Asylum procedures at the border

European Implementation Assessment
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In April 2020, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) launched an implementation report on Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive), covering asylum procedures at the border or transit zone of a Member State. Erik Marquardt (Greens/EFA, Germany) was appointed rapporteur. Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament’s Directorate-General for Parliamentary Research Services (EPRS).

Beyond in-house research, this European Implementation Assessment is based on two external research papers: i) a legal assessment and ii) a comparative country assessment covering seven Member States. It assesses the implementation of Article 43 of the Asylum Procedures Directive on the basis of its effectiveness, fundamental rights – including procedural rights – compliance, efficiency, and coherence with the aims of the Asylum Procedures Directive and the Common European Asylum System as a whole. It concludes that uniform and fair asylum procedures at the European Union border have not been achieved due to patchy implementation also caused by lack of clarity in the underlying EU legal framework. A number of recommendations are made to address the shortcomings identified in future legal and practical arrangements for border procedures.
Executive summary

European Union Member States have committed themselves to offering protection to those who have to leave their home country to seek safety from persecution or serious harm (see Chapter 1). The international standard in the matter is the 1951 Geneva Convention on the protection of refugees. All Member States are party to the European Convention on Human Rights (ECHR) and therefore subject to the jurisdiction of the European Court of Human Rights (ECtHR). The ECHR contains a number of provisions which are applicable to asylum applicants, notably leading to the prohibition on forcing refugees or asylum-seekers to return to a country in which they are liable to be subjected to torture or to inhuman or degrading treatment or punishment (non-refoulement principle). At EU level, the right to asylum is enshrined in the EU Charter of Fundamental Rights (Articles 18 and 19).

Through the Common European Asylum System (CEAS), the EU has developed legal and policy instruments for the management of asylum in the EU that apply from the moment someone has expressed an intention to apply for international protection on EU territory until the moment the application has been recognised, or rejected upon appeal, at which stage the individual becomes eligible for return. The CEAS includes common procedures for granting and withdrawing international protection, laid down in the Asylum Procedures Directive (APD). The main aim of the APD is for every person in need of international protection to have access to a legally safe and efficient procedure and to an individual examination of their claim according to equal standards. Article 43 of the APD allows for border procedures: When applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant, Member States can provide for admissibility and/or substantive examination procedures at these locations. Furthermore, the directive allows for the possibility to apply border procedures in transit zones or in proximity to borders in the event of large numbers of arrivals.

The APD was to be transposed into national law by 20 July 2015. While Article 50 of the APD provides for regular reporting, the European Commission has yet to publish an implementation report. Several pieces of information are available from the UN High Commissioner for Refugees, Council of Europe, European Migration Network (EMN), European Asylum Support Office (EASO), European Union Agency for Fundamental Rights (FRA), non-governmental organisations and academic research. Based on these sources, it is clear that only some Member States apply the border procedure in law and/or fact. At the same time, among those that do apply the border procedure, national practices regarding the scope, time limits, use of detention and procedural guarantees accorded to applicants diverge widely. The quality and fundamental rights compliance of decisions taken in those Member States which have seen a high influx of applicants has been particularly criticised. In the meantime, the Commission tabled a proposal for a reform of the APD in 2016, which envisaged its transformation into a regulation, to bring a higher level of harmonisation.

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3 UNHCR website.
4 Council of Europe, European Court of Human Rights, Commissioner for Human Rights.
5 European Migration Network website.
among the Member States. At that time, no European Commission impact assessment of the APD was provided. As interinstitutional agreement could not be reached on this proposal, the Commission decided to amend it as part of the Pact on Migration and Asylum, put forward in September 2020. Again, no Commission impact assessment was provided.

Meanwhile, the European Parliament commenced work on an implementation report, focused specifically on Article 43 of the APD. In April 2020, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) appointed Erik Marquardt (Greens/EFA, Germany) as rapporteur. Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament’s Directorate-General for Parliamentary Research Services (EPRS).

This European Implementation Assessment (EIA) was carried out by means of desk research, relying primarily on international and EU institutional sources as well as contributions from practitioners, academics and non-governmental organisations (NGOs). In addition, this EIA is based on two external research papers: i) a legal assessment and ii) a comparative country assessment covering seven Member States. It assesses the implementation of Article 43 of the Asylum Procedures Directive on the basis of its effectiveness, fundamental rights – including procedural rights – compliance, efficiency, and coherence with the aims of the APD and the CEAS as a whole. On this basis, the EIA puts forward recommendations regarding future legal and practical arrangements at sea, land and air borders, their scope (on admissibility and/or on the substance) and length of procedures, exemptions, the applicable fundamental rights and procedural safeguards, the treatment of minors and how to deal with large numbers of arrivals. To finalise this EIA between July and October 2020, the EIA focuses on the most pertinent issues and is limited to the analysis of seven Member States. It should be noted that the EIA was performed under several constraints, including the lack of comprehensive data, the lack of a Commission evaluation of the transposition and application of the APD, and the lack of Commission impact assessments of its subsequent proposals on the matter.

On the basis of the in-house research and externalised research papers mentioned above, conclusions are drawn regarding the implementation of Article 43 APD (see Chapter 2). In terms of effectiveness, as previously mentioned, the APD aims at achieving uniformity in procedures across the EU. However, important differences remain between Member States with regard to the concept and scope of the border procedure, accompanying restrictions of liberty and procedural guarantees. On the one hand, EU legislation leaves Member States too much discretion in these areas. On the other hand, it is not properly evaluated by the Commission in cooperation with EASO and the FRA on the basis of the practical situation on the ground, nor comprehensively enforced by the Commission despite clearly identified violations, of the right to liberty, the prohibition of refoulement, the right to asylum and the right to an effective remedy. Infringement procedures have been launched against certain Member States for non-compliance with various aspects of the APD,

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9 2016/0224(COD), Common procedure for international protection in the Union.
but not against other countries with reported violations. Moreover, infringement procedures take time, during which certain Member States have continued to violate the asylum acquis. This touches upon more general problems with the lack of compliance with EU values in a number of Member States and the need to strengthen the EU's toolbox in this regard.

The main fundamental rights affected by the border procedure are the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter), the right to liberty and security (Article 6 EU Charter), the right to asylum (Article 18 EU Charter), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter) and the right to an effective remedy (Article 47 EU Charter), as well as the freedom of movement and prohibition of collective expulsions (Articles 2 and 4 of Protocol No 4 to the ECHR). In addition, specific principles and procedural guarantees for applicants have been laid down in Chapter II of the APD. The systematic and extended use of (de facto) detention in the context of border procedures is not in line with the right to liberty enshrined in Article 6 of the EU Charter. Procedural guarantees provided for in the APD, in particular the right to information, legal assistance and interpretation, are not or only restrictively applied in practice. Vulnerable applicants, including unaccompanied minors, continue to be subject to border procedures and held in detention facilities, raising questions as regards compliance with Article 24(2) of the EU Charter. The short time limits to lodge and decide on appeals, the lack of suspensive effect of appeals in certain countries, as well as the difficult access to quality legal aid, raise concerns as to compliance with Article 47 of the EU Charter. The difficulty in accessing the territory and the asylum procedure, as well as the use of the fiction of non-entry in the context of border procedures, may in certain circumstances undermine the right to asylum under Article 18 of the EU Charter, the principle of non-refoulement under Article 19 of the EU Charter, and the right to an effective remedy under Article 47 of the EU Charter.

An assessment of the efficiency of the border procedure is difficult to make in the absence of a full picture of the exact financial costs of operation of such procedures. Related studies suggest, however, that the costs of border management and control are significant, as a result of which the costs of the implementation of Article 43 APD may also be considerable and probably disproportionate, given that its objectives are not being achieved. Beyond administrative costs, border procedures entail significant human cost for the individuals affected by its application. The studies also suggest that asylum-seekers subject to border procedures are exposed to the harmful effects of deprivation of liberty in inadequate border detention facilities. They furthermore suffer due to their limited access to information and legal representation throughout the border procedure. Efficiency may further be affected in the case of a high influx of applicants.

In terms of coherence, the framework for border procedures under the APD is complex and unclear, in part due to the various cross-references to other provisions of the APD and the application of other CEAS instruments. In particular, it is unclear whether an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure. Furthermore, the APD is fraught with ambiguity with regard to the applicable reception regime of applicants under a border procedure. Neither the APD nor the recast Reception Conditions Directive 2013/33/EU (RCD) provide guidance to Member States as to where and under which conditions asylum applicants can be accommodated.

On the basis of the research conducted, this EIA puts forward a number of recommendations as regards future legal and practical arrangements for asylum procedures at the border and in transit.

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13 See also FRA, Migration: Key Fundamental Rights Concerns - Quarterly Bulletin 4, 2020; as well as J. Bast et al., Human rights challenges to European migration policy, REMAP study of 27 October 2020, in which the authors also analyse non-discrimination.
zones (see Chapter 3). The recommendations are mainly taken from the two external research papers, which are reproduced in full in Part 2 and Part 3 of this EIA. As pointed out by both external research papers, it should be noted that some shortcomings are inherent to the legal framework; more effective implementation alone will not resolve the problems.

Importantly, access to asylum procedures should be ensured at all times and at all external borders of the European Union. Push backs at the external and internal borders of the Member States should be prohibited. The border procedure should be clearly defined in EU law as a procedure in which asylum-seekers have not been granted entry to the territory. It should also be made clear in EU law that, as a general rule, border procedures may not be used at internal borders. EU law should further limit the applicability of border procedure.

The border procedure should only be resorted to following an individual assessment of the circumstances of the case, including an examination of potential special reception and procedural needs. In case of a return to the country of origin or transit, the safety of such return is to be ensured.

The asylum applications of (unaccompanied) children and asylum applicants with special (reception and/or procedural) needs should not be processed in a border procedure. Border procedures may be used to take decisions under the Dublin Regulation, but only if there is a significant risk of abscondering, in accordance with Article 28 of the Dublin Regulation.

The border procedure may be made more effective through adequate funding, training of border management personnel – who have to adhere to fundamental rights in their daily operational work, and appropriate time limits to ensure that the determining authority is able to gather all necessary information and can take a careful asylum decision.

Member States need to collect and transmit statistics on the scope of their border procedures. Independent monitoring should verify the quality of the decision-making process and its outcome, as well as detention conditions and compliance with procedural safeguards.

Any use of detention, as well as restrictions of free movement, should be mandated by domestic law in compliance with EU legislation on reception conditions for asylum-seekers, and subjected to proportionality assessment in each case, taking alternatives into account. Information must be provided pro-actively to all those apprehended at the border on an equal footing.

Border detention facilities must be adequate and ensure a dignified standard of living that guarantees subsistence and protects physical and mental health. Detention conditions that are not in conformity with ECtHR case law should result in the release of the applicants. A decision to detain an applicant or restrict their free movement should be subject to a speedy judicial review.

The use of detention and the imposing of restrictions on freedom of movement in a border procedure are to be accompanied with procedural guarantees. During a border procedure, applicants for international protection should be entitled to free legal and linguistic assistance by qualified legal advisers and interpreters. Applicants should also be able to communicate with the outside world, in order to gather information about the asylum procedure and to gather and submit evidence in support of their asylum claim. The time frame should be sufficient to enable applicants to prepare and substantiate their asylum application and to make effective use of all procedural

14 Cf. FRA, *Border controls and fundamental rights at external land borders*, 2020, section 4 (identify asylum applicants and protect them from *refoulement*).

15 This requirement is already laid down in the Reception Condition Directive with regard to detention, it is not with regard to restrictions on freedom of movement. Especially taking into account the blurring between the two, similar procedural guarantees should be laid down for restrictions on freedom of movement.
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rights granted to them, including those during appeal. During this appeal, the applicants should have the opportunity to have the risk of *refoulement* effectively reviewed by a court or tribunal before they can be expelled.

By analogy to similar developments in related areas (monitoring of EU values,\(^\text{16}\) Schengen Evaluation Mechanism\(^\text{17}\)), this EIA proposes the creation of an EU asylum-monitoring mechanism, in which the European Commission, as the guardian of the EU Treaties, should have a prominent role. Such a mechanism should envisage a clear division of responsibilities between EU institutions, EU agencies (including EASO and FRA), an independent expert panel, and other relevant actors. The mechanism should focus on the monitoring of, the reporting on, and evaluation of the accessibility of asylum procedures at the external borders, as well as practices of detention and restrictions of liberty in the context of a border procedure at the borders or in transit zones. Moreover, the mechanism should evaluate the quality of decision-making with regard to detention measures or restrictions of movement and the need for international protection (in the administrative and appeal phase). The coherence of the CEAS should be ensured under this EU asylum-monitoring mechanism.

In any event, the Commission should publish regular evaluations, in line with the 2016 Interinstitutional Agreement on Better Law-Making and its own Better Regulation Guidelines, on the implementation of the APD (which should have been, but were not, first presented by 20 July 2017). Implementation gaps must be taken seriously and responses to persistent non-compliance must be adopted as appropriate, in accordance with Articles 258 to 260 TFEU and, if necessary, by triggering the Article 7 TEU procedures.

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\(^{17}\) Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJL 295/27 of 6 November 2013.
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1. Introduction

1.1. Asylum Procedures at the border in context

1.1.1. Common European Asylum System

EU Member States have committed to offering protection to those who have to leave their home country to seek safety from persecution or serious harm. The international standard is the 1951 Geneva Convention on the protection of refugees and its 1967 Protocol. In addition, all EU Member States are party to the European Convention on Human Rights (ECHR) and therefore subject to the jurisdiction of the European Court of Human Rights (ECtHR). The ECHR contains a number of provisions which are applicable to asylum applicants, notably leading to the prohibition of forcing refugees or asylum-seekers to return to a country in which they are liable to be subjected to torture or to inhuman or degrading treatment or punishment (non-refoulement principle).18

At EU level, the right to asylum is enshrined in Article 18 of the Charter of Fundamental Rights of the European Union (EU Charter).19 Article 19 of the EU Charter also prohibits returning a person to a country where 'there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment', in line with the non-refoulement principle (cf. Article 4 of the EU Charter).20 Throughout the procedure, the best interest of the child, as enshrined in Article 24(2) of the EU Charter, must be taken into account. Finally, applicants have a right to an effective remedy against decisions on their applications for international protection in accordance with Article 47 of the EU Charter.

Pursuant to Article 67 of the Treaty on the Functioning of the European Union (TFEU), the Union aims at building a Common European Asylum System (CEAS), consisting of rules regarding:

- The allocation of responsibility for examining asylum applications (Dublin Regulation);21
- A European system for the comparison of fingerprints of asylum applicants (Eurodac);22
- Reception conditions for asylum-seekers;23 and
- Asylum procedures;24

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18 In accordance with Article 3 ECHR (prohibition of torture).
19 OJ C 326, p. 391 of 26 October 2012.
20 According to Article 33(1) of the Geneva Convention, the non-refoulement principle prohibits the expulsion or return of a person to the frontiers of territories where the person's life or freedom would be threatened.
22 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29 June 2013, p. 1-30.
In addition, rules have been established regarding the possibility to offer temporary protection, and a European Asylum Support Office (EASO) was founded to enhance practical cooperation among Member States on asylum-related matters and to assist Member States in implementing their obligations under the CEAS. Closely related measures concern resettlement, family reunification, and the return of irregularly staying third-country nationals, including through readmission agreements and arrangements with third countries.

1.1.2. Asylum Procedures Directive

Aims

The 2013 Asylum Procedures Directive (APD) sets out common procedures for Member States granting and withdrawing international protection in accordance with the Qualifications Directive. It has been highlighted that the objective of the APD is to be considered against the background of widely varying procedural guarantees between Member States under the former Asylum Procedures Directive 2005/85/EC. The common procedures in the APD cover the determination of asylum claims, including common procedural safeguards, rules to ensure access to the asylum procedure, and procedural rules at first instance and appeal. The main objectives of the APD are that every person in need of international protection should have access to a legally safe and efficient procedure and to an individual examination of their claim according to equal standards. The outcome of the procedure should not

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be dependent on the Member State who examines the application.34 The APD was to be transposed into Member States’ national legislations by July 2015.35

General provisions on scope and definitions (Chapter I)
The APD applies to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.36 For all procedures, Member States have to designate a ’determining authority’ responsible for the examination of applications for international protection. Member States have to provide these authorities with appropriate means to carry out their tasks in accordance with the directive.37 Related to this, the APD also contains provisions on training of personnel.38 Member States may also provide for other authorities to be responsible in terms of processing cases pursuant to the Dublin Regulation39 and granting or refusing permission to enter the territory in the framework of the border procedure detailed in Article 43 of the APD.40

Basic principles and guarantees (Chapter II)
Chapter II of the APD contains a number of basic principles and procedural safeguards that Member States must provide to applicants for international protection within the border procedure.41 Member States have to register an application for international protection no later than three working days after the application is made.42 This time limit may be extended to 10 working days in the case of a large number of simultaneous applications.43 The Member States have to ensure that the person concerned has an effective opportunity to lodge the application as soon as possible.44 The directive contains special provisions regarding applications made on behalf of minors.45 Third-country nationals in detention facilities or present at border crossing points should be provided with information on the possibility to apply for international protection and granted access to counselling in accordance with Article 8 of the APD.46 Pursuant to Article 9 of the APD, applicants have a right to remain in the territory of the Member State (including at the border or in transit zones)47 pending the examination of the application.48 Article 10 of the APD stipulates the

35 APD, Article 51.
36 APD, Article 3.
37 APD, Article 4(1).
38 APD, Article 4(3), 4(4).
39 Cf. G. Cornelisse, M. Reneman, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, Section 2.5.1.
40 APD, Article 4(2).
41 Cf. G. Cornelisse, M. Reneman, Section 3.
42 APD, Article 6(1).
43 APD, Article 6(5).
44 APD, Article 6(2).
45 APD, Article 7.
46 APD, Article 8.
47 APD, Article 2(p).
48 APD, Article 9; G. Cornelisse, M. Reneman, Section 2.4.2.
requirements for the examination of applications and Article 11 APD contains specific requirements for the determining authority's decision.

Guarantees for applicants include:

1. Information on applicant’s rights and obligations in a language that they understand and on the possibility to request the assistance of an interpreter, notably during a personal interview by the authorities;
2. Free legal assistance, on request, during the procedure of first instance and the opportunity to obtain legal assistance and representation at all stages of the procedure;
3. The right of vulnerable persons, such as minors or victims of psychological, physical or sexual violence, to have their specific needs assessed.

Moreover, in accordance with Article 26 APD, detention is not allowed for the sole reason that someone is an applicant for international protection. Grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with the Reception Conditions Directive. This includes the requirement for a speedy judicial review.

Article 27 APD concerns the procedure in the event of withdrawal of the application and Article 28 APD covers the procedure in the event of an implicit withdrawal or abandonment of the application. In accordance with Article 29 APD, the UNHCR is to be provided access to applicants, including those in detention, at the border and in transit zones. The UNHCR should also have access to information on individual applications and progress on the procedure and on the decision taken, provided that the applicant agrees, and may also present its views regarding individual applications at any stage of the procedure. Article 30 APD stipulates a number of criteria with which Member States must comply when collecting information for the purpose of examining individual cases. The procedural safeguards have to be seen against the background of other CEAS standards, since they in practice operate in connection with some of these other standards.

Procedures at first instance (Chapter III)

First instance decisions should in principle be concluded within six months of lodging the application, subject to derogations. While Article 31(6) of the APD requires national authorities to inform applicants of any delays in the examination of procedures, the directive does not provide for

49 APD, Article 10.
50 APD, Article 11.
51 APD, Article 12(1)(a).
52 APD, Article 12(1)(b).
53 ADP, Article 14-17.
54 APD, Article 19, 21, 23.
55 APD, Article 20, 22, 23.
56 APD, Article 24, 25.
57 Cf. G. Cornelisse, M. Reneman, Section 3.
58 APD Article 26.
59 APD, Article 27.
60 APD, Article 28.
61 APD, Article 29.
62 APD, Article 30.
64 APD, Article 31.
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consequences to follow failure to comply with the time limits. Article 31(8) APD provides for ten optional grounds for accelerating procedures that broadly concern situations where the application appears to have less merit or the applicant’s behaviour is not as desired.\(^65\) The directive does not provide any time limits for the accelerated procedure, merely stipulating that those shall be ’reasonable’.\(^66\) Member States are not required to examine whether the applicant qualifies for international protection where an application is considered inadmissible,\(^67\) because an applicant had come from a ’safe third country’,\(^68\) or would have sufficient protection in a ’first country of asylum’.\(^69\) National designation of third countries as safe countries of origin\(^70\) are, however, heterogeneous and some Member States do not use the concept at all.\(^71\) Article 40 APD covers subsequent applications by the same person.\(^72\) Article 41 APD stipulates exceptions from the right to remain in the case of subsequent applications.\(^73\) The applicable procedural rules are discussed in Article 42 APD.\(^74\)

Procedures for the withdrawal of international protection (Chapter IV)

According to Article 44 APD, Member States shall ensure that an examination to withdraw international protection from a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his or her international protection. Article 45 APD stipulates the applicable procedural rules for withdrawing international protection.

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\(^65\) The grounds mentioned in Article 31(8) APD are: ’(a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU; or (b) the applicant is from a safe country of origin within the meaning of this directive; or (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or (d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or (e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU; or (f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or (g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or (h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or (i) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes; or (j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; G. Cornelisse, M. Reneman, Section 2.5.2.

\(^66\) APD, Article 31(9).

\(^67\) APD, Article 33, 34; G. Cornelisse, M. Reneman, Section 2.5.1.

\(^68\) APD, Article 36, 38, 39

\(^69\) APD, Article 35.

\(^70\) APD, Article 37.

\(^71\) A. Orav, Common procedure for asylum, EPRS, European Parliament, 2019, p. 3.

\(^72\) APD, Article 40.

\(^73\) APD, Article 41.

\(^74\) APD, Article 42.
Appeals procedures (Chapter V)

In accordance with Article 46 APD, applicants must be provided with an effective remedy before a court or tribunal against a decision taken on their application for international protection.75 The competent court or tribunal examining the request for appeal must do so 'in terms of fact and law'.76 Member States have to provide a reasonable time limit for the applicant to exercise her/his right to an effective remedy.77 Applicants shall be allowed, in principle, to remain in the territory of the Member State until the time limit within which they may exercise their right to an effective remedy has expired, and when such a right has been exercised within the time limit, pending the outcome of the remedy.78 Exceptions to this right to remain are stipulated in Article 46(6)-(8). The APD does not stipulate time limits for appeals.79

General and final provisions (Chapter VI)

The general and final provisions of the APD concern, inter alia, challenge by public authorities,80 confidentiality81 and cooperation.82 Article 50 of the APD provides for regular obligations on the European Commission for reporting regarding the application of the directive. The first implementation report was due in July 2017, but the Commission has not issued a report to date.

1.1.3. Asylum procedures at the border or in a transit zone

Aims, scope and definition

Article 43(1) of the APD establishes border procedures to be used by the national authorities of the Member States. When applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant, Member States can provide for admissibility and/or substantive examination procedures at these locations. Member States may conduct a full examination of an application for international protection in the border procedure (and accelerated procedure) in accordance with these grounds, which are enumerated in Article 31(8) APD. These procedures have to comply with the basic principles and guarantees set out in Chapter II of the APD. The APD modified the previous rules on border procedures, with a view to harmonising national arrangements for such procedures.83

Article 43

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or
(b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four

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75 APD, Article 46(1), (2).
76 APD, Article 46(3).
77 APD, Article 46(4).
78 APD, Article 46(5)
79 APD, Article 46(10)
80 APD, Article 47.
81 APD, Article 48
82 APD, Article 49.
weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

However, the term ‘border procedure’ has not been defined in Article 2 APD. In Part 2 of this study, Cornelisse and Reneman submit that ‘border’ should be understood as the external borders of the EU. They furthermore submit that the absence of a common definition allows Member States to claim that they do not have a border procedure, whereas in fact they do apply a procedure, thereby evading their EU law obligations. According to the Court of Justice of the EU in Joined Cases C-924/19 PPU and C-925/19 PPU FMS, the objective of a border procedure is ‘to enable Member States, in well-defined circumstances, to provide for admissibility and/or substantive examination procedures regarding applications for international protection made at the border or in a transit zone of a Member State prior to a decision on an applicant’s entry to its territory’. Such procedural harmonisation should achieve two goals:

1. Uniformity in procedures across the EU; and the
2. Fairness of such procedures.

Uniformity means that similar asylum cases should be treated alike and result in the same outcome. Fairness of border procedures ensures a correct recognition of international protection needs. It ensures compliance with the right to asylum and the prohibition of refoulement guaranteed in Articles 4, 18 and 19 of the Charter of Fundamental Rights of the EU (the Charter) and the identification of those who are not in need of international protection. Moreover, asylum applicants’ right to liberty, guaranteed in Article 6 of the Charter should be respected. Uniformity and fairness prevent secondary movements and help to combat illegal migration.

The annexed study by Cornelisse and Reneman contains a more detailed explanation of border procedures and how they interact with other elements of the APD, CEAS and Schengen Borders Code. The figure below, taken from Chapter 2 of their study, follows the legal framework applicable during the various stages of the procedure depending on whether the right to legally enter is granted, the moment the applicant for international protection is subjected to the border procedure, applicable procedural guarantees and standards to be applied in case of detention/restriction of the freedom of movement, as well as the potential outcomes of the border procedure and its legal and practical consequences.

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84 G. Cornelisse, M. Reneman, Executive summary.
85 Ibidem.
86 Joined Cases C 924/19 PPU and C 925/19 PPU FMS and Others v Országos Idenegrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idenegrendészeti Főigazgatóság [2020].
87 See also G. Cornelisse, M. Reneman, Executive summary.
88 Ibidem.
Figure 1 – EU legislation on border procedures

Source: G. Cornelisse, M. Reneman, Chapter 2.1.
Time limits

Pursuant to Article 43(2) APD, a decision issued in a border procedure should be taken within a reasonable timeframe. Any time limits should be proportionate, providing a realistic opportunity both for applicants to present their case and for the determining authority to assess the claim. In addition, if a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for the application to be processed in accordance with the other provisions of the APD.

Application in case of a large number of arrivals

Furthermore, in accordance with Article 43(3) APD, border procedures may be applied in transit zones or in proximity to borders in the event of large numbers of arrivals, where and for as long as, these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

According to Vested-Hansen, the time limit under Article 43(2) may thus be dispensed with ‘under the rather vague criteria laid down in Article 43(3), which seem to allow for extending ‘border procedures’ both geographically and temporally (‘where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone’). In practice, persons who are subjected to border procedures concerning the admissibility of their application may be likely to being detained pursuant to Article 8(3)(c) Reception Conditions Directive 2013/33/EU. More detailed reflections on the complex relationship between detention and border procedures are provided by Cornelisse and Reneman in Part 2 of this study.

Link with the Return Directive in border procedures

Another objective of the border procedure is to prevent irregular border crossings and to facilitate the return of persons whose applications for international protection have low chances of being recognised (Member States have the power to use border procedures ‘at the[ir] border or transit zones’). According to Cornelisse and Reneman, this is precisely where the significance of the fact that applicants in border procedures have not legally entered the territory lies: ‘they can be refused entry in the event that their applications are dismissed’. This refusal of entry is relevant for subsequent return procedures.

Article 2(2)(a) of the Return Directive provides for the possibility for Member States to not apply the Return Directive to third-country nationals who are: first, subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code; or, second, ‘who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State’. It has been pointed out that the phrase ‘in connection with the irregular crossing’ is unclear and may leave a broad margin of appreciation to

90 Cf. APD, Article 31(9).
93 See G. Cornelisse, M. Reneman, Executive summary.
94 Cf. G. Cornelisse, M. Reneman, Section 2.6.2.
Member States. The risk is that the people apprehended in border areas may systematically be refused the minimum standards laid down in the directive.  

The 2020 European Implementation Assessment of the Return Directive found that most Member States rely on Article 2(2)(a) of the Return Directive and do not apply it in ‘border cases’, and that the procedure applicable in such contexts affords fewer guarantees to the person concerned and typically involves the deprivation of liberty.  

The Court of Justice of the European Union (CJEU) held in case C-47/15 Affum, that the rule had to be interpreted narrowly: Article 2(2)(a) specifies that the apprehension or interception of the third-country nationals concerned must take place ‘in connection with the irregular crossing’ of an external border, which implies a direct temporal and spatial link with that crossing of the border. That situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed.

What is the logic of Article 2(2)(a) of the Return Directive? The CJEU ruled in Affum that its purpose is to permit Member States ‘to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted in connection with the crossing of one such border.

Article 4(4) of the Return Directive stipulates that the people excluded from the scope of the directive should still be afforded some minimum guarantees, including limitations on the use of coercive measures, postponement of removal, emergency health care and needs of vulnerable persons, and detention conditions. In addition, Member States must ensure the respect of the principle of non-refoulement. Importantly, in Case C-562/13 Abdida, the CJEU held that the obligation of the Member States to respect non-refoulement in return procedures could be breached if Member States would remove a migrant suffering from a serious illness to a country in which appropriate treatment is not available.

1.1.4. State of play regarding the implementation of Article 43 APD

Asylum applications reached a peak in 2015, when 1.3 million applications were lodged across the Member States. As safe passage opportunities – such as humanitarian visas, which would enable asylum-seekers to lodge an application in the EU – are limited, most of them arrived through smuggling routes across the Mediterranean, mostly to Italy and Greece. The lack of common action and intra-EU solidarity had a particular impact on Greece. The country’s lack of capacity to receive and register migrants arriving at its external borders also led to their onward movement towards
other EU Member States via the Western Balkans. In turn, this triggered the reintroduction of internal border controls by certain Schengen Member States.\textsuperscript{103}

In its resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, the European Parliament advocated a substantial reform of the Dublin Regulation and a centralised EU system for collecting asylum applications.\textsuperscript{104} In 2016, the European Commission adopted proposals for a CEAS reform which included a proposal for a regulation to replace the APD.\textsuperscript{105} The proposal was not based on an evaluation of the APD, nor was it accompanied by a Commission impact assessment,\textsuperscript{106} which was criticised by Members of Parliament’s LIBE committee in their dialogue with first Vice-President Frans Timmermans, who replied that ‘in urgent cases exceptions to the rule could be made without prejudice to the legal soundness of the proposals’.\textsuperscript{107}

A 2016 study conducted for the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs on the implementation of the CEAS concluded\textsuperscript{108} however that the complexity of the various parts of the APD and the wide discretion left to the Member States in the interpretation and implementation of various concepts and provisions continues to be a weakness. In particular, the study expressed the concern that ‘the grounds available for the application of accelerated procedures and the broad interpretation left to Member States of these grounds may lead to generalised expedited processing of asylum applications with lowered procedural guarantees and undermining the effectiveness of remedies and protection from arbitrary refoulement’.\textsuperscript{109} Furthermore, it noted a large divergence in the application of border procedures, including detention.\textsuperscript{110} In addition, according to the study, ‘the increased application of the safe country of origin and safe third country of origin concepts in the context of accelerated and border procedures increases risks of asylum-seekers being subjected to expedited procedures that do not ensure a proper examination of their protection needs in practice, in particular where effective access to legal assistance and representation is not guaranteed’.\textsuperscript{111}

As will be discussed further in Section 1.5 below, no interinstitutional agreement was reached on this proposal. More recently, in the context of its Pact on Migration and Asylum,\textsuperscript{112} the European


\textsuperscript{104} Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, European Parliament, P8_TA-PROV(2016)0102.


\textsuperscript{106} The European Commission did provide a document providing a state of play on the implementation of EU law giving an overview of infringement procedures launched against Member States that had not notified the Commission of their measures transposing the APD, see Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration Implementation of EU law – State of Play, COM(2016) 85 final, Annex 8 of 10 February 2016.

\textsuperscript{107} LIBE committee Newsletter, 31 October 2016, Dialogue with First Vice-President of the European Commission.


\textsuperscript{109} Ibidem.

\textsuperscript{110} Ibidem, p. 78.

\textsuperscript{111} Ibidem.

Commission has put forward an amended proposal for an asylum procedures regulation combining the rules on asylum procedures at the border and return in a single legislative instrument. It ties in with another proposal for a regulation introducing a screening of third-country nationals at the external borders. These proposals are neither based on a Commission evaluation of the APD nor accompanied by Commission impact assessments (the Commission produced a supporting staff working document, which does not fulfil the criteria of a proper impact assessment in line with its own 2017 Better Regulation Guidelines). Concerning an evaluation, the Commission was in fact supposed to produce a report on the application of the APD no later than 20 July 2017, which however, it has not produced so far. An ad hoc query related to border procedures was launched in the context of the European Migration Network in 2019.

To prepare this EIA, EPRS contacted the European Commission for further information on the transposition and application of Article 43 of the APD in the Member States. The Commission referred EPRS to a 2020 EASO report on border procedures for asylum applications in EU+ countries. However, it should be noted that in the introduction to this report, EASO explains that its current mandate focuses on organising, coordinating and promoting the exchange of information across asylum authorities in Member States and between the Commission and Member States, rather than monitoring and evaluating the implementation of asylum procedures in practice. The report concentrates primarily on explaining the current legislative border procedures in EU+ countries, touching to a lesser extent on their implementation on the ground.

Taking this limitation into account, the report clarifies that 'currently at the level of national legislation, EU Member States do not have a uniform way of shaping the border procedure'. As a result, national border procedures are not necessarily comparable nor applied in similar cases. The report provides an overview of selected aspects of the border procedure in EU Member States plus Iceland, Switzerland and Norway. It should be taken into account that the information reproduced in the EASO report is based on what Member States' authorities have stated.

Application

The EASO report reveals that among EU Member States the border procedure is currently applicable in: Austria, Belgium, Croatia, Czechia, France, Germany, Greece, Italy, Latvia, the Netherlands, Portugal, Romania, Slovenia and Spain. Austria and Germany limit the application of the border

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118 European Asylum Support Office (EASO), Border Procedures for Asylum Applications in EU+ Countries, 2020.
119 EU28, plus Norway, Switzerland, Liechtenstein and Iceland.
120 European Asylum Support Office (EASO), Border Procedures for Asylum Applications in EU+ Countries, 2020, p. 5.
121 Ibidem, p. 5.
122 Ibidem.
123 Those aspects are: The scope of the procedure (admissibility, status determination); Countries that apply/do not apply border procedures; The steps in the application of the procedure; Time limits to issue a decision; Possible outcomes; Appeals; Safeguards provided to asylum applicants; and Available data on border procedures.
124 EASO, Border Procedures for Asylum Applications in EU+ Countries, 2020, p. 9.
Asylum procedures at the border

Asylum procedures at the border

procedure only to applications for international protection submitted at airports.125 Greece applies two types of border procedures: a ‘border procedure’ (applied for applications made at the airport, usually Athens International Airport), and an ‘exceptional border procedure’ (applied in the five eastern Aegean islands with ‘hotspots’).126 Hungary has/had a *de facto* borders procedure: whilst qualified by the Hungarian authorities as a regular procedure, the European Commission noted that it indeed constitutes a border procedure. The Commission stated that the border procedure implemented by Hungary is not in compliance with EU law.127

Figure 2 – Application of border procedures by EU+ countries


Scope

Article 43 of the APD stipulates that border procedures can consist of examining the admissibility of the application, or undertaking a full examination in situations where accelerated procedures can also be applied. A full examination (in-merit examination) can thus take place in a border procedure. ECRE finds that such full examinations take place in Italy, Greece, Hungary and Portugal. In France, Germany and Spain the in-merit examination in the border procedure is partial, limited to assessing whether an application is manifestly unfounded.128

These findings by ECRE partly contrast with those of the 2020 EASO report, which does not differentiate between a full and a partial in-merit examination in the border procedure.129

ECRE moreover finds that at national level, the grounds for applying the border procedure vary from one Member State to another. Providing a comprehensive overview of all grounds for applying the border procedure would require listing inter alia the grounds for considering an application inadmissible in accordance with Article 33 APD and for applying accelerated procedures in

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125 Ibidem, p. 8.
127 ECRE, Executive summary, p. 10.
128 ECRE report, Section 3.4.
129 See Figure 2, EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, p. 12.
accordance with Article 31(8) APD. The overview of national legislative frameworks reveals considerable disparities in the way these criteria have been incorporated in domestic asylum systems, in particular, concerning the grounds for declaring asylum applications inadmissible, which go well beyond the APD in certain countries.\footnote{ECRE report, Section 3.4.}

There are no available statistics on the grounds applied in practice by Member States to activate the border procedure. This makes an assessment of why people are channelled into these procedures difficult, if not impossible.\footnote{See ECRE report, Section 3.4.}

**Time limits for decisions and appeals**

Article 43 of the APD provides that Member States must ensure that first instance decisions in the border procedure are taken 'within a reasonable time', and that asylum-seekers are granted entry to the territory if no decision is taken within four weeks.

According to the EASO report, the time limit for a decision in a border procedure varies among the EU Member States from 2 days (e.g. Germany) to a maximum of 28 days, which may include the appeal (e.g. Belgium and Greece).\footnote{See ECRE report, Section 3.4.} Time limits to lodge an appeal against a decision adopted under a border procedure may vary from two days (e.g. France) to four days (e.g. Spain) to seven days (e.g. Portugal). On time limits for appealing decisions at second instance, national laws mostly envisage short deadlines for lodging an appeal, from two days in France and Spain, to three days in Germany, four days in Portugal, to one month in Italy.\footnote{See ECRE report, Section 3.5.}

Short time limits to lodge an appeal may raise concerns regarding the right to an effective remedy (since applicants may face difficulties in appealing negative decisions and may face 	extit{refoulement} if the risk of ill treatment upon return is not thoroughly assessed).\footnote{See ECRE report, Section 3.5.}
Border procedure and Dublin

According to Cornelisse and Reneman, most EU Member States apply the border procedure to applicants for whose asylum application another Member State is responsible under the Dublin Regulation.\(^{135}\) They note that Czech law limits the application of the border procedure to Dublin cases, where ‘a serious risk of his/her absconding exists’.\(^{136}\) This is the ground for applying detention in Dublin cases.\(^{137}\) Belgium, Germany, Latvia and Romania seem to grant asylum applicants access to the territory, if another Member State is responsible for the examination of their case.\(^{138}\)

Detention

The EASO report highlights that in the context of the border procedure, applicants are accommodated in reception centres at or near the border or in the transit zone. They remain in such accommodation centres at least for the duration of the border proceedings. In practice, since they are not allowed to enter the territory, they are likely to be placed in detention,\(^{139}\) without an effective review of whether such detention is necessary and proportional in view of their right to liberty and security in accordance with Article 6 of the EU Charter and freedom of movement in accordance with Protocol No 4 to the ECHR. In addition, UNHCR has recalled that asylum-seekers should, in principle, not be detained. Detention is an exceptional measure, can only be justified for a legitimate purpose, must be assessed on an individual basis and regularly reviewed. Where detention is used

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\(^{135}\) G. Cornelisse, M. Reneman, Section 2.7.2.


\(^{137}\) Article 28 of Regulation 604/2013.

\(^{138}\) G. Cornelisse, M. Reneman, Section 2.7.2, referring to Table 2 in the annex to their study.

\(^{139}\) EASO, Border Procedures for Asylum Applications in EU+ Countries, 2020, p. 11.
for asylum-seekers, including at a border or in a transit zone, it should meet the requirements under Articles 8 to 11 of the Reception Conditions Directive.140

As indicated in Figure 4 below, all applicants subject to a border procedure are detained in the countries covered by the comparative country assessment conducted by ECRE. The key difference is whether or not the country classifies the situation as detention and then operates within the rules applying to detention at the border. This is the case in France, Portugal and Spain. On the other hand, Germany and Greece do not explicitly qualify the measure as detention. Nonetheless, people are held in closed centres that they are not allowed to enter and exit at will unless they agree to leave the country, therefore they should be considered places of detention.141

Figure 4 – Detention in border procedures

Source: European Council on Refugees and Exiles (ECRE), The implementation of Article 43 of Directive 2013/32/EU in practice (Part II to this study).

A refusal of entry of applicants for international protection is inherently accompanied with restrictions on their liberty. Cornelisse and Reneman find that the legal qualification of a stay at the border or at the transit zone (detention or restriction of movement) raises complex issues of fact and law, as is also apparent from the case law from the CJEU and the ECtHR. The authors state that the qualification of similar situations differs considerably between Member States (see section on fundamental rights compliance below).142

According to Article 8(2) of the RCD, a detention measure should be necessary and proportionate. Cornelisse and Reneman find, however, that there is no evidence that Member States assess


141 ECRE, Sections 3.12.2-3.

142 G. Cornelisse, M. Reneman, Executive summary and Section 3 on detention.
whether less coercive measures can be imposed (except in some cases regarding vulnerable persons). General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in national law.

Procedural safeguards

As regards procedural guarantees in the context of the examination of the asylum application, Cornelisse and Reneman note that there is an important tension between the factors ‘time’ and ‘detention’: ‘On the one hand, asylum applicants need time to substantiate their case and make use of procedural guarantees. On the other hand, the longer the asylum procedure takes, the longer an asylum applicant will be detained. The combination of short time limits and detention often negatively affects the asylum applicant’s ability to substantiate their asylum account. Moreover, it undermines the effectiveness of procedural guarantees, such as the right to legal assistance, in particular in more complex cases.’

On the basis of a 2019 ECRE note, the EASO report also observes that the short deadlines in the border procedures may lead to insufficient time for applicants to prepare for the interview and to gather evidence in support of their applications. It may also limit the applicant’s access to information, interpretation, legal assistance and an adequate vulnerability assessment. Moreover, short deadlines may impact the quality of first instance decisions issued. Due to short time limits, applicants may face difficulties in appealing negative decisions and may face refoulement in the event that the risk of ill treatment upon return is not thoroughly assessed within the tight deadlines allowed. Furthermore, the fact that the APD does not explicitly exempt vulnerable categories from the application of the border procedure has led to divergent practices among Member States.

Cornelisse and Reneman see the combination of short time limits and detention as cause for concern, because a high level of procedural protection may compensate for the negative effects of short time limits and detention. It follows from the case law of the CJEU and ECtHR that in particular the right of (access to) free legal and linguistic assistance is important in that regard. The authors conclude that violations of the right to an effective remedy occur. Whether the shortcomings in the border procedures also lead to violations of the prohibition of refoulement and the right to asylum cannot be established on the basis of their analysis, as they did not find information on the quality of asylum decisions taken in a border procedure. However, the findings give reason for concern.

Application in case of a large number of arrivals

A mass influx of applicants may also affect the provision of procedural safeguards in border procedures, whether these procedures have been officially determined as border procedures by national authorities or not. This has been particularly the case in Greece and Italy. In a 2019 opinion, the FRA inter alia highlights particular problems as regards the registration of applications for international protection, the provision of information to applicants, the availability of legal support,
the rights of the child, and the identification of vulnerabilities.\textsuperscript{150} The EASO report furthermore states that ‘overall in 2019, most first instance decisions issued in EU+ countries using accelerated or border procedures led to a rejection of the asylum application for a significantly higher share of applicants than in case of decisions made through normal procedures’.\textsuperscript{151} Furthermore, ‘according to data exchanged in the framework of EASO’s Early Warning and Preparedness System (EPS), the recognition rate for first instance decisions under the border procedure was 7\%, compared to the total EU+ recognition rate for first instance decisions of 33\% in 2019’.\textsuperscript{152}

1.1.5. Institutional positions

In 2016, the European Commission published a proposal\textsuperscript{153} for a regulation to replace the Asylum Procedures Directive. The choice of a directly applicable regulation is expected to bring about full harmonisation of the procedures, ensuring the same steps, timeframes and safeguards across the EU. The proposal was aimed at:

\begin{itemize}
  \item Simplifying, clarifying and shortening asylum procedures;
  \item Ensuring common guarantees for asylum-seekers;
  \item Ensuring stricter rules to combat abuse;
  \item Harmonising rules on safe countries;
  \item Discouraging secondary movements.
\end{itemize}

Article 41 of the proposal addressing the border procedure did not introduce significant changes to Article 43 of the APD. In 2018, the European Parliament adopted a legislative resolution\textsuperscript{154} on the Asylum Procedure Regulation. As regards the border procedure, this resolution tightened up the wording of Article 41, notably as regards the time limits and the application of border procedures to minors.

The Council, however, failed to reach a general approach on the proposal, with the biggest outstanding issue for most Member States being the border procedure.\textsuperscript{155} In September 2020, in the context of its Pact on Migration and Asylum,\textsuperscript{156} the Commission put forward an amended proposal for an asylum procedures regulation.\textsuperscript{157} This proposal combines the rules on asylum procedures at the border and return in a single legislative instrument. It ties in with another proposal for a regulation introducing screening of third-country nationals at the external borders.\textsuperscript{158} This screening

\textsuperscript{150} FRA, \textit{Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy}, 2019.
\textsuperscript{151} Ibidem, p. 8.
\textsuperscript{152} Ibidem.
\textsuperscript{155} EPRS legislative train schedule, \textit{Reform of the asylum procedures directive}.
would be aimed at pre-identifying those applicants for international protection who would fall within the scope of the border procedure.

At the same time the amended proposal for Article 41 of the asylum procedures regulation spanning 13 paragraphs, inter alia provides additional grounds to use the border procedure, while extending its maximum length. Unaccompanied minors as well as minors under 12 years and their families should be exempt from the border procedure, unless there are security concerns. There is also a new Article 41a, related to border procedures for carrying out returns.

1.2. Scope and objectives, methodology and structure

1.2.1. Scope and objectives

In April 2020, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) launched an implementation report on Article 43 of the Asylum Procedures Directive, covering asylum procedures at the border or transit zone of a Member State. Erik Marquardt (Greens/EFA, Germany) was appointed rapporteur.

Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the EPRS. European Implementation Assessments are designed to contribute to the Parliament’s discussions on this topic, improving understanding of the subject and feeding into the implementation report.

This European Implementation Assessment (EIA) covers the implementation of Article 43 of the APD, covering asylum procedures at the border or transit zone of a Member State. The EIA draws conclusions as regards the transposition and application of Article 43 of the APD, taking into account the principles of effectiveness, fundamental rights, including procedural rights, efficiency, coherence with the aims of the APD and the CEAS as a whole.

On this basis, it puts forward recommendations on how to address the shortcomings identified in a future legal and practical arrangements covering asylum procedures at the border, as per the request of the rapporteur and shadow rapporteurs.

1.2.2. Methodology and structure

The selection of the most pertinent issues (notably effectiveness and fundamental rights compliance) was made on the basis of questions put forward by Parliament’s rapporteur and shadow rapporteurs.

This EIA was carried out between July and October 2020 (four months) by means of desk research, relying primarily on international (UNHCR) and EU institutional sources (EASO, FRA), as well as contributions from practitioners, academics and NGOs. In addition, this EIA is based on two external research papers (in annex).

Taking existing evidence into account, the first research paper includes a horizontal legal assessment of the transposition and application of Article 43 of the APD in all EU Member States to which the directive applies. It also provides an overview and assessment of relevant decisions, in

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160 Ibidem, Article 41(11), p. 28.
161 Ibidem, Article 41(5), p. 27.
162 Ibidem, p. 29.
particular by the Court of Justice of the European Union and the European Court of Human Rights. Furthermore, the research paper contains recommendations regarding future legal and practical arrangements at sea, land and air borders, their scope (on admissibility and/or on the substance) and length of procedures, exemptions, the applicable fundamental rights and procedural safeguards, the treatment of minors and how to deal with large numbers of arrivals.

The second research paper includes a comparative analysis of the application in practice of Article 43 of the APD in seven different EU Member States (France, Germany, Greece, Hungary, Italy, Portugal and Spain). The comparative analysis takes account of the principles of effectiveness, fundamental rights, including procedural rights, efficiency, coherence with the aims of the APD and the CEAS as a whole. Furthermore, the research paper identifies examples of best practices. Finally, the research paper contains recommendations based on the comparative assessment, in terms of a future EU legislative framework on the matter of asylum procedures at the border.

With the agreement of the rapporteur and shadow rapporteurs, the EIA focuses on the seven Member States, as detailed above. These Member States were selected taking account of geographical balance and the type of border procedure(s) – that is: sea, land and air borders.

Constraints
To finalise this EIA within the time frame (July-October 2020), the research focuses on the most pertinent issues and is limited to the analysis of seven Member States. It should be noted that the EIA was performed under several constraints, including a lack of comprehensive data, the lack of a Commission evaluation of the transposition and application of the APD, and the lack of Commission impact assessments of subsequent proposals on the matter (as discussed in more detail in Section 1.1.4).

Structure
The EIA is divided into three sections: the introductory section presents asylum procedures at the borders in context (Section 1.1) and gives a brief overview of the state of play regarding the implementation of Article 43 of the APD (Section 1.1.4), followed by a short overview of the institutional positions (Section 1.1.5). The scope and objectives, methodology and structure are covered in Section 1.2. Following this introduction, the second chapter of the publication provides an assessment and conclusions as regards the implementation of Article 43 of the APD, following the evaluation criteria (effectiveness, fundamental rights compliance, efficiency and coherence with the APD and the CEAS). The third and final chapter contains recommendations on how to address the shortcomings identified in future legal and practical arrangements covering asylum procedures at the border.
2. Assessment and conclusions on implementation of Article 43 APD

The European Commission's Better Regulation Guidelines establish a set of evaluation criteria against which EU interventions are to be assessed. The following criteria, set out in the accompanying Better Regulation Toolbox, will provide the basis for the assessment undertaken here: effectiveness, efficiency and coherence. Effectiveness refers to the degree to which an action achieves or progresses towards its objectives. Efficiency considers the relationship between the resources used by an intervention and the changes generated by the intervention. Coherence involves looking at how well (or not) different actions work together. It may highlight areas where there are synergies that improve overall performance, or that were perhaps not possible if introduced at national level; or it may point to tensions such as objectives that are potentially contradictory or approaches that are causing inefficiencies.

Figure 5 below illustrates the five key evaluation criteria and how they interrelate. Furthermore, a question was included on compliance with fundamental rights. Fundamental rights compliance is discussed between the questions of effectiveness and efficiency. However, account should be taken of the specific nature of EIAs produced by EPRS. As opposed to a Commission evaluation (which has not been carried out regarding the APD), they are produced over a much shorter period of time (in this case four months) and tailored to meet parliamentarians' needs, notably by focusing on the practical application of the EU measure.

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164 Ibidem, Toolbox No 47, Evaluation criteria and questions.
2.1. Effectiveness

Key findings

The implementation of border procedures in the EU is not effective, in that the primary objective of the Asylum Procedures Directive (APD) to create asylum procedures that treat similar asylum cases alike and result in the same outcome throughout the Member States, has not been met. There are important differences between Member States with regard to the concept and scope of the border procedure, the restriction of liberty and procedural guarantees. On the one hand, EU legislation leaves Member States too much discretion in these regards. On the other hand, the European Commission in cooperation with the EASO and the FRA have not properly evaluated the APD on the basis of the practical situation on the ground, nor has the Commission comprehensively enforced the legislation, despite clearly identified violations: of the right to liberty, the prohibition of *refoulement*, the right to asylum, and the right to an effective remedy. Infringement procedures have been launched against certain Member States for non-compliance with various aspects of the APD, but not against other countries facing serious allegations. Moreover, infringement procedures take time, during which certain Member States have continued to violate the asylum *acquis*. This touches upon more general problems of the lack of compliance with EU values in a number of Member States and the need to strengthen the EU's toolbox in this regard.

The primary objective of the APD, to create asylum procedures that treat similar asylum cases alike and result in the same outcome throughout the Member States has not been achieved. However, important differences remain between Member States with regard to the concept and scope of the border procedure, the restriction of liberty and procedural guarantees (discussed in more detail in Section 2.2.).  

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167 G. Cornelisse, M. Reneman, Executive summary.
The border regime established by Article 43 of the APD is complex, unclear and legally ambiguous.\textsuperscript{168} This results in non-transposition and non-application, partial transposition and application and/or incorrect transposition and application at national level.\textsuperscript{169} Many Member States do not provide for a border procedure at national level.\textsuperscript{170} Partial transposition of Article 43 APD is visible in countries which have limited the use of border procedures to certain locations (e.g. airports); as well as limiting the scope of the border procedure to an inadmissibility assessment rather than an in-merit examination of the application.\textsuperscript{171} Certain Member States have incorporated aspects of the border procedure provided for in the APD in their domestic legal order without applying them in practice.\textsuperscript{172} Moreover, regarding the issue of incorrect transposition, some of the grounds foreseen at national level for activating the border procedure seem to go beyond the boundaries set by Article 43 APD.\textsuperscript{173}

One underlying issue is the lack of a common understanding among Member States of what a border procedure is. Some Member States deny legal entry to applicants at the border and process their asylum applications while their freedom of movement is restricted or their liberty is deprived, but do not qualify this procedure as a border procedure in national law. In this way, they employ a border procedure as a matter of fact, while dispensing with the EU law provisions governing them.\textsuperscript{174} Furthermore, the many facultative grounds that may justify the use of a border procedure laid down in Articles 33 and 31(8) APD contain many terms that may be interpreted broadly or restrictively by the Member States.\textsuperscript{175} EU law is also not clear on whether border procedures may be used at internal borders.\textsuperscript{176} Moreover, Article 20(2) APD leaves it to the Member States to decide whether they grant a right to free legal assistance in the administrative phase of the border procedure. Finally, the APD fails to address the application of border procedures to accompanied children.\textsuperscript{177}

In addition, the APD and its border procedure have not been properly evaluated and enforced, despite clearly identified violations. The European Commission has not carried out an evaluation of the APD in general, and border procedures specifically, that takes account of the quality of decision-making and the implementation of relevant provisions on detention in the Reception Conditions Directive.\textsuperscript{178} Moreover, EASO seems to base its findings predominantly on domestic legislation. As a result, Member State practice may evade administrative scrutiny, as neither the relevant agencies nor the Commission seem to know precisely which Member States employ the border procedure as understood by EU law.\textsuperscript{179} Many aspects of the (application of) border procedures in the Member States are problematic. Implementation is far from uniform and violations of the right to liberty, the prohibition of refoulement, the right to asylum and the right to an effective remedy occur on a structural basis.\textsuperscript{180} In this context, infringement procedures have been launched against certain Member States for non-compliance with various aspects of the APD, but not against other countries.

\textsuperscript{168} ECRE, Executive summary.
\textsuperscript{169} Ibidem.
\textsuperscript{170} Ibidem.
\textsuperscript{171} Ibidem.
\textsuperscript{172} Ibidem.
\textsuperscript{173} Ibidem.
\textsuperscript{174} G. Cornelisse, M. Reneman, Executive summary.
\textsuperscript{175} Ibidem.
\textsuperscript{176} Ibidem.
\textsuperscript{177} Ibidem.
\textsuperscript{178} Ibidem.
\textsuperscript{179} Ibidem.
\textsuperscript{180} Ibidem.
also facing allegations of systematic push backs of refugees and refusals to register asylum claims at the border.\(^{181}\)

Moreover, infringement procedures take time, during which certain Member States have continued to violate the asylum acquis.\(^{182}\) This touches upon more general problems with a lack of compliance with EU values in a number of Member States and the need to strengthen the EU’s toolbox in this regard. As highlighted in a recent EPRS study, infringement procedures, provided for under Articles 258-260 TFEU, are ‘a multi-stage mechanism, with an initial, administrative stage, and a second, judicial stage, infringement procedures only move to the judicial stage if the administrative stage has not been successful, and the Commission (or, possibly, a Member State under Article 259 TFEU) decides to refer the case to the ECJ. If that is the case, the ECJ will decide on the matter, declaring whether indeed the Member State in question has failed to fulfil its obligations arising from Union law.’\(^{183}\) ‘Although the first stage of the procedure is not of a judicial nature, as there is no intervention from the ECJ, and the Commission may decide on the case taking into account many different considerations, including political ones, the final stage of the procedure takes place before the ECJ, which will ultimately decide if the Member State has infringed EU law. Therefore, the final outcome binds the Member State in question and provides, at the same time, a generally binding interpretation of EU law. Furthermore, if the Member State concerned does not implement the ECJ’s decisions, Article 260 TFEU can be activated and the ECJ can itself impose financial sanctions on the Member State in question, thus incentivising compliance.’\(^{184}\) Even if their increased use would certainly reduce the enforcement gap, by their very nature, beyond addressing the specific violations they often do not, or rather cannot, fully restore the systemic damage that has been inflicted.\(^{185}\)

2.2. Fundamental rights compliance

Key findings

The systematic and extended use of (de facto) detention in the context of border procedures is not in line with the right to liberty enshrined in Article 6 of the EU Charter. Procedural guarantees provided for in the APD, in particular the right to information, legal assistance and interpretation, are not or only restrictively applied in practice. Vulnerable applicants, including unaccompanied minors, continue to be subject to border procedures and held in detention facilities, raising questions as regards compliance with Article 24(2) of the EU Charter. The short time limits to lodge and decide on appeals, the lack of suspensive effect of appeals in certain countries, as well as the difficult access to quality legal aid, all raise concerns as to compliance with Article 47 of the EU Charter. The difficulty in accessing the territory and the asylum procedure, as well as the use of the fiction of non-entry in the context of border procedures, may in certain circumstances undermine the right to asylum under Article 18 of the EU Charter, the principle of non-refoulement under Article 19 of the EU Charter, and the right to an effective remedy under Article 47 of the EU Charter.

Respect for the EU Charter in European Commission acts and initiatives, including legislative proposals, is a binding legal requirement. To ensure compliance and promotion of fundamental

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\(^{181}\) ECRE, Executive summary.

\(^{182}\) Ibidem.

\(^{183}\) M. Diaz Crego, R. Manko, W. van Ballegooij, Protecting EU common values within the Member States: An overview of monitoring, prevention and enforcement mechanisms at EU level, EPRS, European Parliament, 2020, p. 105.

\(^{184}\) Ibidem.

\(^{185}\) W. van Ballegooij, Addressing violations of democracy, the rule of law and fundamental rights, EPRS, European Parliament, 2020, p. 3.
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rights, the Commission has developed an assessment methodology based on a Fundamental rights checklist in Tool No 28 of the Commission’s Better Regulation Toolbox.\footnote{See the European Commission’s Better Regulation Toolbox, Tool No 28, Fundamental rights and human rights, as well as more generally the European Commission’s 2017 Better Regulation Guidelines.}

Importantly, some of the rights enshrined in the EU Charter are absolute and cannot be ‘limited’ or ‘restricted’, no matter how important the policy objective pursued would be, for example the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the EU Charter) and the prohibition of slavery or servitude (Article 5 of the EU Charter).

Other rights can be subject to limitations if necessary, but only to the extent that such limitations respect the strict requirements set out in Article 52 of the EU Charter, which reads: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.

Harmonisation as envisaged by the CEAS should achieve two goals: i) uniformity in procedures across the EU; and ii) legally safe, effective and fair procedures. Uniformity means that similar asylum cases should be treated alike and result in the same outcome. The safety, fairness and effectiveness of border procedures ensure the correct recognition of international protection needs and conformity with fundamental rights. Uniformity and fairness of procedures prevent secondary movements and help to combat irregular migration.\footnote{G. Cornelisse, M. Reneman, Executive summary and Section 2.3.1.}

The main fundamental rights affected by the EU border procedure are the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter), the right to liberty and security (Article 6 EU Charter), the right to asylum (Article 18 EU Charter), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter) and the right to an effective remedy (Article 47 EU Charter).\footnote{Cf. G. Cornelisse, M. Reneman, Executive summary.} In addition, specific principles and procedural guarantees for applicants have been laid down in Chapter II of the APD.

A 2018 EPRS study on the Cost of non-Europe in asylum policy concluded that the right to asylum itself can be undermined by deficiencies, and a lack of convergence in asylum procedures, because some applicants cannot effectively access procedures, or applications are not given due consideration. Uneven access to legal aid can furthermore undermine the right to an effective remedy. The study furthermore pointed out that the gaps in the asylum procedure and reception conditions may have a particular impact on children’s rights, when asylum-seekers are minors, especially if unaccompanied.\footnote{W. van Ballegooij, C. Navarra, The Cost of non-Europe in Asylum policy, EPRS, European Parliament, 2018, p. 6.}

2.2.1. Fundamental rights enshrined in primary EU law

The prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the EU Charter)

According to Article 4 of the EU Charter, no one shall be subjected to torture or to inhuman or degrading treatment or punishment (as well as under Articles 19(2) and 18 of the EU Charter on the principle of non-refoulement). By virtue of Article S2(3) of the EU Charter, Article 4 therefore has the same meaning and the same scope as Article 3 ECHR.
While the EU Charter itself does not explicitly list which rights are absolute, case law of the European Courts indicates that Article 4 of the Charter is protected in absolute terms. In addition, Article 78(1) TFEU compels the development of a common asylum, subsidiary and temporary protections policy ensuring compliance with the principle of non-refoulement. The prohibition against refoulement also extends to indirect refoulement (that is, where a person is removed to an intermediary country that then removes the person to a third country where the person may be at risk of persecution).

Right to liberty and security (Article 6 of the EU Charter)

Article 6 of the EU Charter stipulates that everyone has the right to liberty and security of person. A refusal to allow applicants entry for international protection is inherently accompanied with restrictions on their liberty. Cornelisse and Reneman find that the legal qualification of a stay at the border or at the transit zone (detention or restriction of movement) raises complex issues of fact and law, as is also apparent from the case law from the CJEU and the ECtHR. The authors state that the qualification of similar situations differs considerably between Member States. They highlight that the blurring of restrictions on freedom of movement and detention is a key source of concern, and that domestic law does not always provide a clear legal basis for either detention or, alternatively, the restrictions on the freedom of movement of applicants. As a consequence, the protection of fundamental rights and procedural guarantees, such as judicial review of the lawfulness of a deprivation of liberty, are not enjoyed uniformly by applicants across the EU. The duration and conditions of detention in border procedures also differ considerably across the Member States.

In many Member States, a legal basis for practices that in actual fact amount to detention (de facto detention) is lacking. As we have seen above, there are many concerns regarding the effectiveness of rights granted by EU law in practice. These concerns mainly relate to the combination of short time limits and detention, which characterise most border procedures in the Member States.

According to Article 8(2) RCD, a detention measure should be necessary and proportionate. Cornelisse and Reneman find, however, that there is no evidence that Member States assess whether less coercive measures can be imposed (except in some cases regarding vulnerable persons). General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in national law.

‘Proportionality stricto sensu means that even if there are grounds for detention, and if less coercive measures do not need to be applied prima facie, an assessment should be carried out whether detention poses an unreasonable burden on the individual. This part of the proportionality test is especially relevant for persons with special needs.’ However, the authors conclude that Member States do not have adequate mechanisms in place to identify persons with special needs in border procedures. ‘Proportionality also means that detention cannot last longer than necessary and, in any case, not longer than four weeks. The four weeks’ time limit is not incorporated in the domestic legislation of all Member States (for example Italy).”

Current EU law does not require a clear legal basis in domestic law for restrictions on the freedom of movement of applicants. Member State practice, particularly with regard to the hotspots, shows

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190 See FRA website on Article 4 of the EU Charter.
192 See FRA website on Article 6 of the EU Charter.
193 G. Cornelisse, M. Reneman, Executive summary and Section 3 on detention.
194 G. Cornelisse, M. Reneman, Executive summary.
195 G. Cornelisse, M. Reneman, Executive summary and Section 3 on detention.
196 Ibidem.
that restrictions on the freedom of movement of applicants often do not satisfy the requirement in the RCD that such restrictions respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD.\textsuperscript{197}

According to Cornelisse and Reneman, Member State practice shows that detention at the border poses particular challenges as regards detention conditions. In the first place, by not formally qualifying deprivations of liberty as such, the requirements in the RCD regarding conditions can be disregarded by Member States. This is the case when it concerns deprivations of liberty in transit zones without a legal basis. What are known as 'waiting zones' often do not satisfy the requirement that applicants for asylum should be accommodated in specialised facilities. Inadequate detention conditions at the border have also been widely reported with regard to the hotspots, but also with regard to detention in police facilities at internal borders, and in transit zones at airports.\textsuperscript{198}

The requirements for judicial review of detention (but not with regard to restrictions on freedom of movement) and other procedural safeguards are adequately ensured in current EU law. Importantly, judicial review should encompass the place and conditions of detention, and the court should be able to substitute its own judgment with regard to the question whether alternatives. As it is today, judicial review in the Member States is contingent on the question whether there is a legal basis for detention, which is lacking in some Member States. As a result, conformity with EU law is not adequately ensured.\textsuperscript{199}

Furthermore, secondary EU law, by not clearly defining the relationship between border procedures and detention, leaves Member States too much scope for applying \textit{de facto} detention practices. This is so because the legal qualification of a stay at the border or in a transit zone before entry is granted may raise complex issues of fact and law. However, the widespread practices of \textit{de facto} detention which Cornelisse and Reneman report constitute a manifest and serious violation of Charter 6 of the Charter.\textsuperscript{200}

Cornelisse and Reneman also point out that several Member States do not have a mechanism in place to identify applicants with special needs in the border procedure. Moreover, it is sometimes not defined in national legislation how adequate support can be provided to asylum applicants in the context of the border procedure, or support is not given in practice.\textsuperscript{201}

According to ECRE, the systematic and extended use of \textit{(de facto)} detention in the context of border procedures, which should be an exceptional measure used as last resort where alternatives to detention cannot be applied effectively, is not in line with the right to liberty enshrined in Article 6 of the EU Charter and Article 5 ECHR.\textsuperscript{202}

Right to asylum (Article 18 of the EU Charter)

Article 18 of the EU Charter stipulates the right to asylum.\textsuperscript{203} A border procedure is characterised by the refusal of entry and its territoriality (at the border or in a transit zone). At the same time, asylum applicants have a right to remain and they cannot be returned before the existence of a risk of

\textsuperscript{197} G. Cornelisse, M. Reneman, Executive summary.
\textsuperscript{198} G. Cornelisse, M. Reneman, Executive summary.
\textsuperscript{199} G. Cornelisse, M. Reneman, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, Executive summary.
\textsuperscript{200} Ibidem.
\textsuperscript{201} Ibidem.
\textsuperscript{202} ECRE, Executive summary.
\textsuperscript{203} See FRA, Council of Europe, \textit{Fundamental rights of refugees, asylum applicants and migrants at the European borders}, 2020, pp. 4-5.
refoulement is assessed. This particular legal constellation inevitably affects the liberty of applicants who apply for asylum at the border or in a transit zone. Indeed, in border procedures, entry is refused precisely in order to prevent free movement within the territory of the Member State (and the potential for subsequent irregular movements in the Schengen area).  

ECRE finds that the right to be heard as well as the procedural guarantees enshrined in the APD, such as the right to information, legal assistance and interpretation, are either not applied or only applied to a limited extent in border procedures. This undermines the right to asylum as well as the principle of non-refoulement, as enshrined in Article 18 and 19 of the EU Charter.

Moreover, over recent years there have been instances of push-backs at European external borders, where persons applying for asylum at the border are not provided with the chance to apply for international protection, but are simply pushed back into non-EU territory. This is in violation of the right to asylum and the prohibition of refoulement guaranteed in Articles 18 and 19 of the EU Charter. Such practices encourage irregular border crossings instead of a prompt application upon arrival at the border, and as such jeopardise the integrity of the European asylum and migration acquis.

Protection in the event of removal, expulsion or extradition (Article 19 of the EU Charter)

Under Article 19 of the EU Charter, collective expulsions are prohibited and no one may be removed, expelled or extradited to a state where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (principle of non-refoulement). Paragraph 1 of this article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR, concerning collective expulsion.

The difficulty in accessing the territory and the asylum procedure, as well as the use of the fiction of non-entry in the context of border procedures, may in certain circumstances undermine the right to asylum under Article 18 of the EU Charter, the principle of non-refoulement under Article 19 of the EU Charter, and the right to an effective remedy under Article 47 of the EU Charter. Thus, it is essential that asylum applicants are allowed to stay on the territory of the Member State in question during the border procedure.

Rights of the child (Article 24 of the EU Charter)

Article 24 of the EU Charter enshrines the rights of the child: children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. Moreover, in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration. In addition, every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to the child’s interests.

According to ECRE, vulnerable applicants, including unaccompanied minors, continue to be subject to border procedures and held in detention facilities inter alia as a result of a lack of efficient

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204 G. Cornelisse, M. Reneman, Executive summary and Sections 3.2 and 3.3.2.
205 ECRE, Executive summary.
206 See also J. Bast et al., Human rights challenges to European migration policy, REMAP study of 27 October 2020.
207 G. Cornelisse, M. Reneman, Executive summary.
208 See FRA, Council of Europe, Fundamental rights of refugees, asylum applicants and migrants at the European borders, 2020, pp. 6-7.
209 ECRE, Executive summary and Section 5.3.2.
vulnerability identification mechanisms. Proper and effective vulnerability identification mechanisms are lacking in all countries examined, thereby rendering any special procedural safeguards and adequate support laid down in EU law meaningless in practice. This is particularly worrying for unaccompanied children and raises questions as regards compliance with the best interest of the child as enshrined in Article 24(2) of the EU Charter.

The CJEU has interpreted EU asylum legislation concerning (unaccompanied) children in the light of the best interests of the child on several occasions. However, it has not ruled what procedural guarantees should be offered to unaccompanied minors in border procedures.

Right to an effective remedy (Article 47 of the EU Charter)

Under Article 47 of the EU Charter, everyone whose rights and freedoms, guaranteed by the law of the Union, are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Moreover, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility to be advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice.

According to ECRE, the short time constraints to lodge and decide on appeals, the lack of suspensive effect of appeals in certain countries, as well as the difficult access to quality legal aid, raise concerns as to whether the right to an effective remedy, as stipulated in Article 47 of the EU Charter and Article 13 ECHR, can be effectively ensured in practice.

Cornelisse and Reneman point out that asylum applicants only have the right to free legal assistance during the appeal phase. The assistance ‘shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant’. Member States may limit the right to free legal assistance on specific grounds. However, this may not arbitrarily restrict the right to free legal assistance and representation or hinder the applicant’s effective access to justice.

The authors furthermore pinpoint relevant case law: the CJEU considers that, when examining whether free legal assistance is necessary in the light of Article 47 of the Charter, national courts should take account of the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. The ECtHR considers that the fact that an asylum applicant is represented by a lawyer,

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210 ECRE, Executive summary.
211 Ibidem.
212 See for example: CJEU Joined Cases C-133/19, C-136/19 and C-137/19 B.M.M. and others [2020], Case C-129/18 SM [2019], Case C-550/16 A. and S. [2018], CJEU Case C-648/11 M.A. [2013].
213 G. Cornelisse, M. Reneman, Section 4.6.4.
214 ECRE, Executive summary.
215 Article 20(1) recast APD; see G. Cornelisse, M. Reneman, Section 4.6.1.
216 Article 20(1) recast APD. See also Article 27(6) of Regulation 604/2013.
217 Article 20(3) recast APD. See similarly Article 27(6) of Regulation 604/2013. This applies for example where the applicant’s appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.
218 Article 20(3) recast APD.
219 CJEU, Case C-279/09 DEB [2010], paras 60-61.
makes short time constraints less problematic.\textsuperscript{220} At the same time, in \textit{I. M. v France}, the fact that the asylum applicant had very limited access to a lawyer in the French border procedure played an important role in the ECtHR finding that Article 13 ECHR had been violated.\textsuperscript{221}

The importance of and need for proper human rights complaint mechanisms at international borders or during border expulsions has also been highlighted in academic literature.\textsuperscript{222} Deportations from Spain without the right of complaint or Hungary's practice of deterring migrants' entry are just two examples.\textsuperscript{223}

\textbf{2.2.2. Procedural guarantees laid down in the APD}

Cornelisse and Reneman emphasise that there are also important differences in the level of procedural protection offered by Member States during the border procedure. Time limits for taking a decision in the administrative phase range from 2 to 28 days. Similar findings were made with regard to time limits for appealing a decision taken in a border procedure and for issuing a judgment in such an appeal. Furthermore, there are large disparities with regard to the right to free legal assistance during the administrative phase of the border procedure. While some Member States provide free legal assistance during the whole border procedure (preparation of the application and assistance during the different steps of the procedure), other Member States only provide free legal assistance during the appeal phase.\textsuperscript{224}

First, the applicant's ability to present and substantiate their asylum application may be undermined by short time limits and detention. 'Adequate and timely information about the asylum procedure and a personal interview during which the applicant is able to present the grounds for their asylum application, is crucial in order to ensure that correct asylum decisions are made.' However, reports show that there is often a lack of timely and adequate information about the asylum procedure. Moreover, the duration of the personal interview (very short or very long) may hinder the applicant's ability to present their asylum account. Remote interviewing and/or a lack of confidentiality in detention centres may (further) undermine the quality of the personal interview (France).\textsuperscript{225}

Second, short time limits restrain determining authorities when examining asylum applications in the border procedure. Research shows that determining authorities feel pressure to finish certain steps of the border procedure (the interview or writing the decision) within the given time-frame, which may affect the quality of decision-making.\textsuperscript{226}

Finally, Cornelisse and Reneman point out that the combination of short time limits and detention undermine the procedural guarantees offered by the APD. Reports show that short time limits and detention in the border procedure often prevent effective access to legal assistance in practice. Asylum applicants are not able to contact a lawyer because of a lack of means of communication, lawyers are given insufficient time to prepare the appeal or hearing with their client or no qualified lawyers are available. A lack of effective access to free legal assistance for the asylum applicant may


\textsuperscript{221} ECtHR, 2 February 2012, Application no 9152/09, \textit{I.M. v France}, paras 151-152. See also ECtHR, 21 January 2011, Application no 30696/09 \textit{M.S.S. v Belgium and Greece}, para. 319.


\textsuperscript{223} Ibid., see Chapter 2 by I. Barbero and M. Illamola-Dausa and J. Toth, Chapter 3.

\textsuperscript{224} G. Cornelisse, M. Reneman, Executive summary.

\textsuperscript{225} Ibidem.

\textsuperscript{226} Ibidem.
affect the quality of the appeal grounds and thus the appeal itself. However, also here time limits are often short and the applicant is restrained by the detention measure. 227

Quality of asylum decisions

According to Cornelisse and Reneman, the factors mentioned above, in particular in combination, may predictably (severely) undermine the quality of the decisions taken in the border procedure. However, since no research into the quality of decision-making in the border procedure has been carried out, this cannot be established in this research. As indicated above, the combination of short time limits and detention often negatively affects the asylum applicant’s ability to substantiate their asylum account. Moreover, it undermines the effectiveness of procedural guarantees, such as the right to legal assistance, in particular in more complex cases. This is concerning because a high level of procedural protection may compensate for the negative effects of short time limits and detention. It follows from the case law of the CJEU and ECtHR that in particular the right of (access to) free legal and linguistic assistance is important in that regard. 228

2.3. Efficiency

Key findings

An assessment of the efficiency of the border procedure is difficult to make in the absence of a full picture of the exact financial costs of operation of such procedures. Related studies suggest, however, that the costs of border-management and control is significant, as a result of which the costs of the implementation of Article 43 APD may also be considerable, and probably disproportionate given that its objectives are not being achieved. Beyond administrative costs, border procedures entail significant human cost for the individuals affected by its application. Asylum-seekers subject to border procedures are exposed to the harmful effects of deprivation of liberty in inadequate border detention facilities. They furthermore suffer under the limited access to information and legal representation throughout the border procedure. Efficiency may further be affected in the case of a high influx of applicants.

The efficiency of border procedures is to be assessed against the costs incurred in their application, covering both the costs – financial and other – to all stakeholders. The assessment of efficiency is not straightforward, due to the inherent and practical challenges of ascertaining what the costs of the operation of the border procedures actually amount to. 229

Costs for Member States

According to ECRE, a full picture of the exact financial costs of operation of border procedures is not available and a general assessment thus suffers from the persisting lack of information in this regard. Related studies suggest, however, that the costs of border-management and control is significant, 230 including through EU funding, 231 as a result of which the costs of the implementation of Article 43 of the APD may also be significant and probably disproportionate, given that its objectives are not

227 Ibidem.
228 G. Cornelisse, M. Reneman, Executive summary.
230 European Court of Auditors, Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results; ECRE, Section 5.2.1.
231 Cf. EPRS legislative train schedule proposal establishing the asylum and migration fund.
being achieved. The border procedures also have important administrative costs for the authorities, as they require increased coordination amongst a variety of authorities.

Costs for individuals subjected to the borders procedure

Border procedures involve short time limits and detention, thereby entailing significant human cost for the individuals affected by its application. Asylum-seekers subject to border procedures are exposed to the harmful effects of deprivation of liberty in inadequate border detention facilities and with limited access to information and external service providers such as legal representatives and NGOs. Efficiency may further be affected in the case of a high influx of applicants or if the use of border procedures is to be extended; due inter alia to the short time constraints, the limited reception capacity and inadequacy of border detention facilities, as well as the limited resources for the provision of adequate safeguards throughout the procedure.

2.4. Coherence with the aims of the APD and CEAS

Key findings

The framework for border procedures under the APD is complex and unclear, in part due to the various cross-references to other provisions of the APD and the application of other CEAS instruments. In particular, it is unclear whether an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure. Furthermore, the APD is fraught with ambiguity with regard to the applicable reception regime of applicants under a border procedure. Neither the APD nor the recast RCD provide guidance to Member States as to where and under which conditions asylum applicants can be accommodated.

Coherence with the aims of the APD

Harmonisation of asylum procedures is based on Article 78(2)(d) TFEU, which provides the EU with the competence to adopt legislative instruments comprising 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.' The preamble to the APD reaffirms the CEAS objective of ensuring that similar cases are treated alike and result in the same outcome.

However, Article 43 has been interpreted, transposed and applied in a widely diverging manner in the Member States. ECRE also points out that the recast APD is fraught with ambiguity with regard to the applicable reception regime of applicants under a border procedure. Neither the APD nor the recast RCD provide guidance to Member States as to where and under which conditions asylum applicants can be accommodated.

Coherence with the aims of the CEAS

Article 78 TFEU stipulates that the EU 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. Its overall objective is that 'similar cases should be treated alike and result in the same

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232 ECRE, Section 5.2.1.
233 Ibidem.
234 Ibidem.
235 ECRE, Section 5.2.2.
236 G. Cornelisse, M. Reneman, Executive summary.
237 ECRE, Executive summary.
outcome.238 However, the border procedure raises several concerns that affect the objective of establishing a coherent CEAS.

Article 43 of the recast APD does not clearly state whether Dublin decisions and decisions to grant asylum can be taken in a border procedure. These ambiguities are also caused by the high complexity of EU legislation applicable to border procedures, as relevant provisions are laid down in the APD, Reception Conditions Directive (Directive 2013/33/EU), the Schengen Borders Code and the Return Directive (Directive 2008/115/EC).239 In other words, 'EU law is ambiguous with regard to the question whether Dublin decisions may be taken in a border procedure. As such, it does not achieve the aim to create uniformity in the application of border procedures in the Member States'.240

In the Member States, de facto border procedures are applied at the internal borders of the EU. This happens for example at the French border with Italy and Spain and the border between Italy and Slovenia. Such procedures evade the rules applicable under the Dublin Regulation. This situation therefore jeopardises the integrity of the CEAS.241

ECRE comes to similar conclusions: according to ECRE, the framework for border procedures under the APD is complex and unclear, in part due to the various cross-references to other provisions of the APD and the application of other CEAS instruments:

1. ‘It is unclear whether an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure. Article 33 APD does not list the application of the Dublin procedure as an admissibility ground. Article 43 APD read in conjunction with Article 33(1) APD seems to suggest that applications for which another Member State is responsible are not examined.’242

2. ‘The APD is fraught with ambiguity with regard to the applicable reception regime of applicants under a border procedure. It is unclear whether an asylum seeker in a border facility is accommodated, detained, or both. The combination of provisions under the recast APD and RCD create a loophole or an ambiguity in the law which allows Member States to "legally" detain asylum seekers at the borders.’243

238 Council of the European Union, ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’ (2009) para. 6.2. See also Recital 8, Preamble, recast APD.

239 G. Cornelisse, M. Reneman, Executive summary.

240 Ibidem.

241 Ibidem.

242 ECRE, Executive summary.

243 Ibidem.
3. Recommendations

On the basis of the research conducted, this EIA makes a number of recommendations as regards future legal and practical arrangements for asylum procedures at the border and in transit zones. The recommendations are mainly taken from the two external research papers, which are reproduced in full in Part II and Part III of this EIA. As pointed out by ECRE, it should be noted that some shortcomings are inherent to the legal framework – implementation alone will not resolve the problems. 244

General

Access to asylum procedures should be ensured at all times and at all external borders of the European Union. Push-backs at the external and internal borders of the Member States should be prohibited. 245 EU law should clearly define the border procedure as a procedure in which asylum-seekers have not been granted entry to the territory. 246 EU law should also make clear that, as a general rule, border procedures may not be used at internal borders. EU law should clarify the relationship between reinstatement of internal border control and the use of border procedures. 247 EU law should further limit the applicability of border procedure to:

1. cases which may be considered less complex as regards facts and law, grounds currently laid down in Articles 33(1)(a), (b), (d) and (e) and 31(a) and (b) of the APD;
2. cases in which the Member State has shown that the applicant has intentionally failed to cooperate with the determining authorities or has misled them, grounds currently laid down in Article 31(8)(c), (d), (g) and (h) of the APD;
3. cases in which the applicant poses a genuine, present and sufficiently serious threat to public order or national security, grounds currently laid down in Article 31(8)(i) of the APD. 248

The border procedure should only be resorted to after an individual assessment of the circumstances of the case, including an examination of potential special reception and procedural needs. 249 In case of a return, the safety of such return is to be ensured.

The asylum applications of (unaccompanied) children and asylum applicants with special (reception and/or procedural) needs should not be processed in a border procedure. 250 Finally, border procedures may be used to take decisions under the Dublin Regulation, but only if there is a significant risk of absconding, in accordance with Article 28 of the Dublin Regulation. 251

Effectiveness

The border procedure may be made more effective through adequate funding, training of border management personnel, who have to adhere to fundamental rights in their daily operational

244 ECRE, Executive summary.
245 G. Cornelisse, M. Reneman, Executive summary and ECRE, Executive summary.
246 G. Cornelisse, M. Reneman, Executive summary.
247 Ibidem.
248 Ibidem.
249 G. Cornelisse, M. Reneman, Executive summary and ECRE, Executive summary.
250 Ibidem.
251 G. Cornelisse, M. Reneman, Executive summary.
Asylum procedures at the border

work, and appropriate time limits to ensure that the determining authority is able to gather all necessary information and can take a careful asylum decision.

Member States need to collect and transmit statistics on the scope of their border procedures, how many applications are being considered through this procedure, who these applicants are and the recognition rates of their applications (both at first and second instance). Independent monitoring should verify the quality of the decision-making process and its outcome, as well as detention conditions and compliance with procedural safeguards. Beyond the Commission as guardian of the Treaties, and the relevant EU agencies (EASO, FRA, and potentially Frontex, the European Border and Coast Guard Agency), monitoring could involve independent experts and NGOs, in line with similar developments regarding Schengen and the monitoring of compliance with EU values more generally.

Fundamental rights compliance

Any use of detention as well as restrictions of free movement should be mandated by domestic law in compliance with EU legislation on reception conditions for asylum-seekers, and subjected to proportionality assessment in each case, taking alternatives into account. Information must be provided pro-actively to all those apprehended at the border, on an equal footing.

Border detention facilities must be adequate and ensure a dignified standard of living, which guarantees subsistence and protects physical and mental health. Detention conditions that are not in conformity with ECtHR case law should result in the release of the applicants. A decision to detain an applicant or restrict their free movement should be subject to a speedy judicial review.

The use of detention and the imposing of restrictions on freedom of movement in a border procedure are to be accompanied with procedural guarantees, such as a speedy judicial review. During a border procedure, applicants for international protection should be entitled to free legal and linguistic assistance by qualified legal advisers and interpreters. Applicants should also be able to communicate with the outside world, in order to gather information about the asylum procedure, to gather and submit evidence in support of their asylum claim. The time frame should be sufficient to enable applicants to prepare and substantiate their asylum application and to make effective use of all procedural rights granted to them, including those during appeal. During this appeal the applicants should have the opportunity to have the risk of refoulement effectively reviewed by a court or tribunal before they can be expelled.

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252 Cf. FRA, *Border controls and fundamental rights at external land borders*, 2020, Section 4 (identify asylum applicants and protect them from *refoulement*).

