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The EU and Asylum

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Introduction

This briefing considers the EU's policies on asylum and how they deal with the issue in light of the surge in applications since the Arab Spring in 2011 and the turmoil in the Middle East that has followed since. The dramatic increase in the numbers of people crossing the Mediterranean and the Aegean and seeking to enter the EU over the spring and summer of 2015 has led to considerable human suffering, overwhelmed Member States, created a major challenge to the EU's rules for handling asylum seekers and led to divisions among Member States. This is a fast-moving situation and this paper will be updated from time to time to take account of developments.

People may seek asylum under the 1951 UN Convention on Refugees (ratified by all EU Member States) if they *have* a well-founded fear of persecution.¹ The Convention imposes a binding obligation on its signatories and was ratified by the UK in 1954, before it joined the EU and would remain binding if it left.² There is often confusion between the terms "asylum seeker", "refugee" and "illegal migrant". In law an asylum seeker is a person who wishes to be recognised as a refugee under the 1951 Convention. Asylum seekers become officially recognised refugees once their asylum application has been accepted. An illegal migrant is a person who enters another country without permission or without seeking asylum or who enters openly for another purpose (such as to visit) and then remains there.³ The category of "internally displaced" is not defined in the Convention but is used by the UN High Commissioner for Refugees to refer to people who have moved to another part of their own country because of a conflict or a natural disaster in their usual place of residence.⁴

Responsibility for handling an asylum claim rests with the Member State where the asylum seeker first entered the EU.⁵ Concern about the handling of asylum seekers arriving in the European Union led to agreement between all Member States in 1990 on the Dublin Convention, under which an asylum seeker can be returned to the first EU Member State where they arrived. As a result of changes agreed in the 1997 Treaty of Amsterdam, the EU began working towards a wider Common European Asylum System (including incorporating the Dublin Convention into EU law as a regulation), adopting the final measure as part of this programme in 2013. Revised versions of two of these measures came into force in July 2015.

¹ *Convention and Protocol relating to the Status of Refugees*, republished 14 November 2011; the 1951 Convention should not be confused with the 1949 Geneva Conventions on armed conflict

² UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, 17 April 2015, p. 4

³ See *Immigration Act 1971*, s. 33(1); and HM Government, *Immigration Rules: Introduction*, 28 July 2015

⁴ See United Nations Economic and Social Council, *Report of Statistics Norway and the Office of the United Nations High Commissioner for Refugees on statistics on refugees and internally displaced persons*, E/CN.3/2015/9, 8 December 2014, p. 5

⁵ *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, 1997 OJ C 254/1

The scale of asylum in Europe

Even before the sudden surge in 2015, applications for asylum had been on a rising trend across the EU over the last decade. They rose from 276,000 in 2004 to 626,000 in 2014.⁶ In the first quarter of 2015 the number of applicants seeking asylum in the EU rose again – by 86 per cent (compared to the same quarter of 2014) to 184,000.⁷ In the UK, the number of asylum seekers rose from about 1,500 people a year in 1979 to a peak of 84,132 in 2002 but later fell sharply and was 31,400 in 2014.⁸ As the table below shows, the pressure is higher in other EU Member States – the UK had the sixth highest number of asylum seekers in the EU in 2014.⁹ In the case of both Hungary and Sweden the number of applications represented a far larger share of their population than the number in the UK:¹⁰

| Country | Number of asylum applicants, 2014 | Applicants per million population, 2014 |
|----------------|--|--|
| Germany | 202,645 | 2,510 |
| Sweden | 81,180 | 8,415 |
| Italy | 64,625 | 1,065 |
| France | 62,735 | 955 |
| Hungary | 42,775 | 4,330 |
| United Kingdom | 31,745 | 495 |

This increase in applications is part of a global trend – the UN High Commissioner for Refugees has said that the number of those seeking refuge in the world in 2014 was 19.5 million, a rise of more than 2.9 million in a year. By the end of 2014, Syria had replaced Afghanistan as the largest source country of those seeking refuge.¹¹

⁶ Eurostat, *Final decisions on (non-EU) asylum applications, 2014*, 18 June 2015

⁷ Alexandros Bitoulas, *Asylum applicants and first instance decisions on asylum applicants: 2014*, Eurostat, 20 March 2015, pp. 4-5

⁸ HM Government, *Immigration Statistics, January-March 2015*, 21 May 2015

⁹ Alexandros Bitoulas, *op. cit.*, p. 4

¹⁰ Eurostat, *op. cit.*

¹¹ See UNHCR, *Global Trends: Forced Displacement in 2014*, 19 June 2015

The top seven countries of origin for applicants in the EU in 2014 were¹²:

| Country | Number of asylum applicants |
|----------------|------------------------------------|
| Syria | 122,790 |
| Afghanistan | 41,305 |
| Kosovo | 37,875 |
| Eritrea | 36,990 |
| Serbia | 30,810 |
| Pakistan | 22,120 |
| Iraq | 21,330 |

In addition, there are smaller numbers from other countries too but the picture changes over time as the global situation changes. What is perhaps surprising is the number of applicants from non-EU countries in Europe. There are large numbers every year from (in order of numbers) Kosovo, Serbia, Russia, Macedonia, Bosnia, Albania and Georgia. This reflects the extent of political instability in the EU's neighbourhood, as well as the economic attractiveness of the EU, and the need for an effective EU policy response to it.

