European Parliament

EU migratory challenge
Possible responses to the refugee crisis

SUMMARY

With hundreds of thousands of people embarking on perilous journeys to reach the EU borders, the EU now faces an unprecedented migratory crisis. The following pages set out possible responses, some based on legislation already in force and others requiring a profound reform of the existing system. It is argued that the so-called Dublin system – defining the Member State responsible in individual cases for examining applications for international protection – has led to overburdening of Member States at the EU's southern external borders. Meanwhile diverging asylum standards across the EU have resulted in a great number of asylum-seekers travelling to Member States with higher reception standards. Therefore the solutions proposed centre, on the one hand, on harmonising national asylum standards and, on the other hand, on distributing asylum-seekers more evenly across the EU.

With respect to illegal border crossings, recent EU policy documents have focused on addressing migrant smuggling through concerted action, including military operations. Moreover, in order to bring down the number of such crossings, legal entry channels to the EU could be proposed for persons in need of international protection. These include a possibility to trigger the so-called Temporary Protection Directive, as well as making use of 'humanitarian admissions' and 'humanitarian visas'.

Any additional admissions create extra costs for Member States, however. One way to limit them is through private sponsorship of refugees as has been undertaken by Canada under the Refugee Sponsorship Program. On top of these concrete actions on EU territory, solutions are possible outside Europe through cooperation with third countries. The aim is to address the root causes of irregular migration, to counter and prevent migrant smuggling and trafficking, and to provide effective return, readmission and reintegration policies for those not qualifying for protection.

In this briefing:

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- Stronger cooperation with third countries
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See also our infographic on 'Recent migration flows to the EU'.

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> **Glossary**
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> **Asylum-seeker:** A person claiming international protection due to the risk of persecution in their home country. (Article 1 A (2) UN Geneva Refugee Convention)
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> **Irregular immigrant:** A third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

The EU migratory challenge

Due to the geopolitical situation in several of the EU's neighbouring countries, the surge of asylum-seekers to the EU has increased steadily since 2008, reaching record highs in the past few months. Asylum-seekers risk their lives on dangerous journeys to Europe, which often do not stop at the EU's external border but continue into the EU. Smugglers avail themselves of the precarious situation of people in need of protection.

Against this backdrop, the EU and its Member States are struggling to find durable solutions. Indeed the EU policy on asylum and irregular immigration has moved

Figure 1 - Asylum applications in the EU28, in thousands

Data source: Eurostat.

a long way from originally autonomous national policies. However, the Common European Asylum System (CEAS) consisting of five key legal instruments (Qualification Directive, Asylum Procedure Directive, Reception Conditions Directive, Dublin III Regulation and EURODAC Regulation)[1] and completed in 2013, has not succeeded in stopping further tragedies in the Mediterranean.

The European Parliament has repeatedly demanded a holistic EU approach to migration through better organising legal migration, fighting irregular migration, strengthening the external borders, building an EU asylum system and creating a global partnership for migration and development. In its resolution of 29 April 2015, Parliament called on the Council to launch crisis resolution mechanisms based on solidarity between Member States.

As part of the European Agenda for Migration, the European Commission proposed in May the relocation of 40 000 asylum-seekers from Italy and Greece to other Member States. Other responses to the refugee crisis under discussion range from better implementation of existing rules to a substantial overhaul of the EU asylum and immigration legislation.

The Common European Asylum System (CEAS)