253 G. Cornelisse, M. Reneman, Executive summary and ECRE, Section 3 on recommendations.

254 ECRE, Executive summary.

255 G. Cornelisse, M. Reneman, Executive summary.

256 EPRS legislative train, *establishing an EU mechanism on democracy, the rule of law and fundamental rights*.

257 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, OJ L 180, 29 June 2013, p. 96-116. This requirement is already laid down in the Reception Condition Directive with regard to detention, it is not with regard to restrictions on freedom of movement. Especially taking into account the blurring between the two, similar procedural guarantees should be laid down for restrictions on freedom of movement.

258 G. Cornelisse, M. Reneman, Executive summary.

259 ECRE, Executive summary.

260 ECRE, executive summary.

261 G. Cornelisse, M. Reneman, Executive summary and ECRE, Section 3 on recommendations.

262 G. Cornelisse, Executive summary and ECRE, Executive summary.
To reiterate, (unaccompanied) children and asylum applicants with special (reception and/or procedural) needs should be explicitly and unequivocally exempt from border procedures as a matter of law. This requires early and effective vulnerability identification mechanisms. Member States should put in place procedures to identify unaccompanied children and promptly refer them to the appropriate child welfare authorities. In case of uncertainty regarding the age of the child, the benefit of the doubt should prevail.263

EU asylum-monitoring mechanism

By analogy to similar developments in related areas (monitoring of EU values,264 Schengen Evaluation Mechanism265), this EIA proposes the creation of an EU asylum-monitoring mechanism, in which the European Commission, as the guardian of the EU Treaties, should play a prominent role. Such a mechanism should envisage a clear division of responsibilities between EU institutions, EU agencies (including EASO and FRA), an independent expert panel, and other relevant actors. The mechanism should focus on the monitoring of, the reporting on, and evaluation of the accessibility of asylum procedures at the external borders, and practices of detention and restrictions of liberty in the context of a border procedure at the borders or in transit zones. Moreover, the mechanism should evaluate the quality of decision-making with regard to detention measures or restrictions of movement and the need for international protection (in the administrative and appeal phase).266 This EU asylum-monitoring mechanism should ensure the coherence of the CEAS.

In any event, in line with the 2016 Interinstitutional Agreement on Better Law-Making and its own Better Regulation Guidelines, the European Commission should publish regular evaluations on the implementation of the APD (the first of which should have been presented by 20 July 2017). Implementation gaps must be taken seriously and responses to persistent non-compliance must be adopted as appropriate, in accordance with Articles 258 to 260 TFEU267 and, if necessary, by triggering the Article 7 TEU procedures.

263 ECRE, Executive summary, Section 3 on recommendations; G. Cornelisse, M. Reneman, Executive summary.
264 European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, P9_TA-PROV(2020)0251; W. van Ballegooij, C. Navarra, An EU mechanism on democracy, the rule of law and fundamental rights, EPRS, 2020.
265 Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJL 295/27 of 6 November 2013.
266 Cf. G. Cornelisse, M. Reneman, Executive summary.
267 ECRE, Executive summary, Section 3 on recommendations.
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Border procedures in the Member States

Legal assessment

This study contains a legal assessment of the implementation of Article 43 of the recast Procedures Directive (2013/32/EU), which concerns border procedures. It examines whether the application of border procedures by the Member States contributes to the aims of the Procedures Directive, the Common European Asylum System and EU migration policy. Moreover, it assesses whether the application of border procedures complies with EU fundamental rights.

The study first sets out the aims and defining elements of the border procedure in order to come to an understanding of the concept ‘border procedure’. After that, it focuses on two important aspects of border procedures: detention and restrictions of the freedom of movement and procedural guarantees in the context of the examination of the asylum application. The final chapter of the study draws conclusions and contains recommendations.
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Executive summary

In this report, we carry out a legal assessment of the application and implementation of border procedures in the EU. We analyse the aim of the border procedure against the background of the EU immigration and asylum acquis, and investigate its effectiveness in achieving these aims. In addition, we examine the conformity of the border procedure with fundamental rights. In this light, particular attention is paid to procedural guarantees and the use of detention. In this executive summary we present our key findings and recommendations with regard to the overall aims and use of border procedures, the accompanying measures of detention and/or restrictions on freedom of movement and the procedural guarantees in such procedures.

Key Findings

1. The Aims of the Border Procedure

The objective of the border procedure in the meaning of Article 43 of the Procedures Directive (Directive 2013/32/EU, RAPD) is to enable Member States, in well-defined circumstances, to provide for admissibility and/or substantive examination procedures regarding applications for international protection made at the border or in a transit zone of a Member State prior to a decision on an applicant’s entry to its territory.

Seen against the underlying rationale of procedural harmonisation in the Common European Asylum System (CEAS), harmonisation should achieve two goals: 1. uniformity in procedures across the EU and 2. Legally safe, effective and fair procedures. Uniformity means that similar asylum cases should be treated alike and result in the same outcome. Safety, fairness and effectiveness of border procedures ensure a correct recognition of international protection needs and conformity with fundamental rights. It ensures compliance with the right to asylum and the prohibition of refoulement guaranteed in Articles 4, 18 and 19 of the Charter of Fundamental Rights of the EU (the Charter) and the correct identification of those who are not in need of international protection. Procedures should moreover be conducted in conformity with other fundamental rights, such as the right to personal liberty and the right to an effective remedy protected by Articles 6 and 47 of the Charter. Uniformity and fairness of procedures prevent secondary movements and help to combat illegal migration, as uniform and fair procedures encourage migrants to apply for asylum directly upon arrival at the border, instead of evading border controls. The aim of the border procedure is not to solve problems that Member States encounter as a result of the lack of solidarity or shortcomings in the Dublin system.

2. Difficult Access to Asylum Procedures

Over the last years there have been instances of push-backs at European external borders, where persons applying for asylum at the border are not provided with the chance to apply for international protection, but are simply pushed back into non-EU territory. This is in violation of the right to asylum and the prohibition of refoulement guaranteed in Articles 18 and 19 of the Charter. It encourages irregular border crossings instead of a prompt application upon arrival at the border, and as such jeopardises the integrity of the European asylum and migration acquis.

3. Important Differences in Member State Practice

In Chapter 1 of this study we show that Member States do not employ a common understanding of what a border procedure is. Some Member States deny legal entry to applicants at the border and process their asylum applications while their freedom of movement is restricted or their liberty is deprived, but do not qualify this procedure as a border procedure in national law. In this way,
they employ a border procedure as a matter of fact, while dispensing with the EU law provisions governing them.

Another concern is that in some Member States, *de facto* border procedures are applied *at the internal borders of the EU* without any safeguards contained in the RAPD. This happens for example at the French border with Italy and Spain and the border between Italy and Slovenia. Such procedures evade the rules applicable on the basis of the Dublin Regulation. These practices jeopardise the integrity of the CEAS. EU law is not clear on whether border procedures may be used at internal borders. A coherent reading of the European immigration and asylum acquis justifies the conclusion that this is not allowed, except if internal border control has been reinstated on the basis of the Schengen Borders Code (Regulation 2016/399, SBC).

**Types of cases**

Moreover, we found that there is no uniformity in the types of cases, which are processed in the border procedure. Most Member States apply border procedures in order to examine 1. whether another Member State is responsible for the asylum application under the Dublin Regulation, 2. whether the asylum application is inadmissible under Article 33 RAPD and 3. whether the asylum application is manifestly unfounded. However, some Member States do not apply border procedures to one or more of these categories of cases. Some Member States pre-screen cases in order to decide whether they should be channelled into the border procedure. Other Member States systematically apply the border procedure to applications made at the border. Moreover, some Member States grant asylum to asylum applicants in the border procedure, while other Member States allow the applicant to enter the territory before they take such a decision in a regular procedure. Finally, EU Member States have different practices with regard to the application of border procedures to (un)accompanied children.

**Detention**

Chapter 2 of this study explains that a refusal of entry of applicants for international protection is inherently accompanied with restrictions on their liberty. The legal qualification of a stay at the border or at the transit zone (*detention or restriction of movement*) raises complex issues of fact and law, as is also apparent from the case law from the CJEU and the ECtHR. The qualification of similar situations differs considerably per Member State. As a consequence, the protection of fundamental rights and procedural guarantees, such as judicial review of the lawfulness of a deprivation of liberty, are not enjoyed uniformly by applicants across the EU. The duration and conditions of detention in border procedures also differ considerably across the Member States.

**Procedural guarantees in the context of the examination of the asylum application**

Chapter 3 of this study demonstrates that there are also important differences in the level of procedural protection offered by Member States during the border procedure. Time limits for taking a decision in the administrative phase range from 2 to 28 days. Similar findings were made with regard to time limits for appealing a decision taken in a border procedure and for issuing a judgment in such an appeal. Furthermore, there are great disparities with regard to the right to free legal assistance during the administrative phase of the border procedure. While some Member States provide free legal assistance during the whole border procedure (preparation of the application and assistance during the different steps of the procedure) other Member States only provide free legal assistance during the appeal phase.
4. Restrictions of Liberty and Fundamental Rights

In many Member States a legal basis for practices that in actual fact amount to detention is lacking (de facto detention). In other Member States, for example those that apply the hotspot approach, the blurring of restrictions on freedom of movement and detention is a key source of concern, and domestic law does not always provide a clear legal basis for either detention or, alternatively, the restrictions on the freedom of movement of applicants.

Current EU law does not require a clear legal basis in domestic law for restrictions on the freedom of movement of applicants. Member State practice, particularly with regard to the hotspots, shows that restrictions of the freedom of movement of applicants often do not satisfy the requirement in the recast Reception Conditions Directive (Directive 2013/33/EU, RCD) that such restrictions respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD.

Proportionality

According to Article 8(2) RCD, a detention measure should be necessary and proportionate. However, there is no evidence that Member States assess whether less coercive measures can be imposed (except in some cases regarding vulnerable persons). General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in national law.

Proportionality strictu sensu means that even if there are grounds for detention, and if less coercive measures do not need to be applied prima facie, an assessment should be carried out whether detention poses an unreasonable burden on the individual. This part of the proportionality test is especially relevant for persons with special needs. However, this study shows that Member States do not have adequate mechanisms in place to identify persons with special needs in border procedures.

Proportionality also means that detention cannot last longer than necessary and, in any case, not longer than four weeks. The four weeks’ time limit is not incorporated in the domestic legislation of all Member States (for example Italy).

Detention conditions

Member State practice shows that detention at the border poses particular challenges as regards detention conditions. In the first place, by not formally qualifying deprivations of liberty as such, the requirements in the RCD regarding conditions can be disregarded by Member States. This is the case when it concerns deprivations of liberty in transit zones without a legal basis. So-called waiting zones often do not satisfy the requirement that asylum applicants be accommodated in specialised facilities either. Inadequate conditions of detention at the border have also been widely reported with regard to the hotspots (Greece and Italy), detention in police facilities at internal borders (France), and in transit zones at airports (Greece).

Procedural guarantees for detainees

Procedural guarantees in case of detention are adequately ensured in EU law. Detention should be ordered in a written decision setting out the legal and factual reasons for the measure, and a speedy judicial review is required. Importantly, judicial review should encompass the place and conditions of detention. As it is now, judicial review is contingent on the question whether there is a legal basis for detention, which is lacking in some Member States. As a result, conformity with fundamental rights is not adequately ensured. Procedural guarantees in case of restrictions on
freedom of movement are not provided for in the RCD, which hampers the application of these restrictions in conformity with the requirements by the Member States.

5. Quality of Asylum Decisions under Pressure

Chapter 3 explains that we have found some instances where Member States failed to implement the procedural safeguards laid down in the RAPD. The clearest example of such failure is that several Member States do not have a mechanism in place to identify applicants with special needs in the border procedure. Moreover, national legislation sometimes fails to mention how adequate support can be given to asylum applicants in the context of the border procedure or it is not provided in practice.

There are many concerns regarding the effectiveness of rights granted by EU law in practice. These concerns mainly relate to the combination of short time limits and detention, which characterise most border procedures in the Member States.

**Presenting and substantiating the asylum application**

First, the applicant’s ability to present and substantiate their asylum application may be undermined by short time limits and detention. Adequate and timely information about the asylum procedure and a personal interview during which the applicant is able to present the grounds for their asylum application, is crucial in order to ensure that correct asylum decisions are made. However, reports show that often, there is a lack of timely and adequate information about the asylum procedure. Moreover, the duration of the personal interview (very short or very long) may hinder the applicant’s ability to present their asylum account. Remote interviewing and/or a lack of confidentiality in detention centres may (further) undermine the quality of the personal interview (France).

**Examination by the determining authority**

Secondly, short time-limits restrain determining authorities when examining asylum applications in the border procedure. Research shows that determining authorities feel pressure to finish certain steps of the border procedure (the interview or writing the decision) within the given time-frame, which may affect the quality of decision-making.

**Effectiveness procedural guarantees**

Finally, the combination of short time limits and detention undermine the effectiveness of procedural guarantees offered by the RAPD. Reports show that short time limits and detention in the border procedure often prevent effective access to legal assistance in practice. Asylum applicants are not able to contact a lawyer because of a lack of means of communication, lawyers are given insufficient time to prepare the appeal or a hearing with their client or there is complete lack of qualified lawyers. A lack of effective access to free legal assistance of the asylum applicant may affect the quality of the appeal grounds and thus the appeal itself. However, also here time limits are often short and the applicant is restrained by the detention measure.

**Quality of asylum decisions**

It is foreseeable that the factors mentioned above, in particular in combination, may (severely) affect the quality of the decisions taken in the border procedure. However, since no research into the quality of decision-making in the border procedure has been done, this cannot be established in this research.
6. Lack of Action EU Institutions

The European Commission has not carried out an evaluation of the RAPD in general and border procedures specifically. In particular, no research has been done to the quality of decision-making in border procedures. As a result, it is unclear whether border procedures in the Member States ensure that a correct decision is taken on the asylum application in first instance and/or on appeal and on limitation or deprivation of the right to liberty and thus whether the applicants’ fundamental rights are respected.

Moreover, in view of the persistent problems that feature with regard to detention at external borders and in transit zones of the Member States, it is difficult to understand why the implementation of the provisions on detention in the RCD and the relationship with Article 43 RAPD has not been evaluated by the Commission.

Reporting

Moreover, the way in which EASO coordinates and promotes the exchange of information across asylum authorities in Member States and between the Commission and Member States does not contribute to clarity about Member States’ practices. In order to determine whether Member States use border procedures, EASO seems to base its findings predominantly on domestic legislation. As a result, Member State practice may evade administrative scrutiny, as not even the relevant agencies (EASO) or the Commission seem to know precisely which Member States employ the border procedure as understood by EU law.

Enforcement

This study has shown, on the basis of existing reports, that many aspects of the (application of) border procedures in the Member States are problematic. The implementation is far from uniform and violations of the right to liberty and the right to an effective remedy occur on a regular or structural basis. Nevertheless, the European Commission seems to have only started one infringement procedure against Hungary concerning the application of the border procedure.

Analysis and Conclusions

As regards effectiveness we have concluded that the first goal of CEAS, to create asylum procedures that treat similar asylum cases alike and result in the same outcome in the Member States has not been attained. We found that there are important differences between Member States with regard to the concept of the border procedure, restrictions or deprivations of liberty and procedural guarantees. This lack of uniformity is caused by the fact that EU legislation leaves Member States too much scope for the application of an ‘a la carte regime’ when it comes to border procedures. For example, the many facultative grounds that may justify the use of a border procedure laid down in Articles 33 and 31(8) RAPD contain vague terms that leave too much scope for discretion to the Member States. Article 20(2) RAPD leaves it to the Member States whether they grant a right to free legal assistance in the administrative phase of the border procedure. Moreover, the RAPD fails to address the application of border procedures to accompanied children.

Moreover, the lack of uniformity is caused by unclarities in EU legislation. For example, Article 43 RAPD does not clearly state whether Dublin decisions and decisions to grant asylum can be taken in a border procedure. These unclarities are also caused by the high complexity of EU Legislation applicable to border procedures, as relevant provisions are laid down in the RAPD, RCD, SBC and Return Directive (Directive 2008/115/EC).
The second goal of the CEAS was to create legally safe, fair and effective asylum procedures, which ensure compliance with fundamental rights, such as the prohibition of refoulement, the right to asylum, the right to liberty and the right to an effective remedy.

As regards detention, violations of the right to liberty are structural in the border procedures. Secondary EU law, by not clearly defining the relationship between border procedures and detention, leaves Member States too much scope for applying practices of de facto detention. This is so because the legal qualification of a stay at the border or in a transit zone before entry is granted may raise complex issues of fact and law. However, the widespread practices of de facto detention which we report in Chapter 3 constitute a manifest and serious violation of Charter 6 of the Charter.

EU law that prescribes that less coercive measures have to be considered and rules regarding alternatives have to be laid down in national law is disregarded by the majority of Member States when it comes to the use of detention in border procedures. The place and conditions of detention differ considerably across the Member States and in some Member States the conditions of (de facto or formal) detention at the border violate the fundamental rights of applicants. If the requirements for lawful detention are not met, applicants have to be released on the basis of the RCD.

As regards procedural guarantees in the context of the examination of the asylum application, it was concluded that there is an important tension between the factors ‘time’ and ‘detention’. On the one hand, asylum applicants need time to substantiate their case and make use of procedural guarantees. On the other hand, the longer the asylum procedure takes, the longer an asylum applicant will be detained. The combination of short time limits and detention often negatively affects the asylum applicant’s ability to substantiate their asylum account. Moreover, it undermines the effectiveness of procedural guarantees, such as the right to legal assistance, in particular in more complex cases.

This is concerning because a high level of procedural protection may compensate for the negative effects of short time limits and detention. It follows from the case law of the CJEU and ECtHR that in particular the right of (access to) free legal and linguistic assistance is important in that regard. It is recognised that good legal assistance results in better prepared and documented asylum applications, more equality between the asylum applicant and the determining authority and a higher quality of asylum decisions. A thorough judicial review of the decision taken in the border may compensate for procedural hurdles encountered by the applicant in the administrative phase. On the basis of our findings, we conclude that violations of the right to an effective remedy occur. Whether the shortcomings in the border procedures also lead to violations of the prohibition of refoulement and the right to asylum cannot be established on the basis of this study, as we did not find information on the quality of asylum decisions taken in a border procedure. However, the findings give reason for concern.

Recommendations

Chapter 4 of this study contains recommendations. First, it is stressed that access to asylum procedures should be ensured at all times and at all external borders of the European Union. Push backs at the external and internal borders of the Member States should be prohibited.

In order to ensure uniformity of border procedures, EU law should clearly define the border procedure as a procedure in which asylum applicants are not (yet) granted the right to enter. Moreover, EU law should make clear that as a general rule, border procedures may not be used at internal borders. EU law should clarify the relationship between reinstatement of internal border control and the use of border procedures.
EU law should **further limit the applicability of border procedure** to:

1. cases which may be considered less complex as regards facts and law (grounds currently laid down in Art. 33(1)(a), (b), (d) and (e) and 31(a) and (b) RAPD)
2. cases in which the Member State has shown that the applicant has intentionally failed to cooperate with the determining authorities or has misled them (grounds currently laid down in Art. 31(8)(c), (d), (g) and (h) RAPD);
3. cases in which the applicant poses a genuine, present and sufficiently serious threat to public order or national security (ground currently laid down in Art 31(8)(i) RAPD).

We recommend that border procedures may be used to take decisions under the Dublin Regulation, but only if there is a significant risk of absconding in accordance with Article 28 Dublin Regulation. The asylum applications of (un)accompanied children and asylum applicants with special (reception and/or procedural) needs, should not be processed in a border procedure.

EU law should require that the border procedure can only be resorted to after an individual assessment of the circumstances of the case, including an examination of potential special reception and procedural needs. Proportionality *stricto sensu* of the detention measure and the question whether an applicant has special reception or procedural needs need to be assessed in coherence.

**Restrictions of the right to liberty**

In the limited amount of cases that Member States may use border procedures under EU law, EU law should oblige Member States to provide a clear legal basis in domestic law for either (1) the use of detention pursuant to Article 8(3)(c) RCD; or (2) of a restriction on freedom of movement pursuant to Article 7 RCD.

In the absence of such a legal basis in domestic law, border procedures cannot be applied and applicants have to be granted the right to legally enter the territory. In that case, detention can only be based on the other grounds enumerated in Article 8(3) RCD.

If a border procedure is accompanied by detention, a full proportionality assessment of the detention measure should be carried out by the authorities deciding to apply the border procedure, including the question whether alternatives can be used. National law should lay down the rules for alternatives for detention with specific regard to border procedures.

The use of detention and the imposing of restrictions on freedom of movement in a border procedure are to be accompanied with procedural guarantees. Chapter 4 of this study contains recommendations regarding the right to a written decision, statement of reasons and the right to a speedy judicial review. In particular, the judicial authority reviewing the detention or restriction of freedom of movement should be able to substitute its own decision for that of the administrative authority with regard to the qualification of the measure (detention or restriction on freedom of movement), and its proportionality.

**Procedural guarantees**

The time frame applicable in the border procedure should enable the asylum applicant to prepare and substantiate their asylum application and to make effective use of all procedural rights granted to them. In particular, the time limits should enable the applicant to receive and understand information about the asylum procedure, to present their asylum account in a comprehensive manner during the personal interview. Moreover, time limits should enable the applicant to make effective use of the right to (free) legal assistance and the right to an effective remedy. This means that the asylum applicant should have sufficient time to understand the decision, find a lawyer, lodge an appeal and (if necessary) a request for suspensive effect, have access to the case file and
write appeal grounds and prepare the hearing together with their lawyer. The time-frame of the border procedure should also ensure that the determining authority is able to gather all necessary information and can take a careful asylum decision.

Member States should enable asylum applicants in detention to make use of means of communication with the outside world, including telephone and internet, in order to gather information about the asylum procedure, to gather and submit evidence in support of their asylum claim and to contact their lawyer or other counsellor.

Furthermore, Chapter 4 contains recommendations with regard to the content of procedural safeguards, such as the right to information, the right to a personal interview and the right to an effective remedy. We recommend that free legal and linguistic assistance should be available to all asylum applicants whose asylum application is dealt with in a border procedure, in order to compensate for short time limits and detention.

**Action of the EU Institutions**

EU institutions should effectively monitor the accessibility of asylum procedures at the external and internal borders, practices of detention and restrictions of liberty in the context of a border procedure at the borders or in transit zones. Moreover, the European Commission should evaluate the quality of decision-making with regard to detention measures or restrictions of movement and the need for international protection (in the administrative and appeal phase).

Reporting and the exchange of information by Member States, EU institutions and EU agencies should be based on a uniform understanding of the border procedure as a procedure in which applicants have not been granted entry to the territory.
List of abbreviations and acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EMN</td>
<td>European Migration Network</td>
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<tr>
<td>FRA</td>
<td>Fundamental Rights Agency</td>
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<tr>
<td>NCP</td>
<td>National Contact Point</td>
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<tr>
<td>RAPD</td>
<td>Recast Asylum Procedures Directive (2013/32/EU)</td>
</tr>
<tr>
<td>RCD</td>
<td>Reception Conditions Directive (2013/33/EU)</td>
</tr>
<tr>
<td>SBC</td>
<td>Schengen Borders Code (Regulation 2016/399)</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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4. Procedural guarantees in border procedures
1. Introduction

In a border procedure, applications for asylum are examined without the Member State authorising the applicant’s entry into the Member State’s territory. Border procedures aim to prevent the irregular entrance into the territory of the EU of asylum applicants, who are (manifestly) not in need of international protection. Border procedures have two distinctive characteristics. First, asylum applicants are usually detained during the examination of their asylum application in order to prevent them from entering the territory. Second, the level of procedural protection may be lower in a border procedure than in a normal asylum procedure, mainly as a result of two factors: the use of detention and short time limits.

In this study we analyse the legal framework applicable to border procedures, with particular attention to the coherence of the EU asylum and immigration acquis and the protection of fundamental rights. We carry out a legal assessment of the implementation of Article 43 of Directive 2013/32/EU (the Recast Procedures Directive, RAPD)\(^1\), which provides the legal basis for the use of border procedures. The study is centred around two central research questions:

1. Does the application of border procedures by the Member States contribute to the aims of the RAPD, the Common European Asylum System in general, and other EU migration legislation such as the Schengen Borders Code (Regulation 2016/399, SBC)\(^2\) and the Return Directive (Directive 2008/115)\(^3\)?

2. Does the transposition and application of border procedures by the Member States comply with EU fundamental rights, including the prohibition of refoulement, the right to asylum, the right to liberty and the right to an effective remedy?

In order to answer the first research question, we will address the following sub-questions:

- What is the rationale underlying the border procedure in the meaning of Article 43 RAPD?
- What are the defining characteristics of such a border procedure?
- How does the application of such a border procedure relate to the aims of the RAPD, the Common European Asylum System and other EU migration legislation (such as the SBC and the Return Directive)?

To answer the second research question, we will examine which standards follow from EU legislation, case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) with regards to detention and restrictions of the freedom of movement and procedural guarantees in the context of the examination of the asylum application. Furthermore, we will assess whether and how Article 43 RAPD has been transposed in the Member States and how border procedures are applied in practice.

With regard to detention and restriction of the freedom of movement we will look at:

- The qualification of restrictions on liberty in border procedures and procedural guarantees applicable;

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The legal basis for detention and restrictions of freedom of movement in border procedures;
The proportionality of the detention measure (criteria for application, necessity, alternative measures); and
The conditions of detention in border procedures.

With regard to procedural guarantees in the context of the examination of the asylum application we will focus on the factors of time and detention and particularly how they affect:

- The ability of asylum applicants to prepare and substantiate their asylum claim during the asylum procedure (possibility to gather evidence, right to information, personal interview);
- The ability of the determining authority to carry out an adequate and complete examination of the asylum application; and
- The effectiveness of procedural guarantees (the right to (free) legal assistance, the right to an effective remedy and adequate support for asylum applicants with special needs, including unaccompanied minors).

Some of our findings with regard to the protection of fundamental rights in the border procedure (Research Question 2) also have implications for the effectiveness of border procedures in achieving the underlying aims of harmonisation (Research Question 1). This is so because differences between the Member States with regard to the protection of fundamental rights when it comes to detention and procedural protection in border procedures jeopardise the aims of EU action in this area, which is to ensure that applicants are offered ‘an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements’. Moreover, as we will set out below, conformity of fundamental rights is in itself an underlying aim of EU harmonisation in this field. As such, the answers regarding our two research questions cannot always be neatly separated as pertaining to only one or the other.

1.1. Methodology

For the purpose of this research, we carried out a desk research. In order to establish the rationale of the border procedure, its defining characteristics and its relation to the aims of the Common European Asylum System (CEAS) and other EU migration legislation we carried out a thorough analysis of EU legislation, the history of EU legislation as laid down in documents of the EU institutions, case law of the CJEU and academic literature.

Where it concerns the standards following from EU fundamental rights, we used the same sources. Additionally, we examined the case law of the ECtHR. The ECtHR’s case law serves as an important source of inspiration for the interpretation of EU fundamental rights, such as the prohibition of refoulement and the right to an effective remedy. EU law may not offer a lower level of protection than that offered by the European Convention on Human Rights (ECHR). Where it concerns the special position of children and unaccompanied minors, the view of the Committee on the Rights of the Child is taken into account. Article 24 of the Charter applies to border procedures in which children are involved. Since this provision is directly based on the obligations laid down in the

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5 Art 52(3) Charter. See for example: CJEU Case C-279/09 DEB [2010], Case C-562/13 Abdida [2014].
6 Art 52(3) Charter.
Convention on the Rights of the Child, the views of the Committee should be considered relevant. The analysis of compliance with fundamental rights is supplemented by a review of the academic literature concerning border procedures, detention of migrants and asylum procedures.

The legal framework is used to assess the transposition and application of border procedures in the Member States with regard to aims and characteristics, procedural safeguards and detention. For the assessment of the implementation and application of the EU legal framework concerning border procedures in the EU Member States we used information contained in the reports published by EU institutions and agencies (such as the European Asylum Support Office (EASO) and the Fundamental Rights Agency (FRA), the United Nations High Commissioner for Refugees (UNHCR), The Committee on the Prevention of Torture (CPT), NGO’s and academics. We also examined information made public by the Member States on websites, such as national legislation and information on asylum procedures, in particular where the reports reviewed referred to them. In the last phase of the research we have used the research findings laid down in ECRE’s comparative analysis of the application of border procedures in seven selected EU Member States.

We want to highlight that there are important limitations to this study. Considering the limited time and resources available for this research, we did not have the opportunity to gather detailed information concerning the transposition and application of border procedures in all the Member States. For example, we were not able to assess the quality of decision-making in border procedures in the Member States by looking at individual decisions. Neither were we able to interview stakeholders or asylum applicants. We used data provided by ECRE’s comparative study, which was carried parallel to our study as well as academic literature and other reports that are currently available. As a result, some of our conclusions concerning the effectiveness and compliance with fundamental rights of the transposition of Article 43 of Directive 2013/32/EU and the application of border procedures in the Member States might only be formulated in abstract terms.

1.2. Structure of the study

The report is structured as follows. Chapter 2 addresses the aims and defining characteristics of in a border procedure and types of cases that are decided upon in such a procedure. The two following chapters zoom in on two important characteristics of the border procedure. First, Chapter 3 examines detention and restrictions of freedom of movement. Chapter 4 focuses on procedural protection offered to asylum applicants in the context of the examination of their asylum application.

In all chapters we pay attention to both research questions (1. Does the border procedure contribute to the aims of the RAPD, CEAS and EU migration legislation? and 2. Does its transposition and application in the Member States comply with fundamental rights?). However, in Chapter 2 the emphasis lies on the first research questions, whereas Chapters 3 and 4 focus more on the second research question. In Chapter 5, we draw conclusions regarding the two research questions and formulate recommendations regarding the effectiveness of border procedures and the required safeguards in light of EU fundamental rights.

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8 ECRE (2020).
2. A common understanding of the European border procedure: aims and defining elements

2.1. Introduction

A border procedure is a procedure in which an application for international protection is examined at the border or in a transit zone, before a decision has been taken on the right to enter the territory of the Member States. The legal basis for this procedure is Article 43 RAPD, but it is interlinked with other provisions in this Directive and other instruments of EU law, most notably the SBC, the Recast Reception Conditions Directive (RCD) and the Return Directive. A schematic overview of the border procedure and its regulation in EU law is provided in the figure below.

In this chapter, we analyse the aims and characteristics of the border procedure against the objectives underlying the RAPD, the Common European Asylum System and other instruments of EU migration law, such as the Schengen Borders Code and the Return Directive. We start by sketching a brief overview of the legislative drafting history of Article 43 RAPD (section 2.2). We then turn to the aims of the border procedure (section 2.3). After that, we focus on the three defining elements of a border procedure as envisaged by the EU legislator:

9 Recital 38 Preamble RAPD
it takes place prior to a decision on entry (section 2.4);
- it provides for admissibility and/or substantive examination procedures in well-defined circumstances (section 2.5); and
- it concerns applications made at the border or in a transit zone (section 2.6).

We then discuss the transposition and application by the Member States with regard to these three defining elements of a border procedure (section 2.7). In our conclusions, we answer the question how successful EU action has been in achieving its objective with particular regard to these three elements (section 2.8).

2.2. Legislative drafting history

We will set out below that the legislative drafting history shows a process of incremental harmonisation of border procedures, and the intention of the EU legislature to limit the use of such procedures to clearly limited cases.

2.2.1. The 2005 Procedures Directive

From the very start, EU standards on asylum procedures were intended to apply to persons who make an application for asylum at the border of a Member State. The travaux préparatoires to the 2005 Procedures Directive show that consultations with Member States made the Commission propose ‘a special approach to applications made at border posts’. The starting point for such procedures was ‘the primacy of national law and the possibility to preserve national specific features of such procedures and administrative arrangements’. This was reflected in the Directive, which allowed Member States to maintain or introduce border procedures, which complied with the procedural principles and guarantees laid down in Chapter II of the Directive. Member States could also ‘keep existing procedures adapted to the specific situation of these applicants at the border’ if they did not comply with these procedural principles and guarantees. Nevertheless, these existing border procedures had to be in accordance with some basic guarantees, including the right to remain, the right to a personal interview and the right to a reasoned asylum decision. The decision on the application had to be taken within a reasonable time, but at least within four weeks. If the decision-making authority did not meet this four-week time-limit, the applicant had to be granted entry to the territory of the Member State.

2.2.2. The recast Procedures Directive

The RAPD further harmonised the application of border procedures. The possibility to maintain existing border procedures, which did not comply with the principles and guarantees of Chapter II of the Directive was deleted, as well as references to national law. The travaux préparatoires show that the possibility to examine the substance of applications in border procedures, in addition to

14 Art 35(1) Dir 2005/85/EC.
15 Recital 16 Preamble Dir 2005/85/EC.
16 Art 35(3) Directive 2005/85/EC.
admissibility, was included to accommodate ‘national systems of Member States which apply the general procedure at the border’. Nonetheless, these procedures were never intended to be applied to all applications made at the border. The Commission emphasised that ‘the list of cases that can be accelerated or examined at the border remains exhaustive.’

The Preamble of the RAPD states:

Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations in well-defined circumstances.

The standards concerning border procedures are laid down in Article 43 RAPD, which reads as follows:

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on: (a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or (b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

2.3. Aims of the border procedure

The Preamble to the RAPD defines the aim of a border procedure rather succinctly: it should enable Member States, in well-defined circumstances, to provide for admissibility and/or substantive examination procedures regarding applications for international protection made at the border or in a transit zone of a Member State, prior to a decision on an applicant’s entry to its territory. This specific aim of the border procedure should be interpreted against the overall aims of the CEAS and the objective underlying harmonisation of asylum procedures in the RAPD. Moreover, it should be

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20 Recital 38 Preamble RAPD.

interpreted in coherence with other instruments of EU asylum and immigration law, in particular the Schengen acquis.

### 2.3.1. Aims of the CEAS

Legislative instruments making up the CEAS are based on Article 78 TFEU according to which the EU 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. The CEAS should be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees (Refugee Convention), and other relevant treaties. In the Stockholm programme, the European Council reaffirmed the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. It emphasised that the CEAS ‘should be based on high protection standards’ and that ‘due regard should also be given to fair and effective procedures capable of preventing abuse.’ The rationale of the CEAS is that ‘individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination.’ Its overall objective is that ‘similar cases should be treated alike and result in the same outcome.’

### 2.3.2. Aims of the RAPD

Harmonisation of asylum procedures is based on Article 78(2)(d) TFEU which provides the EU with the competence to adopt legislative instruments comprising ‘common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.’ The Preamble to the RAPD reaffirms the CEAS objective of ensuring that similar cases are treated alike and result in the same outcome. It also specifies that people in need of international protection must be ensured access to legally safe and efficient asylum procedures. Moreover, approximation of rules on asylum procedures aims at limiting the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of the Qualification Directive (Directive 2011/95/EU) in Member States.

### 2.3.3. Coherence with the Schengen acquis

We have seen that a border procedure entails the examination of an application for international protection at the border or in a transit zone before a decision on entry has been taken. In order to understand this particular objective of the border procedure, we should have regard to other instruments of EU law pertaining to the area of freedom, security and justice. Coherence between the various instruments of EU asylum and immigration law is also called for in view of the Tampere European Council of 15 and 16 October 1999, which ‘established a coherent approach in the field of

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23 Council of the European Union, ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’ (2009) para 6.2. See also Recital 8 Preamble RAPD.
24 Recital 8 Preamble RAPD.
immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.”

Persons subject to border procedures are covered by the SBC. This instrument applies to “any person crossing the internal or external borders of Member States, without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.” The relevance of the SBC for border procedures is implicitly confirmed in Article 4 RAPD, which provides that another authority than the determining authority can be entrusted with the responsibility to grant or refuse permission to enter, in the framework of the border procedure. Border checks in the meaning of the SBC are carried out to ensure that persons may be authorised to enter or leave the territory of the Member States. According to the CJEU, the system established by the Schengen Agreement is

based on compliance with harmonised rules for external border controls and [...] on strict compliance with the conditions of entry of third-country nationals into the territory of the States [...] Each Member State whose territory is part of the Schengen area must have confidence that the controls carried out by every other State in the Schengen area are effective and stringent.

Harmonised rules on border control in the SBC have as an objective to ‘help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations.’ At the same time, such external border control must be carried out without prejudice to the application of provisions which protect asylum applicants, in relation to, inter alia, the principle of non-refoulement.

In the event that the applications for international protection are dismissed in the border procedure, the third-country nationals concerned can be refused entry on the basis of Article 14 SBC. This refusal of entry is relevant for subsequent return procedures. Although return procedures are not the object of this study, we briefly address the link of such procedures with the refusal of entry that follows a negative decision on a border procedure.

Article 2(2)(a) of the Return Directive provides for the possibility of Member States to not apply the Return Directive to third-country nationals who are subject to a refusal of entry in accordance with Article 14 SBC. According to the CJEU, the purpose of this provision is to permit Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted in connection with the crossing of one such border.

Member States must nevertheless ensure that the treatment and level of protection of persons exempted from the scope of the Return Directive are not less favourable as regards the use of coercive measures, postponement of removal, emergency health care, the needs of vulnerable persons and detention conditions. Moreover, they must respect the principle of non-refoulement.

26 Recital 1 Preamble Directive 2008/115/EC.
27 Art 3 SBC.
28 This decision should be based on the reasoned opinion of the determining authority. See Art 4 RAPD.
29 Art 2(11) SBC.
31 Recital 6 Preamble SBC and CJEU Case C-575/12 Air Baltic Corporation [2014] para 50.
33 CJEU Case C-47/15 Affum [2016] para 74. See also CJEU Case C-444/17 Arib and others [2019].
34 Art 5 Directive 2008/115/EC.
Especially with regard to non-refoulement it is significant that EU law has over the last few years increasingly carved out a ‘space between asylum law and irregular migration’.\(^{35}\) Thus, the obligation of the Member States to respect non-refoulement in return procedures may be breached if Member States ‘remove a migrant suffering from a serious illness to a country in which appropriate treatment is not available.’\(^{36}\) Articles 4 and 19(2) of the Charter and the principle of non-refoulement in the Return Directive offer a wider scope of protection against refoulement than should be examined in the EU asylum procedure.\(^{37}\)

A refusal of entry is also relevant for effectuating the obligations that the Schengen acquis puts on carriers, as provided for in Article 26(a) of the Convention implementing the Schengen Agreement of 14 June 1985:

*If aliens are refused entry into the territory of one of the Contracting Parties, the carrier which brought them to the external border by air, sea or land shall be obliged immediately to assume responsibility for them again. At the request of the border surveillance authorities the carrier shall be obliged to return the aliens to the third State from which they were transported or to the third State which issued the travel document on which they travelled or to any other third State to which they are certain to be admitted.*\(^{38}\)

### 2.3.4. Uniform border procedures across the EU

We conclude that the aim of the border procedure is twofold: 1. to enable states to decide on an application for international protection before granting entry and 2. to provide asylum applicants with a legal safe, fair and efficient procedure, which complies with the principle of non-refoulement and offers an appropriate status.

Crucially, harmonisation in this field serves to attain the same level of treatment for applicants as regards procedural arrangements in all Member States. Article 43 RAPD should accordingly be transposed and applied in such a way that similar cases are treated alike and result in the same outcome. This serves to prevent secondary movements and to guarantee equivalent conditions for the recognition of persons in need of international protection. When it comes to border procedures in particular, which involve border checks regulated by the SBC, the objective of uniformity across the EU becomes particularly weighty. After all, the rationale underlying the SBC is the full harmonisation of rules on border control.

In the next sections, we will address the three defining elements of a border procedure. We will start with the relation between the border procedure and the right to enter and stay of applicants for international protection on the territory of the Member States.

### 2.4. ‘Prior to a decision to entry’

A border procedure takes place prior to, or in the context of, a decision on the right of the asylum applicant to legally enter the territory. It should be underlined that the fact that applicants have not legally entered the territory of the Member State is a legal fiction that impacts solely on their entry...
and residence rights and influences the procedures that apply to them; it does not mean that they are legally not subject to the authority of the state, or in any way not under their jurisdiction.39

2.4.1. Refusal of entry in the SBC

The right of access to the territory of the EU is governed by the SBC. Asylum applicants will generally not meet the conditions for entry in Article 6 SBC.40 Article 14 SBC provides that third-country nationals who do not fulfil the entry conditions shall be refused entry to the territories of the Member States. We have seen that the SBC has fully harmonised the rules regarding external border control.41 Thus, the rules governing refusal of entry in the SBC apply to any third-country national who wishes to enter a Member State by crossing an external border of the Schengen area.42 If such a third-country national does not satisfy the conditions for entry, ‘the authorities responsible for border controls must refuse him entry into that territory.’43 We have seen above, that the rationale for such full harmonisation lies in the abolishment of internal border checks.

Nevertheless, the SBC contains exceptions to Member States’ duty of strict border control. In particular, its application shall be ‘without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.’44 Indeed, the obligation to refuse entry ‘shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection’.45 Accordingly, Member States cannot refuse entry to an asylum applicant without assessing whether this asylum applicant is in need of international protection.46 However, the question whether and when Member States must grant asylum applicants the right to legally enter their territory before deciding on their application is not answered by referring to the obligation to respect the principle of non-refoulement, and neither is it elsewhere regulated in the SBC.

2.4.2. The right to remain

A first step to find an answer would be to examine the right of applicants to remain on the territory of the Member State. On the basis of the RAPD, applicants are allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision at first instance.47 The RAPD is adamant that the right to remain shall not constitute an entitlement to a residence permit. The definition of the term ‘remain’ in the RAPD includes a stay at the border or in transit zones.48 Accordingly, the right to remain does not guarantee a prima facie right of entry for applicants.

The CJEU has held that the right to remain in the RAPD prevents asylum applicants from being regarded as ‘staying illegally’, within the meaning of the Return Directive ‘during the period from submission of the application for international protection until adoption of a first-instance decision.

39 ECtHR 23 July 2020, App nos 40503/17, 42902/17 and 43643/17, M.K. and others v Poland.
40 If only because they intend to stay longer than 180 days and do not have a residence permit or long stay visa. Moreover, many asylum applicants do not have a valid travel document and visa for the EU.
41 See also CJEU Case C-575/12 Air Baltic Corporation [2014] para 69.
42 CJEU Case C-606/10 ANAFE [2012] para 35.
44 Art 3 SBC and CJEU Case C-606/10 ANAFE [2012] para 40.
45 See also Recital 36 Preamble and Art 4 SBC, which requires Member States to apply the SCB in accordance with the Member States’ obligations as regards international protection and non-refoulement.
46 See also Annex VI, para 1.1.4.2 SCB and Art 3(1) Regulation 604/2013.
47 Art 9 RAPD.
48 Art 2(p) RAPD.
on that application." This right to remain ends upon the adoption of a first-instance decision rejecting the asylum application. In the words of the Court, this means that the applicant no longer fulfils the conditions for entry, stay or residence in the Member State concerned. Accordingly, that person’s stay becomes illegal.

From this, we can infer that asylum applicants ordinarily fulfil the conditions for entry and stay in the Member States, until a decision rejecting their application in first instance has been taken. Non-admission of applicants constitutes an exception to this general rule. This reading is affirmed by Article 43(2) RAPD, which provides that the applicant shall be granted entry to the territory of the Member State and the normal procedure shall be followed, if a decision in the border procedure has not been taken within four weeks. A border procedure, characterised by non-admission, constitutes an exception to the regular procedure, in which asylum applicants have a right to enter the territory of the Member States. The conclusion that asylum applicants usually enjoy a right to legally enter and stay in the Member States is also supported by the requirement that border procedures can only be applied in ‘well defined circumstances’, which we discuss in the next section.

2.5. ‘In well-defined circumstances’

As Member States may only apply border procedures in well-defined circumstances, there are limitations to the types of cases that can be dealt with in a border procedure. This is also apparent from the travaux préparatoires of the RAPD: the Commission emphasised that ‘the list of cases that can be accelerated or examined at the border remains exhaustive.’ Moreover, Recital 21 of the RAPD stresses the exceptional character of the border procedure by elucidating that ‘as long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to border or accelerated procedures.’

Article 43 RAPD permits the use of border procedures in order to decide on the admissibility of an application, but also in order to decide on the substance of an asylum application. We have seen that the possibility to examine substance in a border procedure was provided for to accommodate ‘national systems of Member States which apply the general procedure at the border.’

2.5.1. Admissibility decisions and Dublin decisions

A border procedure may be used to decide in order to decide on the admissibility of an application, pursuant to Article 33 RAPD. According to that provision, the cases in which Member States are not required to examine an application for international protection because it is inadmissible, are limited to the following circumstances:

1. another Member State has already granted international protection;
2. a country which is not a Member State is considered as a first country of asylum;
3. the applicant comes from a safe third country;
4. the application is a subsequent application, in which no new elements or findings have been presented; or

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49 CJEU Case C-181/16 Gnandi [2018] para 40. See also Recital 9 Preamble Directive 2008/115/EC.
52 Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 235.
EU law is ambiguous on the question whether border procedures may be used to decide that the Member State is not responsible for the examination of the application in accordance with the Dublin Regulation. It suggests that in such cases, applications are not inadmissible, but simply not examined. In that case, Dublin cases cannot be dealt with in the border procedure. In any case, detention in order to effectuate a transfer is separately regulated under the Dublin Regulation.

If a Member State only uses the border procedure to decide on admissibility, the applicant has to be granted access to the territory as soon as the decision-making authority has decided that the grounds for non-admissibility are not applicable. The decision on the substance will then be taken in the regular asylum procedure.

2.5.2. Decisions ‘on the substance’

The (accelerated) border procedure may be used in order to decide on the substance of the application in a number of well-defined cases, exhaustively listed by Article 31(8) RAPD. This provision also provides the grounds for the use of accelerated procedures. As such not all the grounds mentioned under Article 31(8) RAPD will be pertinent to a border procedure.

For border procedures, the following grounds are relevant:

1. the applicant has only raised issues that are not relevant to the examination of whether he or she qualifies for international protection;
2. the applicant originates from a safe country of origin;
3. the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents;
4. it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality;
5. the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing;
6. the applicant has introduced a subsequent application for international protection that is not inadmissible;
7. the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal;
8. the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with the Eurodac Regulation; or
9. the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State.

54 Art 33(1) RAPD.
55 Art 43 RAPD read in conjunction with the first sentence of Art 33(1) RAPD. See also Art 26 Regulation 604/2013 (Dublin Regulation), which mentions the transfer decision and the decision of not examining the application for international protection. As we will show in the next chapter, border procedures usually involve detention. Under the Dublin Regulation the assessment for the legality of detention differs from that under the RAPD, most particularly because for detention under Dublin there needs to be a significant risk of absconding.
56 Art 28 Regulation 604/2013.
57 Art 31(8) RAPD uses the terms accelerated and/or border procedures.
Accordingly, if these circumstances are not present, and the claim is admissible, the applicant has to be granted entry to national territory. The wording of most of these grounds indicates once again that the application of a border procedure can never be automatic. Thus, false information should have been presented with the aim to mislead; representations that do not align with country information should be clearly false, inconsistent and improbable, resulting in a clearly unconvincing claim; destruction of disposal of travel documents has to be done in bad faith; and there have to be serious reasons to consider an applicant a danger to the national security or public order. However, it should be noted that the grounds mentioned in Article 31(8) RAPD contain many vague terms, providing the Member States room to use them extensively.

Crucially, the fact that one of the grounds of Article 31(8) RAPD applies, does not always mean that the applicant is not in need of international protection. Even if, for example, an applicant has, in bad faith, destroyed an identity document, they may still have a well-founded fear for persecution or faces a real risk of serious harm in the country of origin. Indeed, Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection. Consequently, before a Member States rejects the application on substance in a border procedure, it will have to examine whether the applicant qualifies for international protection.

However, it is unclear whether a decision to grant international protection can be taken in the border procedure. We argue that the right to enter should be granted, as soon as it becomes apparent that the application is not inadmissible or manifestly unfounded. This also has implications for the lawfulness of detention in the border procedure, as we will discuss in Chapter 3 of this report.

2.5.3. Time limits and other constraints

Article 42(2) RAPD provides that if a ‘decision’ is not taken within four weeks from the submission of the claim, the applicant must be granted access to the territory and the application will be processed in the regular procedure. This is only different in the event of large numbers, in which case applicants have to be ‘accommodated normally’ in vicinity of the border. The four-week period does not include the period during which the applicants may have a right to stay at the border or in the transit zone pending the outcome of their appeal before a court or tribunal against a negative decision. If the four-week period would have been included the appeal before a court or tribunal, Art 42(2) RAPD would have used the term ‘final decision’ that is defined as an asylum decision, which is no longer subject to an appeal before a (first instance) appeal before a court or tribunal.

Furthermore, Member States are obliged to refrain from using border procedures for applicants in need of special procedural guarantees, who are survivors of rape or other serious violence, if adequate support cannot be provided in a border procedure. Furthermore, the Directive sets limits to the processing of applications submitted at the border by unaccompanied minors.
2.5.4. Automatic use of border procedures is not allowed

Member States may use border procedures to examine whether the grounds for non-admissibility apply. As soon as it is clear that the grounds for inadmissibility under the RAPD do not apply, applicants have to be granted access to the territory and their application has to be processed in a normal procedure.

If a Member State wishes to examine the substance of an asylum claim at the border or in a transit zone, it should justify that decision on the basis of individual circumstances of the case. These circumstances are exhaustively enumerated in the RAPD. The requirement of an individual justification for the use of a border procedure to examine the substance of an application instead of the blanket use of such procedures also follows from the Preamble to the RAPD, in which it is stated that ‘as long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to border or accelerated procedures.’ A strict interpretation of the grounds to resort to a border procedure aligns with the objectives underlying the CEAS and the Schengen acquis: it reduces incentives for applicants to enter the Member States illegally who would then not apply promptly at the border but within the territory, possibly even in another Member State.

2.6. Applications made ‘at border or in transit zones’

In a border procedure, the determining authority of the Member States decides about applications for international protection, which are made at the border of an EU Member State or in a transit zone of an (air)port. According to AG Pikamäe, the territoriality of border procedures is the defining factor of such procedures: ‘Article 43 refers to a power that Member States are entitled to exercise “at the[ir] border or transit zones”.’ Here we analyse the meaning and implications of the term border or transit zone in this definition.

2.6.1. The prohibition of non-refoulement also applies at the border

Third-country nationals who apply for international protection at the border or in a transit zone fall under the scope of the EU asylum acquis. As such, Member States are obliged to respect Articles 4 (prohibition of torture and inhuman and degrading treatment), 18 (right to asylum) and 19 (prohibition of refoulement and collective expulsion) of the Charter. The absence of proceedings in which applications for international protection made at the border can be reviewed, will result in a violation of the prohibition of refoulement laid down in Article 3 ECHR. Refusal of entry without an individual examination can amount to a violation of the prohibition on collective expulsion as protected by Article 4 Protocol No 4 to the ECHR.

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65 CJEU Case C-808/18 Commission v Hungary, Conclusion of AG Pikamäe, paras 85 and 86. See also CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020].

66 Art 3(1) Regulation 604/2013 has explicitly formulated the right to an examination of an application for international protection made at the border or in transit zones. Moreover, Annex VI, para 1.1.4.3 sub a SCB provides that a third-country national who has passed exit control by third-country border guards and subsequently asks Member State border guards present in the third country for international protection, shall be given access to relevant Member State procedures in accordance with Union asylum acquis.

67 ECtHR 23 July 2020, Appl nos 40503/17, 42902/17 and 43643/17, M.K. and others v Poland.
2.6.2. External and internal borders

The RAPD does not explicitly mention that border procedures can only be applied at the external border. However, a reading of the immigration and asylum acquis as a whole warrants the conclusion that the term ‘border’ in Article 43 RAPD should be understood as an external border. According to Article 77 TFEU, the EU shall develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders, and carrying out checks on persons and efficient monitoring of the crossing of external borders. This policy is legally regulated in the SBC, which provides for the absence of border control of persons crossing the internal borders between the Member States, and lays down rules governing border control of persons crossing the external borders.68 Border control is in the interest not only of the Member State at whose external borders it is carried out, but of all Member States, which have abolished internal border control.69

According to Article 22 SBC, ‘internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’ The provisions on border control and refusal of entry (Article 14) are found in Title II of the SBC, titled ‘External Borders’. According to the CJEU, the subject matter of Article 14 SBC is the actual entry and stay in the territories of the Member States.70 Consequently, non-admission in the context of a border procedure as a rule takes place at an external border.

A reading according to which the border procedure may only take place at external borders of the Schengen Area is also justified in light of the CJEU’s case law on Article 2(2)(a) of the Return Directive. As we have seen, this provision allows Member States to exempt from the scope of that Directive third-country nationals who are subject to a refusal of entry in accordance with Article 14 SBC, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of an external border. According to the CJEU, the purpose of this provision is to permit Member States to continue to apply simplified national return procedures at their external borders.71

According to the CJEU, interception and refusal of entry are both characterised by the vicinity of an external border, and these measures serve to ensure that the ‘third-country national refused entry does not enter the territory of the Member State concerned.’72 As such, the possibility to exclude such third-country nationals from the scope of the Return Directive ‘allows the competent national authorities to take the necessary measures easily and swiftly [...]in order to prevent that person from staying on that territory.’73 The border procedure in Article 43 RAPD serves a similar purpose, as it gives Member States the possibility to deny applicants the right to legally enter their territories. It follows logically that the term ‘border’ in that provision should be understood to refer to an external border.

68 Art 1 and Title II Chapter 1 SBC
69 Recital 6 Preamble SBC.
70 CJEU Case C-479/16 A.S. [2017] and CJEU Case C-646/16 Jafari [2017] para 50.
71 CJEU Case C-47/15 Affum [2016] para 74 and CJEU Case C-444/17 Arîb and others [2019].
72 Art 14(4) SBC.
73 CJEU Case C-444/17 Arîb and others [2019] para 54 and CJEU Case C-47/15 Affum [2016].
2.6.3. Reinstatement of internal border controls

The SBC provides for the temporary reinstatement of border control either in case of a serious threat to public policy or internal security in a Member State. Moreover, such a reinstatement is possible in case of serious deficiencies in the external border management of a Member State, which put the overall functioning of the area without internal border control at risk. Article 32 SBC provides that ‘Where border control at internal borders is reintroduced, the relevant provisions of Title II [relating to external borders] shall apply mutatis mutandis.’ This raises the question as to whether third-country nationals who apply for international protection when subjected to internal border control, can be referred to a border procedure.

Here again, case law on the Return Directive may provide guidance. According to the CJEU, the exception contained in Article 2(2)(a) Return Directive does not apply, if a third-country national has been intercepted in the immediate vicinity of an internal border, even where that Member State has reintroduced border control on account of a serious threat to public policy or internal security in that Member State. According to the Court, the mere introduction of internal border control does not mean that Member States would be able to remove more swiftly or more easily third-country nationals intercepted in connection with the crossing of such border from the Schengen territory by being returned immediately to an external border. Nonetheless, the CJEU highlighted that the third-country national in the case at hand had been intercepted, not refused entry. It did not exclude the possibility that under Article 32 SBC the obligations imposed on carriers of onward transportation in Article 26 CISA would apply, if such entry was refused across an internal border.

On the basis of this case law and the objectives underlying the border procedure, it could be argued that border procedures could not be conducted at an internal border, if border controls were reinstated in case of a serious threat to public policy or internal security in a Member State. However, if the reason for reinstatement would lie in ‘serious deficiencies in the external border management of a Member State which put the overall functioning of the area without internal border control at risk’, a different conclusion would be justified. In that situation, the application of the border procedure according to which applicants are not legally granted the right to enter is directly connected with external border management and the overall functioning of the area without internal border control.

2.7. Transposition and application by the Member States

In this section we assess the transposition and application of Article 43 RAPD. We first address practices of non-admission and the location of such practices, and then we discuss the circumstances in which Member States examine applications prior to deciding on entry. We do not address return proceedings after applications have been rejected, as these do not fall within the scope of our research.

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74 Art 25 and 26 SBC.
75 Art 29 SBC
76 CJEU Case C-444/17 Arib and others [2019] para 67.
77 CJEU Case C-444/17 Arib and others [2019] para 56.
78 CJEU Case C-444/17 Arib and others [2019] para 58.
79 Except possibly if entry was refused on the grounds of public order or national security.
2.7.1. Non-admission: practices and location

In the first place, it should be mentioned that over the last years there have been more than a few instances of Member States refusing applicants for international protection entry at the external border without examining their applications. AIDA has reported push-backs at the external (and internal) borders of a number of Member States.\(^{80}\) Some cases concerning Lithuania\(^{81}\), Poland and Slovakia\(^{82}\) have reached the ECtHR. That Court recently issued a judgement concerning Polish practice of refusing entry and returning third-country nationals who came from Belarus, even if they had made it clear that they wished to apply for international protection in Poland.\(^{83}\)

Secondly, some Member States deny legal entry to asylum applicants at the border but do not categorise the procedures subsequently applied to them as border procedures. Practices such as those facilitate an ‘à la carte regime that allows [those Member States] to conduct what are essentially border procedures whilst dispensing with the provisions governing them.’ An example is the asylum procedure that took place in the Hungarian transit zones until 26 May 2020.\(^{84}\) Another example is Lithuania. With regard to that Member State EASO writes: ‘Lithuania does not provide for a border procedure in its national legal framework. However, asylum applications at the border crossing points are analysed in accelerated procedures and all aspects of border procedure are applicable.’\(^{85}\) Similarly, with regard to Slovakia, EASO describes the situation as follows: ‘Slovakia does not have specific border procedures as prescribed in the recast APD. If an application is made in a transit zone of an international airport, the applicant is placed in a reception centre in the transit area or in a dedicated area of a reception facility. A decision is made on whether to allow entry into the territory within 7 days from an initial interview.’\(^{86}\) Such procedures qualify as border procedures. Whilst thus jeopardising the attainment of the aim of harmonisation, these practices bring about an additional complication: Many of the country reports that we consulted for this study use domestic legislation in order to determine whether Member States use a border procedure or not. As such, they may not always provide an adequate picture of what happens at the border, and as such to address the conformity of Member State practices with EU law, international law and fundamental rights becomes very complex.

In the third place, practice with regard to border procedures at internal borders is ambiguous. Italy for example has identified border or transit areas in several provinces along the Slovene border, an internal border.\(^{87}\) France seems to refuse entry to third-country nationals who cross the internal border from Italy or Spain, when internal border control was reinstated, but does not apply any procedure to these applicants.\(^{88}\) The CPT has expressed concerns that Slovenia has legislation in place that enables it to reject applications for asylum as inadmissible, if a foreign national tries to enter Slovenia illegally at a border crossing and expresses the intention to apply for asylum, when he comes from a neighbouring EU Member State regarding which there are no systemic

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\(^{80}\) See Table 1 in the Annex to this report. See for Slovenia also Zagorc and Kogovšek (2017).

\(^{81}\) ECtHR 11 December 2018, Appl no 59793/17 M.A. and others v Lithuania (violation of Art 3 ECHR).

\(^{82}\) ECtHR 11 June 2020, Appl no 17189/11, M.S v Slovakia and Ukraine (no violation as regards Slovakia).

\(^{83}\) ECtHR 23 July 2020, App nos 40503/17, 42902/17 and 43643/17, M.K. and others v Poland.

\(^{84}\) CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Délalföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] Opinion of AG Pikamäe, para 135. See also CJEU Case C-808/18 Commission v Hungary (still pending).

\(^{85}\) EASO (2020) p 37. See similarly with regard to Luxemburg EASO (2020) pp 36-37. See further Table 1 in the Annex to this report.

\(^{86}\) EASO (2020) p 43.

\(^{87}\) EASO (2020) p 18.

shortcomings in relation to asylum procedures and reception conditions that could cause the danger of torture, inhuman or degrading treatment.  

### 2.7.2. What cases do Member States examine in a border procedure?

We have seen that border procedures may be used with no restrictions on analysing admissibility but with limited powers to assess the substance, namely, in the situations listed in Article 31(8) RAPD. Although the requirement that the list of cases that may be examined at the border is limited seems clear in theory, Member State practice is far from uniform.

#### Pre-screening or systematic application of the border procedure?

Several Member States pre-screen applicants at the external border, before they refer them to the border procedure. Austria, for example, subjects applicants to a screening interview that follows the general rules of the regular asylum procedure. On the basis of the interview, the determining authority decides whether the case is referred to the airport procedure. Lithuania applies an initial screening within 24 hours from the lodging of applications made at a border crossing point. The screening consists amongst others of a primary interview and a vulnerability assessment.

In the Netherlands and Belgium on the other hand, the border procedure is applied to all applications made at the border. In the Netherlands, in most cases, the determining authority decides on the fourth day of the border procedure, after the personal interview, whether the decision will be taken in the border procedure. It is argued that only then, there is a complete picture of the case. In Italy, domestic legislation allows for ‘automatic application of accelerated border procedure to persons seeking asylum at the border, as it makes its application solely contingent on the person having tried to evade controls.’ Similarly, in Spain, the border procedure is applied to all asylum applicants who ask for international protection at airports, maritime ports and land borders, as well as those detained in immigration detention centres for irregular migrants.

#### Admissibility and Dublin

Most EU Member States apply the border procedure to applicants for whose asylum application another Member State is responsible under the Dublin Regulation. It should be noted that Czech law limits the application of the border procedure to Dublin cases, where ‘a serious risk of his/her absconding exists.’ This is the ground for applying detention in Dublin cases. Belgium, Germany, Latvia and Romania seem to grant asylum applicants access to the territory, if another Member State is responsible for the examination of their case.

Most Member States (also) assess the admissibility of asylum cases in the border procedure on the basis of Article 33 RAPD. Only Germany and Romania seem to examine the manifestly

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90 See Table 2 in the Annex to this report.  
91 EASO (2020) p 37.  
93 Immigration and Naturalisation Service (IND) Working Instruction 2020/9, p 10. The situation is similar in Belgium.  
94 AIDA (2020) Italy, p 68.  
95 AIDA (2020) Spain.  
97 Art 28 Regulation 604/2013.  
98 See Table 2 in the Annex to this report.
unfoundedness, without assessing the admissibility of an asylum application in the border procedure.  

Substantive examination

ECRE mentioned in 2019 that 10 out of 23 AIDA countries examine the merits of applications in a border procedure. In the Member States we identified that have a border procedure according to national law, only Latvia does not reject asylum applications on the substance. Latvia limits the assessment in the border procedure to the grounds for inadmissibility.

Many Member States assess whether an asylum application is (manifestly) unfounded in the border procedure. Some Member States, such as Italy, Greece and Portugal apply a full assessment of the case. This means that a decision is taken on the asylum application itself. Other Member States, such as France, Germany and Spain limit their examination to the question whether an asylum applicant should be granted entry to the territory in order for the asylum application to be examined in a regular asylum procedure. These procedures are characterised by very short time limits. Nevertheless, such assessment may include an assessment on the substance, such as an examination of credibility issues.

Austrian law applies the border procedure only, if there is no justified indication that the asylum applicant would be granted refugee status or subsidiary protection and one of four specific grounds mentioned in Article 31(8) RAPD apply. It concerns the situation that the asylum applicant:

1. tried to deceive the determining authorities;
2. made statements concerning their asylum account, which are obviously inconsistent with the facts;
3. has not claimed that they have been persecuted in the country of origin; or
4. originates from a safe country of origin.

According to EASO, in 2019, the recognition rate for first instance decisions under the border procedure was 7% in border procedures. This was a lot lower than the total recognition rate for first instance decisions (33%). According to EASO, this may be explained by the fact that in most countries, cases channelled into the border procedure ‘belong to categories less prone to receive protection’. EASO statistics may also be understood against the background that some Member States, such as Belgium, the Czech Republic, Germany, Greece and Romania, grant international protection to asylum applicants in the border procedure, while other Member States do not. The Netherlands for example always refers an asylum case to the regular procedure, if it intends to grant international protection. The recognition rate in the Dutch border procedure is thus 0%.

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99 See Table 2 in the Annex to this report.
100 Sections 23(6), 29(1)(1), 30(1) Latvian Asylum Law.
101 ECRE (2020) p 33.
102 See Tables 3, 4 and 5 in the Annex to this report.
106 See Table 2 in the Annex to this report.
107 Art 3.109b(3) Dutch Aliens Decree.
2.8. Concluding remark

We reflect on the findings of this chapter and the way they relate to Research Question 1 in particular in Chapter 5 of this report (section 5.2, key findings 1-8 and 10, and section 5.3., key findings 28-30). Now that we have identified the aims and defining elements of the border procedure, we will zoom in on two particular characteristics of a border procedure which pose specific challenges for their compliance with fundamental rights. The next chapter will focus on detention, while Chapter 4 will address procedural guarantees in the context of the examination of the asylum application.
3. Detention

3.1. Introduction

According to the Commission in 2013, an important reason for limiting the use of border procedures was the circumstance that such procedures imply detention. The link between border procedures and detention in the RAPD is only explicitly acknowledged in the provision that addresses the use of border procedures with regard to unaccompanied minors: Article 25 (6) RAPD stipulates that when Member States identify an applicant as an unaccompanied minor, they may apply or continue to apply Article 43 only in certain cases, ‘in accordance with Articles 8 to 11 of Directive 2013/33/EU.’ These latter provisions regulate detention in the recast Reception Conditions Directive.

The link between border procedures and detention is explicitly codified in Article 8(2)(c) RCD, according to which an applicant may be detained in order to decide, in the context of a procedure, on the applicant’s right to enter the territory. In this chapter we examine the relationship between detention and border procedures, and assess the transposition and application of EU law by the Member States in this area with particular regard to the aims underlying EU action in the CEAS and conformity with fundamental rights.

First, we briefly analyse the conformity of restrictions on liberty in EU border procedures with the 1951 Refugee Convention (section 3.2). After that, we analyse how a stay at the border or at the transit zone should be legally qualified (section 3.3). We then turn to the requirements for a lawful deprivation of liberty under EU law, with a particular focus on legality, proportionality and the use of alternatives (section 3.3). Next, we discuss the conditions of detention at the border (section 3.4).

An important caveat should be made at the beginning of this chapter. While precise information with regard to the transposition and application of border procedures seems difficult to obtain in general, this is all the more so when it concerns the use of detention at the border or in transit zones of applicants. The lack of publicly available data on the detention of asylum applicants, or the provision of inconsistent or outright contradictory information, has been signalled before as highly problematic. This lack of data concerns the locations of detention, the length of detention, the specific grounds for detention, the procedural safeguards in place, as well as the use of less coercive alternatives.

As a result, analysing the transposition and application of EU law in this area through the use of secondary sources is extremely difficult, and remains limited in important respects. At the same time, the lack of officially available data and the existence of inconsistent or contradictory information in various reports is in itself a key finding of our research, indicating a clear need for establishing better conditions and mechanisms for monitoring the compliance of Member States with their EU law obligations in this area. In view of the persistent problems that feature with regard to detention at external borders and in transit zones of the Member States, it is difficult to understand why the transposition of the provisions on detention in the RCD and Article 43 RAPD has not been evaluated by the Commission.


3.2. Conformity with the Refugee Convention

A border procedure is characterised by the refusal of entry and its territoriality (at the border or in a transit zone). At the same time, asylum applicants have a right to remain and they cannot be returned before the existence of a risk of refoulement is assessed. Moreover, Article 18 of the Charter provides for the right to asylum. This particular legal constellation inevitably impacts on the liberty of applicants who apply for asylum at the border or in a transit zone. Indeed, in border procedures entry is refused precisely in order to prevent free movement within the territory of the Member State (and the potential for subsequent irregular movements in the Schengen area). In this section we discuss how the restrictions on the liberty of applicants relate to Article 31 of the 1951 Refugee Convention. This provision reads as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees, restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The meaning of ‘illegal entry’ in Article 31 includes arriving or securing entry through the use of false documents, or the use of other methods of deception. Restrictions on movement in the sense of Article 31(2) may include administrative detention. However, such administrative detention becomes a penal sanction whenever basic safeguards are lacking. This would be the case, if there is no legal basis for such detention, or if its duration is excessive. Restrictions on movement should be necessary and be applied only on an individual basis. Moreover, the detention of applicants is an exceptional measure, which should be applied on an individual basis after it has been determined that it is necessary in light of the circumstances of the case.

The regularisation of the status mentioned in Article 31(2) should be understood as including a formal authorisation to enter. Hence, the way in which the border procedure with its inherent restrictions on liberty is regulated in secondary EU law, is in accordance with the Refugee Convention and follows its rationale. As argued in the previous chapter, entry can be refused but only in a limited number of circumstances, which need to be assessed individually. In these cases, there is a ground for restrictions on the liberty of applicants, but only for as long as soon as it appears necessary to do so. Formal authorisation to enter should be granted, when an application cannot be decided in a border procedure or because it appears that international protection should be granted.

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113 Goodwin-Gill (2003).
115 Goodwin Gill argues that ‘Although expressed in terms of the ‘refugee’, Article 31 Refugee Convention would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers.’ Goodwin-Gill (2003) p 193.
3.2.1. Member State practice

We do not assess Member State practice here, as the cases in which Member States use border procedures have been analysed in the previous chapter. Systemic or automatic use of these procedures, as practiced by some of the Member States,\(^ {116}\) does not only violate EU secondary law but also Article 31 of the 1951 Refugee Convention.

However, in order to illustrate problems regarding reporting, monitoring and evaluation of the Member States’ transposition of EU law and the conformity thereof with their international legal obligations, we highlight the practice by Bulgaria, a Member State which according to EASO does not apply the border procedure.\(^ {117}\) However, Bulgaria detains asylum applicants upon entry as removable irregular migrants prior to giving them access to the asylum procedure.\(^ {118}\) Access to the procedure can sometimes take weeks or even months from the moment an application is lodged. In some cases, detention is continued during the asylum procedure.\(^ {119}\) Spain employs similar policies at particular places.\(^ {120}\)

3.3. Qualification of a stay at the border or in the transit zone

In this section we address to what extent the situation of applicants in a border procedure should be categorised as amounting to detention, or as a restriction of their freedom of movement. We will argue that the legal constellation of EU asylum law is such that in most cases the use of a border procedure implies detention.\(^ {121}\)

We first turn to the case law by the ECtHR on the legal qualification of the stay of applicants at the border or in a transit zone. After that, we will discuss a recent judgment by the Court of Justice regarding the stay of applicants in the transit zone between Hungary and Serbia. We assess the implications of this case law for drawing the line between deprivations of liberty and restrictions on freedom of movement. As practices of de facto detention inevitably result in the absence of procedural safeguards, we also touch briefly upon procedural safeguards applicable to detention. We then assess Member State practice, with specific regard to lack of available data, imprecise or inconsistent information, practices of de facto detention and the situation at hotspots.

3.3.1. Legal qualification in the ECtHR’s case law

According to the ECtHR, the difference between deprivations of liberty and mere restrictions of liberty is one of degree or intensity, and not one of nature or substance.\(^ {122}\) In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Article 5 ECHR, the starting point must be their concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of transposition of the measure in

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\(^ {116}\) Van Oort (2018)

\(^ {117}\) EASO (2020) p 24.

\(^ {118}\) Detention may be ordered on account of irregular entry, see AIDA (2020) Bulgaria.

\(^ {119}\) Hungarian Helsinki Committee (2019). See also AIDA (2018).

\(^ {120}\) In the form of automatic pre-removal detention of third-country nationals at the Port of Andalucia at police stations in Almería, Tarifa, Motril and Algeciras who upon filing an asylum application are transferred to Foreigner Detention Centres (CIE) and channelled in the border procedure. See AIDA (2018).

\(^ {121}\) Cornelisse (2016).

\(^ {122}\) ECHR 23 February 2017, Appl no 43395/09 De Tommaso v Italy, para 80, ECHR 6 November 1980, Appl no 7367/76 Guzzardi v Italy, para 93, ECHR 7 January 2010, Appl no 25965/04 Rantsev v Cyprus and Russia, para 314 and ECHR 17 January 2012, Appl no 36760/06 Stanev v Bulgaria, para 115.
question. Whether and under which conditions holding aliens at the border or in a transit zone amounts to deprivation of liberty has featured in numerous cases before the ECtHR. According to the ECtHR, the possibility for applicants to leave the country where they sought refuge does not exclude the existence of a restriction of liberty, which may under circumstances turn into a deprivation of liberty:124

_Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions._

_Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country._125

Thus, when holding is prolonged longer than necessary for considering whether the applicant should be granted leave to enter, restrictions of liberty turn into deprivations of liberty. The possibility for applicants to leave for a third country does not necessarily mean that the measures do not impact on their liberty:

_The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in._126

The ECtHR takes account the following factors to conclude whether holding asylum applicants at the border or in an international zone amounts to deprivation of liberty (detention):

1. the applicants’ individual situation and their choices;
2. the applicable legal regime of the respective country and its purpose;
3. the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events; and
4. the nature and degree of the actual restrictions imposed on or experienced by the applicants.127

This approach has often resulted in the ECtHR concluding that applicants held at the border or in transit zones were deprived of their liberty, either because of the duration of their stay there, or

123 ECtHR 6 November 1980, Appl no 7367/76 Guzzardi v Italy, para 92.
125 ECtHR 25 June 1996, Appl no 19776/92 Amuur v France, para 43.
126 ECtHR 25 June 1996, Appl no 19776/92 Amuur v France, para 48. See also ECtHR 27 November 2008, Appl no 298/07 Rashed v Czech Republic.
because there were no adequate legal safeguards available, or because of constant surveillance.\footnote{For a recent case, see ECtHR 21 November 2019, Appl nos 61411/15, 61420/15, 61427/15 and 3028/16 Z.A. and others v Russia.} However, drawing the distinction between restrictions on liberty and deprivations may raise complex issues of fact and law, as was illustrated by a recent Grand Chamber judgment by the ECtHR (overturning a unanimous chamber judgment on this point).

The case of \textit{Ilias and Ahmed}, concerned two third-country nationals, who were held for 23 days in the transit zone between Hungary and Serbia, while their asylum applications were assessed. After these had been rejected as inadmissible (also in appeal), the applicants were escorted out of the transit zone into Serbia. According to the ECtHR, their stay in the transit zone did not amount to a deprivation of liberty. The ECtHR took a number of circumstances into account to arrive at this conclusion, such as the individual situation and choices made (the applicants had crossed the border into Hungary voluntarily); the legal regime in Hungary and its purpose (Hungary’s right to control its borders and the right to verify and examine asylum claims before deciding on admittance); the duration of the stay in the transit zone (23 days was not excessive); and the nature and degree of the restrictions on liberty (the applicants could leave the zone if they crossed the border – albeit illegally – into Serbia). The ECtHR also emphasised the broader migration context at the time (September 2015), which was characterised by ‘mass influx of asylum-seekers and migrants at the border’ which ‘necessitated rapidly putting in place measures.’\footnote{ECtHR 21 November 2019, Appl no. 47287/15 \textit{Ilias and Ahmed v Hungary}, para 228.}

\subsection*{3.3.2. Legal Qualification in EU law}

In EU asylum law, detention is defined as ‘confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.’\footnote{Art 2(h) RCD.} In a recent case, the CJEU was called upon to qualify the accommodation at the border of asylum applicants. In doing so it illustrated the autonomy of EU law vis-a-vis the ECHR. As in \textit{Ilias and Ahmed}, the case concerned applicants who were ordered to remain in the transit zone between Hungary and Serbia. At the time, obligatory residence in the transit zone was provided for by Hungarian law in a case of crisis caused by mass immigration. The authorities did not regard obligatory residence in the transit zone as a deprivation of liberty, because, they claimed, applicants whose applications for asylum have been rejected could leave the transit zone in the direction of Serbia.

The CJEU defined detention as ‘a coercive measure that deprives [an] applicant of his or her freedom of movement by requiring him or her to remain permanently within a restricted and closed perimeter’.\footnote{CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság (2020) para 223.} It then examined the accommodation conditions in the transit zone, drawing attention to the fact that this zone was surrounded by fences and barbed wire, that applicants were housed in containers of no more than 13m\textsuperscript{2} and were under constant surveillance. These circumstances were sufficient for the Court to conclude that accommodation in the transit zone was to be characterised as a ‘detention regime.’ The fact that the Hungarian government insisted that the applicants could leave the transit zone in the direction of Serbia did not alter the \textit{prima facie} finding that their situation amounted to detention. First, entry of the applicants into Serbia would...
be considered illegal by that country. Second, by leaving Hungarian territory, the applicants would lose all possibilities to obtain international protection in Hungary.

Even disregarding the fact that the circumstances in the case decided by the CJEU differed somewhat from those pertaining in Ilias and Ahmed, most notably with regard to the domestic legal framework that was applicable in both cases, an outcome such as reached by the ECtHR would be difficult to reconcile with EU law in any case. Indeed, in its reasoning the CJEU seems to rely implicitly on Article 18 of the Charter protecting the right to asylum. Leaving the transit zone will result in forfeiting this right. Moreover, we have seen in Chapter 2 that EU law explicitly grants asylum applicants a right to stay on the territory of the Member State, therewith including a stay at the border or in a transit zone. There is a logical inconsistency in arguing that people who are kept in a closed area and are wholly dependent on the authorities are not detained, because they can leave this area to cross a border illegally, therewith forfeiting their right to remain and their right to request asylum. The argument that the restrictions on their liberty are of a fundamentally different character because they ‘requested admission to that State’s territory of their own initiative’, makes no sense in the EU legal framework, as these persons exercise a right explicitly granted to them by EU law.

However, the CJEU also referred to UNHCR Guidelines, stating that ‘[the distinction] between deprivation of liberty (detention) and lesser restrictions on movement is one of ‘degree or intensity and not one of nature or substance’. The judgment thus clarifies that detention is characterised by isolation of applicants from the rest of the population by requiring them to remain permanently within a restricted and closed perimeter. Thus, if applicants are free to leave the facility in which they are housed, and the area in which they can move freely is substantial and not enclosed or restricted by physical means, their situation would be qualified as a restriction on their freedom of movement.

This interpretation of the judgment is reinforced by the CJEU’s conclusions with regard to Article 43(3) RAPD. As we have seen, that provision allows Member States to apply border procedures for longer than four weeks

*in the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.*

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132 CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Délalföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 229.

133 CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Délalföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 230.

134 Cornelisse (2020).

135 ECtHR 21 November 2019, Appl no. 47287/15 Ilias and Ahmed v Hungary, para 212. See also para 220: ‘The Court observes, first, that the applicants entered the Röszke transit zone of their own initiative, with the aim of seeking asylum in Hungary. While this fact in itself does not exclude the possibility of the applicants finding themselves in a situation of de facto deprivation of liberty after having entered, the Court considers that it is a relevant consideration, to be looked at in the light of all other circumstances of the case.’

136 CJEU Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Délalföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 223.

137 Art 43(3) RAPD.
The CJEU ruled that the requirement that asylum applicants are ‘accommodated normally’ necessarily means that they cannot be detained.\textsuperscript{138} Normal accommodation under Article 43(3) means that they have access to material reception conditions and housing under the RCD.\textsuperscript{139} However, their freedom of movement can be restricted to an area near the border or a transit zone in accordance with Article 7 RCD.\textsuperscript{140}

When freedom of movement of applicants is restricted to an assigned area, Article 7 RCD requires that this area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive. Member States may also decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.\textsuperscript{141}

3.3.3. Procedural safeguards applicable to deprivations of liberty at the border or in transit zones

Procedural guarantees that apply in cases of detention are not particular to detention at the border or in transit zones, so this report does not address these guarantees separately. However, as practices of de facto detention inevitably result in the absence of these safeguards, we touch briefly upon some aspects of these here.

In the first place, according to Article 9(2) RCD, the detention of an asylum applicant is to be ordered in writing by a judicial or administrative authority and the detention order is to state the reasons in fact and in law on which it is based.\textsuperscript{142}

Secondly, Article 9(3) RCD requires that where detention of the asylum applicant is ordered by an administrative authority, Member States are to provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the person detained.\textsuperscript{143} In addition, Article 9(5) RCD provides that detention is to be reviewed by a judicial authority at reasonable intervals of time, ex officio or at the request of the applicant concerned. Where detention is held to be unlawful, the person concerned is to be released immediately.\textsuperscript{144} The national court reviewing the lawfulness of detention must be able to substitute its own decision for that of the administrative authority that ordered the detention.\textsuperscript{145}

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\textsuperscript{138} CJEU Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 245.
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\textsuperscript{139} Art 17 and 18 RCD, see CJEU Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 245.
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\textsuperscript{140} CJEU Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 247.
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\textsuperscript{141} Art 7(2) RCD.
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\textsuperscript{142} Art 9(2) RAPD. See CJEU Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 257.
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\textsuperscript{143} See also Art 5(4) ECHR.
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\textsuperscript{144} Art 9(3) RAPD. See also CJEU Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] para 329.
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3.3.4. Transposition and Application by the Member States

As mentioned above, the assessment of Member State practice regarding accommodation of applicants during border procedures through the use of secondary sources is difficult, as these sources at times often replicate the official position of the Member State regarding the qualification of the stay at the border or transit zone. Moreover, frequently contradictory information is presented.

As an illustration, in response to an EMN Ad Hoc Query on accelerated procedures and procedures at the border, Austria’s National Contact Point (NCP) indicated that Austria does not have a border procedure. Therefore, they could not answer the question how applicants are accommodated during a border procedure. However, in the same response, they indicated that Austria has provisions for a special procedure at the airport. In another response to an EMN Ad Hoc Query on detention of asylum applicants at the border, Austria’s NCP provided the following information regarding accommodation in the airport procedure: ‘the asylum seeker needs to stay in a Special Transit Centre at the airport for the duration of the procedure - but for six weeks at the most. However, the person concerned always has the opportunity to voluntarily leave the country again.’ The EASO report repeats the seemingly official stance that ‘the applicant may decide to leave Austria at any time during the airport procedure’ and with regard to detention it only specifies that de facto detention of rejected applicants takes place in order to ‘implement negative decisions and secure return.’ In none of these reports it is thus acknowledged that accommodation of applicants during the airport procedure amounts to de facto detention.

The NCP of the Czech Republic replied to an EMN Ad Hoc query regarding detention of applicants at the border that applicants can be refused entry to the territory, if their identity is unclear or if there is a fear of risk for public order, public health or state security. They added that this does not entail ‘a form of strict detention, the freedom of movement is not as limited as in case of detainees.’ However, they mentioned that ‘if this restriction is applied, the asylum seeker is held within the reception centre at the international airport directly in the transit zone’ where they can be kept for four weeks. Regarding the Czech Republic, EASO merely replicates the information that applicants are ‘obliged to stay in the reception facility at the international airport, where the asylum procedure will be conducted.’ As such, a domestic legal basis for detention seems to be lacking and de facto detention of applicants in the border procedure is neither acknowledged nationally, nor at the European level.

The legislation of Finland does not recognise border detention, and EASO indicates that this Member State does not have a border procedure. However, Asylum Applicants are not cleared to enter Finland immediately upon applying for international protection upon arrival at Helsinki airport, as they will first undergo ‘a Border Guard investigation to establish the applicant’s identity, travel route and means of entry into Finland.’ This investigation is conducted at the day of arrival, or, if interpreters are not available, the next day. In Helsinki International Airport and in connection with the Border Guard’s facilities, there is a separate waiting and rest area for persons subject to the Border Guard’s measures and/or decisions. Persons are free to move in the transit area in between investigations. The limited duration of these investigations (one, max two days) seems to be the

146 EMN (2017).
147 EMN (2015).
148 In the most recent country report by AIDA, there is no information on the airport procedure. AIDA (2020) Austria.
150 EMN (2017) and EASO (2020) p 27.
151 EMN (2015).
main reason that the situation of applicants in this situation is not qualified as detention, and as such, at first sight this seems in conformity with the case law of the ECtHR.

In France, at external borders, there is a clear qualification of the accommodation of applicants in a ‘waiting area’ as detention in domestic law, and judicial supervision is provided for. Nonetheless, the EASO report on border procedures does not even use the term ‘detention’ in the section addressing border procedures in France. What’s more, the situation at internal borders in France is much less regulated. Indeed, it has been reported that in the ‘context of ongoing systematic controls on the Italian border throughout 2017, the French border police has detained newly arrived asylum applicants without formal order in a “temporary detention zone” (zone de rétention provisoire) made up of prefabricated containers in the premises of the Menton Border Police.’ Detention is applied in order to assess the situation of entrants and for issuing refusals of entry.