The growth in the numbers of migrants fleeing across the Mediterranean and the Aegean has been the most visible sign of the asylum and illegal immigration problems in Europe over the last three years but the growth in asylum claims from Albania, Kosovo, and Serbia was greater last year.¹³ Asylum claims from Albanians and Kosovars rose sharply in 2014/15, driven by poverty and corruption in their home countries and large-scale people trafficking, with increases of 103 per cent and 82 per cent respectively in the first quarter of 2015.¹⁴ A far smaller proportion are being accepted than from Iraq and Syria because they do not meet the definition of having a well-founded fear of persecution (see below).

While the numbers of asylum seekers in Europe have been growing they are relatively small compared to the burden faced by non-EU countries. For example, the largest number of those seeking refuge in one country at the moment is the 1.59 million in Turkey, mostly from Iraq and Syria. In terms of the proportion of refugees to overall population, Lebanon and Turkey have far more than any EU Member State.¹⁵ Over 86 per cent of the world's refugees are hosted in developing countries, a 10 per cent increase over the last decade.¹⁶

¹² Bitoulas, *supra* n. 7, p. 4

¹³ Eurostat, 'Asylum statistics', 18 June 2015, Table 1

¹⁴ *Ibid.*; see also, 'Exodus from Kosovo: Why thousands are leaving the Balkans', Harriet Alexander, *Daily Telegraph*, 21 February 2015

¹⁵ UNHCR, *supra* n. 11, p. 15

¹⁶ *Ibid.*, pp. 2, 15

EU policy on asylum

Current Legal Measures

Article 78 of the Treaty on the Functioning of the European Union says 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,

in accordance with the UN Convention on Refugees.¹⁷ To achieve this the EU has adopted a number of measures so far:

- The Dublin Regulation – implements the Dublin Convention enabling the return to the Member State where the applicant first arrived; an associated regulation requires that all asylum applicants are finger-printed and an EU database of these fingerprints is maintained, which enables those who have travelled from another Member State to be returned there;¹⁸
- the Asylum Qualification Directive – introduced common definitions of an asylum seeker, using the wording of the UN Convention, and established what their rights are; it came into force in late 2006; its purpose is to ensure that all EU states agree on what an asylum seeker is and treat them in the same way thus deterring “asylum shopping”;¹⁹
- the Asylum Reception Conditions Directive – this requires Member States to provide basic support to asylum applicants, including ensuring they have a standard of living adequate for their health; this directive came into force in February 2005 and was modified in 2011 and 2012;²⁰
- the Asylum Procedures Directive – this established minimum standards in Member States for the granting and withdrawing of refugee status, including legal advice for asylum seekers; it first came into force in 2007 and 2008 and has been modified since.²¹

The UK originally opted in to all four of these measures but chose not to opt in to the revised versions of the Qualification, Reception Conditions and Procedures directives. It did opt in to the revised Dublin regulation.

These measures amount to a comprehensive body of law intended to provide a clear framework in the EU for handling asylum issues while still leaving the decisions on individual applications to Member States. But even before the surge of asylum seekers in the summer of 2015, major problems had arisen in the implementation of these policies. For example, Greece, Hungary and Italy face particular pressures as they are on the most direct routes taken by migrants in to the EU but they have not always registered and fingerprinted new arrivals in accordance with EU law because of the volume of asylum seekers. Italy's programme for

¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union, art. 78, 2012 OJ C 326/47, at pp. 76-77

¹⁸ Regulation No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013 OJ L 180/31

¹⁹ European Commission, 'Who qualifies for international protection', 23 June 2015

²⁰ European Commission, 'Reception conditions', 23 June 2015

²¹ *Ibid.*

asylum seekers can only accommodate 3,000 people but the number of migrants seeking asylum was thought to be around 75,000 in 2013.²² As one study has put it:

states having external borders of the Union are usually less inclined to apply more liberal asylum policies, since it is they who are most often deemed to be the ones responsible for examination of asylum applications under the Dublin II Regulation.²³

This can be seen in the wide variation of acceptance rates for Iraqis seeking asylum during some of the most difficult years in Iraq. In 2006-2008 the acceptance rate in Greece was just 0.03 per cent compared to 53.7 per cent in Germany.²⁴ However, these variations may reflect other factors, such as national policies that may be more generous in granting asylum than the UN Convention requires. In addition, asylum seekers themselves have often shown a reluctance to stay in the first Member State where they have arrived because they wish to seek asylum in another Member State.

