first-round CEAS Directives, the Dublin and Eurodac Regulations will cease to apply following Brexit in the case of a no-deal. In such a scenario, there will be no backup option to transfer asylum seekers to or from the UK under international law and uncertainty will persist in relation to pending transfers. While the UK has expressed interest in a legal mechanism to be able to return asylum seekers to their first point of entry for processing, the EU may wish to establish a Dublin-like system to carry out Dublin transfers for the purpose of family reunification. If the UK is no longer able to remain in the current Dublin III system, an agreement similar to those concluded with Dublin/Schengen associated countries could be established between the UK and the EU for all or specific criteria (e.g. family reunification) for the application of the Dublin system.

Additionally, Brexit might also impact the UK's participation in the **Immigration Liaison Officers Regulation**, within which the UK is currently a major contributor. The implications include the fact that the UK will no longer have access to non-UK contributors to the network, leading to a loss of immigration intelligence on third countries that is shared through the network. On the other hand, the EU will lose access to UK expertise and resources.

Moreover, with regard to the UK's future cooperation with EU bodies such as **EASO and Frontex**, both the EU and the UK would benefit from future cooperation, as the UK is a major contributor in terms of resources and expertise, and both agencies give the UK access to important data and information on legal and illegal migration to and from Europe. The options for continued engagement are however relatively simple and, although it is unlikely that the UK will continue to have the current level of involvement, the agencies have the possibility to conclude Working Arrangements with third countries. The UK will also no longer be part of **EU readmission agreements** with third countries and will need to negotiate separate bilateral readmission agreements. Also related to readmission, the UK and the EU, following Brexit, will have **no means for returning illegally staying citizens on the other territory**.

The study findings suggest that **none of the existing legal mechanisms and policy measures which are used to support the cooperation between the EU and other third countries in the field of international protection are exactly replicable for the UK**. Following Brexit, from being a Member State, the UK will become a third country with a longstanding history of institutionalised cooperation with the EU in the area of international protection, which is likely to distinguish it from other third countries. New arrangements will therefore need to be developed that are tailored to the unique position that the UK will have as an ex-Member State.

A key challenge will be to ensure the protection of asylum seekers' and refugees' human rights in the UK following Brexit, as the UK will neither have obligations under the EU Charter nor be subject to CJEU jurisdiction after exit day unless explicitly agreed as part of an arrangement for continued cooperation in the area of international protection. If the UK continues to implement the content of the first-round CEAS Directives, however, the existing **standards for reception, qualification for international protection and the procedures for granting refugee status to asylum seekers will continue to apply**. However, although the UK will remain committed to the 1951 UN Convention relating to the status of Refugees and the European Convention on Human Rights (under the jurisdiction of the European Court of Human Rights), there are **concerns that the UK will not replace the elements of the EU Charter that are not covered by these international commitments**, leading to reduced human rights protection in the UK. Moreover, there is no guarantee that the UK will continue to align its asylum standards with those of the EU in the future.

Policy recommendations

Overall, Brexit will have **important implications in the field of international protection and more work is needed to ensure preparedness at all levels for the consequences of the withdrawal of the UK from the EU**. On the basis of the findings, the study makes the following recommendations to ensure full preparedness following Brexit:

- The **European Parliament should include an item on the agenda of the LIBE Committee** to discuss the implications of Brexit for asylum, resettlement, return and readmission.
- The **European Parliament should call on the European Council to clarify the mandate of the Article 50 Taskforce** (i.e. whether or not it includes future cooperation in the field of international protection).
- The **European Parliament should call on the European Commission to develop preparedness notices** detailing how Brexit will modify laws and policies in the area of international protection.
- The **European Parliament should call on the European Commission, in close consultation with relevant EU agencies and bodies, to clarify its position on continued cooperation with the UK** in the area of international protection.
- The **LIBE Committee should call on the European Parliament's Brexit Steering Group to comment on**, and the European Commission's **Article 50 Taskforce to respond to, the UK Government's July 2018 White Paper**.
- The **European Parliament, in combination with other relevant authorities, should seek to ensure commitment from the UK to the human rights** that remain shared and that find expression in the European Convention on Human Rights (ECHR). Furthermore, it is recommended that a **'guillotine clause' related to the protection of the human rights of asylum seekers could be included in any cooperation agreements** concluded on the matter between the UK and the EU.
- Finally, it is recommended that the **Commission's Article 50 Taskforce works to ensure the development and inclusion of robust enforcement and dispute resolution mechanisms** to ensure legal certainty in the UK's continuing relationship with EU law.

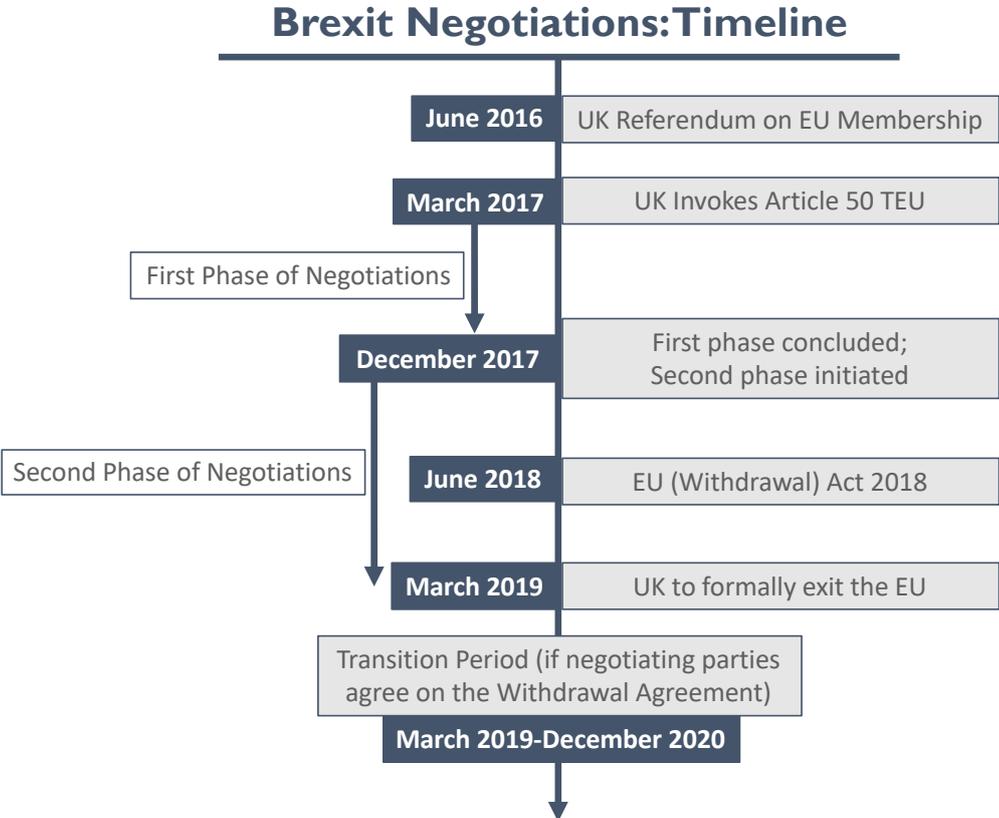
1. INTRODUCTION

Following the UK referendum on EU membership – held on 23 June 2016 – the British Prime Minister, Theresa May, formally invoked Article 50 of the Treaty on European Union (TEU) on 29 March 2017, officially notifying the EU of the UK’s intent to depart the Union two years later, on 29 March 2019. In December 2017, the European Commission concluded that sufficient progress had been made with regard to the first stage of the withdrawal negotiations, which concerned the Brexit financial settlement, citizens’ rights and the Irish border. As a result, the negotiations have progressed to the next stage, focusing on the withdrawal agreement, the transition phase and the framework for the future relationship between the UK and the EU.

To date, the primary output of the second phase of negotiations is the colour coded **‘Draft Agreement on the withdrawal of the United Kingdom from the EU’** (the draft withdrawal agreement), published on 19 March 2018. Article 121 of this draft withdrawal agreement details a transition period (agreed upon at the negotiators’ level, but subject to technical legal revisions) lasting from the entry into force of the withdrawal agreement until 31 December 2020. Article 122 details the terms of the transition period, stipulating that the whole of the EU *acquis* which was previously applicable to the UK will continue to apply to the UK during the transition period, although the UK will no longer be part of the decision-making. The second phase of the negotiations also focuses on the framework and content of future relations following the transition phase.

Furthermore, on 26 June 2018, royal assent was given to the **UK’s Act to Repeal the European Communities Act (ECA) 1972** and make other provisions in connection with the withdrawal of the United Kingdom from the EU, commonly known as the EU (withdrawal) Act 2018. Figure 1 illustrates the timeline of the Brexit negotiations.

Figure 1. Timeline of Brexit negotiations



In relation to the **field of international protection, the UK has a unique relationship with the EU legislative framework**. As stipulated in '**opt-in' Protocol 21** to the EU Treaties, the UK does not take part in legislation proposed or adopted pursuant to Title V of the Treaty on the Functioning of the EU (TFEU), unless it decides to opt-in within three months of the proposal or initiative being presented to the Council. Title V covers the Area of Freedom, Security and Justice (AFSJ), including elements related to international protection. Furthermore, if the UK wishes to participate, there is no possibility of opting out later.

Additionally, **Schengen 'opt-out' Protocol 19** to the TFEU and the Treaty on European Union (TEU) stipulates that the UK has the right, at any time, to request to participate in some or all provisions of the Schengen *acquis*. Article 5 of Protocol 19 states that, in areas of the *acquis* in which the UK participates, the UK is required to opt-out of a proposal or initiative within three months of its publication.

As a result of these negotiated positions, the UK has transposed a unique selection of EU legislation in the field of international protection. For instance, as further detailed in section 3.1, the UK opted-in to the first phase of legislation implementing the Common European Asylum System (CEAS), but not the second phase.

Additionally, the **topic of migration featured prominently in the Brexit campaign**, with the perception that the EU has been unable to control migration featuring as a key tenet of the 'Leave' campaign. Considering the prominence of the topic in the UK political arena, it is not surprising that the UK Government proposed arrangements for the future UK–EU relationship in the field of 'asylum and illegal migration' in its July 2018 **White Paper *The Future Relationship Between the United Kingdom and the European Union***.¹

However, at the **EU level, limited discussions on international protection** in relation to Brexit have been held. Furthermore, it is notable that the Council guidelines providing the EU's Taskforce on Article 50 with its mandate do not explicitly mention international protection.

Furthermore, the UK's withdrawal from the European Union will result in a **new EU external border** for the internal market, which will require a new framework to manage migration.

It is in this context that the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) has commissioned the present study. The study's **general objective is to provide expertise to the LIBE Committee on the legal, institutional and technical implications of the UK's future relationship with the EU after Brexit in the field of international protection** (encompassing the fields of asylum, resettlement, return and readmission).

In particular, this study has the following specific objectives:

- **Specific objective 1:** Complete listing of relevant EU legislation currently applying to the UK in the field of international protection.
- **Specific objective 2:** Overview of legal standards applicable to the UK in the field of international protection after its withdrawal from the EU.
- **Specific objective 3:** Analysis of prerequisites for continued UK participation in relevant areas of common interest in the field of international protection.
- **Specific objective 4:** Analysis of possible forms or models of continued UK participation in relevant areas of common interest.
- **Specific objective 5:** Analysis of the future role of the CJEU in terms of continued jurisdiction and applicability of its case law.

¹ UK Government (2018) *The Future Relationship Between the United Kingdom and the European Union*.

Methodology

To achieve the study objectives, an **extensive desk research exercise** was undertaken, complemented by **interviews** with relevant stakeholders.

- **Desk research:** the initial data collected for the study was through a comprehensive desk research exercise. The study team examined relevant documentation in relation to existing EU legislation, policies and activities in the field of international protection, covering the areas of asylum, resettlement, readmission, as well as return. Furthermore, published positions and commentary on the post-Brexit relationship in these areas have been reviewed. This exercise primarily enabled the completion of specific objectives 1 and 2, while providing a basis of information for specific objectives 3 and 5 in particular. Additionally, the study team examined documentation related to the forms and models of cooperation implemented in these areas by Schengen/Dublin associated countries, focusing on Norway, Denmark and Switzerland. This exercise provided extensive support to specific objective 4. A full bibliography is presented in Annex II.
- **Interviews:** Significant challenges were encountered in securing interviews with key stakeholders due to a combination of: i) stakeholders declining to participate; and ii) the time period for the completion of the analysis, which fell over the summer holiday period. To mitigate this challenge, prominent non-governmental organisations (NGOs) and academic experts were interviewed. Furthermore, the study team increased the involvement of its study experts (Prof. Steve Peers, Dr Jorrit Rijpma, Dr Natascha Zaun and Dr Jan-Paul Brekke). As such, input was provided by eleven institutions and individuals with extensive knowledge of the topic areas and the possible options for a post-Brexit relationship in these areas. A list of organisations and individuals interviewed is presented in Annex I.

Following the analysis of data collected through the above means, the study team, study experts and a representative of the European Parliament met for an **interactive workshop** to discuss the study findings, conclusions and recommendations.

Report structure

The study mainly focuses on the future relationship of the EU and the UK after the UK has withdrawn from the EU (i.e. post Brexit). However, relevant documentation and developments from the negotiation phase have also been considered.

The remainder of the study is structured as follows:

- **Chapter 2.** Provides the background and context to the study, primarily including an overview of the **EU legal framework** in the field of international protection, covering asylum, resettlement, return and readmission;
- **Chapter 3.** Details the **current UK participation in EU legislation and policies in the field of international protection**, including during the transition period;
- **Chapter 4.** Presents an **overview of the international and national legal standards that will be applicable to the UK** following its withdrawal from the EU;
- **Chapter 5.** Presents an **overview of the EU and UK positions on the future relationship in the field of international protection**, highlighting common areas of interest;
- **Chapter 6.** Provides an **overview of the forms of potential future EU–UK cooperation after Brexit** in relation to the common areas of interest identified in section 5, including details of existing models of cooperation with non-EU countries;
- **Chapter 7.** Presents **conclusions and policy recommendations**.

In addition, there are two appendices, as follows:

- **Appendix I:** List of stakeholders that contributed to the study.

- **Appendix II:** Bibliography.

2. BACKGROUND AND CONTEXT

KEY FINDINGS

- Following the 2016 UK referendum on EU Membership, the **UK Government formally invoked Article 50 of the Treaty on European Union on 29 March 2017**, officially notifying the EU of its intent to depart the Union two years later (on 29 March 2019).
- The areas to be covered by this study of the future relationship between the UK and the EU include: the **Common European Asylum System**, primarily including EU legislation on temporary protection, reception conditions, qualification and asylum procedures, the Dublin system (currently implemented through the Dublin III Regulation) and Eurodac, the European Asylum Support Office, and the Asylum, Migration and Integration Fund; **return and readmission**; as well as **relocation and resettlement**.

According to Article 33 of the 1951 UN Convention relating to the status of Refugees, '**No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.**² Under the 1951 Convention, the protection against refoulement under Article 33(1) applies to any person who is defined as a refugee under the terms of the Convention.

In order **to be considered for international protection in the European Union (EU), migrants need to apply for asylum in an EU Member State**, as set out in the legislation underpinning the Common European Asylum System (CEAS).³ After the high point of the 'migration crisis' in 2015, the EU saw a significant decrease in migration trends between 2015 and 2017. Although throughout 2018 there has been a further decrease in asylum applications made,⁴ the EU is still experiencing migratory pressures at its external borders (see Table 1).

Table 1. Number of asylum applications per year (2012–2017)⁵

Number of (non-EU) asylum applications	2012	2013	2014	2015	2016	2017	2018 (Q1)
EU28	335,300	431,100	627,000	1,322,800	1,260,900	704,600	131,000 (-25% compared to Q1 of 2017)
United Kingdom	28,800	30,585	32,785	40,160	39,735	33,780	8,300

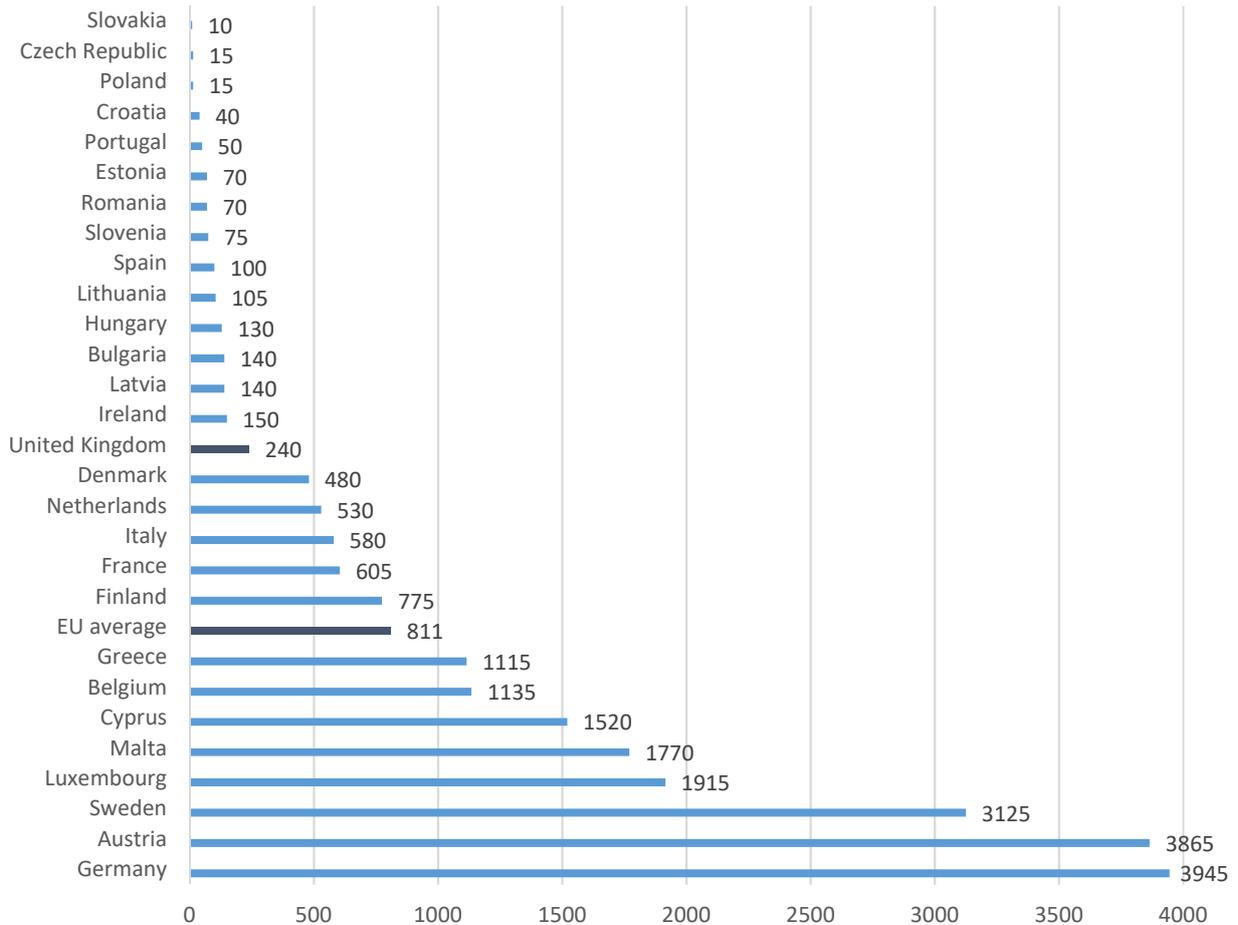
Although the **numbers of asylum applications in the United Kingdom have remained relatively low compared to some other EU Member States** (as shown in

² Article 33, 1951 UN Convention relating to the status of Refugees.

³ European Commission, a Common European Asylum System https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf

⁴ Eurostat, Asylum quarterly report, 15 June 2018, at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Where_do_asylum_applicants_go_to.3F

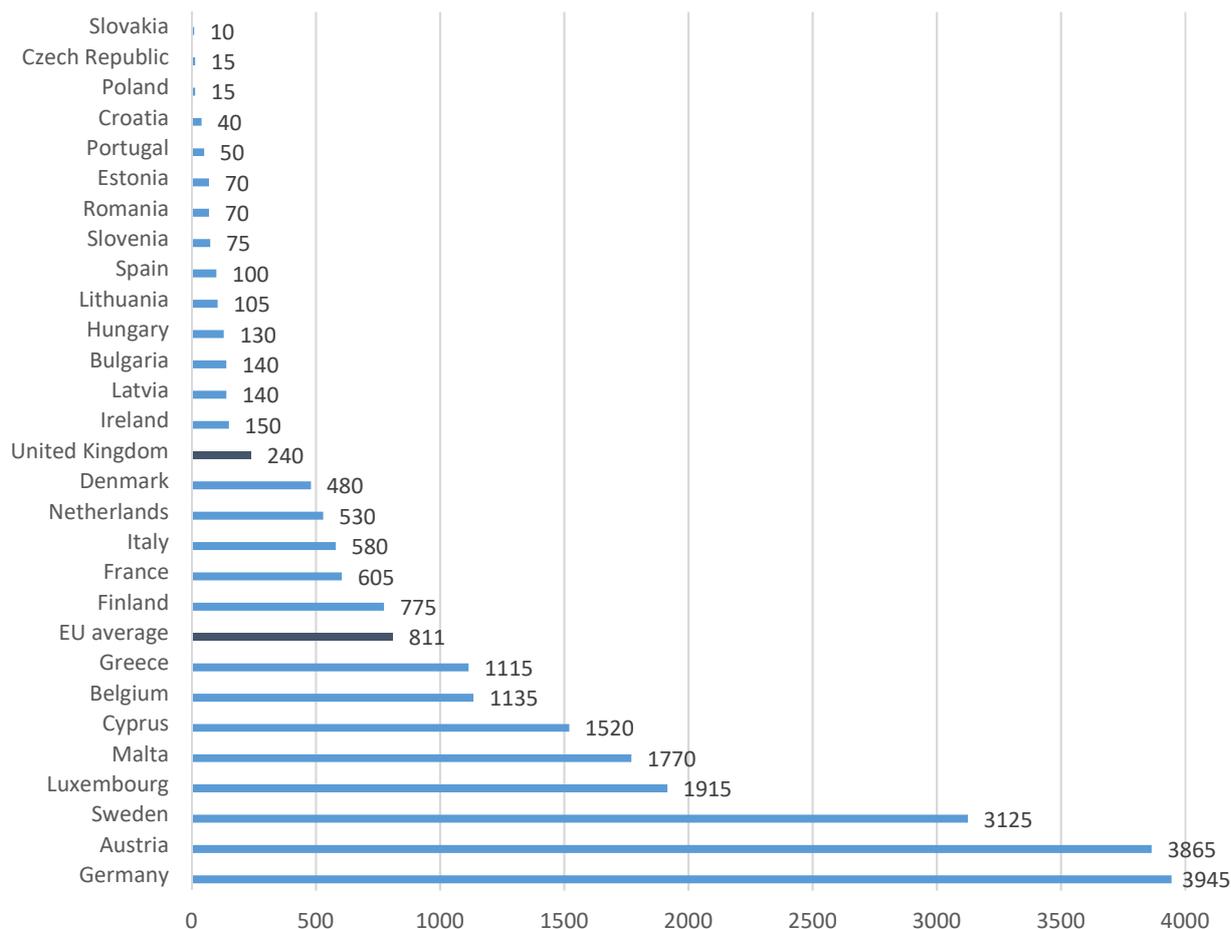
⁵ Eurostat: Asylum statistics. Last accessed on 25/06/2018, at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics



), the perception that the EU has been incapable of controlling the migration pressure was used as an important argument in the Brexit campaign, and **migration more generally also figured as a key topic in the political debates surrounding the Brexit referendum.**⁶ In this context, international protection constitutes a policy area of particular importance and political sensitivity within the negotiations surrounding the content of the future relationship between the UK and the EU.

Figure 2. Positive decisions on asylum applications of all EU Member States per million population (2017)

⁶ 'Immigration resonates on the streets for Brexit campaign', *Financial Times*, 8 June 2018. <https://www.ft.com/content/e7bfc9b4-2bcb-11e6-bf8d-26294ad519fc>



2.1. EU policy in the field of asylum, resettlement, return and readmission

2.1.1. EU competence in the field of border checks, asylum and immigration

One of the first initiatives in Europe in the field of international protection was the reference to refugee issues in the Schengen Convention (Chapter 7).⁷ The Dublin Convention of 1990 (also referred to as **Dublin I**)⁸ then overruled the Schengen Implementation Convention on this issue.

Under the 1992 Treaty of Maastricht,⁹ international cooperation on asylum became part of the EU institutional framework, with migration falling under the third pillar, within the policy area of Justice and Home Affairs (JHA). The 1997 Treaty of Amsterdam¹⁰ then expanded the competency of the EU in the area of asylum, enabling the EU to adopt 'appropriate measures' in the area of asylum. Following the entry into force of the Lisbon Treaty in December 2009,¹¹ the Area of Freedom, Security and Justice (AFSJ) was established, through Title V of Part III TFEU.¹² Policies on border checks, asylum and immigration are covered in Chapter 2 of Title V TFEU.

⁷ Schengen Convention, Resolution on the Schengen Agreement and political asylum, 6 March 1995.

⁸ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ('Dublin Convention'), 15 June 1990.

⁹ Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992.

¹⁰ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997.

¹¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

¹² UNHCR, Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation to a Common Asylum and Migration Policy, at: <http://www.unhcr.org/41b6c90a4.pdf>

2.1.2. Common European Asylum System (CEAS)

Based on Article 78 TFEU (Box 1), the **1999 Tampere European Council established a Common European Asylum System (CEAS), to be implemented in two phases**, with the aim of affirming the principle of non-refoulement and of assuring that nobody is sent back to persecution.

Box 1. Treaty on Functioning of the European Union

Art 78(1) TFEU

'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement...'

In the **first phase of CEAS** implementation, Dublin I was the first legal instrument adopted under international law specifically dealing with asylum responsibility. The Dublin Convention had two key purposes¹³:

- i. To avoid refugees having no State taking the responsibility to examine their asylum application;
- ii. To limit the number of applications per refugee to a single Member State, avoiding asylum seekers lodging their claims in more countries.

From 1999 to 2004, the **EU defined minimum standards for the reception of asylum seekers common to all Member States; standards for qualification for international protection; and procedures for granting or removing the status of refugee**. Moreover, it established the criteria and processes for determining which Member State was responsible for examining asylum applications and established the 'Eurodac' database for storing and comparing fingerprint data.