According to Germany, the stay of applicants in the transit area during the airport procedure ‘does not represent a custodial nor a liberty restricting measure’ in accordance with case law by the German Federal Constitutional Court. The NCP of the Member State referred to the fact that if the applicant wishes to depart, their departure will be organised as soon as possible. Only after thirty days after the arrival at the airport at the latest, the German Federal Police is obliged to obtain a judicial order for the stay in the transit area. However, as the airport procedure cannot last more than 19 days, this legal order for the detention would concern applicants whose applications for international protection have been rejected, also in appeal. Germany replied to an EMN query on detention at the border as follows: ‘the persons concerned are lodged in a building within the airport compound specifically intended for such cases from where the departure or entry of the country can be organised by the German Federal Police at any time.’ Again, it is striking that EASO merely replicates the national legal framework, thus stating that applicants are accommodated in the transit zone without addressing the question of the legal qualification of such ‘accommodation’.

Hungary has recently closed the transit zone at the border with Serbia. It is not clear whether special procedures are applied at airports. The EASO report on Latvia and Lithuania does not mention detention at all, applicants are ‘accommodated’ at ‘border crossing points’ or at ‘border crossing transit zones’. Whether this amounts to *de facto* detention or to what extent a legal basis in domestic law exists for the detention of applicants is not clear.

With regard to Luxembourg, EASO reports that applicants are accommodated in a reception centre, and it adds rather cryptically that this is where they ‘will remain’ until a final decision is issued. In response to an EMN Ad Hoc Query, Luxembourg’s NCP replied that ‘in case the person is controlled at the airport and presents false documents or had already been refused entry into the country and

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153 EASO (2020).
155 AIDA (2018).
159 In 2014, a special procedure at the airport existed, see EMN (2015) p 6: ‘there are special accommodation premises both in Terminal 1 and Terminal 2 of the Budapest airport for the duration of the procedure.’ It is unclear whether and under which conditions special procedures at Budapest airport are still applied.
then applies for international protection, the person can be detained and placed in the detention centre.\textsuperscript{162}

In Slovakia, as was mentioned in Chapter 2 of this report, the border procedure is not qualified as such in national law. EASO writes that the ‘applicant is placed in a reception centre in the transit area or in a dedicated area of a reception facility’ and no mention of detention is made.\textsuperscript{163} However, the NCP of this Member State indicates that reception centres in the transit zone in the airport are not in use, seeing that only a minimum number of applicants for international protection arrives in Slovakia via international airports. As such, applicants are transported to premises set up in another asylum facility in the company of a policeman.\textsuperscript{164} While the transport and stay are not considered to be an entry in the country, the qualification of the accommodation itself in national law remains opaque.

EASO reports that in Portugal, the law provides for the detention of applicants for the duration of the admissibility stage. However, as decisions in the border procedure can also concern the merits, it is unclear whether detention can be continued after it has become clear that an application is not inadmissible. Portuguese legislation provides a legal basis for detention during the border procedure, and border detention in Portugal must be validated by a court.\textsuperscript{165}

There are also other Member States that qualify the accommodation of asylum applicants in border procedures clearly as a deprivation of liberty, such as Belgium, the Netherlands, France and Spain. In these states, procedural guarantees are applicable. However, the data on procedural guarantees is not always clear, as for example in Spain, judicial review is provided for, when detention is imposed with the purpose of return as a result of a refusal of entry.\textsuperscript{166} However, under EU asylum law, detention cannot be imposed with a view to return until the application has been rejected after appeal,\textsuperscript{167} and as such it is not clear whether judicial review also applies to detention in the border procedure as such. In other Member States, such as Greece, we see a combination of practices of \textit{de facto} detention and formal practices of detention.\textsuperscript{168}

In Member States that apply the hotspot approach, we see a blurring between deprivation of liberty and restrictions on freedom of movement.\textsuperscript{169} This issue has been a key source of concern since the commencement of their operation, and can be traced back to the lack of a clear legal framework regulating the restrictions imposed on applicants in such places.\textsuperscript{170} Thus, \textit{de facto} detention occurs at the hotspots in Italy, where people are detained in Lampedusa without receiving a detention order.\textsuperscript{171} After the identification and fingerprinting process has been concluded, applicants are in some but not all cases free to leave the premises during day time.\textsuperscript{172} According to the CPT, several categories of foreign nationals may be prevented from leaving the hotspots without a clear legal basis, and - citing the Italian National Preventive Mechanism - without judicial control and the

\textsuperscript{162} EMN (2015).
\textsuperscript{163} EASO (2020), p. 43
\textsuperscript{164} EMN (2019-I).
\textsuperscript{165} EMN (2015) and ECRE (2020) pp 175-177.
\textsuperscript{166} See ECRE (2020) p 188.
\textsuperscript{167} CJEU Case C-181/16 Gnandi [2018] para 62.
\textsuperscript{168} For example, at Evros, \textit{de facto} detentions take place, while at Athens airport there is a legal basis for detention. See Hungarian Helsinki Committee (2019).
\textsuperscript{169} Majcher (2018).
\textsuperscript{170} Danish Refugee Council (2017).
\textsuperscript{171} FRA (2019) p 59. See also ECtHR 15 December 2016, Appl no 16483/12 Khalifa and Others v Italy.
\textsuperscript{172} But not in all, for example in Lampedusa detention may continue. AIDA (2020) Italy.
possibility of appeal. As hotspots were not formally regarded as deprivation of liberty, no detention orders were issued. Information on rights and procedures was given orally and in written form at the moment of disembarkation or arrival at the hotspot. However, the documents contained complex legal information, and oral explanation was insufficient due to the limited number of legal officers - these group information sessions took place after the pre-identification interview had already taken place. Foreign nationals had the right to apply for asylum anytime until the moment of their forced return, however their ability to do so could be impaired by the lack of information.

In Greece, the initial accommodation of applicants in Lesvos, Chios, Samos, Leros, Kos in the Reception and Accommodation Centres can be qualified as detention. However, the geographical restriction that applies after release could in theory be seen as a measure that restricts freedom of movement. At the same time, reports have highlighted the practical obstacles that applicants encounter after they have been released from detention: ‘asylum seekers are still trapped under conditions highly similar to those of detention.’ Hence, if restrictions on freedom of movement are applied in the hotspots, there seems to be little consideration for the unalienable sphere of private life and access to all benefits under the RCD is not always guaranteed as required by Article 7 RCD.

This overview of Member State practice shows that the same factual situation may amount to deprivation of liberty in one Member State, while it would not be classified as such in another. This jeopardises the uniformity of EU law, therewith hindering the attainment of the underlying objectives of EU action in this area. More fundamentally, the numerous instances of de facto detention in Europe, be it at border posts, transit zones, reception centres, boats, islands or airports, constitute serious violations of the fundamental rights of applicants, and means that the applicable procedural guarantees are not applied. As such, it is striking that the transposition and application of EU law in this area has not been evaluated by the Commission.

3.4. Requirements for lawful detention

This section deals with the conditions that have to be met in order for deprivations of liberty in a border procedure to be lawful. We start with some general reflections on the prohibition of arbitrariness that forms the core of the right to personal liberty. Then we address the legal basis for border detention in domestic law, the grounds for such detention under the RCD, and the proportionality and necessity of the measure, including alternatives.

3.4.1. The prohibition of arbitrariness

The right to personal liberty is protected in all major human rights instruments. For our analysis we focus on Article 6 of the Charter and Article 5 ECHR. In accordance with Article 52(3) of the Charter, the meaning and scope of Article 6 corresponds to the protection offered by Article 5 ECHR, leaving open the possibility that EU law provides more extensive protection. Consequently, the limitations which may legitimately be imposed on Article 6 of the Charter may not exceed those permitted by the ECHR.

Article 6 Charter: Everyone has the right to liberty and security of person

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173 CPT (2018) para 31
174 CPT (2018) para 33
175 CPT (2018) para 35
Article 5(1) ECHR: Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...  

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Any deprivation of liberty should be in keeping with the purpose of the right to personal liberty, namely protecting the individual from arbitrariness. This is reflected in Article 53 of the Charter, in the requirement that restrictions on the rights protected by the Charter should respect the essence of those rights and freedoms. According to the ECtHR, the measure depriving a person of liberty should be in conformity with the objective of protecting the individual from arbitrariness. That means, in particular, that there can be no element of bad faith or deception on the part of the authorities; that detention has a legal basis in national law; that the deprivation of liberty concerned is proportionate in relation to the ground relied on and that execution of the measure is consistent with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) ECHR.

In EU law, the prohibition on arbitrary deprivations of liberty is guaranteed by Article 53(1) Charter which determines that

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

3.4.2. Legality

A first requirement that follows from the prohibition on arbitrariness is the requirement of legality. Article 8(3) RAPD determines that the grounds for detention should be laid down in national law. Legality moreover entails that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself is foreseeable and sufficiently precise in its application, so that the person concerned is able to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. In the context of border procedures, provisions that merely provide for the refusal of entry and removal of aliens, but do not contain any express reference to detention or other measures entailing deprivation of liberty cannot serve as a legal basis for deprivations of liberty. De facto deprivations of liberty at the border, without a basis in national law, are for that reason alone in violation of Article 6 Charter and Article 5 ECHR.

177 ECtHR 24 October 1979, App no 6301/73 (A/33) Winterwerp v The Netherlands.


179 Obviously, this also follows from Art 53 Charter (limitations should be provided by law), but in the context of deprivations of liberty the legal basis in national law is even more pertinent in view of the prohibition on arbitrary deprivations of liberty.

180 ECtHR 15 December 2016, Appl no 16483/12000 Khlaifia and Others v Italy. The importance of a clear legal basis for deprivations of liberty was recently affirmed by the Court of Justice in a case dealing with national criminal sanctions for irregular stay in Case C-806/18, JZ [2020] para 41.

181 ECtHR 15 December 2016, Appl no 16483/12000 Khlaifia and Others v Italy.
3.4.3. Grounds for detention in a border procedure

Article 8(3) RCD provides for the grounds of detention of an asylum applicant. In the context of a border procedure, the ground mentioned under (c) is applicable: ‘An applicant may be detained in order to decide, in the context of a procedure, on the applicant’s right to enter the territory’.

This particular ground for detention of asylum applicants under the RCD is captured under the first limb of Article 5(1)(f) ECHR - the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country. It is significant that the CJEU perceives the link between a border procedure and detention such that detention in a border procedure is based on Article 43(1) and (2) RAPD.182 This means that detention in order to decide on the applicant’s right to enter the territory can only be applied in cases and under the conditions in which the border procedure may be used.

We have seen in Chapter 2 that the general rule in EU law is that asylum applicants have a right to legally enter and stay, at least until a decision in first instance is taken.183 Not granting such a right is an exception to this general rule. It should accordingly remain limited to the cases that may be decided in a border procedure according to Article 43 RAPD. This constellation is in accordance with the requirement set by the ECtHR that the grounds for detention as enumerated by Article 5(1) ECHR are to be interpreted narrowly.184 This is also required by Article 31 of the Refugee Convention as we have seen above. In this context, it is important to underline that the ECtHR has held that, if a Member State uses detention for the purpose of preventing an unauthorised entry, such a measure could raise an issue under Article 5(1)(f) ECHR, ‘if a state enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application.’185 The ECtHR considered:

Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning.186

It goes beyond the scope of this report to address the other grounds for detention under Article 8(3) RCD and their relationship to the border procedure. However, we want to draw attention to two points.

First, the CJEU insists that the grounds for detention under Article 8(3) RCD are exhaustive.187 Recital 17 of the Preamble to the RCD states that the grounds for detention in the Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law and are unrelated to application for

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183 CJEU Case C-181/16 Gnandi [2018].
184 ECtHR 29 January 2007, Appl no 13229/03, Saadi v the UK.
185 See for example, ECtHR 13 December 2011, Appl no 15297/09 Kanagaratnam v Belgium, para 35 and ECtHR 23 July 2013, Appl no 42337/12 Suso Musa v Malta, para 97.
186 ECtHR 13 December 2011, Appl no 15297/09 Kanagaratnam v Belgium, para 97 and ECtHR 15 November 2011, Appl no 57229/09 Longa Yonkeu v Latvia, para 115. Note that it might be difficult to reconcile the CJEU’s conclusions in Gnandi and those in J.N., when seen against the background of this ECtHR case law. To address this inconsistency goes beyond the scope of this report. See for the relationship between the grounds of detention in EU law and the ECHR also Cornelisse (2016-I) pp 187-195.
Border procedures in the Member States

international protection. Nevertheless, detention on these other grounds, for example related to criminal proceedings, should be in accordance with the principles and objectives of the RCD. 188 This means inter alia that detention cannot be based on the ground that the asylum applicant cannot meet his needs due to a lack of material resources. 189

Second, measures depriving applicants of their liberty before a final decision has been taken in the asylum procedure have to be based on the grounds provided in the RCD, because detention in a border procedure after a negative decision has been taken cannot be based on the Return Directive. 190 This means that the applicant may not be held in detention with a view to removal pursuant to Article 15 of the Return Directive, after a first decision rejecting the application in the border procedure.

3.4.4. Proportionality and necessity, including the question of alternatives

The recast RCD, just like all the other instruments of EU law regulating the detention of third-country nationals, determines that detention can only be used when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively. The Preamble to the RCD makes clear that detention is an exceptional measure by providing that ‘applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.’ 191 It also explicitly mentions alternatives: ‘in order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined.’ 192 If necessity is required for detention to be lawful under national or European law, it also becomes a requirement for lawful detention under the ECtHR. 193 The requirements for lawful detention in the RCD do not differentiate between the permitted grounds for the detention of applicants for international protection. 194 Thus, the obligation to assess each case individually with particular regard for the question if other less coercive alternative measures can be applied effectively, also applies to detention ‘in order to decide, in the context of a procedure, on the applicant’s right to enter the territory’. 195 As detention in the context of a border procedure is not dealt with separately, such detention must be subject to the same requirements of proportionality and necessity as detention based on the other permitted grounds in Article 8 RCD. 196

The obligation to consider alternatives is specified by requiring states to ensure that they have rules in their national law concerning alternatives to detention, such as a reporting obligation or the

188. See in the context of the Return Directive: Case 329/11 Achughbabian [2011].
189 This is so because on the basis of Article 17 the RCD, Member States need to provide for material reception conditions and health care if applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence. See Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Iidegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Iidegenrendészeti Főigazgatóság [2020] paras 252-254.
190 CJEU Case C-181/16 Gnandi [2018] para 61.
191 Recital 15 Preamble RCD.
192 Recital 20 Preamble RCD.
193 ECtHR 2 October 2008, Appl no 34082/02 Rusu v Austria, paras 57-58, and ECtHR 22 September 2015, Appl no 62116/12, and Nabil and others v Hungary, paras 40-43.
194 Article 8 (3)(c) RCD.
195 Cornelisse (2016), p. 84.
deposit of a financial guarantee. It is notable that even during the period before the recast RCD was applicable, and the grounds for detention of asylum applicants had accordingly not yet been harmonized in the Member States, the CJEU has stressed the importance of the principle of proportionality and an individual assessment when detaining applicants for international protection.\(^\text{197}\) It has since reaffirmed these requirements also under the recast RCD.\(^\text{198}\) Thus, in the words of the CJEU, ‘national authorities cannot place an applicant for international protection in detention without having previously determined, on a case-by-case basis, whether such detention is proportionate to the aims which it pursues.’\(^\text{199}\) An alternative measure to detention can be envisaged only, if the reason that justified the detention of the person concerned was and remains valid.\(^\text{200}\) If the necessity and proportionality of detention are not assessed, Article 6 Charter and Article 8 RCD are clearly violated.\(^\text{201}\)

The requirement of proportionality plays a special role where it concerns persons with special needs. Article 11 RCD determines that the health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. It requires Member States to ensure regular monitoring and adequate support where vulnerable persons are detained. In addition, the RCD stipulates that minors shall be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.\(^\text{202}\) Moreover, unaccompanied minors may only be detained in exceptional circumstances and all efforts shall be made to release the detained unaccompanied minor as soon as possible.\(^\text{203}\) The minor’s best interests shall be a primary consideration for Member States, as prescribed in Article 23(2) RCD.

In the case law of the ECtHR, the principle of proportionality and the obligation to consider less coercive measures if it concerns persons with special needs and minors is well-established. If Member States do not duly assess the proportionality of such measures and fail to consider alternatives, they act in contravention of the RCD, but also of Article 5 ECHR,\(^\text{204}\) and thus Article 6 of the Charter.

\(^{197}\) CJEU Case C-534/11 \textit{Arslan} [2013].

\(^{198}\) Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] and CJEU Case C-601/15 PPU J.N. v Staatseeraris van Veiligheid en Justitie [2016].


\(^{200}\) CJEU Joined Cases C-924/19 and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság [2020] para 293.

\(^{201}\) CJEU Joined Cases C-924/19 and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020]. See also CJEU Case C-601/15 (PPU) J.N. v Staatseeraris van Veiligheid en Justitie [2016].

\(^{202}\) Art 11(2) RCD.

\(^{203}\) Art 11(3) RCD. Art 25(6)(b) RAPD makes clear that Member States may apply border procedures to unaccompanied minors in accordance with Art 8 to 11 RCD, only in certain cases, which are dealt with in section 3.6.4 of this report.

Limits to the duration of detention are a particular manifestation of the requirement that detention needs to be a proportionate measure. Detention in the context of a border procedure is limited in time also on the basis of Article 43 RAPD: it cannot last longer than four weeks. This does not mean that border procedures can automatically last four weeks: the RCD stipulates that an applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) RCD are applicable. Even within the four-week time limit for the border procedure, the authorities are obliged to carry out the administrative procedures relevant to the grounds for detention procedure diligently, and if they do not, detention ceases to be justified. Thus, delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention. With regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. A border procedure can last longer than 4 weeks according to Article 43(3) RAPD, but in that case, applicants cannot be held in detention.

3.4.5. Transposition and Application by the Member States

In section 3.3, we have addressed the occurrence of de facto detention in the Member States. Seeing that in such cases a legal basis for detention is lacking, these measures are for that reason alone in violation of the right to liberty protected in Article 6 Charter and Article 5 ECHR. Moreover, the lack of a legal basis has implications for the conformity with all other requirements in EU law for lawful deprivations of liberty, as well as for the application of the required procedural guarantees. As such, in discussing Member State practice here, we only address the Member States that provide a legal basis for detention at the border or in the transit zones, as Member States that apply de facto detention will ipso facto not have provided for the grounds for that measure, nor assess its proportionality or necessity.

In Italy, the law allows the detention of asylum applicants in hotspots for identification purposes. However it is not clear how this ground formally relates to the border procedure. Systematic use of border procedures without consideration of the circumstances of the individual case by some Member States (see Chapter 2) means that the proportionality and necessity of the accompanying measure of detention are not duly assessed. Thus, in Belgium and the Netherlands, asylum applicants who apply for asylum at the border are systematically detained, without a necessity test or a preliminary assessment of their personal circumstances. No exception is made for asylum applicants of certain nationalities or asylum applicants with a vulnerable profile other than being a child or a family with children.

Generally speaking, proportionality, necessity and alternatives to detention are not considered by the Member States as soon as it is decided that the border procedure will be applied. Sometimes this is explicitly acknowledged. Thus, it has been reported that legislation transposing the RAPD in Belgium, Hungary and Portugal lays down detention as ‘an automatic, unqualified consequence of

205 Recital 16 Preamble RCD. Case C-601/15 PPU J.N. v Staatsecretaris van Veiligheid en Justitie [2016].
206 Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Igedenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Igedenrendsézet Főigazgatóság [2020] para 240.
207 ECRE (2020) p 69.
208 In Belgium, these applicants are not detained but placed in family units. In the Netherlands, they are detained but not in the airport detention centre.
applying for asylum at the airport, without confining it to cases where it is strictly necessary and proportionate and where alternatives to detention cannot effectively be applied.\footnote{ECRE (2018) p 20.}

The Dutch government justifies this policy by arguing that the obligation to apply alternatives is not applicable in a border procedure, as this would make the exercise of external border control impossible: a refusal of entry is only effective if it is coupled with a deprivation of liberty. Therefore, effective control of the external border requires the deprivation of liberty of all applicants for international protection who arrive at Schiphol.\footnote{Cornelisse (2016) and (2015).} A proposal to change the domestic law transposing the RAPD and RCD, so that it would stipulate that detention would only be used after an individual assessment in which less coercive measures were considered, was rejected by the government. They argued that the obligation to consider and apply alternatives would in practice mean that applying for international protection would give an individual unconditional access to the Schengen territory.\footnote{Cornelisse (2016).}

The French and Luxembourg NCP’s indicate in response to an EMN Ad Hoc query that there is no alternative to the ‘waiting area’ for asylum applicants at the border or in a transit zone (France), or that no alternatives exist for detention in the airport procedure (Luxembourg).\footnote{EMN (2015).}

In the absence of detailed data about some other Member States, the available data strongly suggests the absence of a proportionality and necessity test.\footnote{Although Denmark is not bound by the RAPD, it provides a good illustration of a state that has legislation which provides for restrictions on freedom of movement or alternatives to detention. Thus, until a decision has been made whether to refuse entry, the authorities may take actions to ensure the presence of the alien in transit at an airport with a view to his or her return. The alien may be ordered to deposit his travel documents, to provide security, to stay at a location directed by the police, or to report to the police at specified times. Only where these measures are insufficient, the alien may be placed in detention in special facilities. See Art 37(10) of the Aliens (Consolidation) Act (No. 239 of 10 March 2019).} This is supported by the fact that an obligation to consider alternatives in the context of border procedures is not even mentioned in most of the reporting,\footnote{EASO (2020) does not mention the term alternative to detention even once. In the FRA opinion on hotspots, much of the discussion regarding detention focuses on ‘pre-removal’ detention. FRA (2019).} except in those cases where it concerns applicants with special needs or minors. Research on alternatives to detention in the EU generally does not address detention at the border or in transit zones.\footnote{ELI (2017), De Bruycker and others (2015).}

Proportionality \textit{stricto sensu} is assessed by some Member States only (see for more detail Chapter 4 on the application of border procedures to applicants with special needs and minors). This means that a few Member States make an assessment whether detention is disproportionately onerous for the third-country national in view of special circumstances. In Belgium, families with children that arrive at the border are accommodated in a family unit. In France, the protection officer may put an end to the holding in the waiting zone, if an officer responsible for processing the application considers that applicants require procedural guarantees that are incompatible with his/her stay in a waiting zone (due to his/her age, or psychological, physical, or sexual violence he/she endured before arriving to France).\footnote{EMN (2019).} Children, including unaccompanied minors, are detained at the hotspots.\footnote{FRA (2019).}
As regards the duration of the detention measure in border procedures, there is also significant variation between Member States practice, ranging from two days in the waiting zone or transit zone (France and Germany) or in a Reception and Identification Centre (Greece) to 28 days (Netherlands and Belgium in closed centres; and Greece when it concerns airport transit zones). On the basis of available data, it is not possible to assess the operationalisation of the requirement that detention should not last longer than necessary.

With regard to the duration, problems may arise where international protection is granted during a border procedure, as the accompanying detention measure should be lifted as soon as it becomes clear that there are no grounds present for applying the border procedure (any longer). Similar concerns may arise when a substantial time has lapsed between the decision that access to the territory is to be granted for further examination of the claim, and the notification of such a decision. For instance, with regard to Germany, is has been reported that at Munich Airport, where the authorities decide within the time limit of 2 days, the notification of the decision to the applicant may take up to a week. This is in violation of the requirement that detention shall not exceed the time reasonably needed to complete the relevant procedure.

3.5. Conditions of Detention

The judicial review of detention as required by Article 9 RCD and Article 5 ECHR also encompasses the place and conditions of detention. In this section we address the conditions of detention. We focus on the requirements in the RCD. However, it should be highlighted that also under the ECHR, the place, regime and conditions of detention of asylum applicants must be appropriate, otherwise they could bring about a violation of Articles 3, 5 and/or 8 ECHR. Importantly, the judicial review of detention as required by Article 9 RCD and Article 5(4) ECHR should also encompass the place and conditions of detention.

3.5.1. General

The RCD determines that detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in the RCD shall apply. Moreover, detained applicants shall be kept separately from other third-country nationals who have not lodged an application for international protection as far as possible. The RCD requires that detained applicants shall have access to open-air spaces.

219 ECRE (2019-I).
220 The ECtHR ‘will look at the individual features of the conditions and their cumulative effect. This includes, among other elements: where the individual is detained (airport, police cell, prison); whether or not other facilities could be used; the size of the containment area; whether it is shared and with how many other people; availability and access to washing and hygiene facilities; ventilation and access to open air; access to the outside world; and whether the detainees suffer from illnesses and have access to medical facilities. An individual’s specific circumstances are of particular relevance, such as whether they are a child, a survivor of torture, a pregnant woman, a victim of trafficking, an older person or a person with disabilities.’ FRA (2014) p 167.
221 The place and conditions of detention in order to prevent an unauthorized entry should be appropriate for the detention to be lawful under Art 5 ECHR. ECtHR 28 February 2008 Appl no 37201/06, Saadi v Italy.
222 Art 10(1) RCD.
223 Art 10(2) RCD.
Moreover, Member States shall ensure that persons representing the UNHCR have the possibility to communicate with and visit applicants in conditions that respect privacy. Member States shall also ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Finally, Member States have to provide applicants in detention systematically with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. No derogation to these requirements is allowed in a border procedure pursuant to Article 43 RAPD.

### 3.5.2. Detention of vulnerable persons and of applicants with special reception needs

When it comes to vulnerable persons, the RCD requires that the health, including mental health, of applicants in detention shall be of primary concern to national authorities. In these cases, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health. Specifically with regard to detained minors, the RCD stipulates that they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. Moreover, unaccompanied minors shall never be detained in prison accommodation, and they should be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. If they are detained, Member States shall ensure that they are accommodated separately from adults. Detained families shall be provided with separate accommodation guaranteeing adequate privacy and where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants. No derogation to these requirements is allowed in a border procedure pursuant to Article 43 RAPD. With regard to minors and vulnerable persons, the requirements in secondary EU law reflect the case law of the ECtHR.

### 3.5.3. Transposition and application in the Member States

Conditions of detention at the border or in transit zones in some of the Member States raise serious concerns as regards their compatibility with EU law. Issues reported include prison-like conditions, a lack of access to medical and psychological assistance, inhumane treatment and violent behaviours by guards. In Italy, for example, there seems to be no consideration for the

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224 Art 10(3) RCD.
225 Art 10(5) RCD.
226 Art 11(1) RCD.
227 Art 11(2) RCD.
228 Art 11(3) RCD.
229 Art 11(4) and (5) RCD.
230 Art 11(6) RCD.
231 ECtHR 19 January 2010, Appl no 41442/07 Muskhadzhiyeva and others v Belgium, ECtHR 13 December 2011, Appl no 15297/09 Kanagaratnam v Belgium, para 94, ECtHR 19 January 2012, Appl nos 39472/07 and 39474/07 Popov v France, para 119, ECtHR 12 July, Appl no 11593/12 A.B. and others v France, para 123; ECtHR 12 October 2006, Appl no 13178/03 Mobilanzila Mayeka et Kaniki Mitunga v Belgium, paras 99-104, ECtHR 5 April 2011, Appl no 8687/08 Rahimi v Greece, paras 108-110, ECtHR 24 October 2013, Appl no 71825/11 Housein v Greece, para 76 and ECtHR 20 December 2011, Appl no 10486/10 Yoh-Ekale Mwanje v Belgium, para 124.
requirements that asylum applicants are to be held separate from ordinary prisoners. The holding facilities at Rome Fiumicino Airport for foreign nationals who are refused entry are under the authority of the Italian Border Police. The majority of persons are detained here for one or two days, but there were cases of longer detentions (up to 8 days). As regards conditions of detention, there was an acceptable state of cleanliness, but no activities, no natural light and no access to outdoor areas or fresh air. These conditions made the facilities unsuitable for detentions of more than 24 hours.

In France, conditions may vary from one waiting zone to the other. Some waiting zones have inadequate facilities for unaccompanied minors. Persons declared ‘non-admitted’ to the French territory at the French-Italian border are handed over to the Italian authorities. Their holding in the guard posts, with effective deprivation of liberty, in closed reception areas in the French locality of Menton, depends on the time necessary to complete the formalities. The CPT delegation considered that the material conditions in these areas could undermine the dignity of the persons held therein and suggested that these persons did not spend more than a few hours, let alone the night, there. According to the French authorities, unaccompanied minors are not subject to non-admission decisions anymore.

In Portugal, the restrictions undergone by detainees during their detention go further than strictly necessary by not allowing them to keep their personal belongings. With regard to minors and vulnerable persons there are particular concerns: In Portugal children are not always held separately from adults, and neither are male and female applicants held apart.

At the time of the visit by CPT to Greece in April 2018, legislation provided that all newly arrived foreign nationals could be deprived of their liberty in reception and identification centres (RICs) for an initial period of three days, which can be extended for up to a total of 25 days. The CPT affirmed that foreign national deprived of their liberty ‘continue to run a certain risk of being subjected to ill-treatment by law enforcement officials’ in some areas. Moreover, it stated that fundamental safeguards such as the right of notification of custody, access to a lawyer and to a doctor generally remained ineffective. Information about applicants’ rights is not provided individually or sufficiently. There is a total lack of available interpretation services, which is also reflected in “significant difficulties” in the communication between detainees and staff. International and civil society organisations are granted access to the detention facilities. However, there is no effective complaint procedure in place.

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233 ECRE (2020) p 165.
236 ECRE (2020) p 115.
237 CPT (2020) para 94.
238 CPT (2020) para 96.
240 ECRE (2020).
242 CPT (2019) para 76.
244 CPT (2019) para 79.
246 CPT (2019) para 82.
Moreover, in Greece, the material conditions at police and border guards’ stations are ‘totally unsuitable’ for holding detained people for more than 24 hours, amongst others due to insufficient access to natural light. This time limit is often exceeded in practice, before they could be transferred to a RIC. The RIC in Fylakio accommodated more persons than its official capacity, and for periods exceeding 25 days due to the lack of sufficient open reception facilities. Families with children, women and unaccompanied minors are held together with unrelated men, with whom they have to share toilets, increasing the risk of unsafety. In most centres, basic medical equipment and medication is lacking, and medical screening on arrival is not systematic. Unaccompanied minors may be deprived of their liberty for the purpose of reception and identification for 25 days, although in practice they are held in ‘protective custody’ for prolonged periods. Unaccompanied minors are also held at border guard stations.

In the ad hoc visit of April 2016 to the hotspots (or RICs) on the Aegean Islands, CPT considered the material conditions in the RICs, initially intended to accommodate new arrivals for a few days but in practice for several weeks, ‘under deteriorating conditions’. This was due, amongst others, to overcrowding, especially unsuitable for vulnerable persons. Authorities over-relied on NGOs for providing health-care services, which were insufficient. Requests for access to a doctor were filtered by the discretion of police officers. None of the detainees interviewed by CPT were provided with an official document authorising their initial or prolonged detention. In practice, they were not able to exercise their right to challenge their deprivation of liberty. Detained persons were generally not provided with information about their rights, and legal aid or access to a lawyer was generally unavailable or difficult. In July 2016, most persons in the three hotspots (RICs) visited by the CPT were no longer deprived of their liberty. However, their freedom of movement was restricted to the islands where the centres were placed. Several persons that could still be detained had not received a detention order, and were not clearly informed about the reasons or the legal basis for their detention. The situation of inadequate material conditions, lack of access to health care, insufficient provision of information and legal aid, as well as of interpretation services persisted in July 2016.

3.6. Concluding remark

In order to avoid repetition in this report, we reflect on the findings of this chapter and the way they relate to Research Questions 1 and 2 in Chapter 5 of this report (section 5.1., key finding 8 and section

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251 CPT (2019) para 123.
253 CPT (2017-I) para 16.
254 CPT (2017-I) para 18.
255 CPT (2017-I) para 19.
256 CPT (2017-I) para 22.
257 CPT (2017-I) para 23.
258 CPT (2017-I) para 23.
259 CPT (2017-I) para 27.
261 CPT (2017-I) para 30.
5.2.1, key findings 11-22). In the next chapter we will address a second characteristic of the border procedure that has implications for the protection of fundamental rights of applicants: the (lower) level of procedural guarantees offered in the context of the examination of the asylum application.
4. Procedural guarantees in border procedures

4.1. Introduction

Article 43(1) RAPD mentions that the border procedure should comply with the basic principles and guarantees of Chapter II RAPD, which also apply to ‘regular’ (non-border and non-accelerated) asylum procedures. In the administrative phase of the border procedure, asylum applicants have the same rights as asylum applicants in a regular asylum procedure. The only difference is that in border procedures decisions may be taken by another authority than the decision-making authority. 262 Nevertheless, the RAPD recognises that the level of procedural protection in a border procedure is lower than in a ‘regular’ procedure. It acknowledges, for example, that a border procedure may not be suited for unaccompanied minors and other asylum applicants with special procedural needs, because it may be impossible to provide them adequate support in such a procedure. In this context, it should first be noted that the fact that a border procedure needs to comply with the basic principles and guarantees of Chapter II of the Directive does not prevent Member States to offer a lower level of protection in a border procedure than in a regular procedure. In a border procedure, asylum applicants may for example be subjected to a shorter personal interview than in a regular procedure, or be provided less opportunities to talk to their lawyer in person.

4.1.1. Time and detention

In this context, there are two factors that (in combination) have an important impact on the level of procedural protection offered in a border procedure: time and detention. 263 A border procedure is often much faster than the regular asylum procedure. Because of the obligation to grant an asylum applicant access to the territory of the Member State if no decision is taken within four weeks, there is time-pressure. 264 Moreover, a border procedure may be accelerated, if one of the conditions for considering an asylum application manifestly unfounded is applicable. 265 This means that asylum applicants have less time to prepare and substantiate their asylum application and to make use of their procedural rights.

The fact that a person is detained or that their freedom of movement is limited, also affects how asylum applicants can make use of their procedural rights. 266 Asylum applicants are not able to visit a lawyer and may encounter difficulties contacting one. Also, the opportunities of a lawyer to visit the applicant may be limited. Moreover, asylum applicants do not have free access to (people providing them) information about the asylum procedure.

There is an important tension between the factors time and detention in border procedures. As will be noted in section 3.2, it is necessary to grant sufficient time to asylum applicants to substantiate their case and make use of procedural guarantees. However, the longer the asylum procedure takes, the longer an asylum applicant will be detained, which may have negative effects on their well-being.

262 Art 4(2)(b) RAPD.
264 Art 43(2) RAPD.
265 Art 31(8) RAPD.
266 See AIDA (2015).
4.1.2. Looking at the overall fairness of the procedure

Whether an asylum applicant is granted a fair opportunity to substantiate their asylum account during a border procedure will depend on the interplay of the factors time and detention and the procedural guarantees offered. As will be shown in this section, European courts find short time limits and/or detention less problematic for the quality of the asylum procedure, if the asylum applicant is effectively assisted by a lawyer and interpreter. However, if the asylum applicant is offered insufficient time and opportunity to consult with their lawyer or to make use of linguistic assistance, this will reinforce the difficulties encountered by asylum applicants to substantiate their asylum account within a short period of time.

Fair appeal proceedings against the decision taken in the border procedure may compensate for short time limits and other procedural hurdles encountered by an asylum applicant in the (administrative phase of the) border procedure. Whether the appeal indeed offers such compensation during the appeal, again depends on the time frame of the appeal procedure and the procedural guarantees offered. A quick border procedure, followed by a short time limit for lodging the appeal and for issuing a judgment in appeal, may for example prevent an applicant from effectively consulting a lawyer and preparing the appeal. Then, the asylum applicant does not get a fair chance to convince the court or tribunal that mistakes were made during the administrative phase of the border procedure.

This means that it is not very useful to compare specific aspects of the border procedure, such as the applicable time limits or the right to legal assistance, one by one for each Member State. It is much more relevant to assess the fairness of the border procedure in a Member State as a whole, taking into account the factors time, detention and procedural guarantees as well as the complexity of the cases dealt with in the border procedure.

4.1.3. Outline of this part

This part will start with a discussion of the EU legal framework. It will first address the factor time in a border procedure (section 3.2). Detention has been discussed in the previous Chapter of this report. Section 3.3 will discuss how the CJEU has assessed time limits applicable in asylum procedures in the light of EU fundamental rights and the principle of effectiveness. Subsequently, we will examine how short time limits and detention may impact on the effectiveness on the asylum applicant’s ability to prepare and substantiate their asylum application (section 3.4) and the determining authority’s ability to take a careful decision (section 3.5) as well as on the effectiveness of

267 Both the CJEU and ECtHR assess the overall fairness of the procedure in the light of Art 47 of the Charter and Art 13 ECHR respectively. See for example CJEU Case C-175/11 H.J.D. and B.A [2013] para 102 and ECtHR 21 January 2011, Appl no 30696/09 M.S.S. v Belgium and Greece, para 289.

of procedural rights granted by the RAPD (section 3.6). In this context, we will pay attention to specific procedural guarantees laid down in the RAPD.

4.2. The role of time in border procedures

Border procedures will usually have shorter time limits than regular asylum procedures. It is considered to be in the interest of asylum applicants and the Member States that asylum decisions are taken quickly.269 For that reason, Article 31(2) RAPD provides that Member States should conclude the examination procedure as soon as possible. This applies in particular to border procedures, because most asylum applicants whose application is processed in such a procedure are detained. Therefore, in a border procedure, a decision should be taken within a reasonable time, but at least within four weeks.270 If the decision-making authority does not meet this deadline, the asylum applicant should be granted access to the territory of the Member State ‘in order for his or her application to be processed in accordance with the other provisions of this Directive’.271

As we have outlined in Chapter 2, the decision-making authority should decide in the border procedure about the admissibility of the case and/or about the substance of the case. If the Member State addresses the substance of the case, it may apply an accelerated border procedure.272 The term ‘accelerated procedure’ is not defined in the RAPD. However, it may be assumed that an accelerated procedure has shorter time-limits for decision-making than a regular (non-accelerated) procedure.273 The idea is apparently that less time is needed for asylum cases, which are considered manifestly unfounded than in other asylum cases.

EU legislation recognises that very short time limits in the asylum procedure may undermine the quality of this procedure.274 It mentions that time limits should ensure an ‘adequate and complete examination’ of the application for international protection275 and allow the applicant to have ‘effective access to basic principles and guarantees’ provided for in the RAPD.276 This means for example that information should be given to the asylum applicant in time to be able to make use of the rights granted and the obligations imposed by the RAPD.277 Furthermore, time limits for exercising the right to an effective remedy ‘shall not render such exercise impossible or excessively difficult’.278 The RAPD also explicitly acknowledges that asylum applicants with special procedural needs, may need more time ‘for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection’.279

4.2.1. Time limits in the administrative and appeal phase

The RAPD provides that a border procedure cannot take more than four weeks. The RAPD does not set a minimum time limit for such a procedure. It only states that Member States shall lay time limits

270 Art 43(2) RAPD.
271 Art 43(2) RAPD.
272 See the grounds laid down in Art 31(8) RAPD.
273 This also follows from Recital 20 Preamble RAPD.
274 This is also confirmed by the ECtHR. See ECtHR 2 February 2012, Appl no 9152/09 I.M. v France, para 147 and ECtHR 22 April 2014, Appl no 6528/11 A.C. and others v Spain, para 100.
275 Art 31(9) RAPD. See also Art 31(2) and Recital 20 Preamble RAPD.
276 See also Art 31(2) and Recital 20 Preamble RAPD.
277 Art 12(1)(a) RAPD.
278 Art 47(4) RAPD.
279 Recital 29 Preamble RAPD. See on this issue also See also Reneman (2013).
for the adoption of a decision in first instance accelerated procedures should be reasonable. As a result, Member States have national procedural autonomy to make rules concerning time-limits in border procedures.

Member States shall also provide for reasonable time limits for appealing the decision taken in a border procedure before a court or tribunal. These time limits may not render it impossible or excessively difficult to lodge an appeal. In a border procedure, Member States may also provide for an ex officio review of asylum decisions. If the appeal does not have suspensive effect, the asylum applicant should be granted at least one week to prepare the appeal.

4.2.2. Transposition and application in the Member States

ECRE writes that border procedures, whether applied at land, sea or air borders ‘are invariably characterised by short deadlines for decision-making as well as lodging appeals. In many Member States who examine (the substance of) the case in the border procedure, the procedure is considered to be an accelerated procedure and time limits are (much) shorter than in the regular asylum procedure. Moreover, Member States who do not have an official border procedure, but do examine asylum cases at the border, often apply an accelerated procedure.

The fact that the border procedure is considered an accelerated procedure does not say much about the applicable time limits in the border procedure. The Dutch border procedure for example, is considered a regular procedure because the same tight timeframe applies: eight days from the first interview to the asylum decision. The only difference between the border procedure and the regular procedure is that in the border procedure the asylum applicant has the option to skip or shorten the six-day rest and preparation period, which is offered in the regular asylum procedure. This aims to reduce the period of time the asylum applicant spends in detention.

Decisions on the asylum application are indeed taken within a short period of time, ranging from two days in France, Germany and Lithuania to 28 days in Belgium, Croatia, the Czech Republic and Greece. In several Member States, the asylum applicant will be granted entry to the territory, if no decision has been taken within this time limit. However, in France, the average time needed by OFPRA to issue its opinion on the case is 3.5 days, even though the time-limit is two days.

Italy has not transposed the requirement laid down in Article 43(2) RAPD to grant entry to the asylum applicant, if the decision on the asylum application has not been taken within four weeks.
means that the duration of the border procedure can be extended to a maximum of 18 months to ensure an adequate examination of the procedure. This is not in line with Article 43 RAPD.

There are also large differences between the time limits for appealing an asylum decision taken in a border procedure. They vary from two days in France and Spain to one month in Italy.291 The same applies to time limits for the court or tribunal to take a decision on the appeal against a decision taken in the border procedure.292

In some Member States the total duration of the border procedure is extremely short. For example, in Germany, the maximum duration of the border procedure is 19 days.293 In Spain, the maximum duration of the border procedure (administrative phase and appeal) is even as short as eight days.294 On the other hand, the asylum procedure in the Hungarian transit zones lasted an average of three to six months and increased in 2019 to six to ten months.295

4.2.3. Quality of decision-making under pressure?

These findings raise the question whether the applicable short time limits in border procedures allow for an ‘adequate and complete examination’ of asylum applications, resulting in the effective protection of the prohibition of refoulement and the right to asylum. Therefore, the next section first briefly discusses how the CJEU has assessed time limits applicable in asylum procedures in the light of the right to an effective remedy and the (closely related) principle of effectiveness.

4.3. Effectiveness of EU fundamental rights and procedural guarantees

We have seen that EU legislation leaves plenty of room to Member States to design a border procedure. Nevertheless, there are limits to the Member States’ discretion. National procedural rules applicable in border procedures may not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (the principle of effectiveness).296 The rights referred to, include EU fundamental rights, such as the principle of non-refoulement and the right to asylum laid down in Article 18 and 19 of the Charter. Moreover, national procedural rules applicable in border procedures may not undermine the effectiveness of the procedural guarantees laid down in the RAPD and the right to an effective remedy laid down in Article 47 of the Charter.297

According to the CJEU, Member States have to establish time limits ‘in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration’.298 The CJEU acknowledged that the asylum procedure ‘is of particular importance inasmuch as it enables applicants for international protection to safeguard their most basic rights by the grant of such

292 See Table 6 of the Annex to this report.
293 ECRE (2020) p 121.
294 ECRE (2020) p 182.
297 Reneman (2013).
298 CJEU Case C-429/15 Danqua [2016] para 44.
Border procedures in the Member States

The CJEU requires that the assessment whether national procedural rules are in line with the principle of effectiveness, take place in the abstract (looking at the rule in place) as well as in the light of the individual circumstances of the case. For example, it depends on the complexity of an individual asylum case and the asylum applicant’s individual circumstances whether more or less time is needed in an asylum procedure. The CJEU has suggested that less time is needed in the most manifest cases of inadmissibility, presumably because they are less complex. Arguably, the fact that an asylum applicant has special procedural needs, or is an unaccompanied minor may render short time limits in the asylum procedure extra problematic in the light of the principle of effectiveness. The CJEU has found several times that national time limits for certain steps of the asylum procedures were in general too short in the light of the principle of effectiveness.

In the next sections, we will assess whether the factors time and detention in border procedures undermine the effectiveness of the principle of non-refoulement and the right to asylum. First, we will focus on the question whether the asylum applicant has an effective opportunity to prepare and substantiate the asylum application (section 3.4). In this context we will address the right to information about the asylum procedure. We will also look at the right to a personal interview, which provides the most important opportunity for the asylum applicant to substantiate their asylum application. Secondly, we will examine how the factors time and detention affect the required ‘adequate and complete’ examination of the asylum application by the determining authority (section 3.5). Finally, we will examine the effectiveness of the procedural guarantees offered by the RAPD in border procedures (section 3.6). These guarantees support the asylum applicant in substantiating the asylum application and the determining authority to carry out an adequate and complete examination of the asylum application. In this context, we will focus in particular on the right of access to (free) legal assistance and the right to an effective remedy.

In each section, we will discuss the case law of the CJEU and ECtHR. Moreover, we will illustrate the impact of the factors time and detention. We will highlight where Member States have different approaches and where problems occur as a result of the interplay of short time limits, detention and the complexity of the asylum cases examined on the one hand and the level of procedural guarantees offered on the other hand.

4.4. Preparing and substantiating the asylum application

In asylum procedures, it is up to the asylum applicant to show that they are in need of international protection. They should submit all relevant evidence and other information concerning their asylum application as soon as possible. According to CJEU, an asylum applicant ‘must enjoy a

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299 CJEU Case C-429/15 Danqua [2016] para 45.
300 CJEU Case C-175/08 Salahadin Abdulla [2010].
302 CJEU Case C-69/10 Samba Diof [2011] paras 67-68.
303 CJEU Case C-69/10 Samba Diof [2011] para 68.
304 CJEU Case C-564/18 L.H. [2020] para 73.
305 See also CJEU Case C-564/18 L.H. [2020] para 70 and Reneman (2013)
306 CJEU Case C-429/15 Danqua [2016] and CJEU Case C-564/18 L.H. [2020].
307 See Art 4(1) Qualification Directive.
308 Art 4(1) Directive 2011/95/EU and Art 13 RAPD.
sufficient period of time within which to gather and present the necessary material in support of their application’. Time limits may thus not be so short that the asylum applicant does not have the chance to first receive information about and subsequently comply with their obligation to submit as soon as possible all the documents and other evidence needed to substantiate their application.  

The ECtHR acknowledged that ‘it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled.’ For that reason ‘time limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim’. Short time limits are particularly problematic, if the asylum applicant has just arrived in the Member State and is held in detention during the asylum procedure. In I.M. v France, the ECtHR underlined that the fact that the applicant was detained during the (border) procedure did not permit him, within a period of five days, to gather via external contacts all elements which could substantiate and document his asylum application. The fact that an applicant did not receive legal and linguistic assistance, reinforced the negative effects of short time limits.

4.4.1. The right to information  

Asylum applicants will only be able to substantiate their asylum application, if they understand the criteria for granting international protection, which evidence and information is relevant in the context of these criteria and their procedural rights and obligations. According to the Fundamental Rights Agency (FRA), information should be provided ‘at a time when asylum seekers have overcome the initial stress relating to the journey’ but ‘sufficiently in advance to enable them to prepare or take relevant decisions’.

For this reason, the RAPD requires that all asylum applicants receive information about the means at their disposal for fulfilling the obligation to submit documents, statements and other evidence supporting their asylum account. Asylum applicants seekers also have the right to receive individualised legal and procedural information during the (border) procedure, unless they have access to free legal assistance.

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310 Art 4(1) QD and Art 12(1)(a) RAPD.
311 ECtHR 28 August 2016, App no 59166/12 J.K. v Sweden, para 92.
312 ECtHR 19 February 1998 Appl no 25894/94 Bahaddar v The Netherlands, para 45.
313 This is different if the asylum applicant has stayed in the territory of the Member State before entering the asylum procedure, because they then had time to prepare for the procedure. See ECtHR 6 June 2013, App no 50094/10 M.E. v France, paras 68-69 and ECtHR 10 October 2013, App no 18913/11 K.K. v France, paras 69-70.
314 ECtHR 2 February 2012, App no 9152/09 I.M. v France, paras 144 and146.
315 See ECtHR 2 February 2012, App no 9152/09 I.M. v France. In ECtHR 21 November 2019, App no 47287/15 Ilias and Ahmed v Hungary, para 157, the ECtHR was not ‘prepared to attach significant weight to the applicants’ arguments regarding time-limits’ because they received legal and linguistic assistance.
318 Art 12(1)(a) RAPD.
319 Art 20(2) RAPD. This information should be provided on request and free of charge. See Art 19(1) RAPD and Recital 22 Preamble RAPD.
4.4.2. The personal interview

The personal interview plays a central role in any asylum procedure. All asylum applicants whose case is processed in the border procedure have the right to a personal interview. Exceptions to this right may only be made in exceptional circumstances. The CJEU has stressed ‘the fundamental importance’ of the right to a personal interview in all asylum cases, including those declared inadmissible. It considered that the personal interview in the administrative phase ‘is intended to ensure that, already at first instance, the applicant’s need for international protection [...] is correctly recognised, which is [...] in the interests of both Member States and the applicant since it contributes, inter alia, to the objective of the expeditious processing of applications.’

Conditions of the interview

Research shows that asylum applicants ‘have difficulty transmitting an understandable, authentic, and reliable narrative’, because of uncertainty, fear, trauma, culture shock, the limits of memory, or the belief that they must somehow reconstruct themselves. Zambelli states that of the ways to deal with this is to hold an interview on an equal basis, allowing asylum applicants to tell their story ‘in the presence of an attentive, patient and supportive decision maker’. Dahlvik notes that, even though ‘understanding in all its dimensions is a key factor in the interaction between caseworkers and claimants [...] time pressure does not seem to be a good breeding ground for understanding.’

According to the RAPD, the asylum interview should be conducted ‘under conditions which allow applicants to present the grounds for their applications in a comprehensive manner’. The applicant should get an adequate opportunity to present elements needed to substantiate the application as completely as possible. The interviewer should grant the asylum applicant the opportunity ‘to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant’s statements’.

Conditions, which contribute to the quality of the personal interview include confidentiality and a competent interviewer and interpreter who are (if possible and necessary) of the same sex as the
asylum applicant. Personal interviews of children should take place in a child-friendly manner, for example by using an interviewer who has the necessary knowledge of the special needs of minors. The CJEU considered that the conditions laid down in the RAPD, are intended to ensure the effectiveness of the right to a personal interview. The fact that this provision contains specific, detailed rules relating to how that interview is to be conducted demonstrates the fundamental importance which it attaches to the conditions under which that interview is to take place. The interview must allow the asylum applicant ‘to present the grounds for his or her application in a comprehensive manner’ and invite them ‘to provide, in cooperation with the authority responsible for the interview, all information that is relevant to the assessment of the admissibility and, as the case may be, the substance of the application for international protection’.

4.4.3. Transposition and application in the Member States

The short time limits combined with the detention measure indeed cause problems for asylum applicants to secure and submit supporting evidence in practice. In a procedure, which lasts only a few days, the opportunities to prepare and substantiate the asylum application are very limited. Moreover, contact with the outside world is difficult, for example because applicants do not have access to their phone or interviews take place remotely and no scanners or fax machines are available to submit evidence.

The right to information

Information is provided to asylum applicants in different forms. Member States and NGO’s or UNHCR may provide information sheets or brochures to asylum applicants in the border procedure. Asylum applicants also receive information via websites (in written and/or spoken form), in video’s, or in comic books (for children).

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330 Art 15(3) RAPD. The conditions of Art 15 RAPD also apply to an admissibility assessment. However, Member States may provide that the personnel of authorities other than the determining authority conduct the interview. Then this personnel should have received the necessary basic training, in particular with respect to international human rights law, the Union asylum acquis and interview techniques. See Art 34(2) RAPD. Similar conditions as those mentioned in Art 15 RAPD apply to Dublin cases. See Art 5(5) and (6) Regulation 604/2013.

331 Art 15(3)(e) RAPD.

332 Art 25(3)(a) RAPD. See also Committee on the Rights of the Child General Comment No 6. (2005) treatment of unaccompanied and separated children outside their country of origin, p 20.

333 CJEU Case C-517/17 Milkiyas Addis [2020] para 64.

334 CJEU Case C-517/17 Milkiyas Addis [2020], para 66.

335 CJEU Case C-517/17 Milkiyas Addis [2020] para 69.

336 CJEU Case C-517/17 Milkiyas Addis [2020] para 70.

337 See ECRE (2020) pp 37 and 41.

338 See with regard to Germany, ECRE (2020) pp 58 and 126-127.


340 For example, Austria (see http://www.bfa.gv.at/publikationen/formulare/start.aspx), Belgium (AIDA (2020) Belgium, pp 71-72), Bulgaria (AIDA (2020) Bulgaria pp 45-46), Latvia (EMN 2019), Slovenia (EMN 2019).

341 Bulgaria (See AIDA (2020) Bulgaria, p 46).


343 Bulgaria (See AIDA (2020) Bulgaria, p 46).

344 Belgium (See AIDA (2020) Belgium, p 72), Greece (ECRE(2020) p 140).
However, sometimes the information provided to asylum applicants in the border procedure is difficult to understand and/or only offered in rudimentary form and/or without interpretation. While in some Member States NGOs and/or UNHCR provide information at border locations, in other Member States asylum applicants’ access to NGO’s and UNHCR is limited due to the detention measure. A lack of information may result in asylum applicants having insufficient understanding of the asylum procedure and their own case. This may contribute to gaps, inconsistencies and contradictions in the interview.

The personal interview

The factors ‘time’ and ‘detention’ have an important impact on personal interviews conducted in border procedures. In some Member States, interviews during border procedures are very short. In France for example, personal interviews never exceed an hour and may be as short as 15 minutes. In contrast, in Germany, the average length of the interview is a lot longer (between three and five hours on average) because interviewers first focus on basic information, before they start asking questions about the asylum applicant’s asylum account. In the Netherlands, the interview in the border procedure may take up to a full day, in particular where it concerns complex cases such as asylum applications based on the applicant’s sexual orientation.

In all these situations, the duration of the personal interview may undermine the asylum applicant’s ability to present the grounds for their applications in a comprehensive manner. A short interview may only be sufficient in very simple cases. A long interview may be exhausting for the asylum applicant and result in vague, incomplete or inconsistent statements. Moreover, the applicant may not be able to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the (thick) report of the interview, because of the short time limits in the border procedure. Interviewers may also feel pressure to keep personal interviews short or to continue the interview at all costs, because of the short time limits in the border procedure.

The fact that the asylum applicant is detained may affect the quality of the personal interview. In the airports in France, many asylum applicants are interviewed by videoconference or telephone, leading to technical problems and affecting the quality of linguistic and legal assistance during the interview. Moreover, concerns are raised relating to the confidentiality of the interviews, because they are sometimes carried out in rooms where other persons are present or because interpreters work from public spaces. This may undermine the applicant’s ability to present the grounds for his or her application in a comprehensivemanner, as is required by the CJEU.

346 With regard to France ECRE (2020) p 110.
347 With regard to France and Greece ECRE (2020) pp 110 and 140-141.
349 Belgium (AIDA (2020) Belgium, p 72).
351 ECRE (2020) pp 38 and 108.
352 ECRE (2020) p 123.
353 See with regard to Germany ECRE (2020) p 123.
355 See with regard to France, ECRE (2020) pp 40 and 108.
357 CJEU Case C-517/17 Milkiyas Addis (2020) paras 69-70.
4.5. Adequate and complete examination of the asylum application

Where the asylum applicant needs sufficient time to substantiate their asylum application, the decision-making authority needs sufficient time to carry out ‘a fair and comprehensive examination’ of the asylum application. The determining authority should be able to comply with the requirements for the examination of asylum applications. They should, for example, be able to gather ‘precise and up-to-date’ country of origin information and to seek expert advice if necessary.

The ECtHR requires national decision-making authorities and courts to rigorously assess the existence of a real risk of a violation of Article 3 ECHR upon expulsion. Such an examination must make it possible to remove any doubt, however legitimate it may be, as to the unfounded nature of a request for protection. For example, in a procedure where an asylum application is declared admissible, on the ground that there is a safe third country, the national authorities should thoroughly examine the available general information concerning the risk of the applicant’s removal from this third country without effective access to an asylum procedure. Moreover, a medical examination should take place if an applicant has serious and recent injuries and links them to torture in the country of origin. A border procedure should thus offer the national authorities sufficient time to carry out a rigorous examination of all the facts and evidence, including country of origin information.

4.5.1. Transposition and application in the Member States

Because of the short time limits in border procedures, determining authorities are under constant time pressure. This may have impact on the quality of decision-making. It is questionable whether a careful decision can be taken on an asylum application within a time limit of a few days, as is practice in a number of Member States. This applies in particular where it concerns more complex cases. The authorities may refrain from doing necessary examinations of the facts, or even be inclined to reject asylum applications in the border procedure, in order to prevent that the applicant should be referred to the regular asylum procedure.

Research concerning the Netherlands and Austria shows that decision-makers are often inclined to stick to the time-frame that is given to them to finish a certain task (such as interviewing an applicant or taking a decision). As a result, they may restrict the interview to issues that they deem relevant or refrain from asking expert advice or peer review by colleagues. With regard to Austria it was noted that quantity was valued over quality and that ‘it is important for the officials to save time in every aspect of their work and to relinquish additional work if it is dispensable.

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359 Art 10 RAPD.
360 See Art 10(3)(b) and (d) RAPD.
361 ECtHR 23 March 2016 Appl no 43611/11 F.G. v Sweden, para 113.
362 ECtHR 2 October 2012 Appl no 33210/11 Singh v Belgium, para 103.
363 ECtHR 21 November 2019 Appl no 47287/15 Ilıas and Ahmed v Hungary, para 158.
364 ECtHR 19 September 2013, RJ v France Appl no 10466/11, para 42. This case concerned the application of the French border procedure to an asylum applicant from Sri Lanka.
365 See with regard to Germany, Greece and Spain. ECRE (2020) p 119.
There is very little information available on the quality of decisions made in the border procedure, due to a lack of research and limited presence of third parties (NGO’s and lawyers) during the border procedure.\(^{368}\) However concerns have been raised with regard to the quality of decisions taken in the German and Greek border procedures.\(^{369}\)

### 4.6. Effectiveness of procedural guarantees

The procedural guarantees laid down in Chapter II RAPD aim to ensure ‘a correct recognition of those persons in need of protection’.\(^{370}\) It follows from the principle of effectiveness that asylum applicants should be able to make effective use of the procedural guarantees laid down in the RAPD.\(^{371}\) There is a risk that the factors ‘time’ and ‘detention’ undermine the effectiveness of these procedural guarantees and as a result bring the correct recognition of persons in need of protection into jeopardy. The CJEU has recognised this with regard to the factor ‘time’\(^{372}\) but not yet with regard to the factor ‘detention’. The ECtHR has acknowledged that a combination of short time limits and detention in border procedure may undermine the effectiveness of a procedural guarantee.\(^{373}\)

In this section we will discuss the effectiveness of two important procedural guarantees in border procedures: the right to (free) legal assistance and the right to an effective remedy, which are closely connected. Moreover, we examine the identification of and support for applicants with special procedural needs in the border procedure.

#### 4.6.1. The right to (free) legal assistance

In an asylum procedure, the assistance of a lawyer is of crucial importance.\(^{374}\) According to Guild, ‘[g]ood legal representation of asylum applicants results in better prepared and documented applications. Fewer applications are rejected on formal grounds related to the inadequacy of the documentation, where the applicant is refused on substantive grounds, if legal representatives have been involved in the preparation of claims.’\(^{375}\) Butter adds that a lawyer may compensate the inequality in the asylum procedure between asylum applicants (one-shotters) and the State (the ultimate repeat-player).\(^{376}\) It is also claimed that early legal advice (before the start of the asylum procedure) ‘increases the confidence of all parties in the decision making process and improves the quality of decisions’.\(^{377}\) There are studies that suggest that migrants or asylum applicants assisted by a lawyer are more successful in legal proceedings and that those who are not.\(^{378}\)

According to the RAPD all asylum applicants have the right of access to legal assistance in all stages of the asylum procedure.\(^{379}\) Legal advisers or other counsellors should have access to closed areas, ‘such as detention facilities and transit zones, for the purpose of consulting that applicant’. Article
10(4) RCD specifies that legal advisers or other counsellors should have ‘the possibility to communicate with and visit applicants in conditions that respect privacy.’ Their access to the detention facility may only be limited ‘where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility.’ However, such limitations may not severely restrict or render impossible the access to the facility.\(^{380}\)

In asylum cases, which are decided on admissibility or the substance, the applicant should also be allowed to bring their legal adviser or other counsellors to their personal interview.\(^{381}\) In cases of unaccompanied minors, the presence of a representative and/or a legal adviser is even a requirement.\(^{382}\) Moreover, legal advisors or other counsellors should have access to the information in the applicant’s case file\(^{383}\), including the report, transcript or recording of the applicant’s interview.\(^{384}\) In Dublin cases, the applicant’s legal adviser should have access to the summary of the Dublin interview.\(^{385}\)

The right to free legal assistance

Article 47 of the Charter concerning the right to an effective remedy provides that ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’ Asylum applicants only have the right to free legal assistance during the appeal phase.\(^{386}\) The assistance ‘shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant’.\(^{387}\) Member States may limit the right to free legal assistance on specific grounds.\(^{388}\) However, this may not arbitrarily restrict the right to free legal assistance and representation or hinder the applicant’s effective access to justice.\(^{389}\)

The CJEU has considered that, when examining whether free legal assistance is necessary in the light of Article 47 of the Charter, national courts should take into account ‘the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively’.\(^{390}\) Guild notes that asylum cases are complex and concern a matter of life and death.\(^{391}\) Moreover, due to language issues, asylum applicants are usually not able to represent themselves. This means that the mentioned criteria are all met in all asylum cases. Only the prospect of success may differ from case to case.\(^{392}\)
The ECtHR considered that the fact that an asylum applicant is represented by a lawyer, makes short time limits less problematic. At the same time, in *I.M. v France* the fact that the asylum applicant had very limited access to a lawyer in the French border procedure played an important role in its finding that Article 13 ECHR had been violated.

### 4.6.2. The right to an effective remedy

Asylum applicants who receive a decision concerning their asylum application in a border procedure have the right to an effective remedy before a court or tribunal. According to the CJEU, this means that an asylum applicant should have sufficient time ‘to prepare and bring an effective action’.

In cases where the asylum application is declared inadmissible or rejected on the merits, the court or tribunal should carry out ‘a full and ex nunc examination of both facts and points of law’. This means, amongst others, that the court or tribunal should take into account new evidence and review meticulously whether all of the cumulative criteria for the relevant ground for rejection have been fulfilled. Moreover, the asylum applicant must be able to personally explain their point of view. The national court should have the possibility to hear the asylum applicant, if it finds it necessary. For this purpose the court should be granted sufficient time.

According to the CJEU, the national court or tribunal should be able to ensure during the appeal procedure that the substantive and procedural rules which EU law affords to an asylum applicant are effective. If this is not possible within the time limit prescribed by national legislation, it should ignore this time limit and deliver its judgment as promptly as possible.

In *L.H.*, the CJEU concluded that a time limit of eight days to issue a judgment was not sufficient in an appeal against an inadmissibility decision for the national court to guarantee amongst others the right to an interpreter, the right to contact UNHCR and to access certain information and the right to (free) legal assistance and representation. Moreover, the CJEU referred to the right to adequate support for applicants with special procedural needs and the rights of unaccompanied minors.

The ECtHR requires national decision-making authorities and courts to rigorously assess the existence of a real risk of a violation of Article 3 ECHR upon expulsion. This means that an asylum applicant should always be able to appeal the decision to expel them to a specific country in the

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392 ECtHR 2 February 2012, Appl no 9152/09 *I.M. v France*, paras 151-152. See also ECtHR 21 January 2011 Appl no 30696/09 *M.S.S. v. Belgium and Greece*, para 319.
393 Art 46(1)(a)(iii) RAPD, Art 27 Regulation 604/2013.
394 CJEU Case C-69/10 *Samba Diouf* [2011] para 67. UNHCR states that the time limit for lodging the appeal should allow the applicant to understand the decision and the possibility to lodge a remedy, secure legal assistance, have access to the case file, consult a lawyer, write appeal grounds and (if necessary) a request for suspensive effect. UNHCR (2010) pp 440-441.
395 Art 46(3) RAPD. In Dublin cases the remedy should take the form of ‘an appeal or a review, in fact and in law, against a transfer decision’. Art 27(1) Regulation 604/2013.
396 CJEU Case C-585/16 *Alheto* [2018] para 113.
397 CJEU Case C-564/18 *L.H.* [2020] para 69. See also CJEU Case C-585/16 *Alheto* [2018] para 114.
398 CJEU Case C-564/18 *L.H.* [2020] para 71. See also CJEU Case C-348/16 *Moussa Sacko* [2017].
399 CJEU Case C-564/18 *L.H.* [2020] paras 68-69. The requirement of a full and ex nunc examination is laid down in Art 46(3) RAPD.
400 CJEU Case C-406/18 *PG* [2020] para 37.
401 CJEU Case C-564/18 *L.H.* [2020] paras 70 and 73. See also CJEU Case C-406/18 *PG* [2020] para 30.
402 ECtHR 23 March 2016 Appl no 43611/11 *F.G. v Sweden*, para 113.
light of Article 3 ECHR before an independent authority.\textsuperscript{405} The ECtHR agrees with the CJEU that short time limits in the asylum procedure may undermine the effectiveness of an appeal.\textsuperscript{406}

Review in the context of a request for suspensive effect

Member States may provide that the appeal against a decision taken in a border procedure does not suspend the applicant’s expulsion. However, this is only allowed if the asylum applicant has the necessary linguistic and legal assistance and at least one week to prepare the request to remain on the territory during the appeal and the grounds of appeal. Moreover, the court or tribunal should examine the negative asylum decision in terms of fact and law in the context of the assessment of this request for suspensive effect.\textsuperscript{407} According to the ECtHR, the examination of a request for to remain on the territory should entail a rigorous scrutiny of the risks upon return. This means that a reasonable burden of proof should apply and new evidence should be taken into account.\textsuperscript{408}

4.6.3. Adequate support for asylum applicants with special needs

Asylum applicants may be ‘in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence’.\textsuperscript{409} Member States are required to identify asylum applicants with special procedural needs ‘within a reasonable period of time after an application for international protection is made’. Member States should also address the need for special procedural guarantees, where such a need becomes apparent at a later stage of the procedure.\textsuperscript{410}

Asylum applicants with special procedural needs should be offered ‘adequate support’ in order to allow them to benefit from the rights and comply with the obligations of the RAPD throughout the duration of the asylum procedure.\textsuperscript{411} The RAPD does not define what ‘adequate support’ entails and thus leaves wide discretion to the Member State to decide which support is required. It only states that asylum applicants with special needs should be provided ‘sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection’.\textsuperscript{412} Member States are not allowed to apply the border procedure to asylum applicants with special needs, if this renders it impossible to provide adequate support to them. This applies in particular where it concerns victims of torture, rape or other serious forms of psychological, physical or sexual violence.\textsuperscript{413}

Costello and Hancox write that ‘vulnerable asylum-seeker may be seen as the exception to the harsher rules in the Directive for the assumed to be abusive applicants’, such as border procedures.\textsuperscript{414}

\textit{However, to trigger the exception, some procedure is envisaged, often one that will demand procedural dexterity and proof from the asylum-seeker envisaged as less capable of navigating the...}
process than others. The special needs approach seems liable to be ineffective, giving the appearance but not the reality of procedures adapted to real needs.\footnote{Costello and Hancox (2016) p 371.}

As will be outlined below, this indeed seems to be a problem in practice.

4.6.4. Rights of unaccompanied minors

Unaccompanied minors ‘form a category of particularly vulnerable persons’.\footnote{CJEU Case C-648/11 M.A[2013] para 55, Case C-550/16 A. and S. [2018] para 58.} For this reason, Article 25 RAPD provides that Member States may only (continue to) apply border procedures to unaccompanied minors on six limited grounds. This includes situations in which the unaccompanied minor originates from a safe country of origin, has stayed in a safe third country or is considered a danger to the national security or public order of the Member State.

The border procedure may also be applied, if the minor has misled the authorities by presenting false documents or has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.\footnote{Art 25(6) RAPD.} However, then Member States must have ‘serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision’. The applicant must also be given full opportunity to show good cause for his actions, including by consulting with their representative.\footnote{Art 25(6) RAPD.}

The RAPD mentions that the ‘best interests of the child should be a primary consideration of Member States when applying the Directive’, in accordance with Article 24 of the Charter and the UN Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor’s well-being and social development, including his or her background.\footnote{Recital 33 Preamble and Art 25(6) RAPD.} The CJEU has interpreted EU (asylum) legislation concerning (unaccompanied) children in the light of the best interests of the child on several occasions.\footnote{See for example CJEU Joined Cases C-133/19, C-136/19 and C-137/19 B.M.M. and others [2020], Case C-129/18 SM [2019], Case C-550/16 A. and S. [2018], CJEU Case C-648/11 M.A[2013], Case C-550/16 A. and S. [2018].} However, it has not ruled what procedural guarantees should be offered to unaccompanied minors in border procedures.

Article 24 of the Charter is based on the rights laid down in the Convention on the Rights of the Child.\footnote{Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303, C 303/26.} According to the Committee on the Rights of the Child, which supervises the Convention on the Rights of the Child\footnote{The obligations following from this Convention apply to children who come under a State’s jurisdiction while attempting to enter its territory or are staying in transit zones. Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, p 3.} ‘States should ensure that children in the context of international migration are treated first and foremost as children’.\footnote{Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, p 3.} The best interests of the child should be
taken fully into consideration in granting or refusing applications on entry to or residence in a country. 423

4.6.5. Transposition and application in the Member States

The right to legal assistance

National legislation of several other Member States, such as Austria, Belgium, France, the Netherlands, Portugal, Spain and Romania, provide for the right to free legal assistance during the administrative phase of the border procedure, even though the RAPD does not require them to do so. 424 In Member States such as Croatia, Greece, Germany, Italy and Slovenia national law does not provide for a right to free legal assistance during the administrative phase of the border procedure. 425 In Member States such as Greece and Italy legal assistance is provided or paid for by NGO’s. 426 However, not all applicants have access to these services, because of limited capacity and areas of operation. 427

Accessibility of (free) legal assistance

Access to a (free) lawyer may in practice be hindered in the border procedure due to the fact that time limits are short and the applicant is detained. 428 Asylum applicants may completely depend on the help of the Border Police or the staff of the detention centre to contact a lawyer. UNHCR reported that in Belgium, in some closed centres, the staff automatically proposes a lawyer to asylum applicants who they consider as ‘real’, while they do not systematically offer a lawyer to asylum applicants they consider as "false". Moreover, UNHCR states that it seems that no request for an appointment with a lawyer is made during weekends, since no social service duty is provided at that time. This is problematic considering the short time limits. In France, asylum applicants must try to get hold of a lawyer by telephone from the waiting zone, while concerns have been raised about effective access to a telephone and outdated lists of lawyers. 430

In the Netherlands the right to free legal assistance is ensured during the short time frame of the closed border procedure. 431 A lawyer is appointed to asylum applicants before the start of the border procedure, which enables them to prepare the asylum application before the first interview. Asylum applicants usually also meet their lawyer after each interview, after the IND has issued an intended rejection of the asylum application and after the rejection of the asylum application in order to lodge an appeal. 432 This enables the lawyer to establish trust between them and the asylum applicant and to get a good understanding of the case at issue. 433 Moreover, lawyers play a crucial role in the identification of asylum applicants with special needs. 434 However, even though free legal assistance

423 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, p 6.
427 See with regard to Greece, ECRE (2020) p 141.
429 AIDA (2020) Romania, p 60.
430 AIDA (2020) France, p 57
431 The asylum applicant is able to consult their lawyer before the start of the procedure, after the first and second interview, after the intended rejection and after the decision on the asylum application.
is ensured in the Netherlands during the whole eight-day procedure, lawyers feel that time-pressure undermines the quality of the assistance they can offer, in particular in more complex cases and cases of asylum applicants with special needs. Moreover, they often feel pressure to pursue hopeless cases, because short time-limits do not enable asylum applicants to find another lawyer.

Quality of free legal assistance

Even if the asylum applicant has been allocated a lawyer, the asylum applicant may still encounter difficulties to consult them in time. In Belgium, asylum applicants often do not succeed to get in touch with their lawyer before the interview takes place. Lawyers also tend not to visit their client before the interview to prepare it. If a negative decision is taken in the border procedure, the asylum applicant cannot always discuss the reasons given in the decision with their lawyer. Moreover, lawyers often advise the asylum applicant not to lodge an appeal without explaining the reasons why. In France, the asylum applicant’s lawyer in the appeal phase has a maximum of one hour before the start of the hearing to discuss the case with their client, which makes it difficult to prepare the argumentation. In some Member States, such as Belgium, Greece and Portugal, there are insufficient lawyers available who have the necessary expertise to provide assistance to asylum applicants.

The right to an effective remedy

There is little information available regarding the scope and intensity (and thus the quality) of the judicial review in the context of appeal against the negative decision or the request for suspension of such decision taken in a border procedure in the Member States. In Member States such as Spain and France the time limits for the applicant to lodge the appeal and for the court or tribunal to issue its judgment are only a few days. It is therefore highly questionable whether there is sufficient time for the preparation and fair and adequate examination of the appeal. Anafé reported in 2017 that in France, the court hearing in the appeal against the refusal of the asylum application at the border took an average of 10-15 minutes, while the judges’ deliberations took a similar amount of time. As was noted before, the CJEU found that eight days to decide in the appeal against a decision to declare an asylum application inadmissible was insufficient to guarantee a full and ex nunc examination and the applicant’s procedural rights.

Some concerns have been raised as regards the scope and intensity of judicial review. In Belgium, there seems to be a protection gap, because asylum applicants should appeal an execution order, while they do not know yet when and where a carrier will expel them. As a result, an asylum applicant may be expelled, even though no rigorous scrutiny of the risk of a violation of Article 3 ECHR in the country to which the applicant will be expelled, has taken place. In Germany, the burden of proof in the context of the request for suspensive effect seems to be very high, as the applicant should show ‘serious doubts about the legality’ of the asylum decision. Moreover, the
court decides on such a request in a written procedure in cases, which were rejected as manifestly unfounded.445

Adequate support for asylum applicants with special needs

Several Member States do not apply border procedures to specific categories of (vulnerable) asylum applicants. The Netherlands for example in principle does not apply the border procedure to families with minor children.446 On the other hand, Germany, Greece, Italy and Portugal do apply the border procedure to families with children.447

It is not clear whether asylum applicants who have special procedural needs, because they are victims of torture, rape or other serious forms of psychological, physical or sexual violence, are excluded from border procedures or offered the support they need. Some Member States havenot transposed Article 24(3) RAPD or provide for exceptions to the exclusion of vulnerable persons from border procedures.448 Other Member States, provide in accordance with Article 24(3) RAPD, that the border procedure should not be applied, if adequate support cannot be offered to an asylum applicant during the border procedure.449 However, whether this rule is applied in practice depends on whether the Member State identifies applicants in need of special support in practice.

Special needs assessment

According to EASO, Article 24 RAPD ‘presupposes that countries have developed a mechanism to identify vulnerable applicants within the short delays of a border procedure’.450 However, Austria451, Croatia452, Italy453, Germany454, Portugal455, Slovenia456 and Spain457 do not have such a mechanism in place. Other Member States have such mechanism, but rarely identify asylum applicants with special needs who are subsequently excluded from the border procedure.458 France has a specialised authority responsible for identification of special needs of asylum applicants, but it is not

446 Immigration and Naturalisation Service (IND) Working Instruction 2020/9, p 7. This is only different if the screening at the border shows that the family poses a threat to public order or the authorities have doubts about the existence of family ties between the family members. Belgium places families with children in ‘open housing units, which are more adapted to their specific needs, but which are also legally still considered to be border detention centres’. AIDA (2020) Belgium, p 52.
447 ECRE (2020).
449 For example the Czech Republic in Art 74(1) and 2(i) read in coherence with Art 73(3) Czech Asylum Act. Only vulnerable persons with medical disabilities that do not preclude their placement in a reception centre or in a facility for the detention of foreign nationals, can be processed in the border procedure. Vulnerable persons may nevertheless be subjected to special measures (detention or reporting obligations) for example because the asylum applicant has not established their identity, has forged identity documents or poses a threat to national security or is being transferred on the basis of the Dublin Regulation. It is not clear whether this provision is often applied in practice to vulnerable asylum applicants in the border procedure.
450 For example, the Netherlands Immigration and Naturalisation Service (IND) Working Instruction 2020/9, p 7.
452 AIDA (2020) Austria, p 57.
454 ECRE (2020) p 163.
457 AIDA (2020) p 40.
present at the borders.\footnote{ECRE (2020) p 111.} Moreover, factors such as a lack of free legal assistance and/or linguistic assistance or remote personal interviews will further reduce the chances of identification.

Moreover, in Member States such as Belgium and the Netherlands, a screening on special procedural needs does not take place before an asylum applicant is channelled into the border procedure.\footnote{AIDA (2020) Belgium, p 53. See with regard to the Netherlands: Coene 2019.}

Taking into account the short time-limits in the border procedure, the chances that an asylum applicant with special needs is identified during this procedure are small. This is in particular true where it concerns asylum applicants with less visible vulnerabilities, such as psychological problems.\footnote{See also Pétin (2016) p 99.}

Practice indeed shows that the special needs’ assessment applied in the border procedure may be of a limited nature. In the Netherlands, the authorities apply two separate tests to assess whether a case can be processed in the border procedure: one concerns the question whether the detention measure is ‘unreasonably burdensome’ for the asylum applicant, the other concerns the question whether the asylum applicant has special procedural needs.\footnote{The Netherlands Immigration and Naturalisation Service (IND) Working Instruction 2020/9, p 8.} The individual circumstances taken into account in both tests are not assessed in coherence.\footnote{See about this problem also See AIDA (2015).} It is thus not recognised that the fact that the asylum applicant is detained, affects their ability to substantiate their asylum account and make use of procedural rights or that the fact that the asylum applicant has special procedural needs, may render the detention measure unreasonably burdensome.\footnote{Coene (2019) pp 23 and 34-35.} Furthermore, the assessment whether an asylum applicant has special procedural needs is merely limited to medical and psychological problems, which may interfere with the asylum applicant’s ability to make complete and coherent statements about their asylum account.\footnote{Coene (2019) pp 26-27.}

Adequate support

In some Member States, national law does not define what adequate support may be offered during the border procedure.\footnote{See for example Germany and Portugal. ECRE (2020).} Other Member States do not provide adequate support in practice.\footnote{See with regard to France, Germany. ECRE (2020).}

In the Netherlands, it is assumed that adequate support can be offered during the border procedure.\footnote{Immigration and Naturalisation Service (IND) Working Instruction 2020/9, p 8, See similarly, Art 30(2) Latvian Asylum Law.} Adequate support mainly regards the personal interview, such as holding extra breaks, interviewing the applicant on a special location or taking written statements from the asylum applicant.\footnote{IND Working Instruction 2015/8, p 6.} Other forms of support, such as extra time for certain steps in the procedure or facilities offered in detention are not mentioned in Dutch asylum legislation or policy.\footnote{Para C1/2.5 Aliens Circular. Dutch law does not allow for extension of the strict time limits on the ground that the asylum applicant has special procedural needs.
Rights of unaccompanied minors
Several Member States, such as Belgium, Croatia, the Czech Republic\(^{472}\) and the Netherlands\(^{473}\) do not apply border procedures to unaccompanied minors,\(^{474}\) while other Member States, such as France, Germany, Greece\(^{475}\), Latvia\(^{476}\), Portugal\(^{477}\) and Slovenia\(^{478}\) do.\(^{479}\) In Romania\(^{480}\) and Spain\(^{481}\) unaccompanied minors are not exempted from the border procedure by law, but the authorities claim that they are exempted in practice. Even though several Member States only seem to allow application of the border procedures to unaccompanied minors under strict conditions, this may be different in practice.\(^{482}\) For example, in France unaccompanied minors arriving at the border who hold false documents are considered to have committed fraud, which is reason to apply the border procedure.\(^{483}\)

In several Member States problems occur as regards the identification of unaccompanied minors before or during the border procedure. In France and Spain, unaccompanied minors are considered adults on the basis of identity documents, which are considered false by the authorities.\(^{484}\) Spain applies X-ray tests for identification in cases of both documented and undocumented applicants who declare to be minors during the border procedure.\(^{485}\) These tests are heavily criticised.\(^{486}\)

### 4.7. Concluding remark

In order to avoid repetition in this report, we reflect on the findings of this chapter and the way they relate to Research Questions 1 and 2 in the next chapter (section 5.1., key finding 9 and section 5.2.2., key findings 23-27). In the next chapter we will draw conclusions with regard to all previous chapters and list our recommendations.

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\(^{472}\) Art 2(i) and 74(1) Asylum Act.
\(^{473}\) Art 3:109b (7) Aliens Decree.
\(^{475}\) ECRE (2020) p 63.
\(^{476}\) EASO (2020) p 37.
\(^{477}\) EASO (2020) p 41.
\(^{478}\) EASO (2019) p 25. However, the border procedure is not applied in practice in Slovenia. See AIDA (2020) Slovenia p 35.
\(^{479}\) ECRE (2019) p 3.
\(^{480}\) AIDA (2020) Romania, p 70.
\(^{481}\) ECRE (2020) p 187.
\(^{482}\) ECRE refers to France, Germany, Greece and Spain. ECRE (2020).
\(^{483}\) ECRE (2020) p 64.
\(^{484}\) ECRE (2020) p 65.
\(^{485}\) AIDA (2020) Spain, pp 57-60.
\(^{486}\) AIDA (2020) Spain, pp 57-60. This applies not only to Spain but also for example with regard to Austria (AIDA (2020) p 58), Belgium (AIDA (2020) Belgium, pp 58-59).
5. Conclusions and Recommendations

In this report, we carried out a legal assessment of the transposition and application of border procedures in the EU. The research was centred around two central research questions:

1. Does the application of border procedures by the Member States contribute to the aims of the RAPD, the Common European Asylum System in general, and other EU migration legislation such as the Schengen Borders Code and the Return Directive?

2. Does the transposition and application of border procedures by the Member States comply with EU fundamental rights, including the right to liberty, the prohibition of refoulement, the right to asylum, the right to an effective remedy and the effectiveness of the (procedural) rights granted by EU law?

With regard to question 1, we found that the application of border procedures by the Member States shows serious deficiencies which jeopardises the aims of harmonisation. Some of these deficiencies can be traced back to incorrect transposition and application by the Member States of secondary EU law. However, sometimes the attainment of the objectives underlying harmonisation is hindered by legislative ambiguity in EU law itself (Article 43 RAPD, also in relationship with other instruments of EU law) when it comes to the border procedure.

With regard to question 2, we found that the transposition and application of border procedures by the Member States result in structural violations of the right to liberty and the right to an effective remedy. Violations of the effectiveness of (procedural) rights may bring about violations of the prohibition of refoulement and the right to asylum. It should be highlighted that lack of effective protection of fundamental rights in border procedures also risks jeopardising the aims of EU action in this area, as it creates incentives for irregular border crossings and secondary movements. At the same time, as we will set out below, conformity of fundamental rights is in itself an underlying aim of EU harmonisation in this field. As such, the answers regarding our two research questions cannot always be neatly separated as pertaining to only one or the other.

In this final chapter we will elaborate on our answers to the research questions and present our recommendations. We will first outline our conclusions with regard to the way in which border procedures relate to the aims of EU action in this area. (section 5.1). After that, we outline our conclusions with regard the way in which border procedures in the Member States relate to the protection of fundamental rights, with particular attention to restrictions on the right to liberty and procedural guarantees (section 5.2). We then pay attention to the lack of action at the EU level with regard to remedying the indicated shortcomings in the transposition and application of Article 43 RAPD (section 5.3). Finally, we will list our recommendations (section 5.4).