There is **no EU-wide asylum status**, although the Lisbon Treaty provided a legal basis for a common European asylum system comprising inter alia 'a uniform status of asylum for nationals of third countries, valid throughout the Union' (Article 78(2)a TFEU). The CEAS 2013 did not establish such an EU-wide asylum status either. Rather, the EU asylum system currently in place limits itself to **allocating responsibility for the processing of**
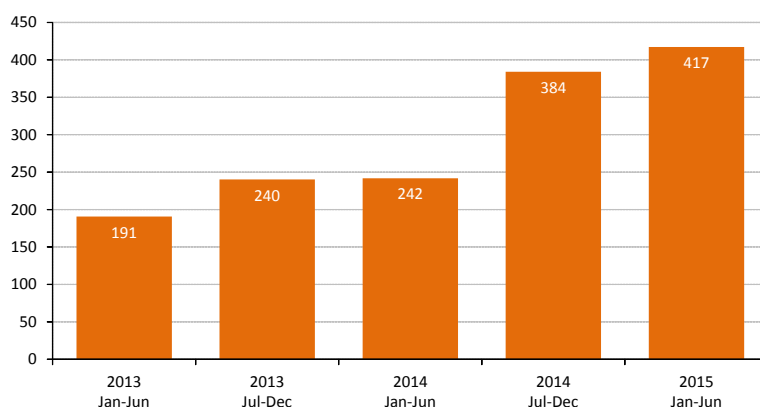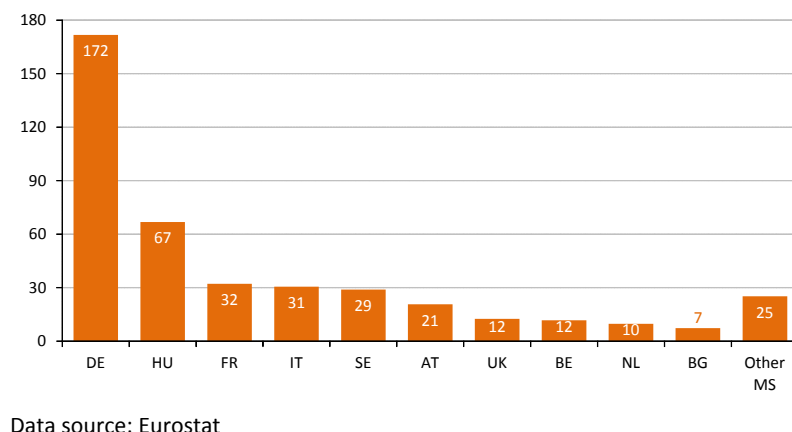
asylum applications to individual Member States, also involving the obligation to provide protection to the refugee in question when the decision is positive. In order to prevent asylum-seekers from moving between Member States and to avoid 'asylum shopping' whereby asylum-seekers choose the EU Member State with the highest protection standards for their application, the CEAS seeks to remove differences in criteria for granting asylum status across

Figure 2 - Asylum applications per Member State, in thousands, January-June 2015

Data source: Eurostat

the EU and also in treatment of asylum-seekers in the different Member States. Accordingly, the CEAS is based on two aspects: (1) single processing of asylum applications by an individual Member State, and (2) the harmonisation of national asylum standards to prevent EU-internal movements of asylum-seekers and refugees.

The Dublin III Regulation establishes that, by default, the first Member State an asylum-seeker entered is responsible for examining their application for international protection. This means that an asylum-seeker who moves to another Member State will be transferred back to the Member State at the EU's external borders, unless the asylum system in that Member State features systemic deficiencies. As a consequence

of the Dublin rules, Member States on the EU's external borders literally form the front line for asylum applications, at the same time as coming under great pressure from irregular immigrants. The overload on some Member States' asylum systems has led to both poor conditions for asylum-seekers (unjustified detentions, mistreat-ment, etc.) and to lower rates of asylum being granted. As a consequence, many asylum-seekers travel to other countries, such as Germany or Sweden, where they have better chances of a successful application and where they enjoy better reception conditions. This second group of Member States often refrain from sending asylum-seekers back to their Member State of entry into the EU because of the worse reception conditions there, in practice turning the 'exception' provided for in the Dublin Regulation into a rule, and in practice suspending the Dublin system altogether. Moreover, experts argue that the objective originally pursued by the Dublin

Figure 3 - Asylum applications per million inhabitants, January-June 2015

> 2 000
1 000 - 2 000
100 - 999
< 100

Data source: Eurostat.