The **second phase of the CEAS** started following the Hague Programme (2004), which called for the development of new measures to be adopted by 2012. This **phase aimed at moving away from minimum standards, towards recast Directives that would provide more uniform status for those granted protection** and was initiated after the entry into force of the Lisbon Treaty.¹⁴ The Lisbon Treaty formed the basis of the transition from minimum standards outlined in the first phase of the CEAS to a harmonised system of common standards. The Treaty also expanded the judicial oversight by the Court of Justice of the European Union (CJEU), allowing it to develop a larger body of case law in the field of asylum. As part of the second phase of the CEAS, between 2011 and 2013 the EU agreed on amendments to the Eurodac and the Dublin system, and the Directives on Reception Conditions, Asylum Procedures, and Qualification.

In 2015, the 'refugee crisis' led to a new need to reform the Phase 2 Directives, and in May 2015, the Commission published the **European Agenda on Migration (EAoM)**,¹⁵ which proposed immediate measures to cope with the crisis in the Mediterranean, as well as measures to manage all aspects of immigration more effectively. Key priorities of the agenda include:¹⁶

- i. Strengthening the CEAS;

¹³ Ibid.

¹⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

¹⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European Agenda on Migration, Brussels, 13. May 2015, COM(2015) 240 final.

¹⁶ European Commission: Commission makes progress on a European Agenda on Migration, 4 March 2015, at: http://europa.eu/rapid/press-release_IP-15-4545_en.htm

- ii. Deepening the cooperation with third countries to prevent people from undertaking life-threatening trips to Europe;
- iii. Developing concrete tools targeting priority countries and routes, to fight irregular migration and human trafficking more robustly; and
- iv. Securing Europe's external borders by increasing support to the EU's border agency Frontex.

In this context, the **European Commission has been working towards a reform of the CEAS**, namely to reform the Dublin system relocation mechanism and the Reception Conditions Directive, and to replace the Asylum Procedure and the Qualification 2011/13 Directives with Regulations, meaning that EU asylum legislation will become directly applicable in Member States, rather than applying through the medium of each country's domestic law.¹⁷ **In 2016, the Commission produced proposals for two reform packages covering the breadth of EU secondary legislation on international protection** (Box 2). The proposed change was presented as an opportunity to move towards a 'more progressive and upward harmonisation of standards' for determining whether individuals need international protection and defining their rights.¹⁸ According to the Commission, the proposed change would represent a shift to more progressive standards, as they would eliminate options and derogations present in the Directives. In fact, the Directives have faced criticism from academic scholars for leading to a 'lowest common denominator', as the many options provided by the Directives enabled Member States to maintain divergent domestic practices. The reform of the Dublin system, on the other hand, aimed to introduce a relocation mechanism to reduce the unbalanced burden on some of the countries with the biggest influxes of asylum seekers.

However, the **overall view is that the reforms proposed will enable a stricter policy environment for asylum seekers** because of punitive measures in cases of secondary movements, and for Member States, as, for example, the new Dublin Regulation would lead to the establishment of a permanent corrective allocation mechanism. The new Regulations on standards of qualification and asylum procedures could remove Member States' right to set more favourable standards for asylum seekers, compared to EU standards.¹⁹

Box 2. 2016 package of proposals for CEAS reform

On 4 May 2016, the Commission published the **first package of proposals for CEAS reform** comprising the following initiatives:

- Proposal for a Regulation to reform the Dublin system;
- Proposal for a Regulation to amend Eurodac; and
- Proposal for a Regulation to establish an EU Asylum Agency which is to replace the European Asylum Support Office (EASO).

On 13 July 2016, the Commission put forward the **second package of proposals for CEAS reform**. The package included:

- A proposal for a new Regulation to replace the Asylum Procedures Directive;
- A proposal for a new Regulation to replace the Qualification Directive;
- Proposed targeted modifications of the Reception Conditions Directive; and
- A proposal for a Union resettlement framework.

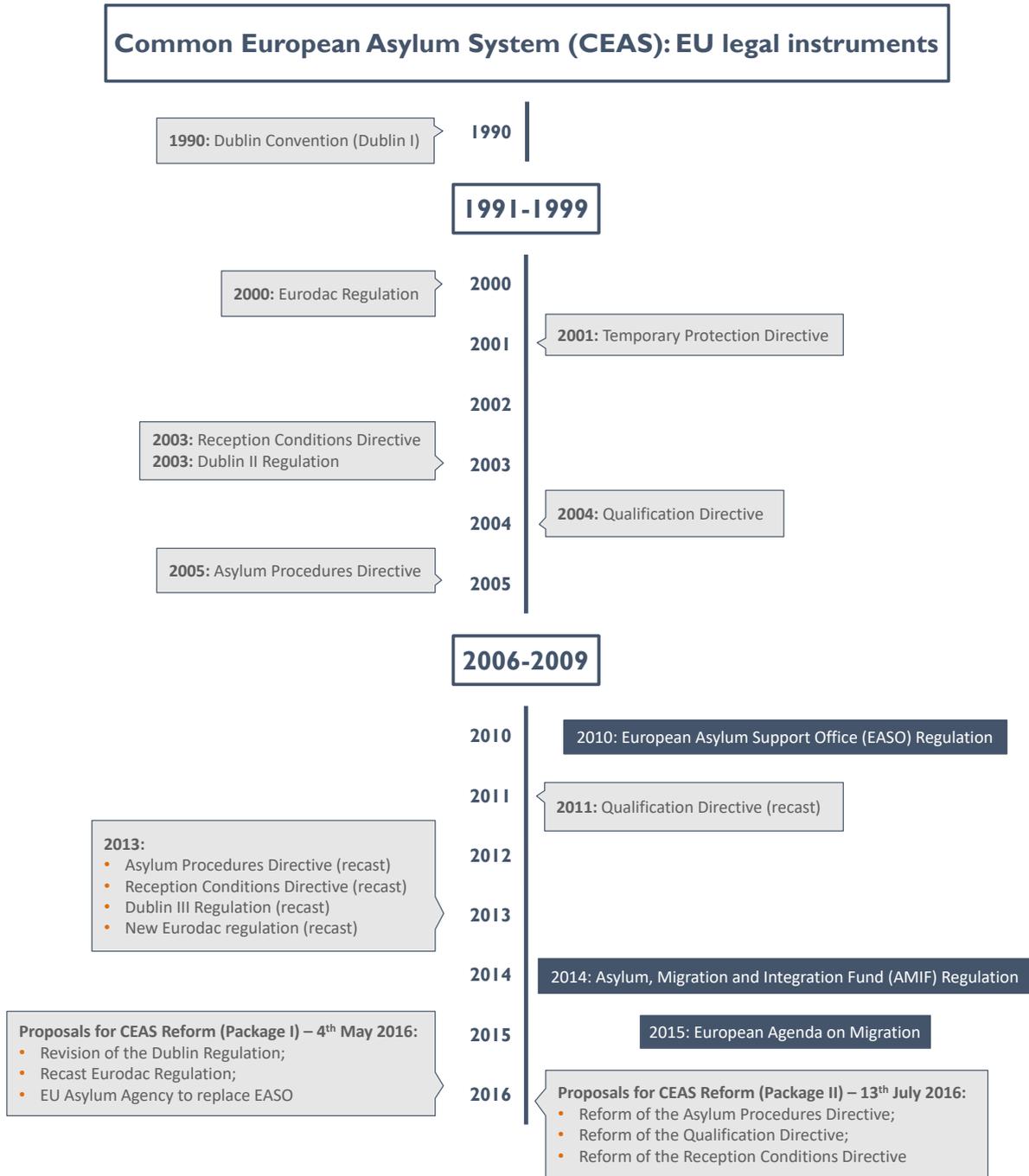
The main legal instruments of the CEAS are summarised in Figure 2, and described further below.

¹⁷ European Commission: Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, 6 April 2016.

¹⁸ Ibid.

¹⁹ European Commission Press Release: Towards a sustainable and fair Common European Asylum System, at: http://europa.eu/rapid/press-release_IP-16-1620_en.htm

Figure 2. EU legislative instruments related to the CEAS



Dublin system

The **Dublin II Regulation**²⁰ (which replaced the 1990 Dublin Convention in 2003) and the **Dublin III Regulation**²¹ aim to **establish the responsibility among Member States for examining applications for international protection**. Dublin III, which replaced Dublin II in 2013, included a number of new rules about how asylum seekers have to be treated under the Dublin process, such as the right of asylum seekers to appeal against a Dublin decision, a general rule stating that people shouldn't be detained while waiting to be transferred to another country under the Dublin system, as well as more rights for unaccompanied minors.²² The Dublin system sets a number of criteria, set in hierarchical order, from family considerations, to recent possession of a visa or residence permit in a Member State, to where the applicant has entered the EU irregularly. Furthermore, Dublin III aims to:

- I. **enhance the protection of asylum seekers** during the process of establishing the state responsible for examining the application;
- II. **clarify the rules** governing the relations between Member States; and
- III. **create a system to detect early problems** in national asylum or reception systems and address their root causes before they develop into fully fledged crises.

All countries under Dublin III Regulation need to submit the requests to determine responsibility for asylum applications using DubliNet, an electronic system that links the different Dublin States.²³

In May 2016 the Commission proposed a reform of the Dublin system (**Dublin IV Proposal**).²⁴ While the hierarchy of the criteria will remain the same as in Dublin III, The **Dublin IV Regulation would introduce a mandatory relocation mechanism for times of crisis** with the aim of sharing the burden of disproportionate refugee influxes.²⁵ The European Commission proposes to set a quota for refugees per Member State (calculated based on Member State GDP and population size), to be applied for crisis situations. When the threshold is reached (150% of the quota), the system will trigger a relocation mechanism of asylum seekers to Member States that had received a number of refugees below the quota.²⁶ In its mandate for negotiations with the Council, the European Parliament proposes to distribute asylum seekers across the EU according to a permanent set mechanism applying in all circumstances, not only in a crisis situation.²⁷ With EU border countries welcoming the Parliament's solution and Central European states refusing any mandatory distribution of refugees, the European Council has still not found a common position on the Commission proposal.

²⁰ Regulation 2003/343/EC.

²¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

²² Ibid.

²³ Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

²⁴ Procedural rights in the proposed Dublin IV Regulation – Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation, 27 September 2016.

²⁵ Van Wolleghen, P.G., If Dublin IV were in place during the refugee crisis. A simulation of the effect of mandatory relocation. 2018 *ISMU*.

²⁶ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). COM/2016/0270 final - 2016/0133 (COD).

²⁷ 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)).

In June 2018, the Council published **Conclusions on Migration**,²⁸ supporting:

- i. the development of **regional disembarkation platforms** for people saved at sea;
- ii. the development of **controlled processing centres** set up in Member States on a voluntary basis;
- iii. the encouragement of Member States to take all the necessary internal legislative and administrative measures to prevent **secondary movements** of asylum seekers;
- iv. the Council to continue work on **the Dublin regulation** and **asylum procedures** proposals; and
- v. the provision of EUR 500 million to **EU Trust fund for Africa** and EUR 3 billion to **Facility for Refugees in Turkey**.

Eurodac

The Dublin system is supported by the **Eurodac Regulation**,²⁹ which **established a Europe-wide fingerprint database originally only for asylum applicants but following its reform of 2013 also from irregular migrants in the EU**. Eurodac has been operating since 2003.³⁰

As part of the reform package of May 2016,³¹ the Commission presented a proposal to reinforce Eurodac to reflect the changes in the Dublin Regulation proposal by extending its scope to introduce the obligation to also take biometric identifiers in addition to fingerprints. Additionally, the proposal aims to allow the storage and comparison of all categories of data (e.g. fingerprints, biometric identifiers and collection of digital photos). The proposal also suggests lowering the minimum age for collecting fingerprints from minors from 14 to 6 years old, in order to facilitate the finding of missing children.³²

Qualification

The first-phase **Qualification Directive**³³ **sets out the conditions governing eligibility for international protection** (refugee and subsidiary protection status). The Qualification Directive specifically references the UN Refugee Convention, translating it into EU law (Box 3).³⁴

Box 3. Qualification Directive

Recital 16 in the preamble:

'Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention'

The **Directive applies to all applications made at the border or on the territory of an EU country by third-country nationals** (i.e. non-EU nationals) or stateless persons who are located outside of their country of origin and who are unwilling or unable to return due to a fear of being persecuted. The **Qualification Directive grants a range of rights to refugees**, such as the right to a residence permit (valid for at least three years for refugees and at least one year for persons with subsidiary protection

²⁸ European Council Meeting, Brussels, 20–29 June 2018.

²⁹ Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

³⁰ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013.

³¹ Communication from the commission to the European Parliament and the council towards a reform of the common European asylum system and enhancing legal avenues to Europe COM(2016) 197.

³² Ibid.

³³ Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 April 2004.

³⁴ Ibid.

status), the right to travel, the right to employment, the right to education, the right to accommodation and the right to medical care.

However, as this Directive left some leeway for maintaining divergences in national asylum legislation and practices between Member States, the EU adopted the **recast Qualification Directive** (2011),³⁵ which had to be transposed by the EU Member States by January 2014. The amendments introduced include: an extended definition of the family (Art. 2(j)); clarification of the definition of actors of protection and introduction of a requirement for protection to be effective and non-temporary (Art. 7); and the further alignment of the internal protection concept with the European Court of Human Rights (ECtHR) case law (Art. 8). However, although the aim of the recast Directive was to introduce common standards for reception conditions across Member States, it still leaves certain leeway that leads to discrepancies of standards between Member States.³⁶

Therefore, in **July 2016, the Commission submitted a draft proposal for a Qualification Regulation**, to replace the recast Qualification Directive,³⁷ which codifies the latest case law of the CJEU and further harmonises common criteria for qualifying asylum seekers for international protection.

Asylum Procedures

The first-phase **Asylum Procedures Directive**³⁸ **lays down minimum standards for the procedures for granting and withdrawing refugee status** in order to reduce the disparities between national examining procedures and to safeguard the quality of decision-making in EU countries. The Directive is applicable to all applications for asylum made on the territory of EU countries, including at borders or in a transit zone. The **recast Asylum Procedures Directive**³⁹ had to be transposed by EU Member States by July 2015. The **recast Directive aims to establish clearer rules on how to apply for asylum to establish common procedures and to make the process both faster and more efficient**, by setting time limits for the examination of applications and providing training to decision-makers. In addition, it aims to be fairer, by providing support to those in need of special guarantees (e.g. because of age, disability, illness, etc.).

In July 2016, the Commission presented a proposal for an **Asylum Procedure Regulation**, as part of the CEAS reform, to replace the Asylum Procedure Directive and to settle uniform standards, make admissibility procedures mandatory, remove incentives for secondary movements between Member States, and to establish a list of safe countries of origin.⁴⁰

Reception Conditions

The **Reception Conditions Directive**⁴¹ **aims to establish minimum standards for the reception of asylum seekers** in order to ensure that they have dignified standards of living. A second aim of the Directive is to ensure that all Member States have consistent reception and living standards in order to limit secondary movements of asylum seekers, who would otherwise be influenced by the variety of reception conditions when claiming asylum. Although reception conditions of asylum seekers differ between Member States because of the different social systems operating in different countries, in 2013 the **recast Reception Conditions Directive**, which became applicable in 2015, replaced the

³⁵ Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, 13 December 2011.

³⁶ Velluti, S., The revised Reception Conditions Directive and adequate and dignified material reception conditions for those seeking international protection. *International Journal of Migration and Border Studies*, 2 (3), 2016 pp. 203–221, p. 209.

³⁷ COM(2016) 466.

³⁸ Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

³⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

⁴⁰ COM(2016) 467. Includes the establishment of a common list of safe countries of origin, which should replace the Commission proposal of 2015 on a list of safe countries of origin.

⁴¹ Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, 27 January 2003.

Council Directive 2003/9/CE on minimum standards, with the aim of establishing common standards and ensuring that asylum applicants have access to housing, food, health care and employment, including medical and psychological care.⁴² However, the recast Directive didn't achieve its goal of creating EU common standards, as the current Reception Conditions Directive is broad in its definition of what constitutes an adequate standard of living, which leads to considerably varied reception systems and reception standards across Member States.⁴³

In July 2016, the **Commission presented a proposal to revise the Reception Conditions Directive to further harmonise reception conditions across the EU**, while reducing incentives for secondary movement. The proposal also aims to increase the integration of migrants and reduce the time it takes for migrants to access the labour market.⁴⁴

EASO

In order to support the CEAS, the **European Asylum Support Office (EASO)⁴⁵ was established in 2010 as an independent and specialised body**. It became fully operational in mid-2011 with the aim of assisting Member States in fulfilling their European and international obligations in the field of asylum. It supports Member States in the development of a Common European Asylum System through the application of a bottom-up approach (i.e. by ensuring Member States handle individual asylum cases appropriately). EASO's main activities involve:

- **Operations**, to provide emergency support to Member States subject to particular pressures or to third countries, in order to reach common solutions, develop regional protection programmes and coordinate Member States' actions on resettlement;
- **Capacity building**;
- **Setting standards** for quality control tools, and supporting the common quality of the asylum process through common quality and common Country of Origin Information (COI);
- **Information, analysis and knowledge development**, through the sharing and merging of data and the assessment of EU-wide trends;
- **Early Warning and preparedness system**.

In April 2016, as part of the CEAS reforms, the **Commission presented a proposal to replace EASO with the European Union Agency for Asylum (EUAA)**. Building on the experiences with support needed in Italy and Greece during the high influx of applicants for international protection in 2015, the proposed EUAA has enhanced roles and increased competencies compared with EASO, as evidenced by the **anticipated growth in the budget allocation** (more than 30% by 2020, from EUR 86.97 million in 2017 to EUR 114.10 million) and **staff** (from around 200 to around 500).⁴⁶ The proposed EUAA Regulation, **under the revised proposal of September 2018,⁴⁷ will establish new obligations for the agency and enhance its cooperation with national asylum authorities and immigration/asylum services in the exchange of information**. Moreover, if adopted, the EUAA will also undertake the role of monitoring agency, assessing Member States' asylum procedures and reception systems and providing operational assistance to national systems under disproportionate pressure.⁴⁸

⁴² Migration and Home Affairs: European Commission, Reception Conditions, at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/reception-conditions_en

⁴³ Ibid.

⁴⁴ Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, 26 June 2013.

⁴⁵ Regulation (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office.

⁴⁶ EASO Press Release: EASO preparing for transformation into European Union Agency for Asylum. Last accessed on 23.10.2018, at: <https://www.easo.europa.eu/easo-transformation-into-euaa>.

⁴⁷ Council of the European Union, Reform of the Common European Asylum System and Resettlement, Brussels, 2 October 2018, 12420/18.

⁴⁸ COM (2016) 271.

Temporary Protection

The **Temporary Protection Directive (2001)**⁴⁹ was developed as a framework for managing an unexpected mass influx of displaced persons and provide them with immediate protection. The aims of the Directive are to reduce disparities between the policies of the EU Member States on reception and treatment of displaced persons in a situation of mass influx, and also to promote solidarity among EU States. The need for a regulatory framework became clear at the end of the 1990s, during the conflict in the former Yugoslavia, which led to the first large flow of refugees into the Union since the Second World War. In order to address the challenges that had arisen from the pressure on Member States with a Southern border, a number of Member States (Austria, Belgium, Denmark, France, Ireland, Germany, Poland and Spain) implemented national forms of temporary protection. The Temporary Directive Protection was consequently developed, in line with the CEAS, to reduce the disparities between Member States and reduce secondary movement within the EU.

However, **the Directive has never been applied in practice, despite a number of major refugee influxes to the EU since its development.** There are a number of reasons to explain why the Directive has not been used, including the political fear that enacting such legislation would act as a pull factor, drawing migrants to the EU. Moreover, in order for the Directive to be triggered, it needs to be voted on and adopted by the Council through a qualified majority vote. The success of such a vote is considered unlikely given that the Temporary Protection Directive could entail burden-sharing between Member States, to which several Member States object. In addition, the broad definition of 'mass influx' resulted in a high threshold, which underpinned the non-application of the Directive.⁵⁰

Family Reunification Directive

The conditions for family reunification of third-country nationals in the EU with their family members were first set out in **Directive 2003/86**,⁵¹ which established, for the first time, the right of refugees (not including beneficiaries of subsidiary protection) to family reunification. The Directive also recognises the right to family reunification of unaccompanied minor refugees.

Networks, funds and strategies

In addition to the legislation implementing the system, the **CEAS also receives support from a range of networks, funds and strategies.** The most prominent examples are presented in Box 4.

Box 4. Agencies, networks, funds and strategies

Key networks, funds and strategies: International protection

A key development was the strengthening of financial solidarity across the Union with the creation of the **Asylum, Migration and Integration Fund (AMIF)** (previously the Return Fund, the Refugee Fund, and the Integration Fund), which for the 2014–2020 period had a budget of EUR 7.3 billion.⁵² AMIF promotes the efficient management of migration flows and the implementation, strengthening and development of a common EU approach to asylum and immigration. Solidarity is one of the objectives of AMIF, ensuring that EU States with higher migration and asylum flows can count on the support of other EU States. AMIF also financially supports the European Migration Network. Following the new challenges that arose from the migration crisis and the recent security

⁴⁹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁵⁰ European Commission, Directorate-General for Migration and Home Affairs, Study on the Temporary Protection Directive, January 2016.

⁵¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁵² Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund, amending Decision 2008/381/EC and repealing Decisions 573/2007/EC, 575/2007/EC and 2007/435/EC.

concerns, the Commission published a proposal for a new Regulation establishing the Asylum Migration Fund (AMF), substantially increasing the Fund's budget to EUR 10.4 billion for the period 2021–2027.⁵³

The **European Migration Network (EMN)**, established in 2008, is an EU-funded network which provides information on migration and asylum to the EU Institutions and Member State authorities, with the aim of supporting the development of immigration policies.⁵⁴ The EMN also plays an important role in better equipping the EU to respond to crisis by providing policy-makers with the most up-to-date and reliable information in the area of asylum and migration.⁵⁵

2.1.3. Return and readmission

While not part of the CEAS, **the Return Directive** plays an important role in the field of international protection. The **Return Directive applies to third-country nationals staying illegally on the territory of a Member State**. If asylum or subsidiary protection is not granted, applicants become irregular and the Directive requires that **Member States apply common standards and procedures for returning illegally staying third-country nationals**.⁵⁶ As such, the return policy is part of the broader migration *acquis* and might constitute the last stage in the migration and asylum procedure for an applicant. The Directive provides minimum standards on issues such as the issuance of return decisions, grounds for and conditions of detention for the purpose of removal, the conduct of removal itself (including voluntary departure, coercive measures, entry ban), non-refoulement, and emergency health care, and provides certain procedural safeguards.

In light of the strong migration pressure facing the EU in 2015 and the need to strengthen EU return policy, the **Commission presented, on 12 September 2018, a proposal for a recast Return Directive**.⁵⁷ The recast Directive aims to: accelerate and simplify border procedures; reduce time for appeals and restrict the suspensive effect of appeals; accelerate the issuing of decisions on return; place an obligation on Member States to establish voluntary return programmes; and introduce a new minimum detention period.

The EU's **return policy is implemented through operational cooperation between EU Member States**, which includes assistance in cases of transit for the purposes of removal by air, organisation of joint flights for removals, mutual recognition of decisions on expulsion, and implementation of guidelines on forced return. The **European Border and Coast Guard Agency (EBCG)** (referred to in this report as Frontex)⁵⁸ was established in 2005 and plays a key role in operational cooperation on return. **Frontex coordinates cooperation between Member States in external border management, assists Member States with training and technical help and provides operational assistance**. The 2015–2016 crisis led to significantly increased Frontex involvement in border control activity, and, in 2016, a reform expanded the role of the agency by including the assessment of the capacity of Member States to meet border control issues, and by widening the scope of the activities of the agency to also include support to Member States in the fields of migration management,

⁵³ Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, COM (2018) 471.

⁵⁴ Council of the European Union Decision establishing a European Migration Network 2008/381/EC.

⁵⁵ European Commission Staff working Document: Interim evaluation of the Asylum, Migration and Integration Fund 2014–2017, 12 May 2018.

⁵⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98–107.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). COM (2018) 634.

⁵⁸ Council of Europe: Parliamentary Assembly, Frontex: human rights responsibilities, 25 April 2013, Recommendation 2016

combating cross-border crimes and search and rescue operations.⁵⁹ Furthermore, on 12 September 2018, the **European Commission proposed a new Frontex Regulation that would significantly increase the number of border guards to address unlawful immigration by 2020.**⁶⁰

Frontex's main activities are: i) assisting countries in their **border management** activities; and ii) organising joint flights to **return migrants** that were not granted asylum to their countries of origin. **Immigration Liaison Officers (ILOs)**, sent to third countries from EU Member States, facilitate contacts with relevant authorities in third countries to prevent irregular migration to the EU and provide operational support for the return of irregular migrants to their country of origin. There are Frontex Liaison Officers, European Return Liaison Officers and European Migration Liaison Officers. The ILOs Regulation⁶¹ defined the obligation to form networks between ILOs, and in 2011 the Commission submitted a proposal to amend the Regulation establishing a link for cooperation between Frontex and the ILO network.⁶²

In addition, to increase the rate of effective returns among migrants who have been ordered to leave the EU, the **Union has established readmission agreements with a number of third countries.** EU Readmission Agreements (EURAs) **facilitate the return of irregularly staying migrants to their country of origin or, in less common circumstances, to the third country from which they entered the EU.** As stipulated in Art. 79(3) TFEU 'The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States'.⁶³ As readmission forms part of the Area of Freedom, Security and Justice (AFSJ), a shared competence under Article 4(2)(j) TFEU, Member States are permitted to conclude their own readmission agreements where the EU has not exercised its competence. As such, if a **Member State and the EU have readmission agreements with the same third country, the EURA takes precedence** and the Member State agreement ceases to apply.⁶⁴

Furthermore, EURAs are negotiated in a broader context where third countries are granted visa facilitation and other financial incentives. Examples of concluded readmission agreements are presented in Table 2.

Table 2. Existing EU Readmission Agreements⁶⁵

Third Country	Date of Entry into Force
Hong Kong	1 March 2004
Macao	1 June 2004
Sri Lanka	1 May 2005
Albania	1 May 2006

⁵⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council, of 14 September 2016, on the European border and coast guard and amending Regulation (EU) 2016/399 of the European parliament and of the council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

⁶⁰ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard, COM (2018) 631.

⁶¹ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

⁶² Proposal for a Regulation of The European Parliament and of the Council on the creation of a European network of immigration liaison officers (recast), 16 May 2018, COM(2018) 303 final, {SWD(2018) 197}.

⁶³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), Article 79.

⁶⁴ European Parliament Briefing: The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation, 2018.

⁶⁵ European Commission, Readmission Policy in the European Union.