5.1. Border procedures and the aims of EU harmonisation

Key finding 1: Access to Asylum Procedures is not guaranteed at the external border of some Member States

Over the last years, there have been instances of push-backs at European external borders, where persons applying for asylum at the border are not provided with the chance to apply for international protection, but are simply pushed back into non-EU territory (see for an overview Table 1 in the Annex to this report). This is in violation of the prohibition of refoulement and the right to asylum guaranteed in Articles 4, 18 and 19 of the Charter. It encourages irregular border crossings instead of a prompt application upon arrival at the border, and as such also jeopardises the integrity of the European asylum and migration acquis.
Key finding 2: Harmonisation in the area of border procedures should achieve uniform, legally safe, fair and effective asylum procedures.

Uniformity means that similar asylum cases should be treated alike and result in the same outcome. Safety, fairness and effectiveness of border procedures ensures a correct recognition of international protection needs and conformity with fundamental rights. It ensures compliance with the right to asylum and the prohibition of refoulement guaranteed in Articles 4, 18 and 19 of the Charter and the identification of those who are not in need of international protection. Procedures should moreover be conducted in conformity with other fundamental rights, such as the right to personal liberty and the right to an effective remedy protected by Articles 6 and 47 of the Charter. Uniformity and fairness of procedures prevent secondary movements and help to combat illegal migration, as uniform and fair procedures encourage migrants to apply for asylum directly upon arrival at the border, instead of evading border controls.

The aim of the border procedure is not to solve problems that Member States encounter as a result of the lack of solidarity or shortcomings in the Dublin system.

Key finding 3: EU law does not allow for the automatic application of border procedures

According to the Preamble to the RAPD and the CJEU, the objective of a border procedure is to enable Member States, in well-defined circumstances, to provide for admissibility and/or substantive examination procedures regarding applications for international protection made at the border or in a transit zone of a Member State prior to a decision on an applicant’s entry to its territory.

According to EU law, applicants have a right to lawfully stay on the territory of the Member States, until a decision has been taken in first instance. If a Member State does not grant an asylum applicant the right to enter the territory prior to the examination of their application, it makes an exception to this rule. As such, the EU legislator has highlighted that the application of border procedures may not be automatic, and can only be used in a limited number of circumstances.

Key finding 4: Member States do not employ a common understanding of the border procedure

Member State Practice with regard to the transposition and application of Article 43 RAPD differs widely. First, there is no common understanding of what a border procedure is and what types of cases may or should be processed in a border procedure. According to EU law, national procedures that examine asylum applications of applicants who have not legally entered the territory, qualify as border procedures. These national procedures need to adhere to the European rules governing them. The refusal of entry, or the postponement of a decision on entry, is a defining feature of the border procedure.

However, Member States do not seem to employ a common understanding of what a border procedure is. Some Member States deny legal entry to applicants at the border and process their asylum applications while their freedom of movement is restricted or their liberty is deprived, but do not qualify this procedure as a border procedure in national law (see for an overview Table 1 in the Annex to this report). In this way, they employ a border procedure as a matter of fact, while dispensing with the EU law provisions governing them.

Key finding 5: There is disparity in the types of cases processed in the border procedure by Member States
Most Member States apply border procedures in order to examine 1. whether another Member State is responsible for the asylum application under the Dublin Regulation, 2. whether the asylum application is inadmissible under Article 33 RAPD and 3. whether the asylum application is manifestly unfounded. However, some Member States do not apply border procedures to one or more of these three categories of cases (see for an overview Table 2 in the Annex to this report). Some Member States channel all persons who apply for asylum at the border into a border procedure (Belgium, The Netherlands), while others apply a pre-screening (Austria). Some Member States grant international protection in a border procedure, while others grant entry to applicants when they recognise that an asylum applicant may qualify for international protection (the Netherlands). Moreover, some Member States use the border procedure on grounds that are not provided for in the Directive (Italy and Hungary). Finally, EU Member States have different practices with regard to the application of border procedures to (un)accompanied children.

Key finding 6: It is not clear from EU law whether border procedures may be used to take decisions under the Dublin Regulation.

From Articles 43 and 33 RAPD it does not transpire clearly whether an assessment under the Dublin procedure may take place when an application is lodged under the border procedure.

The lack of uniformity in state practice here also jeopardises the attainment of the aims underlying procedural harmonisation. It makes sense to clarify legislative ambiguity and provide Member States explicitly with the possibility to use border procedures in order to decide about the application of the Dublin Regulation. However, the exercise of this power should be in conformity with the Dublin Regulation. As border procedures are generally accompanied with detention, such a procedure can thus only be used if there is a significant risk of absconding in accordance with Article 28 of the Regulation. The grounds for assuming such a risk need to be provided for in national law.

Key finding 7: Border procedures may only be applied at the external borders of the EU.

EU law is not clear on whether border procedures may be used at internal borders. A coherent reading of the European immigration and asylum acquis justifies the conclusion that this is not allowed. However, an exception could be made where internal border control has been reinstated on the basis of the SBC. Current Member State practice, for example at the French border with Italy and Spain and the border between Italy and Slovenia, shows that official border procedures are not used at internal borders. Nevertheless, *de facto* border procedures are applied without any of the procedural or fundamental rights safeguards contained in the RAPD. Some Member States identified border or transit areas at internal borders and/or refuse entry to third-country nationals who cross the internal border (Italy, France, Slovenia and Spain). Such procedures evade the rules applicable on the basis of the Dublin Regulation. This jeopardises the integrity of the CEAS.

Only if border controls at the internal borders are reinstated because of ‘serious deficiencies in the external border management of a Member State which put the overall functioning of the area without internal border control at risk’, a border procedure may be applied.

Key finding 8: There is lack of uniformity in providing a legal basis in national law for deprivations of liberty in border procedures and Member State practice shows important disparities regarding procedural guarantees and with regard to the place and conditions of detention.

Chapter 2 of this study explains that a refusal of entry of applicants for international protection is inherently accompanied with restrictions on their liberty. The legal qualification of a stay at the border or at the transit zone (detention or restriction of movement) raises complex issues of fact and
law, as is also apparent from the case law from the CJEU and the ECtHR. The qualification of similar situations differs considerably per Member State. As a consequence, ensuing procedural guarantees, such as judicial review of the lawfulness of a deprivation of liberty, are not enjoyed uniformly by asylum applicants across the EU. Moreover, the place and conditions of detention in border procedures differ considerably per Member State.

Key finding 9: There are important differences in the level of procedural protection offered by Member States to asylum applicants in the context of the examination of their asylum application during the border procedure.

Time limits for taking a decision in the administrative phase range from 2 to 28 days (see Table 3 in the Annex to this report). Similarly, time limits for appealing a decision taken in a border procedure and for issuing a judgment in such an appeal vary between 2 and 30 days (see Tables 4 and 5 in the Annex to this report).

Furthermore, there are great disparities with regard to the right to free legal assistance during the administrative phase of the border procedure. While some Member States provide free legal assistance during the whole border procedure (preparation of the application and assistance during the different steps of the procedure) other Member States only provide free legal assistance during the appeal phase. Moreover, in some Member States, the right to free legal assistance only exists in theory, because in practice insufficient lawyers are available or insufficient time is granted to the applicant to consult their lawyer.

Key finding 10: The aims of uniformity and fairness underlying EU action in this area are achieved through: (1) a common understanding of the border procedure; (2) a strict limitation of the power to use such procedures; (3) clarifying legislative ambiguity as to whether Dublin cases may be dealt with in border procedures; and (4) a clear territorial circumscription of the use of these procedures.

Currently, the border procedure does not achieve the aim of CEAS to treat similar asylum cases alike, resulting in the same outcome of asylum procedures throughout the EU. EU law leaves Member States too much scope for the application of an ‘a la carte regime’ when it comes to border procedures.

EU law has also not been successful in achieving uniformity and fairness, because it does not require that the border procedure be individually justified in each case. Moreover, it allows for the examination of admissibility and merits of complex cases, such as applications concerning the safe-third-country-concept and the credibility of the asylum account. Also, the formulation of the grounds that may justify the use of a border procedure provides Member States with too much discretion. Articles 33 and 31(8) RAPD contain many terms, which may be interpreted broadly or restrictively by the Member States.

5.2. Conformity with fundamental rights

In this section we look at the way in which restrictions on personal liberty and procedural guarantees in the border procedure relate to the protection of fundamental rights (Research Question 2). As mentioned above, some of our findings with regard to the protection of fundamental rights in the border procedure also have implications for the effectiveness of border procedures in achieving the underlying aims of harmonisation (Research Question 1). This is so because differences in the degree in which fundamental rights are protected with regard to detention and procedures jeopardise the aims of EU action in this area which is to ensure that applicants are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements.
Moreover, we have seen that one of the aims of procedural harmonisation is to achieve fair and legal safe procedures, which by definition includes conformity with fundamental rights.

5.2.1. Detention and restrictions on personal liberty

Key finding 11: Border procedures in most cases involve detention.

A refusal of entry of applicants for international protection is inherently accompanied with restrictions on their liberty. At the same time, the legal qualification of a stay at the border or at the transit zone raises complex issues of fact and law, as is also apparent from the case law from the CJEU and the ECtHR. In most cases, an assessment of the actual situation at the border or in a transit zone justifies the conclusion that the situation amounts to detention. There might be some isolated instances when the degree and intensity of the restrictions are such that they do not amount to detention, but to restrictions on the freedom of movement of applicants. However, the circumstance that applicants have applied for asylum of their own free will is not relevant for the question whether their situation at the border or in the transit zone amounts to detention. This would not align with the legal constellation of the CEAS in which the right to asylum is guaranteed and which provides applicants with a right to remain (at the border or in the transit zone). Current EU law does not explicitly acknowledge the interplay between border procedures and detention, which results in practices of de facto detention (see below).

Key finding 12: Automatic use of border procedures, as applied by some Member States violates international law, more particularly Article 31 of the Refugee Convention.

In this report we have argued that the constellation of Article 43 RAPD is such that border procedures cannot be applied indiscriminately, without regard to their necessity in individual cases. Seeing that such procedures involve inherent restrictions the liberty of applicants they also need to be individually justified in light of Article 31 of the Refugee Convention. Moreover, administrative detention upon arrival at the border or in a transit zone, which is not accompanied with basic safeguards is a penal sanction prohibited by Article 31(1) of the Refugee Convention.

Key finding 13: Practices of de facto detention, a serious and manifest violation of Article 6 Charter and of Article 31 Refugee Convention, take place at the borders and in the transit zones of some Member States.

In many Member States a legal basis for practices that in actual fact amount to detention is lacking (de facto detention, i.e. Austria, Germany, Greece). In other Member States, for example those that apply the hotspot approach, the blurring of reception and detention has been a key source of concern since the commencement of the operation of these hotspots. Domestic law does not always provide a clear legal basis for either detention or alternatively the restrictions on the freedom of movement of applicants, let alone that they describe clearly the distinction between the two with regard to particular places (Italy and Greece). Member States that deprive applicants of their liberty without a clear basis in domestic law, act in violation of the prohibition of arbitrary detentions, a fundamental principle of the rule of law, and protected in Article 6 Charter and 5 ECHR. Lack of a legal basis for detention impacts on all the other requirements for lawful detention (grounds, necessity, proportionality, the requirement to consider alternatives, see below).

The manifest violation of primary EU law (fundamental rights) through practices of de facto detention is facilitated by the fact that Article 43 RAPD does not refer to the provisions regarding detention in the RCD, or on any other way makes explicit the link between detention and border procedures.
Key finding 14: The requirement in the RCD that domestic law provides for the grounds for detention has not been transposed and/or applied correctly, by some of the Member States that apply measures of detention in a border procedure.

Article 8 RCD provides for the ground of detention of an asylum applicant in a border procedure. Such an applicant may be detained, in order to decide, in the context of a procedure, on the applicant’s right to enter the territory. Article 8 RCD requires that this ground for detention is laid down in national law. Moreover, conditions for deprivations of liberty under domestic law should be clearly defined and the law itself must be foreseeable and sufficiently precise in its application. In the context of border procedures, provisions that merely provide for the refusal of entry but do not contain express reference to measures entailing deprivation of liberty cannot serve as a legal basis for deprivations of liberty under Article 5 ECHR and EU law. The use of de facto detention by some Member States (see above) ipso facto means that domestic law does not provide for the grounds of detention as required by Article 8 RCD. Some Member States apply a different ground than the one pertinent to the border procedure (for example Italy that provides for detention of identification purposes at the hotspots).

Key finding 15: The requirement in Article 8 RCD, that detention can only be used when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, is disregarded by most Member States that apply border procedures with their accompanying measures of detention.

The recast RCD determines that detention can only be used when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively. The requirements of necessity and proportionality and individual assessment of detention do not differentiate between the permitted grounds for the detention of applicants for international protection. Thus, the obligation to assess each case individually with particular regard for the question if other less coercive alternative measures cannot be applied effectively, also applies to detention in the context of a border procedure. As such, the individualised assessment of the detention measure under EU law aligns with the rule that the border procedure cannot be applied automatically (see above). There is no evidence that Member States assess whether less coercive measures can be imposed (except in those cases that concern vulnerable persons, for example in the Netherlands and Belgium).

Key finding 16: The domestic law of the Member States does not provide for general rules with regard to alternatives to detention in the specific context of border procedures, which is in violation of the RCD.

General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in domestic legislation of the Member States. In the Netherlands, for example, the lack of alternatives for detention in a border procedure is justified with an appeal to the weight of external border control. This Member State argues that applying an alternative to detention will result in nullifying the refusal of entry. However, the absence of rules in domestic law with regard to alternatives for detention in a border procedure is in violation of EU law.

Key finding 17: Member State practice shows that there are insufficient guarantees in place to protect the right to liberty of persons with special needs and minors in border procedures.

Where it concerns the restrictions on liberty inherent to border procedures, Member State practice shows that the fundamental rights of persons with special needs are not adequately protected.
Border procedures in the Member States

Proportionality *stricto sensu* means that even if there are grounds for detention, and if less coercive measures do not need to be applied *prima facie*, an assessment should be carried out if detention does not pose an unreasonable burden on the individual. This part of the proportionality test is especially relevant for persons with special needs. However, our research shows that Member States do not have adequate mechanisms in place to identify persons with special needs in border procedures. Some Member States do not detain (unaccompanied) minors and apply alternatives (Belgium) or refer them to special facilities (the Netherlands). Even with regard to the use of alternatives to detention, criticism has been voiced as regards the protection of fundamental rights of minors and persons with special needs. In view of the inherent restrictions on liberty border procedures entail, the applications of (unaccompanied) children and applicants with special needs, should not be processed in such procedures. Particularly with regard to children, the requirement that their best interest should be a primary consideration for Member States seems difficult to reconcile with their detention at the border or in a transit zone upon their filing an application for international protection at such locations.

**Key finding 18:** EU law determines that detention at the border should not last longer than necessary and in any case not longer than four weeks. This requirement is not transposed and applied adequately in all Member States.

The requirement of proportionality in Article 8 RCD and primary EU law also entails that detention cannot last longer than necessary and, in any case, no longer than four weeks. As soon as it transpires during the border procedure that the application cannot be rejected on the limited grounds that can be assessed in a border procedure, applicants have to be granted entry to the territory, and detention can no longer continue. The four weeks' time limit is not incorporated in the domestic legislation of all Member States (Italy). It is not clear how Member States apply the requirement that detention cannot last longer than the time needed to diligently conclude the procedures relating to the ground of detention, and shortcomings have been signalled there as well, for example because of a significant time lapse between the decision to grant entry and the notification of such a decision to applicants. The granting of international protection in a border procedure may only take place exceptionally, as applicants will need to have been released from detention and granted entry to the territory before this formal decision is taken. Member State practice with regard to this particular point is not clear.

**Key finding 19:** The RCD does not contain a requirement that restrictions on the freedom of movement of applicants in a border procedure need a clear legal basis in domestic law. This facilitates restrictions on the liberty of applicants that do not conform to substantive EU law standards.

According to Article 7 RCD, restrictions on freedom of movement in the context of a border procedure (possibly applicable at hotspots but also in case of ‘normal accommodation’ on the basis of Article 43(3) RAPD in the event of large arrivals) should respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD. Member State practice, particularly with regard to the hotspots, shows that restrictions on the freedom of movement of applicants often do not satisfy the requirement in the RCD that such restrictions respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD (e.g. in Greece, reports of destitution). The current RCD does not require a clear legal basis in domestic law for restrictions on freedom of movement of applicants, and as such EU law fails to ensure adequately that the requirements laid down in Article 7 RCD are in actual fact guaranteed. The lack of a requirement that Member States provide a legal basis in domestic law for restrictions on freedom of movement of applicants in border procedures is also highly
problematic in view of the accommodation blurring between detention and restrictions on freedom of movement in border procedures.

Key finding 20: The conditions of detention at the border and in transit zones of applicants in some of the Member States do not conform to the requirements of the RCD. In some cases, conditions of detention are such that they may constitute violations of Article 3, 5 and/or 8 ECHR.

The RCD provides adequate guarantees to ensure that conditions of detention are in conformity with fundamental rights. If the place and conditions of detention do not meet the requirements that flow from Article 5 ECHR and the case law of the ECtHR, detention is unlawful, and applicants have to be released. While inadequate detention facilities are not an exclusive characteristic of detention at the border or in transit zones, Member State practice shows that detention at these locations poses particular challenges. In the first place, by not formally qualifying deprivations of liberty as such, the requirements in the RCD regarding conditions can be disregarded by Member States. So-called waiting zones often do not satisfy the requirement that asylum applicants should be accommodated in specialised facilities. Inadequate conditions of detention at the border have also been widely reported with regard to the hotspots (Greece and Italy), but also with regard to detention in police facilities at internal borders (France). With regard to minors and persons with special needs, there are particular concerns. For example, children are not always held separately from adults, male and female applicants are not held apart, or there are inadequate facilities for unaccompanied minors.

Key finding 21: Procedural guarantees in case of detention are laid down in EU law but transposition and application of these guarantees is inadequate, in particular in those Member States that apply de facto detention.

While the RCD contains adequate procedural guarantees for detention in accordance with Article 5 ECHR, in practice, these guarantees are contingent on the question whether there is a legal basis for detention in domestic law. Such a legal basis is lacking in some Member States (see above). However, a speedy judicial review of the restrictions on the liberty of applicants held at the border or in a transit zone is required by EU law and the ECHR, independently of how national qualifies the situation. With regard to the scope of judicial review, EU law requires that the judicial authority is able to substitute its own judgement for that of the administration with regard to the proportionality and necessity of the measure. Moreover, according to Article 5 ECHR, the judicial review should encompass the place and conditions of detention.

Furthermore, EU law requires that detention should be ordered in a written decision, setting out the legal and factual reasons for the measure. For the reasons explained above, this requirement is not met by Member States that apply measures of de facto detention.

Key finding 22: The RCD does not contain sufficient (procedural) guarantees relating to restrictions on the freedom of movement of applicants to ensure that these are in conformity with substantive requirements for such restrictions in the RCD

We have seen above that current EU law does not require a clear legal basis in domestic law for restrictions on the freedom of movement of applicants. Member State practice, particularly with regard to the hotspots, shows that restrictions on the freedom of movement of applicants are surrounded by legislative ambiguity which brings about legal uncertainty for applicants. The lack of a requirement in EU law relating to a written decision setting out the legal and factual reasons for such restrictions contributes to the blurring of restrictions on freedom of movement and detention, as prevalent in the hotspots.
Moreover, the lack of a requirement in EU law that such restrictions are subject to judicial review means that there is no effective protection of the guarantee in Article 7 RCD that such restrictions respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD. Crucially, judicial review here could also prevent such restrictions turning into deprivations of liberty (de facto detention).

5.2.2. Procedural guarantees

Key finding 23: The Member States fail to comply with the requirement to identify asylum applicants with special needs

We have found a few instances where Member States failed to transpose the procedural safeguards laid down in the RAPD. The clearest example of such failure is that several Member States do not have a mechanism in place to identify applicants with special needs (Austria, Croatia, Italy, Germany, Portugal, Slovenia and Spain). Moreover, it is sometimes not clearly defined in national legislation how adequate support can be given to asylum applicants in the context of the border procedure (Germany, Portugal) or it is not provided in practice (France, the Netherlands). Moreover, some Member States seem to use the exceptions to the prohibition to process the cases of unaccompanied minors in a border procedure broadly (France, Germany, Greece and Spain). Finally, problems have been identified with regard to the identification of unaccompanied minors (Spain).

Key finding 24: The combination of short time limits and detention negatively affects asylum applicants’ ability to substantiate their asylum account and the adequate and complete examination of the asylum claim by the determining authority.

There are many concerns regarding the effectiveness of rights granted by EU law in practice. These concerns mainly relate to the combination of short time limits and detention, which characterise most border procedures in the Member States. Adequate and timely information about the asylum procedure and a personal interview during which the applicant is able to present the grounds for their asylum application, is crucial in order to ensure that correct asylum decisions are made. However, reports show that often, there is a lack of timely and adequate information about the asylum procedure (Belgium, Germany and Greece). Moreover, the duration of the personal interview (very short or very long) may hinder the applicants’ ability to present their asylum account. Remote interviewing and/or a lack of confidentiality in detention centres may (further) undermine the quality of the personal interview (France).

Short time-limits also restrain determining authorities when examining asylum applications in the border procedure. Research shows that determining authorities feel pressure to finish certain steps of the border procedure (the interview or writing the decision) within the given time-frame (Austria, the Netherlands). They may refrain from doing necessary examinations of the facts, or even be inclined to reject asylum applications in the border procedure, in order to prevent that the applicant should be referred to the regular asylum procedure (Germany, Greece and Spain). There are concerns about the quality of the decisions made in border procedures in some Member States (Germany and Greece). However, as a result of a lack of research into and monitoring of the quality of decision-making in border procedures, no firm conclusions can be drawn on this issue.

Key finding 25: The combination of short time limits and detention undermines the effectiveness of procedural rights and leads to violations of the right to an effective remedy.

The negative effects of short time limits and detention on the applicant’s ability to substantiate his asylum application may (partly) be compensated by offering procedural guarantees. It follows from
the case law of the CJEU and ECtHR that in particular the right of (access to) free legal and linguistic assistance is important in that regard. It is recognised that good legal assistance results in better prepared and documented asylum applications, more equality between the asylum applicant and the determining authority and a higher quality of asylum decisions.

Many Member States provide for the right to free legal assistance in the administrative phase of border procedures, even though the RAPD does not oblige them to do so (Austria, Belgium, France, the Netherlands, Portugal, Spain and Romania). However, in the administrative phase as well as during the appeal phase, short time limits and detention often prevent effective access to legal assistance in practice. Asylum applicants are not able to contact a lawyer because of a lack of means of communication (Belgium and France), lawyers are given insufficient time to prepare the appeal or a hearing with their client (Belgium, France and Hungary), or there is complete lack of qualified lawyers (Belgium, Greece and Portugal). This leads to inaccessibility of the available remedy and as a result to violations of the right to an effective remedy guaranteed in Article 46 RAPD and 47 of the Charter.

A thorough judicial review of the decision taken in the border may compensate for procedural hurdles encountered by the applicant in the administrative phase. However, also here time limits are often short and the applicant is restrained by the detention measure. In Spain, the appeal procedure as a whole (time limit for lodging the appeal plus the time limit for issuing a judgment) only takes four days. It is highly questionable whether a full and ex nunc judicial review, respecting the procedural rights of the applicant, can be ensured in such a short time frame. The lack of effective access to free legal assistance of the asylum applicant may affect the quality of the appeal grounds and thus the appeal itself. It may thus be concluded that violations of the right to an effective remedy guaranteed in Article 46 RAPD and 47 of the Charter occur.

Key finding 26: There is no information available on the quality of asylum decisions taken in border procedures.

This raises the question whether the asylum decisions taken in the administrative and appeal phase of the border are of sufficient quality. Are applicants in need of international protection granted an asylum status and allowed into the territory? If this is not the case, violations of the absolute principle of non-refoulement guaranteed by Article 4 and 19 of the Charter and the right to asylum guaranteed by Article 18 of the Charter will occur.

We cannot give an answer to this question in this study, because no reports are available in which the quality of asylum decisions taken in border procedures is assessed. An assessment of individual decisions in the border procedure fell outside the scope of this research. It is important that further research is done on this issue.

Key finding 27: The border procedure is not suitable to ensure correct decision-making in more complex cases.

Where it concerns the fairness of border procedures, is all about finding the right balance between the speed of the border procedure, the detention measure imposed and the complexity of the asylum application on the one hand and the procedural guarantees offered to the asylum applicant on the other hand. It should be noted in this context that there is an important tension between the factors ‘time’ and ‘detention’. On the one hand, asylum applicants need time to substantiate their case and make use of procedural guarantees. On the other hand, the longer the asylum procedure takes, the longer an asylum applicant will be detained. The problems encountered by asylum applicants to prepare and substantiate their asylum application, the time pressure on determining
authorities and the ineffectiveness of procedural guarantees described above, show that in many Member States this balance has not been found.

The question is whether EU legislation can ensure that Member States find the right balance between time, detention, complexity of cases and the level of procedural protection. Setting minimum time-limits for different steps of the asylum procedure (preparation, decision-making, submitting the appeal, issuing a judgment in appeal) could provide a solution for the sometimes extremely short time-limits in the border procedure. However, this would entail that asylum applicants would have to spend (much) longer in detention, which could lead to violation of the right to liberty. It is not possible to abolish detention or restriction of the freedom of movement in border procedures, because this is necessary to prevent the asylum applicant from entering the territory, which is the aim of the border procedure. The level of procedural guarantees could be raised in the RAPD. However, as we have seen, it is not (only) the level of procedural protection offered by the RAPD that is the problem. The ineffectiveness of procedural guarantees in practice is a bigger problem.

For this reason, we conclude that the solution lies in restricting the application of border procedures to cases, which are less complex in fact and in law. This concerns cases in which the applicant has been granted international protection in another (Member) State, only raised issues that are not relevant to the examination of an asylum application or where the applicant originates from a safe country of origin. In cases where the Member State has shown that the asylum applicant has intentionally failed to cooperate with the determining authority, has misled them or poses a genuine, present and sufficiently serious threat to public order or national security, a longer period of detention may be justified. In order to ensure that these applicants can prepare and substantiate their asylum application within a short period of time, they should be granted an (effective) right to free legal assistance.

5.3. Lack of Action EU Institutions

Key finding 28: Given the lack of uniform application of border procedures and the frequent occurrences of human rights violations in the context of such procedures, and against the background of the current proposal to extend the application of border procedures, it is striking that no monitoring and no evaluation of border procedures has taken place.

The European Commission has not carried out an evaluation of the RAPD in general and of border procedures specifically. As was mentioned before, no research has been done to the quality of decision-making in border procedures. As a result, it is unclear whether the border procedures in the Member States ensure that a correct decision is taken on the asylum application in first instance and/or on appeal and on limitation or deprivation of the right to liberty.

Moreover, in view of the persistent problems that feature with regard to detention at external borders and in transit zones of the Member States, it is difficult to understand why the transposition of the provisions on detention in the recast Reception Conditions Directive and the relationship with Article 43 RAPD has not been evaluated by the Commission.

Key finding 29: exchange of information between the Member States or between the Commission and Member States does not contribute to clarity about Member States’ practices as it is not based on a common understanding of the border procedure.

Moreover, the way in which EASO coordinates and promotes the exchange of information across asylum authorities in Member States and between the Commission and Member States does not
contribute to clarity about Member States’ practices. In order to determine whether Member States use border procedures, EASO seems to base its findings predominantly on domestic legislation. As a result, Member State practice may evade administrative scrutiny, as not even the relevant agencies (EASO) or the Commission seem to know precisely which Member States employ the border procedure as understood by EU law.

Key finding 30: in view of the persistent problems that feature in border procedures, particularly with regard to the protection of fundamental rights of applicants, it is surprising that enforcement of compliance by the Member States with Article 43 RAPD and with provisions on detention and accommodation in the RCD has remained extremely limited.

This study has shown, on the basis of existing reports, that many aspects of the (application of) border procedures in the Member States are problematic. The transposition is far from uniform and potential violations of the right to liberty, the prohibition of refoulement, the right to asylum and the right to an effective remedy occur. Nevertheless, the European Commission seems to have only started one infringement procedure against Hungary concerning the application of the border procedure.

5.4. Recommendations

On access to asylum procedures

1. **Access to asylum procedures** should be ensured at all times and at all external borders of the European Union. Push backs at the external and internal borders of the Member States are prohibited.

On the definition of border procedures

2. EU law should **clearly define** the border procedure as a procedure in which asylum applicants are not (yet) granted the right to enter.

On the limitation of border procedures to well-defined cases:

3. EU law should require that the border procedure can only be **resorted to after an individual assessment** of the circumstances of the case, including an examination of potential special reception and procedural needs. Proportionality *stricto sensu* of the detention measure and the question whether an applicant has special reception or procedural needs, see recommendation 31) need to be assessed in coherence.

4. EU law should **further limit** the applicability of border procedure to:
   a. cases which may be considered less complex as regards facts and law (grounds currently laid down in Art. 33(1)(a), (b), (d) and (e) and 31(a) and (b) RAPD)
   b. cases in which the Member State has shown that the applicant has intentionally failed to cooperate with the determining authorities or has misled them (grounds currently laid down in Art. 31(8)(c), (d), (g) and (h) RAPD);
   c. cases in which the applicant poses a genuine, present and sufficiently serious threat to public order or national security (ground currently laid down in Art 31(8)(i) RAPD).

5. EU law should clarify that border procedures may be used to take decisions under the Dublin Regulation, but **only if there is a significant risk of absconding** in accordance with Article 28 Dublin Regulation.

6. The asylum applications of (unaccompanied) children and asylum applicants with special (reception and/or procedural) needs, should not be processed in a border procedure.
Border procedures in the Member States

On the location of border procedures

7 EU law should make clear that as a general rule, **border procedures may not be used at internal borders.** EU law should clarify the relationship between **reinstatement of internal border control** and the use of border procedures.

On the legal basis of detention or limitation of freedom of movement

8 In the limited amount of cases that Member States may use border procedures under EU law, EU law should oblige Member States to provide a **clear legal basis** in domestic law for either (1) **the use of detention** pursuant to Article 8(3)(c) RCD; or (2) **a restriction on freedom of movement** pursuant to Article 7 RCD. In the **absence of such a legal basis** in domestic law, **border procedures cannot be applied** and applicants have to be **granted the right to legally enter** the territory. In that case, detention can only be based on the other grounds enumerated in Article 8(3) RCD (not Article 8(3)(c)).

On the proportionality of detention

9 If a border procedure is accompanied by detention, a **full proportionality assessment of the detention measure** should be carried out by the authorities deciding to apply the border procedure, including the question whether alternatives can be used. National law should lay down the rules for alternatives for detention with specific regard to border procedures.

On conditions of detention

10 If the place and conditions of detention are not in conformity with the RCD, the Charter and the ECtHR case law, *detention is unlawful* and applicants should be **released**.

11 The EU should **monitor the conditions of detention and restrictions of liberty** at the border or in transit zones.

On procedural guarantees concerning detention and restrictions of freedom of movement

12 The use of detention and the imposing of restrictions on freedom of movement in a border procedure are to be **accompanied with procedural guarantees**.

13 A **decision in writing** should **qualify** the measures as either **detention or restrictions on freedom of movement**, and the **reasons** for the actual restrictions ordered should be stated in fact and in law.

14 Both **detention and restrictions on freedom of movement**, if these are decided by an administrative authority, should be subject to a **speedy judicial review**.

15 The scope of the judicial review should be such as to enable the judicial authority to **substitute its own decision** for that of the administrative authority with regard to the **qualification of the measure** (detention or restriction on freedom of movement). Moreover, it should be able to take into account any element that it considers necessary for assessing the **lawfulness** of the measure ordered, including the **proportionality** and **conditions of detention**.

On time limits in border procedures

16 The time frame applicable in the border procedure should enable the asylum applicant to **prepare and substantiate** their asylum application and to make **effective use of all procedural rights** granted to them. In particular, the time limits should enable the applicant to **receive and understand information** about the asylum procedure, to **present their asylum account** in a comprehensive manner.
during the personal interview. Moreover, time limits should enable the applicant to make **effective use of the right to (free) legal assistance** and the **right to an effective remedy**. This means that the asylum applicant should have sufficient time to understand the decision, find a lawyer, lodge an appeal and (if necessary) a request for suspensive effect, have access to the case file and write appeal grounds and prepare the hearing together with their lawyer.

17 The time-frame of the border procedure should ensure that the determining authority is able to gather all necessary information and can take a careful asylum decision.

**On contact with the outside world**

18 Member States should enable asylum applicants to make use of **means of communication with the outside world**, including telephone and internet, in order to gather information about the asylum procedure, to gather and submit evidence in support of their asylum claim and to contact their lawyer or other counsellor.

**On the right to information**

19 Asylum applicants should have **timely access to adequate and comprehensible information** about the criteria for granting international protection, which evidence and information is relevant in the context of these criteria and their procedural rights and obligations in written and oral form and in a language they understand.

20 Asylum applicants should have **effective access to NGO’s and UNHCR during the border procedure**.

**On the right to a personal interview**

21 Personal interviews in border procedures should in principle be **held in person** (and not remotely) **in the presence of an interpreter**. Exceptions can only be made in exceptional circumstances, for example if no live interpreter is available.

22 The location of the interview and the interpreter should **ensure complete confidentiality**.

**On the accessibility of (free) legal and linguistic assistance**

23 In the border procedure, **free legal and linguistic assistance** should be available to **all asylum applicants** whose asylum application in order to compensate for short time limits and detention.

24 Member States should ensure the effectiveness of the right to free legal assistance by ensuring the availability of **sufficient and qualified legal advisers and interpreters**. Moreover, Member States **ensure the accessibility** of those legal advisers and interpreters.

**On the right to an effective remedy**

25 The court or tribunal assessing the appeal against a decision taken in a border procedure or the request for suspension of this decision should carry out a **full and ex nunc review** of the facts and law, including the need for international protection. To this end, the court tribunal should **hear the asylum applicant** if necessary.
26 The applicant should have the opportunity to have the risk of refoulement (including grounds not covered by the Qualification Directive) effectively reviewed by a court or tribunal before they can be expelled.

On action of the EU institutions

27 EU institutions should monitor the accessibility of asylum procedures at the external borders.

28 The EU institutions should monitor state action at internal borders with regard to applicants for international protection and make sure that the asylum acquis is not disregarded, inter alia through the use of push-backs across internal borders.

29 The EU institutions should monitor deprivations and restrictions of liberty, and the conditions thereof, in the context of a border procedure at the borders or in transit zones.

30 The European Commission should evaluate the quality of decision-making with regard to detention measures or restrictions of movement.

31 The European Commission should evaluate the quality of asylum decisions taken in a border procedure and the quality of the judicial review of such asylum decisions.

32 Reporting ad exchange of information by Member States, institutions and agencies should be based on a uniform understanding of the border procedure as a procedure in which applicants have not been granted entry to the territory.
Annex

Table 1: Overview application of (de facto) border procedures in the Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Border procedure Art 43 RAPD</th>
<th>De facto border procedure 487</th>
<th>No border procedure</th>
<th>Push backs reported by AIDA?</th>
<th>External/ internal border</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>Internal</td>
</tr>
<tr>
<td>Belgium</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td>External</td>
</tr>
<tr>
<td>Cyprus</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Croatia</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>External</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>X</td>
<td></td>
<td></td>
<td>No AIDA report</td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td></td>
<td></td>
<td>X</td>
<td>No AIDA report</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td></td>
<td></td>
<td>X</td>
<td>No AIDA report</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>Internal</td>
</tr>
<tr>
<td>Germany</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>Internal</td>
</tr>
<tr>
<td>Greece</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td>External</td>
</tr>
<tr>
<td>Hungary</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>External</td>
</tr>
<tr>
<td>Italy</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Internal and External</td>
</tr>
<tr>
<td>Latvia</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>No AIDA report</td>
</tr>
</tbody>
</table>

487 It concerns asylum procedures at the border, which are not recognised as a border procedure as meant in Art 43 RAPD under national law.
492 AIDA (2020) Croatia, pp 16, 24-28, 47. It is not clear whether it is applied in practice.
493 EASO (2020) p 38.
494 EASO (2020) p 27.
495 EASO (2020) p 27.
496 ECRE (2020).
499 ECRE (2020).
500 This procedure was applied until 26 May 2020.
501 ECRE (2020).
### Border procedures in the Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Border procedure Art 43 RAPD</th>
<th>De facto border procedure 487</th>
<th>No border procedure</th>
<th>Push backs reported by AIDA?</th>
<th>External/ internal border</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lithuania</td>
<td>X</td>
<td></td>
<td>No AIDA report</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Luxemburg</td>
<td>X</td>
<td></td>
<td>No AIDA report</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>External</td>
</tr>
<tr>
<td>Portugal</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>Internal</td>
</tr>
<tr>
<td>Romania</td>
<td>X</td>
<td></td>
<td>X</td>
<td>Internal and external</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td></td>
<td>X</td>
<td></td>
<td>No AIDA report</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>X</td>
<td></td>
<td>X</td>
<td>Internal</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>X</td>
<td></td>
<td>X</td>
<td>External</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td></td>
<td>X</td>
<td>X</td>
<td>Internal</td>
<td></td>
</tr>
</tbody>
</table>

503 EASO (2020) p 37. EASO writes: ‘Lithuania does not provide for a border procedure in its national legal framework. However, asylum applications at the border crossing points are analysed in accelerated procedures and all aspects of border procedure are applicable’.

504 EASO (2020) p 38. ‘The border procedure is not applied in Luxembourg. However, Luxembourg has an airport procedure applied only at the Luxembourg International Airport.’


509 AIDA (2020) Romania, pp 18-20

510 EASO (2020) p 43.

511 The border procedure is not applied in practice. All asylum applicants are granted entry to the territory. AIDA (2020) Slovenia, pp 17-20 and 35-36.


Table 2: Overview types of decisions made in the border procedure in the Member States

<table>
<thead>
<tr>
<th>Member State</th>
<th>Dublin</th>
<th>Admissibility</th>
<th>Substance</th>
<th>Positive asylum decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria(^{514})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Belgium(^{515})</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Croatia(^{516})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Czech Republic(^{517})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>France(^{518})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Germany(^{519})</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Greece(^{520})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Latvia(^{521})</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>The Netherlands(^{522})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Portugal(^{523})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>?</td>
</tr>
<tr>
<td>Romania(^{524})</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Slovenia(^{525})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Spain(^{526})</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>


\(^{516}\) Art 42(1) and 43 Croatian Aliens Act.

\(^{517}\) Sections 73 and 74(2) of the Czech Aliens Act.

\(^{518}\) ECRE (2020).

\(^{519}\) ECRE (2019-I).

\(^{520}\) This concerns the fast-track border procedure on the islands. See ECRE(2020) p .

\(^{521}\) Sections 23(6), 29(1)(1), 30(1) Latvian Asylum Law.

\(^{522}\) AIDA (2020) The Netherlands.

\(^{523}\) ECRE (2020).

\(^{524}\) AIDA (2020) Romania, p 58.

\(^{525}\) The border procedure is not applied in practice. All asylum applicants are granted entry to the territory. AIDA (2020) Slovenia, pp 35-36.

\(^{526}\) ECRE (2020).
Table 3: Time limits for taking a decision in the border procedure in number of days\footnote{See EASO (2020) (BE, DE, CZ, EL, ES, FR, HR, LV, LT, NL, PT, SI, SK, RO) and Respond (2019), p 35 (DE)}

<table>
<thead>
<tr>
<th>Number of days</th>
<th>FR\footnote{DE}</th>
<th>DE</th>
<th>RO\footnote{LT}</th>
<th>ES</th>
<th>LV\footnote{ES}</th>
<th>EL\footnote{PT}</th>
<th>NL\footnote{SK}</th>
<th>IT</th>
<th>SI</th>
<th>BE</th>
<th>HR</th>
<th>CZ</th>
<th>HU\footnote{HU}</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>FR\footnote{DE}</td>
<td>DE</td>
<td>RO\footnote{LT}</td>
<td>ES</td>
<td>LV\footnote{ES}</td>
<td>EL\footnote{PT}</td>
<td>NL\footnote{SK}</td>
<td>IT</td>
<td>SI</td>
<td>BE</td>
<td>HR</td>
<td>CZ</td>
<td>HU\footnote{HU}</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>7</td>
<td>8</td>
<td>9</td>
<td>14</td>
<td>28</td>
<td>52</td>
<td>60</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\footnote{EASO only mentions that the asylum applicant should be granted entry to the territory, if the decision is not taken within four weeks.}

\footnote{This time limit applies to the motivated opinion, which OFPRA issues before the Ministry of the Interior issues a decision concerning the right to enter the territory. This decision should be taken within a period of 20 days.}

\footnote{Officially, Lithuania does not have a border procedure. This time limit applies to decisions made at border crossing points.}

\footnote{ECRE (2020) Romania, p 58.}

\footnote{The time-limit concerns decisions of admissibility.}

\footnote{Section 29 Latvian Asylum Law.}

\footnote{This concerns the fast track border procedure. ECRE (2020).}

\footnote{ECRE (2020).}

\footnote{Officially Slovakia does not have a border procedure. This time limit applies to decisions made in a transit zone.}

\footnote{This is the standard time limit. See Art 3.110 Aliens Decree. Some cases are not processed in the regular border procedure, but in the prolonged border procedure, which takes a maximum of 28 days. See Art 3(6) Aliens Act 2000.}

\footnote{ECRE (2020).}

\footnote{This concerns the procedure in the transit zone, which is not considered a border procedure by Hungary. ECRE (2020).}
Table 4: Time limits for lodging the appeal against the asylum application in number of days

<table>
<thead>
<tr>
<th>Number of days</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>7</th>
<th>8</th>
<th>10</th>
<th>20–30</th>
<th>30</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>FR</td>
<td>ES</td>
<td>DE</td>
<td>PT</td>
<td>HR</td>
<td>AT</td>
<td>EL</td>
<td>SI</td>
<td>LV</td>
</tr>
</tbody>
</table>
| 540 | See EASO (2020) (AT, BE, DE, CZ, EL, ES, FR, HR, IT, LU, LV, NL, PT, SI, SK, RO) and EMN (2019).
| 541 | ECRE (2020).
| 543 | Section 29(1)(1) Latvian Asylum Law.
| 545 | This concerns the fast track border procedures applied on the Greek islands. ECRE (2020) p.
| 549 | Officially Slovakia does not have a border procedure. This time limit applies to decisions made in a transit zone. EASO (2020) p 43.
| 551 | ECRE (2020).
| 553 | Officially Luxembourg does not have a border procedure. This time limit applies to decisions made in the transit zone of the Airport.
| 555 | EASO (2020).
| 557 | EASO (2020) p 44.
| 559 | Art 42(6) Act on International and Temporary Protection
| 561 | EASO (2020) p 43.
| 563 | ECRE (2020).

Table 5: Time limits for deciding on the appeal against the asylum application in number of days

<table>
<thead>
<tr>
<th>Number of days</th>
<th>2</th>
<th>3</th>
<th>5</th>
<th>7</th>
<th>8</th>
<th>10</th>
<th>14</th>
<th>30</th>
<th>60</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>ES</td>
<td>FR</td>
<td>LV</td>
<td>CZ</td>
<td>HR</td>
<td>GR</td>
<td>AT</td>
<td>SK</td>
<td>PT</td>
</tr>
</tbody>
</table>
| 553 | Section 49(1) Latvian Asylum Law.
| 555 | AIDA (2020) Romania, p 60.
| 559 | ECRE (2020).
| 561 | EASO (2020) p 44.

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540 See EASO (2020) (AT, BE, DE, CZ, EL, ES, FR, HR, IT, LU, LV, NL, PT, SI, SK, RO) and EMN (2019).
541 ECRE (2020).
543 No appeal can be lodged against the decision taken in a border procedure, but a claim can be lodged before the Administrative Court. See EASO 2020, p 25.
545 Section 29(1)(1) Latvian Asylum Law.
547 In case of a second or further order to leave the country, this time limit is 5 days. Art 39/57 Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers. 15 Decembre 1980.
549 Officially Slovakia does not have a border procedure. This time limit applies to decisions made in a transit zone. EASO (2020) p 43.
551 ECRE (2020).
553 Officially Luxembourg does not have a border procedure. This time limit applies to decisions made in the transit zone of the Airport.
555 EASO (2020).
557 EASO (2020) p 44.
561 EASO (2020) p 43.
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Case C-175/11 H.I.D. and B.A [2013]
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Case C-585/16 Alheto [2018]
Case C-129/18 SM [2019]
Case C-444/17 Arib and others [2019]
Joined Cases C 133/19, C 136/19 and C 137/19 B.M.M. and others [2020]
Case C-406/18 PG [2020]
Case C-517/17 Milkiyas Addis [2020]
Case C-564/18 L.H. [2020]
Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020]

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The implementation of Article 43 of Directive 2013/32/EU in practice

Comparative analysis
Executive summary

In the study, the European Council on Refugees and Exiles (ECRE) provides a comparative analysis of the implementation of border procedures as foreseen in Article 43 of the recast Asylum Procedures Directive (Directive 2013/32/EU, hereafter “recast APD”). The study covers seven Member States (France, Germany, Greece, Hungary, Italy, Portugal, and Spain) and addresses the specific research questions listed in Annex I.

Key Findings

The comparative analysis of the seven countries produced thirteen key findings, which are discussed in detail:

1. There are differences in the design and location of the border procedure
2. Serious challenges arise concerning access to asylum at the border, especially prior to the procedure
3. Various authorities play a role in border procedures
4. Grounds for activation of the border procedure vary
5. Time limits for decisions vary (within the rules in the Directive)
6. Practice concerning the border procedure varies
7. Limited evidence is available on the quality of decision-making in the border procedure
8. Diverging outcomes of the border procedure are visible at national level
9. The right to an effective remedy may not be fully respected
10. Procedural safeguards are lacking during the border procedure
11. Vulnerable applicants may be at risk during the border procedure
12. Detention (declared or de facto) is the norm for the border procedure
13. There is limited use of external assistance by national authorities

As is allowed by the discretionary nature of Article 43 recast APD, Member States’ practice differs significantly when it comes to both the design and use of the border procedure. The study’s findings are that, whether applied at land, sea or air borders, such procedures involve a variety of authorities and they are invariably characterised by short deadlines for decision-making and for lodging appeals, a lack of information to (potential) applicants, and reduced accessibility for interpreters, NGOs and legal aid providers due to the locations where procedures are conducted and where applicants are (officially or de facto) detained.

The evidence suggests a more restrictive approach to protection claims in border procedures compared to similar caseloads examined in regular procedures, and further suggests that significant protection gaps result from the unavailability or inadequacy of procedural guarantees. Mechanisms to identify applicants with special needs at the border are also lacking, thus further reducing access to guarantees. An additional challenge is derived from the ambiguities in Article 43 recast APD, which give rise to legal uncertainty and arbitrariness.

Better Regulation assessment

Using the EU’s Better Regulation framework, the provision was also assessed against the principles of effectiveness, efficiency, fundamental rights, and coherence with the aims of the recast APD and the Common European Asylum System (CEAS) as a whole.
Effectiveness

Article 43 recast APD does not clearly define a specific objective, thus rendering an assessment of its effectiveness difficult. The sole objective of the provision is to provide Member States with the possibility of establishing a border procedure.

The effectiveness of Article 43 APD is limited by partial transposition, incorrect transposition and non-transposition.

Partial transposition of Article 43 recast APD was identified as follows:

- Limiting the use of border procedures to certain locations (e.g. airports) or which limiting the scope of the border procedure to an inadmissibility assessment rather than an in-merit examination of the application (i.e. FR, DE, ES).
- Omitting to transpose of some aspects of the border procedure, such as the requirement to allow access to the territory after four weeks (i.e. IT), or the extension of that time limit in the event of an influx of applicants (i.e. FR).
- Separately, where transposition has occurred implementation may be lacking. For example, the provision of information, counselling, and interpretation at border crossing points (Article 8 recast APD) exists in law in the countries covered but is not applied in practice in most cases.

Incorrect transposition of Article 43 was identified as follows:

- Incorporating grounds for activating the border procedure which go beyond the boundaries set by Article 43 recast APD (i.e. in IT, DE and HU).

Non-transposition of Article 43 occurs in Member States outside the study:

- Currently, there is no border procedure in Bulgaria, Cyprus, Estonia, Finland, Ireland, Lithuania, Luxembourg, Poland, Malta, Slovakia and Sweden. This is in accordance with the optional character of Article 43 recast APD but could also indicate doubts about the effectiveness of the border procedure.

The effectiveness of Article 43 recast APD can also be judged against the broader objectives established by the CEAS.

- The objective of Article 78 of the Treaty on the Functioning of the European Union (TFEU) and Article 1 recast APD to establish a common border procedure has not been achieved as Member States’ practice as regards border procedures is highly divergent.
- The objective of ensuring that asylum procedures, including border procedures, are fair and efficient in line with the recast APD, the Tampere Conclusions of 1999, and the 1951 Convention has not been achieved. Border procedures involve a more restrictive approach to protection claims; reduced procedural safeguards for applicants; and systematic detention at the border.
- The objective of the recast APD to ensure adequate support to vulnerable applicants in the context of border procedures has not been achieved: vulnerable applicants, including unaccompanied minors, continue to be subject to border procedures and held in detention facilities inter alia as a result of a lack of efficient vulnerability identification mechanisms.

The effectiveness of Article 43 is also undermined by enforcement challenges.

- The Commission is subject to political constraints when it comes to the launch of infringement proceedings. Even when there is the willingness to use infringement
proceedings, they take time, resources and effort. A Member State may well continue violating the asylum acquis without legal consequences.

The lack of effectiveness is inherent in the complexity and the legal ambiguity of Article 43 recast APD.

- Increasing harmonisation by rendering border procedures (near) mandatory or through otherwise increasing their scope, may not increase their effectiveness as they will continue to be subject to widely different interpretation and application at the Member State level.
- In the context of future legislation, further harmonisation could aim at establishing the highest standards of protection across the EU and raising protection standards where they are currently insufficient, as well as ensuring adequate investment in, and thus improving effectiveness and efficiency of, the regular procedure.

**Efficiency**

A full picture of the financial costs of using of border procedures is not available so a complete assessment of efficiency is not possible. Studies suggest, however, that the costs of border management is significant. The costs of the implementation Article 43 recast APD may also be significant and possibly disproportionate, given that its objectives are not fully met.

The border procedures also has significant administrative costs for national authorities, as they require increased coordination amongst a variety of authorities, notably between border police, asylum authorities and responsible ministries. Resources need to be invested in additional procedures and the separate (from the regular) border asylum regime.

Border procedures involve short time limits and detention, thereby entailing significant human cost for the individuals affected by its application. Asylum seekers subject to border procedures are exposed to the harmful effects of detention, sometimes in inadequate border facilities, and with limited access to information and external service providers, such as legal representatives and NGOs.

**Fundamental rights (including procedural rights)**

Fundamental rights as set out in EU law, above all in the EU Charter of Fundamental Rights (CFR) act as constraints on the use and misuse of border procedures. Nonetheless, fundamental rights concerns arise in the use of border procedures.

- The difficulty in accessing the territory and the asylum procedure, as well as the use of the fiction of non-entry in the context of border procedures, may in certain circumstances undermine the right to asylum under Article 18 CFR, the principle of non-refoulement under Article 19 CFR, and the right to an effective remedy under Article 47 CFR.

- The right to be heard as well as the procedural guarantees foreseen in the recast APD, such as the right to information, legal assistance and interpretation, are either not applied or only applied to a limited extent in border procedures. This undermines the right to asylum as well as the principle of non-refoulement, as enshrined in Article 18 and 19 of CFR.

- Effective vulnerability identification mechanisms are lacking in all countries examined, thereby rendering any special procedural safeguards and adequate support laid down in EU law meaningless in practice. The impact on unaccompanied children is of particular concern and raises questions as to compliance with the best interest of the child principle, enshrined in Article 24(2) CFR.
The short time limits to lodge and decide on appeals, the lack of suspensive effect of appeals in certain countries, and the difficulty accessing quality legal aid raise concerns as to whether the right to an effective remedy as foreseen in Article 47 CFR is ensured.

The systematic and prolonged use of (formal or de facto) detention, which should be an exceptional measure used as last resort where alternatives to detention cannot be applied effectively, is not in line with the right to liberty enshrined in Article 6 CFR.

Coherence

The framework foreseen for border procedures under the APD is complex and unclear, in part due to cross references to other provisions of the APD and to other CEAS instruments.

Under the EU’s current legal framework, it is unclear whether an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure. Article 33 recast APD does not list the application of the Dublin procedure as an admissibility ground. Article 43 recast APD read in conjunction with Article 33(1) recast APD seems to suggest that applications for which another Member State is responsible are not examined.

The recast APD is fraught with ambiguity with regard to the applicable reception regime of applicants under a border procedure. It is unclear whether an asylum seeker in a border facility is accommodated, detained, or both. The combination of provisions under the recast APD and RCD create a loophole or an ambiguity in the law which allows Member States to “legally” detain asylum seekers at the borders.

The recast APD is also ambiguous regarding the application of the border procedure to vulnerable applicants and unaccompanied children. While it does not provide for a clear-cut exemption of vulnerable applicants, the absence of a clear definition of what constitutes “adequate support” results in highly divergent practices at Member State level.

Recommendations

The study provides a set of detailed recommendations, which are summarised here. It should be noted, however, that some of the flaws are inherent to the legal framework, implementation alone will not resolve the problems.

On the access to the territory and to the asylum procedure at borders

- Every person who may be in need of international protection at borders must be ensured effective access to the asylum procedure, in accordance with EU and international law.
- Member States must pro-actively and properly inform all third country nationals at border crossing points of the possibility to apply for international protection, in accordance with Article 8 recast APD and in line with the principle of non-discrimination laid down in Article 21 CFR.
- Persons subject to a refusal of entry must be ensured access to an effective remedy in accordance with EU law and the ECHR. Push backs through automatic refusal of entry, or without administrative formalities at all, are unlawful acts which should lead to accountability and condemnation.
- European countries should eliminate any fictitious designation of transit zones or other facilities at the border as not part of their national territory according to their national law, in line with ECtHR jurisprudence and the territorial scope of the recast APD and RCD.
Border management staff should not be involved in the examination of applications for international protection and must be adequately trained in accordance with Article 6(1) of the recast APD and in line with practical tools developed by EASO and FRA.

On (grounds for) activation of the border procedure

- States should refrain from applying border procedures where possible and activation grounds must not go beyond those set in EU law.
- At EU level, co-legislators should carefully consider whether rendering border procedures mandatory in some circumstances and otherwise expanding their scope will enhance the efficiency of asylum systems in the EU.
- States should collect statistics on (i) the volume of applications considered in border procedures and the profile of the applicants concerned; (ii) the grounds for applying the border procedure; and (iii) the outcomes of border procedures at both first and second instance.

On the functioning of the border procedure and applicable procedural guarantees

- The personal interview should be conducted by the determining authority in person and adopt a gender-sensitive approach.
- The right to free legal assistance and representation should be guaranteed both in law and practice to asylum seekers as soon as their asylum application is lodged.
- Interpretation in the language of the applicant should be provided in person and at all stages of the border procedure.
- Appeals in the border procedure should have automatic suspensive effect so as to affirm the principle of non-refoulement and enhance the right to an effective remedy.
- The right to an effective legal remedy must be effectively ensured in accordance with Article 19(1) TEU, Article 47 CFR, Article 13 ECHR, and Article 46 recast APD.

On vulnerable applicants in the border procedure

- Applicants in need of special procedural or reception needs should be explicitly and unequivocally exempt from border procedures as a matter of law.
- Member States should systematically and as early as possible after the application has been made at the border assess whether an individual applicant is in need of special procedural guarantees. This requires early and effective vulnerability identification mechanisms.

On unaccompanied children in the border procedure

- Asylum applications of unaccompanied children should never be examined in border procedures in accordance with the best interest of the child principle pursuant to Articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC). This exemption must be regulated in law.
- Member States should put in place procedures to identify unaccompanied children and promptly refer them to the appropriate child welfare authorities. In case of doubt on the age of the child, the benefit of the doubt should prevail.

On detention and the deprivation of liberty at the border

- States should not detain asylum seekers at the border. Detention should remain an exceptional measure, used only where alternatives to detention cannot be applied, and must be reviewed regularly.
- Where measures prevent asylum seekers from leaving a transit zones or other border facilities to access other parts of the territory, Member States and the EU should legally
classify such measures as detention, in accordance with the jurisprudence of the European Courts interpreting Article 5 ECHR, Article 6 CFR, and Article 8 of the recast APD.

Border detention facilities must be adequate and ensure a dignified standard of living which guarantees subsistence and protects physical and mental health.

On the access of third parties to border facilities

- Restrictions imposed upon access to border facilities of legal representatives and specialised civil society organisations should be lifted in line with Article 8(2) recast APD
- Independent monitoring bodies should be able to access border facilities so as to be able to provide assistance and information to asylum seekers, help identify vulnerabilities, and flag fundamental rights.
- Effective protection of fundamental rights requires systematic reporting of violations without geographic or procedural restrictions, effective investigation of all allegations, and effective and dissuasive sanctions when violations occur, in line with FRA's Guidance on Border controls and fundamental rights at external land borders.

On ensuring compliance with Article 43 recast APD

- The European Commission should publish its report on implementation of the recast APD (Directive 2013/32/EU), which should have been presented by 20 July 2017.
- Implementation gaps must be taken seriously and responses to persistent non-compliance must be adopted as appropriate, in accordance with Articles 258 to 260 TFEU.
## List of acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AIDA</td>
<td>Asylum Information Database</td>
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<tr>
<td>Anafé</td>
<td>National Association of Border Assistance to Foreigners (France)</td>
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<tr>
<td>APD</td>
<td>Asylum Procedures Directive (recast)</td>
</tr>
<tr>
<td>ASGI</td>
<td>Association for Legal Studies on Immigration (Italy)</td>
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<tr>
<td>BAMF</td>
<td>Federal Office for Migration and Refugees (Germany)</td>
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<tr>
<td>CEAR</td>
<td>Spanish Commission of Aid to Refugees (Spain)</td>
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<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
</tr>
<tr>
<td>CESEDA</td>
<td>Code on Entry and Residence of Foreigners and on Asylum (France)</td>
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<tr>
<td>CETI</td>
<td>Migrant Temporary Stay Centres (Spain)</td>
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<tr>
<td>CFR</td>
<td>Charter of Fundamental Rights</td>
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<tr>
<td>CGPL</td>
<td>General Controller of Places of Detention (France)</td>
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<tr>
<td>CIT</td>
<td>Temporary Installation Centre (Portugal)</td>
</tr>
<tr>
<td>CJA</td>
<td>Code of Administrative Justice (France)</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CMW</td>
<td>Committee on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>CPR</td>
<td>Portuguese Refugee Council (Portugal)</td>
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<tr>
<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
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<tr>
<td>EC</td>
<td>European Commission</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECRE</td>
<td>European Council on Refugees and Exiles</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EDAL</td>
<td>European Database of Asylum Law</td>
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<td>EPRS</td>
<td>European Parliament Research Service</td>
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<tr>
<td>EPS</td>
<td>Early Warning and Preparedness System</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>FRA</td>
<td>Fundamental Rights Agency</td>
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<td>GCR</td>
<td>Greek Council for Refugees</td>
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<tr>
<td>HHC</td>
<td>Hungarian Helsinki Committee</td>
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<tr>
<td>IBMF</td>
<td>Integrated Border Management Fund</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IPA</td>
<td>International Protection Act (Greece)</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>MFF</td>
<td>Multi-Annual Financial Framework</td>
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<td>MSF</td>
<td>Médecins sans frontières</td>
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<tr>
<td>NDGAP</td>
<td>National Directorate-General for Aliens Policing (Hungary)</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OAR</td>
<td>Office of Asylum and Refuge (Spain)</td>
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<tr>
<td>OFPRA</td>
<td>Office for the Protection of Refugees and Stateless Persons (France)</td>
</tr>
<tr>
<td>OHCHR</td>
<td>United Nations Human Rights Council</td>
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<tr>
<td>RCD</td>
<td>Reception Conditions Directive (recast)</td>
</tr>
<tr>
<td>RIC</td>
<td>Reception and Identification Centre (Greece)</td>
</tr>
<tr>
<td>SAR</td>
<td>Search and rescue</td>
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<tr>
<td>SEF</td>
<td>Immigration and Borders Service (Portugal)</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children's Fund</td>
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<tr>
<td>UNWGAD</td>
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1. Introduction

1.1. Background to the report

Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, known as the Asylum Procedures Directive (here the “recast APD” or “the Directive”), sets out provisions on border procedures which may be used by the national authorities of the Member States as part of the Common European Asylum System (CEAS). When applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant, Member States can carry out admissibility and/or substantive (in-merit) examination procedures at these locations. In addition, the APD foresees the possibility to apply border procedures in transit zones or in the proximity of borders in the event of large numbers of arrivals of people seeking protection.

The APD was to be transposed into national law by 20 July 2015. While Article 50 APD provides for regular reporting, the Commission has yet to publish an implementation report. In the meantime, in 2016 the Commission tabled a proposal for a reform of the APD, including its transformation into a regulation, with the stated purpose of generating greater harmonisation across the Member States. At that time, no impact assessment for the Directive was provided.

Against that background and in light of the New Pact on Migration and Asylum and accompanying legislative proposals published on 23 September 2020, the European Parliament aims to undertake its own implementation report, focused specifically on Article 43 of the APD. The European Parliament Research Service (EPRS) thus commissioned the European Council on Refugees and Exiles (ECRE) to carry out a comparative analysis of the application in practice of asylum border procedures, as provided for in Article 43.

ECRE was contracted to analyse and compare the application in practice of asylum border procedures in seven EU Member States, Germany, Spain, France, Greece, Hungary, Italy, and Portugal, in order to provide general findings and concrete examples of how asylum border procedures work in practice.

1.2. Method

In order to gather both data and qualitative information, the study used desk research and examined material from a variety of sources, including primary evidence. The sources consulted include, first, qualitative and quantitative information on national practices extracted from the Asylum Information Database (AIDA) managed by ECRE. Second, statistics made available by national authorities and Eurostat. Third, case law from the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and domestic courts, as reported in the European Database of Asylum Law (EDAL), managed by ECRE. Fourth, reports from civil society organisations, United Nations bodies and EU Agencies. The European Asylum Support Office (EASO) report on Border Procedures for Asylum Applications in EU+ Countries, published in September 2020 was a particularly useful source of information.

ECRE relied heavily on the AIDA country reports because they include a dedicated section on the functioning of the border procedure at national level. Information and extracts from the database have further been largely used for the country profiles that have been added as Annexes to the study. These country reports are written by national experts and reviewed and edited by ECRE. National experts further provided thorough feedback on the respective country profiles presented in this study so as to ensure that information is accurate, detailed and up-to-date. For France and
Germany, ECRE also derived information from its on-site mission reports, which were published following fact-finding visits to and interviews in transit zones and border facilities in 2018 and 2019.

In order to corroborate information and to seek clarifications, ECRE also sent information requests to actors involved in the border procedure (see Annexe III – Information request submitted to national authorities and Annexe IV – Information request submitted to the European Commission). A list of interlocutors is available in Annexe II - List of interlocutors, including:

- National authorities of the seven countries, who were sent a questionnaire requesting information on statistics, the applicable legal framework and on practice. Contributions were received from the authorities in Portugal, France, Germany, Spain and Hungary.
- National civil society organisations and legal practitioners, who provided information in writing or through interviews.
- The Asylum Unit of the European Commission (DG HOME), which referred ECRE back to EASO’s report on Border Procedures for Asylum Applications in EU+ Countries to which it had contributed information on the implementation of the border procedure.

1.3. Information gaps and limitations

While a wide range of information was available, it is lacking on some topics.

1.3.1. Statistics

Detailed statistics on the grounds for activating the border procedure are not available in any of the countries covered, with the exception of Greece. (Although the Greek Asylum Service also stopped publishing monthly statistical data in February 2020, without further explanation, and it is unclear whether it will re-start.)

Detailed statistics on the numbers and profiles of persons subject to the border procedure, on the location and the length of the border procedure, and on appeals were shared by certain national authorities following ECRE’s information requests, but this information is not always comprehensive nor is it usually publicly available.

As regards the outcome of the border procedure, and in particular protection rates, very little comparable information is available. This would have enabled assessment of the difference in the protection rates of asylum applicants of the same nationality in the border procedure compared to the regular procedure, a vital piece of information. EASO’s recent report (September 2020), states that, overall in 2019, most first instance decisions issued in EU+ countries using accelerated or border procedures led to a rejection of the asylum application for a significantly higher share of decisions than was the case for the regular procedure. According to data exchanged in the framework of EASO’s Early Warning and Preparedness System (EPS), the recognition rate for first instance decisions under the border procedure was 7%, compared to the total EU+ protection rate for first instance decisions of 33% in 2019.

Collecting and making this data publicly available would allow for an evidence-based assessment of the usefulness of the border procedure in the Common European Asylum System (CEAS). Collating such statistics would not require substantial administrative resources, as Member States already provide statistical information to Eurostat and to EASO for the EPS.

1.3.2. Budget allocated to the border procedure

At EU level there is no information available specifically on the cost of border procedures. It should be noted, however, that studies suggest that the overall costs of border management and control
The implementation of Article 43 of Directive 2013/32/EU in practice

is significant. For example, according to certain estimates, the EU has paid over €600 million just to set up the IT systems to facilitate the work of border guards,¹ even though the European Court of Auditors demonstrated that certain data are not included in these IT systems, while other data are either incomplete or not entered in a timely manner which reduces the efficiency of some border checks.²

Other information suggests that the EU funds available for border-related elements of asylum and migration policy will increase under the next Multi-Annual Financial Framework (MFF). Of €31.12 billion available for the internal dimension of migration, up to 75% could be spent on return and border management, spread across AMIF (return component), the Integrated Border Management Fund (IBMF), and the decentralised agencies, primarily the European Border and Coast Guard Agency (Frontex).³

1.3.3. Transparency

The research suggests that there is a lack of transparency in the functioning of the border procedure. First, it is not clear what occurs in practice at sea, land and air borders prior to the activation of the border procedure, i.e. when third-country nationals first enter into contact with border management staff. Numerous reports indicate unlawful push-back practices and collective expulsions applied to persons potentially in need of international protection. Limited information provision, limited access to legal and/or NGO assistance, and limited possibility for registration of asylum claims are all taking place. These actions are clear violations of EU and international law and continue to be condemned by national and European courts, yet the scope and extent of violations is hard to establish, inter alia due to the reluctance of national authorities to collect and share information.

Second, a lack of transparency results from the difficulty faced by external bodies when it comes to accessing applicants held in border facilities. Where such access is provided for by law or in administrative practice in theory it may not happen in practice, due inter alia to the location of border facilities and the short time limits in the border procedure.

1.3.4. Practical limitations

Due to the short time period for preparation of the study, and the current COVID-19 emergency, difficulties in information gathering resulted from the unavailability of some stakeholders and challenges in using methods such as confidential interviews.

¹ European Court of Auditors, EU information systems supporting border control - a strong tool, but more focus needed on timely and complete data, 2019, available at: https://bit.ly/3iY5VSJ, p.4.
² Ibid. pp. 4-5.
2. Key findings (France, Germany, Italy, Spain, Portugal, Greece and Hungary)

The key findings concerning the implementation of the border procedure are grouped into thirteen main categories. The findings are derived from the in-depth study of the seven countries and include country-specific and general findings. The detailed country profiles are available in annexes (Annexe V – Country profile France to Annexe XI – Country profile Spain).

2.1. There are differences in the design and location of the border procedure

Article 43(1) of the recast Asylum Procedures Directive (APD or “the Directive”) foresees that Member States may provide for procedures in order to decide on asylum applications at the border or in transit zones of the Member State. The discretionary nature of the provision thus leaves Member States the choice as to whether to use and how to design border procedures. As a result, Member States’ practices differ significantly.4

Figure 1: Application of border procedures by EU+ countries

Source: EASO, Border Procedures for Asylum Applications in EU+ Countries, September 2020, 9.

As indicated in the map above, some countries do not apply the border procedure; and others only apply it at airports. The latter is the case for Germany, where the border procedure is a so-called “airport procedure” regulated in Section 18a of the German Asylum Act and applied in international airports in Frankfurt/Main, Munich, Berlin-Schönefeld, Hamburg and Düsseldorf. In practice, most airport procedures are carried out at Frankfurt/Main airport. In 2018, over 90% of all decisions in airport procedure cases were issued in Frankfurt, with a few others at Munich airport.5 Similarly in

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4 This also been recently confirmed by EASO. See: EASO, Border Procedures for Asylum Applications in EU+ Countries, September 2020.
5 (German) Federal Government, Response to parliamentary question by The Left, 19/8701, 25 March 2019 p. 42.
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2019, more than 80% of airport cases were at Frankfurt airport, followed by Munich, with a handful of cases in Berlin and Hamburg.\(^6\)

In other countries, while the national law does not limit the border procedure to the airport, in practice it is mainly applied at the airport. This is the case in Portugal and France. In Portugal, the information collected by the Portuguese Refugee Council (CPR), which has to be informed of all asylum claims presented in the country, suggests that at least 80% of all border procedures were conducted at Lisbon Airport.\(^7\) Similarly in France, the waiting zone in Roissy-Charles de Gaulle Airport of Paris is the main point of activity in the country, followed by Orly airport, also located in Paris. Since 2015, 70% to 80% of all applications made at the border were made at Roissy airport.\(^8\)

Thus, the border procedure is not only applied mainly at airports in the three afore-mentioned countries, but in each it is also largely conducted at one location: Frankfurt/Main airport in Germany; Lisbon Airport in Portugal and Roissy-Charles de Gaulle Airport in France.

The location and design of the border procedures varies, however, in the other countries covered. In Spain, the border procedure is applied to all applicants who request international protection at airports, maritime ports, and land borders, as well as in Migrant Temporary Stay Centres (Centros de Estancia Temporal para Inmigrantes, CETI). Greece, on the other hand, has two types of border procedure: the so-called ‘normal’ border procedure applied at air borders and a fast-track border procedure applied on the Aegean Islands after the publication of the EU-Turkey Statement. In Italy, the border procedure is relatively new, implemented since September 2019. Little information is available on how it is used in practice but, similarly to Greece, it is foreseen to be applied, \textit{inter alia}, in the hotspots.

In Hungary, the border procedure has not been applied since March 2017, when it was officially suspended. However, from March 2017 to May 2020 asylum applications were processed under the regular procedure in the transit zones at Hungarian-Serbian border, which has been qualified as a border procedure by the European Commission. The Commission stated that the border procedure implemented by Hungary is not in compliance with the recast APD \textit{inter alia} because it does not respect the maximum duration of 4 weeks for holding a person in a transit centre and because it fails to provide special guarantees for vulnerable applicants.\(^9\)

2.2. Serious challenges arise concerning access to asylum at the border, especially prior to the procedure

The implementation of the border procedure pursuant to Article 43 recast APD refers specifically to the situation where an application for international protection has been lodged at the border or in transit zones of the Member States. Statistics indicate a low number of border procedures because they represent only a small percentage of the total caseload of determining authorities.

\(^6\) (German) Federal Government, \textit{Response to parliamentary question by The Left, 19/18498}, 2 April 2020, p. 44.

\(^7\) In 2019, out of 406 border procedures, at least 327 were conducted at Lisbon Airport according to information provided by the CPR.

\(^8\) OFPRA, \textit{Annual reports}.

\(^9\) European Commission, \textit{Migration and Asylum: Commission takes further steps in infringement procedures against Hungary}, 19 July 2018.
2.2.1. Number of border procedures compared to the total number of applications

The figure below compares the number of border procedures to the total number of applications in the countries covered by this study where data was made available:

Figure 2: Share of border procedures out of total applicants in 2019

Source: Eurostat and national authorities.

In 2019, border procedures represented approximately 0.3% of the total caseload in Germany, 1.4% of the total caseload in France and 5.9% of the total caseload in Spain, meaning that the vast majority of applications for international protection are lodged on the territory in each country. The number of border procedures is more significant in Portugal, where it reaches around 22% of the total cases, and in Greece where more than half the applications for international protection are subject to the fast-track border procedure.

Figures shared by national authorities demonstrate trends in the use of the border procedure.

Figure 3: Applications for international protection in France and Spain

Source: National authorities (OFPRA and OAR).
France and Spain have both recorded a consistent and significant increase in the total number of applications, reaching record levels in both countries in 2019. Similarly, the number of border procedures has also increased, although at different levels. In France, the number of border procedures has doubled from around 900 cases in 2015 to more than 2,000 in 2019. This is still far below the record number of 5,100 applications registered at the border in 2008, and only represents a small fraction of the caseload of the determining authority. In Spain, compared to the total number of applications, the number of border procedures has remained relatively stable, ranging from 6,000 to 7,000 cases in the last three years. The percentage of cases dealt with in a border procedure was high for Spain in 2015 and 2016, but has not increased despite the rise in the total number of applications from 2017 to 2019.

In Greece, both the total number of applications and the number of fast-track border procedures have increased; these cases are also a higher share of the total caseload:

Figure 4: Applications for international protection in Greece

In 2019, the fast track border procedure represented more than half the total caseload of the Greek Asylum Service (51%), and nearly half in 2018 (46%). It should be noted that most persons processed under the Greek fast-track border procedure are then channelled into the regular procedure, as will be explained further below.

In Portugal and Germany, the number of applications for international protection has not consistently increased since 2015:

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In Portugal, the number of applications for international protection has varied year by year, while the number of border procedures has remained relatively stable at around 400-500 cases per year. Nevertheless, the number of border procedures in Portugal represents a relatively high percentage of total applications (22% of all cases in 2019). On the contrary, in Germany the number of border procedures (“airport procedures”) remains very low compared to the total number of applications. In 2019, for the eighth consecutive year Germany received by far the largest number of asylum applications in the EU. Interestingly, the number of airport procedures was at its lowest in 2016 – the year when Germany registered a record number of arrivals and asylum claims.

Figures on the number of border procedures were not made available in Italy but they remain limited given that the Italian border procedure has only been implemented since September 2019. In Hungary, the number of border procedures applied until 2017 was relatively low compared to the total number of applications. It should be noted, however, that the number of applications lodged at the Hungarian border has dropped from 9,861 in 2016 to 394 in 2019, a 96% decrease over three years. Similar observations can be made about the total number of applications in Hungary, as Eurostat indicates a decrease from 29,430 in 2016 to 500 applications in 2019, a 98% decrease. This is indicative of the difficulties faced by asylum seekers in lodging an application for international protection in Hungary.

### 2.2.2. Difficulties in accessing the territory and the procedure explain the low number of border procedures

The low number of border procedures described above does not provide a full picture of the situation at the borders, especially as many people seeking international protection arrive at the border, as acknowledged in the recast APD. One reason for the low numbers is that prior to being channelled into a border procedure, people need to have the opportunity to make an asylum claim. In most countries covered by this study (and others), cases of pushbacks and collective expulsions have been reported by a range of independent and governmental actors, and condemned both by

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11 In 2015, there were 50 border procedures, compared to 423 in 2016 and 73 in 2017. Information provided by NGDAP, 9 September 2020.
12 Recital 38 recast APD.
national and European Courts, as illustrated below. The Fundamental Rights Agency (FRA) stated that respect for fundamental rights at borders was one of the main human rights challenges in the EU in 2019 and noted allegations of violence and informal pushbacks, as well as automatic returns without prior individual procedures.\(^{13}\)

It is of fundamental importance to recall that Member States must ensure compliance with the principle of non-refoulement. This is regulated in EU primary law, in Article 78(1) of the Treaty on the Functioning of the EU and in Articles 18 and 19 of the EU Charter of Fundamental Rights (CFR), as well as in international law in the Geneva Convention of 1951 and 1967 Protocol on the status of refugees, and other relevant treaties. Practice at national level raises serious questions as regards compliance with these provisions of EU and international law.

**Push-backs, collective expulsion and refoulement**

In **Greece**, the United Nations High Commissioner for Refugees (UNHCR) reported allegations of refoulement at the Greek–Turkish land border in 2019, a concern shared by the United Nations Committee Against Torture which stated that it “is seriously concerned at consistent reports that the State party may have acted in breach of the principle of non-refoulement during the period under review”.\(^{14}\) Other international organisations and civil society organisations also continued to report *inter alia* to EASO on pushbacks at sea and land borders.\(^{15}\) The Greek Council for Refugees (GCR) filed complaints in 2019, including a report to the Prosecutor of the Supreme Court.\(^{16}\) As the situation escalated, several thousand people arrived at the Turkish side of the Greek border at the end of February 2020 attempting to enter Greek territory, but were denied access. This was condemned including the Council of Europe Commissioner for Human Rights, UNHCR, Members of the European Parliament, and civil-society organisations.\(^{17}\) An official visit to Greece by the Presidents of the European Commission, the European Parliament and the European Council, led to an Action Plan for immediate measures to support Greece.\(^{18}\) These incidents reflect the level of tension at the Greek borders and the difficulties faced by asylum seekers in accessing the asylum procedure.

In **Hungary**, national law includes special rules to address “mass migration”, which require all asylum applicants to be escorted to the Serbian side of the border fence.\(^{19}\) On 19 July 2018, the European Commission referred Hungary to the CJEU for the non-compliance of its asylum and return legislation with EU law.\(^{20}\) Among other issues, the Commission considers that Hungarian legislation falls short of the requirements of the recast APD because it only allows asylum applications to be

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14 UNHCR, *Desperate journeys: January–September 2019*, 2019, p. 8. See also UN Committee against Torture, Concluding observations on the seventh periodic report of Greece, 3 September 2019, para. 16.


submitted within transit zones to which access is granted only to a limited number of persons and after long waiting periods. More recently, the Grand Chamber of the ECtHR held unanimously that there had been a violation of Article 3 of the European Convention on Human Rights (ECHR) regarding the removal of the applicants to Serbia. Since 26 May 2020, persons at border crossing points who wish to apply for international protection, are (temporarily) directed to submit a declaration of intent to the Embassy of Hungary in Kyiv, Ukraine or to the Embassy of Hungary in Belgrade, Serbia.

In Spain, Spanish law allows the “rejection at the border” of any third-country national detected climbing over the fence in the enclaves of Ceuta and Melilla, provided this “complies” with international refugee law. This provision has been criticised by bodies such as UNHCR and the Council of Europe for ignoring human rights and international law obligations towards asylum seekers and refugees. In practice, it has resulted in a drastic increase of refusals of entry of third country nationals at external borders, thereby adding obstacles to the access to the asylum procedure as explained below. Moreover, pushback practices in Spain continue to be both scrutinised and criticised by NGOs, international organisations, the national Ombudsman, and media outlets. In 2019, the UN Committee on the Rights of the Child condemned Spain for the pushbacks of unaccompanied minors. However, in 2020, the Grand Chamber of the ECtHR did not find a breach of the ECHR in the case N.D and N.T v Spain which concerned the return of migrants to Morocco.

In Italy, push-backs and other difficulties in accessing Italian territory have been documented; an issue exacerbated in the context of search and rescue (SAR) operations. In February 2020, Italy renewed a Memorandum of Understanding which includes support to the Libyan coastguard, despite the fact that it was ruled by a Criminal Court to be a violation of the Italian Constitution and international law, and despite criticism from inter alia the Council of Europe Commissioner for Human Rights. NGOs have further reported that refoulement continues to be carried out from Italy to Greece at Adriatic maritime borders. Issues and tensions at land borders with France, Switzerland, Austria and Slovenia are also reported. According to a February 2018 report by Médecins Sans Frontières (MSF), more than twenty people have died in the last two years attempting to cross these borders.

27 (Italy) Criminal Court of Trapani, Sentence of 23 May 2019.
29 For more information on pushbacks incidents reported by NGOs such as ASGI, No Name Kitchen, Ambasciata dei Diritti di Ancona and Associazione SOS Diritti, see AIDA, Country Report Italy – Report on the year 2019, June 2020, pp. 28-29.
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The issues at the Franco-Italian borders are also documented and punished on the French side, with Administrative Courts condemning the refusal of entry measures taken by the French authorities and their refusal to register asylum applications.\textsuperscript{31} On 8 July 2020, the French Council of State found the Ministry of Interior responsible for the violation of the right to access the asylum procedure at the border between France and Italy.\textsuperscript{32} Moreover, at the end of 2019, eight country-wide NGOs and 36 local associations working along the Franco-British, Franco-Italian, and Franco-Spanish borders called for a parliamentary committee of inquiry to ensure that migrants' and refugees' fundamental rights are respected at internal borders.\textsuperscript{33} According to these NGOs, fundamental rights concerns include the destruction of shelters, restricted access to asylum, lack of healthcare and social assistance, inadequate protection for unaccompanied children, systematic push-backs, and harassment by the police of those who provide humanitarian assistance to people on the move.\textsuperscript{34}

As regards access to the territory at airports in France, the French National Association of Border Assistance to Foreigners (Association nationale d’assistance aux frontières pour les étrangers- Anafé), has reported significant issues relating to the registration of applications for international protection. In 2018 and 2019, Anafé was aware of around 100 cases of persons having faced difficulties in registering their asylum claim.\textsuperscript{35}

Finally, albeit at lower levels, push-back practices are also suspected to be carried out in certain circumstances in Germany. In some cases, the Border Police conducts checks on passengers immediately after disembarking (Vorfeld Kontrolle), for example, at the bottom of the stairs when passengers leave an aircraft. The aim is to identify passengers who have no documentation and the airline company which could be responsible for bearing the costs in case of removal. While there are no available statistics on the number of cases involved, organisations and practitioners at Frankfurt/Main airport are aware of some cases and suspect others where persons were immediately removed from Germany from the airport terminal without being brought to the initial reception centre (Erstaufnahmeeinrichtung) despite having expressed their wish to apply for international protection.\textsuperscript{36}

The incidents described affect thousands of persons in need of protection and may violate the right to asylum and the fundamental principle of non-refoulement, as enshrined in EU primary law and international law. They also provide an explanation as to the limited numbers of border procedures applied.

Refusals of entry at the internal and external borders
The difficulties in accessing the territory and the asylum procedure are further exacerbated by the fact that Member States increasingly issue refusals of entry at both their internal and external borders.

\textsuperscript{31} See for example: (France) Administrative Court of Nice, Order No 1801843, 2 May 2018; Administrative Court of Nice, Order No 1800699, 23 February 2018; Administrative Court of Nice, Order No 1701211, 31 March 2017.
\textsuperscript{32} (France) Council of State, Decisions 440756, 8 July 2020. The case concerned a woman and her five-year old son who were pushed back to Italy, despite their request to apply for asylum in France after having crossed the border.
\textsuperscript{33} Le Monde, Droits des migrants : des associations réclament une commission d’enquête parlementaire, 5 December 2019.
\textsuperscript{34} Fundamental Rights Agency (FRA), Migration: Key Fundamental Rights Concerns: Quarterly Bulletin 1 - 2020, 2020, p. 11.
\textsuperscript{35} Information provided by Anafé, 17 September 2020.
\textsuperscript{36} Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 31 August 2020; an attorney-at-law, 29 April 2019.
At the external borders, Eurostat statistics indicate a drastic increase in refusals of entry of third country nationals in recent years:

Figure 6: Third country nationals refused entry at the external borders

Source: Eurostat; migr_eirfs.

The number of refusals of entry have more than doubled since 2015, rising from 297,860 in 2015 to 735,835 in 2019. Spain is responsible for the majority of these decisions – in 2019, it issued more refusals of entry than the other 27 EU Member States combined, with 493,455 third country nationals affected. This results from the amendment to Spanish law allows rejection at the border of any third-country national detected climbing the fence in the enclaves of Ceuta and Melilla, provided this complies with international refugee law.37

At internal borders, Member States have temporarily reintroduced border controls, as allowed by the Schengen Borders Code in the event of a serious threat to public policy or internal security (although the reintroduction should be an exception and must respect the principle of proportionality). They justify these measures on the basis of the arrival of persons seeking international protection.38 This is particularly visible in France and Germany, as both countries have consistently and regularly reintroduced border controls at their internal borders since 2015, which are valid until end of October and mid-November 2020 respectively.39

Not all the individuals refused entry at the internal and external borders are seeking international protection, but nonetheless these figures and incidents indicate that there are likely to be more people seeking protection at borders than represented by the number of applications, and caution is urged in the use of the figures, given the numbers refused entry.