Regulations – to avoid 'asylum-seekers in orbit' (in search of the Member State responsible) – has not been achieved, with Dublin transfer procedures proving long and cumbersome.
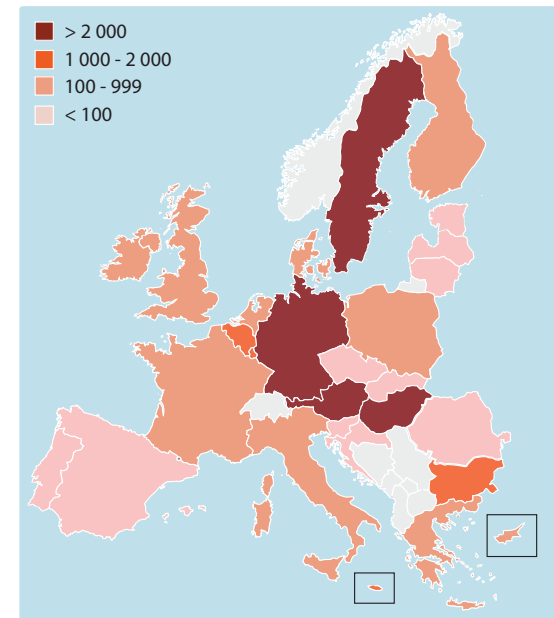
As a result, the allocation of individual responsibilities for asylum applications and for providing services and protection for asylum-seekers and refugees has led to **overburdening** of Member States at the external southern and south-eastern borders, while diverging asylum standards across the EU (partially due the overburdening of some national asylum systems) have led to a great number of asylum-seekers travelling to Member States with higher reception standards.

Possible responses
Solutions proposed centre on harmonising national asylum standards and on distributing refugees more evenly across the EU.

Implementation rather than new legislation: harmonising national asylum standards
Immediately after the completion of the CEAS in 2013, some commentators called for a thorough modification of the newly adopted legislation, shifting from the allocation of individual national responsibilities to a burden-sharing system (see below). However, the prevailing interest of the Member States to assert national control over immigration makes political acceptance of responsibility based on burden-sharing difficult. That is why other commentators point to the need to focus on effective implementation of the newly adopted legislation in the Member States, rather than making further modifications. This is also the stance of both the Council and the European Commission, which stress the need to uphold and fully implement the CEAS, including through increased operational cooperation. It has been suggested that the implementation phase be increasingly supported by the European Asylum Support Office (EASO).[2] It supports the implementation of EU rules by national authorities in order to ensure that asylum applications are dealt with coherently by all Member States. In this view, the EASO could provide a more significant assistance to national administrations in their duty to implement EU rules properly, which would however presuppose better staffing and funding.

Better implementation means above all compliance with asylum standards already harmonised in law at EU level. These include reception conditions, but also criteria for granting protection, which have been harmonised through the Reception Conditions Directive and the Qualification Directive. The deadline for the transposition of the Reception Conditions Directive expired very recently (20 July 2015), which would suggest that improvements might still be outstanding in some Member States. On the other hand, EU asylum legislation provides a wide range of exceptions (that proved necessary to convince Member States to adopt the Directives) that can be applied by national authorities, so that in fact many of the shortcomings of the CEAS do not involve incorrect application of the rules. For instance, the Asylum Procedure Directive establishes that a regular asylum procedure may not last more than six months, but opens up the possibility to extend procedures (without any limit) if 'a large number of third-country nationals simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time limit' (Art. 31).

Amending the Dublin system: burden-sharing
The debate around the Dublin system for allocation of responsibility is either rights-based (better conditions for asylum-seekers, respect for their human rights) or focuses on Member States' interests in preventing too heavy a burden on their social systems and on social cohesion in their societies. Since an overburdening of national asylum systems leads eventually to a worsening of the situation of asylum-seekers, solutions should be sought that combine both aspects.