Third Country	Date of Entry into Force
Russia	1 June 2007
Ukraine	1 January 2008
FYROM	1 January 2008
Serbia	1 January 2008
Moldova	1 January 2008
Bosnia and Herzegovina	1 January 2008
Montenegro	1 January 2008
Pakistan	1 December 2010
Georgia	1 March 2011
Armenia	1 January 2014
Azerbaijan	1 September 2014
Cape Verde	1 September 2014
Turkey	1 October 2014
Algeria	Ongoing negotiations
Belarus	
China	
Jordan	
Morocco	
Nigeria	
Tunisia	

However, **readmission agreements can also be concluded through more informal arrangements.** The European Commission highlighted this matter in its October 2017 letter to the European Parliament's LIBE Committee on EU Readmission developments, stating that: 'Most third countries do not want to engage in negotiations on readmission agreements mainly due to internal political considerations, as such agreements can be a source of public hostility. An example of such informal agreements is the Joint Way Forward with Afghanistan. Furthermore, the ongoing negotiations with Morocco and Algeria are at a standstill and those that were launched in 2016 with Nigeria, Jordan and Tunisia have not progressed as anticipated. The **EU must therefore remain flexible on the form a cooperation framework takes, and focus on the feasibility of achieving results, while respecting international and European law.**¹⁶⁶

In the past, the **EU has always included readmission clauses in its agreements with third countries**, such as Art. 23 of the EU–Canada Strategic Partnership Agreement, stating that Canada would readmit any of its citizens illegally living in an EU Member State. Another form of EU partnership with third countries are the Association Agreements, which expect a greater level of cooperation on readmission, compared to the Strategic Partnership Agreement.

Another **example of cooperation between the EU and third countries is the EU–Turkey collaboration.**⁶⁷ The 2016 EU–Turkey deal, established as a reaction to the 'refugee crisis', aimed at ending irregular migration flows from Turkey to the EU, relieving the external pressure on the Schengen area.⁶⁸ Moreover, the agreement also aimed at improving reception conditions for refugees

⁶⁶ European Commission, DG Migration and Home Affairs, EU Readmission developments – state of play October 2017.

⁶⁷ European Union: Council of the European Union, *EU–Turkey statement, 18 March 2016*, 18 March 2016.

⁶⁸ Ibid.

in Turkey and open controlled channels to Europe for asylum seekers from Syria. This arrangement has, however, been controversial, as although the number of illegal arrivals to the EU and the number of lives lost at sea have decreased substantially, the reception conditions in Turkey have not met the right standards.⁶⁹

2.1.4. Relocation and resettlement

Citing unprecedented pressure on Member States' asylum systems, the European Agenda on Migration (EAoM)⁷⁰ launched the idea of setting up **EU-wide relocation and resettlement schemes** under the emergency response mechanism stipulated in Article 78(3) of the TFEU for the first time. As can be seen in Box 5, Article 78(3) foresees the general possibility for supporting Member States in response to the sudden inflow of third-country nationals, referred to as an emergency situation.

Box 5. Treaty on Functioning of the European Union

Article 78(3) TFEU

*'In the event of one or more Member States being confronted by an **emergency situation characterised by a sudden inflow of nationals of third countries**, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'*

However, Article 78(3) does not provide any detail on the measures or mechanisms by which affected Member State(s) may be supported. Hence, the **concepts of relocation and resettlement were first proposed in the EAoM**, which detailed them as presented in Box 6.

Box 6. Key concepts: Relocation and Resettlement

As defined by the European Agenda on Migration:

'Relocation' refers to a fair and balanced distribution scheme for persons in clear need of international protection among the Member States. Although initially proposed as a temporary scheme, the EAoM clearly highlights: i) the need for a 'permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States'; and ii) its intention to present a legislative proposal on the topic.

'Resettlement' refers to the transfer of non-EU national or stateless persons in clear need of international protection from a third country to a Member State, where they will be admitted and granted the rights afforded to a beneficiary of international protection. Such resettlements are conducted on the submission of the United Nations High Commissioner for Refugees and in agreement with the country of resettlement.

The EAoM targeted the establishment of an EU-wide resettlement scheme offering 20,000 places, supported by dedicated funding of EUR 50 million for the year 2015–2016.

The EAoM also **proposed a distribution key** for determining the relocation and resettlement capacities of each Member State. Developed via the Commission's Resettlement and Relocation Forum, the distribution key is based on objective, quantifiable and verifiable criteria that reflect the capacity of the Member States to absorb and integrate refugees, with appropriate weighting factors reflecting the importance of such criteria, as follows⁷¹:

⁶⁹ Collett, E., The Paradox of the EU-Turkey Refugee Deal, Migration Policy Institution, 2016.

⁷⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European Agenda on Migration, Brussels, 13.5.2015, COM(2015) 240 final.

⁷¹ Ibid, Annex: European Schemes for relocation and resettlement, p. 19.

- The size of the population (40%) – to reflect the capacity of each Member State to absorb a certain number of refugees;
- Total GDP (40%) – to reflect the absolute wealth of each Member State and the capacity of an economy to absorb and integrate refugees;
- Average number of spontaneous asylum applications and number of resettled refugees per 1 million inhabitants over the period 2010–2014 (10%) – to reflect recent efforts by Member States; and
- Unemployment rate (10%) – to reflect the capacity to integrate refugees.

To illustrate, using these criteria in relation to the 20,000 resettlement places, the EAoM states that:

- Germany would receive the highest proportion of resettled individuals (15.43% or 3,086 individuals);
- France (11.87% or 2,375 individuals) and the UK (11.54% or 2,309 individuals), depending on an 'opt-in' decision, would receive similar numbers of resettled individuals; and
- Italy would receive the fourth highest proportion of resettled individuals (9.94% or 1,989 individuals).

Relocation

Following the EAoM commitment, in May 2015, the Commission published the first implementation package of the EAoM, which included a **proposal for a Council Decision establishing provisional [relocation] measures in the area of international protection for the benefit of Italy and Greece**.⁷² The proposal, applying to Syrian and Eritrean nationals in need of international protection that arrived in either Italy or Greece, stipulated that a total of 40,000 persons (24,000 from Italy and 16,000 from Greece) should be relocated over two years based on the distribution key detailed above.⁷³ The proposal further states that Member States will receive EUR 6,000 per person relocated on their territory.

In September 2015, the Commission published its second package of legislative proposals implementing the EAoM. Prominently, this package included:

- Proposal for a **second emergency relocation measure for the benefit of Italy, Greece and Hungary**.⁷⁴ This second temporary relocation measure proposed to relocate 120,000 people from Italy (15,600), Greece (50,400) and Hungary (54,000) using the same distribution key.
- Proposal for a **Regulation establishing a permanent crisis relocation mechanism**.⁷⁵

On 14 and 15 September 2015, respectively, the first and second **temporary relocation proposals were adopted** by the Council.⁷⁶ However, due to strong opposition from Eastern European Member

⁷² European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels, 27.5.2015, COM(2015) 286 final.

⁷³ European Commission, Annexes accompanying the Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels, 27.5.2015, COM(2015) 286 final.

⁷⁴ European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, Brussels, 9.9.2015, COM(2015) 451 final.

⁷⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, Brussels 9.9.2015, COM(2015) 450 final.

⁷⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

States – in particular from the Czech Republic, Hungary, Slovakia and Romania – the following changes were made to the original proposals:

- **Removal of the distribution key in both Council Decisions.** Regarding the first Council Decision, (EU) 2015/1523, the target figure of 40,000 was mandatory but the means for reaching it (i.e. the distribution across the Member States) was to be determined by voluntary relocation commitments. Regarding the second Council Decision, (EU) 2015/1601, relocation commitments were agreed in separate discussions with each Member State for the 15,600 individuals from Italy and the 50,400 individuals from Greece. These figures are Annexed to the Decision and are similar, but not identical, to those presented in the Commission's initial proposal. No pre-determined figures were agreed in relation to the additional 54,000 individuals.
- When proposed, the **second Council Decision, (EU) 2015/1601**, was meant to include the relocation of applicants from Hungary. However, when adopted, it **did not include any such relocation from Hungary**.⁷⁷ Instead, Article 4 stipulated that the '54,000 applicants [...] shall be relocated from Italy and Greece' unless the Commission were to offer a proposal for another country in the 12 months following the adoption.

Since these agreements, the Commission has reduced its relocation goals from 160,000 individuals to 98,255, on the basis that 7,745 allocations from the first Council Decision had not been allocated and that the 54,000 unallocated relocations from the second Council Decision were to be used for resettlement instead of relocation.⁷⁸

However, by March 2018, the Progress Report on the Implementation of the EAoM reported that this number had reached 33,846 relocated individuals. Although this represents a significant reduction compared to the original commitments, the Report states that 96% of all eligible applicants registered for relocation by Italy and Greece had been relocated.⁷⁹

In relation to the ongoing possibilities for relocation, the Commission's proposal to establish a permanent crisis relocation mechanism has been blocked by the Council. In particular, the Council noted that certain delegations raised general scrutiny reservations, highlighting the need to understand and evaluate the functioning of the temporary relocation schemes in advance of any discussions on a permanent scheme.⁸⁰ Meanwhile, in June 2017, the Commission launched infringement proceedings against three Member States for the following reasons:⁸¹

- **Czech Republic** had not relocated anyone since August 2016 and had not made any further pledges.
- **Hungary** had not taken any action in relation to the relocation scheme.
- **Poland** had not relocated anyone or made a relocation pledge since December 2015.

In July 2017, the Commission moved to the next stage of the infringement procedure – sending reasoned opinions – citing the unsatisfactory responses of the three Member States.⁸² On 7 December

⁷⁷ Barigazzi, J. and de la Baume, M., EU forces through refugee deal, Politico Article, 2015.

⁷⁸ European Commission, Report from the Commission to the European Parliament, the European Council and the Council: Tenth report on relocation and resettlement, Brussels 2.3.2017, COM(2017) 202 final.

⁷⁹ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Progress report on the Implementation of the European Agenda on Migration, Brussels, 14.3.2018, COM(2018) 250 final.

⁸⁰ European Parliament, Legislative Train Schedule, Permanent EU Relocation Mechanism. Last accessed on 15.08.2018, at: <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-permanent-eu-relocation-mechanism>

⁸¹ European Commission – Press release: Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice, Brussels, 7 December 2017.

⁸² Ibid.

2017, again following unsatisfactory responses by the three Member States, the Commission referred the three Member States to the Court of Justice of the EU (CJEU), the next stage of the infringement procedure.⁸³

Resettlement

As above, following the publication of the EAoM, resettlement proposals were aligned to the first implementation package, through the Commission **Recommendation on a European resettlement scheme** (8 June 2015). This Recommendation contained a proposal for an EU-wide resettlement scheme for 20,000 individuals on the basis of the above distribution key.

On 20 July 2015, 27 EU Member States (not Hungary) together with Iceland, Liechtenstein, Norway and Switzerland **agreed to resettle 22,504 people in need of international protection** from the Middle East, Northern Africa and the Horn of Africa.⁸⁴ This was the first common EU effort on resettlement, although some Member States had participated in UNHCR resettlement programmes for many years. As such, reported through the progress reports on relocation and resettlement, the scheme faced the following challenges:⁸⁵

- **No timetables** by which resettlements should be carried out were established by the 20 July agreement;
- **Divergences in the maturity of Member State resettlement** programmes and practices and the lack of common rules and procedures for the participating states. As such, less developed Member States took a lot longer to start resettling people than those with established resettlement procedures.

In response to these challenges, the **Commission pledged to develop an EU-wide resettlement proposal**, allowing for a common and coordinated approach across the Member States.⁸⁶

On 13 July 2016, alongside the second CEAS reform package described above, the Commission submitted a proposal for a **Regulation to establish a Union Resettlement Framework**.⁸⁷ The proposal aims to create a common European policy on resettlement with a permanent framework and common procedures. However, a range of stakeholders have called for changes to the terms of the proposal. In particular, the Committee of the Regions, in its opinion on the reform of the common European asylum system (package II), expressed concerns at the legislative solution adopted, noting that the adoption of a reference framework with a Council act complemented by a Commission decision excluding the European Parliament is rarely used in the field of international protection.⁸⁸ Furthermore, the European Economic and Social Committee opinion of January 2017 called for the Regulation to uncouple the resettlement programme from partnership agreements with third countries and focus on people's need for protection.⁸⁹

December 2017 saw the first trilogues between the institutions on the issue. Although a partial provisional agreement seemed to have been reached on 13 June 2018 with the Bulgarian Presidency,⁹⁰ the Council is still calling to continue the negotiations on technical issues.

⁸³ Ibid.

⁸⁴ Council Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20,000 persons in clear need of international protection, document 11130/15.

⁸⁵ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: First report on relocation and resettlement, Brussels 16.3.2016, COM (2016) 165 final.

⁸⁶ Ibid.

⁸⁷ COM(2016) 0468.

⁸⁸ Committee of the Regions, Reform of the Common European Asylum System – Package II and a Union Resettlement Framework, CDR 5807/2016.

⁸⁹ European Economic and Social Committee, Establishing a Union Resettlement Framework, SOC/548.

⁹⁰ Council of the European Union, Document 9520/18, Brussels, 30 May 2018.

While awaiting the adoption of the permanent resettlement framework, the EU continues to support resettlement through temporary mechanisms. In particular, as mentioned above, following the EU–Turkey Statement (18 March 2016),⁹¹ Council Decision (EU) 2015/1601⁹² was amended to allow 54,000 relocation allocations to be fulfilled ‘through resettlement, humanitarian admission or other forms of legal admissions of Syrians in need of international protection from Turkey’⁹³ instead. The Council decision elapsed, however, in September 2017.

Furthermore, through its Recommendation of September 2017,⁹⁴ the Commission launched a **new voluntary scheme of resettlement** for at least 50,000 persons in need of international protection to be resettled by 31 October 2019, supported by EUR 500 million from the EU budget. The response of the Member States to the Recommendation has been positive; more than 50,000 pledges have been received so far from 20 Member States, including the UK, and 4,252 individuals have already been resettled.⁹⁵

By May 2018, the total number of individuals resettled under the EU’s temporary mechanisms had reached 32,207.⁹⁶

⁹¹ Council of the European Union, EU–Turkey Statement, 18 March 2016, Press release 144/16.

⁹² 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 (OJ L 268, 1.10.2016, p 82).

⁹³ Commission Recommendation of 27.9.2017 on enhancing legal pathways for persons in need of international protection; C(2017) 6504.

⁹⁴ Commission Recommendation of 27.9.2017 on enhancing legal pathways for persons in need of international protection; C(2017) 6504.

⁹⁵ European Commission, Progress report on the Implementation of the European Agenda on Migration, 14 March 2018, COM(2018) 250 Final.

⁹⁶ Ibid., p. 18.

3. UK PARTICIPATION IN EU MEASURES IN THE FIELD OF INTERNATIONAL PROTECTION

KEY FINDINGS

- Following the Lisbon Treaty, **the UK has a unique relationship with secondary legislation enacted in the Area of Freedom, Security and Justice (AFSJ)**, under which international protection falls. Considering Protocol 21, the UK has the ability to opt-in with regard to AFSJ legislative proposals. In addition, under Schengen Protocol 19, the UK can request to participate in some or all provisions of the Schengen *acquis*.
- With regard to CEAS legislation, the **UK participates in the first-phase Directives on Qualification, Reception Conditions and Asylum Procedures**. Additionally, the UK opted-in to the **Dublin III Regulation, the Eurodac Regulation, the Temporary Protection Directive, the EASO Regulation and the AMIF Regulation**.
- The **UK does not apply the second-phase CEAS Directives in relation to Qualification, Reception Conditions and Asylum Procedures**.
- The **UK is not permitted to be a full member of Frontex** on the grounds that it did not opt-in to related parts of the Schengen *acquis*. However, on the basis of the Frontex Regulation, the **UK collaborates with Frontex in a range of ways**, including operational support in the fields of return and border management and representation as an observer on the Management Board.
- Regarding other areas of cooperation, the **UK engages with the EU in relation to the Immigration Liaison Officers Regulation, Readmission Agreements, the EU's Global Approach to Migration and Mobility, the Migratory Pressures Roadmap and the European Migration Network**.
- In relation to fundamental rights, the **UK is bound by the Charter of Fundamental Rights of the EU and the European Convention on Human Rights**. The UK is also **subject to the supremacy of EU law and the jurisdiction of the CJEU**.
- A **transition period**, lasting from exit day until 31 December 2020, was included in the draft withdrawal agreement published by the EU and UK negotiating parties on 19 March 2018. Although at this stage it is unclear whether a final withdrawal agreement will be achieved by exit day, the transition period detailed in the draft agreement stipulates that the **UK will: i) continue to be bound by EU legislation and the jurisdiction of the CJEU; and ii) continue to have the right to opt-in** provided by Protocols 19 and 21.
- In the situation that a withdrawal agreement is not achieved (**no-deal scenario**), exit day will mean that **all EU rules not incorporated into UK law via the EU (Withdrawal) Act will immediately cease to apply to the UK**.

3.1. Current UK participation in EU measures

3.1.1. UK opt-in system

As part of the Lisbon Treaty negotiations, the **UK and Ireland negotiated Protocol 21, excluding them from participation in legislation proposed or adopted pursuant to Title V TFEU, unless they**

decided to opt-in. This led to the inclusion of **Protocol 21 to the EU Treaties (also known as the 'opt-in Protocol') on the position of the United Kingdom and Ireland in respect of the AFSJ.**⁹⁷ Articles 3 and 4 of the Protocol provide for the UK to notify the Council if it wishes to participate in the negotiations either 'within three months after a proposal or initiative has been presented to the Council pursuant to Title V' (of the TFEU) or 'any time after its adoption by the Council pursuant to Title V'. In addition, the UK Government has asserted that the opt-in Protocol applies to certain provisions within international agreements the EU had agreed on, despite the absence of a legal basis in Title V.⁹⁸ Finally, under the Schengen Protocol 19, the UK may request to take part in some or all provisions of the Schengen *acquis*.⁹⁹

3.1.2. UK participation in and contribution to the CEAS and related measures

While in past years the UK has not opted-in to most EU asylum policies, it has undertaken 'selective participation in the Common European Asylum System and EU immigration law'.¹⁰⁰ The UK chose to opt-in to the first phase of CEAS measures, adopted between 1999 and 2005 including the abovementioned Directives on asylum procedures, qualification and reception conditions and the Temporary Protection Directive (2001),¹⁰¹ which was developed as a framework for managing an unexpected mass influx of asylum seekers and provide displaced persons with immediate protection. However, the UK decided not to opt-in to a number of the EU recast Directives that comprise the second phase of legislation of the CEAS and which revised the standards adopted in the original Directives.¹⁰²

Table 3 provides a summary of the UK's participation in the key legislation underpinning the CEAS.¹⁰³

Table 3. Summary table UK participation in CEAS legislation

Relevant EU legislation	UK opt-in?	
	1 st phase CEAS	2 nd phase CEAS
Qualification Directives	Yes	No
Asylum Procedure Directives	Yes	No
Reception Conditions Directives	Yes	No
Dublin Regulations	Yes	Yes
Eurodac Regulations	Yes	Yes
Temporary Protection Directive	Yes	
AMIF Regulation	Yes	
EASO Regulation (2010)	Yes	
Returns Directive (2008)	No	

⁹⁷ Consolidated version of the Treaty on the Functioning of the European Union protocol (no 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, 1 July 2013.

⁹⁸ UK Parliament European Union Committee, The UK's opt-in Protocol: implications of the Government's approach, 2015, last accessed on 17.10.2018, at: <https://publications.parliament.uk/pa/ld201415/ldselect/lducom/136/13604.htm>

⁹⁹ Proposal for a Council Decision on the conclusion of the Arrangement between the European Community and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen *acquis* /* COM/2009/0605 final – CNS 2009/0168.

¹⁰⁰ The Migration Observatory. The UK, the Common European Asylum System and EU Immigration Law. Webpage last accessed on 17.10.2018, at: <http://www.migrationobservatory.ox.ac.uk/resources/primers/the-uk-the-common-european-asylum-system-and-eu-immigration-law/>

¹⁰¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

¹⁰² Ibid.

¹⁰³ A full list of UK opt-ins in EU asylum and immigration measures can be found at: <https://publications.parliament.uk/pa/ld201213/ldselect/lducom/91/9116.htm>

As can be seen in Table 3, the UK chose **not to opt-in** to the following Directives:

- the recast of the **Qualification Directive** adopted in 2011 (Directive 2011/95/EU);
- the recast **Reception Conditions Directive** adopted in 2013 (Directive 2013/33/EU);
- the recast **Asylum Procedures Directive** adopted in 2013 (Directive 2013/32/EU), citing concerns over the limits this would place on the UK's national system; and
- the amendment to the EU's **long-term residents Directive** in 2011 to extend its scope to beneficiaries of international protection.

Dublin System

The **UK has participated in the Dublin system since its establishment in 1990 (Dublin I), up to Dublin III.**¹⁰⁴ Data from the UK Home Office shows that, in contrast with preceding years, the number of transfers into the UK under the Dublin Regulation have exceeded the number of transfers out of the UK¹⁰⁵ (Table 4).

Table 4. Transfers into and out of the UK under the Dublin Regulation from 2015 to 2017¹⁰⁶

Year	Number of transfers into the UK	Number of transfers out of the UK
2015	131	510
2016	558	362
2017	461	314

The data also shows that transfers into the UK were largely supported by Articles 8 and 9 of the regulation (Box 7), while transfers out of the UK were mainly supported by the mandate of Art 13 (Box 8).

Box 7. Dublin III Regulation (Regulation (EC) No. 604/2013 of 26 June 2013)

Article 8

'Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor...'

Article 9

'Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.'

¹⁰⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹⁰⁵ Home Office, How many people do we grant asylum or protection to? Webpage last accessed on 17.10.2018, at: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-do-we-grant-asylum-or-protection-to#dublin-regulation>

¹⁰⁶ Ibid.

Box 8. Dublin III Regulation (Regulation (EC) No. 604/2013 of 26 June 2013)**Article 13**

'...[If] an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection...'

Eurodac

The **UK has opted-in to both the Eurodac Regulations,¹⁰⁷ and is also a major user of the system,** being the fifth largest contributor for datasets on applicants for international protection (with 4.8% of all transactions in 2017), and the eighth largest contributor for hits related to data on applicants who have lodged a previous application for international protection in another EU Member State (providing 3.4% of all hits in 2017).¹⁰⁸

AMIF

The **UK opted-in to the establishment of both the AMIF,¹⁰⁹ and, before that, the proposal to increase the co-financing rate of the AMIF's precursors: the European Refugee Fund, the European Return Fund and the European Fund for integration of third-country nationals.¹¹⁰ Currently, AMIF has allocated up to EUR 370 million for the UK to spend on projects addressing asylum and migration issues between 2014 and 2020, meaning the UK receives the highest contribution of any Member State. This funding is mainly used by the UK for return operations.¹¹¹**

EASO

The **UK opted-in to the EU/439/2010 Regulation establishing a European Asylum Support Office and is therefore a full member of EASO.¹¹² As a member of EASO, the level of the UK's involvement in its activities is generally high, although it can vary depending on different areas, as shown in Table 5.**

Table 5. UK's current level of participation in EASO¹¹³

EASO's Activities		
Operations	Capacity building and setting standards	Information, analysis and knowledge development, including Early Warning + preparedness system
UK deployed 14 experts in Greece and 2 in Italy since Jan 2018 (one of the largest contributors)	<ul style="list-style-type: none"> UK involved in thematic network on Dublin, but not other CEAS Directives UK Judges are EASO's major contributors for training material 	The cooperation is two-sided: the UK Home Office shares information and statistics with EASO, and makes use of EASO's data

¹⁰⁷ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013.

¹⁰⁸ EU-LISA. Eurodac – 2017 Statistics. February 2018.

¹⁰⁹ Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund, amending Decision 2008/381/EC and repealing Decisions 573/2007/EC, 575/2007/EC and 2007/435/EC.

¹¹⁰ Report from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Ex post-evaluation reports for the period 2011 to 2013 of actions co-financed by the four Funds under the framework programme 'Solidarity and Management of Migration Flows'.

¹¹¹ Home Office, Asylum Migration and Integration Fund: List of Actions allocated funding, July 2018.

¹¹² Regulation (EU) No 439/2010 establishes a European Asylum Support Office to strengthen cooperation between the Member States in this area and assist them in coping with crisis situations, 19 May 2010.

¹¹³ EASO Working Programme 2017, Multiannual programming 2017-2019.

EASO's Activities		
Operations	Capacity building and setting standards	Information, analysis and knowledge development, including Early Warning + preparedness system
	<ul style="list-style-type: none"> Involvement in training activities is very limited, mainly due to the fact that the UK does not participate in the second-phase CEAS legislation 	

Moreover, the UK National Crime Agency has taken part in the ad-hoc project on the monitoring of migrants on social media, being the most active partner of EASO in the monitoring of migrants' accounts, with the aim of identifying trends and gathering intelligence on migration routes and smuggling networks.

European Border and Coast Guard Agency (EBCG) (FRONTEX)

The **European Council refused to give the UK its authorisation to participate in the Frontex Agency, on the grounds that the UK did not opt-in to those parts of the Schengen *acquis*** relating to the lifting of external borders, to which the Frontex Regulation is a developing measure.¹¹⁴ Although the UK was excluded from full membership of Frontex, the Frontex Regulation makes provision for collaboration with the UK, by:

- **Facilitating operational cooperation with the UK in the field of return**, with the Regulation stating that 'the UK may be involved in joint return operations which benefit from Frontex assistance'.
- **Allowing the UK to participate in a number of operations in the field of border management** (including *Operation Poseidon Land*, *Operation Indalo*, and *Operation Aeneas*, among others), authorised on a case-by-case basis by an absolute majority of the Frontex Management Board.¹¹⁵
- **Having a UK representative attend Frontex Management Board meetings as an observer** without the right to vote.

The **Home Office has stated that currently the UK does not contribute financially towards the administrative costs of Frontex.** Between 2006 and 2015, the UK did contribute through direct financial contributions of GBP 500,000 per year.¹¹⁶ In 2015, however, the Home Office revised the approach, ceasing the direct financial contributions and supplying, instead, equipment and staff to Frontex.¹¹⁷

¹¹⁴ CJEU, C-77/05, 18 December 2007.

¹¹⁵ UK House of Lords, *Leaving the European Union: Frontex and UK Border Security Cooperation Within Europe*, 2017.

¹¹⁶ Bureau of Investigative Journalism, 'Europe's Refugee Crisis: Is Frontex Bordering on Chaos?', 15 September 2015.

¹¹⁷ Home Office, *Report on the Annual Accounts of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States for the Financial Year 2014 together with the Agency's Reply*, 17 November 2015.

