

D4.2

Reports on

**(1) The impact of family migration
and family reunification of refugees
and other migrants**

**(2) Secondary movements within
the European Union**

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January 2022



"This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement N° 882986".

Deliverable Factsheet	
Title and number	<i>Reports on (1) the impact of family migration and family reunification of refugees and other migrants (2) secondary movements within the EU (D4.2)</i>
Work Package	WP4
Submission date	25/February/2022
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Reviewers	(1) Ermioni Xanthopoulou & Mengia Tschaler (BUL) (2) Cristina Blasi, Colleen Boland & Daniel Morente (UAB)
Dissemination level	PU (Public)
Deliverable type	R (Report)

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Reports

(1) The impact of family migration and family reunification of refugees and other migrants (Lena Detlefsen & Tobias Heidland -Kiel Institute for the World Economy-; Andreas Backhaus -Bundesinstitut für Bevölkerungsforschung-)

(2) European Union Policies on Onward and Secondary Movements of Asylum Seekers and Refugees. A Critical Mapping of the EU's Migration Management Complex (Sergio Carrera, Ngo Chun Luk, Friederike Mager & Marco Stefan -Centre for European Policy Studies-)

¹ This deliverable contains two separate reports that we merged in one single document.

The impact of family migration and family reunification of refugees and other migrants

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"This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement N° 882986".

Version Log			
Issue Date	Version	Author	Change
31/01/2022	v0.1	Lena Detlefsen, (IfW), Andreas Backhaus (CEPS) Tobias Heidland (IfW)	First version sent for review.
07/02/2022	V0.2	Ermioni Xanthopoulou (BUL)	Review sent to author
21/02/2022	V0.3	Mengia Tschalaer (BUL) & Colleen Boland (UAB)	Review sent to author
24/02/2022	V0.4	Lena Detlefsen, (IfW),	Final version sent to Coordinator
25/02/2022	V0.5	Cristina Blasi (UAB)	Final check and layout adjustment. Version ready to submit.
15/06/2022	V1.0	Lena Detlefsen & Tobias Heidland (IfW)	Final version after EC review

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Executive Summary

Family migration constitutes the largest migration inflow to OECD countries, accounting for almost half the immigration in recent years. Between 2014 and 2018, family migration increased in most countries, leading to worries about large migration flows in future years following the large numbers of asylum applications in E.U. countries during the mid-2010s. That led some countries to restrict family reunification programs, despite a lack of empirical estimates of the numbers of family migrants that could realistically be expected.

This paper provides predictions of how large an increase in the number of immigrants through family reunification and reproduction can be expected. A common stereotype that policymakers and voters have in mind when considering migrants, especially asylum seekers and refugees, is that of a single, typically male, young person. Reality is more complex, with many migrations taking place as a core family. To establish a more representative picture closer to the facts, it is thus important to distinguish to what extent the structure of migrants' families is driven by family reunification and reproduction that only occurs after the arrival in the destination country, respectively. To assess these questions, we combine data from the IAB-BAMF-SOEP Survey of Refugees with fertility estimates from the Wittgenstein Centre for Demography and Global Human Capital and make predictions about family reunification and delayed fertility. We build thereby on the literature on fertility patterns of migrants and assume two different fertility scenarios: fertility under adaptation and fertility under socialization.

We estimate that in general, for each asylum seeker and refugee, 0.19 family members can be expected to come to Germany through family reunification. In addition, between 0.20 to 0.47 new family members can be expected due to future fertility, depending on the scenario. We also provide further country and education specific predictions building on regression analysis.

Our results imply that family reunification and delayed fertility can increase the asylum seeker and refugee stock in the destination countries, numbers are however lower than often expected.

Keywords: migration, family reunification, delayed fertility, predictions, Germany

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Abbreviations

AZR: Ausländerzentralregister (German: Register of foreign persons)

BAMF: Federal Office for Migration and Refugees

IIASA: International Institute for Applied Systems Analysis

MIPEX: Migrant Integration Policy Index

OECD: Organisation for Economic Cooperation and Development

PRP: Permanent residence permit

SOEP: Socio-Economic Panel

TRP: Temporary residence permit

VID/OEAW: Vienna Institute of Demography of the Austrian Academy of Sciences

WIC: Wittgenstein Centre for Demography and Global Human Capital

W.U.: Vienna University of Economics and Business

1. Introduction

Family migration constitutes the largest migration inflow to OECD countries, accounting for 41 per cent (around 1.9 million migrants) of the total permanent migration flows to OECD countries in 2018 (OECD 2020). Between 2014 and 2018, family migration increased in most countries in the OECD area (OECD, 2017, 2020). Although family migration is broader than family reunification, though, also comprising family formation, accompanying family members of migrants, and international adoption (OECD 2019)¹ the increasing numbers lead to increasing debates on family reunification programs in many countries. Subsequently, several OECD countries restricted their family reunification programmes, causing a decrease in family migration (OECD 2019). Family reunification is often seen as a secondary inflow of immigrants happening as soon as first-movers have settled, received residence status and made the necessary arrangements, which leads to further increases of the migration populations after the arrival of first migrants. In the discussion of family migration and family reunification terms like “migration multiplier” (e.g. Jasso & Rosenzweig 1986) and “chain migration” (e.g. Cascio & Lewis 2020) are often brought up, especially in the U.S. context, to highlight the possibility that each new immigrant could generate a set of potential future immigrants.

This study adds to the debate on family reunification by considering the demographic importance of family reunification as a process that can potentially increase the stock of migrants further after the arrival of an initial wave of migrants. The aim is to improve predictions on the number of family members to arrive in the course of future family reunification programs as the predictions have important implications for the receiving countries’ labour markets, social security systems and integration policy design. Additionally, improved predictions of future family reunification helps to improve general predictions of migration flows due to its increasing importance.

¹ The OECD (2019) terminology stated family migration includes. family reunification;so family members migrate after the arrival of a principal migrant to sponsor their admission, the family ties predate the arrival of the principle agent; family formation, so a residential or foreigner marries a foreigner and sponsors that individual for admission or status change; accompanying family members of migrants, in that case family members are admitted together with the principal agent; , international adoption includes a residential or foreigner adopting a child of foreign nationality residing abroad.

Generally, the right to reunite may be exercised as soon as an asylum seeker has obtained a legal protection status. Family reunification hence represents an important step in the integration path of recognized refugees (e.g. for refugees's satisfaction (Gambaro et al. 2018), leading to a higher likelihood of applying for the recognition of degrees (Jacobsen 2021) and hence labour market integration). In this paper, we will use recently collected German panel survey data (SOEP Refugee sample) on asylum seekers and refugees to generate improved predictions on the number of family members to arrive in the course of future family reunification programs. We will focus on the main origin countries of asylum seekers and refugees in Germany: Syria, Afghanistan, Iran, Iraq, Eritrea and Sub-Saharan Africa (without Eritrea). While the very limited literature so far relies on information about family size reported by asylum seekers and refugees, we will provide quantitative estimates based on already realized family reunification of asylum seekers and refugees. That way, we can build on information of realised family reunification instead of assumed family reunification numbers. We will complement these predictions by estimates about delayed fertility effects on the reproduction of asylum seeker and refugee families after reunification. Delayed fertility thereby means the number of children asylum seeker and refugees welcome after the arrival in Germany. The SOEP data set is best suitable for that purpose as it also contains detailed individual information, which improves predictions on family reunification. We combine the data set with data from the Wittgenstein Centre for Demography and Global Human Capital (2018) on fertility rates across more than 200 countries to predict fertility patterns.

Our study builds and adds to two strands of literature: literature on family migration dynamics and fertility patterns of immigrants. To understand how families migrate and how many family members will follow via family reunification programs, we have to understand family migration patterns as these may differ with regard to the country of origin (e.g. Beauchemin et al. 2015; Kraus et al. 2019). For example, for migrants from Sub-Saharan Africa, Beauchemin et al. (2015) show that transnational family arrangements, so families leaving in different countries, make up most Sub-Saharan migrants. Additionally, literature shows that the odds of reunifying depend further on the gender of the first mover, with families reuniting more often in case of male first movers (Barbiano di Belgiojoso & Terzera 2018),

gender norms in the origin country (Barbiano di Belgiojoso & Terzera 2018), e.g. women only promote their husband's reunification from countries that support female work participation and favour female autonomous migration (Fresnoza-Flot 2017), and social networks (Fresnoza-Flot 2018; González-Ferrer 2013). Importantly, restrictive policy contexts at the destination or legal status neither facilitate nor impede reunification (Beauchemin 2017). However, policies can impact the general migration pattern (Andersson & Jutvik 2019). Additionally, we also need to understand different fertility patterns of migrants to complement our family reunification predictions by estimates about delayed fertility effects. The literature on fertility patterns of migrants thereby provides competing theories: socialisation hypothesis (Kulu et al. 2019; Kulu & Milewski 2007; Milewski 2010), stating that fertility preferences of the origin country persist also in the destination country, adaptation hypothesis (Kulu 2006, 2008), stating that fertility preferences adapt to the fertility preferences in the destination country, disruption hypothesis (Kulu & Milewski 2007), hypothesis of interrelated events (Milewski 2007),). Additionally, the selectivity of migrants and differences in their composition, e.g. education may lead to differences in fertility patterns, as fertility rates are generally lower for higher educated individuals (Balbo et al. 2013). In our study we use the adaptation and socialization theory as potential high and low benchmarks of fertility. In case of the adaptation theory, we use the same fertility trends as in the destination country, Germany, while with the socialization theory we use the fertility rates in the country of origin as a basis. We thereby differentiate between different educational groups.

The main results of our study are that the country of origin is important for the predictions of family reunification, while country of origin and education are important for the predictions of delayed fertility. Generally, our estimates reveal that for each asylum seeker and refugee, 0.19 family members can be expected to come to Germany through family reunification. In addition, between 0.20 to 0.47 new family members per asylum seeker and refugee can be expected due to future reproduction, depending on the fertility rate scenario we are building on (adaptation or sozialisation). However, when looking at country and education specific predictions our results reveal that there is a large heterogeneity across asylum seeker and refugee groups. While we predict 0.29 family member for each

asylum seeker and refugee in case of Syrian asylum seekers and refugees, we only predict 0.07 for asylum seeker and refugee coming from Afghanistan. Our results can be explained by the fact that many asylum seeker and refugee families arrive together in Germany, so family reunification is not necessary. The case is of different for asylum seekers and refugees from Sub-Saharan Africa (excluding Eritrea), for whom we predict a ratio of 0.09, which can be explained by the fact that many families live still separated. Our predictions for delayed fertility, so reproduction after arriving in Germany, based on the adaptation and socialization theory, lead to large differences between both predictions for asylum seeker and refugee from Iraq and Afghanistan as there are large differences between the fertility rates in Germany and Afghanistan/Iraq, especially comparing lower educated groups.

Section 2 will lay the groundwork for the rest of the study by providing an overview of family reunification patterns and fertility trends. Section 3 introduces the legal context in Germany. Section 4 introduces the data and empirical methods. We then provide the results in Section 5. The final Section 6 discusses these results and concludes.

2. Conceptualising family reunification and fertility patterns of asylum seeker and refugees

Our study builds on two strands of literature: the literature on family reunification patterns and the literature on fertility patterns of asylum seeker and refugees. Both strands are important, as we need to understand important characteristics which determine family reunification and fertility patterns. Based on that information, we can improve predictions what increase in the number of asylum seekers and refugees through family reunification and delayed fertility can be expected.

The literature on family reunification found that family reunification is not always the dominant strategy for relocating of families and varies in the gender of the forerunner, spouses and children characteristics, and the country of origin. Refugees coming to Europe often pursue joint family migration and reunification (Kraus et al. 2019). This pattern of joint arrival or fast reunification was also found for Turkish migrants to Germany (González-Ferrer 2007). Studies for migrants coming from sub-Saharan Africa to Europe show on the other hand that family reunification is not always the preferred option of migrants and their families, as they live transnationally more often than they live reunified independently of legal restrictions (Baizán et al. 2014; Beauchemin et al. 2015; Mazzucato et al. 2015; Caarls & Mazzucato 2016). Barbiano di Belgiojoso & Terzera (2018) show that family, cultural, and gender norms of the home country are important for family migration, e.g. women only promote their husband's reunification from countries that support female work participation and favour female autonomous migration (Fresnoza-Flot 2017).

The gender of the forerunner also plays a role, as in case of asylum seekers and refugees from Afghanistan, Syria and Iraq coming to Germany, male forerunner more often reunite with their families than female forerunner (Kraus et al., 2019). In the case of the spouse characteristics, e.g. education, occupational status on family reunification, there is no clear picture. Caarls & Mazzucato (2016) found that having a highly educated spouse left behind decreases family reunification in the host country, while Baizán et al. (2014) found that having a highly educated spouse left behind increases and accelerates family reunification in the host country. Similar contradictory results also emerge for the occupational status of the spouse left

behind. Having an employed spouse left behind delays (González-Ferrer 2007) or impedes (Baizán et al. 2014; Caarls & Mazzucato 2016) their reunification.

There are also contrasting results regarding children. While having a higher number of children delays family reunification in the host country (González-Ferrer 2007; Ryan & Sales 2013), empirical results regarding gender and age selection among children are ambiguous. As for gender selection, some studies highlighted a gender preference for male reunification (González-Ferrer et al. 2012) while others found no gender preference (González-Ferrer 2007) depending on the country and group under investigation. As for age selection, some scholars (Friberg 2012; González-Ferrer 2007; Mazzucato et al. 2015) found that younger children tend to be reunified later than older children. Other scholars show that the existence of minor children is crucial for a couple's joint arrival at the destination as parents of young children may feel additional pressure to keep the family unit together and jointly bring their offspring into safety (Kraus et al. 2019).

One main aspect of family reunification is the legal status of migrants, as e.g. recognized refugee. However, studies have pointed out that legal status neither facilitates nor impedes reunification (Baizán et al. 2014; Caarls & Mazzucato 2016; González-Ferrer 2013). Studies show that migrants may reunify the family through alternative routes, that reunification is sometimes even pursued without legal status (Caarls & Mazzucato 2016; Fresnoza-Flot 2018), and that family reunifying can be even more likely in countries with more restrictive policies (Beauchemin 2017).

However, family reunification needs time and financial resources to take place therefore the socio-economic status can be important (Haagsman 2015). Studies show that an increase in years since since the time when the family member's relocation took place does not necessarily increase the likelihood of family reunification (González-Ferrer 2013; Mazzucato et al. 2015) and economic stability is only in some cases needed (Glick 2010; Kulu & Milewski 2007) and can be substituted by the support of social and family networks (Fresnoza-Flot 2018; González-Ferrer 2013). However, for asylum seekers and refugees from Afghanistan, Iraq and Syria, once recognized by the state, the legal status accelerates the reunification process (Kraus et al. 2019).

Not only the literature on family migration is important for our analysis. We also need the literature on fertility patterns of asylum seekers and refugees to improve

predictions of delayed fertility later on in our study. There are several competing theories in the literature. The socialisation hypothesis is built on the assumption that the reproduction behaviour of migrants after their move reflects the dominant reproduction preferences and behaviour patterns they were exposed to in childhood and that these preferences and behaviour patterns are likely to remain stable over each migrants' life course and even over generations, through mechanisms such as intergenerational transmission or socialisation in a minority group (Kulu & Milewski 2007; Kulu et al. 2019; Milewski 2010).

In contrast, the adaptation hypothesis assumes that an individual's current social context, encompassing both socio-cultural and economic factors, shapes their fertility preferences and behaviour. The new (assimilation) context offers the migrant a different opportunity structure and set of action alternatives to respond to, and a different set of values that s/he may assume or adapt to with time or over generations (e.g. Kulu 2006, 2008).

Two competing hypotheses further exist regarding the start of reproduction following migration. The disruption hypothesis states that due to the psychological stress and economic costs associated with moving, together with the change in environment, the time needed for labour market adjustment, and the separation of the partners may have disruptive effects on the lives of individuals and couples. Childbearing may be intentionally delayed until one or both partners have found a decent job or completed the migration process (Kulu & Milewski 2007). In turn, the hypothesis of interrelated events argues that when migration is closely linked with marriage and family proneness (the unobservable desire to form a family), childbearing may start soon after the migration (Milewski 2010). This hypothesis builds on studies showing that migration may also have positive effects on women's reproduction shortly after migration, as the birth rates of migrants are higher than those of non-migrants at the destination (Lindstrom & Giorguli Saucedo 2007).

An important additional aspect in the context of our study is the selectivity of international migrants and differences in the composition between the respective groupings on fertility differences. The focus here is on observable socioeconomic characteristics: i.e., for example, educational participation affects migrants' opportunities in the labour market and their attitudes toward reproduction (Balbo et al. 2013). For our study, the socialisation and adaptation theories are most

important as both would have diverging impacts on the fertility behaviour of migrants. Additionally, the selectivity of migrants is important to include in our predictions.

3. Legal context of family asylum and family reunification in Germany

Although family reunification is increasingly politicised, the Migrant Integration Policy Index, a tool that measures policies aiming integrate migrants in countries across six continents, documents that policies have remained largely unchanged in many countries (mostly in (small) countries with only current history of migration inflows) since 2015. Nevertheless, restrictions have increased in some countries, including Belgium, Turkey and the U.S. (Mipex).

To understand the legal context of family reunification in Germany, we first need to understand the general legal context for asylum seeker and refugees. Germany differentiates three forms of protection:

1. refugee protection the basis of the Geneva Refugee Convention (Section 3 subsection (1) of the Asylum Act, Section 25 subsections (1) to (3) of the Residence Act, Section 26 of the Residence Act)
2. entitlement to asylum in accordance with Article 16a of the Basic Law (*Grundgesetz* – GG) of the Federal Republic of Germany, which states that persons persecuted on political grounds have the right of asylum (Article 16a para. 1 of the Basic Law, Section 2 subsection (1) of the Asylum Act, Section 25 subsections (1) to (3) of the Residence Act, Section 26 of the Residence Act);
3. subsidiary protection, which applies when neither refugee protection nor an entitlement to asylum can be granted and serious harm is threatened in the country of origin (Section 4 subsection (1) of the Asylum Act).

In case that none of the three forms of protection – entitlement to asylum, refugee protection and subsidiary protection – are applicable, a ban on deportation can be issued if specific grounds apply: a person who is seeking protection may not be returned if return to the destination country constitutes a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or a considerable concrete danger to life, limb or liberty exists in that country (Section 60 subsection (5) of the Residence Act (AufenthG), Section 60 subsection (7) of the Residence Act (AufenthG))

The legal context that is important for our study's purpose is the legal basis for

family reunification and family asylum in Germany.² The legal basis of family reunification in Germany is formulated in Section 36a of the Residence Act (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal). It states that people who have been granted asylum or refugee status are entitled to privileged family reunification.

People entitled to subsidiary protection have no entitlement to privileged family reunification (Section 4 subsection (1) of the Asylum Act). From March 2016 to July 2018 Germany completely suspended family reunification of the closest family members for people with a subsidiary protection status, but it became possible again on 1 August 2018. However, family reunification for this group is limited to a contingent of 1,000 persons per month.³ Authorities are supposed to decide on humanitarian grounds who will be granted a residence permit. These include the duration of separation, the age of the children or serious illnesses and specific hazards in the country of origin. In addition, integration-related aspects should also be considered as a matter of principle.