Finally, most of the countries in the study, i.e. France, Germany, Spain, Portugal, and Hungary, continued to use the legal fiction that asylum seekers located in transit zones or at the border have not legally entered the territory. The application of the legal fiction of non-entry does not discharge states from their legal obligations. This has been confirmed by the ECtHR, inter alia, in the case of N.T. and N.D. v. Spain, as the third country nationals had come within the jurisdiction of the State as soon as the authorities had effective control over them. In M.K. and other versus Poland the ECtHR

38 European Commission, Member States’ notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, 2020.
39 Ibid.
found that the Polish authorities had failed to review the applicants’ requests for international protection despite their procedural obligations and contrary to Article 3 ECHR, by failing to allow the applicants to remain on Polish territory pending the examination of their applications.

2.3. Various authorities play a role in border procedures

The determining authority is the first instance asylum authority responsible for examining applications for international protection and competent to take decisions at first instance. Article 4(2) of the recast APD provides that authorities other than asylum authorities may be deemed responsible for the purpose of granting or refusing permission to enter the territory in the framework of the border procedure, following a reasoned opinion of the determining authority. The table below provides an overview of the national authorities involved in the border procedure. It does not include third parties such as national civil society organisations and legal representatives assisting asylum seekers in the procedure or the support provided by EASO and UNHCR in certain countries, as these points are discussed in Section 3.13.

Table 1: National authorities involved in the border procedure

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<th>National authorities involved in the border procedure</th>
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<tr>
<td>Border-management authority</td>
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<td>FR  Border Police</td>
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<tr>
<td>DE  Border Police</td>
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<tr>
<td>GR  Asylum service</td>
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<td>HU  Border police</td>
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<tr>
<td>IT  Border Police</td>
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<tr>
<td>PT  Immigration and Border Service (SEF)</td>
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<tr>
<td>ES  Border Police</td>
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Source: AIDA reports and national authorities.

2.3.1. Border-management authority

In most of the countries studied, applicants are first apprehended and interviewed by the border police with the aim of collecting basic information e.g. on identity and travel routes. Thus, border management staff are usually the first authority with whom applicants have contact. In Spain, the border police are also responsible for conducting the personal interview and preparing the case file based on which the determining authority will take its decision.41

40 Article 2(f) recast APD.
In other countries, including France and Germany, the border police are solely responsible for conducting a first interview to collect basic information upon apprehension. Nonetheless, border police reports may have a significant impact on the next steps of the procedure and practice indicates that border police staff sometimes go beyond their role. In France there have been cases where the border police ask questions relating to the merits of the application and cases where police indicated to the applicant that their asylum claim had low chances of success. This is not documented in the reports of the border police because it would be ruled a ground for annulment of the decision by the Administrative Courts.

In Germany, concerns have been expressed regarding the level of detail in the interviews conducted by the border police. This includes lengthy questions on travel routes and on people met en route and/or the people who helped in the flight, as well as cases where the border police asked the exact date of issuance of a visa; the reason for not having declared the same amount of money during a first and second interview; and whether there would be objections against a potential removal to the country of origin etc.

Inconsistencies and/or contradictions between an applicant’s statements during the personal interview with the determining authority and the interview with the border police may be used against the applicant, including on elements such as travel route, duration of stay in transit, and personal details of relatives. In Germany, as soon as the determining authority identifies even minor contradictions, this is used to establish serious doubts about the credibility of the application and the authority proceeds to a rejection on the basis of it being “manifestly unfounded” (see Section 3.8).

2.3.2. National authorities at first instance

Determining authorities are the asylum authorities responsible for examining applications for international protection and competent to take decisions at first instance, including during border procedures. Given the complexity of the tasks with which asylum authorities are entrusted and the far-reaching effects of their decisions on the individual and/or family concerned, the recast APD foresees legal guarantees to ensure that they carry out their duties effectively. This includes the obligation on Member States to provide asylum authorities with appropriate means, including sufficient competent personnel, and to ensure that staff have the appropriate knowledge or receive the necessary training in international protection.

Interestingly, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) is one of the few asylum authorities in Europe which has established a Unit dedicated to the border procedure. It is called the “asylum at the border” unit and is responsible for claims made in waiting zones. Asylum authorities in the other countries covered by this study have not established units.
dedicated to the border procedure, but sometimes receive support from external agencies as discussed in Section 3.13.

It should be further noted that in Hungary, a Government Decree of July 2019 established a National Directorate General for Aliens Policing under the management of the police. The Directorate General is thus governed by the Police Act and the staff are police personnel.

2.3.3. National authorities at second instance

All the countries covered provide for the possibility to lodge an appeal against a decision taken in the border procedure. This appeal is lodged with administrative courts in France, Germany, and Portugal; with the Appeals Committee in Greece and with civil courts in Italy. In Spain, “a request for re-examination of the application for international protection” after rejection in the border procedure, must be lodged with the Ministry of the Interior (see Section 3.9).

2.4. Grounds for activation of the border procedure vary

Article 43 of the recast APD provides that border procedures can consist of examining the admissibility of the application or undertaking a full examination in situations where accelerated procedures can also be applied. A full examination (in-merit examination) can thus take place in a border procedure. Such full examinations take place in Italy, Greece, Hungary and Portugal. In France, Germany and Spain the in-merit examination in the border procedure is partial, limited to assessing whether an application is manifestly unfounded.

At national level, the grounds for applying the border procedure vary from one country to another. Providing a comprehensive overview of all grounds for applying the border procedure would require listing inter alia the grounds for considering an application inadmissible in accordance with Article 33 recast APD and for applying accelerated procedures in accordance with Article 31(8) recast APD. The overview of national legislative frameworks reveals considerable disparities in the way these criteria have been incorporated in domestic asylum systems, in particular, concerning the grounds for declaring asylum applications inadmissible, which go well beyond the recast APD in certain countries. Hungary for example applied an inadmissibility ground “safe transit country”, using a hybrid of the safe third country and first country of asylum concepts, which is not compatible with EU law as it arbitrarily mixes rules pertaining to inadmissibility based on the two concepts.

Grounds common to more than one country include coming from a safe country of origin (i.e. in DE, IT, PT) or a safe third country (i.e. PT, ES, GR), as well as misleading the authorities by presenting false information or documents or by withholding relevant information (i.e. PT, ES).

There are no available statistics on the grounds applied in practice by Member States to activate the border procedure, thus rendering difficult a thorough assessment of why people are channelled into these procedures. Moreover, while most of the grounds used in the countries under study are compliant with Article 43 recast APD, some are not. This is the case for Italy where one of the two

52 Article 21(4) Asylum Act.
53 Article 33(2) recast APD. Examples of such provisions include the “arrival through a country where the applicant is not exposed to persecution or serious harm, or where protection is available” (in Hungary - Section 51(2)(f) Hungarian Asylum Act LXXX of 2007), and the making of a subsequent application “during the execution phase of a removal procedure” (in Italy - Article 29-bis Italian Procedure Decree 25/2008).
grounds in the legal framework is not in the APD: Italian national law foresees that a person can be subject to a border procedure “after being apprehended for evading or attempting to evade border controls”, a ground that is not foreseen in the APD.

The scope of the airport procedure in Germany also raises questions as to compliance with the boundaries set by the APD. German law triggers the airport procedure as soon as it is established that the asylum seeker is unable to prove identity by means of a passport or other documentation. It however does not condition the applicability of the procedure on the (APD) requirement of misleading the authorities by withholding relevant information on identity or nationality, or destroying or disposing of an identity or travel document in bad faith. Yet, the recast APD clearly states that as long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not entail an automatic recourse to border or accelerated procedures. Practice suggests that this ground is most often used by German authorities for activating the airport procedure, as the other ground foreseen at national level – coming from a “safe country of origin” – is unlikely to apply because the majority of applicants in the German airport procedure in 2019 came from Syria, Iraq and Turkey, followed by Afghanistan, Iran and Somalia.

Whether Dublin III may or may not be applied in the border procedure remains ambiguous. Under the EU’s current legal framework, it is unclear whether an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure. While EASO has stated that an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure, the APD is less clear. Article 33 recast APD does not list the application of the Dublin procedure as an admissibility ground. Article 43 recast APD read in conjunction with Article 33(1) recast APD seems to suggest that applications for which another Member State is responsible are not to be examined.

In France, Spain, Italy and Portugal the Dublin examination is part of the border procedure. In France, it was applied to eleven people in the border procedure in 2018, two people in 2019, and one person in 2020 as of end September 2020, but it has never resulted in an actual transfer to the responsible Member State. In Spain and Portugal, the national legal framework categorises the attribution of responsibility to another Member State as an inadmissibility ground, even though this ground is not an inadmissibility ground in Article 33 recast APD. For Germany, it is unclear whether the Dublin examination is formally part of the border procedure or not. Nevertheless, it has been reported that persons presumed to fall under the responsibility of another country are usually held in the airport facility in Frankfurt/Main until their transfer. In Greece, the Dublin examination has recently been integrated into the border procedure, whereas under the previous legal framework the fast-track border procedure was not applied to persons falling within the family provisions of the Dublin III Regulation.

56 (Germany) Section 18a(1) Asylum Act. See also: ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, 2019.
57 Article 31(8)(c) and (d) recast APD.
58 Recital 21 recast APD.
59 EASO, Border Procedures for Asylum Applications in EU+ Countries, September 2020, p.13.
60 Information provided by the French Ministry of Interior, 21 October 2020.
61 Information provided by the Refugee Church Service at Frankfurt/Main airport, 25 August 2020.
62 (Greece) Articles 39(5)(d) and 72(3) IPA, repealing the exemption that used to be provided in Article 60(4)(f) L 4375/2016.
2.5. Time limits for decisions vary (within the rules in the Directive)

Under Article 43 of the recast APD, Member States must ensure that first instance decisions in the border procedure are taken “within a reasonable time”, and that asylum seekers are granted entry into the territory if no decision is taken within four weeks. In Italy, however, the requirement of Article 43 of the Directive to allow the applicant to enter the territory if the determining authority has not taken a decision within four weeks has not been transposed into law. The Territorial Commission maintains the possibility of extending the duration of the procedure – during which the applicant would remain at the border or in the transit zone – to a maximum of 18 months to ensure an adequate examination of the application. Member States have introduced deadlines that are generally shorter than four weeks.

Figure 7: Time limits in border procedures (in days)

Source: AIDA and national authorities. The time limits on Greece refer to the normal border procedure, not the fast track border procedure which foresees different time limits.

2.5.1. Time limits at first instance

With the exception of Greece’s normal border procedure, all other countries foresee short deadlines for the determining authority to issue a decision in the border procedure, varying from two days in France, Germany and Italy, to four days in Spain, and seven days in Portugal. In the Greek fast-track border procedure, the determining authority has to take a decision in seven days.

These short time limits may lead to insufficient time for applicants to prepare for the interview and to gather evidence in support of their applications, and they may further impact the quality of decisions issued. Practice suggests that determining authorities are under pressure and face significant difficulties in meeting these (national) legal deadlines at first instance, as a result of which the applicants are eventually granted access to the territory for the purpose of the asylum procedure because the time limit set in national law has expired. This is the case in Germany for example,

63 (Italy) Article 28-bis(3) Procedure Decree, citing Article 27(3) and (3-bis).
64 In the Greek fast-track procedure, the determining authority must issue a decision within 7 days. The latter can be appealed within 10 days. The second instance decision shall be issued within 7 days. See Article Article 90(3)(c) IPA.
where, since 2015, more than half the applicants who lodged an application at an airport were granted entry to the territory because of the difficulty in meeting the two-day deadline.

Statistics for France indicate that OFPRA faces difficulties in meeting the national time limit. From the time when the application for international protection is made, OFPRA has two working days to issue its opinion to the Ministry of the Interior. Since 2016, the average processing time for OFPRA to issue its decision has consistently exceeded this two-day limit, reaching 3.5 days in 2019. A significant number of cases were not examined by OFPRA within four days – in 2019, this concerned 28.5% of cases, a large increase compared to 2018 (17%) and comparable to 2017 (28%). French law does not foresee any time limit for the Ministry of the Interior to issue its decision based on the binding opinion of OFPRA. This means that in theory the applicant can be held in a waiting zone for several days while awaiting the Ministry’s decision. Practice suggests, however, that the Ministry issues its decision the same day as it receives OFPRA’s opinion and there have been no cases in which the decision took longer than the four-week timeframe of Article 43(2) recast APD.

In Greece, the average time between the full registration and the issuance of a first instance decision under the fast-track border procedure was 228 days in 2019, i.e. over 7 months. FRA stated that “even with the important assistance EASO provides, it is difficult to imagine how the processing time of implementing the temporary border procedure or the regular asylum procedure on the islands can be further accelerated, without undermining the quality of decisions. Putting further pressure on the Greek Asylum Service may undermine the quality of first instance asylum decisions, which in turn would prolong the overall length of procedure, as more work would be shifted to the appeals stage”.

2.5.2. Time limits at second instance

On time limits for appealing a decision, national laws envisage short deadlines for lodging an appeal, from two days in France and Spain, to three days in Germany, four days in Portugal, and seven days (border procedure) or ten days (fast-track border procedure) in Greece. Similarly, courts must decide on appeals within short time limits: two days in Spain, three in France and seven in Greece, compared to fourteen days in Germany and thirty days in Italy. Thus, concerns may arise regarding the right to an effective remedy because applicants can face difficulties in appealing negative decisions in a short time and may face *refoulement* if the risk of ill treatment upon return is not thoroughly assessed (see Appeals).

2.6. Practice concerning the border procedure varies

In line with Article 14 and Article 15 of the recast APD, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. The personal interview is an essential component of the asylum procedure and, as such, it must provide the applicant with the opportunity to fully explain the circumstances of their application. As a rule, the recast APD

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65 Article R.213-5 CESEDA.
66 Information provided by the OFPRA, 21 September 2020.
67 OFPRA, *Annual reports*.
68 Information provided by the OFPRA, 21 September 2020.
69 Information provided by the Greek Asylum Service, 17 February 2020.
71 Article 16 recast APD; Article 4(1) recast Qualification Directive.
foresees that the personal interview should be conducted by the personnel of the determining authority – except when a large number of applications make it impossible in practice to conduct timely interviews and thus provides a justification for the temporary involvement of the personnel of another authority in conducting such interviews.\footnote{Article 14(1) recast APD.}

In all countries examined an interview takes place during the border procedure. This usually includes a first interview with the border police to gather basic information, followed by a second interview with the determining authority (see Section 3.3). The scope and nature of the interview varies, however. Interviews are usually held in the hours after a border procedure has started or the following day, thus leaving little time for applicants to prepare.

In France, the interview should take place during the half-day following the notification ("*au cours de la demi-journée"), although a minimum of four hours must pass between the notification and the interview. This minimum waiting time of four hours can be waived if a third party is available earlier or if the applicant so requests. Interviews during the border procedure are conducted by the Border Unit of OFPRA. In practice, these interviews never exceed an hour and may be as short as 15 minutes, which offers limited possibility for applicants to detail the circumstances of their asylum claims.\footnote{Information provided by OFPRA, 21 September 2020.} OFPRA stated that, during interviews, it focuses on identifying vulnerabilities and assessing whether the application is inadmissible or manifestly unfounded.\footnote{Information provided by Anafé, 17 September 2020.} In practice, it appears that the assessment of the asylum claim by OFPRA’s Border Unit goes beyond the limitations set out in law in certain cases. It has been reported that the applicants’ credibility is verified and that interview reports contain comments on stereotypical, imprecise or incoherent accounts on matters such as the sexual orientation of the applicant, and that there was a lack of written proof. This could be construed as *de facto* examining the application on the merits, which has raised concerns.\footnote{AIDA, *Country Report France – Update on the year 2019*, March 2020, p.57.}

In Germany, caseworkers of the Federal Office for Migration and Refugees (BAMF) follow a specific questionnaire throughout the interview. As opposed to more experienced caseworkers, less experienced caseworkers tend to strictly follow the questionnaire, which results in prolonging the time of the interview and asking questions that may be irrelevant to the case concerned.\footnote{Information provided by an attorney-at-law, 31 August 2020.} While the average length is three to five hours, there have been cases lasting much longer, e.g. the interview of an Iraqi female applicant lasting about 6 hours or the interview of a Sri Lankan applicant taking up to 8 hours.\footnote{Information provided by an attorney-at-law, 31 August 2020.} While this could provide the opportunity for an in-depth assessment of the application for international protection, it seems that questions on individual circumstances are asked at a late stage of the interview, after a few hours. The first part of the interview largely focuses on basic information such as the travel route and identification, i.e. questions that have already been asked by the Border Police. This part of the interview may take up to several hours and aims to identify potential inconsistencies and contradictions with previous statements.\footnote{In one case, the first part of the interview focusing on travel route and relevant questions took from 9:30am to 11:25am. It was followed by a short break, and at 11:40am it continued with questions on grounds for applying for asylum; as well as questions highlighting inconsistencies with previous statements. The interview finished at 3:30 pm; thus taking a total of around 6 hours; Information provided by an attorney-at-law, 31 August 2020.} It is only after this that the BAMF asks questions relating to the grounds for applying for asylum and the reasons for having fled from the country of origin. At this stage, asylum seekers are already very tired and stressed from the interview; yet the BAMF is reluctant to stop the interview given the tight deadlines.
within which it has to issue its decision. It thus generally tries to conduct the interview within the same day.⁷⁹

The practice of putting more emphasis during the interview on the circumstances and route of the applicant after their departure, with a focus on the countries visited during the journey, was also reported in Hungary when the border procedure was still formally applied.⁸⁰

In Italy and Portugal, the rules and modalities of the interview are usually the same as those of the regular procedure, and the interview is generally conducted by the determining authority. However, the short time limits of the border procedure are challenging in certain cases. In Portugal for example, where the interview is conducted in detention at the Temporary Installation Centre (CPI) a few days after arrival, applicants have little time to prepare and substantiate their asylum claim.⁸¹ Moreover, reduced guarantees may apply such as the exclusion from the right of the applicant to seek revision of the narrative of the interview.⁸²

Another particularity of the personal interview during the border procedure relates to the location of border facilities. Not all asylum authorities have a presence at the border. In Germany for example, BAMF has permanent presence at the first arrival centre Frankfurt/Main Airport where the majority of airport procedures are conducted, but not at the airport facility at Munich Airport. In the latter cases, BAMF travels to the airport facility from Munich for the purpose of carrying out interviews.⁸³ In other countries where the asylum authority has no presence at the border, interviews are sometimes carried out by other authorities or remotely. This is the case in Spain, where interviews are conducted by the border police, who are trained to that end, while in Greece authorities receive support from EASO to conduct interviews and issue opinions in the fast-track border procedure (see Section 3.13).

In France, the Roissy-CDG airport, where the majority of border procedures take place, is the only waiting zone where the OFPRA Border Unit interviews the asylum seeker in person.⁸⁴ The interviews in all other waiting zones are conducted by videoconference and interviews in all other border procedures are carried out by phone.⁸⁵ When videoconferencing is used, it almost always runs into technical problems, as a result of which the interview is then carried out by phone.⁸⁶ This has led the Administrative Court of Marseille to invoke procedural irregularities and annul decisions refusing admission to the territory for the purpose of seeking asylum where the interview with OFPRA was conducted by phone rather than videoconference.⁸⁷ The use of phones is also reported as problematic, including technical problems and difficulties in following the interview; quality gaps resulting from simultaneous telephone interpretation; and the fact that, where a third party is present, the phone has to be shared between the applicant and the NGO and/or legal

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⁷⁹ Information provided by an attorney-at-law, 31 August 2020.
⁸⁰ Information provided by NDGAP, 9 September 2020.
⁸² Article 25 Asylum Act.
⁸³ Information provided by the Munich Airport Church Service, 5 April 2019. See: ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, 2019, p.10.
⁸⁵ Information provided by OFPRA, 21 September 2020.
⁸⁶ Information provided by OFPRA, 24 April 2018; Information provided by Anafé, 17 September 2020.
⁸⁷ See e.g. Administrative Court of Marseille, Decision No 1704059, 7 June 2017; No 1704319, 16 June 2017. Contrast with Decision No 1706792, 3 October 2017, where the Court found no procedural irregularities.
representative.\textsuperscript{88} Issues stemming from the use of videoconferencing in the context of border procedures have also been reported in Hungary.\textsuperscript{89}

Another important concern raised in practice for border procedures relates to confidentiality. Interviews are sometimes carried out in inadequate rooms where other persons may be present or where there is disruptive background noise. In Portugal, the interview rooms at Lisbon Airport, where most border procedures take place, are reported to be inadequate, mainly due to space constraints and bad soundproofing.\textsuperscript{90} Similarly at Orly airport in France, the remote interview is held in a room where other people are detained and where other police staff may be present. The interview room is not soundproof and is next to a border police office, as a result of which background noise from police officers may disrupt the interview.\textsuperscript{91}

In addition, the border procedure seems to create difficulties for the sharing and submission of documentary evidence in some cases. This is due both to the short time limits as well as the location of border facilities. In Portugal, limited contact with the outside world from the CIT is reported as creating a challenge in the provision of supporting evidence.\textsuperscript{92} In France, where interviews are conducted remotely, there have been cases where asylum applicants were not able to share evidence they had or could only do so partially when videoconferencing was used. There are no other tools such as fax or scanners available to submit these documents.\textsuperscript{93}

2.7. Limited evidence is available on the quality of decision-making in border procedures

There is little information available on the quality of first instance decision-making in the border procedure, given that few evaluations have taken place and quality assurance systems are used less frequently than in the regular procedure (where their use is also limited for some Member States). Moreover, the access to external actors, such as legal representatives and NGOs, is rendered more difficult in border procedures (see Section 3.13).

EASO’s figures show that protection rates tend to be lower in border procedures compared to regular procedures: in 2018 the protection rate for first instance decisions issued using border procedures was 12%, while the total EU+ protection rate at first instance was 39%.\textsuperscript{94} Similarly, in 2019, the protection rate was 7% under the border procedure, compared to the total protection rate for first instance decisions of 33%.\textsuperscript{95} This could indicate a more restrictive approach; it could reflect differences in case-loads; or it may result from the differences in the use of procedural guarantees described below.

According to EASO, the fact in most countries cases channelled into the border procedure are in categories less likely to receive protection may explain the lower recognition rate in border procedures compared to regular procedures.\textsuperscript{96} It should be noted that there is not a large difference

\textsuperscript{88} Information provided by Anafé, 17 September 2020.
\textsuperscript{90} AIDA, Country Report Portugal – Update on the year 2019, June 2020, p.54.
\textsuperscript{91} Information provided by Anafé, 17 September 2020.
\textsuperscript{92} AIDA, Country Report Portugal – Update on the year 2019, June 2020, pp.54-55.
\textsuperscript{93} Information provided by Anafé, 17 September 2020.
\textsuperscript{95} EASO, Border Procedures for Asylum Applications in EU+ Countries, p.8.
\textsuperscript{96} Ibid., p.20.
in the nationalities of applicants channelled into the border procedure compared to the regular procedure, as certain countries of origin feature significantly in both procedures. In 2019, the following top three nationalities were registered in each procedure:

Table 2: Nationalities of applicants for international protection in 2019

<table>
<thead>
<tr>
<th>Nationalities of applicants for international protection in 2019</th>
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<tbody>
<tr>
<td><strong>Spain</strong></td>
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<tr>
<td>Top 3 nationalities in the border procedure</td>
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<tr>
<td>Top 3 nationalities in the regular procedure</td>
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</table>

For Spain, Germany and Portugal, although not for France, there was an overlap between the two procedures at least one of the top three countries of origin appearing in the regular and border procedure: Venezuela in Spain; Syria and Turkey in Germany; and Angola in Portugal. A similar situation occurred in previous years: in Germany, Syria and Iran featured in the top three nationalities in the border and regular procedures in recent years, as did Angola in Portugal and Syria in Spain.

In the absence of comprehensive statistics on the border procedure as explained in the Introduction, it is difficult to compare protection rates with those of applicants in the regular procedure. Nonetheless, the EU-wide low recognition rates in border procedures referred to by EASO may raise concern if they apply to applicants with a similar profile and nationality.

2.8. Diverging outcomes of the border procedure are visible at national level

As explained in the Section 3.4, the border procedure may be limited to the examination of admissibility or, alternatively, a full examination of the merits of an application for international protection may be undertaken in accordance with Article 43 iunctor Article 31(8) recast APD.

In the case of an admissibility examination pursuant to Article 33(2) recast APD, the applicant may be either refused access to the territory (inadmissibility decision) or granted access to the territory for the purpose of the asylum procedure (admissibility decision), whether regular or accelerated, provided that no in-merit examination takes place in the border procedure. Alternatively, if the examination includes an examination of the merits, the application for international protection may be rejected as (i) unfounded in accordance with Article 32(1) recast APD, as (ii) manifestly unfounded in accordance with Article 32(2) recast APD, or the person may be granted a protection status.

Partial figures on decision-making in the countries covered by the study were shared by only a minority of the Member States. With the exception of Greece, they indicate a significant number of inadmissibility and/or manifestly unfounded decisions being issued in border procedures, as a result
The implementation of Article 43 of Directive 2013/32/EU in practice

of which applicants for international protection are refused access to the territory and to the regular asylum procedure.

Figure 8: Total number of decisions in the border procedure in France

In France, only a minority of applicants are effectively granted access to the territory. This concerned 20.4% of applicants in 2016, 26.6% of applicants in 2017, 39.5% of applicants in 2018, and 40.5% of applicants in 2019. This means that, since 2015, most applicants were refused access to French territory. These figures seem to point to the significant difficulties facing persons applying for protection at the border.

Practice in Portugal also indicates that only a minority of applicants are allowed entry to the territory. Of the total number of decisions issued in the border procedure, more than half concerned inadmissibility decisions in the last three years. In 2019, of 406 decisions issued in the border procedure, only 65 persons (16%) were granted entry to the territory, while 266 persons (65%) received an inadmissibility decision. Statistics on the decisions on the merits were not shared by the national authorities.

In Hungary, not a single person subject to the border procedure in 2015 and 2016 was granted access to the territory. All the applicants for international protection received an inadmissibility decision. This concerned 50 persons in 2015 and 423 persons in 2016, mainly originating from Syria, Afghanistan and Iraq. Since 2017 the regular procedure takes place in the transit zone, which constitutes a de facto border procedure. In 2019, 91.5% of asylum applications were rejected on the merits.

On the contrary, in Spain and Germany, the majority of applicants for international protection have been granted access to the territory since 2015 for the purpose of the asylum procedure. However, this access seems to have become more and more limited in 2018 and 2019, following a significant increase of inadmissibility decisions in Spain and of manifestly unfounded decisions in Germany:

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97 OFFRA, Annual reports.
98 Information provided by SEF, 3 September 2020. Similarly in 2018, out of 408 decisions, 129 persons (i.e. 31%) were granted entry and 269 (i.e. 66%) obtained an inadmissibility decision; and in 2017, out of 493 decisions, only 60 (i.e. 12%) were granted access and 356 (72%) refused an inadmissibility decision.
99 Information provided by NGDAP, 9 September 2020.
In Spain, the number of inadmissibility decisions has doubled from 1,317 in 2018 to 3,220 in 2019. Taking into consideration the increase in the number of third country nationals refused access to the territory at the Spanish external borders in recent years, which amounted to 493,455 cases in 2019, it can be concluded that access to the territory for the purpose of the asylum procedure is very challenging in practice.

In Germany, the years 2018 and 2019 were marked by a significant increase of manifestly unfounded decisions. According to available statistics, they rose from around 10% in 2015 up to 50% in 2019. Figures on the first half of 2020 confirm this trend, as the rejection rate in the airport procedure continued to increase up to 56.8% (50 manifestly unfounded decisions out of 88 cases).

The increase of manifestly unfounded decisions in the context of the airport procedure has been subject to particular scrutiny in Germany. A study analysed the decisions issued by BAMF’s branch office at the Frankfurt/Main, which is responsible for the majority of airport procedures in Germany.

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101 Information provided by OAR, 15 September 2020.
102 This increase is even more striking when comparing with numbers of the year 2013: between 2013 and 2019, the rejection rate in the airport procedure have increased tenfold, from 5.1% in 2013 to 52.7% in 2019.
103 (German) Federal Government, Response to parliamentary question by The Left, 19/20377, 23 July 2020, p. 4; Dr. Thomas Hohlfeld, Newsletter ‘Neues aus dem Bundestag’, 7 August 2020.
It was demonstrated that, compared to the rejection rates recorded at national level, the rejection rates of the Frankfurt/Main Branch office were much higher. For asylum seekers from Iraq, the protection rate at the branch office Frankfurt/Main in 2019 was only 18.3%, compared to 51.8% at national level; for Afghanistan: 50% compared to 63.1%; for Iran: 16.2% compared to 28.2%; for Nigeria: 4.1% compared to 14.5%; for Turkey: 30.2% compared to 52.7%.\(^{104}\)

The difference in the rejection rate at national level and in the airport procedure may be linked to a variety of objective factors, such as the profile of applicants and individual circumstances of the asylum applications. Nevertheless, these figures seem to indicate that BAMF has a more restrictive approach to claims in the airport procedure compared to procedures elsewhere in Germany, a practice that has been criticised by various stakeholders,\(^{105}\) and confirms EASO’s analysis according to which recognition rates are prone to be lower in the border procedure than in the regular procedure.\(^{106}\) The difference in recognition rates is particularly worrying taking into consideration that many asylum seekers at airports in Germany originated from the same countries of origin as those applying in the territory, where they benefitted from higher recognition rates nationwide (i.e. Syria and Turkey).\(^{107}\)

As opposed to the countries represented above, Greece has systematically deemed applications lodged under the fast-track border procedure admissible:

Figure 11: Total number of decisions in the fast-track border procedure in Greece

Since 2017, at least 70% of all applications processed under a fast-track border procedure have received an admissibility decision, mainly for reasons of vulnerability. They were thus granted access to the territory for the purpose of the asylum procedure, which does not mean that they were granted international protection, however. As regards in-merit examinations within the fast-track border procedure, figures in 2018 and 2019 indicate that most applicants received either a refugee or a subsidiary protection status rather than a rejection of their asylum claim.

\(^{104}\) Dr. Thomas Hohlfeld, Vermerk zur Antwort der Bundesregierung auf die Kleine Anfrage der LINKEN (Ulla Jelpke u.a.) zur ergänzenden Asylstatistik für das Jahr 2019 (BT-Drs. 19/18498), Newsletter of 6 April 2020.

\(^{105}\) Ibid. See also; PRO ASYL, Allein in Abschiebungshaft: Jugendlicher als Letzter am Frankfurter Flughafen, 11 April 2020; Bistum Limburg, Caritas und Diakonie wollen Aus für Flughafen-Asylverfahren, 30 October 2018, ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, pp. 11-12.

\(^{106}\) EASO, Border Procedures for Asylum Applications in EU+ Countries, September 2020, p.20.

\(^{107}\) BAMF, Das Bundesamt in Zahlen 2019, 2020, p.56.
2.9. The right to an effective remedy may not be fully respected

As provided for in Article 46(1) recast APD, Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against a decision taken at the border or in a transit zone. Article 46(4) further provides for an *ex officio* review of decisions taken in the border procedure. However, the scope and meaning of the latter provision is unclear and does not seem to have been implemented at national level. All countries covered by this study provide for an appeal procedure in the border procedure, albeit with different time limits and safeguards.

### 2.9.1. Time limits at appeal stage

As indicated in Section 3.5, national law envisages short deadlines to lodge and decide on appeals in border procedure. In this regard, it is important to recall that Article 46(4) recast APD obliges Member States to provide for “reasonable” time limits and that the time limit should not render the right to an effective remedy impossible or excessively difficult. It is thus questionable whether a two-to-four day time limit to lodge an appeal as foreseen in Spain, France, Germany and Portugal, with limited access to assistance and to the outside world, is sufficient to exercise the right to an effective remedy.

### 2.9.2. Suspensive effect of appeals

The recast APD leaves discretion to Member States as to whether appeals should have automatic suspensive effect in border procedures and this is foreseen in Portugal, Spain, France, and Germany. The suspensive effect of an appeal is a fundamental safeguard to ensure access to an effective remedy and to avoid applicants being returned to the country of origin before a final decision is taken on their application. It is particularly relevant for the border procedure as it is characterised by short deadlines in these countries, with the risk of applicants being removed within a couple of hours or a day.

On the contrary, the appeal does not have suspensive effect in Italy, and in Greece a derogation from the automatic suspensive effect of appeals applies when the individual benefits from the necessary assistance of an interpreter, legal assistance and at least one week to prepare the appeal before the Appeals Committee. In Hungary, the appeal in the transit zone also does not have automatic suspensive effect and must be explicitly requested by the applicant.

If national law does not provide for automatic suspensive effect upon lodging an appeal the applicant must be able to separately request the application of a provisional measure preventing their removal. The applicant must be allowed to remain on the territory pending the decision of the court or tribunal on this separate request. Time limits may also apply to the request for the provisional measure. In Italy, for example, the applicant can request a suspension of the return order from the competent judge. The court takes a non-appealable decision granting or refusing suspensive effect within five days of the submission and/or replies to any observations.

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109 (Greece) Article 104(3) IPA.

110 Article 46(6) recast APD.

111 Article 46(8) recast APD.

112 Article 46 recast APD.

113 (Italy) Article 35-bis (4) Procedure Decree.
2.9.3. Low chances of success of appeals in the border procedure

Figures on the numbers of appeals lodged in the context of border procedure are lacking. Only three countries, France, Germany and Spain, provided data in this regard. In all countries, they indicate an increase in appeals in recent years and a low chance of success thereof.

In Germany, the number of requests for interim measures against deportation in the context of the airport procedure increased tenfold between 2015 to 2019, rising from 20 to more than 200 requests during that period.\(^\text{114}\) This increase is linked to the increase in the number of manifestly unfounded decisions rather than to the number of airport procedures, as there were fewer applications lodged at airports in 2019 than in 2015. Similarly in Spain, the number of requests for re-examination of an application that has been considered inadmissible or rejected from examination in the context of border procedures (“denegar la solicitud”) has increased sevenfold in the last four years, rising from 408 requests in 2015 to 2,856 requests in 2019.\(^\text{115}\) In France, the number of appeals was relatively stable at around 450 appeals from 2016 to 2018, but increased to around 650 appeals in 2019.\(^\text{116}\)

The increase of litigation in these countries may thus illustrate the restrictive approach adopted by the authorities in recent years in the border procedure, with decisions increasingly challenged at second instance. Regarding the outcome of appeals, available data indicates that the chances of success of appeals are low as the overwhelming majority are rejected.

Figure 12: Appeals in France, Germany and Spain

In France, the success rate of appeals in border procedures was 33% in 2019.\(^\text{117}\)

This is a slight increase on previous years (18% in 2018; 24% in 2017; 15% in 2016; and 11% in 2015), but the majority are rejected. Similar situations occur in the other countries.

In Germany, the number of interim measures granted did not exceed five in 2015, 2016 and 2017

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\(^{115}\) Information provided by the OAR, 15 September 2020.

\(^{116}\) Information provided by the French Ministry of Interior, 21 October 2020.

\(^{117}\) Information provided by the French Ministry of Interior, 21 October 2020.
respectively, while the chances of success was under 10% in 2018 and 2019.118

Similarly, in Spain, of 2,856 requests for re-examination lodged in 2019, only 265 were successful, indicating a success rate of approximately 10%.

The low chances of success of appeals in the three countries may be linked to a number of factors, but it also raises questions as to whether the right to an effective remedy is being ensured in practice. Article 46(3) provides that Member States shall ensure that an effective remedy provides for a full and ex-nunc examination of both facts and points of law. In Germany, the rejection of interim measures is due *inter alia* to the fact that deportations can only be suspended if there are “serious doubts about the legality” of the BAMF decision.119 NGOs have also reported that Administrative Courts do not provide a real opportunity to further clarify inconsistencies between the reports of the interviews conducted by the BAMF and the Federal Police.120 Moreover, where an application has been rejected as “manifestly unfounded”, the court has to decide on a request for an interim measure by written procedure, i.e. without an oral hearing and solely based on case files.121

In Spain, the applicant has the possibility to incorporate new arguments, documentation and allegations into requests for re-examination, but not to provide further clarifications on statements made in the application.122 The notice of review therefore consists of additional elements which may or may not clarify aspects of the initial application. It is also important to note that a request for re-examination of the application is lodged with the Ministry of the Interior and not a Court or Tribunal.123 The Ministry is the authority responsible for conducting the border procedure at first instance and for granting or refusing access to the territory. It is thus unclear how effective this remedy is in practice. Following the rejection of a request for re-examination, applicants also have the possibility to lodge an onward judicial appeal with the National High Court (Recurso contencioso-administrativo).124 The latter has no suspensive effect. NGOs have criticised the obstacles to effectively lodging a judicial appeal,125 and it remains unclear as to how this appeal is applied in practice. It was not mentioned by the national authority in its contribution and neither does EASO’s report on border procedures provide further clarification.

Limitations at appeal stage are also visible in other countries. In Portugal, even if available figures do not distinguish between the different asylum procedures, they indicate a poor success rate at

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119 (Germany) Section 18a(4) Asylum Act in connection with Section 36(4) Asylum Act.
120 Information provided by PRO ASYL, 1 April 2019; an attorney-at-law, 29 April 2019.
121 (Germany) Section 36(3) Asylum Act.
122 Information provided by the OAR, 14 September 2020.
123 (Spain) Article 21(4) Asylum Act.
appeals stage. As confirmed by the CPR, the quality of appeals submitted is often poor and lawyers have limited expertise and training in the asylum field. In Hungary, UNHCR has criticised the shortening of deadlines applicable at appeal stage in transit zones, which seems to jeopardise asylum seekers’ access to an effective remedy.

In Greece, the large majority of appeals lodged by Syrian applicants subject to the fast-track border procedure have also been rejected in recent years. In 2017, 98.2% of all decisions issued by the Appeals Committees upheld the inadmissibility decisions issued by the Asylum Service on the safe third country concept, a practice that largely continued in 2018 and 2019. However, as mentioned above, the majority of applicants under the fast-track border procedure actually receive an admissibility decision at first instance so this concerns the minority who do not.

2.10. Procedural safeguards are lacking during the border procedure

There are safeguards that Member States must provide to applicants for international protection within the border procedure. In accordance with Article 8 recast APD, these include informing applicants of their rights and obligations in a language that they understand and informing them of the possibility to request the assistance of an interpreter, doctor, lawyer, counsel or any other person of their choice. Applicants must not only be informed of these rights, but must also be provided effective access to organisations and persons providing advice.

The very nature of border procedures makes it more difficult to provide full procedural safeguards in practice, which often results in a lack of information to (potential) applicants, reduced accessibility for NGOs and legal aid providers, and inadequate or no interpretation services. The following table provides a rough overview of the availability of these safeguards both in law and practice, based on information collected through desk research and/or provided by stakeholders such as national authorities, lawyers and NGOs.

Table 3: Procedural guarantees in border procedures in law and practice

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<th>Procedural guarantees in border procedures</th>
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<td>Access to free legal assistance at first instance</td>
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The table provides an indication of practice rather than an exhaustive description of national systems because in some countries procedural safeguards are regulated in law but not implemented in practice and vice versa – thus rendering a comprehensive analysis difficult. In addition, in countries where procedural guarantees are not regulated in law but result from practice, the situation is prone to change. The access to legal assistance and NGOs for example largely depends on the availability of resources at a certain time and location – i.e. a situation that may change from one day to the next. Findings for each of the main procedural safeguards will be presented in turn below.

### 2.10.1. Legal assistance

Under the recast APD, free legal assistance is only mandatory in appeal procedures.\(^{129}\) Nevertheless, the Directive also foresees that at all stages of the procedure applicants should have the right to consult, at their own cost, legal advisers or counsellors as admitted or permitted under national law.\(^{130}\) In practice, significant problems regarding access to and quality of legal assistance in the border procedure were reported in all the countries examined. This results \textit{inter alia} from the fact that mandatory free legal assistance at first instance is only foreseen in a few countries. Practical hurdles include the short time limits of the border procedure; the difficulty of accessing lawyers; the lack of competence of legal practitioners on asylum-related matters; and the inadequacy of meeting rooms for private conversations. Most applicants are thus not able to understand the complexity of the border procedure and face difficulties in preparing for the interview in the countries examined.

In addition, the lack of assistance at borders in the context of push-backs and collective expulsions – i.e. before a person is channelled into the border procedure – continues to be reported as a serious concern in all the countries where these incidents occur, specifically Spain, France, Greece, Hungary and Italy.

Access to free legal assistance at first instance in the border procedure

In national law, access to free legal assistance at first instance in the context of border procedures is only foreseen in national law in Portugal and Spain.\(^{131}\)

In Portugal, UNHCR and CPR have the right to be informed of all asylum claims lodged and to personally contact asylum seekers irrespective of the location where the application was lodged.\(^ {131}\) In this context, CPR is regularly present (generally every week) at the Lisbon Airport detention facility to provide \textit{inter alia} free legal information and assistance.\(^ {132}\) In practice, however, legal assistance may be limited due to time and capacity constraints. This is further exacerbated by communication problems, bureaucratic clearance procedures for accessing the restricted area of

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\(^{129}\) Article 20 recast APD.  
\(^{130}\) Article 22 and Recital 23, recast APD.  
\(^{131}\) (Portugal) Article 13(3) Asylum Act.  
\(^{132}\) (Portugal) Article 49(1)(e) and (6) Asylum Act.
the airport where the CIT is located, and limitations in the timely provision of information by SEF on the dates of interviews and language skills of the asylum seekers. As a result, some asylum seekers are not provided adequate assistance prior to their interview with SEF. Important quality issues were further reported regarding private lawyers at the Lisbon Airport’s CIT, as a result of which an investigation had to be launched by SEF. Another obstacle to legal assistance in Portugal results from a fee of €11 to access the restricted area of airports, charged by the company responsible for the national airport, thereby discouraging lawyers from visiting applicants. This fee, which is applied to all external visitors who are not accredited, has been criticised by the Ombudsman and UN Committee Against Torture.

In Spain, access to free legal assistance in the border procedure is mandatory and guaranteed by law. The National High Court (Audiencia Nacional) further held that the mandatory nature of legal assistance at the border entails an obligation to offer legal aid to the applicant for the purpose of lodging the application for international protection, even if he or she does not ask for it or rejects it. Legal assistance is provided by NGOs, Bar Associations or private lawyers. There have been issues in recent years regarding the quality of legal assistance. In 2017, this included a lack of coordination in the appointment of legal representatives at Madrid Barajas Airport following a rise in the number of applications, which seems to have improved in 2018 and 2019. Other concerns relate to the lack of specialisation of private lawyers in asylum-related matters and practical obstacles stemming from the short time limit of the border procedure. Moreover, while applicants are assisted by a lawyer during the interview, they are not always able to meet prior to the interview, which may hinder preparations.

In France, access to free legal assistance at first instance is only foreseen as a possibility and not a necessity in law. Applicants may be assisted during the interview by a third-party, namely a member of an accredited civil society organisation or a legal representative. The possibility to be assisted during the interview remains the exception in practice: 7.5% of applicants were accompanied by a third party in 2019, and 6.9% in 2018 and 4.1% in 2017. In 2019, only seven interviews were attended by an NGO representative. Thus, in the last three years, over 90% of interviews were carried out without a third party present.

In the other countries covered by this study, national law does not foresee access to free legal assistance at first instance, as a result of which it is at the discretion of the national authorities. In Greece, state-funded legal aid is not provided for the fast-track border procedure at first instance. Therefore, legal assistance at first instance is made available only by NGOs based on capacity and areas of operation, while the scope of these services remains severely limited, given the number of applicants subject to the fast-track border procedure. In Italy, national law foresees that asylum

135. (Spain) Article 16(2) Asylum Act, citing Article 21.
138. Ibid.
139. Information provided by Accem, 29 September 2020.
140. Article L. 213-8-1 du CESEDA.
141. OFPRA, Annual reports.
142. Information provided by OFPRA, 21 September 2020.
seekers may benefit from legal assistance and representation during the first instance of the regular and prioritised procedure but only at their own expense.144 In practice, funds for the purpose of legal assistance are insufficient and the capacity of NGOS and lawyers is limited. Thus, the vast majority of asylum applicants undergo the personal interview without any assistance.145

In Germany, at Frankfurt/Main Airport, asylum seekers cannot easily reach out to lawyers prior to their interview and must rely heavily on relatives or the support of Church Refugee Services to establish contact with a lawyer.146 Subject to available capacity, organisations such as PRO ASYL provide funding for lawyers to support asylum seekers from the outset of the procedure. This led to 80 to 90 cases being supported at first instance by PRO ASYL-funded lawyers in 2018.147 More recent figures are not available, but it has been confirmed that only a minority of asylum applicants have access to legal assistance at this stage of the procedure.148

Legal practitioners have reported a notable difference in the procedure depending on whether they are present or not during the interview. When the interview is conducted without the presence of a lawyer, it has been reported that the interview may be shorter and that interviewers tend to make superficial assessments of the claim and to omit questions on important elements such as health conditions. NGOs and practitioners thus highlight that access to quality legal assistance prior to the interview in the border procedure would increase the likelihood of a positive first instance decision.

Access to free legal assistance at second instance in the border procedure
In countries where access to free legal assistance is not provided at first instance, it is still mandatory at second instance, i.e. once a decision on the asylum claim has been issued.

In Germany, the Federal Constitutional Court (Bundesverfassungsgericht) ruled in a landmark decision of 1996 that asylum seekers whose applications are rejected in the airport procedure are entitled to free, quality and independent legal assistance.149 This is the only procedure where asylum seekers are entitled to a form of free legal assistance in Germany.150 The bar association of the region where the airport is located coordinates a consultation service with qualified lawyers. For example, the Bar Association of Frankfurt had a list of 43 lawyers dedicated to the airport procedure as of May 2019, who are on standby for counselling with asylum seekers when needed.151 In practice, the chance of success of appeals seem to be low (see Section 3.9) and the scope of legal assistance is limited. In particular, representation before the court is not part of the free legal assistance.152 A lack of trust of asylum seekers towards lawyers who are appointed to them on the basis of the list has also been reported.153

In Italy, access to free legal aid is not only limited in practice but also as matter of law. Free state-funded legal aid (gratuito patrocinio) is provided by law only to asylum seekers who declare an

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144 (Italy) Article 16 of the Procedure Decree
146 Information provided by the Munich Airport Church Service, 25 August 2020.
147 Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019. See: ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, 2019, p.13.
148 Information provided by an attorney-at-law, 31 August 2020.
149 (Germany) Federal Constitutional Court, Decision 2 BvR 1516/93, 14 May 1996.
151 Information provided by an attorney-at-law, 3 May 2019.
153 Information provided by an attorney-at-law, 31 August 2020.
The implementation of Article 43 of Directive 2013/32/EU in practice

annual taxable income below €11,493.82 and whose case is not deemed manifestly unfounded. Legal aid is therefore subject to both a means and a merits test. The law has substantially curtailed access to legal aid because it establishes that, when fully rejecting the appeal, a judge who wishes to grant legal aid has to indicate the reasons why he or she does not consider the applicant’s claim to be manifestly unfounded.155

In Greece, only five lawyers were engaged by the state-funded legal aid scheme to provide legal assistance to the rejected applicants under the fast-track border procedure on the five islands of Eastern Aegean and Rhodes.156 There are no lawyers on Samos – one of the two islands with the largest number of asylum seekers. Given these severe restrictions, the provision of free legal aid for appellants under the fast-track border procedure remains illusionary.

2.10.2. Interpretation

The recast APD underlines that, at border crossing points, interpretation should be in place to ensure the communication necessary for the competent authorities to understand whether a person wishes to apply for international protection.157 These arrangements must be adopted inter alia to facilitate access to the asylum procedure.158 Moreover, the communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly.159 In practice, problems regarding the availability and quality of interpretation have been reported in the border procedure for all countries covered. The main issues are a lack of availability of interpreters and the challenges of remote interpretation services; a lack of competency and professionalism of interpreters; and a lack of confidentiality.

The lack of availability of interpreters at border points specifically was reported for all countries covered by this study. This is sometimes addressed through remote interpretation services. In Portugal, for example, videoconferencing is used for the purpose of interpretation,160 while German and French authorities ensure interpretation services via phone. In Italy, interpretation services are not always available at border points. Given that the disembarkation of asylum seekers does not always take place at the official border crossing points – where interpretation services are generally available – there may be significant difficulties in promptly providing an adequate number of qualified interpreters.161

The lack of competence of interpreters is also a common issue. In Portugal, quality of interpretation services used for interviews remains a serious challenge, as in many cases service providers are not trained interpreters but rather individuals with sufficient command of source languages. In the case of rarer languages, securing interpreters with an adequate command of the target language remains challenging.162 In Germany, the quality of interpretation seems to vary depending on whether the interpreter has taken an oath to accurately reflect the applicant’s position. As opposed to interviews conducted with the BAMF or the Border Police, in court proceedings, it is reported that interpreters

154 (Italy) Article 16(2) Procedure Decree.
155 (Italy) Article 35-bis(17) Procedure Decree.
156 Information provided by the Greek Council for Refugees, 27 October 2020.
157 Recital 28, recast APD.
158 Article 8(1) recast APD.
159 Article 15(c) recast APD.
160 Information provided by SEF, 2 September 2020.
take an oath, resulting in better translation services and cases being taken “more seriously”. At first instance, there have been cases where the interview was conducted in a language not understood by the applicant, or where it was clear that the interpreter was lacking the necessary terminology.

In France, issues with regard to quality interpretation have been reported in the context of the initial interview, which is carried out with the Border Police at the very start of the procedure. In Beauvais, for example, in the absence of professional interpretation services, the Border Police has resorted to interpretation by fellow police officers, air carrier personnel or even passengers in some cases. On the contrary, interviews with the OFPRA are mostly carried out in the presence of an interpreter, unless the interview can be carried out in French. In recent years, interpretation was used in the majority of cases, reaching up to 89% of all cases in 2019, compared to 82.3% in 2018, 77.8% in 2017 and 72.3% in 2016.

Another issue with regard to interpretation services relates to confidentiality. In France for example, there have been cases of remote interpretation services indicating that the interpreter was in a train station while the interview was ongoing, or in a park surrounded by children. In Hungary there have been cases in Budapest where several interpreters were in the same room during remote interviews, as a result of which the statements of applicants could be heard by the other interpreters.

2.10.3. Information provision

In line with Article 8 recast APD, providing information means *inter alia* to inform applicants at border crossing points of the possibility to apply for international protection and to enable them to better understand the border procedure, thus helping them to understand their rights and comply with their obligations. Member States are free to use the most appropriate means to provide such information, such as through lawyers, NGOs or professionals from government authorities or specialised services of the State.

However, in practice, in all countries examined it was reported that asylum applicants are not systematically informed about or aware of their rights and obligations despite this being required by law. It is particularly notable in the context of push-back practices, where individuals are not informed of their right to apply for international protection despite an explicit obligation to do so under Article 8 recast APD. Even in cases where information is provided, individuals seem to face hurdles in navigating and understanding the complexity of the border procedure. The level of detail of information further seems to depend on where and by whom information is provided.

In France for example, persons expressing the intention to seek asylum when receiving a refusal of entry in the airport (*aéroport*) at the Roissy airport are usually advised to make an application after entering the waiting zone. However information on the right to apply for asylum is not effectively...
The implementation of Article 43 of Directive 2013/32/EU in practice

provided when refusal of entry occurs at the Franco-Italian border, where reports have documented that applicants are being systematically refused access to the territory without further information or the possibility to lodge an asylum application. Moreover, information on the border procedure is not provided in writing through leaflets but orally by caseworkers of the determining authority.

In Germany, the BAMF provides information to asylum seekers, but in practice they face severe challenges to obtaining clear and comprehensible information on the airport procedure. At Munich Airport, people generally have no understanding of the procedure followed in the airport facility. The information provided to applicants on the procedure prior to the BAMF interview (Belehrung) is considered very complicated and difficult to understand, according to some stakeholders. Applicants have their phones confiscated and analysed by the Federal Police to extract possible information on their travel route. Therefore they are unable to communicate with the outside world, to organise legal support at their own initiative or to send or receive documents from lawyers which might help establish elements of their claim, unless helped by the Church Service to do so. At Frankfurt/Main Airport, the BAMF also systematically confiscates phones at the first arrival centre. At Frankfurt/Main Airport the Church Refugee Service tries to provide information and access to phones and computers as far as possible.

In Greece, information materials, such as leaflets and online material, and telephone helplines exist but accessing accurate information is hindered by the complexity of the procedure and constantly changing legislation and practice, as well as bureaucratic hurdles. Given that legal aid is provided by law only for appeal procedures and remains limited in practice, applicants often have to navigate the complex asylum system on their own, without sufficient information. FRA indicated that applicants on the Eastern Aegean islands “still have only limited understanding of the asylum procedure and lack information on their individual asylum cases”. The lack of communication between different authorities on the islands and the frequent changes in the procedure also have an impact on the ability of asylum seekers to receive proper information.

The same issues are visible in Portugal, where asylum seekers are not systematically informed or aware of their rights and obligations despite the existence of information leaflets available in some foreign languages. According to a recent report from the Ombudsman after visits to airport detention facilities, multiple gaps in the provision of information were detected, both with regard to the applicable legal frameworks and the individual situation of the applicants, such as the grounds for detention.

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173 Information provided by the French Ministry of Interior, 21 October 2020.
175 Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.
176 Information provided by an attorney-at-lay, 31 August 2020; Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
177 Greek Asylum Service, Flowchart on the asylum procedure following the EU-Turkey statement.
178 FRA, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the hotspots’ set up in Greece and Italy, February 2019, p. 36.
179 Greek Helsinki Monitor et al., No End In Sight: The mistreatment of asylum seekers in Greece, 2019.
180 Portuguese Ombudsman, Tratamento de Cidadãos Estrangeiros em situação irregular ou requerentes de asilo nos centros de instalação temporária ou espaços equiparados, September 2017, Chapter II, Section 9.
In Spain, generic information on the border procedure is also provided by way of a brochure which is available in Spanish, English, French and Arabic. It is unclear, however, if asylum applicants are systematically provided this information in practice and whether they are able to understand it.

2.11. Vulnerable applicants may be at risk during the border procedure

The recast Asylum Procedures Directive does not provide for a clear-cut exemption of vulnerable applicants, including torture victims and unaccompanied children, from the border procedure. Instead, it makes the use of border procedures for these applicants contingent on the State's capacity to provide adequate support. Article 24(3) recast APD states that when special procedural guarantees cannot be provided within the framework of border procedures and where the applicant is in need of such “special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply” the border procedure.

2.11.1. Exemptions from border procedures as a matter of law

Two countries, Greece and Hungary, did provide for the exemption of certain categories of vulnerable applicants from the border procedure as matter of law. However, these exemptions have been repealed in Greece and suspended in Hungary (except for minors under 14 years of age in the latter).

In Greece, the previous legislation included an exemption of vulnerable groups and/or persons falling within the family provisions of the Dublin III Regulation from the fast-track border procedure. Case law of the Administrative Court of Appeals of Piraeus had also annulled decisions of the Appeals Committees issued under the fast-track border procedure, on the ground that the applicant should have been exempted from it and referred to the regular procedure for reasons of vulnerability. However, the recently introduced international protection Act (IPA) repealed the exemption and persons belonging to vulnerable groups or falling under the Dublin Regulation may now be subject to the fast-track border procedure. To note: unaccompanied minors can also be channelled into this procedure.

Similarly, in Hungary, national law foresees an exemption of vulnerable groups from the border procedure. This applied to unaccompanied minors and other vulnerable persons, in particular minors, elderly persons, people with disabilities, pregnant women, single parents and victims of torture, rape or other serious forms of mental, physical or sexual violence, persons who, after an individual assessment of their situation, can be identified as having special needs. However, in the framework of the “state of crisis due to mass migration”, the rules on the border procedure have been suspended, meaning the exemption of vulnerable groups is currently no longer applicable. During the “state of crisis”, in force since 2017, special rules apply to third-country nationals unlawfully entering and/or staying in Hungary and to those seeking asylum, including the detention

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183 Article 60(4)(f) L 4375/2016, citing Articles 8-11 Dublin III Regulation and the categories of vulnerable persons defined in Article 14(8) L 4375/2016.
185 (Greece) Article 90(4) IPA
186 (Hungary) Section 71A(7) Asylum Act.
of vulnerable persons and unaccompanied asylum-seeking children over 14 years of age in the transit zones.\(^{187}\)

It should be further noted that in Italy, while the exemption of vulnerable groups is not included in the Procedures Decree, two circulars issued on 16 and 18 October 2019 respectively foresee the exclusion of people rescued at sea following search and rescue (SAR) operations, unaccompanied minors and vulnerable persons from the border procedure in certain circumstances.\(^{188}\) This exemption is limited, however, to persons that are channelled into the accelerated procedure on the grounds that they attempted to avoid border controls.

### 2.11.2. Exemptions of border procedures and identification mechanisms in practice

Exemption from the border procedure in practice presupposes that countries have developed a mechanism to identify vulnerable applicants.\(^{189}\) There are no detailed statistics on the profile of applicants subject to a border procedure and whether vulnerable applicants are among them. Nonetheless, evidence gathered for the study suggests a lack of vulnerability identification mechanisms in all the countries. Overall, given the short deadlines of the border procedure, it is unlikely that vulnerable asylum seekers are able to benefit from “sufficient time” to put forward their claim and receive “adequate support” as foreseen in the recast APD.

First, releasing persons from border facilities when they are identified as vulnerable is only regulated in law in France,\(^{190}\) meaning that this remains at the discretion of the authorities in all other countries. The Portuguese SEF stated that “certain categories” of vulnerable asylum seekers are “usually” released from the border facility and channelled to an admissibility procedure and/or regular or accelerated procedure in national territory,\(^{191}\) but information collected by the CPR indicates that this practice has not been applied since 2016. On the contrary, the border procedure seems to be systematically used and a lack of identification mechanism has been reported \textit{inter alia} by the UN Committee Against Torture regarding victims of torture, rape or other serious form of psychological, physical or sexual violence.\(^{192}\)

Similarly in Spain, the lack of an identification mechanism and procedural guarantees for asylum seekers has been reported as one of the main gaps in the Spanish asylum system in recent years, especially regarding victims of human trafficking.\(^{193}\) In Germany, NGOs have also reported that there is no vulnerability identification mechanism in place during airport procedures and that the lack of procedural guarantees for vulnerable groups is a matter of serious concern.\(^{194}\) Asylum seekers with special needs are thus channelled into the airport procedure and are detained in the airport facilities.

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188 (Italy) Ministry of Interior, \textit{Circular of 16 October 2019; Circular of 18 October 2019}.
189 See also: EASO, \textit{Border Procedures for Asylum Applications in EU+ Countries}, September 2020.
190 (France) Article L.221-1 Ceseda
191 Information received by SEF, 2 September 2020.
194 Information provided by the Frankfurt Airport Church Refugee Service on 25 August 2020. See also Bistum Limburg, \textit{‘Caritas und Diakonie wollen Aus für Flughafen-Asylverfahren’}, 30 October 2018.
in practice. This includes cases of pregnant women, survivors of rape, victims of human trafficking
and persons with disabilities. 195

Second, even if foreseen in law or practice, identification mechanisms are either rarely used or have
limited consequences on the continuation of the border procedure, i.e. persons are identified but
continue to be processed under the border procedure including being held in inadequate border
facilities. In France, despite the existence of the afore-mentioned legal framework and a referral
mechanism under which any person in the transit zones may alert OFRPA of a vulnerability, 196 only
5 people were released from the waiting zones due to their vulnerability in 2016 197 and none in 2017. 198
Moreover, there have been cases where applicants were not released from the waiting zones despite
their vulnerability being reported by NGOs. 199 The same issue was also recorded in Italy, where vulnerable groups had to undergo the border procedure despite their vulnerability because they came from a safe country of origin, 200 and in Spain, where victims of human trafficking were returned to their home country despite having been identified as such at the Madrid Barajas airport. 201

Third, in certain countries the assessment of vulnerability is limited to “visible” vulnerabilities (e.g.
young children, pregnant women, elderly and disabled persons). This seems to be the case in Hungary
and in Portugal, 202 but is also likely to be the case in the other countries covered by the study,
given the lack of effective vulnerability identification mechanism.

Despite this situation, a few positive practices related to vulnerable applicants should be
highlighted. In France and Germany, although vulnerable applicants are not released from border
facilities, certain procedural guarantees are granted in practice. These include appointing a
specialised caseworker and/or an interpreter of a specific gender. In Germany, authorities also seem
to afford longer breaks during interviews when necessary. At the Madrid Barajas Airport in Spain, a
new special procedure was adopted in October 2019 which consists of a collaboration with five
NGOs to help identify and provide assistance to victims of human trafficking. 203 This said, the NGO
CEAR reported that, despite being detected as victims of human trafficking by a specialised NGO at
the Madrid airport, and despite the recommendations of the Spanish Ombudsman to avoid their
return, two young Vietnamese girls were returned to their home country in 2019. 204

In Greece, a significant portion of applications initially channelled into the fast-track border
procedure were referred to the regular procedure for reasons of vulnerability. In 2019, of 39,505

195 Ibid.
196 (France) Article L213-8-1 CESEDA. ECRE/AIDA, Access to asylum and detention at France’s borders, June 2018, p. 22.
198 ECRE/AIDA, Access to asylum and detention at France’s borders, June 2018, p. 20.
199 For example, there has been a case where the vulnerability of an 8-months pregnant woman was reported by Anafé
to the OFPRA, but the woman continued to be held in the transit zone. She further had to stand during whole duration
of the interview, as the latter was conducted through a wall mounted telephone. Information provided by Anafé, 17
September 2020.
200 ASGI has recorded at least two cases in Trieste where vulnerable people, in particular single parents with children,
were subject to the border accelerated procedure considering that they came from a safe country of origin.
201 CEAR, ‘La devolución de dos jóvenes vietnamitas, un clamoroso paso atrás contra la trata’, 31 October 2019.
categories which may be released from the border facilities as follows: “unaccompanied children, pregnant women
and seriously ill person”. Information provided by SEF, 3 September 2020.
203 Ministerio de Trabajo, Migraciones y Seguridad Social, ‘El Gobierno pone en marcha un procedimiento de derivación
de potenciales víctimas de trata de seres humanos en el aeropuerto de Barajas’, 15 October 2019.
204 CEAR, ‘La devolución de dos jóvenes vietnamitas, un clamoroso paso atrás contra la trata’, 31 October 2019.
applications initially channeled into the fast-track border procedure, nearly half (18,849) were later referred to the regular procedure due to vulnerability.205

2.11.3. Unaccompanied minors

Article 25(6)(b) provides that the border procedure may only be used vis-à-vis unaccompanied children in certain of the circumstance where admissibility or accelerated procedures would normally be applicable:

Table 4: Border procedure vis-à-vis unaccompanied minors: Article 25(6)(b) recast APD

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<tr>
<td>Protection in another Member State</td>
<td>× Claim unrelated to protection</td>
</tr>
<tr>
<td>First country of asylum</td>
<td>× Safe country of origin</td>
</tr>
<tr>
<td>Safe third country</td>
<td>√ False information or documents</td>
</tr>
<tr>
<td>Subsequent claim with no new elements</td>
<td>√ Destruction or disposal of documents</td>
</tr>
<tr>
<td>Application by dependant</td>
<td>× Clearly unconvincing claim</td>
</tr>
<tr>
<td>Admissible subsequent claim</td>
<td></td>
</tr>
<tr>
<td>Application to frustrate return proceedings</td>
<td>×</td>
</tr>
<tr>
<td>Application not as soon as possible</td>
<td>×</td>
</tr>
<tr>
<td>Refusal to be fingerprinted</td>
<td>×</td>
</tr>
<tr>
<td>Threat to public order or national security</td>
<td>√</td>
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</tbody>
</table>


As indicated above, Member states may apply the border procedures to unaccompanied minors in only a limited set of circumstances: if he or she comes from a safe country of origin; has introduced a subsequent application; may be considered a danger to national security or public order; if the safe third country concept applies; if the applicant presented false documents; or if the applicant, in bad faith, destroyed or disposed of an identity or travel document. The latter two grounds are applicable only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision, provided full opportunity was given to show good cause of action. European case law also warns against the use of detention of children in transit zones. The ECtHR held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.206

France, Germany, Greece, Portugal and Spain allow the application of the border procedure for unaccompanied minors only under the conditions listed above, drawn from the APD. These conditions often arise, however. Statistics are only available in few countries so the numbers of unaccompanied children in border procedures cannot be ascertained.

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205 Information provided by the Greek Asylum Service, 17 February 2020.
In Germany, in 2018 and 2019, there were respectively 121 and 86 minors in the airport procedure, around 19% of all applicants. Information on how many of them were unaccompanied is not available. In practice, it seems that the BAMF contacts the youth welfare office (Jugendamt) in cases involving unaccompanied minors. Officials of the youth welfare office come to the airport facility to conduct an age assessment and unaccompanied minors are usually allowed entry to the territory for the purpose of the asylum procedure.

In Portugal, 14 unaccompanied children were channelled into the border procedure in 2019 according to SEF. Although national law foresees that placement of unaccompanied and separated children in temporary detention facilities at the border must comply with applicable international standards such as those recommended by UNHCR, UNICEF and ICRC practice indicates that a significant number of children have been detained at border facilities in recent years. This has drawn criticism from actors including the national Ombudsman and UNICEF in 2017 and 2018, and the UN Committee on the Rights of the Child and the UN Committee on Against Torture in 2019. The two UN Committees emphasised that detention of children must be avoided and alternatives ensured, regardless of their immigration status.

In France, in 2019 59 applications were made at the border by unaccompanied minors, an increase from 32 applications in 2018 and 39 applications in 2017. While 71.2% of unaccompanied minors were granted entry in 2019, this number was as low as 51.6% in 2018, 24.3% in 2016 and 37% in 2015. Thus in 2018, nearly half of the unaccompanied minors making an asylum claim at the border in France were refused access to the territory; in 2016 it was three-quarters and a large majority in 2015. Interestingly, it should also be noted that in France, fraud is one of the four grounds for applying the border procedure to unaccompanied children, while it cannot be invoked for the application of the accelerated procedure vis-à-vis unaccompanied children on the territory, a policy decision made by the Ministry of the Interior. As the majority of unaccompanied children arriving at the border hold false documents, fraud is widely applied as ground to conduct a border procedure for this category. In carrying out their respective assessments, both OFPRA and the Ministry assess the person’s declared minority and fraud is one of the elements in the assessment.

Moreover, a potential protection gap persists in France at the moment of interception of the unaccompanied child at the airport (aéroport) prior to his or her transfer to the waiting zone. Although national law requires the Border Police to immediately contact the Public Prosecutor in

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207 (German) Federal Government, Response to parliamentary question by The Left, 19/20377, 23 July 2020, p. 4.
208 Information provided by an attorney-at-law, 31 August 2020.
210 (Portugal) Article 26(2) Asylum Act.
212 United Nations Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Portugal, CRC/C/PRT/CO/5-6, 9 December 2019, paras. 42(a) and (d); United Nations Committee Against Torture, Concluding Observations on the seventh periodic report of Portugal, CAT/C/PRT/CO/7, 18 December 2019, para.40(b).
213 OFPRA, Annual reports.
214 Ibid.
215 (France) Article L221-1 Ceseda, citing Article L.723-2(I)(1)-(2), (II)(1) and (III)(5) Ceseda.
216 Information provided by OFPRA, 24 April 2018. See also: ECRE/AIDA, Access to asylum and detention at France’s borders, June 2018, pp. 23-24.
order to have an *ad hoc* administrator appointed who should assist the child at every step in the process, including in the *aéroport*, in practice it is impossible for *ad hoc* administrators to provide assistance prior to arrival in the waiting zone, due to the speed of the process. This undermines the effective protection of unaccompanied children at the very initial stage of the process as they have to face the Border Police without any assistance. As the Border Police are reported to assume a person to be over 18 on the basis of identity documents it considers to be fraudulent, many unaccompanied children may wrongly be assessed as adults and be denied the special protection owed to them under national and EU law.

Wrongly assessing children as adults is an issue resulting from inadequate age assessment methods that has also been reported in other countries. This is particularly visible in Spain where age assessments are systematically carried out, including in cases where official identity documents show the person to be a minor. In several cases at the Madrid Barajas Airport in 2017, children with identity documents proving their minority were registered as adults due to the fact that they were travelling with a (false) passport declaring them over the age of 18. Age assessments have been criticised for inaccuracies, including the lack of a medical basis and lack of provision of information to minors, including by international organisations, NGOs, academics, as well as administration officers and the Spanish Ombudsman. These practices led to condemnation by the United Nations Committee on the Rights of the Child in 2018 and 2019.

The information above shows that despite safeguards and legal obligations in the EU asylum *acquis* relating to the particular vulnerability of unaccompanied minors, many continue to be refused access to the territory and held in border detention facilities. The ECtHR held *inter alia* that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful

### 2.12. Detention (declared or *de facto*) is the norm for the border procedure

Automatic detention practices at borders are well documented, in clear dereliction of states’ obligations to refrain from arbitrary detention, and from penalisation of refugees for irregular entry.

#### 2.12.1. Legal framework on detention under the recast APD

The recast APD provides little information as to where applicants for international protection subject to the border procedure should be held. There is only one partial reference to this in Article 43(3)
which foresees that, in the event of arrivals involving a large number of third country nationals or stateless persons, the border procedure should continue to apply as long as these individuals “are accommodated normally at locations in proximity to the border or transit zone.” This does not clarify, however, what reception conditions should be provided to asylum seekers in the border procedure in a “normal” situation.

Similarly, the recast Reception Conditions Directive (RCD), which applies to applicants under the border procedure, only provides that premises must be used “for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones”, without further detail. Nonetheless, it should be noted that the possibility to detain people at border posts or in transit zones seems to be acknowledged in Article 8(3)(C) which states that an applicant may be detained only “in order to decide, in the context of a procedure, on the applicant’s right to enter the territory”. Furthermore Article 10(5) and 11(6) of the recast RCD ensure that certain guarantees such as the right to information would still be provided to individuals detained in border procedures.

As neither the recast APD nor the recast RCD provides guidance to Member States regarding the reception of applicants for international protection subject to a border procedure, it is unsurprising that countries have diverging terminology to designate the regime applicable to entrants upon arrival: an asylum seeker is: “held in waiting zone” in France and “held in a dedicated facility” in Spain; is issued a “notification of residence in the airport facility” in Germany; and Greece’s law qualifies this measure as a “restriction of movement”.

As noted by EASO, applicants for international protection are likely to be placed in detention pursuant to Article 8(3c) of the recast RCD. Research on the seven countries covered in this study confirms that the border procedure always involves outright detention and/or de facto detention in border facilities. In de facto detention people are held in closed centres that they are not allowed to enter and exit at will unless they agree to leave the country, therefore they should be considered places of detention in accordance with the case law of both the ECHR and CJEU, as well as UNHCR’s Detention Guidelines.

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226 Article 3 recast RCD.
227 Article 18(1) recast RCD.
228 EASO, Border Procedures for Asylum Applications in EU+ Countries, September 2020, p.11.
As the graph shows, all applicants subject to a border procedure are detained in the countries covered by this study. The key difference is whether or not the country classifies the situation as detention and then operates within the rules applying to (official) detention at the border.

2.12.2. Official detention

In France, Portugal and Spain individuals are officially held in detention.

In France, the placement of an individual in a waiting zone is acknowledged as a measure of deprivation of liberty. Back in 1996, the ECtHR held in the landmark judgment of *Amuur v. France* that the placement of individuals in hotel accommodation near Orly airport constituted deprivation of liberty and therefore needed to comply with the safeguards set out in Article 5 of the European Convention of Human Rights (ECHR).[^231] The placement in waiting zones is ordered by the Ministry of the Interior for an initial period of four days.[^232] It can then be extended by the liberties and detention judge (*juge des libertés et de la détention* - JLD) for a period of eight days,[^233] and in exceptional cases or where the person obstructs his or her departure, for eight more days.[^234] This brings the maximum period of detention in waiting zones to twenty days in total. In practice, only a minority of persons are effectively released from the airport detention facilities. This concerned around 170 persons in 2019, 110 persons in 2018 and 90 persons in 2017, thus representing less than 10% of all airport cases.[^235]

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[^232]: (France) Article L221-3 CESEDA.
[^233]: (France) Article L222-1 CESEDA.
[^234]: (France) Article L222-2 CESEDA.
[^235]: OFPRA, Annual reports.
In Portugal, an asylum seeker either at the airport or land border “who does not meet the legal requirements for entering national territory” can be detained for up to seven days for an admissibility procedure. If SEF makes a positive admissibility decision or if no decision has been taken within seven working days, the applicant is released. If the claim is deemed inadmissible or unfounded in an accelerated procedure, the asylum seeker can challenge the rejection before the administrative courts with suspensive effect and remains detained for up to 60 days during the appeal proceeding. After 60 days, even if no decision has been taken on the appeal, SEF must release the individual from detention and provide access to the territory. The maximum detention period of 60 days is equally applicable in instances where the application is made from detention at a CIT due to a removal procedure. In practice, asylum seekers are systematically detained at the border for periods up to 60 days, including vulnerable applicants as mentioned above. This raises questions regarding compliance with Article 43(2) of the recast APD: it requires that an applicant is granted entry to the territory of the Member State in order for their application to be processed in accordance with the other provisions of the Directive when the decision has not been taken within four weeks.

In Spain, the law foresees that individuals subject to the border procedure “are held in facilities set up for this purpose” (permanecerá en las dependencias habilitadas a tal efecto) without specifying whether this amounts to detention or not. Nevertheless, this is acknowledged as detention by the authorities who confirmed that “applicants stay in a detention facility inside the airport”, in accordance with Article 21 of the Asylum Law. As regards land borders, applicants remain at Migrant Temporary Stay Centres (Centros de Estancia Temporal para Inmigrantes, CETI), where freedom of movement is not restricted according to the authorities. Practice indicates that applicants in the CETI are not free to move outside the Ceuta and Melilla enclaves up until they are transferred to the peninsula. This has raised criticism from NGOs and the national Ombudsman, and the Supreme Court ruled on 29 July 2020 that the freedom of movement of persons held in the enclaves must be ensured.

In Italy, there is no legal provision allowing the detention in hotspot or transit areas related to the border procedure, but the law allows the detention of asylum seekers in hotspots for identification purposes. The overlapping of this provision with border procedures can lead to the detention of asylum seekers during (even if not formally related to) the border procedure.

2.12.3. De facto detention

Germany, Greece, Italy and Hungary do not officially or explicitly qualify the measure of holding persons in border facilities as detention.

In Germany, border facilities are closed centres that people are not allowed to enter and exit at will, therefore places of detention. Yet the official position of the German authorities remains that persons held in those facilities are not deprived of their liberty, as confirmed both by the Federal...

236 (Portugal) Article 26 and 35-A(3)(a) Asylum Act.
238 Information provided by the OAR, 15 September 2020.
239 Information provided by the OAR, 15 September 2020.
241 CEAR, El Tribunal Supremo reconoce la libre circulación a los solicitantes de asilo de Ceuta y Melilla, 29 July 2020.
242 Note that under Section 15(6) Residence Act, a person refused entry “shall be taken to the transit area of an airport or to a place of accommodation from which his exit from the federal territory is possible if detention pending exit from
Constitutional Court (Bundesverfassungsgericht, BVerfG) and the Federal Supreme Court (Bundesgerichtshof, BGH). The BAMF stated that asylum seekers are “accommodated in an initial reception facility” and “free to return to their country of origin or a transit country by air at any time during the airport procedure”.

In Hungary, all asylum seekers entering the transit zones of Röszeke and Tompa were de facto detained from March 2017 to May 2020, although the Hungarian authorities refused to recognise that this amounted to detention. In contrast to the Ilias and Ahmed judgment of the ECHR, the CJEU explicitly qualified keeping people at the Hungarian border as detention on 14 May 2020, as a result of which the transit zones have been dismantled.

In Greece, a regime of de facto detention applies as no detention order is issued to applicants who lodge an application for international protection after entering the country via the Athens International Airport without a valid entry authorisation. These persons remain de facto detained at the Athens Airport Police Directorate for a period up to 28 days from the full registration of the application. As regards persons arriving on the Eastern Aegean islands and thus falling under the EU-Turkey Statement, they are subject to a geographical restriction issued initially by the police and subsequently by the Asylum Service. Newly arrived persons may be restricted to the Reception and Identification Centres (RIC) for a few days until registration is completed.

In Italy, the Guarantor for detained persons concluded that a de facto detention regime contrary to Article 13 of the Italian Constitution and to Article 5 ECHR was being applied in the situation where people were unable to enter Italy because they were notified of an immediate refoulement measure and were obliged to stay in special rooms in the transit area of airports and remain at the disposal of the border police. The period of time of detention varied according to the availability of flight connections with the place of origin.

Moreover, even in countries where a detention regime is acknowledged at borders, de facto detention may also occur. This is the case in France where French authorities detain people arriving from Italy without having established a waiting zone to that effect. Since 2017 a so-called “temporary detention centre” made up of containers has been established in the premises of the Border Police office of Menton, where people refused entry are detained before being returned to Italy. It is unclear whether this continued to be used in 2020.

A consequence for people subject to de facto detention is that they do not have access to detention safeguards, such as judicial review of detention and possibilities to appeal, which are applicable to their counterparts where the detention regime is official. This raises serious concerns about differential and unfair treatment, as in all situations of de facto detention.
2.12.4. Detention and reception conditions

In recent years, border detention facilities, whether officially recognised as detention or not, have raised concerns in all countries due to inadequate living conditions, overcrowding, and inaccessibility for external service providers. This is particularly worrying where it affects unaccompanied children and other vulnerable applicants.

In Spain, after a visit to the Madrid Barajas Airport, in 2019 the National Ombudsman reported concerns including a lack of space such as to not comply with the required minimum standards; the lack of hot water in female toilets; the lack of access to daylight; and a lack of medical services. In Portugal, airport facilities have been described as inadequate and particularly problematic for vulnerable applicants by the National Ombudsman. Issues included mixed sex detention facilities, resulting in risks of sexual violence; a lack of support for vulnerable applicants; poor food quality; and inadequate training of and ill-treatment by staff. Following the death of a Ukrainian national at the detention centre at Lisbon airport in March 2019, the Portuguese Minister of Home Affairs launched an internal investigation into the management and functioning of the detention centre and ordered disciplinary inquiries into the involved members of SEF. The Criminal Police arrested three SEF inspectors on suspicion of having killed the individual in the detention centre at Lisbon airport.

In France and Germany, detention facilities at the main airports (Roissy-CDG in France and Frankfurt/Main airport in Germany) are more structured than the other detention facilities, insofar as the infrastructure is specially adapted and concentrates all relevant actors in the same place. However, at Frankfurt/Airport, it was reported that self-harm is frequent, as are hunger strikes. Several self-harm cases (14 in 2018) were reported, with one leading to suicide. The state keeps no statistics on such incidents on the basis that many cases of self-harm are pretexts to leave the facility.

Detention conditions in the Hungarian transit zone gave rise to infringements procedures of the European Commission. On 25 July 2019, the European Commission sent a letter of formal notice to Hungary concerning the situation of persons in the transit zones at the border with Serbia, whose applications for international protection had been rejected, and who were waiting to be returned to a third country. In the Commission’s view, their compulsory stay in the Hungarian transit zones qualified as detention under the EU’s Return Directive. The Commission contended that the detention conditions in the Hungarian transit zones, in particular the withholding of food, did not respect the material conditions required by the Return Directive and the Charter of Fundamental Rights of the European Union.

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250 Cadena Ser, ‘Sin agua caliente y sin medicinas, así son tratados los solicitantes de asilo en Barajas’, 4 April 2019.
252 See, for instance, Público, Direcção do SEF demitida depois de PJ deter três inspectores suspeitos de matar ucraniano, 30 March 2020; Público, Provedora de Justiça: é urgente haver alternativas ao SEF do aeroporto, 1 April 2020; Renascença, Morte no aeroporto. Mais inspectores do SEF, enfermeiros, médicos e seguranças sob investigação, 4 April 2020.
253 Police Judiciária, Detenção de três presumíveis autores de crime de homicídio, 30 March 2020.
254 Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
255 European Commission, Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones, 25 July 2019.
In Greece the situation on the islands has been widely documented and remains alarming.\(^{256}\) Reception conditions in the hotspot facilities may reach the level of inhuman or degrading treatment, while overcrowding leaves an ever increasing number of asylum seekers without access to their rights. By the end of December 2019 more than 38,000 asylum seekers, including 1,809 unaccompanied children, were living in facilities with a designated capacity of 6,178 persons.\(^{257}\) In 2019, a number of recommendations on the living conditions on the islands were addressed to the Greek authorities *inter alia* by the Council of Europe Commissioner for Human Rights,\(^{258}\) UNHCR,\(^{259}\) UNICEF,\(^{260}\) and civil society organisations.\(^{261}\)

2.13. There is limited use of external assistance by national authorities

Involving external actors to monitor and address specific gaps in the examination of asylum claims in the border procedure can help improve the quality and fairness. In the countries covered by this study, access of NGOs to those in a border procedure remains difficult or non-existent, while UNHCR plays a role in only a few countries and EASO provides assistance in the only in the context of the border procedure in Greece.

Access to NGOs

Pursuant to Article 8(2) recast APD, Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Most of the Member States covered by the study do not foresee automatic access for NGOs in their respective legislation, thus leaving it to the discretion of the authorities to allow such access in practice.

Portugal is one of the few countries which does guarantee access to NGOs, as a result of which CPR is regularly present (i.e. generally every week) at the Lisbon Airport detention facility to provide free legal information and assistance.\(^{262}\) In Italy, the Procedures Decree expressly requires the competent authorities to guarantee asylum seekers the possibility to contact UNHCR and NGOs during all

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\(^{256}\) On 31 October 2019, the CoE Commissioner for Human Rights described the situation as “a struggle for survival”, stressing the “desperate lack of medical care and sanitation in the vastly overcrowded camps”. See: Council of Europe, *Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities*, 31 October 2019; Similarly, in November 2019, the, the UN High Commissioner for Refugees described the situation in Moria a “extremely disturbing” and “horrifying”.\(^{256}\) See: UNHCR, *Head of UNHCR calls for urgent response to overcrowding in Greek island reception centres, Europe to share responsibility*, 28 November 2019.


\(^{258}\) Council of Europe Commissioner for Human Rights, *Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities*, 31 October 2019.

\(^{259}\) UNHCR, *Greece must act to end dangerous overcrowding in island reception centres, EU support crucial*, 1 October 2019.


\(^{262}\) (Portugal) Article 49(1)(e) and (6) Asylum Act.
phases of the asylum procedure.\textsuperscript{263} However, due to insufficient funds and due to the fact that NGOs are located mainly in big cities, not all asylum seekers have access to them.\textsuperscript{264}

In France, access to NGOs is foreseen as a possibility under national law,\textsuperscript{265} and available figures indicate that access to NGOs remains limited in practice. In 2018 for example, only 3 interviews with OFPRA were carried out in the presence of an NGO.\textsuperscript{266}

In the other countries, access to NGOs is not foreseen in law, although some may be present in some facilities. This is the case in Spain where, according to the OAR, NGOs are usually provided access to border facilities in order to assist vulnerable applicants. The NGOs CEAR and the Red Cross are present at the airports in Madrid and Barcelona,\textsuperscript{267} and UNHCR conducts monitoring activities at several border facilities. Similarly, in Germany, the Church Refugee Service has permanent presence at Frankfurt/Main airport and can attend interviews with the BAMF, but authorisation is required at Munich Airport. However, access to NGOs other than the Church Refugee Services remains limited at all airports.\textsuperscript{268}

In Greece, access of NGOs to Reception and Identification Centres, camps on the mainland and pre-removal detention facilities is subject to prior permission by the competent authorities. UNHCR is present in Athens, Lesvos, Chios, Samos, Kos, Leros, Rhodes, Thessaloniki and Ioannina.\textsuperscript{269} Access of asylum seekers to NGOs and other actors depends on the situation at each site and on the availability of human resources. In Samos, for example, legal aid organisations are often prohibited from entering the camp, making it difficult to accompany beneficiaries to their interview because the office where it takes place is inside the RIC.\textsuperscript{270}

In Hungary, not only does the law omit to provide access to NGOs, but it actually criminalises activities aimed at assisting asylum seekers in certain circumstances.\textsuperscript{271} This raises serious questions regarding compliance with the recast APD which explicitly foresees that limitations on access to NGOs must not severely restrict or render access impossible.\textsuperscript{272}

The description above demonstrates that access to NGOs remains severely limited, either because it is not foreseen in law or because of capacity constraints and limited resources in practice – all of which is exacerbated by the short time limits of the border procedure. Thus, asylum-seekers may not be assisted and guided through the border procedure.