Table 6. UK's current level of participation in Frontex¹¹⁸

Frontex Activities							
Border Management Activities							Return Activities
Monitoring / Vulnerability assessment / Risk analysis	Capacity/readiness assessment	Management of external borders through ILOs	Joint operations	RABITs	Training	Information-sharing	Joint returns
/	/	/	X (on a case-by-case basis, by absolute majority of Board)	X	/	X	X
/	/	/	UK has participated as an observer to a number of operations	UK has participated in RABITs	/	UK/Frontex exchange border surveillance data. UK can share data when it concludes bilateral/multilateral agreements with other Member States.	UK organised a Joint return operation to Albania

Other Cooperation

The **UK also cooperates with the EU in the field of international protection in a number of independent policies and activities in the field of asylum and immigration.** These practical cooperation initiatives allow EU Member States to share information, data and expertise on EU migration issues. Most of this work is guided by non-binding Council Conclusions, such as:

¹¹⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council, 14 September 2016, on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

- The **EU's Global Approach to Migration and Mobility (GAMM)**,¹¹⁹ which is a framework for external migration policy and provides a strategic guide for the EU's relations on migration with third countries. The UK's work under the GAMM includes the *Silk Routes Partnership*, and the *Dialogue on Migration, Mobility and Security with the countries of the southern Mediterranean*.
- The **Migratory Pressures Roadmap**, which is a framework that responds to current and future pressures.¹²⁰ The UK works with EU partners to combat the abuse of free movement by third-country nationals and support Greece in its efforts to build its migration and asylum system.
- The **EMN**,¹²¹ with the UK EMN National Contact Point being funded by the European Commission to deliver UK national reports on topics relevant to policy-makers at national and EU levels.

In addition, one of the areas in which the UK contributes the most is within the **Immigration Liaison Officers (ILO) Regulation**, which currently deploys more than 500 officers to more than 85 third countries.¹²² The role of ILOs is to manage the EU external borders in accordance with the Schengen *acquis*.¹²³ The EU has proposed a revision of the ILO Regulation, with the aim of enhancing coordination between liaison officers, and to optimise their utilisation through the creation of a European Network of ILO.¹²⁴ Currently, the UK, together with the Netherlands and France operates the largest network of ILOs.¹²⁵

Moreover, in accordance with Articles 1 and 2 TEU of the Protocol on the position of the UK and Ireland, **the UK can participate in EU Readmission Agreements (EURAs), on an opt-in basis**. Of all the EURAs agreed to date, the UK has participated in the following agreements.

Table 7. UK's participation in EU Readmission Agreements:

Third Country	Date of Entry into Force	UK Participation
Hong Kong	1 March 2004	Yes ¹²⁶
Macao	1 June 2004	Yes ¹²⁷
Sri Lanka	1 May 2005	Yes ¹²⁸
Albania	1 May 2006	Yes ¹²⁹
Russia	1 June 2007	Yes ¹³⁰

¹¹⁹ European Commission, Migration and Home Affairs, Global Approach to Migration and Mobility (GAMM). Webpage last accessed on 17.October 2018, at: https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en

¹²⁰ Communication from the commission to the European Parliament, the European Council and the Council, Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy, COM(2017) 820 final.

¹²¹ COM(2016) 466.

¹²² European Parliamentary Research Service, Implementation Appraisal: Revision of the immigration liaison officers network, Regulation (EC) 377/2004, May 2018.

¹²³ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

¹²⁴ Proposal for a Regulation of The European Parliament and of the Council on the creation of a European network of immigration liaison officers (recast), 16 May 2018, COM(2018) 303 final, {SWD(2018) 197}.

¹²⁵ European Parliamentary Research Service, Implementation Appraisal: Revision of the immigration liaison officers network, Regulation (EC) 377/2004, May 2018.

¹²⁶ Agreement between the European Community and the Government of Hong Kong on the readmission of persons residing without authorisation.

¹²⁷ Agreement between the European Community and Macao on the readmission of persons residing without authorisation.

¹²⁸ Agreement between the European Community and Sri Lanka on the readmission of persons residing without authorisation.

¹²⁹ Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation

¹³⁰ Agreement on the readmission of persons residing without authorisation with Russia.

Third Country	Date of Entry into Force	UK Participation
Ukraine	1 January 2008	Yes ¹³¹
FYROM	1 January 2008	Yes ¹³²
Serbia	1 January 2008	Yes ¹³³
Moldova	1 January 2008	No ¹³⁴
Bosnia and Herzegovina	1 January 2008	No ¹³⁵
Montenegro	1 January 2008	Yes ¹³⁶
Pakistan	1 December 2010	Yes ¹³⁷
Georgia	1 March 2011	Yes ¹³⁸
Armenia	1 January 2014	No ¹³⁹
Azerbaijan	1 September 2014	No ¹⁴⁰
Cape Verde	1 September 2014	No ¹⁴¹
Turkey	1 October 2014	No ¹⁴²

3.1.3. UK's application of the EU Charter

The **EU Charter of Fundamental Rights**¹⁴³ was first adopted as a non-binding document in 2000, when it was solemnly proclaimed by the Parliament, the Council and the Commission in Nice, and it **codified those fundamental rights that have been identified by the Court of Justice of the European Union's (CJEU) case law as general principles of EU law**. However, it only became legally binding with the Treaty of Lisbon in 2009 and acts as a human rights instrument to set out a detailed list of civil, political, economic and social rights that also apply to asylum seekers and beneficiaries of international protection. The Charter also draws on a number of other frameworks, including the European Convention on Human Rights (ECHR), the European Social Charter,¹⁴⁴ the Community Charter of the

¹³¹ Agreement between the European Community and Ukraine on readmission of persons.

¹³² Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation.

¹³³ Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation.

¹³⁴ Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation.

¹³⁵ Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation.

¹³⁶ Agreement between the European Community and the Republic of Montenegro on readmission.

¹³⁷ Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation.

¹³⁸ Agreement between the European Union and Georgia on the readmission of persons residing without authorisation.

¹³⁹ Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation.

¹⁴⁰ Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation.

¹⁴¹ Agreement between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation.

¹⁴² Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

¹⁴³ Charter of Fundamental Rights of the European Union, 2000/C 364/01.

¹⁴⁴ Council of Europe, European Social Charter, 18 October 1961, ETS 35

Fundamental Social Rights of Workers,¹⁴⁵ and case law of the CJEU. The Charter applies to EU institutions and to Member States, specifically when they are acting within the scope of EU law.

Initially the UK, together with Poland, opted-out from the Charter, stating that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'.¹⁴⁶ However, **this opt-out was incompatible with the CJEU interpretation of the Charter (Box 9), and in 2011 the CJEU ruled that the Charter had to apply in all EU Member States, with no exclusions.**¹⁴⁷ The Charter, however, binds all Member States and EU Institutions 'only when they are implementing Union law' (Art 51), meaning that the UK will only be bound by the Charter when it acts within the scope of the EU asylum law to which it is bound.

Box 9. CJEU Case C-411/10 and C-493/10, *R(NS) v Secretary of State for the Home Department*

Ruling of the CJEU

'Article 1(1) of Protocol No 30 explains article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.'

The **Charter has played an important role in British courts**, for example in the *Janah v Libya* and *Benkharbouche v Sudan* cases, where the Supreme Court set aside part of an Act of Parliament to give effect to a Charter right.¹⁴⁸

3.1.4. The UK and the jurisdiction of the CJEU

The **Treaty of Lisbon has also expanded the role of the CJEU, allowing it to develop a larger body of case law in the field of asylum.** The CJEU, based in Luxembourg, encompasses the whole EU judiciary, and its role is to consider the actions of EU institutions or Member States, and to ensure that EU laws are applied and interpreted consistently across all EU countries.¹⁴⁹

The **CJEU is the ultimate judicial body for the CEAS under the TFEU, the TEU and the Charter of Fundamental Rights, ensuring that all Member States are implementing the EU instruments uniformly and that minimum standards are applied in each of the Member States.** The CJEU has **five main types of cases**: i) ensuring EU law is properly applied at the national level (i.e. a preliminary ruling); ii) infringement proceedings against a national government for failing to comply with EU law; iii) ensuring the legality of EU legislation and annulling it, if necessary; iv) ensuring the Parliament, Council and Commission make necessary decisions in situations when they fail to act; and v) sanctioning of the EU institutions based on harm caused by action or inaction.

In relation to the applicability of the CJEU to the UK, the **1972 European Communities Act (ECA), through section 2(1), provided EU law with domestic legal effect.** As such, in practice, UK courts have interpreted this section as a **'requirement to give effect to direct effects and supremacy of EU law'**.¹⁵⁰ This position is reiterated in section 18 of the European Union Act 2011, as well as the recent UK Supreme Court *Miller* judgement, in which it is noted that 'EU law not only becomes a source of UK

¹⁴⁵ Community Charter of the Fundamental Social Rights of Workers, 9 December 1989 .

¹⁴⁶ Court of Justice of the European Communities (including Court of First Instance Decisions) .

¹⁴⁷ Consolidated version of the treaty on the functioning of the European Union protocol (no 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 1 July 2013.

¹⁴⁸ The Supreme Court, UKSC 62, 18 October 2017, at: <https://www.supremecourt.uk/cases/uksc-2015-0063.html>

¹⁴⁹ Court of Justice of the European Union webpage.

¹⁵⁰ European Parliament, Briefing: Jurisdiction upon and after the UK's withdrawal: The perspective from the UK Constitutional Order, 2018. Authored by Professor Steve Peers for the Policy Department for Citizens' Rights and Constitutional Affairs.

law, but actually takes precedence over all domestic sources of UK law, including statutes (paragraph 60).¹⁵¹

However, **there are restrictions to the status of EU law in relation to the expression of constitutional principles.** In particular, the UK Supreme Court (in alignment with the respective courts of other Member States, in particular the German Federal Constitutional Court) has implied that it may be willing to call into question the CJEU's jurisdiction in relation to judgements that it considers impact constitutional principles.¹⁵²

The implications for CJEU jurisdiction post-Brexit are discussed further in section 6.2.

3.2. UK participation during the transition period

Until the withdrawal of the UK from the EU, the UK remains a full member of the first phase of the CEAS. Moreover, during the transition period, Protocols 19 and 21, which outline the UK's right to participate on an opt-in basis, will continue to apply. In this regard, the **UK Government has stated that it will 'continue to consider the application of the UK's right to opt-in to forthcoming EU legislation in the area of justice and home affairs on a case-by-case basis'**.¹⁵³ However, from the start of the transition period, the EU will have the right to determine that a measure which applies to the UK should cease to apply to the UK, if its non-participation in a proposal amending that measure would make the relevant legislation inoperable for the remaining Member States.¹⁵⁴ Although to date this decision has never been taken, it could potentially apply to the current proposal to reform the Dublin system, if the Council determines that the non-participation of the UK in the amended version of the measure makes the application of that measure inoperable for other Member States of the EU (Art 21(4a)).¹⁵⁵ Furthermore, the agreed provisions on the transitional period outline that the UK should no longer be allowed to opt-in to measures in this area other than those 'amending, replacing or building upon' the Acts adopted in the AFSJ to which the UK is bound before its withdrawal.¹⁵⁶

As stated in the draft withdrawal agreement, the UK and EU have agreed that the UK will keep EU legislation in its domestic law for 21 months following Brexit (from 29 March 2019 until 31 December 2020), to ensure continuity and consistency in the legal framework and to make sure that businesses' and individuals' rights and obligations will not change, to provide some time for a smooth transition to future agreements. The UK Parliament will then be able to 'amend, repeal and improve' individual laws if needed.¹⁵⁷ Moreover, during the transition phase, the Government accepted that it would be subject to the CJEU, although in this period the judge from the UK will already have left. Under the jurisdiction of the CJEU, the UK will still be bound by the principle of autonomy of the EU legal system, and by its primacy over the law of the EU Member States (Art. 344 TFEU). Following that period, the binding nature of the CJEU will come to an end, as it will no longer have jurisdiction over the UK, and its rulings will no longer have the status of binding authority for UK courts,¹⁵⁸ although the

¹⁵¹ R (on the application of Miller and another) v Secretary of State for Exiting the European Union, Judgement given on 24 January 2017, paragraph 60. Last accessed on 18.10.2018, at: <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

¹⁵² European Parliament, Briefing: Jurisdiction upon and after the UK's withdrawal: The perspective from the UK Constitutional Order, 2018.

¹⁵³ House of Commons. European Union opt-in decision: Asylum Measures: Written statement – HLWS376.

¹⁵⁴ Draft Withdrawal Agreement, 19 March 2018.

¹⁵⁵ Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 21) On The Position Of The United Kingdom And Ireland In Respect Of The Area Of Freedom, Security And Justice. However, the Commission proposal for this Regulation stated the view that the UK's non-participation would not lead to inoperability, and in order for the Council to make a finding of inoperability, the Commission would have to first make a proposal to that end.

¹⁵⁶ Ibid.

¹⁵⁷ Department for Exiting the European Union: Legislating for the Withdrawal Agreement between UK and EU, July 2018.

¹⁵⁸ Ibid.

UK might still accept the CJEU taking up the role of an arbitrary body, dealing with government disputes.¹⁵⁹

However, **both the UK and the EU are also preparing for the option of a no-deal Brexit**. In the case of no agreement, the transition period, which is conditional on a withdrawal agreement being signed, will not apply and all current EU rules will immediately cease to apply starting from 29 March 2019.

¹⁵⁹ For a period of eight years, the CJEU will have jurisdiction as regards the withdrawal agreement provisions on the position of EU27 citizens who were in the UK before the end of the transitional period.

4. OVERVIEW OF THE LEGAL STANDARDS APPLICABLE TO THE UK AFTER ITS WITHDRAWAL FROM THE EU AND THE IMPLICATIONS

KEY FINDINGS

- Key **international legal standards will remain applicable to the UK after Brexit**, including, at the United Nations, the **1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees** and, at the Council of Europe, the **European Convention on Human Rights (ECHR)** (under the jurisdiction of the European Court of Human Rights – ECtHR). Through the **1998 Human Rights Act**, the UK incorporated the ECHR into its domestic legal framework.
- These **international legal standards bind the UK to important principles**, including non-discrimination, non-penalisation for illegal entry or stay in a country, non-refoulement, as well as the obligation to respect the rights of migrants and asylum seekers derived from the ECHR.
- In addition to these international legal standards, the **UK will still be bound by its domestic legal framework in the field of international protection**.
- In relation to **asylum**, the **first-phase CEAS Directives have been transposed into UK law**. However, the 1971 Immigration Act gives the Home Secretary the **power to detain asylum seekers for administrative purposes** and the 2002 National Immigration and Asylum Act seeks to **limit the rights of asylum seekers to appeal against negative asylum decisions** by the Home Office.
- Regarding **resettlement** and **return**, the UK's Home Office currently collaborates with the United Nations High Commissioner for Refugees (UNHCR) on **four resettlement schemes** and implements **three main categories of state-enforced departures**.
- Concerning readmission, the **UK has bilateral readmission agreements with a number of third countries**, which complement its participation in EU Readmission Agreements (EURAs). It also **previously held bilateral readmission agreements that have been superseded by EURAs** with the same third country (e.g. Albania).
- Considering the above, it is envisaged that, following Brexit, a small number of **gaps will occur regarding the rights protected by the UK and the EU**. In particular, without the Charter of Fundamental Rights of the EU (CFR), the **UK will have no legal safeguard to prevent the arbitrary detention of stateless individuals** and **no protection for the right to dignity** (Art. 1 CFR). As such, concerns persist related to the **potential deterioration of the rights afforded to those applying for international protection in the UK**.
- However, in recent years, the **ECtHR has proved more influential in matters of asylum rights** when compared with the CJEU, in particular considering that the **ECtHR passed more asylum judgements than the CJEU in each of the years from 2010 to 2016**.

4.1. International legal standards on asylum, resettlements, return and readmission that will remain applicable to the UK following Brexit

4.1.1. United Nations International legal instruments for the protection of refugees and asylum seekers

Political asylum was first recognised as a human right following the Second World War, in the 1948 Universal Declaration on Human Rights (Art 14(1)).¹⁶⁰ In the following years, the **1951 Refugee Convention broadened the criteria** under which States would grant asylum to refugees, and the **1967 Protocol Relating to the Status of Refugee was developed to expand the Convention's geographical and temporal limits**, which only referred to European citizens becoming refugees as a result of events occurring before 1951.¹⁶¹ Together, the **1951 Convention and the 1967 Protocol form the core of the international protection system and international refugee law, to which the UK is a signatory.**¹⁶² EU law is also based on the international legal framework, as outlined in Article 78 of the TFEU, as amended by the Lisbon Treaty, stating that '[The CEAS] must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'.¹⁶³

Together, the Refugee Convention and Protocol stipulate key provisions that secured the fundamental rights of refugees by setting the principles of non-discrimination, non-penalisation for illegal entry or stay in a country and non-refoulement, which prohibits the enforced return of refugees to countries in which they fear persecution. The Convention and Protocol, which only apply to refugees under the protection of the UNHCR, also lay down minimum standards for the treatment of refugees, including the right to housing, access to courts, primary education, work and the provision of documentation.

Other international Conventions relevant, in part, to the protection of refugees' fundamental rights include:

- 1954 The Convention on the Status of Stateless Persons;¹⁶⁴
- 1961 The Convention on the Reduction of Statelessness;¹⁶⁵
- 1976 The Convention on Economic Social and Cultural Rights;¹⁶⁶
- 1984 The Convention Against Torture;¹⁶⁷
- 1992 The Convention on the Rights of the Child;¹⁶⁸
- 1996 The Convention on Civil and Political Rights and¹⁶⁹
- 2006 The Convention for the Protection of all Persons from Enforced Disappearance.¹⁷⁰

¹⁶⁰ Universal Declaration of Human Rights, of 10 December 1948.

¹⁶¹ Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (Refugees Convention) & Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Protocol).

¹⁶² Ibid.

¹⁶³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

¹⁶⁴ UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.

¹⁶⁵ Ibid.

¹⁶⁶ International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3.

¹⁶⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465.

¹⁶⁸ Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3.

¹⁶⁹ International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171.

¹⁷⁰ International Convention for the Protection of All Persons from Enforced Disappearance, Entry into force 23 December 2010.

4.1.2. Council of Europe legal standards

Based on the 1951 Convention and the 1967 Protocol, in the following years further developments of international asylum legislation were adopted, and in **1953 the Council of Europe (CoE) developed the European Convention on Human Rights (ECHR)**,¹⁷¹ to which all CoE Member States are signatories.

Box 10. European Convention on Human Rights in UK Domestic Law

Incorporation of the European Convention on Human Rights into UK Domestic Law¹⁷²

In 1998, with the Human Rights Act, the UK Parliament incorporated into its domestic law the human rights contained in the ECHR. The Act set out the fundamental rights and freedoms that everyone in the UK is entitled to.

Effects of the Human Rights Act:

- UK citizens can seek justice from a UK court, rather than from the Strasbourg ECHR court if human rights have been breached
- It ensures that the UK Parliament will make sure that new laws are compatible with Convention rights, and that courts interpret laws in a way which is compatible with Convention rights

The **ECHR includes provisions to safeguard the rights of asylum seekers**. In addition to the rights provided by the 1951 Convention, the ECHR imposes the obligation to respect the human rights of migrants and asylum seekers (e.g. right to life, prohibition of torture, right to liberty and security, right of fair trials, no punishment without law prohibition of discrimination) who leave their country for a reason which is different from persecution, which could include family reunification, study or employment.¹⁷³ The **Convention also established the European Court of Human Rights (ECtHR), based in Strasbourg, which has jurisdiction over European countries that are signatories to the ECHR**.¹⁷⁴ The ECtHR deals with complaints from direct victims of violations of obligations from the Convention, only after applicants have exhausted all domestic remedies, and within six months of the final decision made by the highest court of the State in which the complaint originated.

As members of the CoE, all EU Member States are bound by the ECHR. However, in addition, the EU has set complementary rules for its Member States, including the EU Charter of Fundamental Rights, which constitutes primary EU law and which serves as a parameter for examining the validity of secondary EU legislation (such as the CEAS) and national measures.

4.2. UK legal standards on asylum, resettlements, return and readmission that will remain applicable following Brexit

As a signatory to both the 1951 Geneva Convention and Additional Protocol and the ECHR, following Brexit the UK will remain bound to the abovementioned international human right legal standards.

For example, the criteria for accepting applications for asylum in the UK, which are based on the Refugee Convention criteria stating that applicants need to be 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, ... unwilling to avail himself of the protection of that country' will remain the same.¹⁷⁵ In addition, the UK added the following criteria:

¹⁷¹ European Convention on Human Rights.

¹⁷² United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998.

¹⁷³ The 1951 Convention relating to the status of refugees and its 1967 Protocol.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

- The asylum seeker needs to be in the UK
- He [or She] needs International Protection
- He [or She] is not a danger for the security of the UK
- Refusing his [or her] application would result in the applicant going to a country in which his [or her] life and freedom would be threatened.

4.2.1. The UK legal framework in the field of international protection

Asylum

In the UK, the **Home Office is the government department with primary responsibility for securing the UK border and controlling immigration, and UK Visas and Immigration (a division of the Home Office) is responsible for asylum applications.** Asylum seekers may apply for asylum only after entering the UK, and if applicants get refugee status they will be granted leave to remain in the UK for an initial period of five years,¹⁷⁶ after which refugees can apply for UK citizenship.¹⁷⁷

Moreover, **through the European Community Act (ECA) 1972, the UK Parliament has transposed the first phase of the EU CEAS Directives, thereby enabling asylum seekers to rely on EU law before UK courts.** However, the EU standards gave Member States leeway in implementation and, as such, the **UK has more restrictive policies on detention compared to the second phase of CEAS Directives,** to which the UK did not opt-in. For example, the recast Asylum Procedures Directive, to which the UK did not opt-in, provides all asylum seekers with access to legal advisers, free legal information and a same-sex interpreter. The UK, however, only provides asylum seekers with access to an interpreter.

In 1971, the **Immigration Act gave the Home Secretary the power to detain asylum seekers.**¹⁷⁸ This power was subsequently reinforced in 1999 when the Government developed a policy to detain asylum seekers in immigration detention centres (for an indefinite period of time) for administrative purposes. Detainees include people who have been refused leave to enter the UK or who are required to submit to further examination at ports of entry. The majority of immigration detainees are either asylum seekers who have arrived legally and whose claims are being investigated or asylum seekers whose claims have been rejected and are awaiting removal.¹⁷⁹ Moreover, since the 2000s, including through the 2002 National Immigration and Asylum Act, the **UK has introduced a range of legislation that limits the rights of asylum seekers to appeal against negative asylum decisions by the Home Office.** These include 'fast track' procedures with minimal safeguards against removal and non-suspensive appeals, which force asylum seekers to return to their home country to continue their appeals. In addition, these instruments also limit refugee access to medical treatment and, in certain cases, remove income support for living costs for asylum seekers that had failed to apply for asylum 'as soon as reasonably practicable after the person's arrival to the United Kingdom' (Section 55, National Immigration and Asylum Act).¹⁸⁰

All applicants for asylum are fingerprinted and checked against databases, including the UK Immigration and Asylum Biometric system¹⁸¹ and, currently, the Eurodac database, to ascertain whether the applicants have other outstanding applications in other EU countries and to detect fraudulent applications.

¹⁷⁶ House of Commons Library Briefing Paper, Constituency Casework: Asylum, Immigration and Nationality, 13 May 2015.

¹⁷⁷ British Nationality Act 1981, c. 61.

¹⁷⁸ Immigration Act 1971, c. 77.

¹⁷⁹ Refugees Studies Centre, University of Oxford. The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies, 2005.

¹⁸⁰ Section 55 of the Nationality Immigration and Asylum Act 2002.

¹⁸¹ UK Home Office, Biometrics Strategy: Better public services, maintaining public trust, June 2018.

Resettlement

The **UK offers some refugee resettlement programmes that allow limited numbers of refugees, who have been referred to the Home Office by the UNHCR, to resettle in the UK.**¹⁸² Until 2015, the UK had resettled the highest number of persons of all EU Member States.¹⁸³ The UK has four resettlement schemes: i) the Vulnerable Persons Resettlement Scheme (VPRS); ii) the Vulnerable Children's Resettlement Scheme (VCRS); iii) the Gateway Protection Programme; and iv) the Mandate Scheme.

An example of a recent VPRS was the Syrian Vulnerable Person Refugee Scheme, which from 2015 aimed to resettle over 20,000 Syrian nationals in the UK, directly from Syria, rather than through EU refugee relocation programmes, prioritising the most vulnerable people over the next five years.¹⁸⁴ In 2017 6,212 people were resettled in the UK, with over 75% of them being resettled through the VPRS.¹⁸⁵

Return

The **Home Office is responsible for the enforced departure of individuals who have not been granted asylum, on commercial flights or chartered planes.** Such individuals, who have had their asylum request rejected, can be detained for an undefined period of time prior to their return until their country of origin becomes safe enough. In the year ending March 2018, 26,541 individuals entered the detention centres and 27,429 departed.¹⁸⁶

A total of 11,621 returns (including those not directly from detention) were enforced in the year ending March 2018, compared with 12,766 in the previous year.¹⁸⁷ The UK has three main categories of state-enforced departures:¹⁸⁸

- **Deportations** refer to the removal of individuals deemed 'conducive to the public good' by the Secretary of State.
- **Administrative Removals** refer to the return of persons who have: i) entered the country illegally; ii) overstayed their visa or otherwise violated the conditions of their permission to stay in the UK; or iii) been refused entry upon arrival and never entered the country.
- **Voluntary Departures** refer to individuals against whom the UK has initiated enforced removal proceedings. However, contrary to the EU concept, the term 'voluntary' relates to the means of departure as opposed to the choice of whether or not to depart. Three means of voluntary departure exist in the UK: i) Assisted Voluntary Return schemes organised by the Home Office; ii) departure organised by the individual and communicated to the authorities; and iii) departure without communication.

Moreover, **even though the UK did not opt-in to the Return Directive, it works with Frontex on joint operations,** on the basis of the Frontex Regulation.¹⁸⁹ An example of a joint operation was the

¹⁸² UK Government, UK Country Chapter – UNHCR Resettlement Handbook, March 2018.

¹⁸³ Council of the European Union, 22 July 2015, Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection.

¹⁸⁴ Immigration Rules, H.C. 395 (1994), §7.

¹⁸⁵ Home Office, How many people do we grant asylum or protection to? Webpage last accessed on 17.10.2018, at: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-do-we-grant-asylum-or-protection-to>

¹⁸⁶ UK Government, National Statistics. How many people are detained or returned? 24 May 2018.

¹⁸⁷ Ibid.

¹⁸⁸ The Migration Observatory, University of Oxford, Deportations, Removals and Voluntary Departures from the UK (webpage), October 2017. Last accessed on 25.10.2018 at:

<https://migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/>

¹⁸⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

UK's participation in the EU's Operation Triton to rescue and return migrants in the Mediterranean in 2015, where a British Royal Navy ship rescued nearly 5,000 migrants.