Responding to the surge: Operation Triton & Mediterranean Migration

Since November 2014 the EU's border agency, Frontex, has co-ordinated efforts to deal with the large numbers of migrants trying to cross the Mediterranean into Europe. The situation in the Mediterranean had deteriorated following the overthrow of the Gadhafi regime in Libya and the outbreak of civil war there. In addition, those fleeing the fighting in Syria increasingly made their way to Greece, crossing in small boats from Turkey.

Operation Triton, a maritime operation to rescue migrants in the Mediterranean, which replaced Italy's Operation Mare Nostrum, proved inadequate in the spring of 2015 to deal with the sheer numbers trying to cross. An emergency meeting of the European Council on 22 April 2015 agreed to triple the funding for the EU's Mediterranean migration policies and Member States (including the UK) offered additional ships and personnel in the light of the terrible loss of life at sea.²⁵

A new development at that meeting was the decision to launch a security operation under the Common Security & Defence Policy (CSDP) focused on trying to deter people smugglers, particularly from the Libyan coast. The suggestion that the CSDP mission would capture and destroy vessels being used in the illegal migration was controversial but reflected concerns that expanding search and rescue efforts in the Mediterranean had simply encouraged more people to risk the sea crossing. The mission became operational at the end of July 2015.

Responding to the surge: emergency & long-term measures

The most difficult issue was a proposal from the European Commission for an emergency programme of resettlement in Member States for 40,000 asylum seekers who had reached Europe. Several Member States were unwilling to agree to a mandatory scheme and it was agreed it should be voluntary. (The UK, Denmark and Ireland have an opt-out from any such scheme under the

²² 'Lampedusa tragedy: Deaths Prompt Calls to Amend Asylum Rules', Walter Mayr & Maximilian Popp, *Der Spiegel*, 7 October 2013

²³ Joanna Lennart, 'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Merkourios: Utrecht Journal of International and European Law*, (2012) 28(75), pp. 4-19

²⁴ Hannah Cooper, *Migration Studies Unit: Working Papers: No. 2011/10*, London School of Economics, Table 1, p. 11

²⁵ European Council, 'Special meeting of the European Council, 23 April 2015 – statement', 23 April 2015

justice and home affairs provisions of the Treaties, which the first two have exercised). By September 2015, all 40,000 resettlement places had been offered by Member States.²⁶

The scale of the surge of people across the Mediterranean in late August and early September 2015 created a new crisis. The response of Member States was uncoordinated and the desire of most of those fleeing not to settle in the EU Member State they first arrived in led to large numbers seeking to pass through Greece and Hungary without registering. The image of a dead little boy on a beach at Bodrum in Turkey helped to shift public and political opinion towards offering more help to those fleeing Syria and Iraq. In early September, Germany unexpectedly suspended application of the Dublin rules for Syrian asylum seekers in response to distressing scenes of thousands of migrants being forced to stay in Hungary. Faced with a massive surge, Germany announced a week later that it would enforce the Dublin Regulation and decided to conduct border checks to that end.

Other aspects of this crisis included the decision of the Hungarian Government to build a fence on its border with Serbia to stop migrants entering the country except at recognised border crossings. In addition, the ability of the migrants to cross borders within the Schengen zone unchecked became a major political issue as well as a security one.²⁷ At various times several Schengen states suspended their open borders, partly because of the sheer numbers involved but also in response to the activities of people traffickers. The response of the Commission to the new crisis was to propose a series of measures to deal with both the short-term and the long-term issues raised. They were announced by the President of the Commission on 9th September 2015:

- the expansion of the temporary redistribution scheme to a total of 160,000 refugees;
- a permanent mechanism for redistributing refugees in future;
- adopting a common list of safe countries in Europe from which applications for asylum would not normally be accepted;
- more support to help refugees and internally displaced people in the Middle East and North Africa;
- renewed efforts to tackle the conflicts in Syria, Iraq and Libya through political and diplomatic channels; and
- a trust fund for Africa, to address the causes of migration from Africa.²⁸

The implementation of these measures is still under discussion; some of them are very divisive among Member States, particularly those relating to both the temporary and permanent redistribution of refugees within the EU. Given that the UK, Ireland and Denmark can opt out of these measures, they are largely for the other Member States. The safe countries list is a necessary response to the growth in asylum applications from poor European countries, most of which are candidates for EU membership already, and from where the bulk of asylum applicants will be rejected as few can claim to be in fear of persecution.²⁹