The role of UNHCR

Under Article 29(1) of the recast APD, Member States shall allow UNHCR to have access to applicants at the border and in the transit zones. While UNHCR does not play a specific role in the border procedure in France and Germany, it conducts activities in the other countries covered by the research. National law foresees that UNHCR must be informed of all applications lodged both in

\textsuperscript{263} (Italy) Article 10(3) Procedure Decree.
\textsuperscript{264} AIDA, \textit{Country Report Italy – Update on the year 2019}, May 2020, p. 89.
\textsuperscript{265} (France) Article L 213-8-1 du CESEDA.
\textsuperscript{266} In 2018, out of the 93 interviews conducted in the presence of a third-party, 90 interviews were carried out with a legal representative and only 3 of them in the presence of an NGO. See: OFPRA, \textit{Annual Report 2018}, 2019, p. 25.
\textsuperscript{267} Information provided by the OAR, 14 September 2020; ACCEM, 29 September 2020.
\textsuperscript{268} Information provided by the Frankfurt Airport Church Service, 25 August 2020.
\textsuperscript{269} UNHCR, \textit{About UNHCR in Greece}.
\textsuperscript{270} Greek Helsinki Monitor et al., \textit{No End In Sight: The mistreatment of asylum seekers in Greece}, 2019.
\textsuperscript{272} Article 8(2) recast APD.
Spain and Portugal (through its partner CPR),\(^{273}\) and it conducts monitoring activities in border facilities (or hotspots) in Spain, Portugal, Greece, and Italy. UNHCR’s activities include providing information and assistance and identifying vulnerabilities.

UNHCR also plays a role in decision-making, in some cases, such as in Spain where it may issue a binding opinion supporting the granting of protection in border procedures.\(^{274}\) In such a case, the application cannot be considered as manifestly unfounded. UNHCR may further request the Spanish Ministry of the Interior to extend the length of the border procedure to 10 days. In Italy, some experts in the Territorial Commissions, responsible for deciding on asylum claims, are appointed by UNHCR.\(^{275}\)

Involvement of EASO

EASO offers various forms of support to Member States in developing and maintaining their asylum systems. Regarding the border procedure specifically, EASO only plays a role in Greece, where EASO caseworkers contribute to the fast-track border procedure by conducting interviews, preparing opinions and helping to identify vulnerable applicants.

Despite the deployment of significant numbers of EASO caseworkers to the fast-track border procedure on the Greek islands – approximately 60 caseworkers as of July 2019\(^{276}\) – this has not prevented an average seven-month duration of the procedure between full registration and the issuance of a first instance decision. Moreover, the quality of decision-making has been questioned by legal practitioners due to an overemphasis on inconsistencies in the applicant’s statements and gaps in timely identification of vulnerability. In 2018, the European Ombudsman found that “there are genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted”.\(^{277}\)

Another point of contention between EASO and the Asylum Service remains the applicability of the (optional) safe third country concept to non-Syrian applicants in the fast-track border procedure. The overwhelming majority of EASO opinions seem to recommend inadmissibility for non-Syrians on the basis that Turkey is a safe third country for them, whereas the Asylum Service overturns the opinions and declares the applications admissible without exception.\(^{278}\)

\(^{273}\) (Spain), Article 2 Asylum Act; (Portugal) Article 24(1) Asylum Act.

\(^{274}\) (Spain) Article 21(3) Asylum Act.

\(^{275}\) (Italy) Article 4(3) Procedure Decree, as amended by LD 220/2017.

\(^{276}\) ECRE, The Role of EASO operations in national asylum systems, November 2019, p.11.

\(^{277}\) European Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office’s (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews, 5 July 2018, para 46; See also: Greens/EFA, The EU-Turkey Statement and the Greek Hotspots: A failed European Pilot Project in Refugee Policy, June 2018, p. 19.

\(^{278}\) Ibid. p.26.
3. Recommendations

Based on the implementation assessment, following recommendations can be made. It should be noted, however, that some of the flaws are inherent to the legal ambiguity of Article 43 recast APD, thus implementation alone will not resolve the problems:

On the access to the territory and to the asylum procedure at borders

- In order to ensure that the principle of non-refoulement is respected and for the right to asylum to be effective (as recently emphasised by the European Commission), every person who may be in need of international protection at borders must be ensured access to the asylum procedure, in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU); Article 18 of the EU Charter of Fundamental Rights (CFR); and the Geneva Convention of 1951.
- Member States’ obligation under Article 8 recast APD to properly inform third country nationals at border crossing points of the possibility to apply for international protection should not be conditional on any subjective or premature assessment of a person’s vulnerability or need of international protection. In order to be effective, such information must be provided pro-actively to all those apprehended at the border on an equal footing, in accordance with the principle of non-discrimination laid down in Article 21 of the CFR.
- Where a person does not meet the conditions for entry into the territory, any decision of refusal of entry should be individualised, sufficiently motivated and consistent with states’ obligations to receive asylum applications where a request for protection is made. Persons subject to a refusal of entry must be ensured access to an effective remedy in accordance with Article 47 of the EU Charter, Article 13 ECHR and Article 46 recast APD.
- Push backs through automatic refusal of entry, or without any administrative formalities at all, are unlawful acts for which there should be accountability. There should always be an individual assessment of protection needs and of the safety of a return in order to prevent violation of Article 3 ECHR and of the prohibition of collective expulsions as enshrined in Article 4 of Protocol No. 4 to the ECHR.
- The role of border police and other border management agencies’ staff should be limited and must exclude any participation in the examination of applications for international protection. Border management staff should be adequately trained and adhere to fundamental rights in their daily operational work in accordance with Article 6(1) of the recast APD and in line with EASO’s Practical Tools for First-Contact Officials on “Access to the Asylum Procedure” and with the Fundamental Rights Agency’s “Practical Guidance on Border Controls and Fundamental Rights at External Land Borders”.

On (grounds for) activation of the border procedure

- States should refrain from applying border procedures where possible. They are ill-suited to ensuring a fair and efficient examination of an applicant’s need for international protection. Even when applications are made at the border, they can be processed in a regular procedure conducted on the territory with the range of procedural guarantees required under EU and international law.
- Where border procedures are foreseen at national level, the activation grounds must not go beyond these set in Article 43 recast APD.
- At EU level, co-legislators should carefully consider whether rendering border procedures mandatory in some circumstances and otherwise expanding their scope will
enhance the efficiency of asylum systems in the EU. In all scenarios, they should support legal change to provide for an unequivocal exemption of vulnerable applicants from border procedures.

States should further collect statistics on (i) the volume of applications considered in border procedures and the profile of the applicants concerned; (ii) the grounds for applying the border procedure; and (iii) the outcomes of border procedures both at first and second instance. This would contribute to transparency and help relevant actors to assess the functioning of the border procedure.

On the functioning of the border procedure and applicable procedural guarantees

Applicants should be informed about the date and time of the personal interview and be provided a sufficient amount of time to prepare accordingly. The personal interview should be conducted by the determining authority in person and adopt a gender-sensitive approach in line with Article 14 and Article 15 recast APD. Interviews should never be conducted remotely during a border procedure due to the strict time limits and the limited procedural guarantees involved.

Given the complexity of the border procedure and the serious consequences of errors, the right to free legal assistance and representation should be guaranteed both in law and practice to asylum seekers as soon as an asylum application is lodged. Frontloading legal assistance would ensure the people can prepare their claims within short time frames and would contribute to better quality of information provision in the personal interview with the determining authority. It is likely to improve first instance decision-making, which can avoid time consuming and costly appeals. This is in the interest of both the asylum seeker and Member States. Sufficient resources must thus be allocated to this end.

Interpretation in the language of the applicant should be provided in person and at all stages of the border procedure, in accordance with Article 8(1), Article 12(1) and 15(3) recast APD as well as with UNHCR’s guidance on refugee status determination procedures which cautions about the limitations inherent in remote participation of interpreters in interviews and their potentially adverse effect on the quality of the interview. Where an interpreter cannot be physically present at a border facility, the interpreter must work from a space where he or she is free from interruption, noise and the presence of any other individual, in full respect of the principle of confidentiality.

The right to an effective legal remedy must be ensured in accordance with Article 19(1) TEU, Article 47 of the CFR, Article 13 ECHR and Article 46 recast APD. This requires that the asylum applicant be allowed to stay on the territory of a Member State for the time necessary to avail themselves of the right. It further requires systematically and proactively informing applicants of the possibility to lodge an appeal before a court or tribunal, allocating sufficient time to lodge an appeal, and granting access to legal aid.

Appeals in the border procedure should have automatic suspensive effect so as to affirm the principle of *non-refoulement* and ensure that nobody is sent back to persecution before a final decision on their application has been taken. This further reflects States’ obligations to guarantee access to an effective remedy, as well as the opinions of UNHCR, the Committee against Torture, and the Human Rights Committee according to which remedies against expulsion orders should have automatic suspensive effect.

On vulnerable applicants in the border procedure

Where border procedures are in place, applicants in need of special procedural or reception needs should be explicitly and unequivocally exempt as a matter of law. The
border procedure is by definition unsuitable for these claims and does not offer sufficient time and support to such applicants to put forward their protection claims.

> Member States shall systematically and as early as possible after the application has been made at the border assess whether an individual applicant is in need of special procedural guarantees. Early and effective identification mechanism must be established to that end and special attention to vulnerable applicants should be paid throughout all stages of the border procedure, taking into account their specific concerns. This includes providing access to counselling and specific health-care support.

On unaccompanied children in the border procedure

> Asylum applications of unaccompanied children should never be examined in border procedures as these procedures cannot take into account their particular vulnerability nor ensure that their need for special procedural guarantees is realised. Their exemption must be guaranteed by law. Border procedures do not lend themselves to compliance with the best interests of the child principle, as set out in Articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC), Article 24(2) of the CFR, and the recast APD.

> Member States should put in place procedures to identify unaccompanied children and promptly refer them to the appropriate child welfare authorities. In case of doubt, the benefit of the doubt should prevail and there should be a presumption that someone claiming to be under 18 years of age will provisionally be treated as such, in accordance with Article 25(5) recast APD. As soon as an unaccompanied child has been identified, an independent guardian or advisor with relevant childcare expertise should be appointed to assist him or her throughout the procedure.

On detention and the deprivation of liberty at the border

> In general, States should not detain asylum seekers at the border. Where detention is used, in line with legal requirements, it should remain an exceptional measure applied only for a legitimate purpose and reviewed regularly. Any detention measure taken at the border must be based on an individual, rigorous and motivated assessment of its necessity and proportionality. Detention should only be used where alternative, less coercive measures cannot be applied. States should communicate the detention decision to the individual concerned and inform them of available legal remedies. A speedy judicial review in line with States’ obligations under EU and international law should be carried out.

> Where measures prevent asylum seekers from leaving a transit zones or other border facilities to access other parts of the territory, European countries and the European Union through its EU asylum acquis should legally classify such measures as detention, in accordance with the jurisprudence of the European Courts. This would bring legislation in line with the right to liberty enshrined in Article 5 of the ECHR, Article 6 of the EU CFR, and Article 8 of the recast Reception Conditions Directive (RCD).

> Border detention facilities must be adequate and ensure a dignified standard of living guaranteeing subsistence and protecting physical and mental health in accordance with Article 3 ECHR and the recast RCD. This includes providing special facilities to meet the needs of certain applicants, in particular of vulnerable applicants.

On the access of third parties to border facilities

> Restrictions imposed upon access to border facilities for legal representatives and specialised civil society organisations should be lifted in line with Article 8(2) recast APD,
including by guaranteeing access to phones and other communication methods and by respecting confidentiality of contacts.

Independent monitoring bodies should be able to access regularly or permanently border facilities so as to be able to provide assistance and information to asylum seekers, help identify vulnerabilities, and flag fundamental rights violations. This would support implementation of international and European standards and the protection of the human rights of asylum seekers, as well as contributing to the transparency of border procedures.

Effective protection of fundamental rights requires systematic reporting of violations without geographic or procedural restrictions, effective investigation of all allegations, and effective and dissuasive sanctions when violations occur, in line with the Fundamental Rights Agency’s “Guidance on border controls and fundamental rights at external land borders”.

On ensuring compliance with Article 43 recast APD

The European Commission should publish its report on the implementation of the recast Asylum Procedures Directive (2013/32/EU), which should have been presented by 20 July 2017.

Implementation gaps must be taken seriously and responses to persistent non-compliance must be adopted whenever necessary. Where a Member State systematically violates its legal obligations, the Commission should initiate infringement proceedings and work towards restoring compliance, in accordance with Articles 258 to 260 TFEU.
4. Assessment using Better Regulation principles

This section provides additional conclusions drawn from the research using the EU’s own Better Regulation framework. It assesses findings against the principles of effectiveness, fundamental rights, including procedural rights, efficiency, and coherence with the aims of the recast Asylum Procedures Directive (recast APD) and the Common European Asylum System (CEAS) as a whole.

4.1. Are border procedures effective?

Effectiveness refers to the degree to which an action achieves or progresses towards its objectives. Here, the extent to which the objectives of Article 43 recast APD have been met.

Article 43 recast APD does not clearly define any specific objective, thus rendering an assessment of its effectiveness difficult. The sole objective of the provision is to provide Member States the possibility to establish a border procedure in order to decide at the border or transit zones on the admissibility or the substance of an application for international protection. Comparative research conducted in the framework of this study reveals important disparity among EU Member States in transposition and implementation of this provision, indicating that some may not be convinced of its value or effectiveness.

4.1.1. Effectiveness in light of the process of transposition at national level

The effectiveness of Article 43 APD in supporting harmonisation on the use of border procedures is constrained by limitations which resulting from the process of transposition at national level. The study indicates that some Member States decided to limit its transposition, leading to “partial transposition”; some exceeded the scope of discretion afforded to them in certain circumstances, i.e. “incorrect transposition”; and others decided against transposition of the provision altogether, i.e. “non-transposition”.

Partial transposition is visible in countries which have limited the use of border procedures to applications for international protection lodged at airports, while excluding the procedure for land or sea arrivals (Germany) or those limiting the scope of the border procedure to an inadmissibility assessment rather than an in-merit examination of the application (France, Germany and Spain). The provision of Article 43 recast APD which allows the applicant to enter the territory if the determining authority has not taken a decision within four weeks has not been transposed into law in Italy. The possibility to extend the application of border procedures beyond the four-week time limit in the event of an influx of applicants for international protection has not been implemented in certain countries, including France.

Regardless of whether Article 43 has been fully or partially transposed, transposition does not necessarily result in practical implementation, thereby also calling into question its effectiveness. Several Member States have incorporated aspects of the border procedure foreseen by the recast APD in their domestic legal order without applying them in practice. For example, the provision of information, counselling and interpretation at border crossing points as set out in Article 8 recast APD exist in law in the countries covered by this study, but are not applied in practice in most of them. This is particularly visible in the context of push-backs and refusals of entry, but also in the context of border procedures due to the unavailability of service providers and inaccessibility of the location. These issues have been identified in all countries covered by this study.

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Incorrect transposition refers to some of the grounds foreseen at national level for activating the border procedure. In Italy, a person can be subject to a border procedure “after being apprehended for evading or attempting to evade border controls”, which is a ground not foreseen by the recast APD. In Germany, the law triggers the airport procedure as soon as it is established that the asylum seeker is unable to prove identity by means of a passport or other documentation, regardless of whether the applicant tried to mislead the authorities, even though the recast APD clearly states that, as long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to border procedures. These grounds thus raise questions as to compliance with the boundaries set by Article 43 recast APD and further affect its effectiveness. Similarly, Hungary applied an inadmissibility ground of “safe transit country”, using a hybrid of the “safe third country” and “first country of asylum” concepts, which is not compatible with current EU law as it arbitrarily mixes rules pertaining to inadmissibility.

Lastly, it should be underlined that many Member States have not transposed Article 43 recast APD. Currently, there is no border procedure in Bulgaria, Cyprus, Estonia, Finland, Ireland, Lithuania, Luxembourg, Poland, Malta, Slovakia and Sweden. This is in accordance with the optional character of Article 43 recast APD and is also a strong indicator of the reluctance of Member States and their doubts regarding the effectiveness of the border procedure.

4.1.2. Effectiveness in light of a broader set of objectives established by the Common European Asylum System

In absence of a clear specific objective for Article 43 recast APD, the provision can be further assessed in light of the overall objectives of Article 78 of the Treaty on the Functioning of the European Union (TFEU) and Article 1 recast APD, namely to further develop the standards for procedures in the Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union. The lack of harmonisation in the countries covered by this study shows that Member States do not have a uniform way of designing the border procedure provided for by the recast APD. As a result, national border procedures are not necessarily comparable nor are they applied to similar asylum cases. Instead, countries adapt the procedure to their specific national context. The scope and features of a border procedure within the national legal framework vary across the EU, as has been illustrated by the seven case studies. Thus, the objective of establishing a common border procedure has not been achieved. Both the complexity and the ambiguity of the legal provisions creates the risk that efforts to harmonise may have the opposite effect.

Another objective of the recast APD is not only to establish common standards for asylum procedures, but to ensure that these are fair and efficient in the Member States. The need for efficiency and fairness of asylum procedures is also reflected in the Tampere Conclusions of 1999 and is an essential element in the full and inclusive application of the 1951 Convention, which remains the “cornerstone” of the international protection system and the international law to which the CEAS should give effect, according to the jurisprudence of the CJEU. While the efficiency of the border procedure will be assessed below pursuant to the EU better regulation principles, the fairness of the procedure is analysed here.

The research demonstrates that border procedures are all but fair, in particular for the individuals concerned. Border procedures involve a more restrictive approach to protection claims; reduced procedural safeguards for applicants; and systematic detention at the border. Thus, the objective of establishing fair border procedures has not been achieved.

An additional objective of the recast APD relevant to Article 43 is the provision of “adequate support” to applicants who have been identified as in need of special procedural guarantees. The
notion of “adequate support” is defined in recital 29 as “sufficient time enabling effective access to procedures and for presenting the elements needed to substantiate their application”. Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of the border procedures, such an applicant should be exempted from those procedures. This in itself militates against the use of the border procedure for these applicants given the short time limits that apply to submitting documentation, taking first instance decisions, and lodging appeals against negative decisions. Nonetheless, the research indicates that vulnerable applicants, including unaccompanied minors, continue to be subject to border procedures and that vulnerability identification mechanisms are lacking in all the countries covered. Thus, the objective of ensuring adequate support to vulnerable applicants in the context of border procedures has not been achieved.

4.1.3. Mainstreaming the border procedure will not necessarily improve effectiveness

Rendering border procedures (near) mandatory or through otherwise increasing their scope, will not necessarily increase effectiveness and may only have a limited impact on harmonisation.

The challenges identified relate to practical considerations as well as the legislative processes, both at national and EU level. At national level, the effectiveness of Article 43 recast APD is limited by its partial transposition, incorrect transposition and non-transposition, as well as by the complexity of implementation in practice. There is also a substantial degree of both legal ambiguity and excessive discretion foreseen in Article 43 recast APD which also contributes to a lack of harmonisation in transposition and a disinclination to transpose.

This situation implies even mandatory border procedures would be subject to widely different interpretation and application at the Member State level if these inherent problems of legal design are not resolved.

A final limitation to the effectiveness of Article 43 recast APD results from the ineffectiveness of EU-level enforcement mechanisms, which derive in part from the constraints faced by the European Commission. First, the Commission is subject to political constraints in relation to the Member States against whom infringement proceedings should be initiated. The Commission has launched infringement procedures against Hungary and Bulgaria for non-compliance with various aspects of the APD, but not against other countries – those covered by this study and others for systematic push backs of refugees and refusals to register asylum claims at the border. This is particularly visible in the case of Greece. Despite well-documented push-back practices and a suspension of access to asylum at the beginning of 2020 in clear violation of EU and international law, the Commission continues to provide support to Greece. This may be because of the pressure that Greece faces, because of the role that Greece is perceived to play for the EU as a whole (as Commission President Ursula von der Leyen put it “this border is not only a Greek border but it is also a European border”) or for other political reasons. In the case of Croatia, questions have also been raised, including in the European Parliament, about the lack of action, and about underlying political considerations. While political and legal considerations are inextricably linked, a selective approach to enforcement inevitably affects the effectiveness of EU law.

Second, even when there is willingness to pursue them, infringement proceedings take time, resources and effort. A Member State may well continue violating the asylum acquis without legal consequences during the time the case is referred to the CJEU and pending its decision. To illustrate, the infringement procedure against Hungary for noncompliance with the APD was launched by the Commission in 2015 and is still pending. In the meantime, Hungary has introduced a quasi-state of exception directly impacting the situation of asylum seekers at its borders, as demonstrated here.
Third, the Commission’s own policy objectives strongly influence the way it carries out its monitoring and enforcement activities. In recent debates at EU level, border procedures have increasingly been presented as indispensable for the proper functioning of the CEAS and the EU’s integrated border management, as ultimately reflected in the New Pact on Asylum and Migration published on 23 September 2020. As a result, there may be a reluctance to denounce violations occurring in the context of border procedure as this could be seen to contradict what has become the latest proposal for improving the CEAS as embodied in reform proposals.

The effectiveness of Article 43 recast APD would be enhanced if there were a focus on compliance with all applicable standards. In the context of future legislation, it is hard to see how expanding the use of particular tools will improve the effectiveness of the CEAS, without a parallel effort to improve compliance: whatever the legal framework if poor transposition and implementation tolerated not much will change, particularly if the specific challenges in legal design and drafting – complexity and ambiguity – remain in revised legislative frameworks.

Further harmonisation could instead aim at establishing the highest standards of protection across the EU and raising protection standards where they are currently insufficient, as well as ensuring adequate investment in, and thus improving effectiveness and efficiency of, the regular procedure. Harmonisation should not be used as a pretext to lower standards to the bare minimum, and not least because this appears also generate additional problems at the level of effectiveness.

As the decision to focus on the border procedure is central to the latest reform package there is at least an opportunity to exclude the use of border procedures for applicants who have been identified as in need of special procedural guarantees.

4.2. Are border procedures an efficient way to deal with asylum applications at the border?

The efficiency of Article 43 is to be assessed against the costs incurred in its application, covering both the costs to all stakeholders, these being financial and other costs. The assessment of efficiency is not straightforward due the inherent and practical challenges attached to ascertaining what the costs of border procedures actually are, thus some preliminary remarks are provided but a more rigorous assessment of cost effectiveness would be required before a comprehensive analysis could be provided.

4.2.1. Financial, administrative and human costs

At EU-level, there is no available information on the cost of border procedures. It should be noted, however, that related studies suggest that the costs of border management and control is significant. For example, according to certain estimates, the EU budget has provided over €600 million to set up the IT systems to facilitate the work of border guards.\(^{280}\) Despite this generous provision, the European Court of Auditors found that some data are currently not included in these IT systems, while other data are incomplete or not entered in a timely manner. All of which reduced the efficiency of some border checks.\(^{281}\)

Other information suggests that the EU funds available for border-related elements of asylum and migration policy will increase under the next Multi-Annual Financial Framework (MFF). Of €31.12

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\(^{280}\) European Court of Auditors, *EU information systems supporting border control - a strong tool, but more focus needed on timely and complete data*, 2019, p.4.

\(^{281}\) Ibid. pp. 4-5.
billion available for the internal dimension of migration, around 25% will be dedicated to asylum procedures and integration, while around 75% will go to return and police border management.\(^{282}\) This is an indicator of the significant cost of border management and the focus put by Member States on border controls, compared to allocations for the functioning of asylum procedures and integration processes at other locations.

The costs of the implementation Article 43 recast APD may thus be significant and probably disproportionate given that its objectives are not being achieved. However, a full picture of the exact financial costs of operation of border procedures is not available. The assessment thus suffers from the persisting lack of information as described in the Introduction.

Cost assessment goes beyond the direct financial considerations. First, the administrative burden for asylum authorities should also be highlighted. The involvement of a variety of national authorities, especially the border police, requires coordination and collaboration. There may be knock-on effects including administrative delays, miscommunication due to inter-departmental coordination, and the production of additional acts and documents. Second, the involvement of a variety of national actors may create additional difficulties for asylum seekers to understand and navigate the border procedure. In turn, this may foster mistrust in the asylum process, especially when it involves the police, thus impacting on provision of statements and other evidence.

In addition, border procedures involve short time limits and detention, thereby entailing significant human costs for the individuals affected. Asylum seekers subject to border procedures are exposed to the harmful effects of detention in inadequate border detention facilities and with limited access to information and external service providers such as legal representatives and NGOs. The complexity of the border procedure and the difficulty in navigating it without proper assistance may be a further element of stress. The costs for vulnerable applicants including unaccompanied minors is of particular concern, as their special needs are mostly not assessed nor supported in border procedures.

4.2.2. Further practical considerations limiting the efficiency of border procedures

Due to the complexity and ambiguity of border procedure regimes both at national and EU level, a significant administrative burden derives from the management of related provisions, for example ensuring that detention measures are lawful and guaranteeing procedural safeguards in a border context. Some of the country studies, in particular Greece and Italy, show that introducing and expanding new procedures while significant flaws persist in the management of the regular procedure may have a negative impact on the efficiency of the asylum system as a whole. Efficiency may further be seriously affected in the case of a high influx of applicants or if the use of border procedures is to be extended. The study demonstrates that some authorities already face difficulties in meeting national deadlines under the border procedure, regardless of the influx of applicants. A higher number of arrivals or an extended use of border procedures may thus render their practical implementation more complicated for the authorities, in particular regarding procedural guarantees for vulnerable applicants. The limited reception capacity and inadequacy of border detention facilities also severely limit the efficiency of border procedures in case they are applied to more applicants. Similarly, it would be necessary to significantly expand available resources for the provision of adequate safeguards throughout the procedure (e.g. provision of information and legal advice; interpretation services; vulnerability identification mechanisms etc.).

Even with the support of EU agencies in rolling out border procedures, fairness and efficiency are not always guaranteed, as the example of Greece shows. First, in terms of efficiency, the deployment of significant numbers of EASO caseworkers (both locally recruited and Member State officials) to work in the fast-track border procedure on the Greek islands has not prevented an average seven-month duration of the procedure between full registration and the issuance of a first instance decision. This is far beyond the two weeks envisaged in the law. Second, despite the involvement of EASO caseworkers, the quality of decision-making remains questionable, with an overemphasis on inconsistencies in the applicant’s statements and gaps in timely identification of vulnerability.

Thus, in the event of an influx of applicants or if border procedures are mainstreamed, it is difficult to imagine how the efficiency of the border procedure could be improved without undermining the quality of decisions. Putting pressure on (already overstretched) asylum authorities may undermine the quality of decisions issued in the context of border procedures, which in turn would affect its efficiency by prolonging the length of the procedure; increasing litigation at second instance; and limiting adequate and individualised support to applicants in need. A negative impact on the regular procedure is also to be envisaged, given that resources are drawn from a finite supply.

4.3. Are border procedures in line with fundamental rights?

From a legal perspective, fundamental rights concerns arise in the use of border procedures and fundamental rights as set out in EU law, above all the EU Charter of Fundamental Rights, act as constraints on the use and misuse of border procedures.

4.3.1. Access to the territory and to the asylum procedure

When Member States are deciding on whether to admit an applicant for international protection onto their territory, they must act in compliance with the right to asylum. A key factor is to ensure respect for the principle of non-refoulement, in accordance with Article 18 of the CFR and, more broadly, in accordance with Article 78 TFEU which provides that the EU’s policy on asylum must be based on the 1951 Geneva Convention for Refugees and its Protocol. Article 19 of the CFR further provides that collective expulsions are prohibited.

Member States’ obligations under these Articles apply regardless of whether the person intercepted has explicitly applied for asylum or not, implying that there exists an obligation on Member States to proactively assess the risk of refoulement. Moreover, in order for the right to asylum to be effective, access to the asylum procedure must be protected both in law and in practice. The research indicates that this is not the case because push-back practices and refoulement are reported in most countries covered by this study.

The compliance of border procedures with the right to asylum and the principle of non-refoulement must thus be assessed in light of the overall situation of asylum-seekers at the border and the incidents that occur prior to the activation of the border procedure, as these elements are inevitably linked and part of the equation. In the context of push-back practices, significant increases in refusals of entry at external borders, and the temporary re-introduction of internal border controls, the expanded use of border procedures may further undermine the right to asylum and the principle of non-refoulement.

4.3.2. The right to remain on the territory of an EU Member State

It is essential that asylum applicants are allowed to stay on the territory of the Member State in question during the border procedure. Expulsion of an asylum applicant while the first or second instance is still pending may lead to irreparable harm (i.e. persecution or serious harm), thereby
undermining the right to an effective remedy as provided for in Article 47 of the CFR as well as the effectiveness of the prohibition of refoulement pursuant to Article 19 of the CFR.

The research shows that the majority of countries in the study, i.e. France, Germany, Spain, Portugal, and Hungary, made continued use of the legal fiction that asylum seekers located in transit zones or at the border have not legally entered the territory. The application of this fiction in practice may undermine asylum seekers’ right to remain on the territory and a fortiori the right to an effective remedy as well as the prohibition of refoulement.

4.3.3. The right to legal assistance

Article 47 of the CFR provides that “everyone shall have the possibility of being advised, defended and represented” and that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”. Under the case law of both the CJEU and ECtHR, and in the light of Article 47 of the CFR, national procedural rules must not place an unreasonable burden on applicants to ensure they are able to obtain the requisite legal advice. Thus, Member States must ensure that applicants for international protection have effective access to a lawyer during a border procedure.

The research shows numerous concerns with regard to access to legal assistance in the context of border procedures. As regards national law, access to free legal assistance at first instance is only guaranteed in law in Spain and Portugal; and access to free legal assistance at second instance remains limited in law in Italy, Greece and Hungary. In practice, access to legal assistance is challenging in all countries covered by this study inter alia due to a lack of resources, short time-limits, inaccessibility of border facilities, and quality issues.

The lack of effective access to legal assistance in border procedures may thus result in a violation of the right to an effective remedy as provided for in Article 47 of the CFR. A lack of access to legal assistance further negatively affects the right to asylum and the principle of non-refoulement, as enshrined in Article 18 and 19 of the CFR.

4.3.4. The right to be heard

The right to be heard, which is recognised by the CJEU as a general principle of EU law, guarantees every person the opportunity to express their views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect their interests. In the border procedure, this implies giving the applicant the opportunity of a personal interview on their application for international protection with a person competent under national law to conduct such an interview.

Due to the location of border facilities, personal interviews may be conducted remotely during border procedures. In practice, the use of videoconference and phones in the countries covered by this study has resulted in practical difficulties, additional obstacles in submitting evidence, and significant concerns about quality and confidentiality. These concerns are exacerbated by the use of remote and simultaneous interpretation services, as well as the lack of competency of interpreters, despite the Member States’ obligations to ascertain that the applicant is able to understand the language chosen for the interview and that they can express themselves effectively in this language.

Asylum applicants thus face significant obstacles in communicating effectively during the personal interview in the border procedure, which undermines their right to be heard and, a fortiori, the prohibition of refoulement and the right to asylum.
4.3.5. The rights of the child

The CFR stipulates that the best interests of the child must be a primary consideration in all actions concerning them. Border procedures involve fewer procedural guarantees, limited access to assistance, and a deprivation of liberty, which means they are ill-suited to responding to the particular vulnerabilities of unaccompanied children.

In most of the countries examined, unaccompanied minors are not exempted from the border procedure as a matter of law and many continue to be held in border detention facilities in practice. Thus, border procedures do not comply with the best interest of the child.

4.3.6. The right to an effective remedy

Under both international and European law, persons who are in need of international protection have the right to an effective remedy against the rejection of an asylum claim. Article 47 of the CFR recognises the right to a remedy and a fair trial before a court or tribunal as a fundamental right. In order for a remedy to be effective and the proceedings to be fair, a number of requirements need to be fulfilled, including ensuring access to legal aid, which often does not apply in border procedures, as above. Other requirements include granting suspensive effect to the appeal as well as the right to an oral hearing before a court or tribunal.

The recast APD does not foresee the automatic suspensive effect of appeals in border procedures, nor that the appeal procedure automatically suspends the expulsion of the asylum applicant. Article 46(7) recast APD further allows for exceptions to the right to a remedy with automatic suspensive effect in the context of border procedures if certain conditions apply. At national level, several countries do not foresee an automatic suspensive effect in the context of border procedures. This may result in the expulsion of an applicant during the appeal proceeding, putting them at risk of a violation of the right to be protected against refoulement and further undermining the right to an effective remedy.

The right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”, as an underlying element of the right to an effective remedy in Article 47 of the Charter, may also be undermined in border procedures. In Germany, for example, where an application has been rejected as “manifestly unfounded” in the airport procedure, the court has to decide on a request for an interim measure by written procedure without an oral hearing.

Finally, the short time limits that are inherent to the border procedure both at first and second instance, may violate the right to an effective remedy as guaranteed in Article 47 of the Charter. At first instance, the short time limits may impede the applicant in substantiating their asylum claim and the authorities in conducting an appropriate examination of it. At second instance, the short time limits for lodging an appeal may render the appeal inaccessible and asylum applicants may face refoulement in the event that the risk of ill treatment upon return is not thoroughly assessed within short deadlines. These deadlines may further limit the applicant’s right to procedural guarantees throughout the border procedure, namely the access to information, interpretation services, legal assistance, and adequate vulnerability assessments.

4.3.7. The right to liberty

Article 6 of the CFR provides that “everyone has the right to liberty”. The use of detention in the border procedure, whether de jure or de facto, is therefore subject to strict legal constraints and safeguards. Research on the seven countries has shown, however, that all the applicants for international protection subject to the border procedure are detained in practice. The key difference
is whether or not the country acknowledges that there is a situation of detention, which has consequences for the enforceability of legal standards and procedural safeguards to protect applicants against arbitrary detention, which become more challenging when detention is carried out de facto.

Thus, the systematic use of formal or de facto detention in border procedures may undermine the fundamental right to liberty. This is further exacerbated by the short time limits of the border procedure which may have more serious consequences for applicants held in detention than for applicants who are free and may contact, for example, legal representatives or NGOs. Justifying prolonged detention of asylum seekers at the border through reference to their right to an effective remedy is not logical. The right to an effective remedy is best served by granting asylum seekers access to a fair and efficient procedure on the territory, not by prolonging their detention in conditions which may amount to inhuman and degrading treatment.

4.3.8. Are border procedures coherent with the aims of the APD and CEAS?

The framework foreseen for border procedures under the APD is fraught with ambiguity and complexity, in part due to the various cross references to other provisions of the APD and to the application of other CEAS instruments.

First, the border procedure regime is unclear regarding the application of the Dublin procedure. While EASO has noted that an assessment under the Dublin procedure may also take place when an application is lodged under the border procedure, this is not immediately clear from the text of the APD itself. Article 33 recast APD does not list the application of the Dublin procedure as an admissibility ground. Article 43 recast APD read in conjunction with Article 33(1) recast APD seems to suggest that applications for which another Member State is responsible are not examined. As a result, the application of the Dublin procedure in the border procedure varies across the Member States.

Second, it is unclear whether, under the terms of the recast APD and RCD, an asylum seeker in a border facility is accommodated, detained, or both. As the exceptional nature of detention is clearly established in the recast RCD, freedom of movement of applicants has been described as “the conceptual starting point of EU law”. This implies that housing asylum seekers in open facilities which they can freely enter and exit constitutes the default position for reception under the EU acquis. However, certain provisions of the recast RCD, such as Article 8(c), seem to acknowledge the possibility to detain asylum seekers in the border procedure. Articles 10(5) and 11(6) further refer to derogations from certain conditions in cases where “the applicant is detained at a border post or in a transit zone.” This combination of provisions creates a loophole or an ambiguity in the law which allows Member States to “legally” detain asylum seekers at the borders. The contradiction between the provisions – i.e. those rendering detention an exceptional measure and those allowing its use in a wider range of circumstances – creates legal uncertainty and leaves considerable discretion to Member States as to the applicable legal regime and concomitant procedural safeguards. In practice, however, while the EU asylum acquis do not per se impose an obligation on Member States to detain persons applying for international protection at the border or in transit zones, Member States do so without exception.

Third, the APD is fraught with ambiguity with regard to the application of border procedures to vulnerable asylum seekers. The Directive does not provide for a clear-cut exemption of vulnerable applicants, including torture victims and unaccompanied children, from the border procedure but makes it contingent on the State’s capacity to provide adequate support to applicants subject to such a procedure. In the absence of a clear definition of what constitutes adequate support, practice in Member States applying border procedures is highly divergent. Overall, effective mechanisms to
identify applicants with special needs at the border beyond visible vulnerability factors are scarce, rendering any special procedural safeguards laid down in EU law meaningless in practice in any case.

Another source of complexity stems from Article 25(6)(b) recast APD regulating the application of border procedures to unaccompanied children. In attempts to allow its application in some cases, the recast APD introduces a confusing set of grounds. This regards the grounds for inadmissibility, which include “safe third country” but not “first country of asylum”, and grounds for applying the accelerated procedure, which are safe country of origin and falsifying or destroying documents, but not presenting claims entirely unrelated to protection. This allows for a departure from the principle of the best interests of the child and makes an uneasy compromise between procedural guarantees and border control. The effect of such complexity hinders the implementation of protective standards in practice. As the study shows, unaccompanied children continue to be processed under border procedures and to be held in inadequate border detention facilities, putting them at risk given their vulnerability.
5. Good Practices

A number of the Member States examined demonstrate the use of one or more good practices in their legal framework regarding the implementation of the border procedure. While good practice is judged here on the basis of the effectiveness of the procedure and ensuring the fundamental rights of applicants, the discrepancy between the provisions in law and practice mean that it is challenging to fully evaluate the nature and extent of good practice.

- **Legal assistance at first instance as a matter of law**: Free legal assistance at first instance in the border procedure is provided in law in Spain and Portugal.
- **Interview techniques**: In Germany, applicants are asked whether they feel physically and psychologically fit for the interview. If not, a break of a couple of hours may be granted.
- **Gender-sensitive approach**: Individuals may request the interviewer and caseworker, as well as the interpreter, to be of a specific gender in certain countries such as France and Germany.
- **Interpretation**: In Germany, interpreters must take an oath in Court proceedings, resulting in better translation services and cases being taken “more seriously”.
- **Unaccompanied children**: In previous legislation in Hungary (suspended) and Greece (repealed), unaccompanied children were exempted from the border procedure as a matter of law.
- **Suspensive appeal**: National law foresees that the appeal lodged in the context of the border procedure has an automatic suspensive effect in Portugal, Spain, France, and Germany.
- **Clarity over the detention regime**: As opposed to *de facto* detention practices, national law explicitly recognises that the deprivation of liberty of persons being held both in border facilities or transit zones amounts to detention in Portugal and France.
- **Access to NGOs**: Certain accredited NGOs have *permanent* presence in some border facilities and transit zones in Portugal, Spain, France, and Germany.
- **Role of UNHCR**: UNHCR conducts monitoring activities in Spain, Portugal, Greece and Italy. Moreover, UNHCR may issue binding opinions to the determining authority in Spain, in which case the application cannot be rejected as manifestly unfounded; and in Italy it appoints experts in the Territorial Commissions, which decide on asylum applications.
Annex I – Research questions submitted by the European Parliament

<table>
<thead>
<tr>
<th>Application and types of asylum procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Among those EU Member States that have transposed Article 43, which one apply asylum border procedures in practice?</td>
</tr>
<tr>
<td>➢ Are different border procedures applied within one Member State and if so which ones and what constitute the main differences?</td>
</tr>
<tr>
<td>➢ To what extent are border procedures applied at locations in proximity to the border or transit zones?</td>
</tr>
<tr>
<td>➢ Among those EU Member States that have transposed Article 43(3), how is it implemented?</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Duration of asylum border procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ What is the degree of compliance with the time limit of the border procedures set in national legislation?</td>
</tr>
<tr>
<td>➢ Which steps during the border procedure as implemented prove to be the lengthiest in practice?</td>
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</table>

<table>
<thead>
<tr>
<th>Organisational structure</th>
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<tbody>
<tr>
<td>➢ What are the organisational entities involved in the asylum border procedure?</td>
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</table>

<table>
<thead>
<tr>
<th>Grounds for application of asylum border procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Which are the most common grounds Member States rely on when imposing the application of a border procedure on individual asylum applicants?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Procedural guarantees</th>
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</thead>
<tbody>
<tr>
<td>➢ How are procedural guarantees provided in national legislation (e.g. on information provision, legal assistance, personal interview, appeal, interpretation) applied in practice as part of the asylum border procedure?</td>
</tr>
<tr>
<td>➢ How are special procedural guarantees for minors put into practice?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Vulnerability assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ How do Member States identify the existence of specific needs of asylum applicants?</td>
</tr>
<tr>
<td>➢ With regard to mechanisms for vulnerability assessment at the border, do Member States share best practices on the application and implementation of the law?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The role of UNHCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Is UNHCR explicitly and systematically allowed to have access to applicants, including those in detention, at the border and in the transit zones in line with Article 29 of Directive 2013/32/EU?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Organisations providing advice and counselling to applicants for international protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Do asylum seekers have effective access to NGOs?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Access to the territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Are applicants systematically granted entry to the territory of the Member States when a decision has not been taken within four weeks as part of the border procedure, in compliance with Article 43(2) and also in light of recent case law on this matter?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Application of the Dublin procedure in the context of asylum border procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ To what extent are checks on which country is responsible for the assessment of asylum requests carried out in practice in the context of border procedures?</td>
</tr>
<tr>
<td>➢ To what extent are take back and take charge requests been carried out in practice in the context of border procedures?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The right to an effective remedy</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ In light of the transposition and application of Article 46(1)(iii), were applicants’ rights to an effective remedy exercised effectively?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Appeal procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ How many appeal procedures were carried out following a decision (on admissibility or substance) taken in the context of border procedures?</td>
</tr>
<tr>
<td>➢ How long do they take on average?</td>
</tr>
</tbody>
</table>
In how many cases have they overruled the first instance decision? Were the rights of the applicants safeguarded along the procedures?

**Costs of the asylum border procedures**

Is it possible to evaluate the costs, including administrative burden, of the asylum border procedures for the selected Member States and the asylum system?

**Statistics**

To what extent differ recognition rates in border procedures, looking at objectively comparable applications?

**Best practice**

Are there any examples of best practices with regard to the application in practice of asylum border procedures that could inspire future EU legislation on the matter?

**Recommendations**

Please include conclusions and recommendations in light of the comparative assessment regarding the future EU legislative framework on the matter of asylum procedures at the border.
Annex II - List of interlocutors

The table below provides an overview of stakeholders that have been contacted specifically for the purpose of this study. It does not include, however, the stakeholders that have been contacted by ECRE in the context of previous publications which have been used throughout this report.

<table>
<thead>
<tr>
<th>Name of organisation or authority contacted</th>
<th>Contribution received</th>
<th>Date of contribution</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU-level</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>European Commission (DG HOME – Asylum Unit)</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>UNHCR (EU Regional Office)</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td><strong>France</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ministry of Interior (DGEF)</td>
<td>v</td>
<td>21 October 2020</td>
</tr>
<tr>
<td>French Office for the Protection of Refugees and Stateless Persons (OFPRA)</td>
<td>v</td>
<td>21 September 2020</td>
</tr>
<tr>
<td>UNHCR France</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Forum Réfugiés-Cosi</td>
<td>v</td>
<td>9 October 2020</td>
</tr>
<tr>
<td>Anafé</td>
<td>v</td>
<td>17 September 2020</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal Office for Migration and Refugees (BAMF)</td>
<td>v</td>
<td>11 September 2020</td>
</tr>
<tr>
<td>UNHCR Germany</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Informationsverbund Asyl &amp; Migration</td>
<td>v</td>
<td>18 September 2020</td>
</tr>
<tr>
<td>Church Refugee Service at Frankfurt/Main Airport</td>
<td>v</td>
<td>25 August 2020</td>
</tr>
<tr>
<td>Church Refugee Service at Munich Airport</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Attorney-at-law</td>
<td>v</td>
<td>31 August 2020</td>
</tr>
<tr>
<td><strong>Greece</strong></td>
<td></td>
<td></td>
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<tr>
<td>Greek Asylum service</td>
<td>x</td>
<td></td>
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<tr>
<td>UNHCR Greece</td>
<td>x</td>
<td></td>
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<tr>
<td>Greek Council on Refugees (GCR)</td>
<td>v</td>
<td>6 October 2020</td>
</tr>
<tr>
<td><strong>Hungary</strong></td>
<td></td>
<td></td>
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<tr>
<td>National Directorate-General for Aliens Policing (NDGAP)</td>
<td>v</td>
<td>9 September 2020</td>
</tr>
<tr>
<td>UNHCR Hungary</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Hungarian Helsinki Committee (HHC)</td>
<td>v</td>
<td>24 September 2020</td>
</tr>
<tr>
<td>Name of organisation or authority contacted</td>
<td>Contribution received</td>
<td>Date of contribution</td>
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<td>--------------------------------------------</td>
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<tr>
<td><strong>Italy</strong></td>
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<tr>
<td>Italian Ministry of Interior</td>
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<tr>
<td>UNHCR Italy</td>
<td>x</td>
<td>-</td>
</tr>
<tr>
<td>Association for Legal Studies on Immigration (ASGI)</td>
<td>√</td>
<td>23 September 2020</td>
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<tr>
<td><strong>Portugal</strong></td>
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<tr>
<td>Immigration and Borders Service (SEF)</td>
<td>√</td>
<td>3 September 2020</td>
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<tr>
<td>Portuguese Council for Refugees (CPR)</td>
<td>√</td>
<td>11 September 2020</td>
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<tr>
<td><strong>Spain</strong></td>
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<tr>
<td>Office for Asylum and Refuge (OAR)</td>
<td>√</td>
<td>15 September 2020</td>
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<tr>
<td>UNHCR Spain</td>
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<tr>
<td>Accem</td>
<td>√</td>
<td>29 September 2020</td>
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<tr>
<td>Spanish Commission of Aid to Refugees (CEAR)</td>
<td>x</td>
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<tr>
<td>Red Cross Madrid Airport</td>
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<td>-</td>
</tr>
</tbody>
</table>
Annex III – Information request submitted to national authorities

Statistics

Applications for international protection at borders

<table>
<thead>
<tr>
<th>Applications for international protection at borders</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of applications lodged at the border</td>
<td></td>
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<td></td>
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<tr>
<td>Number of applications channelled into the border procedure</td>
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<tr>
<td>First three main countries of origin of persons channelled into the border procedure</td>
<td>Country 1</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Country 2</td>
<td></td>
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<td></td>
<td>Country 3</td>
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</tbody>
</table>

Decisions on applications for international protection at first instance

<table>
<thead>
<tr>
<th>Decisions at first instance on applications for international protection in the border procedure</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admissibility decisions at the border</td>
<td></td>
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<tr>
<td>Total number of decisions issued at the border</td>
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<tr>
<td>Total number of inadmissibility decisions issued at the border</td>
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<tr>
<td>Total number of persons granted access to the territory</td>
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<tr>
<td>Decisions on the merits in the border procedure (if applicable)</td>
<td></td>
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<tr>
<td>Total number of decisions issued on the merits in the border procedure</td>
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<tr>
<td>Number of positive decisions, i.e. granting a protection status</td>
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<tr>
<td>Number of negative decisions, i.e. rejecting the application</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Length of the border procedure</td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>
Number of decisions taken within four weeks (Art. 43(2) Directive 2013/32/EU) |  |  |  |  |  
Average length of the border procedure |  |  |  |  |  

Decisions on applications for international protection at second instance (if available)

<table>
<thead>
<tr>
<th>Decisions at second instance on applications for international protection in the border procedure</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of appeals lodged against a first instance decision in the border procedure</td>
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<tr>
<td>Number of appeals overruling a first instance decision</td>
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<td></td>
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<tr>
<td>Number of appeals upholding a first instance decision</td>
<td></td>
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<tr>
<td>Average length of the border procedure at second instance</td>
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</tbody>
</table>

The European Parliament is interested in the difference of recognition rates in the border procedure compared to the regular procedure. If available, please provide information on the top 5 nationalities of applicants channelled into the border procedure and their recognition rate in these respective procedures.

<table>
<thead>
<tr>
<th>First-time applicants: 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top 5 nationalities of first-time applicants in the border procedure</td>
</tr>
<tr>
<td>Nationality 1</td>
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<tr>
<td>Nationality 2</td>
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<tr>
<td>Nationality 3</td>
</tr>
<tr>
<td>...</td>
</tr>
<tr>
<td>...</td>
</tr>
</tbody>
</table>

First-time applicants: 2019

| Nationality 1 |  |  |
| Nationality 2 |  |  |
| Nationality 3 |  |  |
| ... |  |  |
| ... |  |  |
The implementation of Article 43 of Directive 2013/32/EU in practice

Authorities

1. Which authorities are involved in the border procedure and for which steps?
2. Is there a budget dedicated to the functioning of the border procedure? If yes, what is the estimated total cost?

Legal Framework

1. When was Article 43 of directive 2013/32/EU implemented?
2. In which national law has it been transposed? Is it fully transposed or only partly?
3. Does the law foresee a time limit for carrying out the border procedure?
4. Does the law provide for an appeal against inadmissibility decisions or negative in-merit decisions in the border procedure? If so, what is the time limit to lodge an appeal and does it have automatic suspensive effect?
5. Does the law foresee access to legal assistance during the border procedure?
6. Does the law foresee access of NGOs to border facilities?
7. Does the law foresee the exemption of certain categories of applicants from the border procedure? If so, please indicate which ones.

Procedure

1. On what grounds is an application for international protection referred to the border procedure? Which grounds are most commonly applied (provide statistics if available)?
2. Can an application for international protection be examined on the merits during a border procedure?
3. Are applicants systematically granted entry to the territory of the Member States when a decision has not been taken within four weeks in the context of a border procedure?
4. Is the freedom of movement of people allowed entry on the territory limited? If so, on what legal basis?
5. Is a vulnerability assessment conducted in the context of border procedures? If so, please indicate when, how and by whom vulnerability is assessed.
6. What are the consequences of being identified as vulnerable?
7. Is the Dublin III Regulation applied in the context of border procedures? When another country has been identified as responsible, are people being held in border facilities until their Dublin transfer is carried out?

Applicants’ rights

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the border procedure? If so, what do the questions in the interview focus on?
2. Are interpreters available during interviews?
3. Are interviews conducted through video conferencing?
4. Does an applicant applying at the border receive an information leaflet on the regular asylum procedure and/or on the border procedure? If so, can it be shared with us? In how many languages is it available?
5. Do asylum applicants at the border have access to a lawyer in practice?
6. Do NGOs have access to applicants in the border procedure in practice?
Reception conditions

1. Where are persons that are placed in the border procedure accommodated? Are these facilities located at the border? Is the freedom of movement of applicants restricted in these facilities? If so, on what legal basis?

2. Are people being detained while in border procedures? If so, on what legal basis and where are these facilities located? How long can they legally be detained and what is the average time in practice? Are minors excluded from detention (differentiate between accompanied and unaccompanied minors)?
Annex IV – Information request submitted to the European Commission

1.) Which Member States have implemented Article 43 of Directive 2013/32/EU? Which of these Member States apply this border procedure in practice? Does the European Commission have information as to why certain Member States have decided not to implement border procedures at national level?

2.) How many applicants for international protection in the European Union have been processed into the border procedure in 2015, 2016, 2017, 2018 and 2019?

3.) What are the criteria used by the Member States to refer an application for international protection to the border procedure? Which criterion is most often used?

4.) Which Member States examine applications for international protection on the merits in the context of border procedures?

5.) Are applicants systematically granted entry to the territory of the Member States when a decision has not been taken within four weeks as part of the border procedure in compliance with Article 43(2) of Directive 2013/32/EU?

6.) Is the European Commission aware of de facto detention practices whereby certain Member States are detaining applicants for international protection in border facilities by limiting their freedom of movement in absence of legal basis? If so, in which Member States?

7.) What actions can the European Commission take to ensure that Member States have implemented border procedures in compliance with Article 43 of the Directive 2013/32/EU, and in compliance with the procedural guarantees as provided for in the Asylum Procedures Directive?

8.) Does the European Commission have any particular information on the implementation in Germany, France, Hungary, Greece, Italy, Portugal and Spain that it wants to share in light of this study?
Annex V – Country profile: France

The Country profile France aims to provide a detailed overview of the functioning of the French border procedure. The information contains extracts and is mainly derived from the following sources:

- ECRE, *Access to asylum and detention at France’s borders*, 2018
- OFPRA, *Annual reports*

Statistics
Applications for international protection

France has recorded a consistent increase in the number of applications for international protection since 2015, reaching a record-level of 138,420 applicants in 2019. Similarly, the number of asylum claims made at the border has also increased, although at different levels.

![Applications for international protection in 2015-2019: France](chart)


The number of applications made at the border has doubled from around 900 applications in 2015 to more than 2,000 applications in 2019. This is still far below the record number of 5,100 applications registered at the border in 2008, after which numbers dropped significantly. When comparing these figures with the total number of applications, they represent a very small fraction of the caseload before the Office for the Protection of Refugees and Stateless Persons (OFPRA) (see authorities). In 2019, the number of applications lodged at the border represented only 1.4% of the total caseload. This means that the vast majority of applications for international protection are lodged on French territory.

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283 France has various sources of statistics which provide different figures on the number of persons seeking asylum in France. The number of applicants in France presented here refer to first-time applications lodged at French Prefectures. In comparison, this represented 93,700 applications in 2016, 114,200 in 2017 and 128,790 in 2018; see: Ministry of Interior, *Statistics on asylum*, 2020.

Decisions on applications made at borders

The French border procedure is different from the asylum procedure on French territory, insofar as it examines entry into the territory to seek asylum rather than the asylum application itself. The graph represented below thus represents decisions allowing entry to French territory for the purpose of the asylum procedure.

Source: OFPRA, Information provided on 21 September 2020.

Two observations can be made from the above: first, with the exception of the year 2016, it appears that there were more applications made than decisions issued. This means that in certain cases persons were granted access to the territory before the OFPRA was able to conduct an interview, either because the border police decided to allow entry to the territory or because persons were released from waiting zones by the liberties and detention judge (‘juge des libertés et de la détention’ - JLD). The latter is responsible for the judicial review of the placement of an individual in a waiting zone as this decision is considered as a formal administrative measure that amounts to a deprivation of liberty (see detention). This applied to around 170 persons in 2019, 110 persons in 2018 and 90 persons in 2017. Only a few applicants are thus being released from waiting zones in practice prior to the interview with the OFPRA.

Second, in cases were an interview was carried out by the OFPRA, only a minority of applicants are effectively granted access to the territory. This concerned only 20.4% of applicants in 2016, 26.6% of applicants in 2017, 39.5% of applicants in 2018 and 40.5% of applicants in 2019. This means that, since 2015, the large majority of applicants is systematically refused access to French territory. These figures seem to point to the significant difficulties facing persons applying for protection at the border.

Location of the border procedure

The number of waiting zones has increased from 13 waiting zones in 2015 to 16 waiting zones in 2019. Waiting zones are located between the arrival and departure points and passport control. The law provides that they may include, within or close to the station, port or airport, or next to an arrival area, one or several places for accommodation, offering hotel-type facilities to the foreign nationals concerned. In some areas such

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285 OFPRA, Annual reports.
as Roissy or Marseille, the waiting zone is a facility separate from the airport, meaning that the asylum seeker is transported there to follow the procedure. 286

Waiting zones can further be extended up to 10km away from a border crossing point, when it is found that a group of at least 10 individuals have just crossed the border. This also applies in cases where the 10 individuals of that group have been located at different locations, but still falling within that 10km area.

While there are several waiting zones in France, the one in Roissy – Charles de Gaulle Airport of Paris, is by far the main point of activity in the country, followed by the Orly airport, also located in Paris.

Since 2015, around 70% to 80% of all applications made at the border were made at the Roissy airport. Orly airport received around 10% to 12% of all applicants during that same period. A slight increase in the number of applications made at the border in Overseas France has been noted in 2018 and 2019, mainly due to arrival of several ships from Sri Lanka and Indonesia to the Réunion Island. 287

**Authorities**

The first authority involved in the border procedure is the Border Police (‘Police aux frontières’), which is responsible for border management and apprehending individuals at the border. Thus, it is usually the first authority with whom applicants are in contact. The Border Police conducts a first interview upon arrival to collect basic identification information, based on which the Office for the Protection of Refugees and Stateless Persons (OFPRA) will prepare its interview.

The examination and decision on asylum claims made at the border lie with the OFPRA. Initially falling under the responsibility of the Ministry of Europe and Foreign Affairs, the border procedure has been transferred to the OFPRA in July 2004. It is an administrative body falling under the responsibility of the Ministry of Interior and its institutional independence is explicitly laid down in law, which means that it does not take instructions from the latter. 288 At the end of 2019, OFPRA had a total of 903 staff members.

Interestingly, OFPRA is one of the few asylum authorities in Europe which has established a Unit dedicated to the border procedure. It is entitled the "asylum at the border" Unit and is thus responsible for claims made in waiting zones. 289 In 2018, the Border Unit of OFPRA was comprised of three Protection Officers, one Secretary and one Head of Division. 290 The Border Unit is responsible for determining whether a person should be granted access to the territory for the purpose of the asylum procedure. To that end, it issues a binding opinion to the Ministry of Interior allowing or refusing entry. The Ministry latter is the authority officially issuing the decision, and it can only refuse entry to the territory despite a positive opinion from the OFPRA in case there is a threat to public order. 291 Whereas the assessment of admissibility and manifest unfoundedness of an

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287 OFPRA, Annual reports.
288 Article L.721-2 CESEDA
289 ECRE/AIDA, Asylum authorities: an overview of internal structures and available resources, November 2019, p. 10.
290 ECRE/AIDA, Access to asylum and detention at France’s borders, June 2018, p. 20.
291 Article L.213-8- 1 CESEDA
application made at the border are within the remit of the Border Unit of OFPRA, the application of the Dublin Regulation is examined by the Ministry of Interior.

The Ministry of Interior is also the authority responsible for the placement of foreign nationals in the waiting zone, under the supervision of the liberties and detention judge (juge des libertés et de la détention" - JLD). 292

Administrative Tribunals (Tribunal administratif) are responsible for the appeals lodged against decisions rejecting the access to the territory as well as the placement into waiting zones. 293 An onward appeal against the decision of the Tribunal administratif can further be lodged in front of Administrative Courts (Cour administrative d'appel). 294

Legal framework
Grounds for applying the border procedure

French law foresees a specific procedure for persons held in waiting zones after arriving in train stations, port or airports. Rather than an examination of the asylum claim itself, this procedure concerns the person’s admission to the territory for the purpose of seeking asylum ("admission au territoire au titre de l'asile"). Access to the territory is granted if: (a) France is responsible for the claim under the Dublin Regulation; (b) the claim is admissible; and (c) the claim is not manifestly unfounded. 295 The asylum grounds and the merit of the application should thus not be examined by the OFPRA, as these must be assessed only once the applicant is granted access to the territory and is channelled into the regular procedure.

A person’s access to the territory in the context of the border procedure can thus be either accepted or refused. If the Border Unit of the OFPRA considers that the application for international protection is not manifestly unfounded nor inadmissible, and if France is deemed responsible for the asylum claim under the Dublin III Regulation, the Ministry of Interior is bound to grant entry to French territory. One exception applies in case where there is a threat to national security. 296 While the Ministry of Interior regularly assesses this risk, no cases of refusal of entry on this ground have been reported so far. The asylum applicant will be given an 8-day temporary visa. Within this time frame, upon request from the asylum seeker, the competent Prefectures provides an asylum application certification which allow for the lodging of the application. The OFPRA then processes the asylum claim as any other application for international protection that is lodged on the territory.

If OFPRA considers that the application for international protection is manifestly unfounded or inadmissible, or if another country is deemed responsible under the Dublin III Regulation, the Ministry of Interior refuses to grant entry to the foreigner based on a motivated decision. The person can lodge an appeal against this decision before the Administrative Court within a 48-hour deadline. If this appeal fails, the foreigner can be returned to his or her country of origin. However, individuals refused entry benefit from a so-called “full day” (jour franc), which protects them from removal for one day. In the case of adults, this right must be requested, whereas under the law unaccompanied children cannot be removed before the expiry of the jour franc unless they specifically waive it. 297 The jour franc is no longer guaranteed in Mayotte and at land borders since September 2018, however. 298

292 Article L222-1 and L.222-4 CESEDA.
293 L.213-9 CESEDA.
294 L.213-9(9) CESEDA.
295 Article L.213-8-1 CESEDA.
296 Article L.213-8-1 CESEDA.
297 Article L213-2 CESEDA.
298 Article L213-2 CESEDA, as amended by Article 18 Law n. 2018-778 of 10 September 2018
It should be noted that the asylum applicant is not considered as being on French territory as long as the airport procedure is pending, i.e. there is a ‘fiction of non-entry’ as long as entry to the territory has not been explicitly granted.

Dublin III in the border procedure

The OFPRA can only issue a negative opinion on admission to the territory for asylum purposes in case the application is inadmissible or manifestly unfounded. OFPRA is not competent to assess and apply the Dublin Regulation, which is the third ground for refusal of admission to the territory on asylum grounds (see grounds for application). This competence lies entirely with the Ministry of Interior and such a refusal is issued where there is evidence that the applicant has family ties, documentation from another country or has applied for asylum in another country. In case elements are submitted by the applicant during the interview with OFPRA that are relevant to the application of the Dublin Regulation, OFPRA issues its opinion to the Ministry of Interior without basing itself on the Dublin-related aspects.

The Ministry of Interior reported that the Dublin procedure had been applied in 11 cases in 2019, in two cases in 2019, and in one case in 2020 as of the end of September 2020. However, none of the persons where actually transferred to the responsible Member State. This is due to various reasons such as the suspension of the decision of transfer by the administrative court; the person was released from detention by the liberty judge prior to the transfer; the applicable time limits for the transfer were not met; or cases where the person refused to embark.

Time limits

There is no strict deadline to apply for asylum when individuals are placed in waiting zones. From the time in which the application for international protection has been made, the OFPRA has two working days to issue its opinion to the Ministry of the Interior.

<table>
<thead>
<tr>
<th>Average processing times of the OFPRA (in days)</th>
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<tbody>
<tr>
<td>2015</td>
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<tr>
<td>------</td>
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<tr>
<td>1.58 days</td>
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Source: OFPRA, Information provided on 21 September 2020.

With the exception of 2015, the average processing time for the OFPRA to issue its decisions at the border has consistently exceeded the time limit of two days laid down in national law, reaching up to 3.5 days in 2019. Available figures further indicate that a relatively important amount of cases are not being examined by the OFPRA within four days, thus largely exceeding the two days’ time limit laid down in law. In 2019, this represented 28.5% of the cases, a large increased compared to 2018 (17%) and a figure that is comparable to the year 2017 (28% of the cases).

Nevertheless, national law does not foresee any time limit for the Ministry of Interior to issue its decision based on the binding opinion of the OFPRA. This means that applicant can theoretically be held in waiting zones for several days, up until a formal decision of the Ministry of Interior has been issued. Practice suggests, however, that the Ministry of Interior issues its decision within the same day. Moreover, there have been no cases in which the decision took longer than the 4 weeks timeframe foreseen by Article 43(2) of the recast Asylum Procedures Directive. For the applicable time limits regarding the placement in waiting zones.

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299 Information provided by OFPRA, Fontenay-sous-Bois, 24 April 2018.
300 Information provided by OFPRA, 24 April 2018.
301 Information provided by the Ministry of Interior, 21 October 2020.
302 Article R.213-5 CESEDA.
303 OFPRA, Annual reports.
304 OFPRA, Information provided on 21 September 2020.
**Personal interview**

Individuals apprehended at airports are first interviewed by the Border Police, which drafts a report (*procès-verbal*) collecting basic information relating to the identity of the applicant. In practice, there have been cases where the Border Police has asked questions relating to the merits of the application for international protection or cases where it indicated to the applicant that his/her asylum claim had low chances of success.\(^{305}\) This is not documented in the reports of the Border Police, however, as it would be ruled against by Administrative Courts as a ground for annulment of the decision. Oral questions going beyond the collection of basic information, i.e. questions relating to the merits of the asylum claim.\(^{306}\)

As regards interviews with the OFPRA, the Border Unit notifies the asylum seekers held in the waiting zone of the day and time of the interview as well as the possibility to be assisted by a third party or accredited NGO. The interview should take place within the next half-a day (‘*au cours de la demi-journée*’) following the notification, although a minimum time limit of four hours must pass between the notification and the interview. This minimum waiting time of four hours can be waived if a third-party is available earlier or if the applicant so requests.

Interviews during the border procedure are conducted specifically by the Border Unit of the OFPRA (see authorities). In practice, these interviews never exceed an hour and may be as short as 15 minutes, which offers limited possibility for applicants to expose circumstances surrounding their asylum claims.\(^{307}\) The OFPRA stated that, during interviews, it focuses on identifying vulnerabilities and assessing whether the application is inadmissible or manifestly unfounded.\(^{308}\)

Moreover, videoconferencing and phones are often used in interviews during the border procedure as opposed to the regular procedure. Roissy CDG airport, where the majority of border procedures take place, is the only waiting zone where the OFPRA Border Unit interviews the asylum seeker in person.\(^{310}\) The interviews in Orly, Marseille and Lyon are conducted by videoconference and interviews of all other border procedures are done by phone.\(^{311}\) When videoconferencing is used, it almost always runs into technical problems, as a result of which the interview is then carried out by phone.\(^{312}\) This has led the Administrative Court of Marseille to invoke procedural irregularities and annul decisions refusing admission to the territory for the purpose of seeking asylum where the interview with OFPRA has been conducted by phone rather than videoconference.\(^{313}\)

The use of phones is also reported as very problematic in practice. This includes technical problems and difficulties to follow the interview; important quality gaps resulting from simultaneous telephone

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\(^{305}\) Information provided by Anafé, 17 September 2019.

\(^{306}\) Information provided by Anafé, 17 September 2020.

\(^{307}\) Information provided by Anafé, 17 September 2020.

\(^{308}\) Information provided by OFRPA, 21 September 2020.


\(^{310}\) Ibid. p. 59; Information provided by Anafé, 17 September 2020.

\(^{311}\) Information provided by OFRPA, 21 September 2020.

\(^{312}\) Information provided by OFRPA, 24 April 2018; Information provided by Anafé, 17 September 2020.

\(^{313}\) See e.g. Administrative Court of Marseille, Decision No 1704059, 7 June 2017; No 1704319, 16 June 2017. Contrast with Decision No 1706792, 3 October 2017, where the Court found no procedural irregularities
interpretation; as well as the fact that, where a third party is present, the phone has to be shared between the applicant and the NGO and/or legal representative.\textsuperscript{314}

Another important concern raised in practice relates to issues of confidentiality. Remote interviews are sometimes carried out in inadequate rooms where other persons may be present or where there is a disturbing background noise.\textsuperscript{315} In Orly for example, the interview is held in a common room where other people are held and where other police staff maybe present. Moreover, the interview room is not soundproof and is placed next to an office of the border police, as a result of which background noise from police officers may disrupt the interview.\textsuperscript{316} Remote interviews further create difficulties to share and submit documentary evidence. There have been cases where asylum applicants were not able to share evidence they had in their possession, or only partially on video when videoconference is used. There are no other tools such as fax or scanners available to submit these documents.\textsuperscript{317}

**Procedural guarantees**

The law provides the same procedural guarantees during the interview in the border procedure as in the regular procedure, \textit{inter alia} the assistance of an interpreter paid by the state; the possibility to be accompanied by a third-party and the provision of information on the procedure.\textsuperscript{318}

**Access to legal assistance and NGOs**

Since 2015, the law foresees the possibility for asylum applicants to be assisted during the interview by a third-party, namely a member of an accredited civil society organisation or a legal representative.\textsuperscript{319} The list of NGOs accredited to send representatives to access the waiting zones, established by order of the Ministry of the Interior was last revised in May 2018 and is valid until June 2021. It includes 10 organisations.\textsuperscript{320} As regards specifically the waiting zone at Roissy CDG, the Red Cross has permanent presence and Anafé is present certain hours every week. In other waiting zones, Anafé and certain other NGOs may be reached at certain hours via phone (‘\textit{permanences téléphoniques}’).\textsuperscript{321}

This possibility is rarely used in practice, however. Only 7.5% of all applicants were accompanied by a third party in 2019, compared to 6.9% in 2018 and 4.1% in 2017.\textsuperscript{322} In 2019, only 7 interviews were attended by an NGO representative.\textsuperscript{323} This means that over 90% of interviews were carried out without a third party being present in the last three years.

The limited access to assistance could be due to a lack of awareness on the part of asylum seekers, despite the fact that information sheets to that effect are available in the waiting zones, as well as the shortage in capacity of NGOs which have no permanent presence in the zones.\textsuperscript{324} As mentioned above (interview), the interview may take place only a couple of hours after the application has been made, thus rendering the availability of

\textsuperscript{314} Information provided by Anafé, 17 September 2020.

\textsuperscript{315} Information provided by Anafé, 17 September 2020.

\textsuperscript{316} Information provided by Anafé, 17 September 2020.

\textsuperscript{317} Information provided by Anafé, 17 September 2020.

\textsuperscript{318} Article R.213-4 CESEDA.

\textsuperscript{319} Article L. 213-8-1 du CESEDA.

\textsuperscript{320} Ministry of Interior, \textit{Arrêté du 29 mai 2018 fixant la liste des associations humanitaires habilitées à proposer des représentants en vue d'accéder en zone d'attente}, 2018.

\textsuperscript{321} Information provided by OFPRA, 21 September 2020.

\textsuperscript{322} OFPRA, \textit{Annual reports}.

\textsuperscript{323} Information provided by OFPRA, 21 September 2020.

\textsuperscript{324} ECRE/AIDA, \textit{Access to asylum and detention at France’s borders, June 2018}, p. 22.
NGOs within that short time frame extremely difficult. Available figures indicate that, when a third-party is present, it is usually a legal representative rather than an NGO.325

Access to interpretation

Issues with regard to interpretation have been reported in the context of the initial interview, which is carried out with the Border Police at the very start of the procedure. In Beauvais, for example, in the absence of professional interpretation services, the Border Police has resorted to interpretation by fellow police officers, air carrier personnel or even passengers in some cases.326

As for the interviews with the OFPRA, they must be carried out in the presence of an interpreter, unless the interview can be carried out in French. In practice, interpretation in interviews is available for 40 languages and is readily available through the Inter Service Migrants (ISM) by phone or videoconference. In the last years, interpretation was used in the majority of cases, reaching up to 89% of all cases in 2019, compared to 82.3% in 2018, 77.8% in 2017 and 72.3% in 2016.327

Nevertheless, when carried out remotely, the quality of the interpretation services seems to raise concerns. According to organisations assisting asylum seekers, remote interview and interpretation prove particularly challenging for the individual as he or she is often interrupted by the Protection Officer, who is typing notes at the same time.328 (UNHCR guidance also recommend in person)

Another issue relates to confidentiality. There have been cases where the background noise indicated that the interpreter was in a train station while the interview was ongoing; or in a park surrounded by children.329

Access to information

Persons issued a refusal of entry at the border must be notified of their rights in a language they understand.330 In line with Article 8 of the recast Asylum Procedures Directive, the authorities are required to provide information on the possibility to seek asylum when there are indications of such an intention, and make available the necessary interpretation arrangements to that effect. Moreover, once placed into a waiting zone, individuals must be immediately informed, in a language they can reasonably be considered to understand, of the asylum procedure, their rights and obligations, the potential consequences of any failure to meet these obligations as well as of the refusal to cooperate with the authorities, and the measures available to help them present their asylum claim.331 They are also informed of the possibility to leave the waiting zone at any moment for any destination outside of France.332

However, in practice, information on the right to apply for asylum is not effectively provided in the context of refusal of entry. This is particularly visible at the Franco-Italian border where several reports have documented that applicants are being systematically refused access to the territory without further information nor the possibility to lodge an asylum application.333

325 In 2018 for example, out of the 93 interviews conducted in the presence of a third-party, 90 interviews were carried out with a legal representative and only 3 of them in the presence of an NGO. OFPRA, Annual Report 2018, 2019, p. 25.
326 ECRE/AIDA, Access to asylum and detention at France’s borders, June 2018, p.20.
327 OFPRA, Annual reports.
328 Information provided by La Cimade, 26 April 2018.
329 Information provided by Anafé, 17 September 2020
330 Article L.213-2 Ceseda.
331 Article R.213-2 Ceseda and Article L.221-4 Ceseda.
332 Article L.221-4 Ceseda.
As for the provision of information in waiting zones, the notification of rights is often conducted in a rudimentary manner, and often without interpretation in places such as Nice. In Roissy, on the other hand, persons expressing the intention to seek asylum when receiving a refusal of entry in the airport (aéroport) are usually advised to make an application after entering the waiting zone.334

**Appeal**

When the request for entry for reasons of asylum made at the border is rejected, the individual is refused admission into French territory. The asylum seeker can lodge an appeal that has suspensive effect to challenge this decision before the Administrative Tribunal (*Tribunal administratif*) within 48 hours.335 The Administrative Tribunal must decide within 72 hours.336 In practice, however, the illusory nature of the effectiveness of this suspensive appeal has been raised as a concern.337

In turn, the decision of this Administrative Tribunal can be challenged within 15 days before the President of the competent Administrative Court of Appeal, but this appeal does not have suspensive effect.338 Based on “considerations of the proper application of justice”, the Council of State assigns the case to the Administrative Court that is closest to the concerned waiting zone,339 and no longer to the Administrative Court of Paris only, as was previously the case.

There are no available figures on the number of appeals lodged in the context of border procedures.

**Vulnerable applicants**

**Identification of vulnerabilities**

Asylum seekers in need of special procedural guarantees must be exempted from the border procedure when they are identified as such by OFPRA.340 Specific categories of vulnerability of applicants are listed in French law.341 The OFPRA thus takes into account objective vulnerabilities such as age, illness or pregnancy, as well as vulnerabilities that are related to the reasons for applying for international protection, such as the sexual orientation of the asylum seeker. During the regular asylum procedure, a specialised authority, the French Office for Immigration and Integration (“Office français de l’immigration et de l’intégration” – OFII) is responsible for identifying vulnerabilities and special needs of asylum seekers. However, this authority is not present at borders.

Protection Officers of the Border Unit are trained in the detection of vulnerabilities in the same way as other OFPRA staff, while they can also benefit from the support of thematic reference persons on vulnerability (référents thématiques), coordinated by the Head of Vulnerability Mission.342 Applicants may further request the case officer to be of a specific gender, which is usually followed in practice.343

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335 Article L.213-9 (1) CESEDA
336 Article L.213-9 Ceseda
338 Article L.213-9 (9) CESEDA
339 Article R.351-8 CJA.
340 Article L.221-1 Ceseda
341 Article L.744-6 CESEDA.
343 Information provided by Anafé, 17 September 2020.
The OFPRA further developed a system for the signalling of vulnerabilities in waiting zones. Any person authorised to be present in waiting zones, including the NGOs accredited to that effect, can alert OFPRA of the existence of vulnerabilities through a functional email address. When a person is identified as vulnerable during the border procedure, the OFPRA may request his/her release from the waiting zones. This is marginally used in practice, as only a few referrals were made in recent years and because of the limited presence of NGOs (see legal assistance). In 2016, only 5 persons have been released from the waiting zones due to their vulnerability; and none in 2017.

Overall, given the tight deadlines of the border procedure, which require OFPRA to issue an opinion to the Ministry of Interior within two working days, it is unlikely that vulnerable asylum seekers are able to benefit from “sufficient time” to put forward their claim. Moreover, practice suggests that applicants are not released from waiting zones, even in cases where their vulnerability is reported by NGOs. For example, there has been a case where the vulnerability of an 8-months pregnant woman was reported by Anafé to the OFPRA, but she continued to be held in the transit zone. She further had to stand for an hour during the interview, as the latter was conducted through a wall mounted telephone.

Unaccompanied children

Unaccompanied children are only placed in the border procedure in waiting zones in exceptional cases where they: come from a safe country of origin; make a subsequent application; present false documents or information in order to mislead the authorities; or pose a serious threat to public order or security. While fraud cannot be invoked for the application of the accelerated procedure vis-à-vis unaccompanied children on the territory, it is one of the four grounds for applying the border procedure in their case, a policy decision which lies with the Ministry of Interior. As the majority of unaccompanied children arriving at the border hold false documents, fraud is widely applied as ground to conduct a border procedure for this category. In carrying out their respective assessments, both OFPRA and the Ministry need to assess the person’s declared minority and fraud is one of the elements affecting such an assessment. In 2019, 59 applications were made at the border by unaccompanied minors, an increase from 32 applications in 2018 and 39 applications in 2017.

Since 2004 an ad hoc administrator must be appointed through the Public Prosecutor once a child is transferred to the waiting zone. Ad hoc administrators are made available by the Red Cross and Famille Assistance but here again practice diverges between the waiting zones in France. In Roissy, the Red Cross disposes of an extensive network of ad hoc administrators guaranteeing appointments within a few hours if necessary. As the number of unaccompanied children arriving in other waiting zones is extremely low, ad hoc administrators are less readily available.

In line with the recast Asylum Procedures Directive, the ad hoc administrator can assist the unaccompanied child during the interview with OFPRA in the waiting zone. According to OFPRA, efforts are made to ensure that the ad hoc administrator can speak to the child prior to the interview and that interviews are organised at a day and time which allow the administrator’s presence. Nonetheless, the absence of the ad hoc administrator...
A potential protection gap persists at the moment of interception of the unaccompanied child at the airport (aéroport) prior to his or her transfer to the waiting zone. Although the law requires the Border Police to immediately contact the Public Prosecutor in order to have an ad hoc administrator appointed who should assist the child with every step in the process, including in the aéroport, in practice it is impossible for ad hoc administrators to provide assistance prior to arrival in the waiting zone, due to the speed of the process. This undermines the effective protection of unaccompanied children at the very initial stage of the process as they have to face the Border Police without any assistance. As the Border Police is reported to assume a person to be over 18 on the basis of identity documents if considers to be fraudulent at the same time, many unaccompanied children may wrongly be assessed as adults and be denied the special protection owed to them under national and EU law.355

**Decisions on cases involving vulnerable applicants**

In terms of decisions on cases involving vulnerable applicants, available figures indicate the following trend:

![Graph showing share of decisions granting access to the territory out of total decisions: 2015-2019](chart)

Source: OFPRA, Annual reports. Figures on the share of women being granted access to the territory in 2015 and 2019 were not available.

The above figures demonstrate that, compared to the share of the total number of applicants being granted access to the territory, unaccompanied minors and women seem to have more chances to be granted access to the territory, as the number of positive decisions granted in their cases has consistently exceeded the average for all applicants. It should be noted that women are not vulnerable applicants per se, but the OFPRA has stated throughout recent years that, out of the total number of positive decisions granting entry to the territory, a large share of cases concerned gender based-violence. Another important share of positive decisions concern cases and persecution because of a persons’ sexual orientation.356

Nevertheless, while 71.2% of unaccompanied minors were granted entry in 2019, this number was low as 51.6% in 2018; 24.3% in 2016 and 37% in 2015. This means that in 2018, nearly half of all unaccompanied

356 OFPRA, Annual reports.
The implementation of Article 43 of Directive 2013/32/EU in practice

minors making an asylum claim at the border were refused access to the territory; a situation that applied to 3 in 4 unaccompanied minors in 2016 and to the large majority of them in 2015. This raises important concerns, taking into consideration that the border procedure should in principle only be applied exceptionally to unaccompanied minors.

**Detention and restriction of liberty**

The placement of an individual in a waiting zone is acknowledged as a measure of deprivation of liberty. The European Court of Human Rights (ECtHR) held already in the 1996 landmark judgment of *Amuur v. France* that the placement of individuals in hotel accommodation near Orly airport constituted deprivation of liberty and therefore needed to comply with the safeguards set out in Article 5 of the European Convention of Human Rights (ECHR).

**Length of detention**

The placement in waiting zones is ordered by the Ministry of Interior for an initial period of four days. It can then be extended by the liberties and detention judge (‘*juge des libertés et de la détention*’ - JLD) for a period of eight days and in exceptional cases or where the person obstructs his or her departure, for eight more days. This brings the maximum period of detention in waiting zones to 20 days in total.

A final exceptional prolongation is applicable in the particular case of asylum seekers. If a person held in a waiting zone makes an asylum application after the 14th day, the law foresees the possibility of a further extension of detention for six more days following the submission of the asylum application, with a view to allowing the authorities to conduct the asylum procedure. The detention period can thereby extend to 26 days if the person applies for asylum on the 20th day of detention. Moreover, in certain exceptional cases, the length of detention can be extended to 30 days. There are no available figures on the average length of detention in practice.

**Review of detention**

The placement in waiting zones is a measure ordered by a formal administrative decision and subject to regular judicial review by the Judge of Freedoms and Detention (*juge des libertés et de la détention*, JLD). On the other hand, persons held in waiting zones may be accessed by accredited civil society organisations, although this is rare in practice. Waiting zones also fall within the scope of the mandate of the General Controller of Places of Detention (CGLPL) who monitors places of detention as the National Preventive Mechanism for torture in France. As already mentioned in statistics, only a minority of persons are effectively released from the airport detention facilities in practice. This concerned around 170 persons in 2019, 110 persons in 2018 and 90 persons in 2017; thus representing less than 10% of all airport cases.

**Detention conditions**

The conditions in waiting zones differ considerably from one area to another. Roissy is the most structured and organised waiting zone in France, insofar it provides adapted infrastructure and concentrates all relevant actors in the same place. These include: the French Red Cross (*Croix rouge française*) which provides

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358 Article L.221-3 CESEDA.

359 Article L.222-1 CESEDA.

360 Article L.222-2 CESEDA.

361 Article L.222-2 (2) and Article L.213-9 CESEDA

362 Article L.222-2 (2) and Article L.213-9 CESEDA

363 For a detailed comparison, see Anafé, *Aux frontières des vulnérabilités*, 2018, p. 35 et seq.
humanitarian assistance and counselling; Anafé, which provides legal information and assistance by phone and through a physical presence three days a week; the French Office of Protection of Refugees and Stateless Persons (OFPRA) which conducts interviews with asylum seekers; and as of 2017 the JLD, stationed in an Annex of the TGI of Bobigny in a building adjacent to the waiting zone. Conversely, neither the Red Cross nor OFPRA are physically present in other waiting zones in the country.364

Conditions are reported as more problematic in other waiting zones: NGOs have not the capacity to regularly access them and people detained can thus establish contact only by phone in order to obtain legal aid. Waiting zones are also usually very small and the police is not trained accordingly.365 As regards unaccompanied minors, the Ombudsman urged in 2017 for a better consideration of their interests, in particular by: consolidating training of agents working in waiting zones; informing children about their situation and rights; providing them more space to speak and to be heard; establishing separate spaces for children in the waiting zone; and informing the Prosecutor (’Procureur de la République’) of all unaccompanied children in these locations.366

**De facto detention**

*De facto* detention practices continue to be reported as French authorities detain people arriving from Italy without having established a waiting zone to that effect. Since 2017 a so-called “temporary detention centre” made up of containers has been established in the premises of the Border Police office of Menton, where people refused entry are detained before being returned to Italy.367 No formal decision has been taken by the Prefect of Alpes-Maritimes for the purpose of detaining people in this place, thereby rendering their deprivation of liberty arbitrary and contrary to Article 5 ECHR.

Despite an urgent action (référé-liberté) brought by several organisations to end the detention of persons refused entry at the border, the Administrative Court of Nice found that, even in the absence of a specific legal basis, detention was permissible for a period not exceeding 4 hours, after which the police would be required to transfer the individuals concerned to a waiting zone, in this case the zone of Nice Airport. This interpretation was upheld by the Council of State on 5 July 2017.368

In practice, however, the informal detention zone continues to be used for periods well beyond the 4-hour limit set by the courts. Given that the Italian police ceases its daily activities at 19:00, any person apprehended and refused entry by the Border Police after that time spends the night in detention in order to be handed over to their Italian counterparts the next morning. Consequently, many persons are detained for periods exceeding 10-12 hours without legal basis.369

**The role of UNHCR in the border procedure**

UNHCR does not play any particular role in the border procedure in France.