Generally, spouses and registered partners, parents and minor, unmarried children can apply for family reunification.⁴ Siblings do not have any such rights. Family reunification will also be excluded for marriages entered during the flight process. However, first movers of the families have to ensure an adequate accommodation and a secure livelihood. This regulation is only relaxed for recognised refugees, who can bring their families even if the livelihood is not ensured and adequate accommodation is not available. The contention is to apply for family reunification no later than three months after completion of the asylum process (Part 6, Section 27-36 a), Residence Act). Spouse and minor, unmarried children above 16 have fulfil further criteria. Spouses must be at least 18 years of age, need in most cases simple language skills (Part 6 Section 30, Residence Act). Minor, unmarried children above 16 have to follow their parent within three months (or later in exceptional cases, for example at the end of a school year), or they need to provide evidence of German

² See for an overview BAMF (2022)

³ Section 36a, Paragraph 2, Sentence 2 of the Residence Act (AufenthG), However, this quota has not yet been ever reached (Sachstand WD 3 - 3000 - 137/20)

⁴ Family here is understood in a quite heteronormative manner. Although also registered partners are eligible for family reunification, this is quite difficult for members of LGBTQI community and their families (see Afghanistan as an example), who cannot produce an official document of their relationship, as it is mostly unavailable to them in their country of origin. They are only included in case they are the biological parents of the children they'd like to bring.

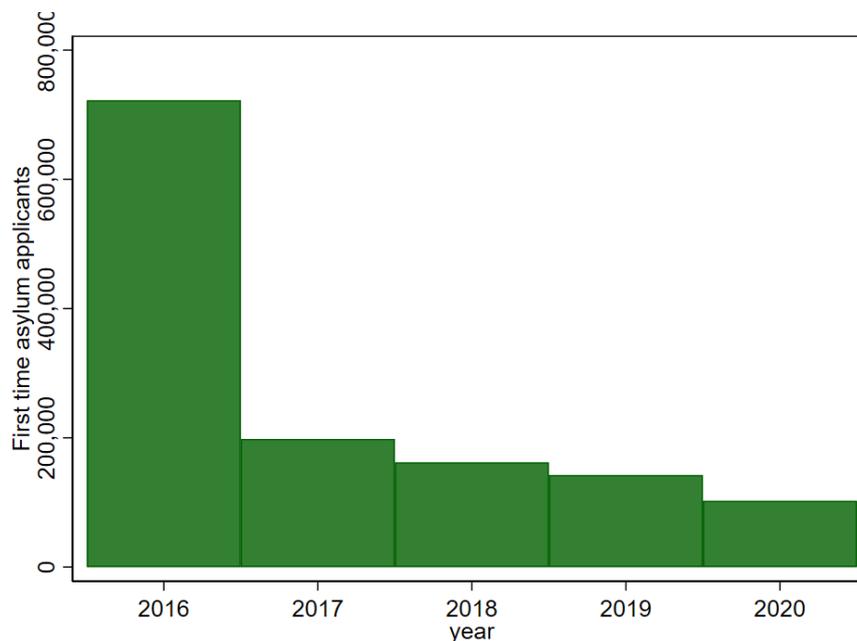
proficiency at level C1. Generally, it needs to be assumed that they will find it easy to become integrated into life in Germany (Part 6, Section 32, Residence Act). Additionally, the Residence Act includes several restrictions for family reunification, e.g. family reunification is not granted to persons who are considered to pose a risk; hence, people who incite hatred against sections of the population, run a prohibited association or take part in violence in pursuit of political and religious goals are excluded without exception (Part 6, Section 27-36 a), Residence Act) .

The legal basis for children born to refugees and asylum seekers is family asylum, regulated in section 26 of the Asylum Act (AsylG) and section 33, 34, 35 in the Residence Act. Once parents have filed an asylum application or have been granted a residence status, their application or residence status also applies to minor-age, unmarried children, who are already in Germany at that time and to children born subsequently in Germany (Section 33, Residence Act) . In case parents are still in the asylum process they can put forward their own reasons for asylum for their child. If they do not do so, the parents' reasons apply (Section 14a, Asylum Act).

4 Refugee and asylum seeker situation in Germany

In order to make prediction of future migration inflows and delayed fertility it is important to first present the larger context of immigration to Germany. In 2016, 722,270 persons applied for asylum for the first time in Germany. We depict the development over the subsequent years in *Figure 1*. After 2016, the number of first-time asylum applicants started declining to 198,255 in 2017 and continued falling to 102,525 in 2020.

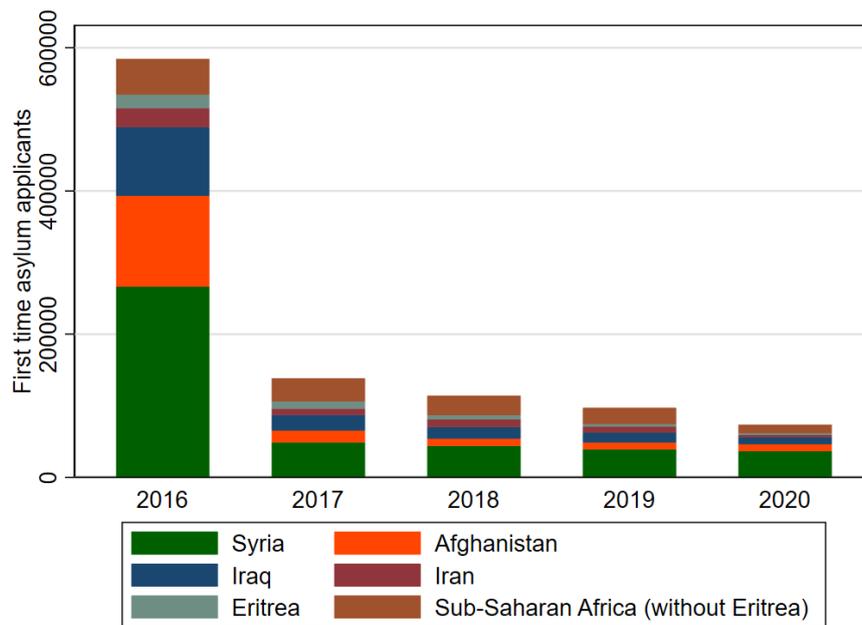
Figure 1 First-time asylum applications in Germany 2016-2020



Source: Eurostat (2021)

Most asylum seekers coming to Germany migrated from Syria, Afghanistan, Iran, Iraq, Eritrea and Sub-Saharan Africa. *Figure 2* shows the distribution of first-time asylum applicants in Germany by country of origin between 2016 and 2020. In 2016, the largest groups of asylum applicants came from Syria, Afghanistan and Iraq. While all numbers decreased afterwards, the figure shows that, in particular, the shares of asylum applicants from Afghanistan and Iraq decreased.

Figure 2 First-time asylum applications in Germany by country of origin 2016-2020



Source: Eurostat (2021)

By concentrating on asylum seekers and refugees from Syria, Afghanistan, Iraq, Iran, Eritrea and Sub-Saharan Africa, we focus our study on a heterogeneous selection of countries. Refugees and asylum seekers from Syria, Afghanistan, Iraq, and Eritrea have fled countries that have suffered from civil war, instability, severe insecurity, and violent conflicts (see Kraus et al. (2019)). At the same time, migration from Iran and Sub-Saharan Africa is more mixed, and motivations also include education and employment possibilities. This can be seen in *Table 1*, which gives the numbers and shares of migration reasons for first-time residence permits for refugees and asylum seekers coming from Syria, Afghanistan, Iraq, Iran, Eritrea and Sub-Saharan Africa in 2019.⁵ While for nationals from Syria, Afghanistan, Iraq and Eritrea mainly other reasons or family reasons played a role, educational reasons and remunerated activities are more prominent reasons for first-time residence permits for refugees and asylum seekers from Iran and Sub-Saharan Africa.

The main focus of our study is family migration and family reunification. As we can see in *Table 1*, family reasons are the second most important reason for permits in

⁵ We concentrate here on data from 2019 as migration decreased substantially in 2020 due to Covid restrictions (OECD, 2020, 2021) and data from 2019 seems therefore to be more representative of migration pattern and reasons.

2019 for all our selected countries (overall, the reason for 19% of first-time permits). However, there are large differences between countries. For Syria, Afghanistan, Iran and Sub-Saharan Africa, the share is around 20 per cent, while the share is much smaller for Iraq and Eritrea. Looking at the absolute numbers in *Table 1*, we can see that 123,265 people received a residence permit due to family reasons. Over half of them came from Syria.

Table 1 Number and share of first-time residence permits by migration reason in 2019

		Syria	Iraq	Afghanistan	Eritrea	Iran	Sub-Saharan Africa (w/o Eritrea)	Total
Other	Total	262278	82739	64819	24302	14992	61628	510758
	Share	0.79	0.91	0.81	0.92	0.50	0.62	0.77
Family reasons	Total	67359	7472	14056	2079	6590	25709	123265
	Share	0.20	0.08	0.18	0.08	0.22	0.26	0.19
Education reasons	Total	2088	337	417	21	5519	9835	18217
	Share	0.01	0.00	0.01	0.00	0.18	0.10	0.03
Remunerated activities reasons	Total	1677	238	338	9	3117	2659	8038
	Share	0.01	0.00	0.00	0.00	0.10	0.03	0.01
Total		333402	90786	79630	26411	30218	99831	660278

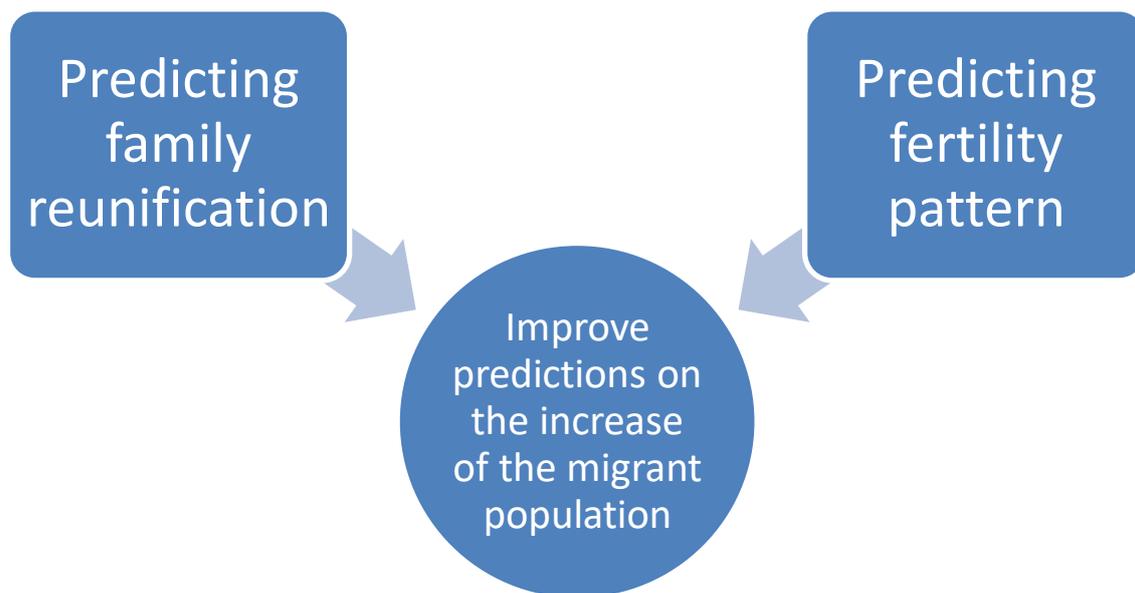
Source: Eurostat (2021)

5 Method and data sets

5.1 Method

The objective of our study is to generate improved predictions on the number of family members to arrive in the course of future family reunification programs complemented with estimates about delayed fertility effects on the reproduction of refugee and asylum seeker families after reunification (see *Figure 3*).

Figure 3 Research agenda



Section 2 discussed important factors for family reunification like gender, age, education, country of origin, the resident status, family status and in case of a family, detailed information on the family migration pattern (together, later, still separated), number of family members, minor children. A data set that includes most of above-discussed factors is the IAB-BAMF-SOEP Survey of Refugees, which we use to predict family migration and reunification patterns.⁶ We use this data set to first investigate which factors determine family migration pattern in our sample, second to estimate the probability depending on individual characteristics that asylum seekers and refugees reunify with their family and third to estimate the number of family members coming after the arrival of the first asylum seeker and

⁶ Information on sexuality is not available in the IAB-BAMF-SOEP Survey of Refugees. We can therefore not differentiate with regard to sexuality in the following analysis and we also can not take sexuality into account because sexuality as a reason to file an asylum claim is not separately given in the data set.

refugee. To predict fertility patterns, we build on the fertility theories discussed in Section 2. For that purpose, we use data provided by the Wittgenstein Centre for Demography and Global Human Capital (2018) on fertility rates across more than 200 countries.

We will investigate which factors explain reproduction behaviour in our asylum seeker and refugee sample and estimate fertility rates based on the theory of socialisation: asylum seekers and refugees show the fertility behaviour of their country of origin and based on the theory of adaption: that asylum seeker and refugee adapt their fertility pattern to the new environment, the destination country. Both give us benchmarks of high/low fertility behaviour. In both cases, we estimate fertility rates taking the selectivity of asylum seeker and refugee into account by differentiating between different educational groups and only increasing in case realized fertility is still lower.

5.2. Data sets

a. IAB-BAMF-SOEP Survey of Refugees

The empirical analysis is based on the IAB-BAMF-SOEP Survey of Refugees. The data was collected as part of the German Socio-Economic Panel to survey a nationwide random sample of asylum seeker and refugee households in Germany. The sample is based on three subsamples. The samples are jointly representative of the population of refugees and asylum seekers who arrived in Germany between 2013 and 2016 and were registered in the Central Register of Foreigners by January 2017 (see Kuehne et al., 2019). In this Central Register (“Ausländerzentralregister”, AZR, see Babka Von Gostomski & Pupeter (2016)), all refugees and asylum seekers living in Germany are registered. The sampling of the IAB-BAMF-SOEP Survey was based on a stratified multi-stage clustered sampling design (Kroh et al. 2017). In the first stage, 170 sample regions across Germany were selected. In the second stage, a random sample was drawn from the addresses provided by the immigration offices within each sample region. Different varying sample probabilities depending upon an individual’s country of origin, current legal status, age, as well as gender were assigned. The sampling frame covered all adults and minors who arrived in Germany between 2013 and 2016 and who have filed an asylum application at the Federal

Office for Migration and Refugees (BAMF) or were hosted as part of specific programmes of the federal government or of a federal state (Bundesland), regardless of the outcome of their asylum procedure and their current legal status. We restrict our sample to the survey years 2016 to 2019 and to asylum seekers coming from Afghanistan, Iraq, Iran, Syria, Eritrea, Sub-Saharan Africa (without Eritrea)⁷, as we have the largest number of observations for those countries of origin and, as indicated above, these were the most relevant countries of origin during the large influx of asylum seekers in 2015/16. We construct variables containing information on age, education, country of origin, the resident status, family status and in case of a family, detailed information on the family migration pattern (together, later, still separated), number of family members, minor children. We construct our education variables in line with the ISCED classification (OECD et al. 2015). *Figure 4* provides an overview of the education classification. The date set provides weights which leads to a representative data set for asylum seeker and refugees who arrived in Germany between 2013 and 2016 in Germany.

b. Wittgenstein Centre for Demography and Global Human Capital data.

The fertility rates are based on data provided by the Wittgenstein Centre for Demography and Global Human Capital (WIC). It is a collaboration between the International Institute for Applied Systems Analysis (IIASA), the Vienna Institute of Demography of the Austrian Academy of Sciences (VID/OEAW), and the Vienna University of Economics and Business (W.U.). The data source they use for their fertility estimates is projection data coming from population projections carried out by researchers at WIC. They are based on several data collection exercises for the base-year data and historical reconstruction to 1950. The research also uses largely the data produced by World Population Prospects: The 2017 revision by the United Nations Population Division (2015 base-year population by age and sex and estimates for 1950-2010, and information about fertility rates, mortality and migration and related indicators for 1950-2015). The data is explained in European Commission. Joint Research Centre. (2018) and Lutz et al. (2014). The projections

⁷ Sub-Saharan Africa includes Cote d'Ivoire, Niger, Gambia, Senegal, Sierra Leone, Mali, Guinea, Burkina Faso, Nigeria, Ghana, Chad, Congo, Cameroon, Angola, Ruanda, Sudan, Uganda, Kenia, Zambia, Somalia, Ethiopia

by education until 2100 are based on collected census and survey data for the base year (around 2015). They follow different what-if scenarios to show the development over time if certain criteria are met. We use in our study the medium SSP2 scenario they provide, which is defined as the medium scenario and the most likely scenario. It comprises medium fertility rates with medium mortality, medium migration, and the Global Education Trend (GET) education scenario.

Figure 4 Education classification

Education	Wittgenstein Centre for Demography and Global Human Capital (2018).	IAB-BAMF-SOEP Survey of Refugees
No Education	No level and Grade 1 of ISCED 1 not completed.	0 years of education
Incomplete Primary	Incomplete ISCED 1	Between 1 and 3 years of education
Primary	Completed ISCED 1 and incomplete ISCED 2	Between 4 and 7 years of education
Lower Secondary	Completed ISCED 2 and incomplete ISCED 3	Between 8 and 10 years of education
Upper Secondary	Completed ISCED 3 and incomplete ISCED 4 5 or 6	Between 11 and 13 years of education
Post Secondary	Completed ISCED 4 5 6 7 or 8	More than 13 years of education

5.3 Descriptive Statistics

We differentiate in our main empirical analysis between the six largest groups of asylum seekers and refugees in Germany, i.e., those coming from Afghanistan, Iraq, Iran, Syria, Eritrea, Sub-Saharan Africa (without Eritrea). In general, we have data on 7,153 individuals in 4,571 households in our sample. *Table 2* provides the number of observations per country of origin.

Table 2 Number of observations: Afghanistan, Iraq, Iran, Syria, Eritrea, Sub-Saharan Africa (without Eritrea)

Country of origin	Nº
Syria	4115
Iraq	1102
Afghanistan	977
Eritrea	325
Iran	222
Sub-Saharan Africa (w/o Eritrea)	412

Source: IAB-BAMF-SOEP Survey of Refugees

Table 3 gives details about the sample composition between 2016 and 2019. In general, more than half of our sample is male and the average education is ten years.

Table 3 Basic characteristics refugee sample

	2016	2017	2018	2019
Age	30.289	30.666	31.665	32.920
Gender	1.24	1.324	1.313	1.304
Years of education	10.025	9.888	10.194	9.828
N	4385	5525	4438	3649

Source: IAB-BAMF-SOEP Survey of Refugees

In 2016, a large share of refugees and asylum seeker already had a temporary residence permit (TRP). This share further increased towards 2019, while the share of permanent residence permits (PRP) increased towards 2017 and then stabilised (see *Table 4* for the numbers and the share in our sample). The increase in temporary residence permits is important for family reunification as it allows people to bring their families and gives planning security for families already residing in Germany.