The Dublin system is grounded in the **allocation of individual national responsibility** on the basis of commonly agreed criteria (hierarchy of criteria: family reunification, residence permits and visas, and, by default, first entry Member State). Conversely, experts call for a modification of the Dublin system in terms of **collective responsibility** so that responsibility for processing asylum claims and providing protection is distributed equitably between all Member States, taking into account their reception capacities.

> An evaluation by the Commission of the Dublin system is due by 21 July 2016 (review clause, Article 46, Dublin Regulation). The Commission will report to Parliament and Council, and propose changes if necessary.

A variety of proposals have been made for fleshing out this collective responsibility, depending on the different degree of solidarity (Article 80 TFEU) that underlines the proposal.

1) An EU-wide asylum status and a centralised EU agency
The European Commission recalled in the May 2015 European Agenda for Migration the obligation under the Treaties to create a 'uniform status of asylum' and committed itself to launching a debate on a **common Asylum Code** (substantive rules) and on a **single asylum decision process** (procedural rules) to guarantee equal treatment of asylum-seekers throughout the EU.

In order to effectively guarantee any substantial EU-wide status, experts propose to establish a **centralised EU agency** that would process asylum applications and determine responsibilities across the EU. This agency could resemble the European Central Bank and could be financed either directly by the EU budget or via contributions from Member States, which would be proportional to their GDP.[3] Some propose in this sense setting up a **Common European Asylum Appeal Court** in order to reduce to a minimum the divergences in Member States' interpretation of EU legislation and the Geneva Convention. Concerns have been raised however about the idea of 'isolating' asylum-related issues from the general jurisprudence of the Court of Justice which could cause a disconnection of asylum issues from, for instance, the logic of the internal market.[4]

2) A system of collective responsibility with distribution of asylum-seekers between Member States
One of the most prominent proposals when debating collective responsibility is the distribution of asylum-seekers among Member States according to a **distribution key**, resembling the German *Königsteiner Schlüssel* – a system used to allocate responsibility among the Bundesländer for the reception of asylum-seekers.[5] Such a distribution key could be based on population, economic wealth, previous integration of refugees, unemployment rates, and adjusted taking into account that Member States transferring asylum-seekers (e.g. Hungary, Italy and Greece) would not take part in the distribution as receiving countries. The Commission proposed such a (temporary) relocation scheme for 40 000 asylum-seekers from Italy and Greece to other Member States and the Council is expected to reach an agreement on such an obligatory (not voluntary) mechanism by mid-September.

However, the physical distribution of asylum-seekers has been criticised for not giving asylum-seekers any choice, which could subsequently lead to secondary movements anyway. Therefore, it has been proposed to combine such physical distributions with financial compensation for Member States receiving more asylum-seekers than foreseen by the distribution key. In the same context, experts propose to take into

account so called 'relocations *sur place*', i.e. asylum-seekers who, without authorisation, moved to a Member State other than that responsible for their asylum application (according to Dublin or to a distribution system), by deducting their number from the quota for their Member State of choice.

3) Joint processing schemes

In February 2013, the Commission published a ['Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU'](). It foresaw inter alia the provision of support from **joint teams** (consisting of experts from several Member States) to a Member State during the 'crisis management' phase of the early warning system now provided for in the Dublin III Regulation. This proposal is now being put into practice in the form of so-called '**hotspots**' in Member States at the external borders. Alternatively, the Commission study also looked into the possibility of joint processing combined with voluntary quotas for refugees and subsidiary protection beneficiaries that Member States would be prepared to take, and these would be relocated to the volunteering State's territory after joint processing in the Member State 'under pressure'.