**Allocated budget for border procedures**

In 2019, the budget implemented by the OFPRA amounted to €67.55 million in commitment authorisations (‘autorisation d’engagement’) and €69.10 million in credit payments (‘crédits de paiement’). The expenditure mainly concerned personal costs (€49.21 million, i.e. 71%), expenditure related to the OFPRA’s activity (€10.87 million, i.e. 16%) and rental charges (€4.38 million, i.e. 6.3%).

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364 AIDA, *Country Report France – Update on the year 2019*, April 2020, p. 120.
365 Ibid.
There is no detailed information on the budget allocated specifically to the border procedure, but the OFPRA estimated it costs at around €154,500, respectively for transport (€5,000), restoration (€2,500) and mainly for interpretation services (€147,000). An additional €3,000 to €4,000 is also allocated to staff costs.\textsuperscript{370}

\textsuperscript{370} Information provided by OFRPA, 21 September 2019.
Annex VI – Country profile: Germany

The Country profile Germany aims to provide a detailed overview of the functioning of the German airport procedure. The information contains extracts and is mainly derived from following sources:

- ECRE, *Airport procedures in Germany: Gaps in quality and compliance with guarantees*, 2019
- BAMF, *Das Bundesamt in Zahlen 2019*, 2020

Statistics
Applications for international protection in Germany

Despite a drop in the number of applications for international protection since 2016, Germany remains by far the main receiving country in the EU. For the eighth consecutive year, it has recorded the largest number of applicants, reaching 165,938 applications in 2019. During that time period, the number of border procedures, i.e. the German “airport procedure” (*Flughafenverfahren*), has remained relatively low:

![Graph showing applications for international protection: 2015-2019](image)

Source: BAMF, *Das Bundesamt in Zahlen 2019*, p. 60; Information by the BAMF, 11 September 2020.371

The airport procedure represents less than 1% of all applications lodged since 2015. In 2019 for example, it represented only 0.2% of all cases. Interestingly, the number of airport procedures has been at the lowest in 2015 - the year during which Germany registered a record number of arrivals and asylum claims.

Outcome of the airport procedure

The airport procedure in Germany entails solely an examination of whether or not an asylum application should be rejected as “manifestly unfounded”.372 The law does not permit a refusal of entry into the territory if the Federal Office for Migration and Refugees (BAMF) dismisses asylum applications as inadmissible. Decisions by the BAMF on airport cases must be issued within two calendar days from the moment when an application for international protection is lodged. The asylum applicant is not considered as being on German

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371 The BAMF stated that the airport statistics are not a cohort but a period statistic. Deviations can result from annual carryovers. Therefore the number of the formal asylum applications according to Section 18a Paragraph 1 Sentence 3 of the Asylum Act does not necessarily have to match the number of decisions according to Section 18a Paragraph 3 of the Asylum Act and the “notification according to Section 18a Paragraph 6 of the Asylum Act” (entry permits); Information provided by the BAMF on 11 September 2020.

372 Section 18a(2) German Asylum Act.
The implementation of Article 43 of Directive 2013/32/EU in practice

territory as long as the airport procedure is pending, i.e. there is a ‘fiction of non-entry’ as long as entry to the territory has not been explicitly granted. If the application is rejected as “manifestly unfounded”, the person is issued a refusal of entry pursuant to the Schengen Borders Code. Another possible outcome of the airport procedure is that the BAMF declares the application for international protection successful (‘anerkannt’) within two calendar days, in which case the asylum applicant is granted access to the territory. Nevertheless, this option is not applied in practice as entry is systematically being granted in cases where the BAMF has not taken a decision within the legal time-limit of two calendar days, or because it has declared that it will not be able to do so within that time frame.

Source: BAMF, Information provided on 11 September 2020.

The graph indicates that more than half of applicants who have lodged an application at the airport have systematically been granted entry to the territory since 2015 – a situation that concerned the large majority of them up until 2017, while 2018 and 2019 were marked by an increase of manifestly unfounded decisions.

The increase in the number of manifestly unfounded decisions merits particular attention. A relevant analysis of rejection rates can be made specifically regarding the work of the BAMF’s branch office at the Frankfurt/Main airport which is responsible for the majority of airport procedures in Germany. It was demonstrated that, compared to the rejection rates recorded at national level, the rejection rates of the Branch office were much higher. For asylum seekers from Iraq, the protection rate at the branch office Frankfurt/Main in 2019 was only 18.3% - compared to 51.8% at national level; Afghanistan: only 50% compared to 63.1%, Iran: 16.2% compared to 28.2%, Nigeria: 4.1% compared to 14.5%, Turkey: 30.2% compared to 52.7%.

The difference in the rejection rate at national level and in the airport procedure may be linked to a variety of objective factors, such as the profile of applicants and individual circumstances of the asylum applications. Nevertheless, these figures seem to indicate that the the BAMF has a more restrictive approach to claims in the airport procedure compared to procedures elsewhere in Germany, a practice that has been criticised by NGOs and different stakeholders.

Source: BAMF, Information provided on 11 September 2020.

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373 Section 18a(3) German Asylum Act.
374 Section 18a(6) Asylum Act.
375 Dr. Thomas Hohlfeld, Vermerk zur Antwort der Bundesregierung auf die Kleine Anfrage der LINKEN (Ulla Jelpke u.a.) zur ergänzenden Asylstatistik für das Jahr 2019 (BT-Drs. 19/18498), Newsletter of 6 April 2020.
376 For a critique, see Dr. Thomas Hohlfeld, Vermerk zur Antwort der Bundesregierung auf die Kleine Anfrage der LINKEN (Ulla Jelpke u.a.) zur ergänzenden Asylstatistik für das Jahr 2019 (BT-Drs. 19/18498), 6 April 2020; PRO ASYL, Allein in Abschiebungshaft: Jugendlicher als Letzter am Frankfurter Flughafen, 11 April 2020; Bistum Limburg, ‘Caritas und Diakonie wollen Aus für Flughafen-Asyverfahren’, 30 October 2018; ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, pp. 11-12.
Practice suggests that the BAMF actively seeks to find inconsistencies or contradictions during interviews in the airport procedure, namely on the applicants’ statements on elements such as travel route, duration of stay in transit, personal details of relatives, including contradictions compared to statements made during the Federal Police interview when persons are first apprehended at the airport. As soon as the BAMF identifies even minor contradictions, it establishes “serious doubts” (erhebliche Zweifel) about the credibility of the application and proceeds to a “manifestly unfounded” rejection. BAMF decisions rejecting claims as manifestly unfounded have been described as superficially motivated and of poor quality, as they include superficial assessments of grounds of persecution, such as religion, political opinion or membership of a particular social group due to sexual orientation.

Moreover, although applications can not be rejected as inadmissible in the airport procedure, stakeholders at Frankfurt Airport are aware of cases where the BAMF erroneously relied on “first country of asylum” or “safe third country” grounds – for Democratic Republic of Congo (DRC) or Zimbabwean nationals having obtained status and/or resided in South Africa prior to arriving in Germany – to reject applications as manifestly unfounded.

Other potential factors for the high rejection rates in the airport procedure include the pressure on asylum authorities to meet legal deadlines and issue decisions quickly; insufficient opportunities for in-depth examination of facts in cases of doubt due to time constraints; inadequate counselling opportunities for asylum seekers due to their de facto detention and difficulties for them to properly prepare for the interview within said deadlines.

The difference in recognition rates is particularly worrying taking into consideration that many asylum seekers at airports originated from the same countries of origin as those applying in the territory, where they benefitted from higher recognition rates. Out of the three main countries of origin of applicants in Germany, two were the main nationalities in the airport procedure, namely applicants from Syria and Turkey. Other countries represented in the airport procedure in 2019 included Iran, Iraq, the Democratic Republic of Congo, China, Somalia, Algeria and Egypt.

Similar observations can be made about the year 2018, where Syria and Iran were part of the main three countries of origin both at national level and at airports. Other countries represented in the airport procedure in 2018 included Turkey, the Democratic Republic of Congo, Iraq, Afghanistan, Zimbabwe, Cuba, Egypt and Russia.

Overall, since 2015, Syrians and Iranians were systematically part of the top 3 nationalities represented in the airport procedure.

**Authorities involved**

The Federal Police is the first authority involved in the airport procedure, as it is usually the first authority interviewing individuals apprehended at the airport. It may apprehend individuals either directly on the airport apron or in the airport terminal. The Border Police is responsible for assessing whether the case falls...
under the airport procedure and writes a report collecting detailed information (e.g. travel routes and modes of arrival in Germany) that will be shared with the BAM.

The Federal Office for Migration and Refugees (BAMF) is responsible for examining applications for international protection and competent to take decisions at first instance. It is thus also responsible for airport procedures. The BAMF falls under the Ministry of Interior and had a total of 6,980 positions or “full-time job equivalents” as of February 2020. Out of them, around 3,596.8 full-time equivalents deal with asylum procedures specifically, while others cover activities going beyond asylum-related matters. The BAMF has branch offices in all Federal States but it does not have units dedicated to the border procedure.

Administrative Courts are responsible for requests for interim measures made by applicants following a rejection of their application for international protection in airport procedure. The Administrative Court Frankfurt/Main is thus usually the competent Court for airport cases.

**Legal framework**

**Grounds for applying the border procedure**

The airport procedure is legally defined as an “asylum procedure that shall be conducted prior to the decision on entry” to the territory. The German Asylum Act foresees the applicability of the airport procedure where the asylum seeker arriving at the airport:387

- Comes from a “safe country of origin”;
- Is unable to prove his or her identity with a valid passport or other means of documentation.

The second ground merits particular consideration. German law triggers the airport procedure as soon as it is established that the asylum seeker is unable to prove identity by means of a passport or other documentation. It does not condition the applicability of the procedure upon requirements of misleading the authorities by withholding relevant information on identity or nationality, or destroying or disposing of an identity or travel document in bad faith. The scope of the airport procedure in Germany is therefore not consistent with the boundaries set by the recast Asylum Procedures Directive.389

Yet, practice suggest that the second ground is most often used for activating the airport procedure. As demonstrated in countries of origins of applicants in the procedure, many applicants in the airport procedure in 2019 came from Syria, Iraq, and Turkey, as well as other countries such as Afghanistan, Iran or Somalia. These are all countries which are not considered as “safe” and which have a relatively high chance of recognition at national level. A fortiori, this means that the airport procedure is mostly activated on the second legal ground, when a person is unable to present proof of identity.

**Dublin in the border procedure**

The BAMF reported that the formal examination of the application of Dublin III lies with the Federal Police (and the Dublin-Unit of the BAMF). It is thus unclear whether the Dublin Regulation is conducted at the airport procedure or not. Nevertheless, the Frankfurt/Main Airport Refugee Service reported that persons falling under the responsibility of another country are usually held in the airport facility in Frankfurt/Main until their transfer. One exception applies to persons falling under the responsibility of Greece, who have been reportedly granted entry to the territory after a few days.390

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384 The actual number of staff is likely to be much higher, as there are many part-time positions within the BAMF that are not counted in this figure.


386 Section 18a(1) Asylum Act.

387 Section 18a(1) German Asylum Act.

388 Article 31(8)(c) and (d) recast Asylum Procedures Directive.

389 See also Dominik Bender, *Das Asylverfahren an deutschen Flughäfen*, May 2014, p. 41.

390 Information provided by the Frankfurt Airport Church Refugee Service, 25 August 2020.
Time limits

The maximum duration of the airport procedure is 19 days:

- The BAMF examines the application for international protection, carries out the personal interview and decides within 2 days whether the applicant can enter the country, or if the application is to be rejected as manifestly unfounded; 391
- In the case of rejection, applicants can lodge an appeal within 3 days in front of the competent Administrative Court and request an interim measure;
- If the Administrative Court grants the provisional measure or if it does not rule within 14 days, the applicant can enter the territory of Germany. 392

These time limits are thus much shorter than the 4-week time limit laid down in the recast Asylum Procedures Directive. 393 As demonstrated in statistics, the majority of applicants are granted access to the territory in order to proceed with the asylum procedure. Nevertheless, where the BAMF decides to examine an application for international protection under the airport procedure, the two-days time limit is always respected in practice. Failure to meet the two-days deadline would be systematically sanctioned by the Administrative Court.

Personal interview

Interview with the Border Police

The asylum seeker is first interviewed by the Federal Police before attending an interview with the BAMF. These first interviews focus predominantly on travel routes and modes of arrival in Germany. The organisation of the Federal Police interviews seems to vary depending on the airport:

- At Frankfurt Airport, the person undergoes two interviews with the Federal Police, one at the airport terminal upon apprehension, and a second interview upon the person’s arrival at the ‘first arrival centre’ (‘Erstaufnahmeeinrichtung’). The Border Police conducts searches in order to collect as much information as possible (e.g. identification documents; flight tickets providing information on the travel route etc.); both with the aim to identify the individual and the travel route, as well as potential smuggling networks.
  
  Serious concerns have been reported regarding the level of details of these interviews. This includes exhaustive questions on travel routes and on the persons met on the route and/or persons that helped to flee; as well as cases where the Border Police asked the exact date of issuance of a visa; the reason for not having declared the same amount of money during the first and second interview; as well as asking whether there would be objections against a potential removal to the country of origin etc. 394 Moreover, according to asylum seekers’ reports to stakeholders, at the first interview at the terminal, the Federal Police does not always proactively inform the individual of the possibility to seek international protection. The Border Police also uses interpretation by phone during the first interview at the airport terminal and sometimes also during the interview at the first arrival centre; which leads to poor quality interpretation. A good practice reported during the second interview with the Border Police, however, is that individuals are asked whether they feel physically and psychologically fit for the interview, in which case a break of a couple of hours may be granted. 395

391 Section 18a(6)(1) and (2) German Asylum Act.
392 Section 18a(4) and (6) German Asylum Act.
393 Article 43(2) recast Asylum Procedures Directive.
394 These questions are examples deriving from transcripts of interviews conducted with the Border Police that have been obtained by lawyers. Information provided by an attorney-at-law, 31 August 2020.
395 Information provided by an attorney-at-law, 31 August 2020.
At Munich Airport, the initial interview is carried out immediately upon the person’s arrival at the airport facility (‘Flughafenunterkunft’), usually during late hours.\(^\text{396}\)

Overall, the fact that asylum applicants are on their own at this stage of the procedure, with limited access to information, assistance and interpretation services; and that these interviews are conducted immediately upon apprehension within extremely short deadlines, have been described as stressing factors which may contribute to inconsistencies and contradictions. Yet, the report of the Border Police is crucial for the next steps of the airport procedure as it is shared with the BAMF and is systematically being relied upon to identify inconsistencies between the individual’s statements. This practice has been noted in both Frankfurt and Munich.\(^\text{397}\) The report of the Border Police is not shared with the applicant; it can only be accessed in the person’s case file made available to lawyers and it is only available in German.\(^\text{398}\)

**Interview with the BAMF**

The BAMF is responsible for the personal interview for the purpose of processing the asylum application in the airport procedure. An application for international protection is formally lodged only at this stage of the procedure. Interviews are always conducted by the BAMF in person, without the use of videoconferencing or other remote communication media.\(^\text{399}\) The BAMF has permanent presence at the first arrival centre where Frankfurt Airport procedures are conducted, but not at the airport facility at Munich Airport. In the latter cases, the BAMF travels to the airport facility from Munich for the purpose of carrying out interviews.\(^\text{400}\)

Caseworkers of the BAMF follow a specific questionnaire (‘Fragebogen’) throughout the interview. As opposed to more experienced caseworkers, less-experienced caseworkers tend to strictly follow this questionnaire, which results in significantly prolonging the time of the interview and asking questions that may be irrelevant to the case concerned.\(^\text{401}\)

The length of the interview with the BAMF has also been reported as problematic. While the average length seems to be three to five hours, there have been cases lasting much longer; e.g. an interview of an Iraqi female applicant lasting about 6 hours, or the interview of a Sri Lankan applicant taking up to 8 hours.\(^\text{402}\) While this could provide the opportunity for an in-depth assessment and examination of the application for international protection, it seems that questions on individual circumstances are only asked after a couple of hours. The first part of the interview largely focuses on basic information such as the travel route and identification, i.e. questions that have already been asked by the Border Police. This part of the interview may take up to several hours and aims to identify potential inconsistencies and contradictions with previous statements.\(^\text{403}\) It is only after this assessment that the BAMF asks questions relating to the grounds for applying for asylum and the reasons for having fled from the country of origin. At this stage, asylum seekers are already very tired and stressed from the interview; yet the BAMF is reluctant to stop the interview given the tight deadlines within which it has to issue its decision. It thus generally tries to conduct the interview within the same day.\(^\text{404}\)

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\(^{396}\) Information provided by the Munich Airport Church Service, 5 April 2019. In one case, for example, two asylum seekers from Turkey were interviewed at 03:00 in the facility.

\(^{397}\) Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; an attorney-at-law, 31 August 2020; an attorney-at-law, 15 April 2019.

\(^{398}\) Information provided by an attorney-at-law, 29 April 2019.

\(^{399}\) Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019; Munich Airport Church Service, 5 April 2019.

\(^{400}\) Information provided by the Munich Airport Church Service, 5 April 2019.

\(^{401}\) Information provided by an attorney-at-law, 31 August 2020.

\(^{402}\) Information provided by an attorney-at-law, 31 August 2020.

\(^{403}\) In one case, the first part of the interview focusing on travel route and relevant questions took from 9:30am to 11:25am. It was followed by a short break, and at 11:40am it continued with questions on grounds for applying for asylum; as well as questions highlighting inconsistencies with previous statements. The interview finished at 3:30 pm; thus taking a total of around 6 hours; Information provided by an attorney-at-law, 31 August 2020.

\(^{404}\) Information provided by an attorney-at-law, 31 August 2020.
At the end of the interview with the BAMF, asylum seekers are reportedly pressured to sign the interview transcript in certain cases, even without having understood the procedure. While this does not seem to be an issue in Frankfurt airport, some stakeholders in Munich have referred to BAMF officials threatening with immediate removal from Germany in case the person would refuse to "cooperate".  

**Procedural guarantees**

**Access to legal assistance and NGOs**

According to a decision of the Federal Constitutional Court ("Bundesverfassungsgericht"), asylum seekers whose applications are rejected in the airport procedure are entitled to free, quality and independent legal assistance.  

406 This is the only procedure where asylum seekers are entitled to a form of free legal assistance in Germany.  

However, legal aid is made available only after a negative decision by the BAMF. This means that legal aid is not provided during the first instance airport procedure, i.e. prior to the interview with the BAMF.

In Frankfurt Airport for example, asylum seekers can not easily reach out to lawyers prior to their interview and must heavily rely on relatives or the support of Church Refugee Services to establish contact with a lawyer.  

Subject to available capacity, organisations such as PRO ASYL provide funding for lawyers to support asylum seekers from the outset of the procedure. This has led to about 80 to 90 cases being supported at first instance by PRO ASYL-funded lawyers in 2018.  

More recent figures are not available, but it has been confirmed that only a minority of asylum applicants have access to legal assistance at this stage of the procedure.

Legal practitioners witness a notable difference in the procedure depending on whether they are present or not during the interview with the BAMF. When the interview is conducted without the presence of a lawyer, it has been reported that the interview may be shorter and that interviewers tend to make superficial assessments of the claim and to omit asking questions on important elements such as health conditions.

NGOs and practitioners have thus highlighted that access to quality legal assistance prior to the BAMF interview in the airport procedure would increase the likelihood of a positive first instance decision by the BAMF.

As regards access to legal aid following a negative BAMF decision and potential requests appeals before the Administrative Court (Verwaltungsgericht, VG), the bar association of the airport's region coordinates a consultation service with qualified lawyers. For example, the Bar Association of Frankfurt currently had a list of 43 lawyers dedicated to the airport procedure as of May 2019, who are on stand-by for counselling with asylum seekers when needed.  

In practice, however, the chances of success of appeals seem to be very low (see Appeal) and the scope of the legal assistance is limited. In particular, representation before the court is not part of this free legal assistance.  

The lack of trust of asylum seekers towards lawyers who are appointed to them on the basis of this list has also been reported as problematic.

NGOs have also very limited access to the airport procedure as they need to be accredited. Presence of NGOs during the asylum interview conducted by the BAMF at Munich Airport for example is not clearly regulated. As a result, authorisation for the Church Refugee Service to attend the interview depends on the individual

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405 Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.
406 German Federal Constitutional Court, Decision 2 BvR 1516/93, 14 May 1996.
408 Information provided by the Munich Airport Church Service, 25 August 2020.
409 Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
410 Information provided by an attorney-at-law, 31 August 2020.
411 Information provided by an attorney-at-law, 29 April 2019.
412 Information provided by an attorney-at-law, 3 May 2019.
414 Information provided by an attorney-at-law, 31 August 2020.
The implementation of Article 43 of Directive 2013/32/EU in practice

Caseworker, which is usually allowed in the case of female applicants. On the other hand in Frankfurt Airport, the presence of the Church Refugee Service during the interview is not a problem if the BAMF has been informed beforehand. The Church Refugee Service further provides psychosocial assistance to asylum and helps reaching out to lawyers depending on available capacity. Access to other NGOs than the Church Refugee Service, however, remains limited in practice at the Frankfurt/Main Airport.

Access to interpretation

Interpreters are contracted by the BAMF. Interpretation has been highlighted as very problematic at the airports in Frankfurt/Main and Munich, where the majority of airport procedures are conducted (see statistics).

The Border Police resorts to interpretation services via phone in most cases, especially during the first interview at the airport upon apprehension of the individual, and the BAMF often struggles to find adequate interpreters for the interview. There have been cases where the interview was conducted in a language not understood by the applicant, or where it was clear that the interpreter was lacking the necessary terminology.

The quality of interpretation also seems to vary depending on whether the interpreter has taken an oath to accurately reflect the applicants’ position. As opposed to interviews conducted with the BAMF or the Border Police, interpreters must reportedly take such an oath in Court proceedings, resulting in better translation services and cases being taken “more seriously”.

Access to information

The BAMF provides information to asylum seekers, but in practice they face severe challenges to obtaining clear and comprehensible information on the airport procedure.

At Munich Airport, people generally have no understanding of the procedure followed in the airport facility. The information provided to applicants on the procedure prior to the BAMF interview (‘Belehrung’) is considered very complicated and difficult to understand, according to some stakeholders. Applicants have their phones confiscated and read out by the Federal Police to extract possible information on their travel route. This means they have no access to their phone for several days, as there are no phones in the facility and they have no internet access in the facility. Therefore they are unable to communicate with the outside world, to organise legal support at their own initiative, and to send or receive documents from lawyers which can help establish elements of their claim, unless helped by the Church Service to do so.

At Frankfurt/Main Airport, the BAMF also systematically confiscates phones at the first arrival centre. Nevertheless, the Church service provides information as well as access to phones and computers wherever possible.

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415 Information provided by the Munich Airport Church Service, 5 April 2019.
416 Information provided by the Frankfurt Airport Church Service, 25 August 2020.
417 Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019; an attorney-at-law, 29 April 2019.
418 ECRE, Airport procedures in Germany: Gaps in quality and compliance with guarantees, p.10.
419 Information provided by an attorney-at-law, 31 August 2020.
420 Information provided by an attorney-at-law, 31 August 2020.
421 Information provided by an attorney-at-law, 15 April 2019.
422 Information provided by the Munich Airport Church Service, 5 April 2019; an attorney-at-law, 15 April 2019.
423 Information provided by an attorney-at-law, 31 August 2020; Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
Appeal

When an application for international protection is rejected in the airport procedure, a copy of the decision is sent to the competent Administrative Court. The applicant may request interim measures ("Antrag auf Gewährung einstweiligen Rechtsschutzes") against deportation within three calendar days. This has a suspensive effect, i.e. the denial of entry and the deportation are suspended. The court must then issue its decision within 14 days, otherwise entry to the territory must be granted.

Since 2015, around 663 requests for interim measures to prevent deportations following a negative decision in the airport procedure were registered:

Source: BAMF, Das Bundesamt in Zahlen 2019, p. 60. Note that the figures on requests for interim measures may also refer to the caseload of the previous year in certain cases.

The number of requests for interim measures has been multiplied by ten between 2015 to 2019, rising from 20 to more than 200 requests. This increase is linked to the increase in the number of manifestly unfounded decisions rather than to the number of airport procedures, as there were less applications lodged at airports in 2019 than in 2015. The expansion of litigation in the context of airport procedures is thus another indicator of the restrictive approach adopted by the BAMF in recent years.

Following decisions were issued by Courts in the context of airport procedures:

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424 Section 18a(2)-(4) Asylum Act.
425 Section 18a(4) Asylum Act
426 Section 18a(2)-(4) Asylum Act
The overwhelming majority of requests for interim measures have been systematically rejected by Administrative Courts, thus upholding the BAMFs' manifestly unfounded decisions and refusals of entry into the territory. This is due *inter alia* to the fact that deportations can only be suspended if there are ‘serious doubts about the legality’ of the BAMF decision.\(^{427}\) NGOs have also reported that Administrative Courts do not provide a real opportunity to further clarify inconsistencies between the reports of the interviews conducted by the BAMF and the Federal Police.\(^{428}\) Moreover, where an application has been rejected as ‘manifestly unfounded’, the court has to decide on a request for an interim measure by written procedure, i.e. without an oral hearing and solely based on case-files.\(^{429}\) The right to appeal in the context of airport procedures has thus been described as severely limited in practice.

**Vulnerable applicants**

The German Asylum Act exempts neither unaccompanied children nor persons with special procedural guarantees from the airport procedure, despite an express obligation under the recast Asylum Procedures Directive to provide for such exemptions under certain conditions.\(^{430}\) It also makes no reference to “adequate support” which should be provided to those requiring special procedural guarantees.\(^{431}\)

With the exception of applications lodged by minors, there are no detailed available figures on the profile of applicants in airport procedures. In 2018 and 2019, there were respectively 121 and 86 minors in the airport procedure, thus representing around 19% of all applicants.\(^{432}\) Information as to whether some of them were unaccompanied minors is not available. However, in practice, it seems that the BAMF contacts the youth welfare office (*Jugendamt*) in cases involving unaccompanied minors. Officials of the youth welfare office come to the airport facility to conduct an age assessment and unaccompanied minors are usually allowed entry to the territory for the purpose of the asylum procedure.\(^{433}\)

The BAMF reported that, where a vulnerability has been identified prior to the application process (e.g. according to the report of the Federal Police, through information gathered by the State or by a legal representative) this will be taken into consideration.\(^{434}\) This includes appointing a specialised caseworker...

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\(^{427}\) Section 18a(4) Asylum Act in connection with Section 36(4) Asylum Act.

\(^{428}\) Information provided by PRO ASYL, 1 April 2019; an attorney-at-law, 29 April 2019.

\(^{429}\) Section 36(3) Asylum Act.

\(^{430}\) Articles 25(6)(b) and 24(3) recast Asylum Procedures Directive.

\(^{431}\) Article 24(3) recast Asylum Procedures Directive.

\(^{432}\) (German) Federal Government, *Response to parliamentary question by The Left, 19/20377*, 23 July 2020, p.4.

\(^{433}\) Information provided by an attorney-at-law, 31 August 2020.

\(^{434}\) Information provided by the BAMF, 11 September 2020.
and/or an interpreter with a specific gender; as well as procedural guarantees during interviews such as longer breaks. Moreover, the BAMF stated that vulnerable persons receive the procedural guarantees to which they are entitled from the Federal state (e.g. medical care, possible psychological care, adequate accommodation and meals etc.).

NGOs reported, however, that there are no vulnerability identification mechanism in place during airport procedures and that the lack of procedural guarantees for vulnerable groups is a matter of serious concern.435

Cases reported to ECRE include the following:

- Pregnant women subjected to very long interviews with the BAMF in both Frankfurt/Main and Munich, even in cases of advanced pregnancy;
- Survivors of rape and persons with specific medical conditions not referred for specialised medical treatment in Frankfurt/Main;
- Survivors of rape denied the possibility to be interviewed by a “special officer” (Sonderbeauftragter) of BAMF in Munich, although in Frankfurt/Main victims of gender-based violence were provided with a female caseworker and interpreter upon request in known cases;
- Survivors of rape obliged to undergo the interview in the official language of their country of origin instead of their spoken language in Munich.

Detention and restriction of liberty

De facto detention

In Germany, facilities where airport procedures are conducted carry different official denominations and are managed by the respective Federal States (Bundesländer):

- In the Federal State of Hesse, the facility at Frankfurt/Main Airport is officially entitled “initial reception centre” (Erstaufnahmeeinrichtung). However, the Federal Police “transit notification” (Transitbescheinigung) issued to persons arriving at the airport refers to it as “transit area” (Transitbereich). The facility is located in Building 587a of “Cargo City South”, a restricted area near the airport.
- In the Federal State of Bavaria, the facility at Munich Airport is called “airport facility” (Flughafenerunterkunft). It is located in the “Visitors’ Park” near the airport.

Both facilities are closed centres that people are not allowed to enter and exit at will, therefore places of detention. Yet the official position of the German authorities remains that persons held in those facilities are not deprived of their liberty, as confirmed both by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) and the Federal Supreme Court (Bundesgerichtshof, BGH).438 The BAMF stated that asylum seekers are “accommodated in an initial reception facility” and “free to return to their country of origin or a transit country by air at any time during the airport procedure”.439

The fiction of no deprivation of liberty is maintained in Germany despite clear pronouncements by the European Court of Human Rights (ECtHR) on the deprivation of liberty regime applicable in transit zones at air and land borders.440

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437 Note that under Section 15(6) Residence Act, a person refused entry “shall be taken to the transit area of an airport or to a place of accommodation from which his exit from the federal territory is possible if detention pending exit from the federal territory is not applied for. The foreigner’s stay in the transit area of an airport or in accommodation pursuant to sentence 1 shall require a judicial order no later than 30 days after arrival at the airport”. Upon expiry of that time limit, the person must be allowed entry into the territory: Section 18a(6)(4) Asylum Act.


439 Information provided by the BAMF, 11 September 2020.

In practice, when placing asylum seekers in *de facto* detention in the airport facility of Munich Airport, the Federal Police issues a “notification of residence in the airport facility” (*Bescheinigung für den Aufenthalt in der Flughafenunterkunft*) for the purpose of the airport procedure. This decision expressly states that the person is informed that such residence is not a freedom-restrictive measure and that the person can abandon the asylum procedure at any time, unless there are reasons grounded in criminal law which prohibit this.441 As for Frankfurt/Main Airport, the Federal Police issues a “transit notification” (*Transitbescheinigung*) stating that the person is allowed to stay in the facility until the completion of border police controls.

**Detention conditions**

Asylum seekers with special needs are channelled into the airport procedure and are detained in the airport facilities in practice. During its visits, ECRE was made aware of cases including pregnant women, survivors of rape, and persons with disabilities.442 While unaccompanied minors are reportedly referred to the youth welfare office and granted access to territory (when minority has been confirmed by an age assessment), the initial reception centre at Frankfurt/Main Airport includes two special rooms for accommodating unaccompanied children.443 The availability of services and activities in the airport facility in Frankfurt/Main largely relies on the Church Service, which provides access to psychological assistance, computers, phones and etc.

The initial reception centre in Frankfurt/Main has a capacity of 105 places. Men and women are separately accommodated. The ground floor includes a dining room with games, a separate TV room with drawings, while a prayer room is located separately. There is a courtyard accessible at all hours of the day and is equipped with a basketball court. People are allowed to leave their rooms at any point but cannot exit the centre. All windows in the living unit face the courtyard, not the outside.444 Access to medical care has improved in recent years through the present of a general practitioner 4 to 5 days a week, as opposed to 1 day per week in previous years. The social services also contact an ambulance when needed, and persons are referred to a psychiatrist when needed.445

The church service has not seen any cases of violence in the centre. However, self-harm is frequent, as are hunger strikes. Several self-harm cases – 14 in 2018 – have been reported, with one leading to suicide. The state keeps no statistics on such incidents on the basis that many cases of self-harm are pretexts to leave the facility.446

**The role of UNHCR**

UNHCR does not play a particular role during the airport procedure. Nevertheless, it participated in a ‘Dialogue on the airport procedure’ (*Dialogforum Flughafenv erfahren*) which was organised until 2015. The latter gathered representatives of BAMF, the Federal Police, UNHCR, the Church Refugee Service, the Refugee Council of Hesse, PRO ASYL and the Bar Association of Frankfurt to discuss quality issues.447

**Allocated budget for border procedures**

There is no information available on the allocated budget for border procedures.

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441 An excerpt of this decision can be found in Annex II of the following report: ECRE, *Airport procedures in Germany: Gaps in quality and compliance with guarantees*, 2019.
442 Information provided by the Munich Airport Church Service, 5 April 2019.
443 Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
444 Information collected during ECRE’s visit to the centre on 2 April 2019.
445 Ibid.
446 Information provided by the Frankfurt Airport Church Refugee Service, 1 April 2019.
447 Information provided by UNHCR, 30 April 2019.
Annex VII – Country profile: Greece

The Country profile Greece aims to provide a detailed overview of the functioning of the Greek border procedures. The information contains extracts and is mainly derived from following source:


Greece has two types of border procedures. The first will be described here as the “normal border procedure” and the second as the “fast-track border procedure”. In the second case, many of the rights of asylum seekers are severely restricted, as will be explained.

In practice, the normal border procedure is only applied in airport transit zones, in particular to people arriving at Athens International Airport – usually through a transit flight – who do not have a valid entry authorisation and apply for asylum at the airport.

The fast-track border procedure is applied to applicants subject to the EU-Turkey statement, i.e. applicants arriving on the Eastern Aegean islands after 20 March 2016, and takes place in the Reception and Identification Centres (RIC) where hotspots are established (Lesvos, Chios, Samos, Leros, Kos).

People arriving through the Evros land border are not subject to the EU-Turkey statement. Therefore, they are not subject to the fast-track border procedure, their claims are not examined under the safe third country concept, and they are not subject to a geographical restriction upon release.

**Statistics**

The Asylum Service received 77,287 new applications in 2019, which amounts to an increase of 15.4% compared to 2018. Out of the 77,287 new applications 39,505 were initially channelled into the fast-track border procedure. Of those, 18,849 were referred to the regular procedure due to vulnerability and 1,432 due to the application of the Dublin Regulation. In 2017, 2018 and 2019, the Asylum Service took the following decisions:

<table>
<thead>
<tr>
<th>First instance decisions taken in the fast-track border procedure: 2017-2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions on admissibility</td>
</tr>
<tr>
<td>Inadmissible based on safe third country</td>
</tr>
<tr>
<td>Admissible based on safe third country</td>
</tr>
<tr>
<td>Admissible pursuant to the Dublin family provisions</td>
</tr>
<tr>
<td>Admissible for reasons of vulnerability</td>
</tr>
<tr>
<td>Decisions on the merits</td>
</tr>
<tr>
<td>Refugee status</td>
</tr>
<tr>
<td>Subsidiary protection</td>
</tr>
<tr>
<td>Rejection on the merits</td>
</tr>
<tr>
<td><strong>Total decisions</strong></td>
</tr>
</tbody>
</table>

Information provided by the Asylum Service, 17 February 2020.
The implementation of Article 43 of Directive 2013/32/EU in practice

Source: Greek Asylum Service.

Authorities

The Asylum Service is responsible for examining applications for international protection and competent to take decisions at first instance. The responsibility for the Asylum Service shifted several times between different Ministries in 2019 and early 2020. At the end of 2019, the Asylum Service operated in 25 locations throughout the country, compared to 23 locations at the end of 2018, 22 locations at the end of 2017, and 17 locations at the end of 2016.449

EASO is also engaged in the asylum procedure. EASO experts have a rather active role in the fast-track border procedure, as they conduct first instance personal interviews; they issue opinions regarding asylum applications; and they are also involved in the vulnerability assessment procedure. Following a legislative reform in 2018, Greek-speaking EASO personnel can also conduct any administrative action for processing asylum applications.

Legal framework

A new law on asylum was issued in November 2019, L. 4636/2019 (hereinafter: International Protection Act or IPA). This section refers to both the previous law and the existing law. The Greek law established two different types of border procedures. The first is the “normal border procedure” and the second the “fast-track border procedure”. The distinction between the normal border procedure and the ‘fact-track border procedure is still applicable following the entry into force of the IPA on 1 January 2020. However, the IPA amended several aspects of the border procedure. Article 90 IPA establishes the border procedure, limiting its applicability to admissibility or to the substance of claims processed under an accelerated procedure, whereas under the terms of the previously applicable Article 60(1) L 4375/2016, the merits of any asylum application could be examined at the border.450

The normal border procedure

In the normal border procedure, where applications for international protection are submitted in transit zones of ports or airports, asylum seekers enjoy the same rights and guarantees as those whose applications are lodged in the mainland.451 However, deadlines are shorter: asylum seekers have no more than three days for interview preparation and consultation of a legal or other counsellor to assist them during the procedure and, when an appeal is lodged, its examination can be carried out at the earliest five days after its submission. Where no decision is taken within 28 days, asylum seekers are allowed entry into the Greek territory for their application to be examined according to the provisions concerning the regular procedure.452 During this 28-day period, applicants remain de facto in detention.

In practice, the afore-mentioned procedure is only applied in airport transit zones, in particular to people arriving at Athens International Airport – usually through a transit flight – who do not have a valid entry authorisation and apply for asylum at the airport. The number of asylum applications subject to the border procedure at the airport in 2019 is not available

Fast-track border procedure

450   Article 90(1)IPA, citing Article 83(9) IPA.
451   Articles 47,69, 71 and 75 IPA
452   Article 60(2) L4375/2016 and Art. 90(2) IPA.
This fast-track procedure applies to third-country nationals in Reception and Identification Centres on the Eastern Aegean Sea islands: Lesvos, Chios, Samos, Leros and Kos. According to the current legal framework it applies until 31 December 2020.

In practice, in 2019 and 2020, the fast-track border procedure has been variably implemented depending on the profile and nationality of the asylum seeker concerned, as follows.

- Applications by Syrian asylum seekers are examined on admissibility on the basis of the Safe Third Country concept;
- Applications by non-Syrian asylum seekers from countries with a recognition rate below 25% are examined only on the merits;
- Applications by non-Syrian asylum seekers from countries with a recognition rate over 25% are examined on both admissibility and merits ("merged procedure"). In such cases, EASO systematically recommended inadmissibility decisions based on the “safe third country” concept, subject to a few exceptions. The Asylum Service overturned these opinions as a matter of policy, to then proceed to the examination of application on the merits.453

The fast-track border procedure until the end of 2019 under Article 60(4) L 4375/2016

Although the fast-track border procedure was initially introduced as an exceptional and temporary procedure, it has become the rule for a significant number of applications lodged in Greece. In 2019, the total number of applications lodged before the RAO of Lesvos, Samos, Chios, Leros and Rhodes and the AAU of Kos was 39,505.454 This represented 51.1% of the total number of applications lodged in Greece that year.

The fast-track border procedure was initially foreseen by Article 60(4) L 4375/2016, voted through a few days after the EU-Turkey statement. It provided an extremely truncated asylum procedure with fewer guarantees.455 As the Director of the Asylum Service noted at that time: “Insufferable pressure is being put on us to reduce our standards and minimize the guarantees of the asylum process... to change our laws, to change our standards to the lowest possible under the EU [Asylum Procedures] directive.”456

The United Nations Special Rapporteur on the human rights of migrants highlighted that the provisions with regard to the exceptional derogation measures for persons applying for asylum at the border raise “serious concerns over due process guarantees.”457 It noted that the duration of the fast track border procedure “raises concerns over access to an effective remedy, despite the support of NGOs. The Special Rapporteur was concerned that asylum seekers may not be granted a fair hearing of their case, as their claims are examined under the admissibility procedure, with a very short deadline to prepare.”458

In February 2019, the EU Fundamental Rights Agency (FRA) underlined that “almost three years of experience [of processing asylum claims in facilities at borders] in Greece shows, [that] this approach creates fundamental rights challenges that appear almost insurmountable.”459

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453 ECRE, The Role of EASO operations in national asylum systems, 2019
454 Information provided by the Asylum Service, 17 February 2020.
455 GCR, Παρατηρήσεις επί του νόμου 4375/2016, 8 April 2016.
458 Ibid. para 82.
459 Fundamental Rights Agency (FRA), Update of the 2016 FRA Opinion on fundamental rights in the hotspots set up in Greece and Italy, 2019.
The implementation of Article 43 of Directive 2013/32/EU in practice

The UN High Commissioner for Refugees, following a visit in November 2019, “cautioned that faster processes to determine people’s status should not come at the expense of safeguards and standards, highlighting that the majority of arrivals to Greece this year were refugees, mostly Syrian and Afghan”.460

Main features of the procedure of the fast-track border procedure under the IPA

The fast-track border procedure under Article 90(3) IPA, in force since January 2020, repeats to a large extent the previous legal framework and provides inter alia that:

- The registration of asylum applications, the notification of decisions and other procedural documents, as well as the receipt of appeals, may be conducted by staff of the Hellenic Police or the Armed Forces, if police staff is not sufficient.
- The interview of asylum seekers may also be conducted by personnel deployed by EASO. However, Article 90(3) also introduced the possibility that “in particularly urgent circumstances” the interview be conducted by trained personnel of the Hellenic Police or the Armed Forces, contrasting with the strict limitation on registration activities under the previous L. 4375/2016.
- The asylum procedure shall be concluded in a short time period.

More precisely, according to Article 90(3)(c) IPA:

- The Asylum Service shall take a first instance decision within 7 days;
- The deadline for submitting an appeal against a negative decision is 10 days;
- The examination of an appeal is carried out within 4 days. The appellant is notified within 1 day to appear for a hearing or to submit supplementary evidence. The second instance decision shall be issued within 7 days.

This may result in undermining the procedural guarantees provided by the international, European and national legal framework, including the right to be assisted by a lawyer. As these truncated time limits undoubtedly affect the procedural guarantees available to asylum seekers subject to an accelerated procedure, as such, this raises questions on their conformity with Article 43 of the recast Asylum Procedures Directive, which does not permit restrictions on the procedural rights available in a border procedure for reasons related to large numbers of arrivals.

These very short time limits seem to operate exclusively at the expense of applicants for international protection in practice. In fact, whereas processing times take several months on average, applicants still have to comply with the very short time limits provided by Article 90(3) IPA.461 The average time between the full registration and the issuance of a first instance decision under the fast-track border procedure was 228 days in 2019, i.e. over seven months.462

The Greek Asylum Service is under constant pressure to accelerate the procedures on the islands, which was also one of the reasons invoked for the amendment of national legislation in late 2019. However the FRA found “even with the important assistance the European Asylum Support Office provides, it is difficult to imagine how the processing time of implementing the temporary border procedure or the regular asylum procedure on the islands can be further accelerated, without undermining the quality of decisions. Putting further pressure on the Greek Asylum Service may undermine the quality of first instance asylum decisions, which in turn would prolong the overall length of procedure, as more work would be shifted to the appeals stage.”463

Personal interview

Border procedure

460 UNHCR, Head of UNHCR calls for urgent response to overcrowding in Greek island reception centres, Europe to share responsibility, 28 November 2019; UNHCR, UNHCR urges Greece to strengthen safeguards in draft asylum law, 24 October 2019.

461 Fundamental Rights Agency (FRA), Update of the 2016 FRA Opinion on fundamental rights in the hotspots set up in Greece and Italy, 2019, p. 26.

462 Information provided by the Asylum Service, 17 February 2020.

463 Ibid.
The personal interview at the border is conducted according to the same rules described under the regular procedure. In practice, in cases known to Greek Council for Refugees, where the application has been submitted in the Athens International Airport transit zone, the asylum seeker is transferred to the RAO of Attica or the AAU of Amygdaleza for the interview to take place.

Fast-track border procedure

Under the fast-track border procedure as per Article 60(4) L 4375/2016, the personal interview could be conducted by Asylum Service staff or EASO personnel. According to Article 90(3) IPA, in force since 1 January 2020, the personal interview may be conducted by Asylum Service staff or EASO personnel or, “in particularly urgent circumstances”, by trained personnel of the Hellenic Police or the Armed Forces.464

As regards EASO, its competence to conduct interviews had already been introduced by an amendment to the law in June 2016, following an initial implementation period of the EU-Turkey Statement marked by uncertainty as to the exact role of EASO officials, as well as the legal remit of their involvement in the asylum procedure. The EASO Special Operating Plans to Greece foresaw a role for EASO in conducting interviews in different asylum procedures, drafting opinions and recommending decisions to the Asylum Service throughout 2017, 2018 and 2019.465 A similar role is foreseen in the Operational & Technical Assistance Plan to Greece 2020, including in the Regular procedure.466

As found by the European Ombudsman in 2018, “EASO is being encouraged politically to act in a way which is, arguably, not in line with its existing statutory role. Article 2(6) of EASO’s founding Regulation (which should be read in the light of Recital 14 thereof, which speaks of “direct or indirect powers”) reads: ‘The Support Office shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection’.467 Furthermore, in 2019 and following a complaint in an individual case, the European Ombudsman found that “EASO’s failure to address adequately and in a timely way the serious errors committed in […] case constituted maladministration”.468

During 2019, the content of the personal interview varied depending on the asylum seeker’s nationality. Interviews of Syrians mostly focused only on admissibility under the Safe Third Country concept and were mainly limited to questions regarding their stay in Turkey. Non-Syrian applicants from countries with a recognition rate below 25% were only examined on the merits, in interviews which could be conducted by EASO caseworkers. Finally, non-Syrian applicants from countries with a rate over 25% undergo a so-called “merged interview”, where the “safe third country” concept was examined together with the merits of the claim.

In practice, in cases where the interview is conducted by an EASO caseworker, he or she provides an “opinion / recommendation” (πρόταση / εισήγηση) on the case to the Asylum Service, which issues the decision. The transcript of the interview and the opinion / recommendation are written in English, which is not the official language of the country.469 The issuance of an opinion / recommendation by EASO personnel to the Asylum

464 Article 90(3)(b) IPA.
467 European Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office’s (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews, 5 July 2018, para 33.
468 European Ombudsman, Decision in case 1139/2018/MDC on the conduct of experts in interviews with asylum seekers organised by the EASO, 30 September 2019, para 18.
469 This issue, among others, was brought before the Council of State, which ruled in September 2017 that the issuance of EASO opinions / recommendations in English rather than Greek does not amount to a procedural irregularity, insofar as it is justified by the delegation of duties to EASO under Greek law and does not result in adversely affecting the assessment of the applicant’s statements in the interview. The Council of State noted that Appeals Committees
The implementation of Article 43 of Directive 2013/32/EU in practice

Service is not foreseen by any provision in national law and thus lacks a legal basis. In 2019, EASO conducted 6,047 interviews and issued 5,365 opinions in the fast-track border procedure during that year, out of which 1,283 opinions recommended the referral of the asylum seeker to the regular procedure for reasons of vulnerability.

Finally, a caseworker of the Asylum Service, without having had any direct contact with the applicant e.g. to ask further questions, issues the decision based on the EASO record and recommendation.

In November 2019, 28 applications examined under the fast-track border procedure on Lesvos island, were rejected at first instance by the Lesvos RAO, without undergoing any asylum interview, contrary to the guarantees of the Directive 2013/32/EU. The applicants all belonged to nationalities with a recognition rate under 25%. All negative decisions mentioned in identical wording that "the asylum seeker did not attend a personal interview since repeated attempts to find interpretation services for the mother tongue and the language of communication of the asylum seeker proved unsuccessful". In some of these cases the applicants were served fictitious invitations to interviews scheduled for the same day the decision was issued.

In a number of these cases, the Appeals Committees reversed the first instance decisions. According to the second instance Decision, the Committee considered that the failure to conduct an interview was contrary to the law and referred the cases back to the first instance for an interview to take place.

Moreover, and following a parliamentary priority question submitted to the European Commission on 25 November 2019 with regard to these cases, the European Commission noted that "the Directive on asylum procedures (2013/32/EU) guarantees that the asylum applicants' are given the opportunity of a personal interview on their applications for international protection, with certain limited exceptions. As regards the interpretation, the Directive provides that the communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly."

Quality of interviews by EASO

The quality of interviews conducted by EASO caseworkers has been criticised, including in terms of compatibility with EASO’s own standards. \textit{Inter alia}, quality gaps such as lack of knowledge about countries of origin, lack of cultural sensitivity, questions based on a predefined list, closed and leading questions, repetitive questions, frequent interruptions and unnecessarily exhaustive interviews, and conduct preventing lawyers from asking questions at the end of the interview have all been reported.

In 2018, following the ECCHR complaint, the European Ombudsman found that “there are genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted”. In the same year, a comparative analysis of 40 cases of Syrian applicants whose claims were examined under the fast-track border procedure further corroborated the use of “inappropriate communication methods and unsuitable questions related to past experience of harm and/or persecution” which include closed questions impeding a proper follow-up, no opportunity to explain the case in the...
applicant’s own words, failure to consider factors that are likely to distort the applicant’s ability to express him- or herself properly (such as mental health issues or prior trauma), lack of clarification with regard to vague or ambiguous concepts mentioned by the interviewer, potential inconsistencies or misunderstandings regarding critical aspects of the case that could lead to confusion and/or the inability of the applicant to express him- or herself effectively, and more generally, violations of the right to be heard.477

In a 2019 comparative analysis, it was noted that in some cases EASO opinions relied on outdated sources, both with regard to the examination of the safe third country concept vis-a-vis Turkey and the examination of the merits of the application. Errors in legal analysis were also noted.478

In 2019, following a complaint submitted to the European Ombudsman, EASO stated that as part of a quality feedback report, it had thoroughly examined the complainant’s case and that “EASO considered that the quality feedback report showed that the interviewer pursued a line of questioning that was inappropriate for the case, and displayed a misunderstanding of the complainant’s situation. Consequently, the case officer had ‘made a severe error of judgment when dealing with [that] case’, and this should not have been approved by his manager. EASO also acknowledged that there were problems with the work of the interpreter”. The Ombudsman found: “EASO’s failure to address adequately and in a timely way the serious errors committed in Mr […]’s case constituted maladministration”. 479

**Procedural guarantees**

**Access to NGOs**

Access of NGOs to Reception and Identification Centres, camps on the mainland and pre-removal detention facilities is subject to prior permission by the competent authorities. It depends on the situation prevailing on each site, for instance overcrowding, and on the availability of human resources.

As reported, in Samos legal aid organisations are often prohibited from entering the camp, making it difficult to accompany beneficiaries to their interview, as the GAS office is located inside the RIC on the island.480 Moreover, during 2019, GCR faced a number of obstacles in accessing the Fylakio RIC (Evros).

**Access to interpretation**

The law envisages that an interpreter of a language understood by the applicant be present in the interview.481 Interpretation is provided both by interpreters of the NGO METAdrasi and EASO’s interpreters. The use of remote interpretation has been observed especially in distant RAO and AAU. When it comes to rare languages, if no interpreter is available to conduct a direct interpretation from that language to Greek (or English in cases examined by EASO case workers), more interpreters might be involved in the procedure.

**Access to information**

Article 41 L.4375/2016 provided, *inter alia*, that applicants should be informed, in a language which they understand and in a simple and accessible manner, on the procedure to be followed, their rights and obligations. This provision is repeated by Art. 69(2) IPA.

480 Greek Helsinki Monitor et al., *No End In Sight: The mistreatment of asylum seekers in Greece*, 2019.
481 Article 77(3) IPA.
The Asylum Service has produced an informational leaflet for asylum seekers, entitled “Basic Information for People Seeking International Protection in Greece”, available in 20 languages. Moreover, the Asylum Service provides:

- Information in 18 languages on its website;
- A telephone helpline with recorded information for asylum seekers in 10 languages;
- A telephone helpline by which applicants can receive individual information, accessible for some hours daily;
- Information on the asylum procedure through 10 videos in 7 languages;
- A mobile application called “Asylum Service Application” with information on the procedure;
- An illustrated booklet with information tailored to asylum-seeking children, available in 6 languages.

However, due to the complexity of the procedure and constantly changing legislation and practice, as well as bureaucratic hurdles, access to comprehensible information remains a matter of concern. Given that legal aid is provided by law only for appeal procedures and remains limited in practice, applicants often have to navigate the complex asylum system on their own, without sufficient information.

For example, as noted by FRA, applicants on the Eastern Aegean islands “still have only limited understanding of the asylum procedure and lack information on their individual asylum cases”. The lack of communication between different authorities on the islands and the frequent changes in the procedure also have an impact on the ability of asylum seekers to receive proper information.

Access to legal assistance

State-funded legal aid is not provided for the fast-track border procedure at first instance. Therefore, legal assistance at first instance is made available only by NGOs based on capacity and areas of operation, while the scope of these services remains severely limited, bearing in mind the number of applicants subject to the fast-track border procedure.

As regards the second instance, as of 31 December 2019, there were in total 5 lawyers registered in the register of lawyers, under the state-funded legal aid scheme, who had to provide legal aid services to the rejected applicants at the appeal stage under the fast-track border procedure on the five islands of Eastern Aegean and Rhodes. No lawyers under the state-funded legal aid scheme were present as of 31 December 2019 on Samos – one of the two islands with the largest number of asylum seekers and Leros.

Appeal

The IPA foresees that the deadline for submitting an appeal against a first instance negative decision is seven days, compared to five days under the previous Article 61(1)(d) of L.4375/2016. While the latter foresees an automatic suspensive effect for all appeals under the border procedure, this is no longer the case under the IPA. The automatic suspensive effect of appeals depends on the type of negative decision challenged by the applicant. For the case of applications examined under the border procedure, the derogation from automatic suspensive effect of appeals is applicable under the condition that the individual benefits from the necessary assistance of an interpreter, legal assistance and at least one week to prepare the appeal before the Appeals Committee.

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482 Asylum Service, Basic Information for People Seeking International Protection in Greece, June 2013.
483 Fundamental Rights Agency (FRA), Update of the 2016 FRA Opinion on fundamental rights in the hotspots set up in Greece and Italy, 2019, p. 36.
484 Greek Helsinki Monitor et al., No End In Sight: The mistreatment of asylum seekers in Greece, 2019.
485 Article 92(1)(c) IPA.
486 Article 104(3) IPA.
In cases where the appeal is rejected, the applicant has the right to file an application for annulment before the Administrative Court.

Fast-track border procedure

Similarly to the first instance fast-track border procedure, truncated time limits are also foreseen in the appeal stage, although a few improvements have been made following the introduction of the IPA. Whereas according to the previous Article 60(4) L 4375/2016, appeals against decisions taken in the fast-track border procedure had to be submitted before the Appeals Authority within five days, the deadline for appealing a negative decision is now ten days.

With regard to applications rejected at first instance within the framework of the fast-track border procedure, the new law states, that a derogation from automatic suspensive effect of appeals can only be ordered provided that the individual benefits from the necessary assistance of an interpreter, legal assistance and at least one week to prepare the appeal before the Appeals Committee.

The Appeals Committee examining the appeal must take a decision within seven days, contrary to three months in the regular procedure. In practice it is difficult for the Appeals Committee to meet this very short deadline.

According to Articles 97(2) and 78(3) IPA which refer to the specific case of applicants residing in RIC on islands and whose applications are examined under the “fast-track border procedure”, a written certification of the Head of the Reception Centre should be sent to the Appeals Committee on the day prior of the examination of the Appeal. The certification must specify that the appellant lived at the specific RIC at the day of examination or, alternately, an appointed lawyer should appear before the Committee on the day of the examination of the appeal. If these conditions are not met, the appeal is rejected as “manifestly unfounded”. This raises serious concerns with regard to the effectiveness of the remedy and the risk of a violation of the principle of non-refoulement.

As regards appeals against first instance inadmissibility decisions issued to Syrian asylum-seekers based on the “safe third country” concept in the fast-track border procedure, it should be highlighted that in 2016, the overwhelming majority of second instance decisions by the Backlog Appeals Committees overturned the first instance inadmissibility decisions based on the safe third country concept. The Special Rapporteur on the human rights of migrants “commended the independence of the Committee, which, in the absence of sufficient guarantees, refused to accept the blanket statement that Turkey is a safe third country for all migrants — despite enormous pressure from the European Commission.”

Conversely, following the amendment of the composition of the Appeals Committees, 98.2% of decisions issued by the Independent Appeals Committees in 2017 upheld the first instance inadmissibility decisions on the basis of the safe third country concept.

In 2018, the Appeals Committees issued 78 decisions dismissing applications by Syrian nationals as inadmissible based on the safe third country concept. As far as GCR is aware, there have been only two cases...
of Syrian families of Kurdish origin, originating from Afrin area, in which the Appeals Committee ruled that Turkey cannot be considered as a safe third country for said Syrian applicants due to the non-fulfilment of the connection criteria (see Safe Third Country). 493

Respectively, in 2019 and as far as GCR is aware, all cases of Syrian Applicants examined under the fast-track border procedure have been rejected as inadmissible on the basis of the safe third country concept (29 Decisions), 494 if no vulnerability was identified or no grounds for the case to be referred for humanitarian status were present.

Onward appeal

Applicants for international protection might lodge an application for annulment (αίτηση ακύρωσης) of a second instance decision of the Appeals Authority Committees before the Administrative Court of Appeals. The general provisions regarding judicial review, as amended in 2018 and 2019, are also applicable for judicial review issued within the framework of the fast-track border procedure and concerns raised with regard to the effectiveness of the remedy are equally valid. Thus, among others, the application for annulment before the Administrative Court does not have automatic suspensive effect, even if combined with an application for suspension. Suspensive effect is only granted by a relevant decision of the Court. This judicial procedure before the Administrative Courts is not accessible to asylum seekers without legal representation.

According to practice, appellants whose appeals are rejected within the framework of the fast-track border procedure are immediately detained upon the notification of the second instance negative decision and face an imminent risk of readmission to Turkey. The findings of the Ombudsman, that detainees arrested following a second instance negative decision are not promptly informed of their impeding removal, 495 are still valid.

The IPA has further hindered the effective access to judicial review for appellants for whom their appeal has been rejected within the framework of the fast-track border, i.e. who remain under a geographical limitation on the Aegean Islands or are detained on the Aegean Islands following the notification of the second instance decision. Article 115(2) IPA foresees that the First Instance Administrative Court of Athens is the competent Court for submitting legal remedies against second instance negative decisions with regards application submitted on the Aegean islands. Thus, legal remedies regarding appellants who reside or even are detained on the Aegean Islands, should be submitted by a lawyer before the Administrative Court of Athens. By taking into consideration the geographical distance and the practical obstacles (for example to appoint a lawyer able to submit the legal remedy in Athens) this may render the submission of legal remedies non accessible for those persons. 496

Given the constraints that detained persons face vis-à-vis access to legal assistance, the fact that legal aid is not foreseen by law at this stage, that an onward appeal can only be submitted by a lawyer, and the lack of prompt information about impeding removal, access to judicial review for applicants receiving a second instance negative decision within the framework of the fast-track border procedure is severely hindered.

Vulnerable applicants

As opposed to the previous legislation, the IPA repeals the exemption of persons belonging to vulnerable groups and applicants falling under the Dublin Regulation from the fast-track border procedure. This includes unaccompanied minors who are brought under the scope of the border procedure. Article 90(4) IPA provides that unaccompanied minors are examined under the fast track border procedure in case that:

\[ \text{494 Information provided by the Appeals Authority on 21 April 2020.} \]
\[ \text{495 Greek Ombudsman, Return of third-country nationals – Special Report 2017, 2018.} \]
\[ \text{496 Mutandis mutandis ECHR, Kaak v. Greece, Application No 34215/16, Judgment of 3 October 2019.} \]
the minor comes from a country designated as a safe country of origin in accordance with the national list.

- he/she submits a subsequent application.
- he/she is considered a threat to the public order/national security.
- there are reasonable grounds for considering that a particular country is a safe third country for the minor, and this would be in line with the best interest of the minor.
- the unaccompanied minor has misled the authorities by submitting false documents or he/she has destroyed or he/she has lost in bad faith his/her identification documents or travel document, under the conditions that he/she or his/her guardian will be given the opportunity to provide sufficient grounds on this.

Detention and geographical restriction

De facto detention in the normal border procedure

A regime of *de facto* detention applies for persons entering the Greek territory via the Athens International Airport – usually through a transit flight – without a valid entry authorisation. These persons receive an entry ban to the Greek territory and are then arrested and held in order to be returned on the next available flight. Persons temporarily held while waiting for their departure are not systematically recorded in a register. In case the person expresses the intention to apply for asylum, then the person is detained at the holding facility of the Police Directorate of the Athens Airport, next to the airport building, and, after full registration, the application is examined under the border procedure. As provided by the law, where no decision is taken within 28 days, the person is allowed to enter the Greek territory for the application to be examined according to the regular procedure.

However, despite the fact that national legislation provides that rights and guarantees provided by national legislation *inter alia* on the detention of asylum seekers should also be enjoyed by applicants who submit an application in a transit zone or at an airport, no detention decision is issued for those applicants who submit an application after entering the country via the Athens International Airport without a valid entry authorisation. These persons remain *de facto* detained at the Athens Airport Police Directorate for a period up to 28 days from the full registration of the application.

Geographical restriction and detention in the fast-track border procedure

The fast-track border procedure applied to applicants subject to the EU-Turkey statement takes place in the Reception and Identification Centres (RIC) where hotspots are established (Lesvos, Chios, Samos, Leros, Kos). At the early stages of the implementation of the Statement, a detention measure was systematically and indiscriminately imposed on all new arrivals. More precisely, this measure was imposed either *de facto*, under the pretext of a decision restricting freedom to the area within the premises of the RIC for a period of 25 days, or under a deportation decision together with a detention order. Following criticism by national and international organisations and actors, and due to limited capacity to maintain and run closed facilities on the islands with high numbers of people, the “restriction of freedom” to within the RIC premises as a *de facto* detention measure is no longer applied in the RIC of Lesvos, Chios, Samos Leros and Kos, as of the end of 2016. Now, in most cases, newly arrived persons are allowed to exit the RIC, at least after some days. For example, in Lesvos, as of December 2019, new arrivals remain restricted, until reception and identification procedures are conducted, for 3-5 days. This restriction to RIC facilities amounts to *de facto* detention.

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498 Article 60(2) L 4375/2016 and Article 90(2) IPA.
499 Article 60(1) L 4375/2016 and Article 90(1) IPA.
500 UNHCR, *Explanatory Memorandum pertaining to UNHCR’s submission to the Committee of Ministers of the Council of Europe on developments in the management of asylum and reception in Greece*, May 2017, p. 2.
The implementation of Article 43 of Directive 2013/32/EU in practice

Up until the conclusion of reception and identification procedures, a geographical restriction is also systematically imposed on every newly arrived person on the Greek islands, imposing the obligation to remain on the islands and in the RIC facilities.

At the end of 2019, the “pilot project”, launched in 2017 was still being implemented on Lesvos, Kos and part of Leros. This consists in newly arrived persons belonging to particular nationalities with low recognition rates immediately being placed in detention upon arrival and remaining there for the entire asylum procedure.501 While the project initially focused on nationals of Pakistan, Bangladesh, Egypt, Tunisia, Algeria and Morocco, the list of countries was expanded to 28 in March 2017 and the pilot project was rebranded as the “low-profile scheme”.502 As of May 2018, the scheme was implemented for nationals of countries with a recognition rate lower than 25% on Lesvos, whereas the recognition rate threshold for implementation is 33% on Kos.503 The implementation of this practice raises concerns vis-à-vis the non-discrimination principle and the obligation to apply detention measures only as a last resort, following an individual assessment of the circumstances of each case and to abstain from detention of bona fide asylum seekers.

Detention following second-instance negative decision

Applicants on the islands whose asylum application is rejected at second instance under the fast-track border procedure are immediately detained upon notification of the second-instance negative decision. This practice directly violates national and European legislation, according to which less coercive alternative measures should be examined and applied before detention. While in detention, rejected asylum seekers face great difficulties in accessing legal assistance and challenging the negative asylum decision before a competent court.

Detention due to non-compliance with geographical restriction

A “geographical restriction” is systematically imposed on newly arrived persons subject to the EU-Turkey Statement, meaning that they have to remain on the island of arrival. It is applied indiscriminately, without a proportionality test, for an indefinite period (without a maximum time limit provided by law), and without an effective legal remedy to be in place.

As set out in a Police Circular of 18 June 2016, where a person is detected on the mainland in violation of his or her obligation to remain on the islands, “detention measures will be set again in force and the person will be transferred back to the islands for detention – further management (readmission to Turkey).”504 Following this Circular, all newly arrived persons who have left an Eastern Aegean island in breach of the geographical restriction, if arrested, are immediately detained in order to be returned to that island. This detention is applied without any individual assessment and without the person’s legal status and any potential vulnerabilities being taken into consideration. Detention in view of transfer from mainland Greece to the given Eastern Aegean island can last for a disproportionate period of time, in a number of cases exceeding five months, thereby raising issues with regard to the state’s due diligence obligations. Despite the fact that a number of persons allege that they left the islands due to unacceptable reception conditions and/or security issues, no assessment of the reception capacity is made before returning these persons to the islands.

In practice, persons returned to the islands either remain detained – this is in particular the case of single men or women – or they are released without any offer of an accommodation place. Detention on the islands is of

502 ECRE, ‘Asylum procedure based on nationality rather than on merit – the situation of Pakistani asylum applicants under the EU Turkey Deal’, 8 December 2017.
504 Directorate of the Hellenic Police, "Εγκύκλιος ΕΛΑΣ 1604/16/1195968/18-6-2016 Διαχείριση παράτυπων αλλοδαπών στα Κέντρα Υποδοχής και Ταυτοποίησης, διαδικασίες Ασύλου, υλοποίηση Κοινής Δήλωσης ΕΕ-Τουρκίας της 18ης Μαρτίου 2016 (πραγματοποίηση επανεισδοχών στην Τουρκία)". See also inter alia Kathimerini, Islands “suffocating” due to the refugee issue, 23 August 2016.
particular concern as a high number of third-country nationals, including asylum seekers, continue to be held in detention facilities operated by the police directorates and in police stations, which are completely inappropriate for immigration detention. As a rule, this is the case in Chios, Samos, Leros and Rhodes where police stations were the only available facility for immigration detention in 2019. For those released upon return to the islands, destitution is a considerable risk, as reception facilities on the islands are often overcrowded and exceed their nominal capacity, whereas in Rhodes there is no RIC at all. In 2019, a total of 551 persons were returned to the Eastern Aegean islands after being apprehended outside their assigned island, up from 514 in 2018.

Involvement of UNHCR

UNHCR is present in Athens, Lesvos, Chios, Samos, Kos, Leros, Rhodes, Thessaloniki and Ioannina, and UNHCR teams cover through physical presence, field missions and *ad hoc* visits the sites in their area of responsibility. 505 In addition, a UNHCR team present at the RIC of Fylakio (Evros) at the Greek-Turkish land border helps asylum seekers who have recently arrived at the RIC. They ensure asylum seekers are identified properly and that unaccompanied children and people with specific needs are directed to appropriate services. 506

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505 UNHCR, *About UNHCR in Greece*.
Annex VIII – Country profile: Hungary

The Country profile Hungary aims to provide a detailed overview of the functioning of the Hungarian border procedure up until 2017 and the procedure applied in the transit zone up until 2020. The information contains extracts and is mainly derived from following source:


Since 28 March 2017, the border procedure has been suspended. The border procedure was used only until the amendments to the Asylum Act entered into force on 28 March 2017. The amendments prescribe that due to the current state of mass migration emergency the provisions on border procedures are no longer applicable, since the procedure in the transit zones became a regular procedure and all asylum seekers have to remain in the transit zone until the end of the procedure. In 2020, the use of border procedure is still suspended. However, following a judgment of the European Union (CJEU), declaring the transit zone on the border between Hungary and Serbia as unlawful detention, the transit zone has been abolished.

On 18 June 2020, the Hungarian Government adopted Act VIII 2020 on Transitional Provisions related to the Termination of the State of Danger and on Medical Preparedness (the Omnibus Bill). The Omnibus Bill follows Decree 233/2020 (V.26), which was introduced at the end of May 2020 and provides clarification of asylum procedures during the state of danger. In accordance with the Bill those present at the territory of Hungary (with the exceptions listed below) or at the border crossing points cannot apply for asylum in Hungary, but are directed to the nearest Embassy. However, the Omnibus Bill does not restrict embassies to outside of the Schengen Zone, but allows the Government to issue a separate Decree that defines precisely at which Embassies the statement of intent to make an application for asylum can be submitted. The Government Decree 292/2020 states that it is only possible to apply at the embassy in Belgrade or Kiev. Following the submission of a statement of intent, which has to be made through a prescribed form, authorities may conduct remote interviews before issuing a single-entry permit to make an application for asylum. It is no longer possible to apply for asylum on the territory of Hungary, neither at the border crossing points with the exception of three categories of persons: family members of refugees and beneficiaries of international protection who are staying in Hungary; and anyone subject to measures restricting their liberty unless they are found to have entered the territory irregularly. The Bill will be in force until end of 2020, although it is highly likely that it may be extended.

In the section below we briefly describe the legal framework regarding the implementation of article 43. This will be followed by the situation in the transit zone, that followed the suspension of the border procedure and was in place until May 2020.

Statistics
Applications for international protection at borders

In Hungary, figures on applications for international protection at borders were as follows:

507 For more details, see AIDA, Country Report Hungary, 2017 Update, February 2018, 41 et seq.
508 EDAL, CJEU - Jointed Cases C-924/19 PPU and C-925/19 PPU, Judgement of 14 May 2020, paras. 223-225; 231.
509 HHC, Hungary de facto removes itself from the common european asylum system, 12 August 2020.
The graph indicates that the number of applications lodged at the border has significantly dropped from 9,861 in 2016 to 394 in 2019, i.e. a -96% decrease within three years. Similar observations can be made about the total number of applications in Hungary, as Eurostat indicates a decrease from 29,430 applicants in 2016 to 500 applicants in 2019; i.e. a -98% decrease. As regards the number of border procedures applied until 2017, they remained relatively low compared to the total number of applications.

**Authorities**

The Asylum and Immigration Office ceased to exist on 1 July 2019 as the National Directorate-General for Aliens Policing (NDGAP) was established taking over the responsibility for asylum and aliens policing matters. The Directorate continues to be under the supervision of the Ministry of Interior and having its own budget, but operating as a law enforcement body under the Police Act. While the Directorate kept the institutional structure of its legal predecessor, as being a law enforcement body, the employees – who decided to stay at the Directorate – had to enter to the police personnel and therefore, lost their government employee status.

The NDGAP, a government agency under the Ministry of Interior, is in charge of the asylum procedure through its Directorate of Refugee Affairs (asylum authority). The NDGAP is also in charge of operating the transit zones, open reception centres and closed asylum detention facilities for asylum seekers.

The Regional Administrative and Labour Court is competent for the appeals procedure.

**The application of the border procedure (suspended since March 2017)**

**Legal framework**

Provisions regulating the border procedure are currently suspended in Hungary, due to the “state of crisis due to mass migration”.

Article 43 of directive 2013/32/EU was implemented by Section 2 of the Act CVI. of 2015 amending the Act LXXX of 2007 on Asylum on the 8th of July 2015. This was suspended as of 28 March 2017. The law foresaw two types of border procedures: (a) the so called “airport procedure” and (b) the procedure in transit zones.

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510 Sections 1, 2 and 4 of the Government Decree no. 126/2019 (V.30.) on the appointment of the aliens policing body and its powers.

511 Act XXXIV of 1994 on the Police.

512 Section 5 point g) of the Police Act.
As of 28 March 2017 (until May 2020) asylum applications could only be submitted in the transit zones, with the exception of those staying lawfully in the country. All asylum seekers, excluding unaccompanied children below the age of 14, have to stay at the transit zones for the whole duration of their asylum procedure. The asylum procedure in the transit zone became therefore a regular procedure and no longer a border procedure.

The border procedure is a specific type of admissibility procedure; therefore the assessment of the claim is limited to a limited set of circumstances, in most cases to the sole fact whether the applicant entered Hungary from a safe third country. The applicant’s actual need of international protection is not assessed in the border procedure.

Airport procedure

The airport procedure is regulated in Section 72 of the Asylum Act and Section 93 of Decree 301/2007. Although there were approximately 100 to 200 asylum applications submitted at the airport each year, the airport procedure was rarely applied in practice.

Border procedure in the transit zones

The border procedure in transit zones was introduced in September 2015 and is regulated in Article 71/A of the Asylum Act. The transit zones were established at Serbian and Croatian borders. The transit zone is where asylum procedures are conducted and where buildings required for conducting such procedures and housing migrants and asylum seekers are located. Asylum seekers could be held there for a maximum period of 4 weeks.

The European Committee for the Prevention of Torture (CPT) observed the following with regard to the border procedure: “The CPT notes the combination of the expediency of border asylum procedures, the lack of automatic suspensive effect of appeals against administrative decisions rejecting asylum applications as inadmissible, the absence of an obligation to hear the person by the court in the appellate proceedings, the possibility to take final court decisions by a judicial clerk, the impossibility to present new facts and evidence before the court and problematic access to legal assistance. Consequently, the CPT has serious doubts whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and involve an individual assessment of the risk of ill-treatment in case of removal and thus provide an effective protection against refoulement, bearing also in mind that, according to UNHCR, Serbia cannot be considered a safe country of asylum due to the shortcomings in its asylum system, notably its inability to cope with the increasing numbers of asylum applications.”

According to Subsection 3 and 4 of Section 71/A of the Act LXXX of 2007 on Asylum, the asylum authority shall decide on the admissibility of an application in priority proceedings, at the latest within eight days from the time of submission thereof. When a decision has not been taken within four weeks, the asylum authority shall grant entry in accordance with the provisions of law. In the cases directly witnessed by the HHC, an inadmissibility decision at the transit zone was given in less than an hour. This was confirmed by UNHCR. Such speedy decision-making gives rise to evident concerns regarding the quality and the individualisation of asylum proceedings as required by EU law and the application of even the most basic due process safeguards. In parallel with the inadmissibility decision, rejected asylum seeker received a ban on entry and stay for 1 or 2 years. This ban was entered into the Schengen Information System and prevents the person from entering the entire Schengen area in any lawful way. In Ilias and Ahmed, the European Court of Human Rights rules that Hungary violated Article 3 by failing to conduct an efficient and adequate assessment when applying the safe third country clause for Serbia.

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513 CPT, Report to the Hungarian Government on the visit to Hungary carried out from 21 to 27 October 2015, 3 November 2016, para 69.
514 UNHCR, Hungary as a country of asylum, May 2016, para 25.
515 Article 10(3)(a) recast Asylum Procedures Directive; Article 4(3)(c) recast Qualification Directive.
Personal interview

According to the Hungarian authorities at least one personal interview is conducted in every asylum procedure including the border procedure. In every case the hearing will cover the applicant’s personal data, the conditions and route of arrival to Hungary, the claimed grounds for asylum. In a border procedure more emphasis is being put during the interview on the circumstances and route of the applicant after his/her departure, with focus on the countries visited during the journey. The authorities further noted that interpreters are available in person or through video conferencing systems.

Procedural guarantees

Following its visit in 2015 the CPT concluded that it had serious doubts whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and involve an individual assessment of the risk of ill-treatment in case of removal and thus provide an effective protection against refoulement.

Appeal

According to Subsection 3) of Section 53 of the Act LXXX of 2007 on Asylum, there is a deadline of seven days for filing an appeal against inadmissibility decisions, and Section 68 gives eight days in the case of decisions on the merit.

Vulnerable applicants

According to the Asylum Act, the border procedure cannot be applied to vulnerable asylum seekers.\textsuperscript{516} These are unaccompanied minors, or other vulnerable persons, in particular minors, the elderly, people with disabilities, pregnant women, single parents and victims of torture, rape or other serious forms of mental, physical or sexual violence, persons who, after an individual assessment of their situation, can be identified as having special needs. The authorities shared that vulnerability is assessed by the members of police conducting the applicant’s entry to the border facility, by the medical expert serving there, and by the asylum officer based on preliminary information, what was said at the personal hearings, and other additional factors.

However, it has been noted that since there is no proper identification mechanism in place, the only vulnerabilities that are taken into account are the visible ones. This means that usually only families, unaccompanied minors, single women, elderly and disabled would be excluded from the border procedure and after admittance to the transit zone, they would be transferred to the open or closed camps in the country.\textsuperscript{517}

Detention and de facto detention in the border procedure

In the prior airport procedure

Asylum seekers may not be held in the holding facility at the Budapest international airport transit zone for more than 8 calendar days. If the application is not deemed inadmissible or manifestly unfounded or no decision has been taken after 8 days, the asylum seeker has to be allowed entry into the country and a regular procedure will be carried out.\textsuperscript{518} However, asylum seekers admitted to the country are usually detained, since as of July 2013, applying for asylum in the airport procedure constitutes a ground for asylum detention.\textsuperscript{519}

\textsuperscript{516} Section 71A(7) Asylum Act.
\textsuperscript{517} Section 71A(4) Asylum Act.
\textsuperscript{518} Section 72(5) Asylum Act.
\textsuperscript{519} Section 31/A(e) Asylum Act.
In the transit zones
People asking for asylum at the border zones were kept inside the transit zones, unless they were exempted from the border procedure, whereby they are transferred either to the asylum detention centre or are directed to go to the open reception centres.

Despite the government’s position that asylum seekers in the transit zones were not deprived of their liberty, the conditions in these facilities confirmed that applicants held there are in a state of detention. For example, in the Röszke transit zone on the Serbian-Hungarian border, asylum seekers could only move within a restricted area within the facility not larger than 140m².520 It is also clear from the CPT report following their visit to Hungary that they consider transit zones as places where people are deprived of their liberty.521

Asylum procedure in the transit following the suspension of the border procedure

From 28 March 2017 - 21 May 2020, asylum applications could only be submitted in the transit zones, with the exception of those staying lawfully in the country. All asylum seekers, excluding unaccompanied children below the age of 14, had to stay at the transit zones for the whole duration of their asylum procedure. The asylum procedure in the transit zone is a regular procedure and no longer a border procedure.

The Commissioner for Human Rights of the Council of Europe Dunja Mijatović wrote in the report following her visit to Hungary from 4 to 8 February 2019 that, “Human rights violations in Hungary have a negative effect on the whole protection system and the rule of law. They must be addressed as a matter of urgency”. This includes the arbitrary detention of asylum seekers in transit zones along the Hungarian-Serbian border and "repeated reports of excessive violence by the police during the forcible removals of foreign nationals".522

Access to the transit zone

Not all people seeking protection had immediate access to the transit zone. The NDGAP decided exactly who could enter the transit zone on a particular day. Beginning in March 2016, an ever-growing number of migrants continued to gather in the “pre-transit zones”, which are areas partly on Hungarian territory that are sealed off from the actual transit zones by fences in the direction of Serbia. Here, migrants waited in the hope of entering the territory and the asylum procedure of Hungary in a lawful manner. Approximately one-third of those waiting to access the transit zones were children. Although parts of the pre-transit zones are physically located on Hungarian soil, they are considered to be in "no man’s land” by Hungarian authorities, who provided little to nothing to meet basic human needs or human rights. Migrants waited idly in dire conditions.523

In autumn 2016, the Serbian authorities decided to terminate the practice of waiting in the pre-transit zone. Since then, all asylum seekers that wished to be put on the waiting list in order to be let to the transit zone in Hungary needed to be registered in one of the temporary reception centres in Serbia and wait there until it was their turn to enter the transit zone.524 The only person staying in the pre-transit zone for longer periods of time was the community leader. People who are about to enter the transit zone are brought to the pre-transit zone usually one day in advance of their entry. Since April 2018, the role of the community leader in the pre-transit zone is shared between the fathers of the families from the Subotica reception centre. They rotate, with each staying for about 4 days in the pre-transit zone. This is necessary in order to prevent people from

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520 ECRE, Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary, October 2015, pp. 14-16.
521 CPT, Report to the Hungarian Government on the visit to Hungary carried out from 21 to 27 October 2015, 3 November 2016.
522 Council of Europe, Commissioner for Human Rights Dunja Mijatović; Report following the visit to Hungary from 4 to 8 February 2019, 21 May 2019.
523 HHC, Destitute, but waiting: Report on the visit to the Tompa and Röszke Pre-Transit Zone area on the Serbian-Hungarian border, 22 April 2016.
accessing pre-transit area and jumping the list. In addition, since there is no direct communication between Hungarian and Serbian authorities, fathers are used for communication between the authorities. The fathers stay in the heated tent in Röszke and in the abandoned duty free shop in Tompa. Hungarian authorities give them food once a day.

The clear criteria that determined who is allowed access to the transit zone are time of arrival and vulnerability. The other determining factors were not so clear. In Röszke, there were three separate lists for those waiting: one for families, one for unaccompanied children and one for single men. In Tompa there is a single list containing the names of all three groups. The names were put on the list by the Serbian Commissariat for Refugees, once the people had registered at the temporary reception centres in Serbia. The list was then communicated to the so-called community leader (an asylum seeker) who is chosen by the Commissariat and who is placed in the pre-transit zone. The community leader then communicated the list to the Hungarian authorities. The Hungarian authorities allowed people into the transit zones based on these lists and communicated the names of the people entering the transit zone in the following days to the community leader, who then informed the Commissariat who then informed the people. There was no official communication between the Hungarian and Serbian authorities on this matter. The HH C observed that the waiting time in Serbia is already exceeding a year.

**Asylum procedure in the transit zone**

The asylum procedure in Hungary started with an assessment of whether a person falls under a Dublin procedure. If this is not the case, the NDGAP proceeds with examining of whether the application is inadmissible or whether it should be decided in an accelerated procedure. The decision on this shall be made within 15 days. The procedural deadline for issuing a decision on the merits is 60 days.

According to the NDGAP, the average length of an asylum procedure, from submitting the application for asylum until the first instance decision is delivered was 82 days in 2019. In case of Syrian asylum seekers, this time was shorter, a total of 69 days, while the applications of Afghan applicants were decided in 78 days. In case of Iraqi asylum seekers, the average length of the asylum procedure was longer than the average for all asylum seekers, lasting for a total of 87 days.

In practice, according to the HHC, the average length of an asylum procedure, including both the first-instance procedure conducted by the NDGAP and the judicial review procedure, is 3–6 months. In 2019, the HHC observed significantly extended asylum procedures. This is due to the fact that most of the negative decisions are quashed at the court and the NDGAP has to conduct a new procedure that in many cases results in another negative decision that is then quashed again by the court. The average therefore increased to 6 – 10 months.

The asylum seeker has a first interview usually immediately upon the entry into the transit zone, unless the interpreter is not available, in which case the interview is scheduled in the following days. During the asylum procedure, the asylum seeker can have one or more substantive interviews, where he or she is asked to explain in detail the reasons why he or she had to leave his or her country of origin.

**Lack of effective legal assistance at the first interview**

In the transit zones asylum seekers requesting assistance of lawyers at their first interview would get such assistance only occasionally, depending on whether the State legal aid lawyers are at that moment present in the transit zone. The interview would not be postponed in order to wait for the lawyer to arrive. (source AIDA report, p.34). Although asylum seekers in the transit zone are informed about the possibility to request legal assistance from state legal aid lawyers, this assistance has been reported as not effective. Asylum seekers have complained that the state legal aid lawyers rarely meet them and do not give them any information about the procedure. They rarely write effective submissions for the clients.

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525 Section 47(2) Asylum Act.
526 Section 47(3) Asylum Act.
The implementation of Article 43 of Directive 2013/32/EU in practice

The HHC attorneys or any other non-government affiliated attorneys do not have access to the transit zones. The HHC attorneys could only represent the clients if the asylum seekers explicitly communicated the wish to be represented by the HHC attorney to the NDGAP and signed a special form. Once this form is received by the NDGAP, the HHC attorney could meet the client – accompanied by police officers – in a special container located outside the living sector of the transit zone. This way the legal aid in the transit zone was seriously obstructed, as free legal advice does not reach everyone in the transit zone, but only those explicitly asking for it. Furthermore, it was impossible to obtain legal assistance by the HHC attorney during the first NDGAP interview, since the interview usually happens immediately when the person is admitted to the transit zone and therefore there is no opportunity to access an attorney first.