Table 4 Numbers and share of residence status of Refugee sample

		2016	2017	2018	2019
Permanent residence permit (PRP)	N	22	63	69	50
	Share	0.005	0.012	0.016	0.014
Temporary residence permit (TRP)	N	2332	3865	3414	3010
	Share	0.547	0.710	0.782	0.829
Suspension of deportation or Visa (S/V)	N	286	255	213	168
	Share	0.067	0.047	0.049	0.046
Residence Permission (Gestattung) (G)	N	1429	1003	544	331
	Share	0.335	0.184	0.125	0.091
Miscellaneous (M)	N	192	259	125	74
	Share	0.045	0.048	0.029	0.020
N		4261	5445	4365	3633

Source: IAB-BAMF-SOEP Survey of Refugees

6. Results

6.1. Family reunification

As the objective of our study is to generate improved predictions on the number of family members to arrive in the course of future family reunification programs we start by looking at the general statistics of family reunification (a). We complement that with regression analysis (b) leading to our predictions (c).

a. Statistics

To understand the family reunification pattern, it is first important to investigate how many of the asylum seekers and refugees who arrived in 2016 were interested in family reunification. Family reunification is generally only of interest for individuals having a spouse or minor children left behind. Therefore, we differentiate between single individuals who stated they do not have minor children, those with families who arrived jointly (the same year of arrival), those with families who arrived later, and those with families where the families are still separated. Information about different groups is important to improve predictions as every group brings in different family reunification and fertility pattern. Asylum seekers and refugees without partners and children might not bring additional family members in the first place but could still marry and get children in the upcoming years. Families who arrived together might not bring more family but could potentially get more children. Families who are still separated might still bring their family and might just start getting children. So, it is important to know the distribution to make predictions.

Table 5 Numbers and Percentage of different stated family categories

Category	Number	Per centage
Single & no minor children	299	5.38%
Families arrived together	1916	34.45%
Families arrived later	607	10.91%
Families still separated	2,740	49.26%
Total HH	5,562	100%

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

The majority of our sample consists of individuals having a family (spouse and/or minor children). Thus, half of the families in our sample are still separated (52%), while the other half either arrived jointly (36%) and one part already followed (12%). *Table 6* shows that this pattern differs across countries of origin. While families from Syria, Iraq, Afghanistan and Iran largely arrived together or joined already, most families from Eritrea and Sub-Saharan Africa are still separated.

Table 6 Numbers and Percentage of different family categories by country of origin

Category	Syria	Iraq	Afghanistan	Eritrea	Iran	Africa (w/o Eritrea)
Single and no minor children	82 3.19%	25 3.75%	20 3.18%	24 8.57%	10 6.29%	49 14.52%
Families arrived together	982 40%	269 49.54%	234 36.25%	33 13.21%	54 34.59%	29 13.44%
Families arrived later	387 15.61%	65 9.61%	40 6.84%	18 6.43%	13 9.43%	15 4.84%
Families still separated	1,085 41.20%	311 46.10%	338 53.74%	202 71.79%	78 49.69%	208 67.20%
Total HH	2,536	670	632	277	155	301

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

The picture also differs with regard to the residence status. Families with a permanent or temporary residence permit are already reunified, while the other group is still largely separated.

Table 7 Numbers and Percentage of different family categories by residence status

Category	Residence status: Permanent or Temporary residence permit			
	No		Yes	
	No.	Share	No	Share
Single and no minor children	133	0.07	166	0.04
Families arrived together	128	0.07	486	0.13
Families arrived later	510	0.28	1,399	0.37
Families still separated	1,050	0.58	1,399	0.37
Total HH	1,821		3,741	

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

b. Regression analysis

To understand which aspects matter for each group and the migration pattern of families, we conduct regression analysis. We start our analysis by looking at both single asylum seekers and refugees and families, with and without a residence permit. We estimate the following Probit regression to explain whether factors explaining whether an asylum seeker or refugee is single given the age, educational level and the origin country of the asylum seeker or refugee and an error term ε_i :

$$P_i(Y) = \alpha_i + \beta_i \text{age} + \gamma_i \text{Education} + \delta_i \text{Country} + \varepsilon_i$$

In a second step, we estimate the following Probit regression explain specific family migration pattern given that an asylum seeker or refugee has family:

$$P_i(Y|Family) = \alpha_i + \beta_i \text{age} + \gamma_i \text{Education} + \delta_i \text{Country} + \theta_i X + \varepsilon_i$$

With the explanatory variables age, educational level, the country of origin and further variables X here number of family members, number of children, residence permit (Yes/No), and year of arrival in Germany and an error term ε_i . . In a last step we estimate the same Probit regression for all asylum seekers and refugees to obtain the general factors explaining when an asylum seeker or refugee reunifies later with his/her family.

$$P_i(Y) = \alpha_i + \beta_i \text{age} + \gamma_i \text{Education} + \delta_i \text{Country} + \theta_i X + \varepsilon_i$$

Table 8 shows our Probit regression results. Regression 1 shows that single people are generally older and more likely to come from Iraq, Eritrea, Iran and Africa (excluding Eritrea) compared to Syria. They are generally low educated. In regression (2) to (5) looking at family migration patterns, we included all factors mentioned in Section 2: age, education, country of origin, the resident status, number of family members, minor children, as explanatory variables. When we look at the results for different family migration patterns in case asylum seekers and refugees have a family ((2) to (4)), we find that the country of origin is important for the migration pattern. Families from Iraq, Eritrea and Africa (without Eritrea) are more likely to be still separated. The results are in line with studies determining the behaviour of refugees to Germany using the first waves of the SOEP data set (Kraus et al., 2019) and with studies looking at the family migration pattern of asylum seekers and refugees from Sub-Saharan Africa (Beauchemin et al., 2015). Also, education and the years of arrival play a role. More educated families generally arrive more often separately than less-educated families. The medium educated generally still live separated. The longer families are in Germany, the more frequently they have already reunified. In our case, residence permits also play a role because the probability of arriving together or reuniting later increases with obtaining a residence permit. Having more family members leads to a higher probability to arrive together or being reunified later, while minor children lead to a higher probability to arrive together. This picture stays consistent when only looking at the behaviour of people with a resident permit in *Table A1* in the Annex. The results are important for our predictions in several ways. First, our results support the fact that we have to differentiate between different countries of origin when determining the likelihood of family reunification. Asylum seekers and refugees coming from Afghanistan and Syria are more likely to come together or to be reunified soon. Additionally, education plays a role, although the picture is more complex and other factors than education matter. Having a residence permit plays a role, as do age and having minor children.

In regression (5), we look at what characteristics generally explain the probability of bringing the family later. This is important to know because we can predict the reunification probabilities for subgroups based on this regression. Generally (except for age), these results are in line with regression (2), where we only looked at

families.

Second, education plays a role, although the picture is more complex and other factors than education matter. And third, having a residence permit plays a role, as do age and having minor children.

In the next step, we look at the number of family members across the different migration family types. We see in *Table 9* that the family size is larger in case families arrive together or later and that, across all types of migration, families are the largest for Syrian asylum seekers and refugees. The impact of education is again non-linear: very low and very highly educated families have the largest family size. Looking at all families reunified later, we see that in that subgroup, families from Eritrea, Iran and Africa (without Eritrea) are larger and the impact of education is again non-linear.

Table 8 Regression analysis family reunification with and without a residence permit

	Family migration pattern				All Later (5)
	Single (1)	Later (2)	Together (3)	Still separated (4)	
Age	0.038*** (0.00)	0.003*** (0.00)	-0.004*** (0.00)	0.003*** (0.00)	-0.003*** 0.00
Incomplete primary	Base	Base	Base	Base	Base
Primary	0.136*** (0.01)	-0.214*** (0.01)	-0.232*** (0.01)	0.288*** (0.01)	-0.178*** -0.01
Lower secondary	-0.059*** (0.01)	-0.158*** (0.01)	-0.002 (0.01)	0.052*** (0.01)	-0.051*** -0.01
Upper secondary	-0.017 (0.01)	-0.001 (0.01)	-0.189*** (0.01)	0.149*** (0.01)	-0.041*** -0.01
Post secondary	-0.142*** (0.02)	0.084*** (0.02)	-0.022* (0.01)	-0.050*** (0.01)	0.100*** -0.02
Syria	Base	Base	Base	Base	Base
Iraq	0.208*** (0.01)	-0.409*** (0.01)	0.125*** (0.01)	0.072*** (0.01)	-0.388*** -0.01
Afghanistan	-0.162*** (0.01)	-0.255*** (0.01)	-0.002 (0.01)	0.105*** (0.01)	-0.185*** -0.01
Eritrea	0.417*** (0.01)	-0.308*** (0.01)	-0.667*** (0.01)	0.673*** (0.01)	-0.463*** -0.01
Iran	0.311*** (0.01)	-0.412*** (0.01)	0.276*** (0.01)	-0.068*** (0.01)	-0.253*** -0.01
Sub-Saharan Africa (without Eritrea)	0.971*** (0.01)	-0.131*** (0.01)	-0.889*** (0.01)	0.680*** (0.01)	-0.103*** -0.01
Residence permit (Yes/No)		0.235*** (0.01)	0.298*** (0.00)	-0.348*** (0.00)	0.417*** -0.01
Number family members		0.172*** (0.00)	0.167*** (0.00)	-0.251*** (0.00)	0.171*** 0
No. children under 18		-0.010*** (0.00)	0.160*** (0.00)	-0.125*** (0.00)	-0.014*** 0
Year of arrival in Germany		0.296*** (0.00)	-0.030*** (0.00)	-0.146*** (0.00)	0.246*** 0
constant	-3.092*** (0.02)	- 598.523*** (6.43)	59.099*** (5.50)	294.402*** (5.10)	- 497.703*** -7.21
No. of Obs.	746891	702031	702031	702031	745762
Psd. R2	0.137	0.117	0.153	0.195	0.107
Prob > chi2/F	0.000	0.000	0.000	0.000	0

Note: Probit regression results, binary dependent variables, regression (2), (3) and (4) are only based on the family sample, * $p < 0.10$, ** $p < 0.05$, *** $p < 0.010$

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

Table 9 Number family members

	Number family members	
	All (1)	Families arrived later (2)
Age	0.091*** (0.00)	0.096*** (0.00)
Family still abroad	Base	
Family arrived later	1.112*** (0.01)	
Family arrived together	1.206*** (0.00)	
Syria	Base	Base
Iraq	-0.139*** (0.01)	-0.049* (0.03)
Afghanistan	-0.065*** (0.01)	-0.594*** (0.03)
Eritrea	-0.074*** (0.01)	0.819*** (0.04)
Iran	-0.611*** (0.01)	0.378*** (0.04)
Africa (without Eritrea)	-0.002 (0.01)	0.316*** (0.03)
Incomplete primary	Base	Base
Primary	0.302*** (0.01)	0.623*** (0.05)
Lower secondary	-0.166*** (0.01)	0.408*** (0.05)
Upper secondary	-0.272*** (0.01)	-0.034 (0.05)
Post secondary	-0.327*** (0.01)	0.190*** (0.06)
Year of arrival	0.052*** (0.00)	0.252*** (0.01)
constant	-106.517*** (4.61)	-508.718*** (13.50)
No. of Obs.	702667	58691
R2	0.385	0.303
Prob > chi2/F	0.000	0.000

Note: OLS regression, dependent variables number of family members* $p < 0.10$, ** $p < 0.05$, *** $p < 0.010$

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

These results lead to important implications for our predictions, as the numbers of family members and consequently the expected number of people coming in case of family reunification differs across countries of origin and educational level.

c. Predictions

Based on our descriptive analysis and our regression analysis, we can make predictions regarding family reunification. Starting with the descriptive approach, we can use the results for the share of asylum seeker and refugees bringing their family in general later and use for them the number of family members they brought. If we know and use this number and divide it by all asylum seekers and refugees arriving, we can calculate how many additional family members one asylum seeker and refugee would bring due to family reunifying. The results are given in *Table 10*. Our calculations reveal that, per asylum seeker and refugee, 0.19 family members can be expected to come to Germany through family reunification. If we differentiate between countries of origin, we find large differences between countries of origin. In general, the ratio for family reunification is between 0.07 for Iran and 0.29 for Syria.

Table 10 Predictions of family reunification based on descriptive approach

	Family reunifying
Ratio per asylum seeker and refugee	0.19
Syria	0.29
Iraq	0.14
Afghanistan	0.07
Eritrea	0.11
Iran	0.09
Sub-Saharan Africa (w/o Eritrea)	0.09

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

Based on regression (5) in *Table 8*, we can calculate marginal effects for the countries of origins depending on education given in. *By contrast*, a highly educated Syrian asylum seeker's and refugee's predicted probability is 0.124.

Table 11. With the marginal effect, we can estimate how likely it is for asylum seekers and refugees to bring their family later based on the country of origin and the educational level taking all other variables at the mean.⁸ The predicted probability that a low educated Syrian asylum seeker and refugee will be bringing his family later is 0.106. *By contrast*, a highly educated Syrian asylum seeker's and

⁸ With the data we have we could calculate more detailed probabilities, but already the educational distribution of arriving asylum seeker and refugees is unknown in destination countries.

refugee's predicted probability is 0.124.

Table 11 Marginal effects of coming family coming later

		Margin	z	P>z	[95% Conf. Interval]	
Incomplete primary	Syria	0.106	49.250	0.000	0.102	0.111
	Iraq	0.055	37.170	0.000	0.052	0.058
	Afghanistan	0.078	43.710	0.000	0.075	0.082
	Eritrea	0.048	32.670	0.000	0.045	0.050
	Iran	0.070	34.740	0.000	0.066	0.074
	Sub-Saharan Africa (w/o Eritrea)	0.090	45.470	0.000	0.086	0.094
				102.20		
Primary	Syria	0.079	0	0.000	0.078	0.081
	Iraq	0.039	54.920	0.000	0.038	0.040
	Afghanistan	0.057	67.420	0.000	0.056	0.059
	Eritrea	0.034	40.940	0.000	0.032	0.035
	Iran	0.051	44.310	0.000	0.048	0.053
	Sub-Saharan Africa (w/o Eritrea)	0.066	70.990	0.000	0.064	0.068
				128.83		
Lower secondary	Syria	0.098	0	0.000	0.096	0.099
	Iraq	0.050	60.920	0.000	0.048	0.051
	Afghanistan	0.072	73.110	0.000	0.070	0.074
	Eritrea	0.043	46.030	0.000	0.041	0.045
	Iran	0.064	48.150	0.000	0.061	0.066
	Sub-Saharan Africa (w/o Eritrea)	0.083	74.800	0.000	0.080	0.085
				164.93		
Upper secondary	Syria	0.100	0	0.000	0.098	0.101
	Iraq	0.051	64.260	0.000	0.049	0.052
	Afghanistan	0.073	77.480	0.000	0.071	0.075
	Eritrea	0.044	43.980	0.000	0.042	0.046
	Iran	0.065	51.230	0.000	0.062	0.067
	Sub-Saharan Africa (w/o Eritrea)	0.084	80.290	0.000	0.082	0.086
Post secondary	Syria	0.124	64.910	0.000	0.120	0.128
	Iraq	0.066	46.800	0.000	0.063	0.068
	Afghanistan	0.093	51.310	0.000	0.089	0.096
	Eritrea	0.057	37.130	0.000	0.054	0.060
	Iran	0.083	42.260	0.000	0.079	0.087
	Sub-Saharan Africa (w/o Eritrea)	0.106	53.910	0.000	0.102	0.110

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

Based on our regression(2) in Table 9, we can calculate marginal effects for the countries of origins depending on education given in Table 12. Taking our example from above, we can say that if a low educated Syrian asylum seeker and refugee

reunifies later, they will bring 2.204 family members each. In the case of highly educated Syrian asylum seekers and refugees, this number is 2.394.

Table 12 Margins number of family members coming in case of family reunification

		Margin	t	P>t	[95% Conf. Interval]	
Incomplete primary	Syria	2.204	44.570	0.000	2.107	2.301
	Iraq	2.156	40.220	0.000	2.051	2.261
	Afghanistan	1.611	29.220	0.000	1.503	1.719
	Eritrea	3.023	48.660	0.000	2.902	3.145
	Iran	2.582	39.690	0.000	2.455	2.710
	Sub-Saharan Africa (w/o Eritrea)	2.521	51.970	0.000	2.426	2.616
Primary	Syria	2.827	158.490	0.000	2.792	2.862
	Iraq	2.778	109.950	0.000	2.729	2.828
	Afghanistan	2.233	78.120	0.000	2.177	2.289
	Eritrea	3.646	90.410	0.000	3.567	3.725
	Iran	3.205	69.910	0.000	3.115	3.295
	Sub-Saharan Africa (w/o Eritrea)	3.143	123.320	0.000	3.093	3.193
Lower secondary	Syria	2.613	171.570	0.000	2.583	2.643
	Iraq	2.564	97.870	0.000	2.513	2.615
	Afghanistan	2.019	69.930	0.000	1.962	2.076
	Eritrea	3.432	86.980	0.000	3.355	3.509
	Iran	2.991	66.220	0.000	2.902	3.079
	Sub-Saharan Africa (w/o Eritrea)	2.929	112.760	0.000	2.878	2.980
Upper secondary	Syria	2.171	193.110	0.000	2.149	2.193
	Iraq	2.122	82.570	0.000	2.072	2.172
	Afghanistan	1.577	62.310	0.000	1.527	1.626
	Eritrea	2.990	77.980	0.000	2.915	3.065
	Iran	2.549	61.040	0.000	2.467	2.631
	Sub-Saharan Africa (w/o Eritrea)	2.487	101.090	0.000	2.439	2.535
Post secondary	Syria	2.394	98.210	0.000	2.346	2.442
	Iraq	2.346	67.260	0.000	2.277	2.414
	Afghanistan	1.800	50.300	0.000	1.730	1.871
	Eritrea	3.213	72.770	0.000	3.127	3.300
	Iran	2.772	56.080	0.000	2.675	2.869
	Sub-Saharan Africa (w/o Eritrea)	2.711	78.640	0.000	2.643	2.778

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

6.2. General fertility rates of asylum seekers and refugees

Besides improving predictions on the number of family members to arrive in the

course of future family reunification programs, the aim of our study is to complement the predictions with prediction of delayed fertility of refugees and asylum seeker. We start by looking at the general statistics (a) and complement that with regression analysis (b) leading to our predictions (c).

a. Statistics

One aspect that has often been neglected in the general discussion about family reunification are fertility rates of asylum seekers and refugees. Even if there were no future immigration, we would observe a change in the share of the population with migration background relative to the overall population if their fertility pattern was different from the pattern observed in the existing population of the destination country.