4) Mutual recognition of positive asylum decisions

At present, the Dublin system is based on the principle of **mutual recognition of negative asylum decisions**: if a person's claim for international protection has been rejected in one Member State, and he or she subsequently claims asylum in another Member State, the second Member State is entitled to decline to examine the application. This has led to asylum-seekers trying at any price to avoid being registered as an asylum-seeker in a Member State in which they do not want to stay. This often pushes them into hiding from the law and promotes criminality. Experts have therefore proposed establishing the mutual recognition of positive asylum decisions instead. This would allow refugees having obtained the status in one Member State (the one in charge according to the Dublin rules) to move to another Member State, where they might have close family ties or better job opportunities, after a certain period of time (e.g. two years), while keeping any secondary rights deriving from the refugee status.[6] This proposal both seeks to **prevent uncontrolled secondary movements within the EU**, and envisages a **better distribution of the costs** for the Member States providing protection. It should be noted however that the principle of free movement within the EU makes the implementation of such a system difficult, such that it might need to be coupled with coercive measures, e.g. loss of certain advantages if moving to another Member State before the two-year period has expired.

5) Free choice approach with financial compensation

Commentators have also proposed allowing asylum-seekers free choice of the Member State in which they would like to apply for asylum. In return, Member States would be financially compensated by the other Member States.[7]

Offshore processing of asylum applications: the Australian case

It has also been proposed to establish Centres for the processing of asylum applications outside EU territory in transit countries for asylum-seekers and irregular immigrants. This would be possible legally only if the third country in question were a signatory to the Geneva Refugee Convention, and if EU protection standards could be guaranteed abroad.

Australia has long established such a system of offshore processing of asylum applications. The Australian approach to 'boat migration' is characterised by distinguishing between 'genuine refugees' who wait offshore in resettlement camps and other refugees arriving directly in Australia by boat.[8] Particularly in the early 2000s emphasis was placed on discouraging unauthorised arrivals through the introduction of mandatory detention laws, processing of asylum-seekers offshore and cooperation with transit countries such as Indonesia and Malaysia.[9] In 2012, offshore processing of asylum claims was reintroduced by the Australian government. This so-called 'Pacific solution' envisages the transfer of asylum-seekers who reach Australia by boat to refugee camps offshore, e.g. in the South Pacific island state of Nauru or Papua New Guinea's Manus Island. In 2011, the Government signed an agreement with Malaysia to send the next 800 refugees that Australia received by boat there, in exchange for accepting 4 000 refugees from Malaysia over the next four years. The 'refugee swap' ('Malaysia solution') was deemed to deter refugees from making the dangerous journey to Australia by boat and 'smash the people smugglers' business'. The High Court declared the agreement invalid since Malaysia is not a signatory to the Geneva Refugee Convention and due to mistreatment of asylum-seekers there.

Migrant smuggling

With border controls being tightened, the majority of migrants resort to the assistance of smugglers. There is no reliable data on the number of people smuggled to the EU and the order of magnitude of related profits. The crime is believed however to be highly profitable and characterised by low risk of detection. The criminal groups involved tend to change routes and *modus operandi* and seek to maximise their profits. This results in practices which are very risky for migrants, squeezed onto small inflatable boats or end-of-life cargo ships, or into trucks.

Possible responses

The EU considers targeting migrant smuggling as a priority, as illustrated by the ongoing EUNAVFOR MED military operation set up by Council Decision (CFSP) 2015/778 and launched in June 2015. The purpose of this operation is to systematically identify, capture and dispose of vessels suspected of being used by migrant smugglers or traffickers.

Moreover, the need to prevent and counter migrant smuggling has been highlighted by recent policy instruments, notably the European Agenda on Migration of May 2015 and the European Agenda on Security of April 2015.

The Action Plan against migrant smuggling of May 2015 sets out specific actions to implement the two Agendas. The following actions are planned for the years 2015–20:

- **Enhanced police and judicial cooperation** including: listing and monitoring suspicious vessels; supporting Member States in towing to shore boats intended to be used by smugglers or disposing of them at sea; stepping up financial investigations; creating a single point of contact on migrant smuggling in each Member State; setting up a Contact Group of EU Agencies on migrant smuggling.