In the summer of 2018, Hungary passed legislation criminalising otherwise legal activities aimed at assisting asylum seekers. Preparing or distributing information materials or commissioning such activities a) in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded, b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit, became a crime, which is punished by custodial arrest or, in aggravated circumstances, imprisonment up to one year (e.g. in case of material support to irregular migrants, organisations or individuals operating within the 8 km zone near the border; or providing assistance on a regular basis).\(^{527}\)

**Appeal**

The deadline for lodging a request for judicial review is only 8 days.\(^{528}\) The drastic decrease of the time limit to challenge the NDGAP’s (and before the IAO’s) decision, in force since 1 July 2013, has been sharply criticised by UNHCR and NGOs such as HHC, which have argued that this will jeopardise asylum seekers’ access to an effective remedy.\(^{529}\) The appeal has no automatic suspensive effect. This needs to be requested.

**Inadmissibility grounds**

A new inadmissibility ground, a hybrid of the concepts of “safe third country” and “first country of asylum”, is in effect since 1 July 2018.\(^{530}\) The provision stems from amendments to the Asylum Act and the Fundamental Law,\(^{531}\) but it was only put to practice in mid-August 2018. Since 28 March 2017, persons without the right to stay in Hungary can only lodge an asylum application in either of the two transit zones located at the Hungarian-Serbian border.\(^{532}\) Since Hungary regards Serbia as a safe third country,\(^{533}\) the new inadmissibility provision abolished any remaining access to a fair asylum procedure in practice. Since July 2018, once an asylum application was lodged, authorities systematically denied international protection to those who arrived via Serbia, declaring these applications inadmissible under the new rules.\(^{534}\) The applicant can rebut the NDGAP’s presumption of inadmissibility in 3 days, after which the NDGAP will deliver a decision.\(^{535}\) In case the NDGAP decides the application inadmissible, it will also order the applicant’s expulsion.

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\(^{528}\) Section 68 Asylum Act.


\(^{530}\) Section 51(2)(f), and newly introduced Section 51(12) Asylum Act.

\(^{531}\) Article XIV Fundamental Law.

\(^{532}\) Section 80/J(1) Asylum Act.

\(^{533}\) Section 2 Decree 191/2015.

\(^{534}\) FRA, *Periodic data collection on the migration situation in the EU*, November 2018.

\(^{535}\) Section 51(12) Asylum Act.
This inadmissibility ground is not compatible with current EU law as it arbitrarily mixes rules pertaining to inadmissibility based on the concept of “safe third country” and that of “first country of asylum”. Article 33(2) of the recast Asylum Procedures Directive provides an exhaustive list of inadmissibility grounds, which does not include such a hybrid form. This breach of EU law is further attested by the European Commission’s decision of 19 July 2018 to launch an infringement procedure. According to the Commission, “the introduction of a new non-admissibility ground for asylum applications, not provided for by EU law, is a violation of the EU Asylum Procedures Directive. In addition, while EU law provides for the possibility to introduce non-admissibility grounds under the safe third country and the first country of asylum concepts, the new law and the constitutional amendment on asylum curtail the right to asylum in a way which is incompatible with the Asylum Qualifications Directive and the EU Charter of Fundamental Rights.”

The NDGAP does not examine whether Serbia would be willing to readmit the applicant before issuing an inadmissibility decision based on this hybrid ground, despite this being a condition for a country to be considered a first country of asylum, according to Article 35 recast APD. In all final inadmissibility cases based on the hybrid of the concepts of safe third country and first country of asylum, the NDGAP would not withdraw its inadmissibility decision despite the fact that Serbia officially refused to admit the applicants back. Instead, the former IAO’s and now the NDGAP’s alien policing department began an arbitrary practice of modifying internally the expulsion order issued by the NDGAP’s asylum department by changing the destination country from Serbia to the country of origin of the applicants. Against such internal modification no effective legal remedy is available under domestic legislation. This means that Hungary not just automatically rejects all asylum claims, but it also expels asylum seekers to their countries of origin (such as Afghanistan) without ever assessing their protection claim in substance.

On 14 May 2020, the CJEU ruled that a change of the destination country in a return decision by an administrative authority should be regarded as a new return decision requiring an effective remedy in compliance with Article 47 CFREU. It found that the Hungarian legislation providing for a safe transit country ground applicable in the present case was contrary to EU law.

**De facto detention in the transit zone**

Since March 2017, first-time asylum seekers (with exception of UAM below the age of 14) without lawful Hungarian residence or visa have been accommodated exclusively in one of the transit zones immediately after claiming asylum where they are entitled only to reduced material conditions. Asylum seekers who enter the transit zones can no longer request to stay in private accommodation at their own cost on account of the existent state of crisis due to mass migration. The majority of asylum seekers (433 persons) in 2019 were placed in the transit zones, while only a few applicants were waiting for their first instance asylum decision in one of the open reception facilities in 2019, such as in 2018.

Since 28 March 2017, all asylum seekers entering the transit zones of Röszke and Tompa are de facto detained, although the Hungarian authorities refuse to recognise that this is detention. The fact that asylum seekers inside the transit zones are deprived of their freedom of movement is also confirmed by the UNWGAD.

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537 Filippo Grandi, UN High Commissioner for Refugees: Hungary’s coerced removal of Afghan families deeply shocking, 8 May 2019.
538 EDAL, CJEU - Joined Cases C-924/19 PPU and C-925/19 PPU, Judgement of 14 May 2020.
539 Information provided by former IAO, 12 February 2019.
540 UNWGAD, ‘UN human rights experts suspend Hungary visit after access denied’, 15 November 2018.
On 14 May 2020, the Court of Justice of the European Union published its judgment in the joined cases C-924/19 and C-925/19 concerning, inter alia, the accommodation of asylum seekers in the Röszke transit zone at the Hungarian-Serbian border. In contrast to the Ilias and Ahmed judgment of the ECtHR, the CJEU explicitly qualified keeping people at the border as detention. The Court held that the obligation for a person to remain permanently in a transit area whose perimeter is restricted and closed, within which the person’s movements are limited and monitored, and which the person cannot legally leave voluntarily, in any direction whatsoever, appears to be “detention” within the meaning of the Return Directive (RD) and Reception Conditions Directive (RCD). To reach this conclusion, the Court relied on the definition of detention in Article 2(h) of the RCD, according to which detention refers to confinement of an applicant within a particular place, where the person is deprived of his/her freedom of movement. This definition applies also to detention regulated by the RD, which does not include a definition. Following this judgment, the transit zones have been abolished.

CPT,\textsuperscript{541} UNHCR,\textsuperscript{542} UNHCR,\textsuperscript{543} UN High Commissioner for Human Rights,\textsuperscript{544} UN Special Rapporteur on the human rights of migrants,\textsuperscript{545} European Commission,\textsuperscript{546} and Commissioner on Human Rights of the Council of Europe.\textsuperscript{547}

\textsuperscript{542} UNHCR, \textit{UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees}, 12 September 2017.
\textsuperscript{545} OHCHR, \textit{End of visit statement of the UN Special Rapporteur on the human rights of migrants, Felipe González Morales}, 17 July 2019.
\textsuperscript{546} European Commission, \textit{Migration and Asylum: Commission takes further steps in infringement procedures against Hungary}, 19 July 2018.
\textsuperscript{549} EDAL, \textit{CJEU - Joined Cases C-924/19 PPU and C-925/19 PPU}, Judgement of 14 May 2020.
\textsuperscript{550} Ibid. paras 223-225.
Annex IX – Country profile: Italy

The Country profile Italy aims to provide a detailed overview of the functioning of the Italian border procedure applied since 2019. The information contains extracts and is mainly derived from following source:


The border procedure was introduced in Article 28-bis(1-ter) of the Procedure Decree by the 2018 reform and foresees a 9-day examination of asylum applications where an applicant makes an application directly at the designated border areas or transit zones after being apprehended for evading or attempting to evade controls or comes from a safe country of origin. In these cases the entire procedure can be carried out directly at the border or in the transit area. The border procedure has been applied since September 2019.

The introduction of the border procedure in the Italian legal system took place under the reform by the previous government. While the current government announced that they would review this reform, no changes have been introduced, so far.

Being recently introduced in the legal framework, and due to the COVID-19 outbreak that had an effect on the entire asylum system, the information on practice regarding the application of the border procedure, is limited.

Statistics

There are no statistics available on the border procedure in Italy. Seeing its recent implementation into the legal framework the number of applicants channelled into the border procedure is limited.

Authorities

At the border persons can apply for international protection at the border police. The competent authorities to examine asylum applications and to take first instance decisions are the Territorial Commissions for the Recognition of International Protection (*Commissioni Territoriali per il Riconoscimento della Protezione Internazionale*), which are administrative bodies specialised in the field of asylum, under the Ministry of Interior. The Territorial Commissions are established under the responsibility of Prefectures. LD 220/2017, entering into force on 31 January 2018, reformed the functioning and composition of the Territorial Commissions. As of December 2019, there were 20 Territorial Commissions and 21 sub-Commissions across Italy. Out of the five Territorial Commissions foreseen by the amended Procedure Decree to examine asylum applications subject to the border procedure the MoI Decree has created only two new sections of Territorial Commissions, Matera (section of Bari) and Ragusa (section of Syracuse), therefore assigning to the Territorial Commissions already competent for the border or transit areas, the task of examining the related applications - where the conditions exist - with an accelerated procedure.

As amended by LD 220/2017, each Territorial Commission is composed at least by 6 members, in compliance with gender balance. These include:

- 1 President, with prefectural experience, appointed by the Ministry of Interior;

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551 Article 28-bis(1-ter) Procedure Decree, as amended by Article 9(1) Decree Law 113/2018.
553 Ministry of Interior, *Quaderno statistico per gli anni 1990-2018*.
554 Article 28 bis (1 quarter) Procedure Decree.
The implementation of Article 43 of Directive 2013/32/EU in practice

1 expert in international protection and human rights, designated by UNHCR;
4 or more highly qualified administrative officials of the Ministry of Interior, appointed by public tender.\footnote{556}{Article 4(1-bis) Procedure Decree, inserted by LD 220/2017, citing Article 13 Decree Law 13/2017, followed by the appointment of 250 persons through public tender.}

Following the 2017 reform, interviews are conducted by officials of the Ministry of Interior and no longer by UNHCR. The decision-making sessions of the Commission consist of panel discussions composed by the President, the UNHCR-appointed expert and two of the administrative officers, including the one conducting the interview.\footnote{557}{Ibid.}

The circulars authorize the establishment of “mobile units” within the territorial commissions in order to carry out the hearing at the border offices.

**Legal framework**

Decree Law 113/2018 amended the Procedure Decree introducing a border procedure, applicable in border areas and transit zones.\footnote{558}{Article 28-bis(1-quater) Procedure Decree, as amended by Article 9 Decree Law 113/2018 and L 132/2018.} The law postponed the definition and implementation of the procedure to the issuance of a MoI decree, consequently issued on August 5, 2019 and published on 7 September 2019.\footnote{559}{Ministry of Interior, Decree of 5 August 2019, published on Gazzetta Ufficiale as of 7 September 2019.}

The MoI Decree designates the transit and border areas where the accelerated procedure applies.\footnote{560}{Article 28 bis (1)(1-ter) and (1 – quater) of the Procedure Decree.}

The decree does not provide any definition of the border and transit areas as it only establishes that the border or transit areas are identified in those already existing in the following provinces:

- Trieste and Gorizia;
- Crotone, Cosenza, Matera, Taranto, Lecce and Brindisi;
- Caltanissetta, Ragusa, Syracuse, Catania, Messina;
- Trapani, Agrigento;
- Metropolitan city of Cagliari and South Sardinia.\footnote{561}{ASGI, Le zone di transito e di frontiera, September 2019.}

The Association for Juridical Studies on Immigration (ASGI) underlined that the provisions refer in a generic way to the “transit areas or border areas identified in those existing in the provinces” and not to demarcated areas, such as ports or airport areas or other places coinciding with physical borders with extra EU countries, which seems to conflict with the rules of the European Union, in particular with the definitions from article 2 of the Schengen borders code.\footnote{562}{When looking at the geographical location of Matera, it should be noted that it is not near to any of Italy’s borders.}

Not all airports and transit zones are included in the Decree as places where border procedure applies, so the border procedure can be applied only in the airports of the cities mentioned in the Decree.

**Grounds for applying the border procedure**

The border procedure may be applied where the applicant:\footnote{563}{Ibid.}

- Makes an application directly at the designated border areas or transit zones after being apprehended for evading or attempting to evade controls;
Comes from a Safe Country of Origin.\textsuperscript{564}

Under the border procedure, the entire examination of the asylum application can take place directly at the border area or in the transit zone.\textsuperscript{565}

Since its entry into force, the border procedure has also been applied to the internal border of Friuli Venezia Giulia for arrivals by land and to the Coastal borders to people disembarked from small boats, considering them as people who avoided or tried to avoid the border controls.

Among the first cases at the maritime border, the procedure was applied to some Tunisian citizens rescued at sea in the night between 6 and 7 October 2019. After 20 days of detention in the hotspots of Lampedusa, they were moved to the Questura of Agrigento. At the moment of the formalization of the asylum application, they were informed that a border procedure would have been applied to their applications for the attempt to evade border controls. Subsequently, as the circular of 18 October 2019 excluded the application of the border procedure to persons rescued at sea, the procedure was converted into an accelerated procedure for their coming from a safe country of origin, not taking into any account their vulnerability due to the shipwreck trauma.\textsuperscript{566}

As underlined by the Association for Juridical Studies on Immigration (ASGI), the wording of the provision could allow for the automatic application of accelerated border procedure to persons seeking asylum at the border as it makes its application solely contingent on the person having tried to evade controls. In this sense the provision goes beyond Article 43 the Asylum Procedures Directive, as the attempt to evade border controls is not included in the acceleration grounds laid down in Article 31(8) of the Directive which could lead to the application of a border procedure.

Among the first cases of border procedure’s applications in Trieste, as of December 2019, three Pakistani asylum seekers have been subject to the accelerated procedure simply because they encountered police not far away from the Slovenian border. According to the time frame set by the law, their hearing before the Territorial Commission took place after only 6 days from their arrival. However, the Commission decided to apply the ordinary procedure instead, since the three asylum seekers had not evaded or tried to evade any control. One of them, in particular, was seriously wounded in the foot, he could not run away and he went to meet the police officers hoping they could help him. Furthermore, all of them told that, in their way from Slovenia, they had always walked straight without having to pass any checks and that they had realized they had crossed the border only from the license plates of the cars. The Territorial Commission of Trieste observed that the behaviour was not compatible with the intention to avoid border controls but nothing was observed about the fact that the border between Slovenia and Italy is purely internal to the European Union and no suspension of the Schengen Agreement was in place when the applicants crossed the internal border. Thanks to the TC’s decision, the appeal was filed under the ordinary procedure, granting them with automatic suspensive effect. The acceleration of the procedure, however, prevented the applicants from promptly obtaining the useful documentation to prove their origin and their credibility.

\textbf{Time limits}

The border procedure under Article 28-bis(1-ter) of the Procedure Decree follows the same rules as the 9-day Accelerated Procedure relating to applications made from CPR or hotspots under Article 28-bis(1). Upon receipt of the application, the Questura immediately transmits the necessary documentation to the Territorial

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\textsuperscript{564} The list of safe countries of origin has been adopted by decree of the Minister of Foreign Affairs on 4 October 2019, in agreement with the Ministry of Interior and the Ministry of Justice. It includes: Albania, Algeria, Bosnia and Herzegovina, Cape Verde, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Senegal, Serbia, Tunisia and Ukraine.

\textsuperscript{565} Article 28-bis(1-ter) Procedure Decree, as amended by Article 9 Decree Law 113/2018 and L 132/2018.

\textsuperscript{566} Questione Giustizia, “\textit{Le nuove ipotesi di procedure accelerate e di frontiera}”, 9 January 2020.
Commission, which must take steps for the personal interview within 7 days of the receipt of the documentation. The decision must be taken within the following 2 days. 567

In two circulars issued on 16 October 2019 568 and 18 October 2019 569, the MoI gave directives for the application of the border procedure and it attached the specific C3 form to be used to register the asylum application in these cases. In accordance with the speed imposed by the procedure, the Circulars state that the application for international protection presented at the border and transit areas has to be formalized by the competent Questura at the time of identification connected to the illegal entry. Also, even if the law provides that the President of the Territorial Commission is responsible to identify the cases for accelerated procedures on the basis of the documentation provided, 570 the Circulars establish that, following the formalisation, the Questura informs the competent Territorial Commission about the application of the border procedure and that the latter, via telephone, fixes the hearing date within 7 days 571. The hearing date is immediately notified to the applicant together with the delivery of the C3.

The requirement of Article 43 of the Directive to allow the applicant to enter the territory if the determining authority has not taken a decision within 4 weeks has not been incorporated in the Procedure Decree. The Territorial Commission maintains the possibility of extending the duration of the procedure – while the applicant would remain at the border or in the transit zone – to a maximum of 18 months to ensure an adequate examination of the application. 572

**Personal interview**

The same guarantees are those applied during the Regular Procedure are applied. The Procedure Decree provides for a personal interview of each applicant, which is not public. 573 According to the amended Article 12(1-bis) of the Procedure Decree, the personal interview of the applicant takes place before the administrative officer assigned to the Territorial Commission, who then submits the case file to the other panel members in order to jointly take the decision.

**Procedural guarantees**

- **Access to NGOs**

The Procedure Decree expressly requires the competent authorities to guarantee asylum seekers the possibility to contact UNHCR and NGOs during all phases of the asylum procedure. 574 However, due to insufficient funds or due to the fact that NGOs are located mainly in big cities, not all asylum seekers have access thereto. Under the latest tender specifications scheme (capitolo d'appalto) adopted on 20 November 2018, funding for legal support activities in hotspots, first reception centres, CAS and CPR has been replaced by “legal information service” of a maximum 3 hours for 50 people per week.

In December 2019 ASGI tried to obtain access to the hotspot of Lampedusa but it was formally denied. The Prefecture of Agrigento alleged the lack of specific agreements with the Ministry of Interior, as requested by the SOPs. As regards the access guarantees provided by the Reception Decree for detention centres, the Prefecture has considered that it allows limiting the access of NGOs just for the administrative management of the centre and that the presence of EASO, UNHCR and IOM, as well as the access of the Guarantor for the rights of detained people are sufficient to protect migrants.

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567 Article 28-bis(1) Procedure Decree, inserted by the Reception Decree.
568 Ministry of Interior, Circular of 16 October 2019.
569 Ministry of Interior, Circular of 18 October 2019.
570 Article 28 (1 bis) Procedure decree.
571 Pursuant to Article 28 bis (1-ter).
572 Article 28-bis(3) Procedure Decree, citing Article 27(3) and (3-bis).
573 Article 12(1) Procedure Decree; Article 13(1) Procedure Decree.
574 Article 10(3) Procedure Decree.
Access to interpretation

In the phases concerning the registration and the examination of the asylum claim, including the personal interview, applicants must receive, where necessary, the services of an interpreter in their language or in a language they understand. Where necessary, the documents produced by the applicant shall be translated.575

At border points, however, interpretation services may not always be available depending on the language spoken by asylum seekers and the interpreters available locally. Given that the disembarkation of asylum seekers does not always take place at the official border crossing points, where interpretation services are generally available, there may therefore be significant difficulties in promptly providing an adequate number of qualified interpreters able to cover different idioms.

In practice, there are not enough interpreters available and qualified in working with asylum seekers during the asylum procedure.

Access to information

The law provides for specific information obligation to be carried out before the formalisation of the asylum application under the border procedure. The dedicated C3 merely indicates the application of the border procedure in Italian and the reasons why it is applied, also informing about the exclusion from the accelerated procedure for vulnerable people.

Access to legal assistance

The rules and criteria for legal assistance are the same as in the regular procedure.

Legal assistance at first instance

According to Article 16 of the Procedure Decree, asylum seekers may benefit from legal assistance and representation during the first instance of the regular and prioritised procedure at their own expenses.

The Procedure Decree provides that the Ministry of Interior can establish specific agreements with UNHCR or other organisations with experience in assisting asylum seekers, with the aim to provide free information services on the asylum procedure as well on the revocation one and on the possibility to make a judicial appeal. These services are provided in addition to those ensured by the manager of the accommodation centres.576 However, following the reform of the reception system brought about by Decree Law 113/2018, implemented by L 132/2018, the new tender specifications scheme (capitolo d’appalto) adopted by way of Ministry of Interior Decree on 20 December 2018 has ceased funding for legal support in different reception hotspots, first reception centres, CAS and CPR, and replaced it with “legal information” services.

National funds are also allocated for providing information and legal counselling at official land, air, sea border points and in the places where migrants arrive by boat.577 In addition, some funds for financing legal counselling may also be provided from European projects / programmes or private foundations. However, it should be highlighted that these funds are not sufficient.

The vast majority of asylum applicants go through the personal interview without the assistance of a lawyer since they cannot afford a lawyer and specialised NGOs have limited capacity due to lack of funds.

Legal assistance in appeals

575 Article 10(4) Procedure Decree, as amended by the Reception Decree.
576 Article 10(2-bis) Procedure Decree.
577 Article 11(6) TUI.
With regard to the appeal phase, free state-funded legal aid (\textit{gratuito patrocinio}), is provided by law to asylum seekers who declare an annual taxable income below €11,493.82 and whose case is not deemed manifestly unfounded.\textsuperscript{578} Legal aid is therefore subject to a “means” and “merits” test.

L 46/2017 has substantially curtailed access to legal aid. It establishes that, when fully rejecting the appeal, a judge who wishes to grant legal aid has to indicate the reasons why he or she does not consider the applicant’s claims as manifestly unfounded.\textsuperscript{579}

\textbf{Appeal}

An appeal against a negative decision in the border procedure has to be lodged before the Civil Court within 30 days.\textsuperscript{580} However, the appeal does not have automatic suspensive effect.\textsuperscript{581}

\textbf{Vulnerable applicants}

The Procedure Decree does not include any provision for the exemption of unaccompanied children and/or persons in need of special procedural guarantees from the accelerated procedure and the border procedure. However, with the circulars issued on 16 October 2019\textsuperscript{582} and on 18 October 2019\textsuperscript{583}, the MoI excludes from the application of the border procedure for attempting to avoid border controls, people rescued at sea following SAR operations, unaccompanied minors and vulnerable persons, referring to regulatory obligations.\textsuperscript{584} This entails that they are only exempted when they are in the accelerated procedure for attempting to avoid border procedures. If they would in the accelerated procedure for another reason they would not be exempted.

There is no procedure defined in law for the identification of vulnerable persons. However, the Ministry of Health published guidelines for assistance, rehabilitation and treatment of psychological disorders of beneficiaries of international protection victims of torture, rape or other serious forms of psychological, physical or sexual violence.

\textbf{Detention and restriction of liberty: The use of hotspots, transit zones and CPR for border procedures}

\textbf{Hotspots}

The Circulars assure the availability of accommodations for asylum seekers subject to the border procedure within the centres existing in the provinces identified as transit or border areas by the Mol decree 5 August 2019. Of the areas that have been identified as border or transit areas, many correspond to Taranto, Messina and Agrigento (Lampedusa hotspot), or places affected by disembarkations, such as Cagliari, or close to CPR (pre-removal detention centres such as in Gorizia and Trieste, Brindisi, Trapani Caltanissetta).

Early September 2020 it has been noted that the hotspots are overcrowded. The proportion of applicants channelled in the border procedure, residing in the hotspots is unclear. Following the COVID—19 outbreak hotspots (and boats) are being used for quarantine. Many people have been staying there for a prolonged duration. Access to the asylum procedure was already very difficult before COVID-19, but worsened now. In many cases, after quarantine, people are directly sent to CPR and only there they have the possibility to apply

\textsuperscript{578} Article 16(2) Procedure Decree.
\textsuperscript{579} Article 35-bis(17) Procedure Decree.
\textsuperscript{580} Article 35-bis(2) Procedure Decree, as amended by Article 6 Decree Law 13/2017 and L 46/2017.
\textsuperscript{582} Ministry of Interior, \textit{Circular of 16 October 2019}.
\textsuperscript{583} Ministry of Interior, \textit{Circular of 18 October 2019}.
\textsuperscript{584} Probably, in the absence of internal rules in this sense, the reference is to Article 24 (3) Directive 2013/32/UE. See: Questione Giustizia, \textit{Le nuove procedure accelerate: lo svilimento del diritto di asilo}, 3 November 2019.
for asylum but once there their asylum request is considered made only to avoid the expulsion, which is a legal basis for detention.

The Moi Decree issued on 5 August 2019 and published on 7 September 2019, identified among the transit and border areas, those ones close to hotspots: Taranto, Messina and Agrigento (Lampedusa hotspot) and Ragusa (close to the Pozzallo hotspot) thereby facilitating the application of an accelerated procedure to the people present in the hotspots. Persons arriving at hotspots are classified as asylum seekers or economic migrants depending on a summary assessment, mainly carried out either by using questionnaires (foglio notizie) filled in by migrants at disembarkation, or by orally asking questions relating to the reason why they have come to Italy. People are often classified just solely on the basis of their nationality. Migrants coming from countries informally considered as safe e.g. Tunisia are classified as economic migrants, prevented from accessing the asylum procedure and handed removal decisions.

According to the SOPs, all hotspots should guarantee inter alia “provision of information in a comprehensible language on current legislation on immigration and asylum”, as well as provision of accurate information on the functioning of the asylum procedure. In practice, however, concerns with regard to access to information persisted in 2019.

As of April 2019, as part of the monitoring project in Lampedusa, ASGI found that a different type of “foglio notizie” was released to some migrants. It was detailed to exclude all the reasons that would prevent the expulsion, completed before printing, and delivered to the persons not in the identification phase but immediately after their transfer from the hotspot, at their arrival in Porto Empedocle. In addition, migrants were asked to sign a paper called “Scheda informativa”, through which they declared they were not interested in seeking asylum before the transfers and before signing the scheda informativa. ASGI, In Limine, La determinazione della condizione giuridica in hotspot, 29 April 2019.

The Justice of Peace of Trapani and the Court of Palermo had validated the detention of an asylum seeker of Tunisian nationality on the basis of the so-called “foglio notizie”. Following an intervention of the ASGI, two appeals were lodged within the In Limine project, which led to the decisions by which the Court of Cassation clearly stated that the filling in and signing of the following “foglio notizie” cannot affect the legal status of the foreign citizen as an applicant for protection, leading to the revocation or overruling of the application previously submitted.

Transit zones

Under the border procedure, the entire examination of the asylum application can take place directly at the border area or in the transit zone. There is no definition of transit zones. The border procedure shall only be applied only in transit areas of airports and ports of the provinces indicated in the Decree.

During visits carried out in early 2019 at the Rome Fiumicino and Milano Malpensa airports, the national Guarantor for detained persons found that, in 2018, 260 people, in the case of Rome and, 333 people, in the

585 Ministry of Interior, Decree 5 August 2019, Article 2.
588 See the foglio notizie at: https://cutt.ly/Kw9KM.
589 See scheda informativa at: https://cutt.ly/Wyv9LQ.
590 Article 10 (2) TUI Consolidated Act on Immigration.
591 ASGI, Accolti i ricorsi presentati nell’ambito del progetto In Limine di ASGI che chiede alle autorità di sospendere la prassi illegittima, 29 April 2019.
592 ASGI, Accolti i ricorsi presentati nell’ambito del progetto In Limine di ASGI che chiede alle autorità di sospendere la prassi illegittima, 10 September 2020.
case of Milano, were held at the border crossing for over 3 days immediately after their arrival in Italy, as they were considered not entitled to enter the national territory. Some of them were held in these areas for 8 days.594 In both areas, as evidenced by the Guarantor, access to lawyers is effectively prevented.

Responding to an open letter from ASGI, the Ministry of Interior indicated in October 2019 that the staying even for several days in the transit area is not supposed to be considered as detention and therefore to have the defence rights guarantees related to detention because it is implemented as part of the immediate refoulement procedure that does not provide for jurisdictional validation.595

However, the Guarantor for detained persons concluded in his report that a de facto detention contrary to Articles 13 of the Italian Constitution and to Article 5 of the ECHR596 was configurable in the situation where people were unable to enter Italy since they were notified an immediate refoulement measure and were obliged, at the disposal of the border police, to stay in special rooms in the transit area of the airports. This period of time varied according to the availability of flight connections with the place of origin.

CPR (pre-removal detention centres)

Under the Reception Decree, asylum seekers can be detained in CPR where third-country nationals who have received an expulsion order are generally held.597 According to the law, asylum seekers detained in CPR should be placed in a dedicated space.598 However, as reported by the Guarantor for the rights of detained persons in his report of visits to CPR in 2016 and 2017 detained persons in all structures were in a precarious state without any consideration of legal status, not even that of asylum seekers.599 In 2019, the Guarantor reported that he had recommended all CPR to favour as much as possible the separation between those who come from the criminal circuit and those who are only in a position of administrative irregularity or who are asylum seekers. Only the prefecture of Brindisi had responded by committing to identify different organizational methods. 600

Detention

There is no legal provision allowing the detention in hotspot or transit areas related to the border procedure, but the law allows the detention of asylum seekers in hotspots for identification purposes. The overlapping of this provision with border procedures can lead to the detention of asylum seekers during (even if not formally related to) the border procedure.

Article 6(3-bis) of the Reception Decree introduced the possibility to detain asylum seekers in hotspots for the purpose of determining their identity or nationality. The law states that this should happen in the shortest possible time and for a period not exceeding 30 days. If identification has not been possible within that timeframe, they could be sent to CPR for detention up to 180 days.601 Although Article 6(3-bis) of the Reception Decree foresees the possibility of detention for identification purposes in specific places, such places are not specified and they will not be identified by law. In a Circular issued on 27 December 2018, the Ministry of Interior specified that it will be the responsibility of the Prefects in whose territories such structures are found to identify special facilities where this form of detention could be performed. At the time of writing, such facilities have not yet been identified.

596 Guarantor report, page 7. See also, Questione Giustizia, Zone di transito internazionali degli aeroporti, zon grigie del diritto, 9 December 2019.
597 Article 6(2) Reception Decree.
598 Article 6(2) Reception Decree.
According to ASGI, detention in facilities other than CPR and prisons violates Article 10 of the recast Reception Conditions Directive, which does not allow any detention in other locations and also because in these places, the guarantees provided by this provision are not in place. According to ASGI, the amended Reception Decree also violates Article 13 of the Italian Constitution, since the law does not indicate the exceptional circumstances and the conditions of necessity and urgency allowing, according to constitutional law, for the implementation of detention. Moreover, the law makes only a generic reference to places of detention, which will be not identified by law but by the prefectures, thus violating the “riserva di legge” laid down in the Article 13 of the Constitution, according to which the modalities of personal freedom restrictions can be laid down only in legislation and not in other instruments such as circulars.\textsuperscript{602}

**The role of UNHCR**

Hotspot-SOPs ensure that access to international and non-governmental organisations is guaranteed subject to authorisation of the Ministry of Interior and on the basis of specific agreements, for the provision of specific services. Currently in the hotspots, UNHCR monitors activities, performs the information service and, as provided in the SOPs, is responsible for receiving applications for asylum together with Frontex, EASO and IOM. The data collected by UNHCR are only shared internally and with the Ministry of Interior. The data is not published neither shared with other NGOs.

\textsuperscript{602} ASGI, *Manifesto illegittimità costituzionale delle nuove norme concernenti permessi di soggiorno per esigenze umanitarie, protezione internazionale, immigrazione e cittadinanza previste dal decreto-legge 4 ottobre 2018*, n. 113, 15 October 2018.
Annex X – Country profile: Portugal

The Country profile Portugal aims to provide a detailed overview of the functioning of the Portuguese border procedure. The information contains extracts and is mainly derived from following source:

- AIDA, Country Report Portugal – Update on the year 2019, May 2020, pp.52-57. The country report is written by a national expert and reviewed and edited by ECRE.

Portugal has 36 external border posts, of which 8 are air border posts and 28 are maritime border posts. The law provides for a special procedure regarding applications made at a national border. While this procedure provides for the basic principles and guarantees of the regular procedure, it lays down a significantly shorter time limit for the adoption of a decision regarding admissibility or merits (if the application is furthermore subject to an accelerated procedure). Additionally, the border procedure is characterised by a shorter appeal deadline before the Administrative Court (4 days), as well as reduced procedural guarantees such as exclusion from the right of the applicant to seek revision of the narrative of his or her personal interview and shorter appeal deadlines. Furthermore, asylum seekers are detained during the border procedure.

Statistics
Applications for international protection in Portugal

The statistics provided by the SEF for 2019 indicate a total of 406 border procedures (approximately 22% of the 1,849 spontaneously arriving asylum seekers), but do not include a breakdown per border post. In comparison, there were 408 border procedures in 2018, 493 in 2017, 269 in 2016 and 248 in 2015.

Figures on the number of persons in need of special procedural guarantees that were subject to border procedures were not available, except for unaccompanied children. According to SEF, 14 unaccompanied children were subjected to the border procedure in 2019.

Decisions on applications made at borders

Out of a total of 406 asylum seekers subject to the border procedure in 2019, 65 were admitted to the regular procedure and 266 were rejected as inadmissible (a number that likely includes both applications deemed inadmissible and applications rejected on the merits in accelerated procedures conducted at the border).

Authorities

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604 Article 23(1) Asylum Act.
605 This includes access to the procedure, the right to remain in national territory pending examination, the right to information, personal interviews, the right to legal information and assistance throughout the procedure, the right to free legal aid, special procedural guarantees, among others.
606 These consist of 7 days for both admissibility decisions and accelerated procedures at the border (Article 24(4) Asylum Act) as opposed to 30 days for admissibility decisions on the territory and between 10 and 30 days for accelerated procedures on the territory.
607 Article 25(1) Asylum Act.
608 Article 24 Asylum Act.
609 Articles 26(1) and 35-A(3)(a) Asylum Act.
610 Information received by SEF, on 2 September 2020.
611 Ibid.
The Immigration and Borders Service is responsible for all applications introduced at the border, or on the territory. The Asylum and Refugees Department (GAR) of the Immigration and Borders Service (SEF) is responsible for the examination of asylum applications.

**Legal framework**

Article 43 of directive 2013/32/EU was implemented 5 May 2014, through Act n. 26/2014 of 5 May 2014 amending Act n. 27/2008, transposing Directives 2011/95, 2013/32/EU and 2013/33/EU. It should be noted that the border procedure already existed in Law 27/2008.

The law provides for a specific procedure regarding applications made at a national border. A distinctive feature of the legal framework of border procedures consists in the provision for the detention of asylum seekers for the duration of the admissibility stage/accelerated procedure.

**Grounds for applying the border procedure**

In practice a person who:
(i) does not meet the entry requirements set in the law;
(ii) is subject to a national or an EU entry ban; or
(iii) represents a risk or a serious threat to public order, national security or public health,

is refused entry in national territory, and is notified in writing by SEF of the corresponding decision. His or her asylum application for international protection can subsequently be processed in the border procedure, when grounds for the accelerated procedure or inadmissibility apply.

The grounds laid down in Article 19(1) of the Asylum Act for applying an accelerated procedure include:

- Misleading the authorities by presenting false information or documents or by withholding relevant information or documents with respect to identity and/or nationality that could have had a negative impact on the decision;
- In bad faith, destroying or disposing of an identity or travel document that would have helped establish identity or nationality;
- Making clearly inconsistent and contradictory, clearly false or obviously improbable statements which contradict sufficiently verified COI, thus making the claim clearly unconvincing in relation to qualification for international protection;
- Entering the territory of the country unlawfully or prolonging the stay unlawfully and, without good reason, failing to make an application for international protection as soon as possible;
- In submitting the application and presenting the facts, only raising issues that are either not relevant or of minimal relevance to the examination of whether the applicant qualifies for international protection;
- Coming from a Safe Country of Origin;
- Introducing an admissible subsequent application;
- Making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in removal;
- Representing a danger to the national security or public order; and
- Refusing to comply with an obligation to have fingerprints taken.

The law provides for an admissibility procedure that is characterised by:

- specific grounds for considering an asylum application inadmissible;

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612 Article 23(1) Asylum Act.
613 Articles 26(1) and 35-A(3)(a) Asylum Act.
614 Article 32 Immigration Act.
615 Article 38(2) Immigration Act.
616 Article 19-A Asylum Act.
The implementation of Article 43 of Directive 2013/32/EU in practice

specific time limits for the first instance decision on admissibility;617
legal implications in case the deciding authority does not comply with those time limits;618
the right to an appeal against the inadmissibility decision;619
and specific rights attached to the admission to the procedure which represent a distinctive feature of the Portuguese asylum procedure.620

The grounds laid down in Article 19-A(1) of the Asylum Act for considering an asylum application inadmissible include cases where the asylum seeker:

- Falls under the Dublin procedure;
- Has been granted international protection in another EU Member State;
- Comes from a First Country of Asylum i.e. has obtained refugee status or otherwise sufficient protection in a third country and will be readmitted to that country;
- Comes from a Safe Third Country i.e. due to a sufficient connection to a third country, can reasonably be expected to seek protection in that third country, and there are grounds for considering that he or she will be admitted or readmitted to that country;
- Has made a subsequent application without new elements or findings pertaining to the conditions for qualifying for international protection; and
- Is a dependant who had lodged an application after consenting to have his/her case be part of an application lodged on his/ her behalf, in the absence of valid grounds for presenting a separate application.

**Time limits**

The National Director of SEF has 7 days to issue a decision either on admissibility or on the merits of the application in an accelerated procedure.621 In the absence of inadmissibility grounds or grounds for deeming the application unfounded in an accelerated procedure, SEF admits the asylum seeker to the regular procedure and authorises entry into national territory/release from border detention.622 Non-compliance with the time limit results in the automatic admission of the applicant to the regular procedure and release from the border.623

**Personal interview**

Before any decision on the application for international protection is given, the applicant is guaranteed the right to make statements in the language of his or her preference or in another language, which he or she may understand and through which he clearly communicates.

The rules and modalities of the interview are the same as those of the regular procedure and the interview is generally conducted by SEF-GAR. However, given the short time limits applicable to the border procedure, the interview is conducted in detention at the Temporary Installation Centre (CIT) a few days after arrival. This means little time to prepare and substantiate the asylum application and reduced guarantees such as the exclusion from the right of the applicant to seek revision of the narrative of the interview.624 An additional problem regarding interviews conducted at the Lisbon Airport are the space constraints of the interview offices which leave very limited space and privacy, notably due to inadequate sound isolation.

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617 Articles 20(1),24(4), 33(4) and 33-A(5) Asylum Act.
618 Articles 20(2) and 26(4) Asylum Act.
619 Articles 22(1) and 25(1) Asylum Act.
620 Article 27(1)(3) Asylum Act pertaining to the issuance of a provisional residence permit and Article 54(1) pertaining to the right to access the labour market.
621 Article 24(4) Asylum Act. On the territory, decisions on admissibility must be taken within 30 days and decisions in the accelerated procedure within 10 to 30 days.
622 Article 26(4) Asylum Act.
623 Ibid.
624 Article 25 Asylum Act.
Many asylum seekers arrive at the border without valid identification documents or supporting evidence to substantiate their asylum application and contacts with the outside world from within the CIT are limited and rarely effective for the purposes of securing supporting evidence, given the short period of time between the arrival, the personal interview and the first instance decision.

Regarding certain categories of vulnerable asylum seekers such as survivors of torture, rape or other serious forms of psychological, physical or sexual violence, the absence of identification and vulnerability assessments means that potential special needs may not be known to the asylum authorities and may not have been taken into account at the time of interview. CPR is unaware of the implementation of special procedural guarantees at the border such as the postponement of the interview, additional time for submitting supporting evidence or the presence of supporting personnel in the interview in 2019.625

Procedural guarantees

Access to NGOs

In accordance with the law, UNHCR and CPR have the right to be informed of all asylum claims presented in Portugal and to personally contact asylum seekers irrespective of the place of application in order to provide information on the asylum procedure, as well as regarding their intervention throughout the process.626 In this context, CPR is regularly present (i.e. generally every week) at the Lisbon Airport detention facility to provide free legal information and assistance,627 in particular regarding the asylum procedure; access to free legal aid at appeal stage; and the promotion of the release without conditions of particularly vulnerable asylum seekers either by SEF ex officio or by means of review by the Criminal Courts.

In its visits to border detention facilities, the Ombudsman has observed that detainees are not always provided information on their rights and on the internal functioning of facilities. Gaps were also identified in the provision of information on grounds for detention and status of procedures.628

CPR is aware of concerns raised by free legal aid lawyers regarding an 11€ fee charged by ANA, S.A., the private company in charge of national airports, for accessing the restricted area of the airports where the detention facilities are located which can discourage them from visiting their clients.629 This fee, which is applied to all external visitors that are not accredited, has been criticised by the Ombudsman that qualified it as a restriction to article 35-B(4) of the Asylum Act.630 The UN Committee Against Torture also expressed concern with the application of this access fee in its recent Concluding Observations on Portugal, thereby recommending the State to “guarantee that retained asylum seekers and irregular migrants have unhindered, prompt and adequate access to counsel, including legal services”.631

Access to interpretation

Interpreters are available during the interviews and that no interviews are conducted through videoconferencing.632

The same findings as for the regular proceedings apply. The quality of interpretation services used for interviews remains a serious challenge, as in many cases service providers are not trained interpreters but

626 Article 13(3) Asylum Act.
627 Article 49(1)(e) and (6) Asylum Act.
632 Information provided by SEF, 2 September 2020.
rather individuals with sufficient command of source languages. While the interpreters are bound by a legal
duty of confidentiality, there is no agreed code of conduct used by the SEF. In the case of rarer languages –
e.g. Tigrinya, Pashto, Bambara, Lingala, Tamil, Kurdish and to a lesser extent Arabic and Farsi – securing
interpreters with an adequate command of the target language remains very challenging.

Access to information
Upon registration, the asylum seeker receives written information (available in a limited number of languages)
regarding the rights and duties attached to the asylum application. The SEF has also produced information
leaflets that briefly cover some of its information obligations such as the asylum procedure and the rights and
duties of applicants of international protection and a specific information leaflet for unaccompanied children
regarding the asylum procedure, reception conditions, rights and duties including legal representation and
age assessment. In the case of asylum seekers detained at the border, the certificate of the asylum application
contains a brief reference to Article 26 of the Asylum Act that provides for the systematic retention of asylum
seekers in the border procedure.

Asylum seekers are not systematically informed or aware of their rights and obligations in detention despite
the existence of information leaflets available in a limited number of foreign languages. According to a
report (May 2019) of the National Preventive Mechanism, multiple gaps in the provision of information were
detected, both with regards to the applicable legal frameworks and the individual situation of the applicants.

Despite having been designated as legal representative for the vast majority of unaccompanied children who
applied for asylum in 2019, CPR is unaware of the provision of child-friendly information by the SEF, including
the specific information leaflet for unaccompanied children and the information leaflet provided for by Article
4(3) of the Dublin Regulation.

Access to legal assistance
The Asylum Act in particular provides for the right of asylum seekers to free legal assistance at all stages of the
asylum procedure which is to be understood as including the first instance of the regular procedure. Such
legal assistance is to be provided without restrictions by a public or private non-governmental organisation
in line with a Memorandum of Understanding

Furthermore, under the Asylum Act, UNHCR and CPR as an organisation working on its behalf must be
informed of all asylum applications in Portugal and are entitled to personally contact all asylum seekers
irrespective of the place of application to provide information regarding the asylum procedure, as well as
regarding the intervention of CPR and UNHCR in the procedure (dependent on the consent of the applicant).
These organisations are also entitled to be informed of key developments in the asylum procedure upon
consent of the applicant, and to present their observations at any time during the procedure pursuant to
Article 35 of the 1951 Refugee Convention.

However, CPR noted that following the registration of the asylum claim CPR only has access to applicants once
SEF has conducted its individual interview covering admissibility and eligibility.

To that end, CPR is obliged to resort to the same (bureaucratic and lengthy) procedure used in the territory
albeit faced with specific constraints (e.g. shorter deadlines for application, communication problems, timely

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633 Portuguese Ombudsman, Tratamento de Cidadãos Estrangeiros em situação irregular ou requerentes de asilo nos
centros de instalação temporária ou espaços equiparados, September 2017, Chapter II, Section 9.
634 Portuguese Ombudsman, Mecanismo Nacional de Prevenção – Relatório à Assembleia da República 2018, 30 May
2019.
635 Article 24(1) Asylum Act.
636 Article 13(3) Asylum Act. See also Article 24(1) concerning applications at the border, Article 33(3) Asylum Act
concerning subsequent applications, Article 33-A(3) concerning applications following a removal procedure.
637 Article 28(5) Asylum Act.
access to interpreters, etc.). The relevance of broader legal support within the context of detention and the possibility of adopting a specific MoU with the Bar Association for that purpose was also underlined by the Ombudsman.638

In 2019, CPR, in partnership with UNHCR, continued its efforts to engage with the Portuguese Bar Association with the aim of providing training to free legal aid lawyers. CPR also continued advocating for the Portuguese Bar Association to engage with the Ministry of Interior in order to promote the full implementation of the legal provisions mentioned above regarding an accelerated free legal aid procedure at the border for the purposes of appeal.

While CPR provided support to 1,553 asylum seekers that applied for international protection in 2019, the continued increase of spontaneous asylum applications has further impacted its capacity to provide legal information and assistance to asylum seekers placed in detention at the border, similar to the regular procedure. This problem is aggravated by shorter deadlines, communication problems, bureaucratic clearance procedures for accessing the restricted area of the airport where the CIT is located (in particular regarding interpreters), and limitations in the timely provision of information by SEF on the dates of interviews and language skills of the asylum seekers.

In practice, free legal assistance provided by CPR in first instance procedures at the border includes: (a) providing legal information on the asylum procedure and the legal aid system; (b) accessing free legal aid for the purpose of appeals; (c) assisting lawyers appointed under the free legal aid system in preparing appeals with relevant legal standards and COI; and (d) advocating with SEF for the release of particularly vulnerable asylum seekers such as unaccompanied children, families with children, pregnant women and the severely ill.

Similarly, to the regular procedure, the overall quality of free legal aid at appeal stage remains a concern due to the current selection system of lawyers.

The unscrupulous activity of a limited number of private lawyers at the Lisbon Airport’s CIT, providing poor quality services in exchange for excessively high fees, remained a problem in 2019. This concern has been raised by CPR with SEF and the Portuguese Bar Association but is still ongoing despite past criminal investigations conducted by SEF that have resulted in criminal charges related to smuggling and trafficking in human beings. In September 2018, SEF reported that an investigation involving a lawyer in the Lisbon area was ongoing. According to the press note,639 the authorities conducted house and office searches and the lawyer was formally put under investigation (“constituída arguida”).

Appeal

The Asylum Act provides for an appeal against a rejection decision at the border, either on admissibility grounds or on the merits in an accelerated procedure. The appeal consists of a judicial review of relevant facts and points of law by the Administrative Court.640 The time limit for lodging the appeal is of 4 days for all grounds.641

Similarly to the regular procedure, the first and onward appeals have an automatic suspensive effect.642 The law also provides for a simplified judicial process with reduced formalities and time limits with the objective of shortening the duration of the judicial review.643 However, the Administrative Courts rarely reach a decision on the appeal within the maximum detention time limit of 60 days, meaning that the asylum applicant is

640 Article 25(1) Asylum Act; Article 95(3) Administrative Court Procedure Code.
641 Article 25(1) Asylum Act.
642 Article 25 Asylum Act.
643 Article 25(2) Asylum Act.
The implementation of Article 43 of Directive 2013/32/EU in practice

granted access to the territory, albeit liable to a removal procedure in case his or her application is rejected by final decision.644

In practice the average duration of the judicial review of a first instance rejection decision at the border is similar to the regular procedure.

The information shared by CSTAF does not include a breakdown by type or outcome of procedures but indicates a poor success rate at appeals stage. In this regard, the CPR acknowledged that the quality of many appeals submitted is often poor as in the other procedures, given that very few lawyers have relevant expertise and training in the field. It should be noted that while CPR may be requested to intervene in the judicial procedure, namely by providing country of origin information or guidance on legal standards, it is not a party thereto and is therefore not systematically notified of judicial decisions by the courts.

**Vulnerable applicants**

The law identifies a sub-category of individuals whose special procedural needs result from torture, rape or other serious forms of psychological, physical or sexual violence and who may be exempted from the border procedure under certain conditions.645 Furthermore, the placement of unaccompanied and separated children in temporary installations (detention) at the border – and hence application of border procedures – must comply with applicable international standards such as those recommended by UNHCR, UNICEF and ICRC.646

The border procedure is applied systematically. SEF shared that certain categories of vulnerable asylum seekers such as unaccompanied children, pregnant women and seriously ill were usually released from the border and submitted to an admissibility procedure and/or regular or accelerated procedure in national territory.647 CPR noted that until 2016 indeed, certain categories of vulnerable asylum applicants such as unaccompanied children, pregnant women and seriously ill persons were released from detention at the border and channelled to an admissibility procedure and/or regular or accelerated procedure in national territory. This changed in 2016 and a significant percentage of vulnerable applicants – including unaccompanied children, families with children and pregnant women – have been detained and subject to the border procedure since then. Following media coverage and stark criticism by the Ombudsman and NGOs, the Ministry of Home Affairs issued an instruction in July 2018 focusing inter alia on the detention of children at the border. As a result, CPR has noted shorter detention periods of families with children and unaccompanied children. However, with the exception of unaccompanied children, this had not resulted in significant changes with regard to the exemption from border procedures as the latter are still routinely applied to vulnerable applicants.

According to the available information, no standard operational procedures and tools allowing for the early and effective identification of survivors of torture and/or serious violence and their special procedural needs are in place. As such, asylum seekers who claim to be survivors of torture, rape or other serious forms of psychological, physical or sexual violence are not exempted from border procedures in practice, despite the lack of provision of special procedural guarantees at the border. 648

The identification of survivors of torture was recently addressed by the UN Committee Against Torture in its recent Concluding Observations on the seventh periodic report of Portugal. The Committee observed that “[…] the State party has not provided complete information on the procedures in place for the timely identification

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644 Article 21(2) and (3) Immigration Act.
645 Article 17-A(4) Asylum Act. Exemption from border procedures is dependent on the impossibility to offer “support and conditions to asylum seekers identified as being in need of special procedural guarantees.”
646 Article 26(2) Asylum Act.
647 Information provided by SEF, 2 September 2020.
of victims of torture among asylum seekers [...] 649, and recommended “[…] the establishment of effective mechanisms to promptly identify victims of torture among asylum seekers.” 650

Detention and deprivation of liberty

According to SEF, detention of asylum seekers in Portugal is limited to applicants at the border. The 3 detention facilities at the border are located in the international areas of Lisbon, Porto and Faro airports and have separate detention zones for asylum seekers. The facilities have an overall capacity of 30, 14 and 14 places respectively.

The legal framework of detention centres is enshrined in Act 34/94 that provides for the detention of migrants in Temporary Installation Centres (Centros de Instalação Temporária, CIT) that are managed by the SEF for enforcing a removal from national territory or for attempted irregular entry at the border. The detention facilities at the border, while not CIT per se, have been classified as such by Decree-Law 85/2000 for the purposes of detention following a refusal of entry at the border. These are therefore detention centres with a strict separation between asylum seekers and other migrants. Asylum seekers submitted to border procedures may be detained for up to 60 days in case of an appeal, as provided for in the law.

Out of the three, the facility at the Lisbon airport is the most relevant to the detention of asylum seekers. Bearing in mind that the Asylum Act provides for detention of asylum seekers at the border 651 which is systematically applied in practice, the 2019 statistics provided by SEF show that a total of 406 asylum seekers were submitted to border procedures and hence placed in detention for a period of up to 60 days.

In practice, asylum seekers are systematically detained at the border for periods up to 60 days. While up to 2016 certain categories of particularly vulnerable applicants such as unaccompanied children, families with children, pregnant women and severely ill persons were generally released without conditions, SEF changed its practice in this regard.

In 2017, the detention of an asylum-seeking family with children at the Lisbon Airport detention facility drew criticism from the Ombudsman, particularly regarding the inadequate detention conditions offered to a child with special health needs. 652

In July 2018, following media reports on detention of young children at Lisbon Airport, 653 and remarks by the Ombudsman and UNICEF, 654 the Ministry of Home Affairs issued an order determining:

- An internal review of the functioning of the CIT at Lisbon Airport;
- The urgent presentation by SEF of a report on the recommendations issued by the Ombudsman in 2017 regarding the above-mentioned centre;
- That children under 16 years old (whether accompanied or not) cannot be detained in the CIT for more than 7 days;
- That the construction of the Temporary Reception Centre of Almocageme (CATA), located in the municipality of Sintra, is given maximum priority. So far there is no definite public information on whether it will be an open or closed centre.

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650 Ibid. para 38(d).
651 Articles 26(2) 35-A(3)(a) Asylum Act.
652 Portuguese Ombudsman, Tratamento dos cidadãos estrangeiros em situação irregular ou requerentes de asilo nos centros de instalação temporária ou espaços equiparados, September 2017, p. 28.
Length of detention

In accordance with the Asylum Act, an asylum seeker either at the airport or land border “who does not meet the legal requirements for entering national territory” can be detained for up to 7 days for an admissibility procedure.\(^\text{656}\) If SEF takes a positive admissibility decision or if no decision has been taken within 7 working days, the applicant is released. If the claim is deemed inadmissible or unfounded in an accelerated procedure, the asylum seeker can challenge the rejection before the administrative courts with suspensive effect and remains detained for up to 60 days during the appeal proceedings. However, after 60 days, even if no decision has yet been taken on the appeal, SEF must release the individual from detention and provide access to the territory. The maximum detention period of 60 days is equally applicable in instances where the application is made from detention at a CIT due to a removal procedure.\(^\text{657}\)

The information available to CPR, regarding 26 unaccompanied children, of which one was deemed adult by SEF, indicates that there were instances of detention at the border for periods ranging from 1 to 47 days (on average 7 days) in 2019. The information available to CPR regarding 52 children accompanied by adults reveals that they were detained at the border for periods ranging between 0 and 59 days (on average 12 days).\(^\text{658}\) As such, while CPR has observed a tendency to decrease detention periods for children following the order issued in July 2018 by the Ministry of Home Affairs, this practice remains a concern in light of international standards that prohibit any immigration detention of children.\(^\text{659}\)

Review of detention

The law provides for the right of asylum seekers to information in writing regarding the grounds for their detention, access to free legal aid and legal challenges against detention in a language they either understand or are reasonably expected to understand.\(^\text{660}\)

In practice, the declaration issued by SEF to asylum seekers at the border for the purposes of certifying the registration of their application contains a brief reference to the norm of the Asylum Act that provides for the detention of asylum seekers at the border.\(^\text{661}\) CPR is unaware of the provision of information in writing regarding the grounds of detention, the right to access free legal aid and the right to judicial review of the detention order.\(^\text{662}\) That being said, asylum seekers benefit from legal information and assistance from CPR at the border, which also includes free legal assistance for the purpose of judicial review of the detention order. However, this is limited to vulnerable asylum seekers due to capacity constraints.

The competent authority to impose and review the detention of an asylum seeker in a CIT,\(^\text{663}\) or in detention facilities at the border,\(^\text{664}\) is the Criminal Court which has territorial jurisdiction over the place where detention occurs. In the case of detention at the border, SEF is required to inform the Criminal Court of the detention within 48 hours upon arrival at the border for purposes of maintaining the asylum seeker in detention beyond

\(^{\text{656}}\) Article 26 and 35-A(3)(a) Asylum Act.  
\(^{\text{657}}\) Article 35-B(1) Asylum Act.  
\(^{\text{658}}\) In some instances, families were transferred from the EECIT to UHSA during the period of detention.  
\(^{\text{660}}\) Article 35-B(2) Asylum Act.  
\(^{\text{661}}\) Article 26 Asylum Act.  
\(^{\text{662}}\) Even though the declaration issued by the SEF to asylum seekers at the border for the purposes of certifying the registration of the asylum application contains a brief reference to their right to legal aid, it does not specify that such legal aid also encompasses Criminal Court procedures pertaining to their detention at the border.  
\(^{\text{663}}\) Article 35-A(5) Asylum Act.  
\(^{\text{664}}\) Article 35-A(6) Asylum Act.
that period. The review of detention can be made \textit{ex officio} by the Criminal Court or upon request of the detained asylum seeker at all times on the basis of new circumstances or information that have a bearing on the lawfulness of the detention.

In the case of asylum seekers at the border, the Criminal Court usually requires SEF to provide information on developments of the asylum application within 7 days after their initial request for confirmation of the detention. This procedure allows the Criminal Court to reassess the lawfulness of the detention on the basis of the decision from SEF regarding the admissibility of the asylum application.

To CPR’s understanding, once SEF informs the Criminal Court that the asylum application at the border was rejected, there are no additional \textit{ex officio} reviews prior to release even in cases where the court invites SEF to consider the release of vulnerable applicants. Where the applicant appeals the rejection of the asylum application and is therefore not removed from the border, release usually takes place at the end of the maximum detention time limit of 60 days.

**Detention conditions**

In the absence of legal standards for the operation of CIT, the detention facilities at the border and the CIT – UHSA in Porto are managed by the SEF pursuant to internal regulations.

The Ombudsman also expressed concern with frequent overcrowding of the facility in Lisbon, opposed to instances of excessive isolation of detainees in the facility in Porto.

In March 2019, the Criminal Police arrested three SEF inspectors on suspicions of having killed a man in the detention centre at Lisbon airport. According to media reports, a 40-year-old man from Ukraine who was refused entry into national territory was found dead in the detention centre with signs of having been violently assaulted. Media outlets also reported alleged efforts to conceal the facts. While the case was under investigation at the time of writing, both the Director and Deputy Director of Borders (Lisbon) were removed from office. The Minister of Home Affairs requested an internal investigation to the direction and functioning of the detention centre and ordered disciplinary inquiries to all the involved members of SEF. The three inspectors arrested reportedly denied the claims. The Minister of Home Affairs was in the meantime at the Parliament where he expressed his outrage and vowed to do his best for the situation not to be repeated. The Minister further announced changes to be implemented in the detention centre that, at the time, was closed due to the coronavirus epidemic. While details were not available at the time of writing, measures such as the provision of better support to persons refused entry by the Bar Association, and the reinforcement of monitoring (including by external entities) and security measures were referred. The Minister also affirmed

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665 Ibid.
666 Article 35-A(6) Asylum Act.
667 Ministerial Decision n. 5863/2015 of 2 June 2015 regulates in detail detention conditions by police forces, including SEF, but is only applicable to the initial 48-hour detention period.
668 Portuguese Ombudsman, National Preventive Mechanism, *Report to the Parliament 2018*, 30 May 2019, p.40. The Ombudsman also issued a specific recommendation regarding excessive isolation suggesting the authorities to systematically transfer persons detained in such situations to UHSA following 7 days of detention at the border facility. See Ombudsman, *Recomendação n.º 2/2019/MNP*, 2 October 2019.
that asylum seekers would no longer be detained in this detention centre. The implications of such statements are not yet clear. The application of the border procedure seems to be on hold for the moment.

Following the public debate during the summer of 2018 regarding the detention of vulnerable asylum seekers and the detention conditions at Lisbon Airport, the Ministry of Home Affairs adopted a decision on 24 July 2018 determining among others an inquiry into the functioning of the detention facility by the General Inspectorate of Internal Administration (Inspeção Geral da Administração Interna – IGAI) and a report from SEF to the Ombudsman regarding the state of implementation of its report recommendations from 2017. The results of these initiatives have not yet been known.

672 Público, Eduardo Cabrita: ‘negligência grosseira e encobrimento grave’ do SEF na morte de ucraniano, 8 April 2020.
Annex XI – Country profile: Spain

The Country profile Spain aims to provide a detailed overview of the functioning of the Spanish border procedure. The information contains extracts and is mainly derived from following source:

- AIDA, Country Report Spain – Update on the year 2019, April 2020, pp.48-53. The country report is written by a national expert and reviewed and edited by ECRE.

Statistics
Applications for international protection in Spain

The number of applications for international protection in Spain has significantly increased in recent years. In 2019, it reached around 118,000 applications, which is more than ten times higher than in 2016.

Source: Eurostat; Office for Asylum and Refuge (OAR), Information provided on 14 September 2020.

Compared to the total number of applications, the number of border procedures has remained relatively stable, ranging from around 6,000 to 7,000 cases in the last three years. Border procedures represented around 6% of the total caseload of the Office for Asylum and Refuge (OAR) in 2019, compared to around 16% in 2016.

Decisions on applications made at borders

The purpose of the Spanish border procedure is to assess whether the application for international protection is admissible or inadmissible, and whether the applicant should be granted access to the territory for the purpose of carrying out the asylum procedure. Applications for international protection are thus not examined on the merits in the context of border procedures, unless they are considered as manifestly unfounded.

In the last years, following decisions were issued by the Office for Asylum and Refuge (OAR):
The implementation of Article 43 of Directive 2013/32/EU in practice

Source: Office for Asylum and Refuge (OAR), Information provided on 14 September 2020.

The graph above indicates that up until 2018, the large majority of applicants channelled into the border procedure were granted access to the territory in order to carry out the asylum procedure. Nevertheless, there has been an important increase in inadmissibility decisions doubling from 1,317 in 2018 to 3,220 in 2019. Taking into consideration the number of third country nationals refused access to the territory at the Spanish external borders, which amounted to 493,455 cases in 2019 (see above), it can be concluded that access to the territory for the purpose of the asylum procedures remains very difficult in practice. Several Spanish organisations have denounced the low number of admissions in border procedures compared to the regular procedure.673 The Supreme Court also clarified that the inadmissibility can be decided only in consideration of formal and objective grounds, as opposed to an analysis and assessment of the specific elements and reasons that surround the asylum application.674

Location of the border procedure

The border procedure is applied to all applicants who request international protection at airports, maritime ports and land borders, as well as in Detention Centres for Foreigners (CIE - Centro de Internamiento de Extranjeros).675

There is evidence of one non-admission room (Sala de Inadmisión de Fronteras) in Barcelona El Prat Airport; one room in Málaga Airport; and two rooms in Terminals 1 and 4 of the Madrid Barajas Airport.676 According to the OAR, operational transit zones are mainly those in Madrid Barajas Airport and Barcelona El Prat Airport.677 As regards CIEs, there are 7 detention facilities in Spain located in: Madrid, Barcelona, Valencia, Murcia, Algeciras, Las Palmas de Gran Canaria, and Santa Cruz de Tenerife.

There are no available statistics on the number of border procedures being applied at each of these locations. As long as the border procedure is pending, the applicant has not formally entered the Spanish territory, i.e. a fiction of non-entry applies.

Authorities

The Border Police is responsible for apprehending persons at the border and, when applications for international protection are lodged, for conducting interviews with asylum applicants at border posts. A

673 CEAR, Las personas refugiadas en España y Europa 2015, Capítulo IV: La admisión a trámite, 2015.
674 Supreme Court, Decision 4359/2012, 22 November 2013.
676 Spanish Ombudsman, Mapa de los centros de privación de libertad, 5 February 2018.
677 Information provided by OAR, 8 March 2019.
The examination of the application for international protection and the decision on the asylum claim is issued by the Office for Asylum and Refuge (OAR), the Spanish determining authority acting on behalf of the Ministry of the Interior. This means that all decisions relating to applications for international protection are officially issued by the Ministry of the Interior.

The National High Court (Audiencia Nacional) is responsible for requests for re-examinations lodged by applicants in case of inadmissibility decisions and decisions rejecting the examination of the applications as well as refusals of entry at the border.

Legal framework
Grounds for applying the border procedure

The aim of the border procedure is to assess whether an application for international protection is admissible or inadmissible and whether the applicant should be granted access to the territory for the purpose of the asylum procedure. As provided in Article 20(1) of the Asylum Act, applications can be considered inadmissible on the following grounds:

- When another country is responsible under the Dublin III Regulation or pursuant to international conventions to which Spain is party;
- The applicant is recognised as a refugee and has the right to reside or to obtain international protection in another Member State;
- The applicant comes from a safe third country as established in Article 27 of Directive 2005/85/EC;
- The applicant has presented a subsequent application but with different personal data and there are no new relevant circumstances concerning his or her personal condition or the situation in his or her country of origin; or
- The applicant is a national of an EU Member State.

According to information shared by the Spanish authorities, the Dublin III Regulation is not applied in application lodged at Spanish border posts.

Applications for international protection are not examined on the merits in the context of border procedures. One exception applies, however, to applications that are manifestly unfounded. Applications for international protection can be rejected as manifestly unfounded in the following circumstances:

- The facts exposed by the applicant do not have any relation with the recognition of the refugee status;
- The applicant comes from a safe third country;
- The applicant falls under the criteria for denial or exclusion under the Asylum Act, Articles 8, 9, 11 and 12;
- The applicant has made inconsistent, contradictory, improbable, insufficient statements, or provided information that contradicts sufficiently reliable information about the country of origin or of habitual residence if stateless, in a manner that clearly shows that the request is unfounded with regard to the fact of having a founded fear to be persecuted or suffer serious harm.

The grounds for rejecting an application for international protection as manifestly unfounded in the context of border procedures thus include the criteria for denying or excluding a protection status. This means that, in practice, the border procedure in some cases may consist in an examination of the individual circumstances presented by the applicant for substantiating his or her request for international protection. This raises serious concerns as applications should, in principle, not be examined on the merits in the context of border procedure, as the latter is characterised *inter alia* by different procedural safeguards (see procedural

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678 Article 21(2)(b) Asylum Act.
safeguards) and shorter time limits (see time limits). It further leaves the determining authority important discretion on the admission of the application, as the Asylum Act does not define the criteria for which statements should be considered as “inconsistent, contradictory, improbable, or insufficient”.

The National High Court (Audiencia Nacional) has reitered in 2017 that an asylum application cannot be rejected on the merits in the border procedure unless it is manifestly unfounded. It further ruled that an application for international protection cannot be considered as manifestly unfounded where it is not contradicted by country of origin information or where UNHCR has issued a positive opinion supporting the granting of protection.679

If the application is allowed, the person can enter the territory and the application is analysed through an urgent procedure (3 months) where the application has been lodged at a Detention centre for foreigners (CIE), and through the ordinary procedure (6 months) if the application has been lodged at a border post.

Time limits (in law and practice)

The decision from the Office on Asylum and Refuge (OAR) to issue an inadmissibility decision or to grant entry to the territory must be issued within 4 days from the lodging of the application.680 In case an application is considered inadmissible or is rejected from examination (“denegar la solicitud”) and access to the territory is refused, the applicant can lodge an appeal within 2 days. The Court then has only 2 days to issue its decision,681 which is a very short deadline. This brings the maximum time limit of the border procedure to a total of 8 days.

The 4-days time limit for the OAR to issue its decision can be extended to 10 days by the Ministry of Interior on the basis of a reasoned decision if UNHCR so requests.682 This applies to cases where the Ministry of Interior intends to reject the application from examination considering that the applicant falls under one of the reasons for exclusion or denial from protection within the Asylum Act.683

The National High Court (Audiencia Nacional) further clarified in 2017 that the deadline to issue a first instance decision within 4 days starts running as soon as the application is lodged;684 i.e. after 96 hours; as opposed to the previous practice of the OAR to suspend the procedure during weekends, which had resulted in longer detention periods in border facilities.

Where the time limits are not respected, the applicant will be admitted to the territory for the purpose of the asylum procedure. The OAR has reported that the average of the length of the border procedure, including appeal proceedings, is 8 to 10 days.685 Available information indicates that persons were frequently granted access to the territory in 2017 and 2018 because the time limits could not be met due to capacity shortages within the OAR following the rise in applications for international protection. Applicants were admitted to the territory with a document stating their intention to apply for international protection once on Spanish territory. This practice does not seem to have continued in 2019, however.686

Moreover, a previous practice reported in 2017 and 2018 relate to some cases in the Detention Centre for Foreigners (CIE) of Valencia where the Ministry of Interior considered that the deadline provided by the Asylum Act did not apply to asylum applications lodged from CIE; meaning that applicants remained in

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679 National High Court, Decision SAN 1179/2017, 17 March 2017. On the importance of UNHCR opinions, see also Supreme Court, Decision STS 3571/2016, 18 July 2016; National High Court, Decision SAN 335/2017, 3 February 2017.
680 Article 21(2) Asylum Act.
681 Article 21(4) Asylum Act.
682 Article 21(3) Asylum Act.
683 Article 21(3) Asylum Act.
685 Information provided by the OAR, 14 September 2020.
686 AIDA, Country Report Spain – Update on the year 2019, April 2020, p.34.
detention even where the OAR had not issued its decision within 4 days. The Ministry of Interior considered that in such cases the 1-month time limit foreseen for the regular procedure would apply, which was refuted by the Spanish Ombudsman recalling the legal obligation to issue a decision on applications lodged at borders and from CIE within 96 hours.\(^{687}\) Such practices were no longer reported in 2019.

**Personal interview (in law and practice)**

The personal interview at border points is carried out by police officers. Based on this first interview, case workers of the OAR can examine the application and take a decision. However, a second interview can also be requested by the OAR if there are doubts or contradictions.\(^{688}\) Videoconferencing is rarely used in practice, and questions are not limited to identity, nationality and travel route.

The same procedural safeguards are reportedly provided as in the regular procedure. This includes privacy and confidentiality during the personal interview and the possibility to request that the interpreter and the caseworker to be of a particular gender.

**Procedural guarantees**

**Access to legal assistance**

Access to free legal assistance in the border procedure is mandatory and guaranteed by law.\(^{689}\) As opposed to the regular procedure, applicants for international protection are thus always assisted by a lawyer during their interviews with the border police and the OAR in the context of border procedures, as well as during appeal proceedings. The National High Court (Audiencia Nacional) further held that the mandatory nature of legal assistance at the border entails an obligation to offer legal aid to the applicant for the purpose of lodging the application for international protection, even if he or she does not ask for it or rejects it.\(^{690}\)

Legal assistance is provided by NGOs, Bar Associations or private lawyers. There have been several issues in recent years regarding the quality of legal assistance. In 2017, this included a lack of coordination in the appointment of legal representatives at Madrid Barajas Airport following a rise in the number of applications, but this seems to have improved in 2018 and 2019.\(^{691}\) Other concerns relate to the lack of specialisation of private lawyers in asylum-related matters as well as the practical obstacles stemming from the short time limit of the border procedure.\(^{692}\) Moreover, while applicants are assisted by a lawyer during the interview, there are not always able to meet prior to the interview, which may hinder the possibility for them to prepare accordingly.\(^{693}\)

Another important element to bear in mind relates to the absence of legal assistance at the external borders. This does not necessarily concern persons who have been channelled into the border procedure, but rather the thousands of persons who have no access thereto as they are being pushed-back and/or refused entry at the border (see statistics). Concerns have been expressed in this regard by UNHCR, and in 2019 the NGO CEAR further highlighted the issue of the lack of legal assistance for people who arrived by sea.\(^{694}\) Legal assistance in this context is undermined by obstacles such as the lack of information for newly arrived persons and the lack of possibility to access a lawyer.

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688 Article 17 Asylum Act.
689 Article 16(2) Asylum Act, citing Article 21.
690 Audiencia Nacional, Decision SAN 5389/2017, 28 December 2017.
692 Ibid.
693 Information provided by Accem, 29 September 2020.
In May 2019, the Spanish Ombudsman admitted a complaint lodged by the Spanish General Bar Council (Consejo General de la Abogacía Española) regarding the difficulties that lawyers are facing in the provision of legal assistance to persons reaching illegally Spanish shores. The General Bar Council raised several issues, including the violation of the right of defence of asylum seekers. This mainly results from the inadequacy of facilities to carry out preparatory, individualised and private interviews with asylum seekers as well as the lack of interpreters, thus preventing the possibility for them to be interviewed in their mother tongue. The Spanish General Bar Council drafted a Protocol on the provision of legal assistance to persons arriving to Spain by sea in June 2019, with the aim to provide guidance to lawyers offering legal assistance to asylum seekers arriving to the Spanish shores.

**Access to NGOs and information**

Access of NGOs to border facilities is not foreseen by law. According to the OAR, NGOs are usually provided access to border facilities in order to assist vulnerable applicants, although there is no further information available on this. The NGOs CEAR and the Red Cross have presence at the airports of Madrid and Barcelona, and UNHCR conducts monitoring activities to several border facilities (see role of UNHCR).

Generic information on the procedure is also provided by way of a brochure which is available in Spanish, English, French and Arabic. It is unclear, however, if asylum applicants are systematically provided this information in practice and whether they are able to understand it.

**Appeal**

**Request for re-examination (re-examen)**

The border procedure foresees the possibility to ask for the re-examination of the application for international protection when the latter has been declared inadmissible or rejected from examination (“denegar la solicitud”). This type of administrative appeal is only foreseen in the context of border procedures. The request for re-examination has automatic suspensive effect and must be requested in front of the OAR within 2 days from the notification of the decision to the applicant. The National High Court has clarified that this time limit must be calculated in hours rather than in working days.

In May 2019, the Supreme Court provided clarity on the effects of submitting a re-examination of an asylum claim to another authority as well as on the calculation of time limits. As regards the competent authority, the Supreme Court noted that the Asylum Act does not indicate where re-examination requests should be filed. It therefore ruled that the general rules and guarantees applicable to the administrative procedure under the general Spanish Administrative Procedures Law applied to such cases. This means that the application for re-examination does not have to be filed where the applicant lodged an asylum claim and that it can be filed at any registry or public office of the Ministry of Interior. Moreover, the Court stated that the calculation of the two-days deadline starts at the moment of receipt by the competent authority of the request for re-examination.

During the administrative appeal, the applicant has the possibility to incorporate new arguments, new documentation and new allegations, but not to provide further clarifications on statements expressed in the

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695 Defensor del Pueblo, ‘El Defensor admite una queja de la abogacía sobre las dificultades que tienen para prestar asistencia a las personas que llegan a las costas en situación irregular’, 31 May 2019.

696 Consejo General Abogacía Española, La Abogacía Española impulsa un Protocolo de actuación letrada para entradas de personas extranjeras por vía marítima, 20 June 2019.

697 Information provided by the OAR, 14 September 2020; ACCEM, 29 September 2020.


699 Article 21(4) Asylum Act.

700 Audiencia Nacional, Decision SAN 2591/2017, 8 June 2017; Decision SAN 2960/2017, 30 June 2017.

701 Spanish Supreme Court, Decision STS 1682/2019, 27 May 2019.
application. The notice of review therefore consists of additional statements that may detail and clarify certain aspects of the initial application.

**Onward judicial appeals**

Applicants for international protection can lodge a judicial appeal (Recurso contencioso-administrativo) against Court decisions dismissing the request for re-examination. In the case of an inadmissibility decision, the applicant may submit a judicial appeal before the central courts (Juzgados centrales de lo contencioso). Conversely, in the case of rejection for examination, the judicial appeal will have to be lodged before the National High Court (Audiencia Nacional).

These judicial appeals have no suspensive effect. Instead, interim measures have to be granted in order to avoid the removal of the applicant. This has been criticised by NGOs as an important obstacle to an effective judicial protection. The tight deadlines foreseen in the border procedure, along with the swift execution of removals and forced returns once admission is refused, hinder the possibility to effectively lodge a judicial appeal in practice.

**Vulnerable applicants**

**Identification of vulnerability**

The Asylum Act does not provide a specific mechanism for the early identification of vulnerabilities. In practice, case officers of the OAR may identify an applicant as a vulnerable person during the examination of the application, in collaboration with the Border Police and UNHCR. Where applicant is identified as vulnerable, the application will be examined carefully and entry to the territory may be granted.

However, there is no information available as to whether this is systematically applied in practice. The lack of identification mechanism and procedural guarantees for asylum seekers has been reported as one of the main gaps in the Spanish asylum system in recent years, especially regarding victims of human trafficking. Given the numerous issues reported in the identification of vulnerable applicants in the regular procedure, it is only fair to assume that the short time limits applicable to the border procedure are additional barriers to the provision of adequate procedural guarantees for vulnerable applicants.

Nevertheless, positive developments have been reported in certain locations where the border procedure is being applied. This is the case at the Madrid Barajas Airport, where the Directorate-General for Integration and Humanitarian Assistance of the Ministry of Inclusion, Social Security and Migration signed the adoption of a specific procedure in October 2019, together with the State Delegation for Gender Violence of the Ministry of the Presidency, Relation with the Parliament and Equality. The new procedure foresees a collaboration framework with five NGOs working in the reception of asylum seekers and in the detection of - and assistance to - trafficked persons. The aim is to foster and guarantee a swift access to adequate support services, before and independently from their formal identification as victims of human trafficking. The NGOs involved in this procedure are the Spanish Red Cross, Proyecto Esperanza-Adoratrices, Association for the Prevention, Rehabilitation and Care for Women Prostituted (APRAMP), Diaconía and the Fundación Cruz Blanca. The aim is to extend the pilot project to other Spanish airports in the future, e.g. in Barcelona and Málaga, but there is no more information available as to future plans. This being said, the NGO CEAR reported that, despite being

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702 Information provided by the OAR, 14 September 2020.
704 Information provided by the OAR on 14 September 2020.
706 Ministerio de Trabajo, Migraciones y Seguridad Social, ‘El Gobierno pone en marcha un procedimiento de derivación de potenciales víctimas de trata de seres humanos en el aeropuerto de Barajas’, 15 October 2019.
detected as victims of human trafficking by a specialised NGO at the Madrid airport, and despite the recommendations of the Spanish Ombudsman to avoid their return, two young Vietnamese girls had been returned back to their home country in 2019.  

**Unaccompanied children**

According to the OAR, unaccompanied children are exempted from the border procedure, although this is not foreseen by law. A specific Protocol regarding unaccompanied children was adopted in 2014 in cooperation between the Ministries of Justice, Interior, Employment, Health and Social Services and of Foreign Affairs along with the Public Prosecutor (Fiscalía General). The Protocol foresees *inter alia* a framework for the identification of unaccompanied children arriving by sea and defines the procedure that should be followed for age assessment procedures in case of doubts about the persons minority.

In practice, medical methods and consideration of documentary evidence in the context of age assessment procedures have been heavily criticised by international organisations, NGOs, academics, as well as administration officers and the Spanish Ombudsman. They have further led to several condemnations by the United Nations Committee on the Rights of the Child in 2018 and 2019. The main concerns relate to the inaccurate nature of these tests, the lack of medical knowledge as well as the lack of provision of information to minors. This results *inter alia* from the lack of legislative coherence and the discretion afforded to the authorities.

Practice suggests that medical age assessment procedures are carried out as a rule rather than as an exception, even in cases where official identity documentation are being provided. In several cases at the Madrid Barajas Airport in 2017, children with identity documents proving their minority were registered as adults due to the fact that they were travelling with a (false) passport declaring them over the age of 18.

Save the Children has also documented important issues faced by unaccompanied minors arriving to Spain. Where the border police have doubts over a child’s age, and no identification documents are provided, the children are not systematically integrated under the public minor protection system until their age is assessed. This means that some of them have to wait for the result of the age assessment procedure in so-called Centres for the Temporary Assistance of Foreigners (Centro de Atención Temporal de Extranjeros – CATEs) which are *de facto* detention centers managed by the police.

There are no available figures on the number of unaccompanied minors processed into the border procedure.

**Detention and restriction of liberty**

Under Spanish legislation, asylum seekers should not be detained if their asylum procedure is pending. In practice, however, individuals subject to the border procedure are *de facto* detained in “areas of rejection at
borders” (Salas de Inadmisión de fronteras) at international airports and ports. \(^{716}\) This amounts *de facto* to deprivation of liberty, since applicants are not allowed to leave those spaces.

Similarly, individuals who apply for asylum after being placed in detention centres for foreigners (CIE) remain detained pending the decision on admission to the territory for the purpose of the asylum procedure.

Thus, every person subject to a border procedure in Spain is either officially or *de facto* detained.

**Length of detention**

Individuals are placed in “areas of rejection at borders” at international airports and ports for a maximum of 8 days, until a decision is taken on their right to enter the territory. In 2017, the Ombudsman documented cases of persons being held in the airport facility for periods exceeding the legal time limits. \(^{717}\) No further cases have been reported in 2018 or 2019.

As regards persons placed in detention centres for foreigners (CIEs), the overall maximum detention period is 60 days. \(^{718}\) However, as soon as an application for international protection is lodged in a CIE, the same time limits as in other border facilities apply; i.e. 8 days in total.

**Review of detention**

The arrest of a foreigner shall be communicated to the Ministry of Foreign Affairs and the embassy or consulate of the person detained, when detention is imposed with the purpose of return as a result of a refusal of entry. \(^{719}\)

The competent authority to authorise and, where appropriate, annul the placement in a detention centres for foreigners (CIE) is the Provincial Court (Audiencia Provincial) which has territorial jurisdiction over the place where detention is imposed. The judge responsible for monitoring the stay of foreigners in detention centres and in “areas of rejection at borders” will also be the first instance judge of the place they are located in. This judge takes decisions over requests and complaints raised by detainees where they affect their fundamental rights. \(^{720}\) These decisions may not be appealed. Persons in detention remain available to the judge or court that authorised or ordered the detention. \(^{721}\)

**The role of UNHCR**

UNHCR plays an important role in the Spanish asylum system, including in the context of border procedures. The OAR must inform UNHCR of all the asylum applications lodged in Spain and – during the regular procedure - the latter contributes to the procedure by being part of the Inter-Ministerial Commission of Asylum (Comisión Interministerial de Asilo y Refugio – CIAR), where it has the right to intervene but not to vote. \(^{722}\)

Regarding the border procedure specifically, UNCHR has presence in several border facilities where it carries out monitoring activities. It carries out periodic visits *inter alia* to the Madrid and Barcelona Airports and, in relation to sea arrivals, it has a permanent presence in the Autonomous Community of Andalucía, namely in Málaga (covering Motril and Almería) and in Algeciras (also covering the Cádiz province). UNCHR further carries out periodic visits to the main points of disembarkation of boat arrivals, i.e. in Algeciras, Málaga, Motril

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\(^{716}\) Article 22 Asylum Act.

\(^{717}\) Ombudsman, *El Defensor del Pueblo inspecciona la sala de asilo del aeropuerto de Barajas para conocer la situación de un grupo de saharauis*, 31 August 2017.

\(^{718}\) Article 62(2) Aliens Act.

\(^{719}\) Articles 60(4) and 62(5) Aliens Act.

\(^{720}\) Article 62(6) Aliens Act.

\(^{721}\) Article 60(3) Aliens Act.

\(^{722}\) Article 2 Asylum Act.
and Almería. In this context, UNHCR is also able to contribute to the identification of vulnerable persons, which is of paramount importance given the lack of identification mechanism and the lack of procedural guarantees described above.

As regards the decision-making process, UNHCR may issue a binding opinion supporting the granting of protection in border procedures.\textsuperscript{723} In such a case, the application cannot be considered as manifestly unfounded. UNHCR may further request the Ministry of Interior to extend the length of the border procedure to 10 days.

**Allocated budget for border procedures**

There is no information available regarding the budget allocated for border procedures. Nevertheless, reports indicate that several million of euros have been spent for border management purposes, including for the construction and renovation of the fences at the Spanish enclaves, and for equipment dedicated to border guards. In 2019 for example, it was reported that renovation work of the fences at the enclaves had been initiated with a total budget of €32 million.\textsuperscript{724}

\textsuperscript{723} Article 21(3) Asylum Act.

\textsuperscript{724} El Foro de Ceuta, *Interior sustituirá las concertinas por una sofisticada valla con cuatro tramos*, 22 January 2020.
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In April 2020, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) launched an implementation report on Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive), covering asylum procedures at the border or transit zone of a Member State. Erik Marquardt (Greens/EFA, Germany) was appointed rapporteur. Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament’s Directorate-General for Parliamentary Research Services (EPRS).

Beyond in-house research, this European Implementation Assessment is based on two external research papers: i) a legal assessment, and ii) a comparative country assessment covering seven Member States. It assesses the implementation of Article 43 of the Asylum Procedures Directive on the basis of its effectiveness, fundamental rights – including procedural rights – compliance, efficiency, and coherence with the aims of the Asylum Procedures Directive and the Common European Asylum System as a whole. It concludes that uniform and fair asylum procedures at the border have not been achieved due to patchy implementation also caused by lack of clarity in the underlying EU legal framework. A number of recommendations are made to address the shortcomings identified in future legal and practical arrangements for border procedures.