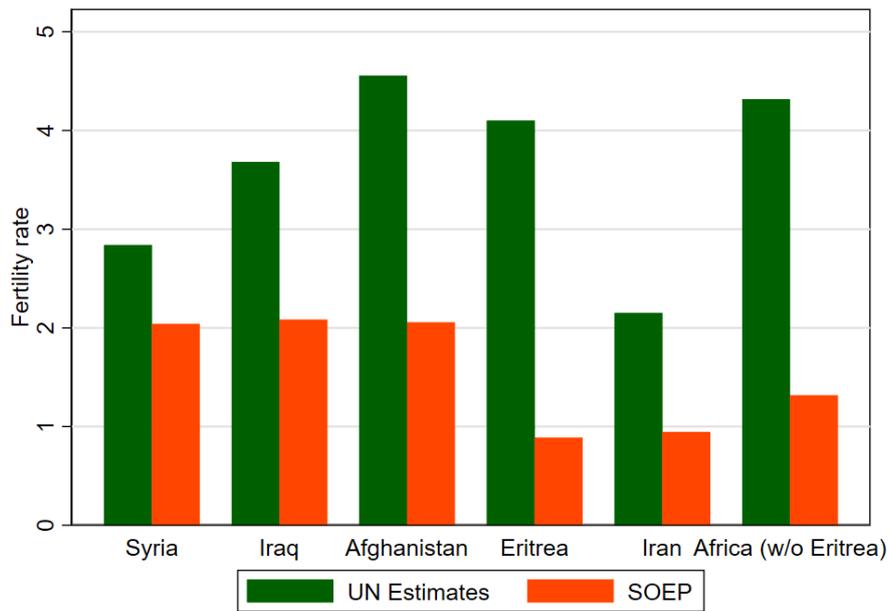
Table 13 Family statistics by country of origin

	N	Age	No. children		Married		Child born after arrival	
	Total	Mean	Mean	Total	Mean	Total	Mean	Total
Syria	4115	31.92	1.23	695277	0.49	278536	0.03	19296
Iraq	1102	31.47	1.33	187230	0.46	63989	0.02	2933
Afghanistan	977	29.31	1.2	242384	0.47	94551	0.04	7667
Eritrea	325	27.32	0.5	32290	0.33	21285	0.03	1842
Iran	222	32.06	0.63	42942	0.37	25165	0.01	870
Africa (w/o Eritrea)	412	29.31	0.86	181001	0.28	59187	0.05	10507

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

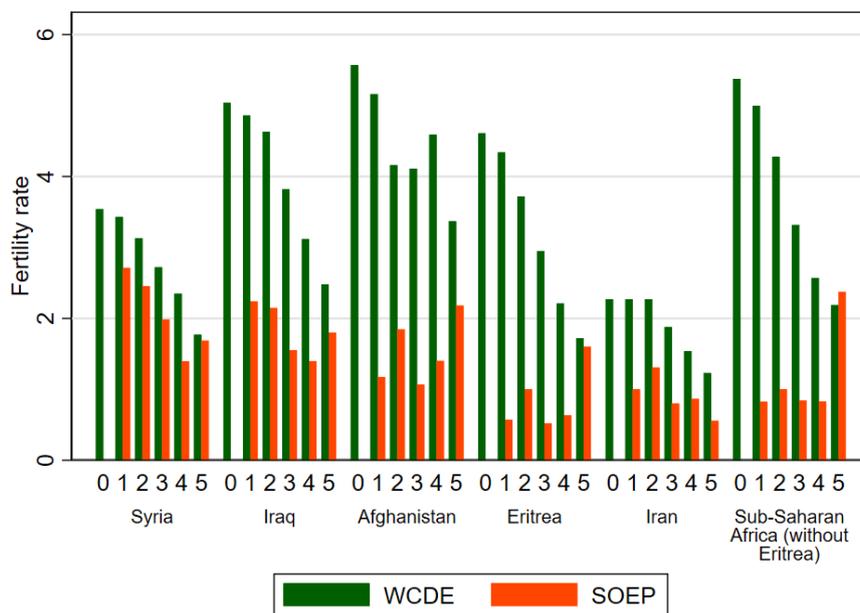
The U.N. estimate of Germany's fertility rate is 1.586 between 2015-2020. Comparing the German fertility rates to fertility rates in countries of origin, we see that the fertility rates in the country of origin are higher than in Germany, varying between about two in Iran and more than four in African countries and Afghanistan. The figure also shows that the individuals in our SOEP sample of asylum seekers and refugees so far do not match the fertility rates of the countries of origin.

Figure 5 Fertility rates compared by country of origin



Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations; U.N. (2019),

Figure 6 Fertility rates in the country of origin by educational level



Source: Wittgenstein Centre for Demography and Global Human Capital (2018). Wittgenstein Centre Data Explorer Version 2.0, IAB-BAMF-SOEP Survey of Refugees; Own calculations

Differentiating further by education, we see great heterogeneity within countries, depending on the educational level. Furthermore, the SOEP data for some countries like Syria matches the origin data already, which supports the socialisation theory, while the numbers are still much lower for other countries.

b. Regression analysis

In the next step, we also want to check what explains asylum seekers' and refugees' reproduction choices at destination using regression analysis. We estimate the following regression using OLS regression:

$$\begin{aligned} \text{No children}_i = & \alpha_i + \beta_i \text{age} + \gamma_i \text{education} + \delta_i \text{country} + \theta_i \text{residence permit} \\ & + \vartheta_i \text{year of arrival} + \epsilon_i \end{aligned}$$

With age, the educational level, country of origin, residence permit (yes/no) and year of arrival as explanatory variables and error term ϵ_i . We thereby estimate the regression both for the general number of children and the number of children after the arrival in Germany.

Our results are depicted in *Table 14* and our results show that general fertility rates increases with age, so older cohorts generally have more children. Furthermore, fertility rates differs by country of origin and education, as seen before. Reproduction after arriving in Germany decreases with age, so younger asylum seekers and refugees get more children in Germany. We also find differences between countries of origin, with asylum seekers and refugees from Syria and Africa (excluding Eritrea) getting more children and a non-linear relationship regarding education.

Table 14 Regression fertility rate pattern

	General	After arrival
Age	0.088*** (0.00)	-0.002*** (0.00)
Syria	Base	Base
Iraq	-0.012** (0.00)	-0.034*** (0.00)
Afghanistan	0.017*** (0.00)	-0.015*** (0.00)
Eritrea	-0.289*** (0.01)	0.083*** (0.00)
Iran	-0.513*** (0.01)	0.007*** (0.00)
Sub-Saharan Africa (without Eritrea)	-0.005 (0.00)	0.039*** (0.00)
Incomplete primary	Base	Base
Primary	0.201*** (0.01)	0.051*** (0.00)
Lower secondary	-0.064*** (0.01)	0.030*** (0.00)
Upper secondary	-0.320*** (0.01)	0.012*** (0.00)
Post secondary	-0.137*** (0.01)	0.010*** (0.00)
Residence permit	0.140*** (0.00)	0.021*** (0.00)
Year of arrival	0.107*** (0.00)	0.011*** (0.00)
constant	-216.577*** (3.95)	-22.802*** (1.17)
No. of Obs.	743534	230694
R2	0.312	0.025
Prob > chi2/F	0.000	0.000

Note: OLS regression, dependent variables number of family members* $p < 0.10$, ** $p < 0.05$, *** $p < 0.010$

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

The aim of our study is to predict delayed fertility effects. To do this, we build on the theories discussed in Section 2. We adjust the fertility rates based on the socialisation and adaptation theory, combined with the assumption of the selectivity of asylum seekers and refugees based on education. We use fertility estimates on the data from the Wittgenstein Centre for Demography and Global Human Capital (2018) for educational groups from each country of origin. We estimate the fertility rate in the case of socialisation by using the fertility rate in the country of origin for

each educational group and adapting individual fertility rates that are still lower accordingly. In the case of the adaptation fertility rate, we adjust the fertility rates to the German fertility rates as long as fertility rates are lower than Germany's. Table 15 shows our estimates. We can see that the mean fertility rate will generally increase under both theories. So also, when the newly arrived asylum seekers and refugees adapt their reproduction plans, we can expect to see an increase in the asylum seeker and refugee population.

Table 15 Predictions fertility rate estimates

		Incomplete primary	Primary	Lower secondary	Upper secondary	Post secondary
Syria	Adapt.	2.43	2.35	2.16	1.90	2.06
	Soc.	3.58	3.26	2.86	2.48	2.26
	Fertility	1.44	1.50	1.00	0.80	1.20
Iraq	Adapt.	2.07	2.30	1.99	1.87	1.78
	Soc.	4.48	4.38	3.64	3.05	2.55
	Fertility	0.88	1.28	0.72	0.80	0.75
Afghanistan	Adapt.	1.85	2.03	1.78	1.97	1.87
	Soc.	4.98	4.13	4.03	4.47	3.34
	Fertility	0.51	0.86	0.25	0.93	0.73
Eritrea	Adapt.	1.71	1.80	1.89	1.65	2.03
	Soc.	3.97	3.50	2.96	2.23	2.22
	Fertility	0.34	0.49	0.44	0.38	1.17
Iran	Adapt.	1.73	1.88	1.99	1.63	1.48
	Soc.	2.17	2.29	2.11	1.65	1.32
	Fertility	0.24	0.49	1.08	0.49	0.35
Sub-Saharan Africa (without Eritrea)	Adapt.	1.76	2.14	1.89	1.64	1.57
	Soc.	4.53	4.17	3.22	2.49	2.17
	Fertility	0.23	0.98	0.62	0.54	1.08

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

In a next step we again estimate the following regression using OLS regression analysis to explain the factors explaining the number of children born after the arrival in Germany. Again we have age, the educational level, country of origin, residence permit (yes/no) and year of arrival as explanatory variables and an error term ϵ_i .

$$\begin{aligned} \text{No children after arrival}_i &= \alpha_i + \beta_i \text{age} + \gamma_i \text{education} + \delta_i \text{country} + \theta_i \text{residence permit} \\ &+ \vartheta_i \text{year of arrival} + \epsilon_i \end{aligned}$$

Table 16 shows the regression results for the increase in fertility rates due to the adaptation/socialisation theory. We can see that delayed fertility can be expected to be especially relevant for younger asylum seekers and refugees and asylum seekers and refugees not yet having a residence permit. The impact of the country of origin depends on the theory we build on. In the case of adaptation, Syrian and Iranian asylum seekers and refugees have the largest increase in fertility rates. Concerning socialisation, asylum seekers and refugees from Iraq, Afghanistan, Eritrea and Sub-Saharan Africa have the most significant increase. The fertility rate difference is especially large under adaptation in the case of very low and high educated asylum seekers and refugees, and under socialisation, the difference decreases with education.

Table 16 Regression analysis fertility rates based on adaptation and socialisation theory

	Adaptation (1)	Socialisation (2)
Age	-0.034*** (0.00)	-0.97058*** (0.00)
Syria	Base	Base
Iraq	-0.089*** (0.00)	0.502*** (0.01)
Afghanistan	-0.065*** (0.00)	1.179*** (0.01)
Eritrea	-0.037*** (0.01)	0.249*** (0.01)
Iran	0.081*** (0.01)	-0.341*** (0.01)
Sub-Saharan Africa (without Eritrea)	-0.263*** (0.00)	0.494*** (0.01)
Incomplete primary	Base	Base
Primary	-0.041*** (0.01)	-0.817*** (0.01)
Lower secondary	0.095*** (0.01)	-0.946*** (0.01)
Upper secondary	0.102*** (0.01)	-0.991*** (0.01)
Post secondary	-0.005 (0.01)	-1.527*** (0.01)
Residence permit	-0.070*** (0.00)	-0.182*** (0.01)
Year of arrival	-0.045*** (0.00)	-0.023*** (0.00)
constant	91.558***	50.427***
Single + No children U18	2(3.11)	(4.94)
Family arrived laterNo. of Obs.	2.80230694	3.44230694
Family arrived togetherR2	2.730.281	3.290.466
Prob > chi2/F	0.000	0.000

Notes: OLS regression; Dependent variable additional children in Germany based on adaptation or socialisation * $p < 0.10$, ** $p < 0.05$, *** $p < 0.010$

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

c. Predictions

Building on our descriptive analysis and our regression analysis we can make predictions about delayed fertility of asylum seekers and refugees under the assumption of adaptation and socialization theory. Table 17 shows the general ratios per asylum seeker and refugee, i.e. the additional children we can expect from

each arriving asylum seeker and refugee. We can calculate that ratio by summing up all additional children due to the adaptation/socialisation theory of all asylum seeker and refugee in Germany and dividing this by the number of recent asylum seeker and refugee. Generally, we predict that 0.20 and 0.47 additional children are born under adaptation and socialisation assumption, respectively. The ratio thereby varies between countries of origin. Following adaptation, the ratio is between 0.12 for nationals from Eritrea and 0.24 for nationals from Syria. Following socialisation, the ratio is between 0.20 for nationals from Iran and 0.64 for nationals from Afghanistan.

Table 17 Descriptive results delayed fertility

	Adaptation	Socialisation
Ratio per asylum seeker and refugee	0.20	0.47
Syria	0.22	0.40
Iraq	0.22	0.68
Afghanistan	0.18	0.69
Eritrea	0.11	0.26
Iran	0.19	0.20
Sub-Saharan Africa (w/o Eritrea)	0.16	0.52

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

Additionally, we provide estimates of the marginal effects of regression (1) in *Table 16* in case of adaptation by country of origin and educational level, taking all other variables at the mean. Again taking Syria as an example, our predictions reveal that the fertility rate of low educated Syrian asylum seekers and refugees generally increases by 0.604, while the fertility rate highly educated Syrian asylum seekers and refugees increases by 0.599. In cases of socialisation, *Table 19* reveals that the fertility rate of low educated Syrian asylum seekers and refugees increases in general by 2.170, while the fertility rate of highly educated Syrian asylum seekers and refugees increases by 0.643.

Table 18 Marginal effects Adaptation

		Margin	t	P>t	[95% Conf.	Interval]
Incomplete primary	Syria	0.604	89.010	0.000	0.591	0.617
	Iraq	0.515	68.150	0.000	0.500	0.529
	Afghanistan	0.539	75.820	0.000	0.525	0.553
	Eritrea	0.567	59.790	0.000	0.549	0.586
	Iran	0.685	82.800	0.000	0.669	0.701
	Sub-Saharan Africa (w/o Eritrea)	0.341	47.390	0.000	0.327	0.355
Primary	Syria	0.563	181.190	0.000	0.557	0.569
	Iraq	0.474	109.510	0.000	0.465	0.482
	Afghanistan	0.498	113.300	0.000	0.489	0.506
	Eritrea	0.526	71.090	0.000	0.512	0.541
	Iran	0.644	113.370	0.000	0.633	0.655
	Sub-Saharan Africa (w/o Eritrea)	0.300	67.440	0.000	0.291	0.308
Lower secondary	Syria	0.699	264.110	0.000	0.694	0.704
	Iraq	0.610	149.370	0.000	0.602	0.618
	Afghanistan	0.634	146.340	0.000	0.625	0.642
	Eritrea	0.662	90.290	0.000	0.648	0.677
	Iran	0.780	143.840	0.000	0.769	0.791
	Sub-Saharan Africa(w/o Eritrea)	0.436	99.160	0.000	0.427	0.444
Upper secondary	Syria	0.706	323.170	0.000	0.702	0.711
	Iraq	0.617	153.410	0.000	0.609	0.625
	Afghanistan	0.641	154.000	0.000	0.633	0.649
	Eritrea	0.669	93.010	0.000	0.655	0.684
	Iran	0.787	161.460	0.000	0.778	0.797
	Sub-Saharan Africa (w/o Eritrea)	0.443	108.730	0.000	0.435	0.451
Post secondary	Syria	0.599	122.840	0.000	0.590	0.609
	Iraq	0.510	88.190	0.000	0.499	0.521
	Afghanistan	0.534	87.540	0.000	0.522	0.546
	Eritrea	0.562	67.710	0.000	0.546	0.579
	Iran	0.680	102.200	0.000	0.667	0.693
	Sub-Saharan Africa (w/o Eritrea)	0.336	54.990	0.000	0.324	0.348

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

Table 19 Marginal effects socialisation

		Margin	t	P>t	[95% Conf.	Interval]
Incomplete primary	Syria	2.170	200.960	0.000	2.149	2.192
	Iraq	2.672	222.380	0.000	2.649	2.696
	Afghanistan	3.350	296.320	0.000	3.327	3.372
	Eritrea	2.420	160.290	0.000	2.390	2.449
	Iran	1.830	139.020	0.000	1.804	1.856
	Sub-Saharan Africa (w/o Eritrea)	2.664	232.860	0.000	2.642	2.687
	Primary	Syria	1.353	273.610	0.000	1.343
Iraq		1.855	269.540	0.000	1.842	1.869
Afghanistan		2.532	362.330	0.000	2.519	2.546
Eritrea		1.603	136.040	0.000	1.580	1.626
Iran		1.013	112.030	0.000	0.995	1.030
Sub-Saharan Africa (w/o Eritrea)		1.847	261.160	0.000	1.833	1.861
Lower secondary		Syria	1.225	290.710	0.000	1.216
	Iraq	1.727	265.820	0.000	1.714	1.739
	Afghanistan	2.404	348.870	0.000	2.390	2.417
	Eritrea	1.474	126.300	0.000	1.451	1.497
	Iran	0.884	102.460	0.000	0.867	0.901
	Sub-Saharan Africa (w/o Eritrea)	1.719	245.720	0.000	1.705	1.732
	Upper secondary	Syria	1.179	338.950	0.000	1.172
Iraq		1.681	262.690	0.000	1.668	1.693
Afghanistan		2.358	356.110	0.000	2.345	2.371
Eritrea		1.428	124.710	0.000	1.406	1.451
Iran		0.838	108.070	0.000	0.823	0.854
Sub-Saharan Africa (w/o Eritrea)		1.673	258.010	0.000	1.660	1.686
Post secondary		Syria	0.643	82.830	0.000	0.628
	Iraq	1.145	124.460	0.000	1.127	1.163
	Afghanistan	1.822	187.790	0.000	1.803	1.841
	Eritrea	0.893	67.520	0.000	0.867	0.918
	Iran	0.303	28.570	0.000	0.282	0.323
	Sub-Saharan Africa (w/o Eritrea)	1.137	116.940	0.000	1.118	1.156

Source: IAB-BAMF-SOEP Survey of Refugees; Own calculations

7. Conclusion

Family migration constitutes the largest migration inflow to OECD countries, accounting for almost half the immigration in recent years. Between 2014 and 2018, family migration increased in most countries, leading to debates about large migration flows in future years following the large numbers of asylum applications in E.U. countries during the mid-2010s, leading some countries to restrict family reunification programs. Although the discussion of family migration and family reunification with terms like “migration multiplier” (e.g. Jasso & Rosenzweig, 1986) and “chain migration” (e.g. Cascio & Lewis, 2020) are often brought up, especially in the U.S. context, there is still a lack of empirical estimates for many countries of the numbers of family migrants that could realistically be expected.

To address this knowledge gap, our study adds to the debate on family reunification by using recently collected German panel survey data (SOEP Refugee sample) on asylum seekers and refugees to generate improved predictions on the number of family members to arrive in the course of future family reunification programs and make predictions about delayed fertility effects of refugee families after arriving in Germany. The data is complemented with fertility data from the Wittgenstein Centre for Demography and Global Human Capital (2018) on fertility rates across more than 200 countries. We focus on the main origin countries of asylum seekers and refugees in Germany: Syria, Afghanistan, Iran, Iraq, Eritrea and Sub-Saharan Africa (without Eritrea).

The main results of our study are that country of origin and education are important for the predictions of family reunification and delayed fertility. The country of origin is important for predictions of family reunification and delayed fertility, while education only plays a role for the later and only lead to small differences with regard to family reunification. Generally, our estimates reveal that for each asylum seeker and refugee, 0.19 family members can be expected to come to Germany through family reunification. However, when looking at country and education specific predictions our results reveal that there is a large heterogeneity across asylum seeker and refugee groups. While we predict 0.29 family member for each asylum seeker and refugee in case of Syrian asylum seeker and refugee, we only predict 0.07

for asylum seekers and refugees coming from Afghanistan. Our results can be explained by the fact that many asylum seekers and refugees families arrive together in Germany, so family reunification is not necessary. The case is different for asylum seekers and refugees from Sub-Saharan Africa (excluding Eritrea), for whom we predict a ratio of 0.09, which can be explained by the fact that many families live still separated which is in line with studies by e.g. Beauchemin, (2017); Beauchemin et al. (2015). In addition, between 0.20 to 0.47 new family members can be expected due to future fertility, depending on the scenario. Our predictions for delayed fertility are based on the adaptation and socialization theory, which leads to potential high and low benchmarks of fertility rates. Differences between both scenarios can be low for asylum seekers and refugees from Iran and are large for asylum seekers and refugees from Iraq and Afghanistan.