Readmission

Currently, the returns of irregular third-country nationals to another Member State where they have previously been registered in Eurodac or of which they have a legal residence document, occur through the Dublin system. The Dublin system identifies, in accordance with a number of criteria, the Member State responsible for examining an application for international protection made in one of the Member States.

UK-third country readmissions, on the other hand, are negotiated both through EURAs and through bilateral official and unofficial agreements between the UK and third countries. The future participation of the UK in these readmission systems will depend on the outcome of the withdrawal negotiations.

4.3. Protection of fundamental rights in the UK following Brexit

4.3.1. Possible implications of ceasing to apply the EU Charter of Fundamental Rights protection in the UK

The **EU (Withdrawal) Act specifies that following Brexit, the Charter will not be transferred into UK national law, although it rules that the Act will not prevent the UK from replicating EU laws and from continuing to participate in EU agencies.**¹⁹⁰ Even without the EU Charter, however, the UK will still follow international legal standards, including the 1951 Refugee Convention and the ECHR. The UK is also a party to the 1954 Convention on the Status of Stateless Persons¹⁹¹ and to the 1961 Convention on the Reduction of Statelessness,¹⁹² although it lacks domestic policies and procedures to address challenges linked to statelessness. For example, there are no provisions in UK law designed to protect the rights of stateless persons against arbitrary detention.¹⁹³¹⁹⁴ As such, without the Charter, the UK will have no specific legal safeguard to prevent the arbitrary detention of stateless persons.

Since its establishment, **the Charter, which is complementary to the ECHR, has played an important role within the EU with regard to the protection of the rights of refugees.** However, although both the ECHR and the EU Charter aim at providing protection to those in need of international protection, the Charter provides a set of additional rights for applicants and beneficiaries compared to the ECHR. Additional rights include the right to data protection, to access their data and to rectify it (Art 8 Charter) and the right to dignity (Art 1 Charter), which is relevant for the way in which sexual minority credibility is tested in Europe, as shown in a number of preliminary rulings of the CJEU (*A, B and C v. Staatssecretaris van Veiligheid en Justice*).¹⁹⁵

¹⁹⁰ European Union (Withdrawal) Act 2018, c.16 of 26 June 2018.

¹⁹¹ UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.

¹⁹² UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

¹⁹³ UNHCR, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: United Kingdom.

¹⁹⁴ UNHCR / Asylum Aid Joint Report, Mapping Statelessness in the UK, November 2011. According to the UNHCR, 'detention will be arbitrary unless it is: i) carried out in pursuit of a legitimate objective; ii) lawful; iii) non-discriminatory; iv) necessary; v) proportionate and reasonable; and, vi) carried out in accordance with procedural safeguards in international law.' Furthermore, within this study, 'one-third of the 37 persons interviewed for the research had been held in immigration detention and the amount of time spent there ranged from three days to five years.

¹⁹⁵ Gomez, E., The Post-ABC Situation of LGB Refugees in Europe. *Emory International Law Review*, 2016.

The **EU Charter also provides clearer specification of rights covered by the ECHR or UK domestic law**. An example is the Charter's right of non-discrimination, based on any ground, such as 'race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation' (Art 21 Charter). In contrast, the ECHR only prevents discrimination in connection to other Convention's rights, and not as a right on its own (Art 14 ECHR). Another example is the right 'to marry and found a family', which is also outlined in both the ECHR (Art 12 ECHR) and in the Charter (Art 9 Charter).

Moreover, although human rights provided by the ECHR are more binding, as they were incorporated into domestic law through **the 1998 Human Rights Act**, the Act **does not include some of the rights from other UN legal standards, which are reflected in the EU Charter**.¹⁹⁶ These include, for example, the Convention on the Rights of the Child,¹⁹⁷ which have not been incorporated into UK domestic law. Therefore, following Brexit, there is the risk that adequate child protection will not be recognised as a right in British courts. Moreover, the EU Charter provides an additional layer of protection of fundamental rights, as in cases of conflict between basic rights contained in the Charter and an act of the UK Parliament, the EU law would prevail over domestic law. The Charter also outlines the Right to Asylum (Box 11),¹⁹⁸ which is not mentioned in the Human Rights Act. However, the UK Government has argued that the UK will continue to provide asylum rights through domestic law (e.g. the Nationality, Immigration and Asylum Act 2002;¹⁹⁹ the Asylum and Immigration Appeals Act 1993;²⁰⁰ and the Immigration Rules²⁰¹).²⁰²

Although it is unclear whether the UK will amend its practices in this regard, it is clear that the legal safeguards related to these additional rights covered by the Charter but not in UK law will cease to apply.

Box 11. EU Charter of Fundamental Rights

Article 18: Right to Asylum

'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.'

The **Charter is a more comprehensive catalogue of human rights, compared to the ECHR**, and if the UK continues to be bound by the ECHR, but not by the EU Charter, there are concerns that the application in the UK of the rights contained in the EU system will not be at the same level as it is today.²⁰³

In this regard, **concerns have been raised regarding whether a scenario where the UK is no longer bound by EU law after Brexit could lead to a deterioration of the rights afforded to those individuals applying for international protection in the UK** (e.g. timeframes to appeal asylum decisions, reception conditions and the use of detention, etc.). Some experts believe that a reduction in standards could ultimately lead to the UK becoming less desirable in the eyes of asylum seekers, with the potential consequence of putting more migratory pressure on other Member States.²⁰⁴ However,

¹⁹⁶ United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998.

¹⁹⁷ Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577.

¹⁹⁸ Charter of Fundamental Rights of the European Union, 2000/C 364/01.

¹⁹⁹ UK Government, Nationality, Immigration and Asylum Act 2002.

²⁰⁰ UK Government, Asylum and Immigration Appeals Act, 1993

²⁰¹ UK Government (2018) Immigration Rules webpage, last accessed on 17.October 2018, at:

<https://www.gov.uk/guidance/immigration-rules>

²⁰² UK Government (2017) Charter of Fundamental Rights of the EU Right by Right Analysis, 5 December 2017.

²⁰³ Interview with a representative of CCBE.

²⁰⁴ Številová, Z. and Rozumek, M., How to Reform the Common European Asylum System: a View From East-Central Europe, Social Europe, 14 November 2016,

opinions are divided on the impact of such policies on an asylum seeker's decision to apply in a specific country, and a number of studies show that standards of reception or qualification are not the primary criteria for the destination choices of asylum seekers.^{205,206} For example, a study looking at changes in asylum seekers' perceptions of Australia following the implementation of its restrictive asylum policies²⁰⁷ showed that the worsening of reception and procedure standards was not the most important criterion to select a destination, as refugees from Afghanistan, Bangladesh, Pakistan and Sri Lanka still considered Australia as a country of choice, because of its migrant communities, language, highly functioning civil society and labour market.²⁰⁸

On the other hand, as the UK has expressed its willingness to participate at some level in the CEAS (e.g. in the reformed Eurodac and Dublin (or Dublin-like) regulations), the **divergence of standards of refugee recognition, protection and rights is unlikely to be helpful to the UK position**. Therefore, in order to both regain sovereignty while retaining cooperation with the EU, the UK may want to replicate EU legal standards in its domestic law. Academic experts suggest that it is likely that residual effects of the EU Charter will remain in UK domestic legislation, with case-by-case parliamentary intervention selectively repealing unwanted legislation.²⁰⁹

4.3.2. Possible implications of ceasing the jurisdiction of the CJEU on dispute resolution in the field of international protection in the UK

The **EU (Withdrawal) Act also stated that following Brexit there will no longer be 'reference to the CJEU, and no more absolute supremacy for CJEU decisions'** (Section 6(4)).²¹⁰ Looking at existing models of dispute resolution between the EU and other third countries, however, alternative international agreements can be enforced and interpreted by means other than the CJEU, such as through political, judicial, or quasi-judicial bodies. There are a number of existing precedents (although not in the field of international protection) where the EU has reached agreements with third countries which provided for a close cooperative relationship without the CJEU having direct jurisdiction over those countries. Precedents include: i) Joint Committees; ii) Arbitration models; iii) Reporting and monitoring requirements; iv) Reference to pre- or post-agreement CJEU decisions; v) Supervision and Monitoring; and vi) Provisions for voluntary references to the CJEU for interpretation.²¹¹

An example of a mechanism of law enforcement between the EU and a third country that could be replicated in the UK–EU future agreement is the arrangement that the Union has with Switzerland in the area of asylum.²¹² If there are legal disputes between an EU country and Switzerland, the CJEU can only intervene when an EU court asks it about the EU–Swiss treaty, while the Swiss courts cannot ask it about that treaty. Disputes between Switzerland and the EU in relation to the application of Dublin III, as for any other agreement, are referred to a special joint committee (comprising an equal number of Swiss and EU representatives) with the role of resolving disputes, in the light of both the CJEU and Swiss national courts. Moreover, for any issue that arises under the Dublin system that may have an impact

²⁰⁵ Peers, S. and N. Rogers (2006). *EU immigration and asylum law. Text and commentary*. Leiden/Boston: Martinus Nijhoff Publishers.

²⁰⁶ Zaun, N., Why EU asylum standards exceed the lowest common denominator: The role of regulatory expertise in EU decision-making. *Journal of European Public Policy*, 23(1), 168–182, 2016.

²⁰⁷ Department of Immigration and Border Protection. Immigration Detention and Community Statistics Summary at 31 June 2016. Canberra (AUST): Government of Australia; 2016.

²⁰⁸ Marie McAuliffe, The Nexus Between Forced and Irregular Migration: Insights from Demography, *Demography of Refugee and Forced Migration*, 10.1007/978-3-319-67147-5_11, (217-232), 2017.

²⁰⁹ London School of Economics (LSE) European Institute Commission on the Future of Britain in Europe (2016) The Implications of Brexit for Fundamental Rights Protection in the UK, Report on the hearing held on 25th February 2016.

²¹⁰ EU (Withdrawal) Act.

²¹¹ UK Government, Enforcement and Dispute Resolution. A Future Partnership Paper, no publication date, last accessed on 17.10.2018, at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf

²¹² Interview with a representative of CCBE.

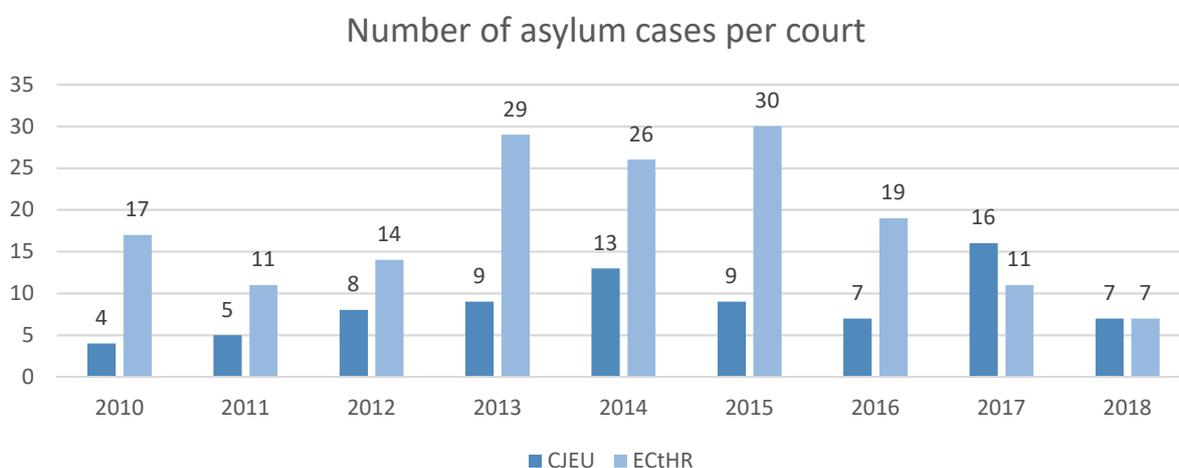
on how the Dublin system works in Switzerland, the Swiss Government has the right of audience before the CJEU to make its argument on how the CJEU should determine the case.²¹³

If, following negotiations, no agreement on the terms of the withdrawal are agreed upon, the CJEU will no longer have jurisdiction over the UK. This means that the UK will no longer be bound by CJEU preliminary rulings relating to the UK, which determine whether a national law or practice is compatible with EU law, and that the EU and its Member States will no longer be able to start infringement proceedings against the UK Government for failing to comply with EU law.

In this regard, however, **in recent years, the ECtHR has been more influential in matters of asylum rights when compared to the CJEU.** As shown in On the other hand, CJEU rulings, according to CJEU case law, are binding more generally unless the CJEU indicates otherwise.

Figure 3, the ECtHR ruled on more asylum cases than the CJEU in each of the years 2010–2018.²¹⁴ However it should be noted that, strictly speaking, the decisions of the ECtHR are only binding upon the parties participating in the judicial procedure in question.²¹⁵ On the other hand, CJEU rulings, according to CJEU case law, are binding more generally unless the CJEU indicates otherwise.

Figure 3. Comparison of the CJEU and ECtHR in regard to the number of asylum judgements²¹⁶



Furthermore, the **ECtHR has played a central role in condemning human rights breaches resulting from the Dublin System.**²¹⁷ A key example is the case *M.S.S v Belgium and Greece*, where the ECtHR condemned both Greece and Belgium for violation of non-refoulement as protected under Art 3 ECHR (Box 12), as it found that Belgium had sent an asylum applicant back to Greece, where the applicant's conditions of detention would have been below EU minimum standards and where the applicant had a high risk of refoulement without thorough examination of the asylum claim.²¹⁸

As the UK will still be bound by the ECHR and under the ECtHR's jurisdiction, the impact on international protection standards in the UK may therefore not change significantly.

²¹³ Interview with a representative of CCBE.

²¹⁴ Data collected from the ECRE's EDAL online database (European Database of Asylum Law).

²¹⁵ Article 46 (1) European Court of Human Rights.

²¹⁶ Data collected from the ECRE's EDAL online database (European Database of Asylum Law).

²¹⁷ Costello C. (2015) *The Human Rights of Migrants and Refugees in European Law* (Oxford: OUP).

²¹⁸ *M.S.S v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).

Box 12. European Convention on Human Rights: Article 3

Article 3 – Prohibition of Torture

'No one shall be subject to torture or inhuman or degrading treatment or punishment'

On the other hand, however, it is **difficult to see how issues concerning fundamental rights can be determined by other bodies than by the juridical institution of the EU**. The ECtHR, which determines matters in relation to the ECHR, is not an EU instrument, and although it informs EU laws, the CJEU can depart from the decisions of the Strasbourg Court, as the CJEU is not bound to decisions of the ECtHR and is unlikely to give more judicial power to a different court. If the UK will want to continue to participate in some of the EU measures, it might be required to abide by the jurisdiction of the CJEU, although there are countries that are applying EU law but are not within the CJEU's jurisdiction. This applies, for example, to all non-EU Schengen/Dublin associated countries, which have access to databases of EU data without the jurisdiction of the CJEU. However, the EU has agreements with these countries which stipulate that if any substantial difference between the CJEU and their courts arises on the interpretation of their agreement which cannot be settled by discussion in the Mixed Committee, the agreement will be terminated.

5. OVERVIEW OF THE EU AND UK POSITIONS ON THE FUTURE RELATIONSHIP AND AREAS OF COMMON INTEREST IN THE FIELD OF INTERNATIONAL PROTECTION

KEY FINDINGS

- Since the beginning of the negotiations, **no EU institution has discussed what is expected in the future framework of cooperation with the UK in the area of international protection.** Furthermore, the European Council **guidelines are unclear on the mandate of the Article 50 Taskforce** in relation to the area of international protection. It could be argued that **the reference to 'global challenges' in Article 9 could incorporate international protection** but no action has been taken in this respect.
- The **UK has been more forthcoming in relation to the topic** of international protection. In particular, through its White Paper on *The Future Relationship between the United Kingdom and the European Union* (July 2018), the **UK expressed its interest in continued cooperation** in relation to the 'global challenges of asylum and migration'. More specifically, it states its desire for continued cooperation on: **Frontex; international dialogues** with European and African partners to tackle illegal migration; **reuniting unaccompanied children** with their families; and a **Dublin-like legal framework** for the transfer of asylum seekers to and from EU Member States, including access to **Eurodac**.
- Primarily, UK concerns centre on a post-Brexit increase in the movement of asylum seekers to the UK, where the UK would have: **no legal mechanism to transfer these asylum seekers to the first country of entry** in the EU (or other relevant Member State); and **no means for understanding whether an asylum seeker had previously applied for asylum in an EU country**. Particular concerns relate to key points of entry, such as the Ireland–Northern Ireland border and Calais.
- As such, it is considered that **areas of common interest**, considering the **UK's stated desires**, the **implications of the UK's exit** in the area of international protection for both the UK and the EU and the **anticipated preconditions for cooperation** (see section 6.2), include the following: the **CEAS** and, in particular, a **system for the transfer of asylum seekers** to the most relevant country for processing; the **European Asylum Support Office; Frontex; readmission agreements**; and the **network of immigration liaison officers**.

Since the Brexit Referendum, there have **been limited discussions and negotiations in the field of international protection compared to other fields, despite immigration being at the core of the pre-referendum Brexit debate.** It is also important to note that, **because of the opt-in system, the UK's participation in the EU's international protection system has always been limited.** Therefore, the impact of Brexit may not be as significant in the area of asylum, compared to other fields.

As covered in the previous section, the UK currently has an opt-in facility with regard to EU asylum legislation and selectively takes part in agency activities and operations. However, the draft EU Withdrawal Agreement (Art. 123), published in March 2018, provides that, as a result of no longer being part of all EU agencies, bodies and institutions, the UK will lose the right to be part of the negotiation

of policy measures and strategic decisions and will only be able to participate in policies when finalised.²¹⁹

Following Brexit, a new external border of the EU will be created, prompting the need for a new framework to manage migration across this new border. The second phase of the negotiations on the future relationship between the UK and the EU started in March 2018, following the adoption of additional guidelines for discussion by the European Council. This phase will include discussions on the future relationship in the area of asylum and migration. This policy area does not operate independently and is intertwined with the negotiations on the UK's foreign relations and the Irish border.

5.1. EU position on future relationships

Since the beginning of the negotiations, **no EU institution has discussed what is expected in the future framework of cooperation with the UK in the area of international protection.**

The guidelines adopted by the European Council (Article 50) define the framework for negotiations under Article 50 TEU, setting out the positions of the EU throughout the negotiation.²²⁰ The guidelines cover trade and economic cooperation, security, international crime, defence, foreign policy and the fight against terrorism. Moreover, Article 9 states that 'the future partnership should address global challenges, in particular in the areas of climate change and sustainable development, as well as cross-border pollution, where the Union and the UK should continue close cooperation'.²²¹ Moreover, **although the guidelines mention other 'global challenges' (Art 9), international protection is not explicitly mentioned**, which might explain why the European Commission Article 50 Taskforce (TF50) has not started negotiating the future EU–UK relationship in the fields of asylum, resettlement, return and readmission.

In the **draft Withdrawal Agreement, TF50 of the European Commission has covered the outcomes of current negotiations and the elements agreed so far. The field of international protection is however not covered**, and the Commission is yet to publish a communication detailing what the EU considers as 'areas of common interest' in the fields of international protection. The draft Agreement also lays down specific provisions on **'pending issues' (title V), without, however, covering issues related to international protection**, such as what will happen to asylum seekers waiting to be transferred under the Dublin system from the EU27 (or non-EU States associated to the Dublin system) to the UK or vice versa, following Brexit.

Moreover, the European Parliament's Resolution on the Framework on the Future EU–UK Relationship,²²² which outlined that, based on the shared history, geographical proximity, and regulatory alignment of the two parties, the UK will remain an important partner for the EU following Brexit, did not include international protection in its agenda. The Resolution does however note that the new framework for future cooperation with the UK in all fields will be consistent with the following principles, which will be unconditionally applicable to all 'common areas of interest':²²³

- Third countries must not have the same rights and benefits as Member States, or members of the EFTA/EEA;
- Protection of the integrity and correct functioning of the internal EU market and safeguarding of EU agreements with third countries/international organisations;
- Preservation of the autonomy of the EU's decision-making and of the role of the CJEU;

²¹⁹ Department for Exiting the European Union: Legislating for the Withdrawal Agreement between UK and EU, July 2018.

²²⁰ European Council (Art 50), Guidelines Following the United Kingdom's Notification Under Article 50 TEU, 29 April 2017.

²²¹ European Council (Art 50), Guidelines from 23 March 2018.

²²² European Parliament, Guidelines on the framework of future EU–UK relations. European Parliament Resolution of 14 March 2018 on the Framework of the future EU–UK Relationship (2018/2573(RSP)).

²²³ Ibid.

- Continued adherence to human rights principles, and to the standards laid down by international obligations in a number of areas including state aid, workers' rights, climate change and public health.

5.2. UK position on future relationships

The **UK, on the other hand, although it is yet to publish its anticipated White Paper on migration, has mentioned some areas of interest in the field of international protection in its recent and wide-ranging White Paper on *The Future Relationship between the United Kingdom and the European Union (July 2018)*.**²²⁴ In this White Paper, the UK proposes that, rather than agreeing the UK's participation in individual EU programmes on a case-by-case basis, the EU and the UK should develop new alternative cooperation approaches when the cooperation would benefit both parties. The White Paper does not include any further details, however. It also outlines future areas of interest for the UK regarding continued participation in the EU's international protection system, within the context of its approach to security, stating that 'it is vital that the UK and the EU establish a new, strategic relationship to address the global challenges of asylum and illegal migration'.²²⁵ In the area of international protection, the White Paper proposes the development of a new strategy, referred to as the 'whole of route' approach. This proposal includes interventions to remove incentives for immigration at all stages of a migrant's journey to Europe.

The **areas of interest with regard to continued cooperation with the EU in relation to asylum and migration mentioned by the UK Government in the White Paper include:**²²⁶

- Cooperation with **Frontex** (as well as with the EU agency for Law Enforcement Cooperation, **Europol**),²²⁷ to strengthen the EU's external borders and address organised immigration crime;
- Continued UK participation in international dialogues with European and African partners, frameworks and processes to tackle illegal migration (e.g. the Khartoum Process, which is an agreement with Sudan that provides the Sudanese government with funds to deal with immigrants crossing to the Libyan border²²⁸);
- Access to **Eurodac**;
- Continue to allow unaccompanied children to join close family members in the UK.

Additionally, the UK expressed an interest in new arrangements with the EU to prevent individuals claiming asylum in more than one country. According to the White Paper, such arrangements would seek to provide the UK and the EU Member States with a **Dublin-like legal framework** for the return of asylum seekers to another country for the processing of their asylum claim. This framework would prevent asylum seekers from making claims in more than one country or to make claims in the UK after being rejected in an EU Member State and vice versa. However, the White Paper details no criteria or means by which the legal framework would determine when asylum seekers would be transferred.

Without such an arrangement, for example following a no-deal Brexit, a key UK concern relates to a potential increase in the movement of asylum seekers to the UK, in particular, considering the following reasons:

- i. Asylum seekers will be able to apply for asylum in the UK following the rejection of a previous claim for asylum in an EU Member State;
- ii. The UK will have no legal mechanism to transfer asylum seekers to an EU Member State that it feels is better placed to handle the claim. As such, the UK will be required to process the claims of all arriving asylum seekers.

²²⁴ UK Government, *The Future Relationship Between the United Kingdom and the European Union*, of July 2018.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ European Parliament, *The EU–UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*.

²²⁸ Khartoum Process <https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process>

In relation to this concern, it is important to note the role of the most evident points of entry. In particular, Brexit might have **implications on future negotiations between France and the UK on the migration flow from Calais**, as well as between Belgium and the UK concerning entry via Belgian ports. In the same way, the **border between Northern Ireland and the Republic of Ireland could become an easy point of entry for migrants** wishing to seek asylum in the UK. Theoretically, the UK could enforce passport checks, customs checks and tariffs at the border, but this is considered highly unlikely, as the EU and the UK have agreed that the UK-Ireland Common Travel Area providing for passport-free travel between the two islands will continue and both Governments are committed to the continuation of an 'invisible border'.²²⁹ In order to maintain the Common Travel Area arrangement and the free movement of UK and Irish citizens, a possibility would be for the UK and Ireland to seek a bilateral agreement under similar terms.²³⁰

5.3. Areas of common interest of the UK and the Union in the field of international protection

Based on the EU and UK positions described above, this section concludes on the **most pertinent areas of common interest** between the UK and the EU in the field of international protection. However, as detailed above, the EU has not elaborated a position on the areas under discussion. As such, this section is based on the benefits of continued EU–UK collaboration and the prerequisites of such a collaboration detailed throughout this report. More specifically, the prerequisites for future cooperation between the EU and the UK following Brexit are presented in more detail in section 6.2.

CEAS

This section first details the interest of both parties in cooperation on the content of the CEAS Directives, before discussing Dublin as a common area of interest.

Even though the UK will no longer formally be part of the CEAS after Brexit, the **standards from the first phase of the CEAS Directives are incorporated into UK law and will be retained through the EU (Withdrawal) Act**, which received royal assent and was adopted as UK legislation on 26 June 2018.²³¹ As such, current **UK legislation ensures that standards of reception, qualification and asylum procedures in the UK will not be reduced below the standards set through the first-phase CEAS Directives**. This is in the interests of the EU primarily because any restrictions to these standards in the UK could impact the decisions of migrants to travel to the UK. Additionally, should cooperation on international protection be established between the EU and the UK following Brexit, the maintenance of these standards, as well as the compatibility of these standards with an evolving CEAS legal framework, will be of significant interest to the EU. More specifically, these points are significant because, if the UK amends the first-phase CEAS legislation to provide more restrictive standards, it would also initiate further divergence from EU standards – contrary to the objectives of the CEAS – and potentially result in a situation where the transfer of asylum seekers to the UK is precluded. As evidenced by the ECHR and CJEU judgements relating to the deficiencies in the Greek asylum system – Dublin transfers of asylum seekers to Greece have been suspended since 2011 due to the judgements – both courts will act if asked to rule on the compatibility of the UK's asylum system with human rights legislation.²³²

Considering Dublin, however, it is notable that the EU (Withdrawal) Act cannot have a practical effect regarding arrangements with the Union, as the EU would have to agree to such arrangements first. As such, although the first-phase CEAS Directives are enshrined in UK law, CEAS elements that require

²²⁹ House of Lords, Brexit: UK–Irish Relations, 5 September 2017.

²³⁰ Department for Exiting the European Union, Official Recognition of the Unique Nature of UK–Irish Relations (The Impact on the Peace Process and on North–South and East–West Relations).

²³¹ European Union (Withdrawal) Act 2018.