- **Improved gathering and sharing of information on *modus operandi*, routes and economic models of smuggling networks** including: deployment of European migration liaison officers in key EU Delegations; strengthening Europol's focal point on migrant smuggling ('Checkpoint') and its joint maritime information operation (JOT MARE) as EU information hubs on migrant smuggling; Further development of the Africa-Frontex Intelligence Community; enhanced monitoring of pre-frontier areas with full use of Eurosur; identifying and monitoring potential smuggling

vessels; stepping up Europol's support for detecting internet content used by smugglers; including migrant smuggling data within the regular Eurostat collection of crime statistics.

- **Enhanced prevention of smuggling and assistance to vulnerable migrants** including: information and prevention campaigns in third countries on risks of smuggling; development of guidelines for border authorities and consular services; opening negotiations on readmission with the main countries of origin of irregular migrants; defining targets as regards the number of inspections to be carried out every year in the economic sectors most exposed to illegal employment.

- **Stronger cooperation with third countries**.

Providing safe and legal entry channels to the EU for persons in need of international protection

People in need of international protection struggle to enter the EU legally in order to seek asylum. Due to the very few legal entry channels available, the majority of those seeking international protection are forced to cross the EU's external borders in an irregular manner, risking their lives and resorting to human smugglers.

Possible responses
Temporary Protection Directive
In view of the unprecedented migratory flows to Europe, and in line with the European Parliament resolutions of 11 September 2012, 9 October 2013 and 29 April 2015, it may be argued that the necessary conditions apply to trigger the Temporary Protection Directive, a legal instrument which has not been used since its adoption in 2001.

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin, and to promote a balance of efforts among Member States in receiving and bearing the consequences of receiving such persons. To activate the Directive, the existence of a **mass influx of displaced persons** must be established by a Council Decision adopted by a qualified majority on a proposal from the Commission.

In response to the migratory flows from North Africa in 2011, the Commission stated that the Temporary Protection Directive could be activated if the relevant conditions – the persons concerned are likely to be in need of international protection, they cannot be safely returned to their countries of origin, and the numbers of persons arriving who are in need of protection are sufficiently great – are met.

The number of persons who have entered the EU irregularly in the period January-July 2015 is nearly 340 000, compared to 123 500 in the same period of last year, and 280 000 in all of 2014. A great number of them are fleeing war-torn countries such as Syria. Therefore, it is clear that they are likely to be in need of international protection and that they cannot be safely returned to their countries of origin.

Humanitarian admission
Humanitarian admission is another tool that could be used to provide a safe and legal entry channel to the EU for persons in need of international protection. 'Humanitarian admission' refers to national programmes under which persons in need of international protection are admitted to the territory of the receiving state and are provided with a limited or permanent right to stay. Humanitarian admission programmes are similar to,

but not the same as, resettlement because they target refugees who are not individually selected and submitted by the UNHCR.

Examples of humanitarian admissions targeting Syrian refugees include the humanitarian admission programme in Germany (20 000 persons), the humanitarian admission programme in Austria (1 500 persons), the Vulnerable Persons Relocation scheme in the United Kingdom (187 persons) and the Syrian Humanitarian Admission Programme in Ireland (114 persons).

Humanitarian visas

Visas issued on humanitarian grounds ('humanitarian visas') are yet another instrument that could be employed to provide a safe and legal avenue to enter the EU for persons in need of international protection. EU law does not provide for a separate humanitarian visa procedure. However, humanitarian visas could be issued either as national visas for long-term stay ('D visas') or as short-term visas for visits of up to three months in EU Member States that are part of the Schengen area ('C visas').

A 2014 EP study suggests that a total of 16 EU Member States currently have or have previously had schemes for issuing humanitarian visas by means of national and/or Schengen visas. Promising practices of issuing humanitarian visas to Syrian refugees are found, for example, in France (1 880 visas), Switzerland (4 700 visas), Brazil (7 380 visas) and Argentina.

Private sponsorship

Asylum procedures represent certain organisational and financial costs for Member States, to which are added subsistence costs running until the beneficiary of international protection has become self-sufficient. Such costs are part of what is often referred to as the 'burden' for the host state (e.g. when calls are made for fairer 'burden sharing' among EU Member States).