The results are important in several ways. First we add to the debate on family reunification by showing that expected asylum seeker and refugee numbers coming through family reunification are much lower than often anticipated. Families generally migrate together, especially in case of minor children, or live still separated after several years like in the case of Sub-Saharan Africa. Both factors lower the numbers for family reunification. Having predictions on family reunification can inform with evidence the debate on family reunification and can help fasten the process in agreement with destination countries' obligations under international law on respecting family unity and which has positive implications for asylum seekers and refugees in the destination country, e.g. increases asylum seekers and refugees satisfaction (Gambaro et al. 2018) and is leading to a higher likelihood of applying for the recognition of degrees (Jacobsen 2021) and hence to better labour market integration, our results. Second, we add to the discussion about delayed fertility. Although our results are based on two common theories in fertility research: the adaptation and the socialisation theory, our results can lead as benchmark predictions of delayed fertility. Also here numbers are smaller than often expected and depend largely on the selectivity of asylum seekers and refugees, so that only based on detailed migration flow predictions including e.g. education of migration, exact delayed fertility predictions can be made.

General our predictions are also subject to limitations. Our study is limited with regard to the time frame under investigation. A longer time horizon would be

preferable to capture also later forms of family reunification, although studies show that an increase in years since since the time when the family member's relocation took place does not necessarily increase the likelihood of family reunification (González-Ferrer 2013; Mazzucato et al. 2015). Additionally, the choice of underlying theory for our delayed fertility predictions have implications for the results. We tried to use two extreme forms to provide upper and lower bounds of potential delayed fertility, so that true values might be within these benchmarks.

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Annex

Table A1 Regression analysis family reunification with residence permit

	Family migration pattern			
	Single (1)	Later (2)	Together (3)	Still separated (4)
Age	0.031*** (0.00)	0.005*** (0.00)	-0.007*** (0.00)	0.004*** (0.00)
Incomplete primary	Base	Base	Base	Base
Primary	0.350*** (0.02)	-0.304*** (0.02)	-0.332*** (0.02)	0.401*** (0.01)
Lower secondary	-0.039** (0.02)	-0.158*** (0.02)	-0.154*** (0.01)	0.155*** (0.01)
Upper secondary	-0.073*** (0.02)	0.045*** (0.02)	-0.382*** (0.01)	0.255*** (0.01)
Post secondary	-0.000 (0.02)	0.079*** (0.02)	-0.327*** (0.02)	0.181*** (0.02)
Syria	Base	Base	Base	Base
Iraq	0.142*** (0.01)	-0.276*** (0.01)	-0.070*** (0.01)	0.197*** (0.01)
Afghanistan	0.043*** (0.01)	-0.133*** (0.01)	0.124*** (0.01)	-0.080*** (0.01)
Eritrea	0.167*** (0.01)	-0.270*** (0.01)	-0.740*** (0.01)	0.709*** (0.01)
Iran	0.350*** (0.01)	-0.380*** (0.02)	0.469*** (0.01)	-0.246*** (0.01)
Sub-Saharan Africa (without Eritrea)	0.776*** (0.01)	-0.127*** (0.01)	-1.554*** (0.02)	0.954*** (0.01)
Number family members		0.180*** (0.00)	0.157*** (0.00)	-0.242*** (0.00)
No. children under 18		-0.015*** (0.00)	0.184*** (0.00)	-0.166*** (0.00)
Year of arrival in Germany		0.275*** (0.00)	-0.017*** (0.00)	-0.149*** (0.00)
constant	-2.826*** (0.02)	-556.678*** (7.31)	34.597*** (6.49)	300.746*** (6.02)
No. of Obs.	516065	488114	488114	488114
Psd. R2	0.099	0.104	0.152	0.193
Prob > chi2/F	0.000	0.000	0.000	0.000

Note: Probit regression results, binary dependent variables, regression (2), (3) and (4) are only based on the family sample, * $p < 0.10$, ** $p < 0.05$, *** $p < 0.010$

Source: IAB-BAMF-SOEP Survey of Refugees

European Union Policies on Onward and Secondary Movements of Asylum Seekers and Refugees

A Critical Mapping of the EU's Migration Management Complex

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January 2022



"This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement N° 882986".

Version Log			
Issue Date	Version	Author	Change
16/02/2022	v0.1	Sergio Carrera et at. (CEPS)	First version sent for review.
21/02/2022	V0.2	Daniel Morente (UAB)	First review sent to author
25/02/2022	V0.3	Sergio Carrera et at. (CEPS)	Final version sent to Coordinator
25/02/2022	V0.4	Cristina Blasi (UAB)	Final check and layout adjustment. Version ready to submit.
18/06/2022	V1.0	Sergio Carrera et at. (CEPS)	Final version after EC review

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1. Introduction

This Report examines European Union (EU) policies designed to manage irregular movements of asylum-seekers and refugees from selected African and Asian countries, and what the EU calls 'secondary movements' inside the Schengen Area. It provides a typology and qualitative assessment of what we call the 'EU migration management complex', i.e. the conglomerate of EU instruments and actors behind policies aimed at managing the unauthorised cross-border mobilities by asylum seekers and refugees. The report pays especial attention to the conceptual assumptions, and their accompanying cartographic visualisations or maps, policy objectives and actual impacts of the 'complex' as regards their effectiveness, legal coherency and fundamental rights of asylum-seekers and refugees.

The analysis comes at a moment when EU policies have found increasing appeal in attempts to monitor, anticipate or even predict 'crisis' or, more generally, the spontaneous unauthorised pre-border movements and actual arrivals of asylum-seekers¹. The use of maps – such as those used by the EU Frontex agency's Annual Risks Analysis – are playing a key role in EU policy by providing a 'way of thinking' about migration through a grand narrative which is shaped in a visual 'snapshot' of arrows symbolising unauthorised human journeys following seemingly linear 'migration routes' and heading towards Europe, crossing the EU's external borders and moving inside the Schengen area.

The academic state-of-the-art literature has provided critical insights as regards the conceptual and methodological limitations and biases inherent to these migration mapping exercises and their premises. Crucially, a key lesson learned is that existing 'migration visualisations and predictive tools' in the EU are often reactionary or ad hoc both in design, objectives and fundamentals. They miss the role and impacts that EU policies have in co-creating and reproducing the very phenomena that they are seeking to address, i.e. irregular human mobility across various world regions and within Europe.

This Report examines the extent to which EU migration management complex relates to and/or impacts the existence of genuine and effective access to legal admission and mobility instruments for purposes of seeking asylum and refugee protection in the EU. It does so by first assessing the shapes of the intersection between EU migration and foreign affairs' policies, which has come to be known as the 'external dimensions of EU migration

¹ See European Commission (2020a), 'Commission Recommendation on an EU Mechanism for Preparedness and Management of Crisis Related to Migration (Migration Preparedness and Crisis Blueprint)', C(2020)6469 final, Brussels, 23 September. One of the key principles of the Blueprint is 'anticipation', which is understood by the European Commission as follows: 'the migratory situation should be regularly monitored and decisions should be taken on the basis of a full and coordinated situational picture primarily with a view to prevention', page 1 of Annex of the Communication. This principle is said to inform one its key objectives: 'Sharing situational awareness and early warning/forecasting', which according to the Communication should rely on all relevant feeding 'information and evidence into an early warning/forecasting system to be developed at EU level.', page 2.

policies², and second, by studying the EU asylum and border policies aimed at prevent intra-EU mobility or free movement of asylum-seekers and refugees. These reveal a complex, hugely diversified and fragmented multi-actor field and multi-instrument ‘patchwork’ which EU policies tailor towards selected states framed as ‘key’ or ‘priority countries’ for purposes of managing migration and secondary movements.

Existing scholarly contributions have provided innovative conceptual frameworks for gaining a better understanding of EU external migration policies, and their rapidly changing and dynamic normative components (Carrera et al., 2019; Carrera, Santos and Strik, 2019; Pijnenburg and Gammeltoft-Hansen, 2018; Gammeltoft-Hansen and Vedsted-Hansen, 2017; Papagianni, 2013; and Ryan and Mitsilegas, 2010)³. It has also advanced alternative visualisations or successful counter-mapping initiatives aimed at showing the restrictive scope and effects of EU migration and border policies, challenging some of their starting premises and humanising the debate (e.g. Migreurop, 2019; Casas-Cortes et al., 2017; Van Houtum and Bueno Lacy, 2019; Abel and Sander, 2014)⁴.

Usually, however, these alternative visualisation initiatives have focused on sectoral or specific EU instruments, while a more global and cross-instrument and cross-actors examination needs to be further explored and complemented. This may be crucial as the actual impacts of some of the newest EU policies can only be understood through a combined cross-instrument (*instruments-in-chain* approach), coupled with an understanding of some of these instruments as ‘venues’ where various transnational and national actors pursue their interests, find old/new alliances abroad and create

² On the concept and rationales behind EU external dimension of Justice and Home Affairs policies refer to Balzacq, T. (2009), *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security*, Palgrave Studies in European Union Politics, Palgrave Macmillan, Hampshire, 2009.

³ Carrera, S., Den Hertog, L., Kostakopoulou, D. and Panizzon, M. (eds.) (2019), *The External Faces of EU Migration, Borders and Asylum Policies: Intersecting Policy Universes*, Brill Nijhoff, Leiden, 2019; Carrera, S., Santos Vara, J. and Strik, T. (eds.) (2019), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar Publishing, Cheltenham, 2019; Pijnenburg, A. and Gammeltoft-Hansen, T. (2018), ‘International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law’, *European Journal of Migration and Law*, Vol. 20, No. 4, 2018, pp. 373-395; Gammeltoft-Hansen, T. and Vedsted-Hansen, J. (2017), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Routledge, Abingdon and New York, NY, 2017; Papagianni, G. (2013), ‘Forging an external EU migration policy: from externalization of border management to a comprehensive policy’, *European Journal of Migration and Law*, Volume 15, No. 3, 2013, pp. 283-299; and Ryan, B. and Mitsilegas, V. (2010), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, Leiden, 2010.

⁴ Migreurop (2019), *The Atlas of Migration in Europe: A Critical Geography of Migration Policies*, Routledge, London, 2019; Casas-Cortes, M., Cobarrubias, S., Heller, C. and Pezzani, L. (2017), ‘Clashing Cartographies, Migrating Maps: Mapping and the Politics of Mobility at the External Borders of the E.U. rope’, *ACME: An International Journal of Critical Geographies*, Vol 16, No. 1, 2017, pp. 1-33, <https://acme-journal.org/index.php/acme/article/view/1094>; and Van Houtum, H. and Bueno Lacy, R. (2019), ‘The Migration Map Trap: On the Invasion Arrows in the Cartography of Migration’, *Mobilities*, Vol. 15, No. 2, 2019, pp. 196-219; G. J. Abel and N. Sander (2014), *Quantifying Global International Migration Flows*, Science, Vol. 343, Issue 6178, pp. 1520-1522.

knowledge on ‘migration’ (Carrera et al., 2019)⁵. This report aims at contributing to fill in this gap by examining the amalgam of the most recent and currently applicable policies that the EU utilises or implements in the management of unauthorised cross-border mobility of third country nationals – often labelled by EU actors as ‘onward and secondary movements’ – both in the scope of EU external and internal migration management policies. The analysis comes along with visualisations illustrating EU instruments, and their priorities.

The Report has been structured as follows. After this Introduction, *Section 2* lays down the methodology and specific methods and conceptual assumptions deployed in this Report. *Sections 3, 4 and 5* continue the journey by covering three case studies dedicated to the mapping of EU instruments and actors in a selection of states framed as ‘priority countries’ by the EU for the purposes of migration management – Nigeria in Africa (*Section 3*), and Afghanistan in Asia (*Section 4*), and another one covering EU policies aimed at preventing intra-EU mobility of asylum-seekers within the EU’s territory from Greece, Italy and Spain (*Section 5*). Based on this analysis, *Section 6* draws key cross-cutting findings and outlines a set of maps and visualisations (infographics) aimed at gaining a better understanding of EU policies in these domains. *Section 7* provides the conclusions.

⁵ Carrera, Den Hertog, Kostakopoulou and Panizzon (eds.) (2019), op. cit.

2. Conceptual basis and methodology: Assessing and visualizing EU migration policies

This Report provides a qualitative assessment of the wide range of EU policies which apply in selected non-EU states identified as ‘key’ or ‘priority countries’ by the EU for purposes of managing migration – including EU policies covering returns and readmission⁶. In the African region, the European Commission’s EU Migration Partnership Framework⁷, which builds upon the Global Approach on Migration and Mobility (GAMM)⁸, and the EU Pact on Migration and Asylum⁹ place **‘migration issues’ at the top of the EU’s external relations priorities and frame some African states as ‘countries of origin’ and ‘countries of transit’ of irregular migration** with whom to establish international migration partnerships.

For instance, Nigeria is typically portrayed in EU policy documents as a ‘source country’ of ‘irregular immigrants’. States such as Niger, Libya and Tunisia are usually presented as ‘transit countries’ or ‘corridors’ of ‘illegal external border crossing’ in what is often called by EU Frontex Agency the Central Mediterranean Route towards Italy and Malta¹⁰. Similarly, other African states such as Mauritania or Morocco are framed as both ‘countries of transit’ and ‘origin’ of unauthorised movements/entries in the scope of illegal border crossings in the ‘Western Mediterranean Route’ towards Spain¹¹.

In Asian and East European regions, following a similar logic, EU policies frame states like Afghanistan as one of the key countries of origin of ‘irregular migration’. This comes along an understanding of states such as Iran, Iraq or Pakistan as both countries of transit of

⁶ European Commission (2021a), Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum, COM(2021) 590 final ANNEX 2, Brussels, 29 September, <https://ec.europa.eu/info/sites/default/files/annex2-report-migration-asylum.pdf>.

⁷ European Commission (2016a), Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7 June; see also European Commission (2017a), Report from the Commission to the European Parliament, the European Council and the Council, ‘Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration’, COM(2017) 350 final, Strasbourg, 13 June.

⁸ European Commission (2011a), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The Global Approach to Migration and Mobility’, COM(2011) 743 final, Brussels, 18 November; See also Commission Services, ‘GAMM Update’, Council Document No. 11539/19 LIMITE, Brussels, 12 September 2019, <https://www.statewatch.org/news/2019/october/eu-global-approach-to-migration-and-mobility-gamm/>.

⁹ European Commission (2020b), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23 September.

¹⁰ Frontex, ‘Risk Analysis for 2020’, European Border and Coast Guard Agency (Frontex), Warsaw, March 2020, https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Annual_Risk_Analysis_2020.pdf.

¹¹ Ibid.

Afghan nationals and source countries of unauthorised movements by their own nationals. In this context, Turkey has been presented as both a key country of transit or a ‘corridor’, and as a country of origin in the scope of what has been termed as the ‘Eastern Mediterranean Route’ towards Greece. All the above, in turn, usually leads to EU Member States such as Italy, Spain and Greece¹² to be often portrayed as main ‘source countries’ or ‘countries of transit’ of what has been coined as ‘secondary movements’ of asylum-seekers and refugees heading towards central and northern European states within the common EU Schengen territory.

This Report takes a critical approach towards these conceptual assumptions and the underlying EU categorization of nationals from countries like Nigeria and Afghanistan as ‘irregular migrants’ (*Section 2.1* below), and the dominant mapping tools behind this grand policy narrative of ‘migration in Europe’ and intra-EU movements by asylum-seekers from these countries (*Section 2.2*).

2.1. Migrants, asylum-seekers or refugees?

EU migration management policies create much confusion and are legally misleading as regards their personal scope. Our assessment takes into consideration that the notions of ‘illegal border crossings’ used by Frontex Annual Risks Analysis, or the one used more broadly by European institutions of ‘illegal or irregular immigration’ are conceptually unsuited to understand the complexities of asylum seeking across various world regions. They also blur Member States’ obligations stemming from their own legal commitments under international human rights and refugee protection standards.

An asylum seeker or a refugee cannot be considered, treated and counted as “irregular immigrants”. The fact that individuals may use unauthorised or irregular means does not make the ‘irregular migrants’. Only once asylum seekers’ claim for international protection has been individually assessed subject to determination procedure, and positively recognized or rejected – with access to effective remedies – can these persons fall into the status of ‘irregular migrant’ (Gil-Bazo and Guild, 2021).¹³

In comparison to the general administrative status of third country national (TCN) under EU law, refugee and other international protection statuses carry significant normative weight and a clearer set of legal restrictions limiting the discretion of EU Member States

¹² See letter sent by the Greek Minister for Migration and Asylum, Notis Mitarachi to the Vice-President of the European Commission, Margaritis Schinas, and European Commissioner for Home Affairs, Ylva Johansson of 4 June 2021, <https://www.politico.eu/wp-content/uploads/2021/06/06/20210604-YMA-Ministers.pdf> and letter by Federal Minister of the Interior, Horst Seehofer Building and Community of 1 June 2021, <https://www.statewatch.org/media/2485/letter-six-schengen-states-to-european-commission-secondary-movements-1-6-21.pdf>

¹³ Gil-Bazo, M.-T. and Guild, E. (2021), ‘The Right to Asylum’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford, 2021, pp. 867-882. According to Gil-Bazo and Guild, “asylum is different from refugee status: the former constitutes the institution for protection, while the latter refers to the content of the protection offered to those who benefit from asylum”.

and agencies discretion. Furthermore, **people seeking asylum** may not fulfil the criteria for benefiting from the 1951 United Nations Geneva Convention and 1967 Protocol status, and yet they **can and are still granted other international protection statuses**, such as complementary protection (McAdam, 2021),¹⁴ subsidiary protection under EU asylum law¹⁵ or based on other compassionate or humanitarian grounds in accordance with Member States national legal systems.¹⁶

The irrelevance of ‘irregularity’ is enshrined in the obligation of non-penalisation of asylum seekers and refugees’ illegal entry or stay and the non-criminalisation of people smuggled is recognised in the 1951 Geneva Convention and the 2000 UN Migrant Smuggling Protocol. According to Costello and Ioffe (2021),¹⁷ Article 31 of the Geneva Convention “cannot be considered to require a person to seek international protection at the first effective opportunity...and does not provide a basis for safe third country practices”. Costello and Ioffe conclude that the Geneva Convention’s starting point is the fact that asylum seekers and refugees often transit irregularly through a series of countries before reaching asylum.¹⁸ The irrelevance of irregularity is also enshrined in the EU Schengen Borders Code (SBC) which establishes that **EU border control and surveillance norms shall apply without prejudice to the rights of refugees** and persons requesting international protection, in particular as regards non-refoulement.¹⁹ Therefore, the fact and common reality that people seeking asylum and refugees may have to move and cross borders irregularly does not make them irregular migrants.

Nationals from Nigeria and Afghanistan are, often wrongly, presented as ‘irregular immigrants’ in the EU *ex ante* without considering their individual protection needs and context-specific realities. They are considered to be ‘expellable’ on the basis of dubious applications of ‘safe third country’ notions by some EU Member States which automatically assume that they can find protection or safety elsewhere, or in some part of

¹⁴ McAdam, J. (2021), ‘Complementary Protection’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford, 2021, pp. 661-677.

¹⁵ Refer to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, pp. 9-26.

¹⁶ According to UNHCR Glossary an asylum seeker is “An individual who is seeking international protection. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which the claim is submitted. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee was initially an asylum-seeker”. Available at <https://www.unhcr.org/master-glossary.html>.

¹⁷ Costello, C. and Ioffe, Y. (2021), ‘Non-penalisation and Non-criminalisation’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford, 2021, pp. 917-932.

¹⁸ Ibid.