²³² Commission Recommendation of 28.9.2016 addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013. C(2016) 6311 final.

cooperation with the EU, such as the **Dublin system**, will cease to apply in a no-deal scenario and would require common interest and a place in any future cooperation agreement to continue.

With this in mind, the **Dublin system is probably the area in which the EU would most benefit from continued UK participation**. Primarily, if asylum standards in the UK were reduced to a lower standard compared to the Union, there is the possibility, especially from the Irish perspective, that: i) there will be an increase in the movement of persons from the UK into EU Member States; and ii) there will be a redirection effect for incoming migrants from the UK to EU Member States. This means that, if Dublin no longer applies, the responsibility for examining applications of third-country nationals previously living in the UK will fall on the receiving Member State, which will no longer have a legal basis to transfer these asylum seekers back to the UK. In practice, this has already been illustrated by the CJEU Case *M.A. vs The International Protection Appeals Tribunal* (CJEU C-661-17), which concerns a Bangladeshi family that lived in the UK, travelled to Ireland following the Brexit decision and requested asylum protection in Ireland. As the family had been living in the UK, the provisions of the Dublin system require the transfer of the family to the UK, as first point of entry, to have their asylum application examined. However, the claim put forward before the Irish court on behalf of the family states that there is **uncertainty whether, following Brexit, the UK's asylum standards would meet the standards required under EU law**. As a result, they made a case that they should not be transferred back to the UK.²³³ The CJEU will have to decide the approach that Ireland (and consequently all other Member States) will have to take in relation to the UK and Brexit. This derives from the fact that there is no clear agreement in place on future agreement between the UK and EU with regard to the application of the EU Charter or standards equivalent to the ones of the EU Charter and CEAS.

As detailed above, the **UK has already stated its desire for a Dublin-like system** that introduces a mechanism for the transfer of asylum seekers to the country that is best placed to consider its application. Should such a system not be introduced, the UK would also not have a legal basis to return migrants, in particular those arriving in the UK via secondary movement, to EU Member States.

In view of the above, it is considered that **cooperation on a system by which to transfer asylum seekers between the UK and the EU would be of common interest**.

EASO

An **area of mutual benefit for cooperation is the UK's collaboration with EASO**. Currently, the UK is involved in the Organisation through operations, the deployment of experts, the preparation of training material and projects. If the UK ceases to be part of EASO, its contributions to EASO's activities would terminate.

Future participation of the UK in EASO could be in the interests of the EU as it would help to ensure consistency between asylum procedures in the UK and EU Member States. Considering EASO's aim to support in a bottom-up manner, continued familiarity and collaboration with the UK on its asylum system could be key to supporting harmonisation (to the extent possible) between the UK and the EU. This could help tackle asylum shopping and secondary movements of asylum seekers in the EU. Moreover, considering the replacement of EASO with the new EU Asylum Agency (EUAA), which will considerably expand the scope of the agency, the EUAA is also likely to be interested in future access to UK third-country reports and ILOs in third countries, which, should the proposal for a revision of the ILO Regulation²³⁴ be adopted, will have an enhanced role in the facilitation of EU measures to tackle illegal immigration.²³⁵ The UK, on the other hand, would benefit from continued collaboration with the EUAA as following the reform it will become a central agency in the European landscape. Moreover,

²³³ C/116-17 Ireland – M.A. (a minor) -v- The International Protection Appeals Tribunal & ors, 8 November 2017.

²³⁴ European Commission, Proposal for a Regulation on the creation of a European network of immigration liaison officers (recast), COM(2018) 303.

²³⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Creation of a European Network of Immigration Liaison Officers, 16 May 2018.

the UK might be interested in participating in EASO in order to have access to the common European safe country list.

AMIF

Following Brexit, **the remainder of the EUR 370 million that AMIF has allocated to the UK for the period between 2014 and 2020 will be lost and is not likely to be replaced by the UK**, as international protection activities are not a priority on the government's agenda. The UK will also lose funding from other EU funding programmes, including funding for research and the Regional Structural Funding (RSF), which supports activities to increase access to services for refugees, asylum seekers and migrants. In its most recent White Paper,²³⁶ the UK covered the possibility of working together with the EU on new funding instruments. The new Asylum and Migration Fund (AMF) (2021–2027), which was developed as a more flexible funding instrument to be able to address unforeseen migratory events, will cover the period post-Brexit. Under AMF, support for integration will focus on early integration measures and aim at facilitating first key integration steps such as language courses but also capacity-building for authorities in charge of integration policy, one-stop information shops for newly arrived legally staying migrants and exchanges between legally staying recently arrived migrants and members of the host community. Longer-term integration will be supported under the EU's cohesion funds.²³⁷

Other Cooperation

With regard to the UK's participation in independent international dialogues with third countries, and especially **for EU Readmission Agreements (EURAs), the UK's withdrawal will have implications for both the EU and the UK**. As such, it is **considered an area of common interest**. However, in a recent European Parliament briefing it was noted that the 'effects are asymmetric',²³⁸ as a lack of cooperation in this area would have a greater impact on the UK than the EU.

From the EU's perspective, the UK's diplomatic relationships and assistance reportedly plays an important role in the negotiation of EURAs with third countries.²³⁹ This is of particular significance considering the comments of the Commission on the difficulty of engaging with third countries on readmission, detailed in the 2017 Commission report on EU readmission developments.²⁴⁰

However, for the UK, the impact will be larger, as its **withdrawal from the EU will signal its withdrawal from the EURAs negotiated to date**. As such, should cooperation on EURAs not persist, the UK will, in some cases, be able to return to previously agreed bilateral readmission agreements with third countries, but, in many cases, it will need to negotiate separate, new bilateral readmission agreements. Considering that the EU currently has 17 EU Readmission Agreements in operation, this would represent a significant future investment for the UK in developing new agreements.

Additionally, following Brexit, there will be **no legal mechanism for the readmission of EU citizens staying irregularly in the UK to the EU**, and vice versa for UK citizens that are irregularly present in the EU.²⁴¹ As such, addressing this issue of EU-UK readmissions is in the interests of both the EU and the UK.

Additionally, cooperation between **Immigration Liaison Officers (ILOs), mentioned above, is also considered a common area of interest** between the UK and the EU. From the EU's perspective, the UK has one of the largest Member State networks of ILOs, to which continued EU membership would

²³⁶ UK Government, The Future Relationship Between the United Kingdom and the European Union, of July 2018.

²³⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, COM(2018) 471.

²³⁸ European Parliament Briefing: The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation, 2018.

²³⁹ Expert workshop conducted to support this study

²⁴⁰ European Commission, DG Migration and Home Affairs, EU Readmission developments – state of play October 2017.

²⁴¹ European Parliament Briefing: The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation, 2018.

bring many benefits. From the UK's perspective, it currently derives benefits from cooperation with ILOs in third countries in which it does not itself have ILOs. However, in the future, considering in particular the proposal to revise the ILO network, the UK could benefit significantly from enhanced coordination and optimisation of ILO networks at the EU level.

6. POTENTIAL FORMS OF FUTURE COOPERATION AFTER BREXIT

KEY FINDINGS

- **Schengen/Dublin associated countries** (Norway, Iceland, Liechtenstein and Switzerland) have **signed treaties with the EU on the participation in the Dublin system** (and therefore Eurodac) and are involved in the development of the Schengen *acquis* at all levels of the EU Council decision-making system, but **they do not have the right to vote on new legislation**.
- It is envisaged that **none of the current cooperation models are suitable for the UK's future relationship with the EU**.
- The **key prerequisite for continued cooperation is the establishment of a mutually trusting relationship**. To ensure this, it is considered important **to ensure clarity on the UK's relationship with EU law**, including a robust and dependable enforcement and dispute resolution framework, and to ensure **continuing respect for human rights** and the **protection of personal data**.
- Regarding the **Dublin system**, a range of cooperation options exist, including: the **UK remaining in Dublin III**; a type of agreement **similar to the Schengen/Dublin associated countries; selective participation** in the system, for example for family reunification; **bilateral agreements** between the UK and single Member States; bilateral agreements between the UK and third countries; or a **mutual understanding agreement**.
- Considering **EASO**, a clear way forward is the agreement of a **Working Arrangement**, as signed with all Schengen/Dublin associated countries, to facilitate cooperation on a range of activities.
- Regarding **AMIF and the AMF**, the UK could receive funding as the AMF seeks to **enhance cooperation with third countries**.
- **Frontex** has a **significant interest in cooperating with third countries** and has agreed **Working Arrangements with 18 third countries**, as well as the Commonwealth of Independent States and the Migration, Asylum, Refugees Initiative. As such, there is **significant precedent for cooperation between the UK and Frontex**.
- On **readmission**, the Schengen/Dublin associated countries cooperate in EURAs under the same terms as EU Member States. It would be **beneficial for both the EU and the UK to continue UK involvement in EURAs**. Furthermore, the inclusion of a **readmission clause** could ensure the UK can return EU citizens staying illegally in the UK and vice versa.

Through the EU (Withdrawal) Act, following Brexit, the European Communities Act 1972 (ECA)²⁴² will no longer apply, EU law will no longer have a direct effect within the legal order of the UK, and new forms of future cooperation will have to be agreed on. There are a number of potential forms of future collaboration for the Regulations and bodies outlined in Table 8, as they are the measures in which the UK is currently participating, and in which it has expressed interest for future cooperation.²⁴³

²⁴² European Communities Act 1972.

²⁴³ UK Government, The Future Relationship Between the United Kingdom and the European Union, of July 2018.

Table 8. UK's contribution to key EU legislation and policy in the field of international protection

EU legislation / policy	Legal basis regulating current UK's relationship to each EU legislation and measures	Level of participation
CEAS	<ul style="list-style-type: none"> • UK opted-in to the Dublin Regulations (I, II, III)²⁴⁴ • UK opted-in to Eurodac (I, II)²⁴⁵ • First-generation CEAS legislation (Qualification Directive, Reception Conditions Directive, Asylum Procedures Directive) • EASO²⁴⁶ 	Full
AMIF	<ul style="list-style-type: none"> • UK opted-in to AMIF²⁴⁷ 	Full
Frontex	<ul style="list-style-type: none"> • Article 51 of Regulation 2016/1624: 'the Agency shall facilitate operational cooperation of the member states with Ireland and the United Kingdom in specific activities'.²⁴⁸ • UK excluded from full membership because not Schengen State. • UK attends Management Board meetings with no right to vote. • No financial contribution, but provides staff/equipment on a case-by-case basis 	Partial
Individual EU Measures to tackle migration and asylum	<p>Examples:</p> <ul style="list-style-type: none"> • EU Readmission Agreements (EURAs) • Global Approach to Mobility and Migration (GAMM), including: <ul style="list-style-type: none"> ○ Common Agendas on Migration and Mobility (CAMM) ○ Mobility Partnerships (MP) 	Full

In order to assess potential forms of future cooperation between the UK and the EU, the different models of cooperation between the EU and third countries will be discussed, followed by an analysis of how different third countries' cooperation models would enable the UK to take part in the abovementioned EU measures.

6.1. EU-third country cooperation models

Norway, Liechtenstein and Iceland are associated to the EU through both their EEA and Schengen memberships. This grants them participation rights in a number of EU activities and bodies. Switzerland, which is also bound to the Schengen *acquis*, but not to the EEA, has a more remote relationship with the EU, through its membership in the EFTA. The **EU-Switzerland relationship is framed by over 150 separate bilateral agreements**, some of which require the Swiss Government to adopt EU laws in the areas that give it enhanced access to the EU market.²⁴⁹ In the field of international protection, Norway, Liechtenstein, Iceland and Switzerland are all Schengen/Dublin associated countries. Schengen/Dublin associated countries have signed treaties with the EU on participation in the Dublin system (and therefore Eurodac) and are involved in the development of the Schengen *acquis* at all levels of the EU Council decision-making system, but they do not have the right to vote on new decisions and regulation.

²⁴⁴ Regulation No. 604/2013.

²⁴⁵ Regulation (EU) No 603/2013.

²⁴⁶ Regulation (EU) No 516/2014

²⁴⁷ Regulation (EU) No 439/2010.

²⁴⁸ Regulation (EU) 2016/1624.

²⁴⁹ European Economic Area (EEA) / Relations with the EU, at: <http://www.efta.int/eea>

While not being bound by most Asylum Directives, Schengen/Dublin associated countries are legally required to implement Regulations and Directives relevant to the Schengen *acquis* or the Dublin system, such as the Returns Directive and the Dublin and Eurodac Regulations, with the Dublin system being a requirement for the Schengen cooperation (Box 13).²⁵⁰

Box 13. Agreement between the European Union, the European Community and the Swiss Confederation

Article 15(4)

'This Agreement shall be applied only if the agreement between the European Community and Switzerland on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in any of the Member States or in Switzerland [Dublin system] is implemented'

In the case of **Norway, however, domestic legislation focuses on harmonisation with European standards for all Asylum Directives** to avoid pull factors that could make Norway more attractive to asylum seekers compared to other countries in the EU (as described in Box 14).

Despite the close cooperation and participation in EU policies and bodies, **Norway, Liechtenstein, Iceland and Switzerland, as non-EU Member States, do not have the right to participate in negotiations on new EU measures** and laws and can only decide whether to participate in EU initiatives once they are fully developed. Schengen/Dublin associated countries do, however, make significant financial contributions to EU programmes or to EU Member States on a bilateral basis, and specifically Norway has contributed to the development of the Dublin accords, EASO and Frontex as explained below.

Box 14. Case Note: Norway–EU model in the area of asylum, resettlement, return and readmission

In short:

While popular support for EU membership is at an all-time low in Norway, politicians across the political spectrum and civil servants point to the increased importance of aligning Norwegian migration policies with those in the Union. While being formally bound by the Schengen and Dublin agreements, Norway's status as a non-member of the Union means that it finds itself excluded from key intra-Union decision-making processes in the area of migration management. Norwegian decision-makers want Norway to remain a relevant cooperating partner for the EU in the area of asylum. In these efforts, they see increased importance in participating actively in the Union's operative institutions, such as EASO, EMN and Frontex.

Key points:

Seeks to be in line with the EU – Norway, although not a member of the EU, has an explicit strategy of adjusting its migration policies with those of the Union so as not to 'stand out' from the common European policies or those of key Member States. This strategy has been followed by consecutive conservative and social democratic governments over the past 15 years.

The backdoor to CEAS – Norway is formally bound by the Schengen and Dublin agreements. These agreements indirectly oblige Norway to also take into consideration other CEAS legislation,

²⁵⁰ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, 27 February 2008.

including the CEAS directives.²⁵¹ For example, the other Dublin countries need to know that Norway adheres to the common minimum standards for reception and processing so as to allow for the return of asylum seekers to that country. The participation in the Schengen and Dublin cooperation and the informal ties that follow have been labelled 'Norway's backdoor to CEAS'.²⁵²

Increased role of European courts – Norway, a party of the ECHR, has paid due attention to the rulings of the ECtHR and the CJEU in the area of migration. Although Norway is not bound by CJEU interpretations, the CJEU has become highly relevant for Norwegian legislators and civil servants due to Norway's formal and informal relation to the common migration regulations in the EU. For instance, an analysis of European jurisprudence, conducted for the Norwegian Ministry of Justice, concludes that, in the area of international protection, major differences between Norwegian law and practice and interpretations of the CJEU are rare²⁵³ and the Norwegian Directorate of Immigration, which maintains a database of relevant CJEU case law, notes that CJEU judgements are an 'important source of law'²⁵⁴ for Norway.

Institutional attachment – Norway has actively sought to be active in, and to some degree influence, the core EU agencies and networks in the field of migration management, albeit given the limitation of its status as a non-member. The agencies include Frontex, EASO, the European Migration Network (EMN), and the Schengen steering committee. It has also directed a portion of the compensation following from the EEA agreement towards operative migration measures and institutional migration regulatory support in Greece.²⁵⁵

Increased attention to the (value of) EU policies – The 'refugee crisis' in 2015 and the following EU–Turkey agreement highlighted to many Norwegians the importance of a common European approach to migration, as it, along with other restrictive measures in Europe, led to a sharp reduction in arrivals to Norway. Following a continued Norwegian contribution to border operations in the Mediterranean, the crisis led not only to a renationalisation of migration policies in Norway, but also to a broader understanding of the role of EU policies and agreements in the regulation of migration to the region.²⁵⁶ Because of the continued low number of asylum arrivals, the dynamic of migration management appeared as one of common European interest. The Norwegian Government was open to relocation initiatives and suggested burden-sharing schemes. These were seen as having at least two functions: (i) Securing cooperation within the EU/Schengen area regarding number of arrivals and thereby creating predictability, and (ii) Creating goodwill within the EU–Norway relationship in the field of asylum.²⁵⁷

The applicability of Schengen/Dublin associated countries and other third-country models to the future EU–UK relationship

As Prime Minister Theresa May has said, **none of the current cooperation models are suitable models for the UK's future relationship with the EU**, as the UK's withdrawal from the EU is an

²⁵¹ For example, in order to fulfil the Dublin III regulation ((EU) No 604/2013), Norway has to also have a reception system and asylum processing that secures that the minimum standards set out in ECHR are adhered to (see Article 3.2 in EU No 604/2013). Another example is article 18.2 in the Dublin regulation, referring to Directive 2013/32/EU (Procedures Directive).

²⁵² Vevstad, V., Et felles europeisk asylsystem (A common European Asylum System). EMN report, November 2012.

²⁵³ Vevstad, V. and Mysen, C., Normative European Jurisprudence in a Refugee and Migration context. Report: Institute for Social Research, Oslo, 2011.

²⁵⁴ Norwegian Directorate of Immigration online database of relevant CJEU case law. Last accessed on 25.10.2018 at: <https://www.udiregelverk.no/en/documents/cjeu-case-law/?ATFID=1540146&ARFID=1430685>.

²⁵⁵ During the 2014–2021 period Greece is to receive EUR 116 million from the European Economic Area (EEA) funds. As of 2018, a large portion of these funds were used to strengthen Greek asylum reception and processing capabilities. 98% of the funds were supplied by Norway, the rest by Iceland and Liechtenstein https://www.regjeringen.no/no/aktuelt/pm_hellas/id2577076/

²⁵⁶ Brekke, J-P. and Staver, A. (2018), The renationalisation of migration policies in times of crisis: the case of Norway. *Journal of Ethnic and Migration Studies*. Routledge. DOI:10.1080/1369183X.2018.1433026.

²⁵⁷ Interview with Norwegian civil servant.

unprecedented event which will require new specific arrangements. Nevertheless, the advantages and disadvantages of these cooperation models for the future UK–EU relationship will be examined here, as described in Table 9.

Table 9. Appropriateness of existing models of cooperation to the future EU–UK relationship

Existing model	Advantages	Disadvantages
EU–Schengen/Dublin associated countries (excluding Switzerland)	<ul style="list-style-type: none"> • Dynamic and well-established model, that would offer legal clarity • UK would be able to take part in discussions and influence outcomes of negotiations, without, however, having a vote when laws are adopted 	<ul style="list-style-type: none"> • UK would have to adopt EU laws in specific fields, without the right to vote on them
EU–Switzerland	<ul style="list-style-type: none"> • Allows for selective bilateral agreements in areas of common interest • UK would be able to take part in discussions and influence outcomes of negotiations, without, however, having a vote when laws are adopted 	<ul style="list-style-type: none"> • The EU is unlikely to accept this model: It made clear that the EU–UK future relationship framework should ‘include a robust dispute resolution mechanism, thus avoiding a proliferation of bilateral agreements and the shortcomings which characterise the EU’s relationship with Switzerland’²⁵⁸
EU–Turkey (Customs Union and refugee agreements)	<ul style="list-style-type: none"> • If the UK stays in a Customs Union, it would avoid renewal of custom controls at the UK/Irish border • Simpler route for cooperation in international protection compared to other models, as it is based on cooperation between two countries’ authorities • New arrangements, specific to the UK’s context, could be developed 	<ul style="list-style-type: none"> • The model could constrain the UK’s trade policy with other third countries, as, if part of the Custom Union, it needs to follow EU legislation

What is certain is that, **given the UK’s role in Europe, a strong future strategic partnership model encompassing the fields of asylum and illegal immigration**, together with other areas (e.g. defence, security and trade) will be of benefit to both the EU and the UK. There are a number of potential options for a future UK–EU relationship in the area of international protection, and the various options are analysed below in light of the existing cooperation of the Union with Dublin/Schengen associated countries and other third countries, considering the applicability of such models of cooperation to the UK with regard to the Dublin system and Eurodac, EASO, AMIF, Frontex and agreements with third countries.

²⁵⁸ European Parliament, Motion for a Resolution to wind up the debate of the future EU–UK relationship pursuant to Rule 123(2) of the Rules of Procedure.

6.2. Prerequisites for future EU–UK cooperation in the field of international protection

Establishing mutual trust between the EU and the UK is of key importance to the success of a future relationship between the UK and the EU in the area of international protection. To establish such a relationship of mutual trust, there are key prerequisites that need to be fulfilled relating to ensuring continuing **respect for human rights** and the **protection of personal data**, as well as ensuring **clarity on the UK's relationship with EU law**, in particular through the development of adequate enforcement and dispute resolution mechanisms.

It is anticipated that the UK will remain bound by the ECHR, of which it has been a part since 1953,²⁵⁹ despite the fact that in the past some UK politicians have expressed a desire to withdraw from the ECHR.²⁶⁰ This would be essential for further cooperation with the Union, notably in the area of international protection. In June 2018, the Chief Negotiator of the Taskforce on Article 50 Negotiations, Michel Barnier, made clear that future relationships with the UK will depend on strong, common commitments to human rights.

Although the ECHR will continue to provide strong protection of human rights in the UK, there is uncertainty regarding the future role of the CJEU, in particular in relation to the Charter. In order **to establish mutual trust between the EU and the UK, clarity and collaboration on these points are essential.**

As detailed in Clause 1 of the European Union (Withdrawal) Act, the **intention of the UK is to repeal the 1972 ECA on exit day.** Following this, the UK Government anticipates that the relationship between the UK and EU law will take two distinct forms, as described below.²⁶¹

- **Case law adopted before the UK's withdrawal** will form part of EU law retained as domestic law by the UK, as detailed in the EU (Withdrawal) Act – section 6(2). As per section 5(2) of the same Act, such case law will continue to be binding and the principle of supremacy will continue to apply. However, retained EU law, such as the first-phase CEAS Directives, can be amended by secondary legislation or an Act of Parliament, or the UK Supreme Court will be able to overturn CJEU precedent.
- **Case law adopted after the UK's withdrawal**, according to the EU (Withdrawal) Act, may be considered at the option of UK courts, as is the case for other third-country legislation.

In relation to regulating its relationship with the EU and EU law following its withdrawal, the **UK Government has stated its willingness to use established methods of international dispute settlement.** For example, the UK Government's Enforcement and Dispute Resolution Future Partnership Paper²⁶² details a range of precedents for dispute resolution mechanisms in international agreements, including:

- Establishment of a Joint Committee (as in the EEA agreement);
- Establishment of suitable arbitration models (referring to the CETA agreement and presenting examples such as the World Trade Organisation's system for dispute settlement);
- Agreement on reporting and monitoring requirements to evaluate the implementation of the agreement (as in relation to the Lugano Convention, which concerns civil judicial cooperation between EU and EFTA States);
- Agreement on supervision and monitoring procedures; and
- Establishment of effective mechanisms for remedy.

²⁵⁹ European Commission, Press release: Speech by Michel Barnier at the European Union Agency for Fundamental Rights, 19 June 2018, at: http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm

²⁶⁰ Home Secretary's speech on the UK, EU and our place in the world, 25 April 2016.

²⁶¹ Ibid, p. 4.

²⁶² UK Government, Enforcement and dispute resolution – a future partnership paper, Department for Exiting the European Union, 23 August 2017.

Regarding this issue of dispute resolution, however, the role of the CJEU is under question. Primarily, this is because the **longstanding position of the CJEU is that a Joint Committee-type body, as described above, cannot definitively interpret EU law, such that it is binding on the EU or its institutions.**²⁶³ It is considered likely, therefore, that any agreement on dispute settlement will be restricted by CJEU case law. In particular, this will leave a basic choice between referring issues concerning the interpretation of EU law to the CJEU and deciding to disapply the relevant aspects of any post-Brexit cooperation between the EU and the UK if agreement is not possible.²⁶⁴ With this said, however, the EU usually finds a political resolution to disputes with preferential trading partners 'without the need for dispute settlement or sanctions procedures'.²⁶⁵ Furthermore, **the EU has not published regarding its preferred path to mutual trust in this area.**

Furthermore, to date there has been **no agreement between the UK and the EU over cases pending on exit day.** Although the Joint EU–UK Report of 8 December 2017²⁶⁶ details that cases pending in the CJEU on exit day relating to the UK will remain under the jurisdiction of the CJEU, it makes no such indication with regard to cases pending in UK courts relating to issues that might be subject to CJEU jurisdiction. These issues need to be clarified to ensure mutual trust in the relationship between the UK and the EU.

In relationship to international protection more specifically, there are **two key issues at play.** Firstly, following Brexit, the UK may seek to amend the transposed first-phase CEAS Directives. Second is the question of whether the future reforms of the CEAS will continue to be compatible with the UK's application of the first-phase CEAS Directives. Regarding the first point, the implications are clear from the above discussion. Without any amendments, the transposed first-phase Directives will continue to be under the jurisdiction of the CJEU. However, if changes are made, the UK Supreme Court would be able to overturn CJEU precedent. As such, as a precondition for continued cooperation with the EU, it is likely that the UK will need to retain the transposed Directives as they are currently.

Considering the second point, however, the **EU direction of travel with regard to the CEAS Directives may make them incompatible with UK law, even if the UK retains the Directives in their current form.** As the CEAS trends towards further harmonisation and in light of the ECHR and CJEU judgements relating to deficiencies in the Greek asylum system,²⁶⁷ such a situation appears feasible. As such, a key prerequisite for future collaboration is an understanding of mechanisms for dealing with such a situation.

Another prerequisite for continued cooperation in the area of international protection, and in particular for access to the Eurodac database, concerns the **protection of personal data.** If the Charter no longer applies to the UK, Article 8 of the Charter, covering data protection rights, will be lost, and it is still unclear whether the UK will incorporate the data protection elements required by the Charter in its Data Protection Act.²⁶⁸ As Eurodac holds sensitive data on asylum seekers and irregular migrants, data protection is a priority, and therefore including procedural and data protection safeguards to ensure adequate compliance with EU data protection legal standards will be a prerequisite for continued access to the system, as stated in the Council's guidelines (Box 15).²⁶⁹ An Adequacy decision will

²⁶³ See, for instance, Opinion 1/00, [2002] ECR I-3493, paras 37–45.

²⁶⁴ European Parliament, Briefing: Jurisdiction upon and after the UK's withdrawal: The perspective from the UK Constitutional Order, 2018.