Possible responses

An additional route to granting international protection whilst avoiding an additional financial and organisational impact on the host state is by involving a private element in the process. This has been done in Canada, where each year thousands of people are resettled through a Refugee Sponsorship Program.

The programme applies to refugees and individuals in refugee-like situations who are outside Canada. Private sponsors take on the financial responsibility of providing necessary settlement assistance, including help with housing, food and clothing, as well as finding employment. The sponsorship period is normally 12 months but can exceptionally be extended to 36 months.

The categories of sponsors include:
- Sponsorship Agreement Holders (and their constituent groups): incorporated organisations that have signed a formal sponsorship agreement with the competent authority;
- Community Sponsors: organisations located in the community where the refugees are expected to settle;
- Groups of Five: five or more Canadian citizens or permanent residents, who are at least 18 years of age, live in the expected community of settlement and have collectively arranged for the sponsorship of a refugee.[10]

Partnerships with other organisations and individuals (e.g. family members) are possible.

Statistics show that approximately 40 000 refugees were resettled in Canada between 2004 and 2013 via this scheme alone. In 2013, the number of privately sponsored refugees surpassed the number of refugees in the Government-Assisted Refugee Program which – some commentators argue – is contrary to the general principle requiring that privately sponsored refugees only be additional to those under the government's quota.

The Syrian refugee crisis has increased pressure on the Canadian government to accept refugees. In 2015, the government agreed to accept 10 000 refugees over the next three years in response to the UNHCR's goal of resettling 100 000 Syrian refugees worldwide. Of the 10 000 refugees, 60% are supposed to be privately sponsored.

Whereas the Canadian programme stands out as a particularly wide one (in terms of scope and size), more restricted programmes have been run in other countries, such as Australia and Germany. In some German *Länder*, Syrian families were allowed to sponsor their relatives who otherwise would not have been able to enter the country (e.g. under family reunification rules).

Stronger cooperation with third countries

Stronger cooperation with third countries, especially countries of origin or transit of asylum-seekers, is needed because it is an essential tool to address the root causes of irregular migration, to counter and prevent migrant smuggling and trafficking, and to provide effective return, readmission and reintegration policies for those not qualifying for protection.

Possible responses

To further improve cooperation with third countries, a number of concrete measures have been suggested by the Commission in the European Agenda on Migration, the EU Action Plan against migrant smuggling (2015–20) and the 9 June 2015 letter of Commissioner Avramopoulos to the Council, as follows:

- Regional Development and Protection Programmes will be set up or deepened, starting in North Africa and the Horn of Africa, as well as by building on the existing one in the Middle East.
- A pilot multi-purpose centre will be set up in Niger by the end of the year.
- Migration will become a specific component of ongoing Common Security and Defence Policy (CSDP) missions already deployed in countries like Niger and Mali, which will be strengthened in the field of border management.
- The role of EU Delegations in key countries on migration will be stepped up.
- With a budget allocation of €96.8 billion for the 2014-20 period, EU external cooperation assistance, and in particular development cooperation, will play an important role in tackling global issues like poverty, insecurity, inequality and unemployment, which are among the main root causes of irregular and forced migration.
- Negotiations on readmission agreements with the main countries of origin of irregular migrants will be launched.
- Operational and political cooperation on readmission with countries of origin will be stepped up.

- Increasing EU leverage on readmission of irregular migrants by means of visa policy, trade policy and development aid will be considered.
- Enhanced use of IT systems to enforce return will be considered.
- Communication and awareness-raising campaigns in key countries of origin and transit for migrants will be carried out.
- Bilateral and regional cooperation frameworks with relevant partners focusing on practical measures to address the smuggling of migrants will be launched or enhanced.
- Funding of projects to support third countries in setting up strategies on migrant smuggling, stepping up police and judicial responses, and developing an integrated border management system will be considered.

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