¹⁹ See Arts. 3.b and 4 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23 March 2016, pp. 1-52.

their country-of-origin territories (Feline Freier, Karageorgiu and Ogg, 2021)²⁰. Previous research has shown that the current EU official assumption that a majority of third country nationals arriving irregularly are unlikely to receive protection is **unfounded and not evidence based**²¹. For instance, the Commission Staff Working Document (SWD) accompanying one of the legislative initiatives presented under the 2020 EU Pact on Migration and Asylum²² states that

‘... today a large share of migrants arriving irregularly are unlikely to receive protection in the EU. The average EU recognition rate in 2019 for first-time applications was just 30 % in the EU-27. Member States are therefore not only faced with an increased burden to process asylum applications, but also have to return a higher number of irregular migrants with inadmissible or rejected asylum claims’²³.

This contrasts with Eurostat statistics which show a recognition rate across the EU-27 higher than 30 % in all recorded years **since 2012**. Attempting to distinguish between types of positive decisions or groups of citizenship does not lead to the cited figure of 30 %²⁴, nor do any derivative approximation of first instance decisions on first-time asylum applications in the EU-27 in 2019. Brouwer et al. (2021) have questioned the 30 % reference **citing the omission in the recognition rate of numbers on persons granted humanitarian protection**, the lack of consideration for **negative first-instance decisions on asylum applications based on ‘safe third country notions’** or which have subsequently been successfully challenged on **appeal or review**, and the issue of disparities in positive recognition rates between the EU Member States (ECRE, 2020)²⁵.

²⁰ Feline Freier, L., Karageorgiu, E. and Ogg, K. (2021), ‘The Evolution of Safe Third Country Law and Practice’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford, 2021, pp 518-534.

²¹ Brouwer, E. et al., ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, Study for European Parliament LIBE Committee PE 697.130, European Parliament, Brussels, July 2021, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)697130](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130).

²² ‘European Commission (2021b), ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] {COM(2020) 610 final}’, SWD(2020) 207 final, Brussels, 23 September.

²³ Ibid., p. 20.

²⁴ Based on Eurostat data (migr_asydcfsta), in 2019 in the EU-27, a total of 541 085 decisions in first instance have been adopted on asylum applications. Positive decisions were adopted in 206 030 instances, of which 108 980 were granted refugee status, 45 065 were granted some form of humanitarian protection status, and 51 985 were subsidiary protection statuses. This results in an EU-27 average recognition rate of 38.08%. Excluding subsidiary protection would lead to a recognition rate of 28.47%, which is lower than the cited EU-27 average by a significant margin. Calculation of the EU-27 average recognition rate solely for applicants with a *nationality* other than the nationality of an EU Member State (labelled in the dataset as ‘extra-EU-27’) would similarly lead to a recognition rate of 38.09%.

²⁵ Brouwer, E. et al. (2021), op. cit., pp. 40-41. ECRE, ‘Asylum Statistics in Europe: Factsheet’, ECRE, Brussels, 19 June 2020, <https://ecre.org/asylum-statistics-in-europe-factsheet/>. According to ECRE, “Low recognition rates do not automatically point to the conclusion that an individual or particular group is not in need of international protection. Decision-making across Europe continues to be an “asylum lottery”: a person’s chances of obtaining protection vary dramatically depending on the country examining their claim.”

There are also **many obstacles and practical barriers experienced by individuals at times of having access to effective remedies** and challenging first instance negative decisions across EU Member States (ICJ and ECRE, 2018)²⁶. Furthermore, misguided assumptions of safety and ‘irregularity’ become untenable and groundless in countries like Nigeria and Afghanistan where refugee protection needs are at present a reality²⁷. Therefore, this Report contributes towards a better understanding of the extent to which nationals from the countries targeted by EU external migration policy may in fact be legitimate asylum-seekers and refugees.

2.2. Revisiting onward migrations and secondary movements

Another definitional caveat behind EU policies relates to the attributed features and assumptions behind **the concepts of transit or onward migration and secondary movements**. The predominant storyline behind EU policy efforts in these areas finds direct inspiration on the most popular maps aimed at providing a visual picture of these phenomena for purposes of managing, monitoring and policing migrations.

2.2.1. Migration maps

One illustrative instance of the predominant migration maps in the EU is the one which was developed by **the International Centre for Migration Policy Development (ICMPD)** on ‘Irregular and Mixed Migration Flows’ as part of a project titled *Mediterranean Transit Migration (MTM) – Dialogue*, which run from 2006 to 2014. The MTT Dialogue was implemented by ICMPD, an inter-governmental organisation with UN observer status, **Europol and Frontex**, in cooperation with UNHCR²⁸. It also counted with the partnership of the **United Nations Office on Drugs and Crime (UNODC) and Interpol**.

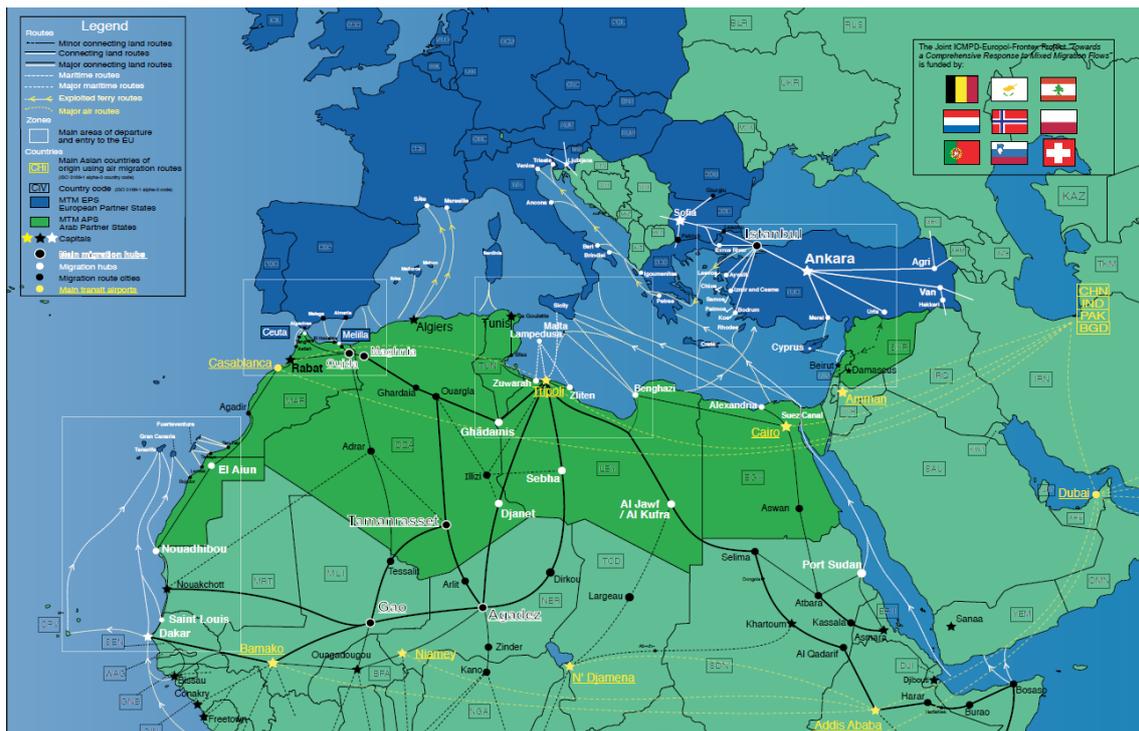
²⁶ ICJ and ECRE (2018), ‘Joint Submission of the International Commission of Jurists (ICJ) and of the European Council on Refugees and Exiles (ECRE) to the United Nations Special Rapporteur on the human rights of migrants report on access to justice for migrants’, 16 April 2018, <https://www.icj.org/wp-content/uploads/2018/04/ICJECRE-NonLegalSubmission-SRMigrants-Access2JusticeEurope4Migrants-2018-ENG.pdf>.

²⁷ See for instance UNHCR country overview referring to the forced displacement of more than 2.4 million persons with unquestionable protection needs as a result of the Boko Haram insurgency in Nigeria back in 2014 and which continues in 2021. Refer to <https://www.unhcr.org/nigeria-emergency.html> According to UNHCR ‘To date, the Lake Chad Basin region is grappling with a complex humanitarian emergency. Over 3.2 million people are displaced, including over 2.9 million internally displaced persons (IDPs) in north-eastern Nigeria, over 684 000 IDPs in Cameroon, Chad and Niger and 304 000 refugees in the four countries.’ As regards Afghanistan, refer to <https://www.unhcr.org/afghanistan-emergency.html> UNHCR issued a non-return to Afghanistan advisory opinion in August 2021; see UNHCR (2021a), ‘UNHCR Position on Returns to Afghanistan’, United Nations High Commissioner for Refugees (UNHCR), Geneva, August, <https://www.refworld.org/docid/611a4c5c4.html>.

²⁸ ICMPD, Europol and Frontex (2007), ‘Arab and European Partner States Working Document on Joint Management of Mixed Migration Flows’, Publications Office of the European Union, Luxembourg, 2007, https://www.iom.int/sites/g/files/tmzbd1486/files/migrated_files/What-We-Do/docs/Towards-a-Comprehensive-Response-to-Mixed-Migration-Flows-en.pdf. See also ICMPD, ‘Mediterranean Transit Migration Dialogue: Building Partnerships through Innovation, Factsheet’, International Centre for Migration Policy Development (ICMPD), Vienna, 2014, <https://www.icmpd.org/content/download/48212/file/mtm%20FACTSHEET.pdf>.

The MTT Dialogue aimed at supporting national migration and law enforcement officials, as well as international and EU agencies on migration policing and border control/surveillance policies. The MTM Map presented in *Figure 1* below, co-authored by ICMPD, Frontex and Europol, was designed with the idea of irregular migration routes²⁹ towards the EU comprising the West Africa, West Mediterranean, Central Mediterranean, East Africa and East Mediterranean routes³⁰.

Figure 1. ICMPD i-Map on Mediterranean transit migration



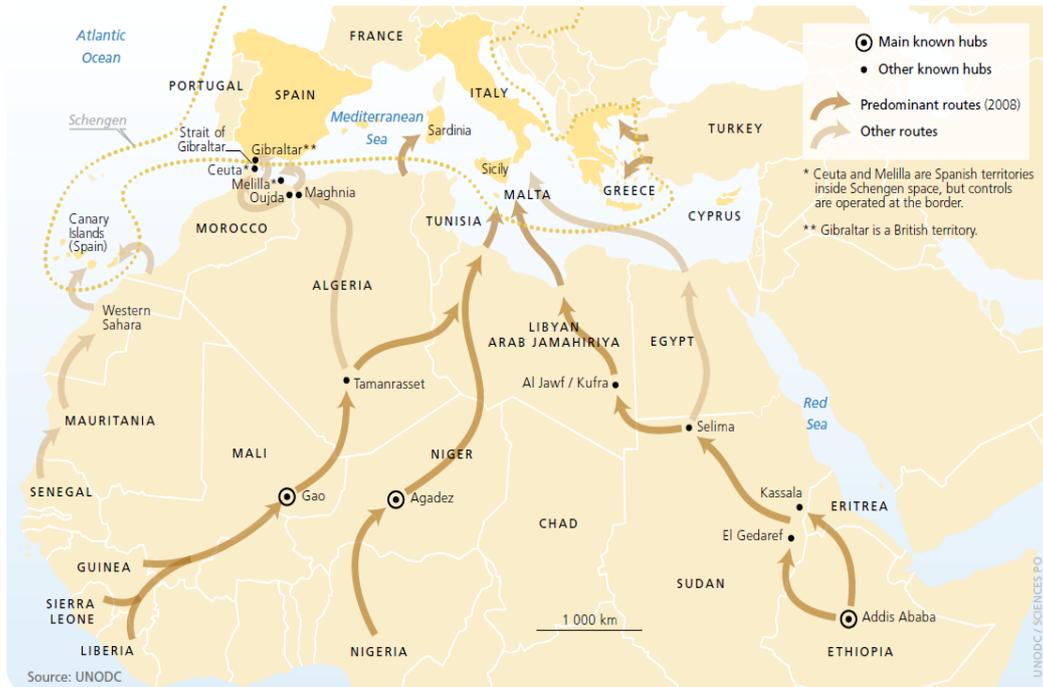
Source: ICMPD, Europol and Frontex (2007).

²⁹ According to ICMPD, Europol and Frontex (2007) ‘variations in the flow of one route impacts on the intensity of flows in the other. In fact, it is increasingly the case that, due to more efficient controls border controls on the northern shores, increasingly perilous journeys and deaths (in particular at sea), or indeed due to increasing favourable socio-economic conditions in North Africa, migrants remain stranded or opt to remain in North African countries. Thus, countries that were originally countries of transit are increasingly becoming countries of final destination for a large number of Sub-Saharan Africans or Asian migrants migrating through the African continent’, page 19. And page 20 states that: ‘Moreover, given the composition of irregular migration flows, which at any given time may include persons in need of international protection, it is clear that controlling borders alone will not fully address mixed migration in the region’.

³⁰ Following the ICMPD, Europol and Frontex (2007) report ‘the Group of Western Irregular Migration Routes’ is composed by: ‘The West Africa route is both a land and sea-based route that starts in Western African countries and ends in the Canary Islands via Senegal or Mauritania. The West Mediterranean route begins in West Africa, runs through Morocco or Algeria and ends in mainland Spain. The Central Mediterranean route has its roots in the same region of West Africa. It progresses through Algeria, Libya and/or Tunisia to reach Malta or Italy.’ Furthermore, the ‘Group of Eastern Irregular Migration Routes’ is composed by ‘The East Africa route begins in the Horn of Africa, heads north to Italy and Malta via Sudan, Libya and/or Egypt. The East Mediterranean route starts in Asia, Central Asia or the Horn of Africa and ends in Cyprus, Greece or Bulgaria via Turkey’, p. 19.

Another example of a map is the one designed by UNODC in 2010 with inputs by Interpol (*Figure 2* below), which focused on human mobility issues through the lens of policing and the criminalisation of human smuggling. EU agencies such as Europol also provided inputs.

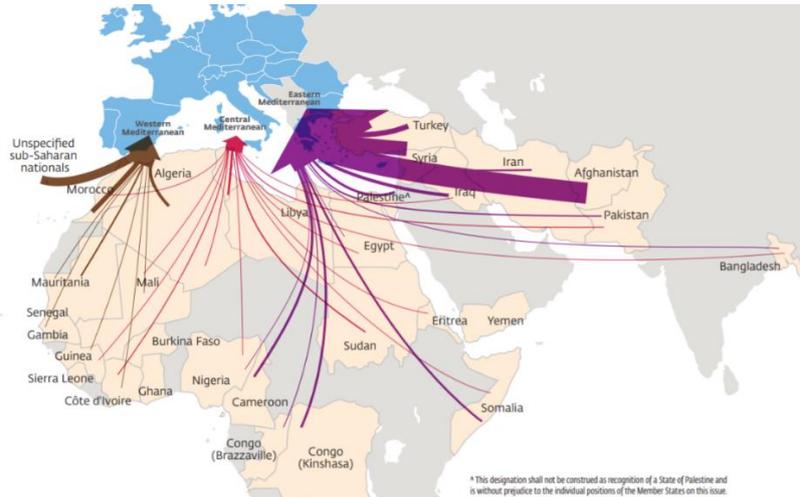
Figure 2. UNODC map titled 'Main routes for African irregular migrants to Europe 1999-2008'



Source: UNODC, ‘The globalization of crime: A transnational organized crime threat assessment’, United Nations Office on Drugs and Crime (UNODC), Vienna, 2010.

These and other earlier initiatives have given inspiration to others which are at present directly informing EU policy debates and agendas on migration and asylum. A case in point are those used by **EU Frontex Agency in its Annual Risks Analysis (RA) Reports** (*Figures Figure 3 and Figure 4* below). Frontex RA (2020) aims at providing a comprehensive picture of the European Union’s migratory situation, (page 6), and limit the challenges and threats for border management by risk analysis. It says this offers a ‘situational picture as regards irregular immigration’ into the EU, with its core focus on the number of arrivals and what Frontex calls ‘illegal border crossings’ data.

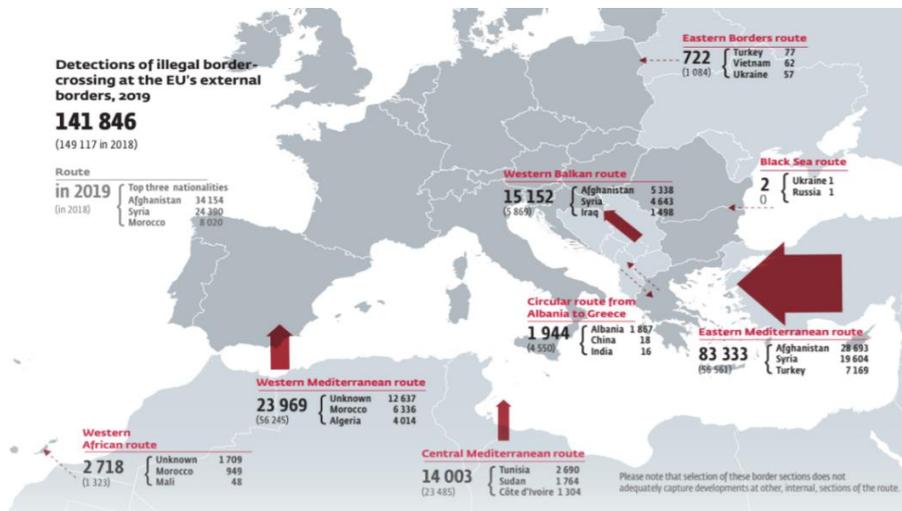
Figure 3. Frontex situational overview I



Source: Frontex Risk Analysis 2020, p. 22.

Frontex RA refers to geographical ‘migration routes’ – Western, Central and Eastern Mediterranean - and ‘migration corridors’, such as the central route via Serbia and the route from the Greek-Albanian border, which characterise what it calls ‘the Western Balkan route’ as transited by irregular migrants trying to reach Western Europe from Turkey. The RA identifies as ‘corridors’ in the Central Mediterranean: Libya, Algeria, Tunisia and Turkey³¹.

Figure 4. Situational overview II – detections of illegal border crossing at the EU’s external borders 2019



Source: Frontex Risk Analysis 2020, p. 24.

A preliminary finding emerging from the actors who have played a more active role behind the design and reproduction of this and similar mapping tools is their predominant policing or crime-control nature and mandate, and their role in the criminalisation of human mobility and asylum. Another interesting example of ‘migration map’, this time in relation to intra-EU movements of asylum-seekers and refugees, is the

³¹ Frontex (2020), op. cit., pp. 24-25.

one presented in an advisory report prepared by the **Dutch Advisory Committee of Migration Affairs (ACVZ)** in 2019 dealing with 'Secondary Movements of Asylum-seekers in the EU' (Figure 5). The advisory report includes a map aimed at visualising 'secondary movements' based on the statistical data on the use of Eurodac databased published annually by the eu-LISA agency.

Figure 5. Top 25 Eurodac hits from and to the 10 EU+ Member States 2018



Source: ACVZ (2019), page 20³².

2.2.2. Unpacking maps

Van Houtum and Bueno Lacy (2019) have provided one of the most compelling and interesting explorations of **the methodological flaws characterising prevailing migration maps in the EU** as regards: first, their grid (which hides or nullifies human beings and suffering); second, the use of arrows (feeding into the myth of invasion (De Haas, 2008)³³ by representing directional and consistently linear movements targeting

³² ACVZ, 'Secondary movements of asylum seekers in the EU. Advisory Report', Report submitted to the Minister for Migration, Dutch Advisory Committee on Migration Affairs (ACVZ), The Hague, November 2019, <https://www.adviescommissievoorvreemdelingenzaken.nl/publicaties/publicaties/2019/11/05/increasing-onward-migration-of-asylum-seekers-in-the-eu>. According to footnote 40 of the Report 'the more red the colour of a Member State, the higher the amount of registered first-time asylum applications...the thicker the arrow, the higher the amount of Eurodac hits'.