²⁶⁵ *Ibid.*, p. 9.

²⁶⁶ Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, published 8 December 2017.

²⁶⁷ Commission Recommendation of 28.9.2016 addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013. C(2016) 6311 final.

²⁶⁸ UK Government, Data Protection Act 2018

²⁶⁹ European Council (Art. 50) guidelines on the framework for the future EU–UK relationship, 23 March 2018, EUCO XT 20001/18. BXT 25 CO EUR 5 CONCL 2.

therefore be needed to ensure the protection of the personal data to be processed, for the UK to be able to continue to have access to Eurodac.²⁷⁰

Box 15. European Council Guidelines

'In the light of the importance of data flows in several components of the future relationship, it should include rules on data. As regards personal data, protection should be governed by Union rules on adequacy with a view to ensuring a level of protection essentially equivalent to that of the Union'

Furthermore, many of the proposals to reform legislation in the area of international protection, including the CEAS Directives, make mention of the Member State obligations in relation to the processing of personal data under the General Data Protection Regulation (GDPR).²⁷¹ Given the extraterritorial reach of the GDPR, it will be applicable to the UK in relation to the processing of data on any persons 'in the Union'.²⁷²

6.3. Dublin System (including Eurodac)

6.3.1. Existing forms of cooperation with third countries

The aim of the Dublin system is to determine which Member State is responsible to examine an application for asylum and to ensure quick access to asylum procedures. **All Member States, as well as Switzerland, Norway, Liechtenstein and Iceland through an association agreement with the EU, are currently participating in the application of the Dublin III Regulation.** However, according to Norwegian civil servants familiar with the negotiations on the reform of the Dublin Regulation, there has recently been less room for Norway to influence the process. Even though Norway is not part of the official decision-making and drafting process of EU law, it was allowed to provide written comments on the draft of the new Dublin Regulation.

Access to Eurodac is currently only available to EU Member States and the four associated Dublin states: Iceland, Norway, Liechtenstein and Switzerland.

6.3.2. Potential options for the future relationship with the UK

Under the Dublin system, the UK's geographical location has worked to its advantage. As the UK is an unlikely first point of entry to the EU, asylum seekers arriving in the UK via secondary movement can be sent back to other Dublin States.²⁷³ Germany, France, Greece, Spain and Italy accounted for 78% of all first-time applicants in the EU28 in the second quarter of 2018.²⁷⁴

While neither the EU nor the UK have issued guidelines regarding the UK's future participation in the Dublin system, the advantage of the UK remaining in the system is clear. This is because not reaching a cooperation agreement on this issue would leave the UK without a legal mechanism to return asylum seekers to the first-entry EU Member State. The UK may therefore find itself wholly outside of a system for regional management of asylum applications.

The **proposed Dublin IV Regulation, with the corrective allocation mechanism, might however not be in the UK's best interests**, as it would mean that the UK, which in 2016 received approx. 0.6 asylum applications / 1,000 residents (vs. the EU average of 2.48 applications), would have to take in more refugees.²⁷⁵ Were the UK to maintain the same agreement as the current one, it could still opt-

²⁷⁰ COM/2016/0272 final/2 – 2016/0132 (COD)

²⁷¹ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of the personal data and on the free movement of such data.

²⁷² Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of the personal data and on the free movement of such data.

²⁷³ Eurostat, Dublin Statistics on countries responsible for asylum application, March 2014, updated November 2018

²⁷⁴ Eurostat, Asylum Quarterly Report. 20 September 2018.

²⁷⁵ Refugee Council Information, Asylum Seekers in Europe, May 2016.

out from Dublin IV and remain bound to the more favourable Dublin III, if it is not withdrawn, as proposed by the European Parliament in their negotiating mandate. On the other hand, were the UK to withdraw from the EU under a no-deal scenario, it may face removal from the Dublin system until an agreement can be reached. As mentioned above, the implications for the UK of its removal are significant. In particular, the UK will no longer be able to identify whether asylum seekers have claimed asylum in other EU Member States before entering the UK and will be left without a legal mechanism to return asylum seekers to other Dublin countries.

Given the UK's interest in remaining in the Dublin system, future arrangements to maintain cooperation are likely to become part of the package deal. There are a number of options for the UK's future participation in the system, as shown in Table 10.

Table 10. Potential options for UK's future participation in the Dublin system

Potential Option for Future Participation	Description of Arrangement
UK to remain in the Dublin III system	The UK's interest in continuing participation in the Dublin III system could be used as a key leverage point by the EU in the negotiation process, considering the balance of implications described above and the potential withdrawal of Dublin III in light of Dublin IV.
Schengen/Dublin associated countries type of agreements	Would require the EU to sign an agreement with the UK to participate in the Dublin system as it has done with countries such as Switzerland, Norway and Iceland. This type of arrangement would allow the UK to participate in the system with the same rights and obligations as a Member State.
UK's selective participation in the system (e.g. only for family members reunification)	The UK would cease being part of the Dublin system but for specific areas of common interest, such as for family members' reunification, children, or other groups of people an agreement on transfers could be concluded. This is a likely option, as in the July 2018 White Paper the UK outlined its intention to allow unaccompanied children to join close family members in the UK. The EU Withdrawal Act also refers to an agreement on this issue.
Bilateral agreements on asylum responsibility between the UK and Member States (e.g. with Ireland)	This exceptional arrangement would mainly be relevant for future relationships between the UK and Ireland, although new legal tools would arguably need to be developed to allow single Member States to sign bilateral agreements with third countries for international protection and asylum issues. Case law of the CJEU, however, indicates that this might prove challenging, as it might be argued that only the EU, and not its Member States, has the exclusive competence over the allocation of asylum seekers between

Potential Option for Future Participation	Description of Arrangement
	Member States and third countries. ²⁷⁶ If so, the Treaties (Article 2 TFEU) allow the EU to waive its exclusive competence: there would be a particular case to do so in order to avoid the institution of border checks between Ireland and the UK.
Bilateral agreements between the UK and other third countries	The UK would be able to continue to negotiate arrangements for the transfer of asylum seekers to other countries through bilateral agreements. This has been the case, for example, with Australia, which has entered resettlement agreements with Malaysia ²⁷⁷ and with Cambodia, ²⁷⁸ with the government of Australia bearing the financial costs for both schemes.
Mutual understanding agreement	EU Member States and the UK would consider each other to be safe third countries, allowing the establishment of unofficial mutual understanding agreements between the UK and Member States, should the safe third-country concept persist. ²⁷⁹ This type of arrangement would be different from both an international agreement and an EU deal.

Continued access to the Eurodac database

Continued UK access to Eurodac will be dependent on the outcomes of the Brexit negotiations on the future extent of continued UK participation in the Dublin system, given the basic functionality of Eurodac of establishing responsibility to process asylum applications.

In the case that the UK is excluded from the database, there is **uncertainty regarding what will happen to the data on migrants' movement to and from the UK**, which was recorded in the database prior to Brexit. There will therefore be the need for new legislation outlining whether the data will still be accessible by other Member States, or if it will be deleted. Member States are the owners of the information they share with Eurodac, meaning that the UK will continue to be, also following its withdrawal from the EU, the owner of the data it introduced in the database, and can therefore decide to remove the data from the database if no other agreement is put in place.

²⁷⁶ See, for instance, judgment of the Court in Case C-114/12 (Grand Chamber, 4 September 2014, (Action for annulment — External action of the European Union — International agreements — Protection of neighbouring rights of broadcasting organisations — Negotiations for a Convention of the Council of Europe — Decision of the Council and the Representatives of the Governments of the Member States authorising the joint participation of the Union and its Member States in the negotiations — Article 3(2) TFEU — Exclusive external competence of the Union)).

²⁷⁷ Arrangement between the government of Australia and the government of Malaysia on transfer and resettlement, at: <http://www.kaldorcentre.unsw.edu.au/sites/default/files/arrangement-australia-malaysia-transfer-resettlement.pdf>

²⁷⁸ National Legislative Bodies / National Authorities, *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia*, 26 September 2014.

²⁷⁹ General Court of the European Union, Press release, 28 February 2017, The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU–Turkey statement which seeks to resolve the migration crisis. The proposed EU asylum procedures Regulation would more fully harmonise national law relating to 'safe third countries'.

Moreover, **if the UK continues to have access to Eurodac, it will have to agree to take part and contribute to the updating of the system**, including through financial contributions. In particular, continued participation could face technical challenges depending on the involvement of the UK in the range of EU justice and home affairs information systems. This is of particular importance considering the proposals and recently adopted legislation in this area, including the European Travel Information and Authorisation System (ETIAS) Regulation²⁸⁰ and the Entry-Exit System (EES) Regulation²⁸¹ and the two Commission proposals for a framework of interoperability between these systems.²⁸² Although the UK will not take part in these proposed and adopted systems, the interoperability proposals in particular incorporate both information systems to which the UK does and does not participate.

6.4. European Asylum Support Office (EASO)

6.4.1. Existing forms of cooperation with third countries

EASO has cooperation agreements in place with Norway, Iceland, Switzerland and Liechtenstein. These associated countries contribute to the EASO budget and in return have full access to EASO activities, are allowed to deploy experts, and their nationals can be EASO staff. The **associated countries are allowed to attend the meetings of the Management Board but have no vote.**

Norway was involved in the establishment of EASO and is the most active third country and a major contributor to the organisation. The legal basis is the 'working arrangement with the Kingdom of Norway on its participation in the work of EASO' (March 2014).²⁸³ It plays a significant role in the development of training and guidelines on asylum within EASO. The establishment and later increased role of EASO has been followed with keen interest by Norwegian politicians and civil servants. As the role and mandate of EASO is expanded, the Norwegian focus on this institution is expected to increase. The proposed replacement of EASO with the expanded EUAA will amplify the Norwegian perception of EASO as a key arena of participation on asylum issues.²⁸⁴

The primary aim of EASO is to support Member States in the implementation of the CEAS, as well as to coordinate the exchange of information and other actions within the EU. However, its mandate also includes some cooperation with third countries, by enabling exchange of information to assist capacity-building measures, supporting the implementation of regional protection programmes, providing training, and implementing resettlement measures. This is however not an institutional cooperation, but rather based on specific EU-funded projects, such as projects relating to the provision of specific training in the third countries (e.g. Instrument for Pre-accession Assistance (IPA-II) with the Western Balkan countries and Turkey).²⁸⁵

In 2013, EASO adopted the External Action Strategy, supported by DG HOME, DG DEVCO, ECHO, by Member States and by international organisations, for its external activities. To date, however, EASO

²⁸⁰ Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulation (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

²⁸¹ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.

²⁸² Proposal for a Regulation on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226

²⁸³ EASO, the European Union signs a working arrangement with the Kingdom of Norway on its participation in the work of EASO, at: <https://www.easo.europa.eu/sites/default/files/public/Press-Release-Norway.pdf>

²⁸⁴ Interview with Norwegian civil servant.

²⁸⁵ EASO, Two Project Partners meeting under the Regional IPA II Project, at: <https://www.easo.europa.eu/regionallIPA-II-project>

has not signed any Working Arrangement (WA) with third countries, showing its lack of focus on actions outside of the EU.

6.4.2. Potential options for the future relationship with the UK

The **EASO Regulation includes a provision stating that Working Arrangements (WA) can be made with EASO**, and this has already happened in the case of Norway, Switzerland, Liechtenstein and Iceland.²⁸⁶ **Being a Schengen member is not a requirement for participation in EASO's activities; however, it remains to be seen whether this could work for the UK**, as for WAs to be made an agreement between the third country and the EU first needs to be concluded, and it is politically difficult to imagine that this will happen without a wider EU–UK Brexit agreement. Such an agreement would therefore cover the entire EU–UK relationship, which would set the broad political parameters for any EASO–UK agreement (including data protection). **A potential challenge for future EASO–UK cooperation could be the timeline to conclude such agreement, as previous arrangements with EEA/EFTA countries took a year to be concluded.** This means that the timeframe between Brexit and a new agreement might lead to a gap in the cooperation, with potential implications for the continuity of projects and activities.

Additionally, the **proposal for the new EUAA differs in its provisions for the establishment of working arrangements.** Where the EASO Regulation, through Art. 49, provides one article for 'cooperation with third and associate countries', the proposal for an EUAA provides separate articles for cooperation with associate countries (Art. 34), specifically naming Iceland, Liechtenstein, Norway and Switzerland, and third countries (Art. 35). These different articles provide the countries with access to different levels of cooperation. For instance, Art. 34 provides for associate countries to participate in meetings of the Management Board, whereas Art. 35 does not.

6.5. Asylum, Migration and Integration Fund (AMIF)

6.5.1. Existing forms of cooperation with third countries

Currently, **no third countries directly contribute to or directly benefit from AMIF** (although Member States can use the Emergency Assistance component of the fund in their cooperation with third countries). The fund's goal is to contribute to the efficient management of migration flows and to support the development of the CEAS, respecting the rights enshrined in the EU Charter.²⁸⁷ Currently all Member States, with the exception of Denmark, contribute to its implementation. The Fund is managed directly by the EU, which expects that each Member State dedicates 20% of their share of AMIF to support a harmonised application of the CEAS.

6.5.2. Potential options for the future relationship with the UK

Following Brexit, the UK will lose its entitlement to the financial support provided by the Fund (which will become the Asylum and Migration Fund (AMF)), which will grow to EUR 10.4 billion for the period 2021–2027. However, **future UK cooperation with the fund might be possible, as the new proposal for the establishment of the AMF highlights the willingness to include the external dimension**, stating that: 'In relation to the external dimension, the Fund should target support to enhance cooperation with third countries'. It also specifies that the Fund will 'be open to the association of third countries, with specific contributions, benefits and conditions for participation' (Box 16).²⁸⁸ This could provide an avenue for continued cooperation with the UK.

²⁸⁶ EASO, Press Release: Norway, Switzerland, Liechtenstein and Iceland finalised working arrangements for their participation in the work of EASO, June 2013, at: <https://www.easo.europa.eu/news-events/press-release-norway-switzerland-liechtenstein-and-iceland-finalised-working>

²⁸⁷ Article 3 of the Specific Regulation.

²⁸⁸ Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, COM(2018) 471.

Box 16. Proposal for the Regulation to Establish the Asylum and Migration Fund

Article 5: Third countries associated to the Fund

'The Fund shall be open to third countries in accordance with the conditions laid down in a specific agreement covering the participation of the third country to the Asylum and Migration Fund, provided that the agreement:

- *Ensures a fair balance as regards the contributions and benefits of the third country participating in the Fund;*
- *Lays down the conditions of participation in the Fund, including the calculation of financial contributions to the Fund and their administrative costs.*
- *Does not confer to the third country a decisional power on the Fund;*
- *Guarantees the rights of the Union to ensure sound financial management and to protect its financial interests.'*

6.6. Frontex

6.6.1. Existing forms of cooperation with third countries

EEA/EFTA countries' participation in the European Borders and Coast Guard Agency (EBCG or Frontex) must be seen in the context of the overall framework of the Schengen *acquis*, with Frontex being the agency coordinating the management of the external borders of the Union.²⁸⁹

Frontex provides technical and operational assistance to help Member States strengthen their borders through joint operations. However, Frontex relies on EU countries to provide border and coast guards and equipment for its joint operations. It also develops common training standards for border authorities in cooperation with the Fundamental Rights Agency. **Schengen countries are very active in Frontex operations.** For example, Norway participated in operation Triton in 2015, which received broad positive attention in domestic media. In this example of direct contribution to Frontex, the Norwegian Ministry of Justice and Public Security, in cooperation with the Ministry of Defence and the Norwegian Defence Logistics Organisation, chartered the vessel *Siem Pilot*, rescuing 2,400 migrants.²⁹⁰ In addition, Norway has provided personnel to many other operations organised by Frontex.

Norway, Iceland, Switzerland and Liechtenstein are represented on the Management Board of Frontex, without the right to vote, together with representatives from EU Member States.²⁹¹

Frontex also has a **significant interest in cooperating with third countries**, with the goal of minimising the number of people arriving at the EU's external borders. This is reflected both in the 2004 and in the 2016 Regulations governing the activities of the Agency, which state that 'the Agency shall facilitate and encourage technical and operational cooperation between Member States and third countries'.²⁹²

²⁸⁹ Art 21 of the Frontex Regulation.

²⁹⁰ Press release: Norwegian vessel to the Mediterranean, 15 May 2015, at: <https://www.regjeringen.no/en/aktuelt/norsk-skip-til-middelhavet/id2411973/>

²⁹¹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

²⁹² Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

Based on Article 14 of its founding Regulation,²⁹³ **Frontex has working arrangements with 18 non-EU/EEA third countries**, as shown in Table 11, cooperating across a wide range of fields, including: i) joint operations; ii) information processing and exchange; iii) return operations; iv) training; v) research and development; vi) pilot projects; vii) technical assistance; and viii) operational interoperability.²⁹⁴ As can be seen in Table 11, the **arrangements with third countries, in most cases, incorporate the majority of types of cooperation possible under the Frontex Regulation**. Only in the cases of Russia and the Migration, Asylum, Refugees Initiative (MARRI) are the types of cooperation significantly limited. The Agency, in particular, has a special collaboration agreement with Turkey, which stipulates the principles of reciprocity for the exchange of analytical tools and strategic information, including new ways of breaching border security and routes, and changes in routes used by migrants and asylum seekers.²⁹⁵

The Agency can also invite observers from third countries to participate in its activities as well as maintain contacts with the authorities of third countries responsible for irregular immigration and returns under the condition that the third country complies with minimum human rights standards. Frontex also participates in GAMM instruments (e.g. MPs, CAMMs, migration dialogues, etc.).²⁹⁶

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Communication from the Commission to the Council and the European Parliament – The global approach to migration one year on: towards a comprehensive European migration policy COM/2006/0735 final.

²⁹⁶ Ibid.

Table 11. Frontex working arrangements with third countries by type of cooperation

Third Country	Year	Agreement Type	Types of cooperation foreseen by the agreements							
			Joint operations ²⁹⁷	Returns	Training	Information processing and exchange	Research and development	Pilot projects	Technical assistance	Interoperability
Albania	2009	WA	X	X	X	X	X	X	X	X
Armenia	2012	WA	X		X	X	X	X		X
Azerbaijan	2013	WA	X		X	X	X	X	X	X
Belarus	2009	WA	X		X	X	X	X	X	X
Bosnia and Herzegovina	2009	WA	X	X	X	X	X	X		X
Canada	2010	WA	X	X	X	X	X	'capability studies' and 'actual projects'		X
Cape Verde	2011	WA	X	X	X	X	X	X	X	X
Georgia	2008	WA	X		X	X	X	X	X	X
Kosovo	2016	WA	X	X	X	X	X	X	X	X
Macedonia	2009	WA	X	X	X	X	X	X		X
Moldova	2008	WA	X		X	X	X	X	X	X
Montenegro	2009	WA	X	X	X	X	X	X		X

²⁹⁷ For Albania, Armenia, Bosnia, Cape Verde, Macedonia, Montenegro, Nigeria and Serbia, the agreements provide the possibility for officials from the non-EU state in question to participate in Frontex-coordinated joint operations as observers, provided the EU Member State hosting the operation agrees. For Azerbaijan, Belarus, Georgia, Moldova, Russia and Ukraine, the agreements commit the parties to: 'Elaboration and coordination of joint operational measures and pilot projects for maintaining and improving border control.' Clauses committing Frontex and its counterpart authority to ensuring 'close cooperation and participation when Frontex-coordinated operations are carried out at a shared border' are contained in the agreements with Bosnia, Cape Verde, Macedonia, Montenegro, Nigeria and Serbia. The agreement with the US and Canada commits the parties to: 'Participation in joint operations (including, but not limited to, removals or returns, airport operations, and maritime operations), where appropriate and permitted by the relevant legal framework applicable to each Participant.' The 'memorandum of understanding' with Turkey contains the clause: 'Secondment of national officers of the Turkish authorities competent in border management to Focal Points established for specific Frontex activities on the basis of a proposal by Frontex after securing agreement of the hosting EU Member State.'

Third Country	Year	Agreement Type	Types of cooperation foreseen by the agreements							
			Joint operations ²⁹⁷	Returns	Training	Information processing and exchange	Research and development	Pilot projects	Technical assistance	Interoperability
Nigeria	2012	WA	x	x	x	x	x	x		x
Russia	2006	Terms of Reference	x						x	
Serbia	2009	WA	x	x	x	x	x	x		x
Turkey	2012	Memorandum		x	x	x	x	x		x
Ukraine	2007	WA	x		x	x	x	x	x	x
United States	2009	WA	x	x	x	x	x	'capability studies' and 'actual projects'		x
Commonwealth of Independent States²⁹⁸	2009	Memorandum	x		x	x		x		
Migration, Asylum, Refugees Initiative (MARRI)²⁹⁹	₃₀₀	WA			x	x				x

Source: Frontex – Working Arrangements with non-EU Countries. Available at: <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>

²⁹⁸ Commonwealth of Independent States includes Russia, Belarus, Ukraine, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan and Uzbekistan.

²⁹⁹ MARRI includes Albania, Bosnia and Herzegovina, Croatia, Montenegro, Macedonia and Serbia.

³⁰⁰ No date of signature is detailed; MARRI working arrangement signed via exchange of letters.

6.6.2. Potential options for the future relationship with the UK

Although the UK is currently present at the Agency's Management Board meetings, it is not a full member of Frontex, and the extent to which Brexit will impact the current arrangement is still unclear. There are precedents for Frontex cooperation with non-EU (yet Schengen) countries (e.g. Norway, Iceland, Switzerland), as well as agreements with third, non-EU/EEA, countries.³⁰¹ However, **there are currently no non-EU/EEA countries which are invited to the Frontex Management Board meetings**, and thus the UK might lose its right to participate in these meetings and operations.³⁰²

The **most likely option for a future Frontex–UK relationship would be the exclusion of the UK from the Agency**, as the UK will become a third country. However, although the UK will no longer be able to lead joint surveillance operations, as the power to implement border controls remains within Member States only, the **UK would still be able to have an agreement on cooperation with Frontex**, including joint operations in the UK.³⁰³ Art 54(3, 4) of the European Border and Coast Guard Regulation established a framework for cooperation with third countries which could be applicable to the UK, as it states that: 'The Agency [Frontex] may establish such cooperation with third countries in the areas of exchange of information, risk analysis, training, research and development and pilot projects. This cooperation may take place on the territory of third countries.'³⁰⁴

Moreover, there are **current discussions within the European Commission for the development of additional ways to include third countries**, which, after Brexit, will include the UK. Further cooperation will include returns, through the new Partnership Framework on migration. This partnership has, as an immediate output, the aim of refining cooperation between the EU, Member States and third countries to develop actions to discourage people from risking their lives trying to reach Europe.³⁰⁵

6.7. Readmission

6.7.1. Existing forms of readmission agreements of non-EU countries with third countries

The EEA/EFTA states (Norway, Liechtenstein, Iceland and Switzerland) have a unique relationship with the EU with regard to readmission agreements as, due to their level of cooperation with the EU, they **usually conclude the same readmission agreements as the EU**, and under the same terms.³⁰⁶

6.7.2. Potential options for the future relationship on readmission

As detailed above, two issues related to readmission are relevant within this discussion:

1. The potential future UK involvement in **EU Readmission Agreements** (i.e. those agreements negotiated by the EU with third countries).

³⁰¹ Frontex, 'Third Countries', at <https://frontex.europa.eu/>

³⁰² House of Lords, Leaving the European Union: Frontex and UK Border Security Cooperation Within Europe. Ben Taylor | LIF 2017/0039 | 24 April 2017.

³⁰³ García Andrade, P., 'Initiatives of EU Member States in managing mixed flows in the Mediterranean and the EU distribution of competences', in C. Matera and A. Taylor, Common European Asylum System and human rights: enhancing protection on times of emergencies, CLEER Working Papers, 2014/7, pp. 54–55.

³⁰⁴ Communication from the Commission to the European Parliament and the Council. Model Status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard. COM/2016/0747 final.

³⁰⁵ European Commission, Fact Sheet, Towards a new Partnership Framework with third countries under the European Agenda on Migration, at: [http://europa.eu/rapid/press-release MEMO-16-2118_en.htm](http://europa.eu/rapid/press-release_MEMO-16-2118_en.htm)

³⁰⁶ Joint Declaration to EU readmission agreements.

2. The potential for a future **EU–UK readmission agreement** that provides a mechanism for the return of citizens of the UK or EU staying irregularly in the territory of the other.

Regarding the first issue, in many cases, such as with Albania, the **UK concluded bilateral readmission agreements prior to the EURAs**. However, in accordance with Art 216(2) TFEU,³⁰⁷ **EU agreements supersede prior State agreements**, and in accordance with Art 4(3) TFEU, Member States' external competence, including in migration and international protection matters, must not undermine the internal common rules of the EU. As such, these previously concluded readmission agreements were superseded by EURAs, if concluded with the same third countries. For example, the EU–Albania agreement³⁰⁸ was developed after, but superseded by, the respective UK–Albania agreement.³⁰⁹

Following the UK's withdrawal from the EU, it will no longer be able to participate in EURAs. However, during the proposed transition period the UK will remain party to EURAs, as the draft withdrawal agreement provides that non-EU countries will be notified that the UK remains a de facto party during this period. With this in mind, it is **unclear to what extent the UK will be able to reinitiate bilateral readmission agreements** concluded with third countries prior to the EU agreements. If the original agreements are no longer valid, the UK would still be able to negotiate similar official agreements with third countries or even collaborate through unofficial arrangements, which can be decided through an exchange of letters, as some readmission policies are non-legally binding agreements between countries.³¹⁰

Alternatively, the level of EU–UK cooperation in this field can be determined through the future relationship agreement. Primarily, given this is considered an area of common interest, the **UK and the EU could agree to continue collaboration on EURAs**. The geographical proximity and migration patterns,³¹¹ as well as benefits to the EU in the form of diplomatic assistance from the UK and benefits to the UK in the form of a wider range of EURAs and the need not to negotiate and conclude separate agreements would facilitate such a collaboration.

Regarding the second readmission issue, in the absence of a future agreement, the **return of EU citizens staying irregularly in the UK, and vice versa, will be governed by customary international law**. As such, the inclusion of a **readmission clause**, as detailed in the European Parliament briefing on the topic,³¹² would provide a mechanism for this type of readmission and be beneficial to both parties.

³⁰⁷ Consolidated version of the Treaty on the Functioning of the European Union part five – external action by the union title v – international agreements.

³⁰⁸ Proposal for a Council Decision on the signature of the Agreement between the European Community and the Republic of Albania on the facilitation of issuance of short-stay visas.

³⁰⁹ Treaty Series N. 40. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania on the Readmission of Persons and Protocol for the Implementation of the Agreement.