²⁶ European Council, *Relocation of 40 000 refugees from Greece and Italy agreed by Council*, 14 September 2015

²⁷ This concern was increased by an unrelated incident involving a suspected terrorist who was on a Thalys crossborder train on 21 August 2015: European Commission, *Commissioners Avramopoulos and Bulc at the Paris meeting on cross-border cooperation against terrorism and for rail security*, STATEMENT/15/5553, 29 August 2015

²⁸ European Commission, *Refugee Crisis: European Commission takes decisive action*, IP/15/5596, 9 September 2015

²⁹ European Council, *Presidency conclusions following the Justice and Home Affairs Council of 14 September 2015*, 14 September 2015, p. 6

Concern has been expressed that those granted asylum would be free to move to other Member States, including the UK. Refugees will only acquire this right once they have been granted citizenship by the country that granted them asylum, a process that usually takes a number of years.

The new measures recognise the overwhelming importance of trying to restart a dialogue between the warring parties in Syria, to find a way to build bridges between the Sunni and Shia communities in Iraq and to support the UN-led conflict resolution process in Libya. They also acknowledge the important link with EU development policy as it is one of the most effective means by which we can address the common migration triggers of poverty and poor governance. This is particularly important in Africa but also in some parts of Asia.

The UK's Position

The UK Government chose to opt in to the first phase of EU asylum measures between 1999 and 2004 but the coalition government announced in 2013 that it would not be opting in to the next wave of EU asylum measures as they did not think that would be in Britain's best interests.³⁰ Broadly, the UK has opted in to those measures which enable it to control migration but opted out of those which would enhance the rights of migrants.³¹ This enables the UK to retain the right (within the terms of the Convention) in relation to asylum seekers to refuse or to withdraw support, and to prevent access to employment for up to 12 months. It also enables the UK to use detention and/or accommodation centres for asylum seekers. Under the 2013 Asylum Reception Conditions Directive, which came into force in July 2015 but from which the UK opted out, asylum seekers have to be allowed to work after a maximum of nine months; and the use of detention is restricted.

In response to the crisis in the summer of 2015, the UK decided to accept a larger number of asylum seekers from Syria, up to 20,000 people over five years, separately from the temporary redistribution scheme established by the EU.³²

The law relating to asylum seekers is complex and constantly evolving as a result of case law. There is sometimes confusion between the UN Refugee Convention and the Council of Europe's European Convention on Human Rights. These two conventions are international commitments entered into by the UK prior to its EU membership.

Although not a member of Frontex (because the UK is not part of the Schengen borderless zone) the UK has been an active participant in many of its operations to combat illegal migration and makes financial contributions to some of its programmes. These include missions to support the policing of the land and sea borders of Bulgaria and Greece to help them deter and manage the large flows of migrants via those countries and more recently in Operation Triton, to which the UK has committed substantial military assets.³³

³⁰ Cathryn Costello & Emily Hancox, *The UK, the Common European Asylum System and EU Immigration Law*, The Migration Observatory, 7 May 2014, p. 2

³¹ The key legislative measures are listed on page 4 of this paper

³² HC Deb 7 September 2015, vol 599, cols 23-27

³³ See Katherine Boot *et al.*, *Between Greece and Turkey: At the border of denial*, FRONTEX, 19 May 2014

Future Developments

The pressure on Member States from asylum seekers is unlikely to decline in the short-term. The conflicts in the Middle East and the growing population of young people in Africa (many of whom cannot find work) will continue to drive large-scale people movements, including towards Europe.³⁴ EU policies can help to mitigate its effects but political settlements are needed to end the civil war in Syria, to bring stability to Iraq, to enable a coherent response to the terrorism of so-called Islamic State and to improve governance and human rights in a number of African states.

The EU's legal measures have helped to establish a stronger framework for asylum in Europe but the unwillingness of certain Member States to go very far to share the burden that falls disproportionately on southern European Member States has led to considerable tensions within the EU and arguably undermined the effectiveness of EU policies. But there must also be doubts about the viability of mandatory quotas, not least because it would be difficult to require an asylum seeker to move to an EU Member State in which they did not wish to live.

It is in the UK's interest that we work within the EU to ensure that all Member States apply broadly the same rules and would-be asylum seekers are thus deterred from exploiting differences between countries. Our nearest neighbours are other EU Member States through which many asylum seekers come in order to claim asylum here.

The UK's interest in a concerted European response to the migration emergency would remain even if the UK left the EU. Many non-EU countries in Europe, such as Switzerland and Turkey, have large numbers of asylum seekers.

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³⁴ Population Reference Bureau, *The World's Youth: 2013 Data Sheet*, 26 April 2013



Senior European Experts

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