³³ De Haas, H. (2008), 'The Myth of Invasion: The Inconvenient Realities of African Migration to Europe', *Third World Quarterly*, Vol. 29, No. 7, 2008, pp. 1305-1322. According to Haas popular views on the 'root causes' of migration from Africa 'are based on fundamentally flawed assumptions about the actual magnitude, nature and causes of African migration to Europe, which is not so massive, new or so driven by 'African misery' as is commonly assumed,' and concludes 'policies to 'fight illegal migration' are bound to fail because they are among the very causes of the phenomenon they claim to combat'.

the EU or some of its Member States, often designed as huge in size similar to entire countries and overtaking Europe, and using certain red-like or purple colours raising uneasy and danger to the reader); and third, their impactful framing regarding the way in which one thinks of migration – collective imagination – and the justification that they provide for ever-restrictive policy choices in the EU (Van Houtum and Bueno Lacy, 2019)³⁴.

The maps presented in *Section 2.2.1* of this Report are not neutral. In addition to hiding the people behind the arrows and the effects that policies have over their impacts on mobile people's rights, lives and dignity, **maps carry an ideological background and 'framing intention' at the service of actor-specific interests and priorities**. A key methodological bias characterising these maps is their shared assumption that all unauthorised human journeys are 'onward movements' following 'routes' heading towards the EU or having specific Northern EU countries as their final destination.

Casas-Cortes et al. (2017) underline how maps such as the one by ICMPD, Frontex and Europol (*Figure 1* above) put forward a '**securitarian' cartographic approach to human mobilities** not so much focused on authorised EU border crossings. The focus is instead on the **pre-border surveillance** of mobility itineraries across various regional geographical areas before arrival³⁵, which EU actors seek to track and manage **in cooperation with relevant third state authorities and actors** in these regions. This model of cooperative deterrence has translated, according to Pijnenburg and Gammeltof-Hansen (2018), a qualitative shift in the balance of cooperation towards partner states in the Global South taking on a more active role which he understands as cooperative deterrence³⁶.

The theoretical assumptions behind these maps follow closely the traditional 'pull and push' migration theories (Greenwood, 2019)³⁷, according to which 'potential' people on the move engage in a meticulous rational choice and utility maximisation decision-making process waiving several factors or drivers for choosing a specific country as their desired destination. Accordingly, this same theory portrays, people on the move are also 'migration policy experts' with in-depth knowledge of the applicable rules and the benefits to be reaped when comparing European destinations. The push and pull theory has found particular appeal in EU asylum policy debates and the European Asylum Support Office, which has been now rebaptised as the European Union Asylum Agency (EUAA) (EASO, 2016)³⁸.

³⁴ Van Houtum and Bueno Lacy (2019), op. cit.

³⁵ Casas-Cortes, Cobarrubias, Heller and Pezzani (2017), op. cit.

³⁶ Pijnenburg and Gammeltof-Hansen (2018), op. cit.

³⁷ See Greenwood, M.J., 'The Migration Legacy of E. Ravenstein', *Migration Studies*, Vol. 7, No. 2, 2019, pp. 269–278; see also Massey, D.S., et al., 'Theories of International Migration: A Review and Appraisal', *Population and Development Review*, Vol. 19, No.3, 1993, pp. 431-466.

³⁸ EASO (2016), 'The Push and Pull Factors of Asylum-Related Migration, A Literature Review', European Asylum Support Office, Valletta, November 2016, <https://euaa.europa.eu/sites/default/files/publications/The%20Push%20and%20Pull%20Factors%20of%20Asylum%20-%20Related%20Migration.pdf>. The EASO Report was prepared by

Guild (2021) has argued that **the pull-push theory is simply wrong**. It not only tends to obscure **a number of normative and prejudicial assumptions about human mobility and what constitutes migration**. She explains how this theory allows the theorist to apply so-called rational choice theory to what a push or pull factor is according to his or her preferences and preconceptions about the society³⁹. Furthermore, if there is anything crucial that the literature in the areas of geography, social-anthropology and sociology of law has taught us it is that these assumptions are not only **over-simplistic, they are also wrong and biased**.

Authors like Van Houtum and Bueno Lacy (2019) or Crawley and Jones (2021)⁴⁰ have convincingly argued that human mobility is anything but a straight, unidirectional or smooth line, representing linear or 'liquid' movements between two specific places, i.e. the country from where people leave and the one of chosen destination. Instead, migration can only be understood as **complex social processes** where journeys often extend over long or prolonged periods of time and individuals engage in largely incoherent, multi-faceted mobility, enforced immobility and often life-threatening experiences (Schapendonk and Steel, 2014; Schapendonk et al., 2020)⁴¹.

Many individuals actually do not continue moving on 'by choice'. Crawley and Jones (2021) have shown evidence of instances where people in fact **do not have any given country or Europe in their minds**, which in turn challenges the grand narrative behind the dominant EU maps studied above according to which migrants are in transit or onward movements having as their *real* final destination the EU or specific EU countries. Many people do not leave with preferred destinations in mind and they also tend to change their minds, reconsider and/or abandon 'preferred destinations' along the various phases comprising their journeys (Crawley and Jones, 2021)⁴². Cross-border human mobility often translates into multiples moments of leaving and in-between living spaces - which may become permanent and non-transitional in nature. Those arriving to Europe have not always crossed all the borders encountered in their journeys irregularly, and

Maastricht University and the Global Migration Data Analysis Centre (GMDAC) of the International Organization for Migration (IOM).

³⁹ Guild, E. (2021), 'Promoting the European Way of Life: Migration and Asylum in the EU', *European Law Journal*, Vol. 26, No. 5-6, 2021, pp. 355-370. Guild argues as an example that experts using 'push/pull theory' would find it difficult to qualify American nationals mobility to the EU on the basis of this theory, let alone framing them as 'migrants', p. 358.

⁴⁰ Crawley, H. and Jones, K. (2021), 'Beyond Here and There: (Re)Conceptualising Migrant Journeys and the "In-Between"', *Journal of Ethnic and Migration Studies*, Vol. 47, No. 14, 2021, pp. 3226-3242.

⁴¹ Schapendonk, J. and Steel, G. (2014), 'Following Migrant Trajectories: The Im/Mobility of Sub-Saharan Africans en Route to the European Union', *Annals of the Association of American Geographers*, Vol. 104 No. 2, 2014, pp. 262-270; and Schapendonk, J., Van Liempt, I., Schwarz, I. and Steel, G. (2020), 'Re-routing migration geographies: Migrants, trajectories and mobility regimes', *Geoforum*, Vol. 116, November 2020, pp. 211-216.

⁴² Crawley and Jones (2021), op. cit. Crawley and Jones argue that 'People are not simply 'passing time' waiting for the opportunity to move on to Europe. They live, love and work in the places where they reside, in turn contributing to those spaces and the social, economic and political processes', p. 3238.

have experienced violence, unsafety and death along their journeys (Crawley et. al., 2016)⁴³.

Therefore, the literature confirms that **journeys are not straightforward or following identifiable routes or corridors towards the EU**. As Kuschminder (2021)⁴⁴ has explored, it is instead necessary to duly consider the agency and the constraints of people on the move during their various journeys, including cases of death or serious/severe physical and psychological injuries (McMahon and Sigona, 2020)⁴⁵. **People are not either migration/asylum policy experts tailoring their decisions and choices to move according to applicable regulations and instruments**. Crawley and Hagen-Zanker (2018) have shown that the roles that EU migration policies are expected to have in people's destination preferences is not evidence based. Their research has brought to light the fact that the majority of persons engaging in cross-border mobilities have very limited or no-knowledge of asylum and migration policies, and that they did not choose particular destinations because of generous migration policies⁴⁶. The literature therefore questions the linear logic lying behind push and pull factors theory, and the role that migration management policies are expected to have by EU and national policy makers.

2.2.3 Europe is *not* the main destination

This is corroborated by available statistical evidence, which shows that **Europe is not the main destination to where nationals seeking asylum from countries like Nigeria or Afghanistan actually go**. Nigerian nationals were among the top 10 nationalities applying for international protection in the EU in 2019 and 2020. According to Eurostat statistics, in 2020, a total of 17 265 decisions had been issued on asylum applications from Nigerian nationals. However, UNHCR global data show that in 2020, Nigerians in need of protection were overwhelmingly internally displaced (IDPs), with more than 2.6 million Nigerian IDPs of concern to UNHCR recorded. Of the Nigerian nationals who have left Nigeria seeking or having been granted international protection abroad (426 013 Nigerians in 2020), more than two thirds of them are situated in the region, with Niger

⁴³ Crawley, H. et al., 'Destination Europe? Understanding the Dynamics and Drivers of Mediterranean Migration in 2015', MEDMIG Final Report, Coventry, November 2016, <https://www.compas.ox.ac.uk/2016/destination-europe-understanding-the-dynamics-and-drivers-of-mediterranean-migration-in-2015/>.

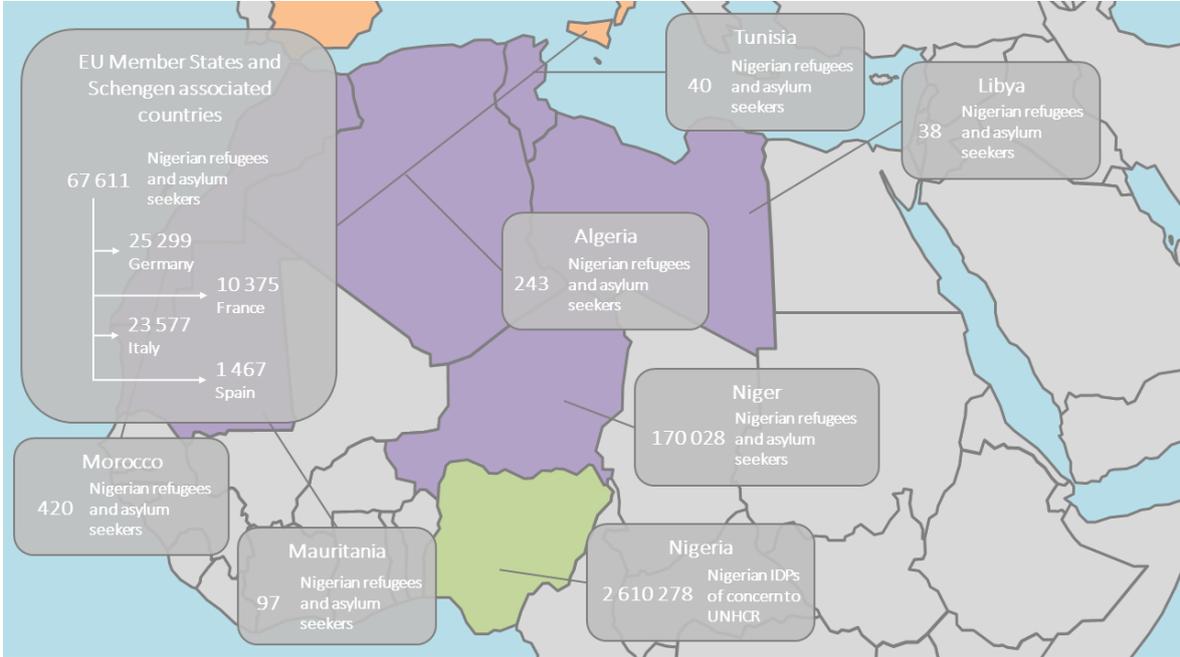
⁴⁴ Kuschminder, K. (2021), 'Before Disembarkation: Eritrean and Nigerian Migrants Journeys within Africa', *Journal of Ethnic and Migration Studies*, Vol. 47, No. 14, 2021, pp. 3260-3277.

⁴⁵ McMahon, S. and Sigona, N. (2020), 'Death and Migration: Migrant Journeys and the Governance of Migration During Europe's Migration Crisis', *International Migration Review*, Vol. 55, No. 2, 2020, pp. 605-628.

⁴⁶ Crawley, H. and Hagen-Zanker, J. (2018), 'Deciding where to go: Policies, people and perceptions shaping destination preferences', *International Migration*, Vol. 57, No. 1, 2018, pp. 20-35. On how there is 'insufficient evidence to substantiate the claims made by politicians around economic pull factors', refer to James, P. and Mayblin, L. (2016), 'Factors influencing asylum destination choice: a review of the evidence', University of Sheffield Working Papers 04/16.1, University of Sheffield, Sheffield, March 2016, <https://asylumwelfarework.files.wordpress.com/2015/03/asylum-seeker-pull-factors-working-paper.pdf>.

(171 028) and Chad (117 463) hosting over 67 % of Nigerian refugees and asylum-seekers⁴⁷.

Figure 6. Nigerian IDPs, refugees and asylum-seekers in 2020 in select countries



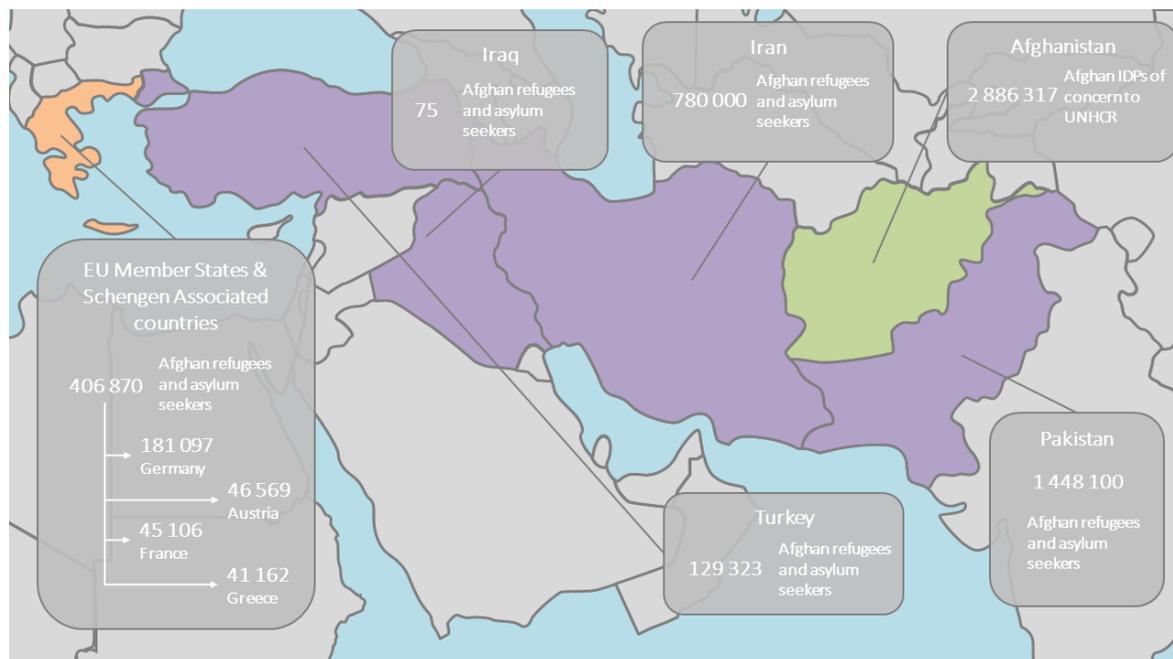
Source: UNHCR, Refugee Data Finder (population figures).

Similarly, according to Eurostat statistics, in 2020, a total of 41 765 decisions had been issued on asylum applications from Afghan nationals⁴⁸. That notwithstanding, according to UNHCR data, in 2020, over two (2) million Afghan IDPs of concern to UNHCR were recorded. Moreover, of the Afghan nationals who have left Afghanistan seeking or having been granted international protection abroad (2 833 565 Afghans in 2020), the overwhelming majority of them are located in the region, with Pakistan (1 448 100) and Iran (780 000) hosting over 78 % of Afghan refugees and asylum-seekers.

⁴⁷ UNHCR, Refugee Data Finder (population figures).

⁴⁸ Eurostat (migr_asydecfsta).

Figure 7. Afghan IDPs, refugees and asylum-seekers in 2020 in select countries



Source: UNHCR, Refugee Data Finder (population figures).

2.2.3. Cross-border and intra-EU mobility of asylum-seekers and refugees

All the above profoundly complicates the use and soundness of notions such as onward migrations and movements⁴⁹. Similar caveats apply to the EU's policy notion of secondary movements, which is particularly focused on the management of onward migration of asylum-seekers within the EU(+) from the Member State that is responsible under the Dublin system for processing the asylum application, to another Member State.⁵⁰ The EU's concept of secondary movements is based on **the acceptance since the origins of the**

⁴⁹ UNHCR uses the following notion of 'onward movements': 'Refugees and asylum-seekers who have fled to one country in search of protection may also subsequently move on to other countries. Such 'onward movements' of asylum-seekers and refugees can be of concern, both to States and to UNHCR, if they take place without the requisite authorizing documentation or involve dangerous means of travel. Irregular onward movements generally reflect a lack of available protection for refugees and asylum-seekers, including access to timely durable solutions.', UNHCR, '10 Point Plan in Action. Chapter 8: Addressing onward movements', United Nations High Commissioner for Refugees (UNHCR), Geneva, December 2016, <https://www.unhcr.org/the-10-point-plan-in-action.html>, page 202.

⁵⁰ Definition used by the Obermann, L. and Vergeer, S. (2020), 'Secondary movements of asylum seekers in the EU: Research Report', report submitted to the Dutch Minister for Migration, Dutch Advisory Committee on Migration Affairs (ACVZ), The Hague, January 2020, available at <https://www.adviescommissievoorvreemdelingenzaken.nl/publicaties/publicaties/2019/11/05/increasing-onward-migration-of-asylum-seekers-in-the-eu>, page 20. According to the Glossary of the European Migration Network (EMN) secondary movements of asylum-seekers refers to 'The movement of migrants, including refugees and asylum-seekers, who for different reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere.' Available at https://ec.europa.eu/home-affairs/pages/glossary/secondary-movement-migrants_en. See also Radjenovic, A., 'Secondary movements of asylum-seekers in the EU asylum system', EPRS Briefing PE 608.728, European Parliamentary Research Service (EPRS), Brussels, October 2017, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2017\)608728](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)608728).

EU Dublin system about the questionable legitimacy to police and criminalise intra-EU free movement of refugees, and the lack of mutual recognition of positive asylum decisions among participating states (Guild, 2006)⁵¹.

The EU concept is also based on a model assuming the possibility to **clearly differentiate between ‘primary’ and ‘secondary’ movements of asylum-seekers** inside the Schengen Area (Carrera et al., 2019). It assumes a refusal to accept that there can be legitimate reasons why a person may decide to move to another country to seek asylum and it is associated with the alleged voluntariness of the decision to move onward, specifically to a country other than the one of first irregular entry. It is thus considered that asylum-seekers choose voluntarily, and therefore without solid enough or verified justifications, to move to a Schengen state different from the one declared to be responsible for assessing their asylum claim. (Carrera et al., 2019)⁵².

EU policies on intra-EU mobility of asylum-seekers and refugees **wrongly assume that the decision of an asylum-seeker to leave the EU country of first arrival is not legitimate or not based on a genuine need of protection and safety elsewhere**⁵³. By refusing *a priori* that intra-EU mobility can be dictated by legitimate reasons, if not by the actual necessity to receive an adequate level of international protection and access to a functioning asylum system, this very logic justifies the adoption of increasingly restrictive policies focused on the containment, control and policing of asylum-seekers’ onward mobility inside the EU. As a result, intra-EU mobility of asylum-seekers and refugees has been brought into the domain of irregularity, if not of outright criminality⁵⁴.