³¹⁰ Cassarino, J.P. and Giuffré M., Finding its place in Africa: Why has the EU opted for flexible arrangements on readmission? FMU Policy Brief No. 01/2017, 1 December 2017.

³¹¹ European Parliament Briefing: The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation, 2018.

³¹² European Parliament Briefing: The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation, 2018.

7. CONCLUSIONS AND RECOMMENDATIONS

Building on the findings presented through chapters 2–6, this section details the **conclusions** of this study for the future relationship between the UK and the EU following Brexit in the field of international protection. Following the conclusions, relevant **policy recommendations**, addressed to the most relevant actors, are presented.

7.1. Conclusions

Following the UK's withdrawal from the EU, the former Member State will **become a third country with a longstanding history of cooperation with the EU in the area of international protection**, considering within that term the areas of asylum, resettlement, return and readmission. With this said, it is clear that **the UK will not be considered a conventional third country**; a perspective supported by both the UK and the EU negotiating parties, as illustrated by the below quote from the European Council's (Art. 50) guidelines.

*The European Council **welcomes and shares** the United Kingdom's desire to **establish a close partnership** between the Union and the United Kingdom after its departure.³¹³*
Section IV (18), European Council (Art.50) guidelines

To ensure such a future partnership, in the first instance, the European Commission's Taskforce on Article 50 and the UK Department for exiting the EU must agree upon a **withdrawal agreement** and a Political Declaration on the **framework for the future relationship** (the 'future framework'). If these agreements are reached, the UK and EU processes of adoption detailed in Box 17 will begin.

Box 17. Processes for the adoption of the withdrawal agreement and the future framework

UK and EU processes for adoption: The withdrawal agreement and the future framework

In the **UK**, the withdrawal agreement and the future framework must be debated in both Houses of the UK Parliament and, should the House of Commons approve the deal, Parliament will move to adopt an **Implementation Withdrawal Agreement and Implementation Bill**, as detailed in the UK's EU (Withdrawal) Act 2018.

For the **EU**, the withdrawal agreement will be presented to the European Parliament and the Council, alongside the Political Declaration on the Future Framework. At the Council, the Agreement must be **backed by a qualified majority representing 72% of the 27 Member States** (i.e. requiring the support of at least 20 Member States representing 65% of the EU27 population). At the Parliament, a **plenary vote must approve** the Agreement by a vote of simple majority, including MEPs from the UK.³¹⁴ However, MEPs are also permitted to refer any legal objections to the CJEU.

Furthermore, the **draft withdrawal agreement**, published on 19 March 2018, includes provisions for a **transition period**. Should the terms from the draft agreement remain in an agreed and adopted final withdrawal agreement, such a transition period will span from the entry into force of the withdrawal agreement until 31 December 2020. **During the transition period, the whole of the EU *acquis* will continue to apply to the UK, including CJEU jurisdiction, but the UK will no longer be part of decision-making processes.**

³¹³ European Council, Special meeting of the European Council (Art.50) – Guidelines. EUCO XT 200004/17, 29 April 2017.

³¹⁴ European Commission, Fact Sheet: Questions & Answers: Publication of the draft Withdrawal Agreement between the European Union and the United Kingdom, Brussels, 28 February 2018.

Should the negotiating parties not reach an agreement, the UK will experience a **no-deal Brexit**, where EU rules would cease to apply from the 29 March 2019 deadline.

In relation to the field of **international protection**, as documented throughout this analysis, it is clear that **limited focus has been placed on the topic** to date:

- The **EU institutions and, in particular, Taskforce on Article 50 have not published or responded to UK positions** with regard to a future framework of cooperation in the field of international protection. Moreover, the **Council guidelines do not explicitly provide for a mandate on the topics of asylum, resettlement, return and readmission**. However, the question remains whether paragraph 9 of the Council guidelines, which states that the 'future partnership should address global challenges',³¹⁵ could also apply to the area of international protection.
- The **UK**, through its White Paper on *The Future Relationship between the United Kingdom and the European Union*, has, under the auspices of its proposed approach to security cooperation, indicated that 'it is vital that the **UK and the EU establish a new, strategic relationship to address the global challenges of asylum and illegal migration**',³¹⁶ echoing the wording of the Council guidelines. This White Paper further details the UK's interest in continued cooperation, in particular with regard to Frontex, Europol, Eurodac and the development of a Dublin-like legal framework. Furthermore, the UK is expected to publish a White Paper on Migration 'at the end of this year (2018)'.³¹⁷ However, the primary focus of this White Paper will be legal migration and the extent to which the field of international protection will be covered is unknown.

Although limited discussions have taken place between the EU and the UK in the context of the Brexit negotiations, it is clear that **Brexit will have significant implications** in the field of international protection and that there are **areas in which continued cooperation would bring benefits for both parties**, in particular with regard to the Dublin system and Eurodac, EASO, Frontex and other means of cooperation such as ILOs and readmission agreements.

Regarding the CEAS, it is notable that, in the immediate future, the **UK will continue to implement the content of the first-round CEAS Directives**, as these Directives have been transposed into UK law. As such, the standards for the reception of asylum seekers; standards for qualification for international protection; and the procedures for granting or removing refugee status – all implemented in the UK through the first-round CEAS Directives – will remain at the existing level. In this regard, the **primary concern is that, over time, the UK could amend its legislative framework, resulting in diminished and divergent standards** compared to those in place in the EU Member States. In this respect, it is important to consider the ECtHR and CJEU 2011 judgements on the Greek asylum system and note that **both courts will act if they consider the UK's asylum system has not respected the human rights of asylum seekers**.

An EU measure where significant implications are foreseen if no agreement is negotiated for future cooperation is the **Dublin system**. Primarily, from the UK perspective, it would have no recourse to return asylum seekers to the first point of entry. For the EU, a key challenge would be the lack of a legal mechanism to send asylum seekers to the UK for the purpose of family reunification. Furthermore, as already illustrated by the CJEU case *M.A. vs The International Protection Appeals Tribunal*, the potential for a perception of diminishing standards in the UK could have implications in relation to Dublin. In this respect, from an EU perspective, such a perception could lead to the movement of asylum seekers out of the UK to EU Member States, which, following Brexit, will have no recourse to return them to the UK.

³¹⁵ European Council, European Council (Art. 50) – Guidelines. EUCO XT 20001/18, 23 March 2018.

³¹⁶ UK Government, *The Future Relationship Between the United Kingdom and the European Union*, July 2018.

³¹⁷ House of Commons, *Brexit: new guidelines on the framework for future EU–UK relations*. Briefing Paper Number 8289, 19 April 2018.

As such, it is considered that **cooperation on Dublin is an area of common interest for the UK and the EU.**

In relation to the potential future relationship under the Dublin system, a range of potential options for continued cooperation have been identified, including: i) the establishment of a **Dublin association agreement** similar to the agreement between the EU and Schengen / Dublin associated countries; or ii) **selective participation** by the UK in areas of specific common interest, such as family reunification.

However, the following challenges remain:

- The draft withdrawal agreement does not explicitly mention **pending issues in relation to asylum seekers waiting to be transferred under the Dublin system** from the EU27 (or non-EU States associated to the Dublin system) to the UK or vice versa. As such, in a no-deal scenario, there will be no agreement on how to process such ongoing transfers.
- The discussions on the future of Dublin system cooperation are inextricably linked to the future of UK access to **Eurodac**. Although the UK has stated its desire to maintain access, a no-deal scenario would result in its exclusion and uncertainty regarding the future availability of data within Eurodac that was provided by the UK.

Although not specifically mentioned by the UK as an area of interest, **EASO is considered a prime opportunity for continued collaboration in the area of international protection.** From the EU's perspective, EASO could act as a mechanism to ensure continued alignment and monitor potential divergences between UK and EU asylum procedures. The EU would also benefit from the UK's input via country reports, as is the case with other third countries. For the UK, in particular, involvement in the proposed future state of EASO, as the EU Agency for Asylum (EUAA), will give it unprecedented insight at the forefront of European activity in the field of asylum.

The options for continued engagement with EASO are much simpler than for the Dublin system. EASO has the possibility within its legal framework to **conclude Working Arrangements with third countries**, following an agreement between the third country and the EU. However, three challenges persist:

- i. Although EASO has agreements in place with Schengen/Dublin associated countries, it is yet to conclude a Working Arrangement with any other third country. Furthermore, Working Arrangements allow for a more limited scope of cooperation compared to that of the Schengen/Dublin associated countries, as well as the current UK involvement with EASO.
- ii. Previous agreements with Schengen/Dublin associated countries took a year to be concluded. In view of this, these timelines need to be considered in advance to avoid disrupting the continuity of ongoing projects and activities.
- iii. Under the proposed EUAA Regulation, the cooperation available under working arrangements differs for the Schengen/Dublin associated countries, which already have established arrangements with EASO, and other third countries. Dealt with by separate Articles, the Schengen/Dublin associated countries (Art. 34) have much greater collaboration opportunities than other third countries (Art. 35). Hence, without explicit inclusion in Art. 34 of the EUAA proposal, the UK will only be able to cooperate with the EUAA in a restricted manner.

Besides Dublin cooperation and EASO, a **key stated area of interest for the UK is ensuring future cooperation with Frontex.** However, it is unlikely that the UK will be permitted to continue its current level of involvement with Frontex, where it is present at Management Board meetings but not a full member. There is precedent for cooperation with third countries, but no non-EU/EEA countries participate in the agency's Management Board. Instead, such third countries have, to date, cooperated with Frontex through Working Arrangements, which can implement the means for cooperation in a wide range of areas, including: i) joint operations; ii) information processing and exchange; iii) return

operations; iv) training; v) research and development; vi) pilot projects; vii) technical assistance; and viii) operational interoperability.³¹⁸

Additionally, the **EU would benefit significantly from continued collaboration with the UK's network of Immigration Liaison Officers**; primarily, because the UK provides the third biggest network of ILOs comprising approximately 12% of the total number of ILOs.³¹⁹ **There is also support in the UK for continued cooperation in this area.** In June 2018, the UK Immigration Minister stated that 'where the UK has no ILO posted to a third country there are benefits in utilising EU or Member State ILOs to further UK objectives on migration'.³²⁰ Given that a key tenet of the recast ILO Regulation relates to the implementation of a steering board, chaired by the Commission, in the same statement from June 2018, the UK Immigration Minister recognises that third countries involved with Schengen will be permitted to participate as observers at the steering board, without full membership. Although this statement does not commit the UK to a preferred course of action, it clearly reiterates the benefit of the ILO networks to the UK and the primary possibility for continued cooperation, as an observer to the steering board.

The final elements of the EU's international protection legal and policy framework which merit attention in relation to Brexit are **readmission agreements**. Following Brexit, the UK will no longer be permitted to participate in EU negotiated readmission agreements. However, prior to the establishment of EU readmission agreements, the UK held many bilateral readmission agreements, which were superseded by the EU agreements with the same country. Even if these pre-existing agreements remain valid, which is uncertain, there is **common interest in collaborating on readmission agreements with third countries**. On the one hand, the EU would benefit from the UK's diplomatic assistance in the negotiation of EURAs with third countries, particularly given the noted difficulty of engaging with third countries on readmission.³²¹ On the other hand, the UK would benefit from maintaining the scope of EU negotiated readmission agreements.

Furthermore, both the **EU and the UK would benefit from a readmission clause related to EU-UK readmission**: i.e. a legal mechanism for the readmission of UK citizens irregularly staying in the EU and vice versa.

7.2. Policy recommendations

On the basis of the above findings and conclusions, the study makes the following policy recommendations:

Measures to ensure preparedness

As detailed in the European Council guidelines of 23 March 2018, 'the Commission, the High Representative of the Union for Foreign Affairs and Security Policy and the Member States [should continue to] work on preparedness at all levels for the consequences of the UK withdrawal, taking into account all possible outcomes'.³²² Through this study, it has been illustrated that, to date, limited preparations have been undertaken with regard to the future relationship between the EU and the UK in the field of international protection. Furthermore, Brexit will have significant consequences in relation to the field of international protection. As such, **the following measures are recommended to ensure full preparedness at all levels** for the consequences of Brexit:

³¹⁸ Ibid.

³¹⁹ European Commission (2018) SWD: Evaluation of the Council Regulation (EC) 377/2004 on the creation of an immigration liaison officers network. SWD(2018) 197 final.

³²⁰ Home Office, Explanatory Memorandum for EU Legislation 9036/18 [COM (2018) 303 final] Regulation of the European Parliament and of the Council on the creation of a European network of Immigration Liaison Officers (recast), 5th June 2018.

³²¹ European Commission, DG Migration and Home Affairs, EU Readmission developments – state of play October 2017.

³²² European Council, European Council (Art. 50) – Guidelines. EUCO XT 20001/18, 23 March 2018.

- To ensure awareness of the consequences of Brexit in the field of international protection, as well as the potential options for a future relationship between the UK and the EU, the **European Parliament should include an item on the agenda of the LIBE Committee** to discuss the consequences of the UK's withdrawal in the field of international protection, the options for the future relationship and how agreement on these options will be achieved. Such discussions should be framed and led by the Parliament's Brexit Steering Group.
- To ensure a legitimate basis for negotiations in the field of international protection, the **European Parliament should call on the European Council to clarify the mandate of the Article 50 Taskforce** and, in particular, clarify whether it should cover the future relationship between the EU and the UK with regard to legislation in the field of international protection.
- To ensure clarity on the position of the EU in relation to the future relationship between the UK and the EU regarding legislation in the field of international protection, the **European Parliament should call on the European Commission – more specifically, DG Migration and Home Affairs – to develop preparedness notices** detailing how Brexit will change law and policy in the area of international protection. Such preparedness notices will indicate where adaptations of EU law are required.
- Following on from the above, the **European Parliament should call on the European Commission, in close consultation with relevant EU agencies and bodies, to clarify its position on continued cooperation with the UK** following Brexit on the body of EU law comprising the area of international protection. Furthermore, immediate steps should be taken to ensure that the **risks of a no-deal are managed**, in particular in relation to 'in progress' elements, such as pending Dublin transfers.
- To complement these above, the LIBE Committee should call on the **European Parliament's Brexit Steering Group (BSG) to comment on the July 2018 UK White Paper on *The Future Relationship Between the United Kingdom and the European Union***. With specific regard to the topic of this study, the BSG should respond on the 'asylum and illegal migration' positions established by the UK in its White Paper. Furthermore, the **LIBE Committee should call on the European Commission, through its Taskforce on Article 50, to respond to the UK White Paper**.

Ensuring respect for human rights and asylum standards

Although the UK is currently committed to the European Convention on Human Rights (ECHR), as well as other international legal standards relevant to the field of international protection, there are concerns that Brexit could, in the longer term, lead to reduced human rights protections in the UK. This is of particular significance if the UK reignites its previously held desire to leave the ECHR or the UK diminishes the standards currently implemented through its transposition of the first-round CEAS Directives. In particular, these Directives establish minimum standards for the reception of asylum seekers, standards for qualification for international protection and asylum procedures.

As such, to facilitate the maintenance of mutual trust in relation to the respect for human rights and asylum standards, as well as the UK's future relationship with EU law, the following measures are recommended.

It is recommended that the European Parliament, in combination with other relevant authorities, such as the United Nations High Commissioner for Refugees (UNHCR) and the Council of Europe, **seek to ensure commitment from the UK to the human rights that remain shared and that find expression in the ECHR**. Furthermore, if the UK and the EU enter into cooperation agreements in relation to any of the above areas, it is recommended that **such agreements could include a**

'guillotine clause'.³²³ This clause, suggested by Taskforce 50 in relation to the field of police and judicial cooperation,³²⁴ would stipulate that, should the standards fall below those agreed by the EU and the UK, the EU would halt cooperation on the matter in question.

Finally, it is recommended that Taskforce 50, in collaboration with its UK counterpart, work to ensure the **development of robust enforcement and dispute resolution mechanisms** in relation to the UK's continuing relationship with EU law.

³²³ European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *The EU–UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters*. Study conducted by Optimity Advisors, 2018.

³²⁴ Taskforce for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. Internal EU27 preparatory discussions on the framework for the future relationship on police and judicial cooperation in criminal matters. 18 June 2018. TF50 (2018) 18/6. Commission to EU27.

ANNEX I: LIST OF STAKEHOLDERS

Table 12 presents the stakeholders that contributed to the study.

Table 12. List of stakeholders contacted and interviewed for the study.

Stakeholder
EU-level stakeholders
EASO
eu-LISA
Council of Bars and Law Societies of Europe (CCBE)
Norwegian stakeholders
Norwegian Ministry of Foreign Affairs
Norwegian representative on the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC)
NGOs and academic stakeholders
UK Refugee Council
UNHCR (Brussels and London)
Professor Steve Peers
Dr Natascha Zaun
Dr Jorrit Rijpma
Dr Jan-Paul Brekke

ANNEX II: REFERENCES

- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania on the Readmission of Persons and Protocol for the Implementation of the Agreement, 14 October 2003, Treaty Series N. 40 (2005).
- Bangkok Principles on the Status and Treatment of Refugees ('Bangkok Principles') of 31 December 1966.
- Barigazzi, J. and de la Baume, M., 'EU forces through refugee deal', *Politico*, 2015.
- Barnier, M., 'An Ambitious Partnership with the UK after Brexit', European Commission, 2 August 2018.
- Brekke, J-P. and Staver, A., 'The renationalisation of migration policies in times of crisis: the case of Norway', *Journal of Ethnic and Migration Studies*, Routledge, 2018.
- British Nationality Act 1981, c. 61
- Buck, T., 'Immigration resonates on the streets for Brexit campaign', *Financial Times*, London, 8 June 2016.
- Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, of 22 November 1984
- Charter of Fundamental Rights of the European Union No 2000/C 364/01 of 18 December 2000
- Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- Commission Recommendation C(2017) 6504 of 27 September 2017 on enhancing legal pathways for persons in need of international protection.
- Committee of the Regions, Reform of the Common European Asylum System – Package II and a Union Resettlement Framework, CDR 5807/2016.
- Communication from the Commission to the Council and the European Parliament – The global approach to migration one year on: towards a comprehensive European migration policy COM/2006/0735 final.
- Communication from the commission to the European Parliament and the Council Towards a reform of the common European asylum system and enhancing legal avenues to Europe COM/2016/0197.
- Communication from the Commission to the European Parliament and the Council, Model Status Agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard COM/2016/0747 final.
- Communication from the Commission to the European Parliament, the European Council and the Council, Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy COM(2017) 820 final.
- Community Charter of the Fundamental Social Rights of Workers of 9 December 1989.
- Consolidated version of the Treaty on the Functioning of the European Union protocol (no 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice of 1 July 2013.
- Consolidated version of the Treaty on the Functioning of the European Union protocol (no 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom of 1 July 2013.
- Consolidated version of the Treaty on the Functioning of the European Union Part Five, The Union's External Action Title V – International Agreements Article 216.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, New York, 10 December 1984.

- Convention and Protocol Relating to the Status of Refugees, 28 July 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (Refugees Convention) and 31 January 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Protocol).
- Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities – Dublin Convention of 15 June 1990.
- Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, New York, 20 November 1989
- Council Conclusions of 20 July 2015 ('on resettling through multilateral and national schemes 20 000 persons in clear need of international protection'), document 11130/15.
- Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
- Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, of 4 November 1950, ETS 5.
- Council of Europe, European Social Charter of 18 October 1961, European Treaty Series No 35.
- Council of Europe: Parliamentary Assembly, Frontex: human rights responsibilities of 25 April 2013, Recommendation 2016 (2013).
- Council of the European Union 'EU-Turkey statement, 18 March 2016', 18 March 2016.
- Council of the European Union Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network.
- Council of the European Union, Document XT 21004/18 of 29 January 2018 on Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union.
- Department for Exiting the European Union Policy Paper on Enforcement and Dispute Resolution, a future partnership paper of 23 August 2017.
- Department for Exiting the European Union Policy Paper on The Future Relationship Between the United Kingdom and the European Union of 12 July 2018.
- Department for Exiting the European Union, Legislating for the Withdrawal Agreement between UK and EU of 24 July 2018.
- Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary, Government of Australia, Canberra, 30 June 2016.
- Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
- Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
- Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, 13 December 2011.
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

- EU budget: Commission proposes major funding increase for stronger borders and migration, 12 June 2018.
- European Commission, Commission makes progress on a European Agenda on Migration, Brussels, 4 March 2015.
- European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European Agenda on Migration of 13 May 2015, Brussels, COM(2015) 240 final.
- European Commission Communication to the European Parliament and the Council on Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe of 6 April 2016, Brussels, COM(2016) 197 final.
- European Commission Communication to the European Parliament, the European Council and the Council on Progress report on the Implementation of the European Agenda on Migration of 14 March 2018, Brussels, COM(2018) 250 Final.
- European Commission Fact Sheet, Towards a new Partnership Framework with third countries under the European Agenda on Migration, Strasbourg, 7 June 2016.
- European Commission Press Release of 4 May 2016, Towards a sustainable and fair Common European Asylum System.
- European Commission Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece of 27 May 2015, Brussels, COM(2015) 286 final.
- European Commission Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary of 9 September 2015, Brussels, COM(2015) 451 final.
- European Commission Proposal for a Council Decision on the conclusion of the Arrangement between the European Community and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen acquis of 30 October 2009, Brussels, COM/2009/0605 final – CNS 2009/0168.
- European Commission Report from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Ex post-evaluation reports for the period 2011 to 2013 of actions co-financed by the four Funds under the framework programme 'Solidarity and Management of Migration Flows' of 12 June 2018, Brussels, COM(2018) 456 final.
- European Commission Staff Working Document SWD(2018) 339 final of 12 May 2018 Interim Evaluation of the Asylum, Migration and Integration Fund 2014–2017.
- European Commission, *A Common European Asylum System*, Publications Office of the European Union, Luxembourg, 2014.
- European Commission, Annexes accompanying the Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece of 27 May 2015, Brussels, COM(2015) 286 final.
- European Communities Act 1972, c.68 of 17 October 1972.
- European Council on Refugees and Exiles, European Database of Asylum Law.
- European Economic and Social Committee SOC/548 Establishing a Union Resettlement Framework, 2016.
- European Parliament Committee on Civil Liberties, Justice and Home Affairs Report of 6 November 2017 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)).
- European Parliament Resolution on the Schengen Agreement and political asylum 6 April 1995.

- European Parliament Think Tank Briefing of 6 February 2018 on the implications of the United Kingdom's withdrawal from the European Union on readmission cooperation.
- European Parliament, *Division of competences between the European Union and its Member States concerning immigration*, Brussels, 2011.
- European Union (Withdrawal) Act 2018, c.16 of 26 June 2018.
- Eurostat, EU Member States granted protection to more than half million asylum seekers in 2017, 19 April 2018.
- García Andrade, P., 'Initiatives of EU Member States in managing mixed flows in the Mediterranean and the EU distribution of competences', in Matera, C., and Taylor, A., *Common European Asylum System and human rights: enhancing protection on times of emergencies*, *CLEER Working Papers*, 2014/7, CLEER, Centre for the Law of EU External Relations, The Hague, 2014.
- Home Office Report on the Annual Accounts of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States for the Financial Year 2014 together with the Agency's Reply of 17 November 2015.
- Home Secretary's speech on the UK, EU and our place in the world of 25 April 2016.
- House of Commons Library Briefing Paper No 8289 of 19 April 2018 on Brexit: new guidelines on the framework for future EU–UK relations.
- House of Commons Library Briefing Paper No SN03186 of 13 May 2015 on Constituency Casework: Asylum, Immigration and Nationality.
- House of Commons Written Statement HLWS376 of 19 December 2016 European Union opt-in decision: Asylum Measures.
- House of Lords Debate of 5 September 2017 on Brexit: UK-Irish Relations.
- House of Lords Research Briefing LIF 2017/0039 of 25 April 2017 on Leaving the European Union: Frontex and UK Border Security Cooperation Within Europe.
- Human Rights Act 1998, c.42, 9 November 1998.
- Immigration Act 1971, c. 77 of 28 October 1971.
- International Commission of Jurists (ICJ), Procedural rights in the proposed Dublin IV Regulation – Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation, 27 September 2016.
- LSE European Institute, *The Implications of Brexit for Fundamental Rights Protection in the UK*, Report of the hearing held on 25 February 2016.
- Mathiason, N., Parsons, V., and Jeory, T., 'Europe's Refugee Crisis: Is Frontex Bordering on Chaos?', *Bureau of Investigative Journalism*, 15 September 2015.
- McAuliffe, M., *The Nexus Between Forced and Irregular Migration: Insights from Demography*, Demography of Refugee and Forced Migration, in Hugo G., Abbasi-Shavazi M., Kraly E. (eds) *Demography of Refugee and Forced Migration*, *International Studies in Population*, vol 13. Springer, Cham, 2017.
- Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia, 26 September 2014.
- Nationality, Immigration and Asylum Act 2002, c.41 Section 55.
- Peers, S., and Rogers N., *EU immigration and asylum law: Text and commentary (Immigration & Asylum Law & Policy in Europe)*, Martinus Nijhoff Publishers, Leiden/Boston, 2006.
- Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.
- Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

- Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.
- Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.
- Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
- The Migration Observatory, The UK, the Common European Asylum System and EU Immigration Law, 2 May 2014.
- Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea, Treaty Series No. 18 (2004), 4 February 2003.
- Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997.
- Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007/C 306/01.
- Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities, C325/5.
- UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006

- UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
- UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993.
- UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606.
- UN General Assembly, Universal Declaration of Human Rights, of 10 December 1948.
- UNHCR Press Release, 'UNHCR and League of Arab States sign agreement to address refugee challenges in the Arab region', 22 September 2017.
- UNHCR, Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation to a Common Asylum and Migration Policy, *Tool Boxes on EU Asylum Matters*, Tool Box 1: The Fundamentals, November 2003.
- Van Wolleghen, P.G., If Dublin IV were in place during the refugee crisis. A simulation of the effect of mandatory relocation, Istituto per lo Studio della Multietnicità (ISMU), January 2018.
- Vevstad, V., and Mysen, C., Normative European Jurisprudence in a Refugee and Migration context, Institute for Social Research, Oslo, 2011.
- Vevstad, V., Et felles europeisk asylsystem (A Common European Asylum System), European Migration Network (EMN), November 2012.
- Zaun, N., Why EU asylum standards exceed the lowest common denominator: The role of regulatory expertise in EU decision-making, *Journal of European Public Policy*, Vol. 23 Issue 1, 2016, pp. 168–182.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the LIBE Committee, provides expertise on the legal, institutional and technical implications of the UK's withdrawal from the EU in the field of international protection. More specifically, this analysis presents the current situation with regard to UK–EU cooperation in the field, the legal standards that will be applicable to the UK following its withdrawal, the areas of common interest in the field and the potential forms of future cooperation.

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