Schapendonk (2021) has argued that while Southern European countries like Italy, Greece and Spain are by and large generally portrayed as the origin or ‘source countries’ from where unauthorised intra-EU movements of refugees take place, available research and statistics show **a far more complex picture where intra-EU mobility patterns also occur among North-European countries and where individuals’ agency to self-relocate is the reality**. Schapendonk (2021) has concluded that secondary movements

⁵¹ Guild, E. (2006), ‘The Europeanisation of Europe’s Asylum Policy’, *International Journal of Refugee Law*, Vol. 18, No. 3-4, September/December 2006, pp. 630-651. Guild explains how since “the beginning of the EU project, [there has been] an antipathy towards them which resulted in their exclusion from the benefits of EU free movement rights. This antipathy remains”, page 633.

⁵² Carrera, S., Stefan, M., Cortinovis, R. and Luk, N.C. (2019), ‘When mobility is not a choice: Problematising asylum-seekers’ secondary movements and their criminalisation in the EU’, *CEPS Paper in Liberty and Security in Europe* No. 2019-11, CEPS, Brussels, December 2019, <https://www.ceps.eu/ceps-publications/when-mobility-is-not-a-choice/>, p. 4. This has been previously argued by Zimmerman (2009), who underlines that ‘secondary movements’ are seen rather as ‘voluntary and motivated by economic or quality of life concerns than by safety’; see Zimmerman, S.E. (2009), ‘Irregular Secondary Movements to Europe: Seeking Asylum Beyond Refuge’, *Journal of Refugee Studies*, Vol. 22, No. 1, 2009, pp. 74-96.

⁵³ Carrera, Stefan, Cortinovis and Luk (2019), *op. cit.*, pp. 5-6.

⁵⁴ Majcher, I. (2021), ‘Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law’, *Refugee Survey Quarterly*, Vol. 40, No. 1, March 2021, pp. 82-105.

are rather policy artefacts, instead of empirical realities based on evidence⁵⁵. EU policies aimed at managing secondary movements are indeed targeting what is a ‘ghost phenomenon’. This has been acknowledged by the 2020 Commission Staff Working Document (SWD) accompanying the EU Pact on Migration and Asylum, which expressly stated that:

‘Secondary movements *cannot be exactly quantified*, as there is for the moment no one single indicator for measuring this phenomenon. Proxy indicators are used to measure the extent of secondary movements in the direction of the northwest of the EU and there are no publicly available reports to demonstrate *the exact scope* of the phenomenon’⁵⁶. (Emphasis added)

Therefore, this Report refrains from reproducing or using uncritically the notions of onward or transit irregular/unauthorised migrations and secondary movements. For the purpose of our analysis, we choose to instead refer to cross-border and intra-EU mobility or free movement of asylum-seekers and refugees.

2.3. The EU migration management complex

2.3.1. Concept and Classification

Based on all the above considerations, this Report seeks to examine and visualise **the EU Migration Management Complex**⁵⁷, which is understood as the matrix of EU instruments and actors comprising and enacting policies focused on the management of cross-border and intra-EU mobility of asylum-seekers and refugees. The use of the notion of ‘complex’ is inspired by the concept of ‘security complex’ advanced by Buzan and Wæver (2003), which refers to systems or ‘complexes’ where different state and non-state actors and security sectors engage in ‘securitisation’ or ‘desecuritisation’ processes in the international system and which will manifest in ‘regional clusters’. While this Report does not engage in an examination of all the relevant international, regional and national actors discursively engaging, relating and interacting in the securitisation of migration, the investigation includes an analysis of **the roles of the most relevant EU and international actors behind current EU instruments, either as authors or/and implementing actors**.

The analysis pays attention to EU and international actors including different Directorate-Generals (DG) of the European Commission with competences in areas presenting an external dimension, the European External Action Service (EEAS) and EU Delegations, EU

⁵⁵ Schapendonk, J. (2021), ‘Counter moves. Destabilizing the grand narrative of onward migration and secondary movements in Europe’, *International Migration*, Vol. 59, No. 6, 2021, p. 49.

⁵⁶ European Commission (2021b), op. cit., footnote 53 in page 33.

⁵⁷ Buzan, B. and Wæver, O. (2003), *Regions and Powers: The Structure of International Security*, Cambridge Studies in International Relations, Cambridge University Press, Cambridge, 2003, p. 44.

agencies (such as Frontex, EUAA, eu-LISA, Europol, etc.), and organisations like UNODC, UNHCR, IOM or ICMDDP, etc. By **combining the analysis of instruments with actors**, the Report considers that some instruments may in fact represent venues or ‘intersecting policy universes’ where different communities of ‘home affairs’ or ‘migration management’ actors and professionals relate to each and get engaged in the design, framing and/or implementation of policies (Carrera et al., 2019)⁵⁸.

The assessment is based on the following six-fold classification or **typology of instruments**:

1. **Legal or regulatory instruments:** these comprise formal laws or regulations such as Schengen and asylum *acquis*, EU visa rules – including visa-related and carrier sanctions regulations, as well as international agreements, such as EU readmission agreements, EU visa facilitation agreements as well as EU association agreements and partnership and cooperation agreements, etc. Legal instruments correspond with ordinary EU legal acts or international agreements as enshrined in the EU Treaties. They fall under the ordinary legislative procedure or, in the case of international agreements, benefit from democratic accountability by the European Parliament, and judicial control by the Court of Justice of the EU.
2. **Policy instruments:** these relate to instruments lacking a legally binding nature and/or not qualifying as legal acts or international agreements. Yet they present provisions articulating the scope and implementation of specific migration management policies. They fall outside EU treaties, as well as democratic and judicial EU accountability. They can be qualified as ‘arrangements’ and take the shape of statements, joint declarations, common agendas on migration and mobility (CAMM), Mobility Partnerships, EU and bilateral readmission arrangements⁵⁹, etc.
3. **Political instruments:** these include bilateral or regional instruments aimed at providing a general political framework of cooperation and debate between EU institutions and third countries’ authorities for negotiating other types of instruments. Examples include high-level dialogues, partnership and policy frameworks, regional dialogues, etc.
4. **Operational instruments:** they comprise ‘working arrangements’ consisting of joint operational border surveillance and migration management activities

⁵⁸ Carrera, Den Hertog, Kostakopoulou and Panizzon (eds.) (2019), op. cit. According to Carrera et al., ‘The concept of intersecting policy universes refers to the emergence of venues where different communities of policy makers and professionals from different fields and levels relate to each other and share their interests in the processes of policy formulation and implementation. Universes are co-created as new venues where security actors interact, seek and pursue their interests and strategies of legitimation and authority, by linking with humanitarian, development, market-based, actors.’, p. 4.

⁵⁹ Carrera, S. (2019a), ‘On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes’, in S. Carrera, L. den Hertog, D. Kostakopoulou and M. Panizzon (eds.), *The External Faces of EU Migration, Borders and Asylum Policies: Intersecting Policy Universes*, Brill Nijhoff, Leiden, pp. 21-59.

between relevant border/coast guard or police and migration enforcement national authorities and EU agencies. In some cases, they involve the presence, cooperation and coordination functions by EU agencies like the European Border and Coast Guard (EBCG) Frontex, the European Union Agency for Asylum (EUAA), Europol or eu-LISA (European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice). Other examples include bilateral/multilateral joint border surveillance/maritime operations between specific EU Member States and third neighbouring states, Frontex joint operations and working arrangements with third countries and liaison officers, and the EU hotspots in Greece and Italy.

5. **Technological instruments:** they include instruments aimed at border/pre-border and maritime satellite surveillance as well as those focused on identification technologies consisting of biometrics and alphanumeric data. These instruments rely on the gathering, storage/use and transfer of information of travellers and specific risk categories of persons moving. Examples of these technologies are EUROSUR (European Border Surveillance System), national border / maritime surveillance tools; as well as EU large-scale databases and their interoperability such as Eurodac, the Schengen Information System (SIS) II, the Visa Information System (VIS), etc.
6. **Financial instruments:** these instruments comprise the use of funds and the financing of projects focused on capacity building on migration management, border controls/surveillance, search and rescue (SAR) at sea, information provision, returns and readmission, countering human smuggling and trafficking, etc., as well as the training and exchanges of national officials and practitioners in all these domains. Some of these financial instruments are part, or components, of formal EU budgetary instruments, e.g. the EU Facility for Refugees in Turkey, EU Development Funds (e.g. the Neighbourhood, Development and International Cooperation Mechanism, NDICI) or the EU Asylum, Migration and Integration Fund (AMIF), while others are extra-budget or 'emergency financial instruments, and therefore escape the ordinary accountability and transparency procedures, such as the "EU Trust Funds".

These categories are not aimed at being self-exclusionary. In fact, some of these instruments may present **multi-faceted features or are of a hybrid nature** by combining some or several of the above-mentioned features. The assessment pays particular attention **to the extent to which migration management features among their objectives / priorities**. The analysis of instruments and actors does not aim at being fully comprehensive or complete in either scope or reach. It rather seeks to provide an **indicative picture** of the most salient and relevant policies which are currently into force.

2.3.2. Methodology

The analysis has been mainly based on the main findings emerging from existing state-of-the-art academic literature and other publicly available sources on the external dimensions of EU migration policy on cross-border and intra-EU mobility of asylum-seekers and refugees in Europe. Furthermore, on 16 November 2021, in the scope of the ITFLOWS project, CEPS organised a webinar titled *The EU Pact on Migration: A New Framework for Predicting and Anticipating Crisis*⁶⁰. The event brought together distinguished scholars, practitioners and policymakers to examine the potentials and methodological limitations of existing tools for predicting and visualising migration and asylum in light of the European Commission's 2020 Recommendation on Migration Preparedness and Crisis Blueprint and the proposal on a Crisis and Force Majeure Regulation. This Report considers and highlights the key issues, findings and conclusions which emerged during the panel debate.

Geographically, the Report reduces its scope to the two case studies of nationals from countries that are listed among the main countries of origin and which are covered by the ITFLOWS project: Afghanistan and Nigeria. Moving on from these two starting points, a selection of relevant neighbouring countries often presented as either transit countries have also been included. This involves, in the case of Nigeria, its neighbour Niger, Mauritania, and the North African countries Tunisia, Morocco, and Libya⁶¹. As regards Afghanistan, this includes Iran, Iraq, Pakistan and Turkey. Given the hyper-complexity of instruments and their implementation dynamics, the Report does not seek to present a fully comprehensive picture of all the instruments directly or indirectly covering human mobility in the relevant countries and regions. It nevertheless provides a comprehensive outline of those which are more relevant to the EU – and three selected EU Member States (Greece, Spain and Italy).

The assessment of the impacts does *not* seek to address the extent to which existing EU policies affect or not the preferences or journeys of persons on the move. Instead, the assessment of the 'impacts' is inspired by the evaluation criteria laid down in the European Commission's 2017 **Better Regulation Guidelines** and the corresponding relevant parts of the Better Regulation Toolbox⁶². Accordingly, this Report pays particular attention to the following three criteria: first, **effectiveness** – the extent to which EU

⁶⁰ See <https://www.ceps.eu/ceps-events/the-eu-pact-on-migration-a-new-framework-for-predicting-and-anticipating-crises/>

⁶¹ For a general overview of cooperation with third countries see: Commission Services, 'Update on state of play of external cooperation in the field of migration policy', Council Document No. 5351/22 LIMITE, Brussels, 14 January 2022, available at <https://migration-control.info/internal-eu-document-update-on-state-of-play-of-external-cooperation/>, p. 4-5.

⁶² See European Commission (2017b), 'Commission Staff Working Document. Better Regulation Guidelines', SWD(2017) 350, Brussels, 7 July, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>; and European Commission, 'Better regulation toolbox', https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox/better-regulation-toolbox-0_en.

external migration policies fulfil their objectives; and second, **legal incoherence** – the extent to which they are inconsistent with international and regional principles of legal admission and global solidarity; and third, **fundamental rights compliance**, which focuses on their compatibility with the EU Charter of Fundamental Rights⁶³.

⁶³ See EU Better Regulation Toolbox 29 on ‘Fundamental Rights, including the promotion of Equality’.

3. Case study I: Cross-border mobility by Nigerian nationals

Central to the relationship between the EU and Nigeria is the **EU Migration Partnership Framework**, which was adopted in 2016 as part of the European Commission's European Agenda on Migration⁶⁴. Complementing previous initiatives⁶⁵, this **political instrument** lists Nigeria as one of the 'priority countries' for migration management purposes, next to Niger, Ethiopia, Mali and Senegal, and aims to strengthen cooperation and discussion on the root causes of irregular migration and forced displacement.

The Migration Partnership Commission Communication identifies as *immediate actions*, which should be implemented by the MPF's key partners, improving migration management legislative and institutional frameworks, capacity building on border and migration management (including the provision of refugee protection), increasing expulsions through returns and readmission policies and offering legal migration channels (including resettlement) to stem the irregular flows of people on the move.

To date, **the implementation of the Migration Partnership Framework with the selected African states is reflected in the kind and variety of instruments that the EU and selected EU Member States have concluded and put into effect with Nigeria's authorities as well as with those in relevant African and neighbouring countries to prevent leaving (Section 3.1.), enforce transit and manage intra-regional mobility (Section 3.2.), prevent unauthorised spontaneous arrivals and entry in the EU's territories (Section 3.3.) and expel Nigerian nationals (Section 3.4.).**

3.1. Obstacles to leave

Nigerian nationals are required to be in possession of a valid visa when transiting (Airport Transit Visa, ATV) and/or entering (Uniform Schengen Visa, USV) the EU, as Nigeria is part of the list those third countries whose nationals must be in possession of visas when crossing the external borders⁶⁶. The Schengen visa requirement constitutes one of the most important **EU legal instruments** preventing genuine and effective legal admission channels for Nigerian nationals in the EU. In 2020, as a way of illustration, EU consulates registered a total of 21 550 applications for ATVs and UTVs from Nigerians. At the same time, only 49.1 % of all visa applications were successful in obtaining a visa. In fact, after

⁶⁴ European Commission (2016a), op. cit.

⁶⁵ Referring to the 'Global Approach to Migration and Mobility' (GAMM) (2005, renewed in 2011), the 'Valletta Summit Declaration' and 'Action Plan' (2015), the 'EU Sahel Strategy Regional Action Plan' (2015), and the 'Rabatt' (2006) and 'Khartoum Process' (2014). For more details on *political* and *policy* instruments, see Annex.

⁶⁶ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 303, 28.11.2018, p. 39–58.

Guinea-Bissau and Senegal, Nigeria has one of the highest rejection rates among all third countries requiring a Uniform Schengen Visa (USV) to legally enter the EU⁶⁷.

Securing regular entry with the necessary travel documents is safeguarded by EU law through **carrier sanctions**, which comes in the shape of another EU **legal instrument, Directive 2001/51/EC**. Accordingly, all (air) **carriers** are obliged to ensure that all passengers are in possession of valid travel documents *before* boarding and are exposed to criminal sanctions if they fail to do so. Likewise, carriers have to facilitate checking on persons at external borders by transmitting passenger data to the responsible border guard authorities⁶⁸. In the case of non-compliance, resulting in a Nigerian passenger being refused entry, the carrier must not only take charge of the repatriation of the person concerned to the country of destination or where he or she is guaranteed admittance (here: Nigeria)⁶⁹, but also ensure that the passenger does not enter the EU irregularly until his or her return⁷⁰. The EU implements a criminalisation approach by subjecting misbehaving carriers to fines of between EUR 3 000 and EUR 500 000 and⁷¹ by other sanctions such as immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence⁷². Specifically in the case of air carriers, this set of regulations makes it impossible for people on the move to leave a country by air without carrying a national identification document and a valid visa.

During the process of leaving the country, the **European Union Emergency Trust Fund for Africa (EUTF)**⁷³ constitutes a central **financial instrument** putting further emphasis on prioritising the prevention of irregular migration, combating trafficking and smuggling of migrants, and supporting return and readmission. Based on the EUTF's constitutive agreement⁷⁴, the governance structure is divided into three sections, (a) the EUTF

⁶⁷ European Commission (2020c), 'Visa statistics for consulates 2020', https://ec.europa.eu/home-affairs/system/files/2021-05/visa_statistics_for_consulates_2020.xlsx, *non-issued rate of Uniform Schengen Visa (USV) in 202*, Guinea-Bissau (53.0 %); Senegal (52.2 %); **Nigeria (51.0 %)**; Sudan (48.6 %); Ghana (47.9 %); Guinea (47.2 %); Comoros (45.6 %); Eritrea (44.8 %); Bangladesh (44.6 %); Pakistan (43.5 %).

⁶⁸ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6.8.2004, p. 24–27, Art. 3.

⁶⁹ Schengen Borders Code, Art. 14(6) and Annex V, Part A, under 2(a).

⁷⁰ Schengen Borders Code, Art. 14(6) and Annex V, Part A, under 2(b).

⁷¹ Council Directive 2001/51/EC, Art. 4; Council Directive 2004/82, Art. 4.

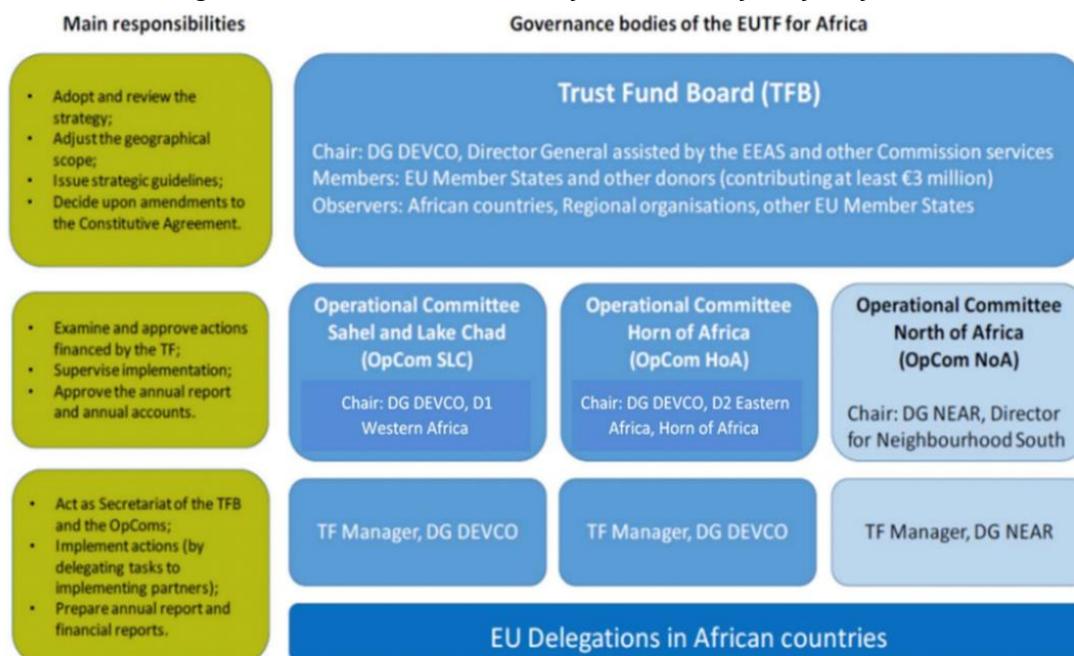
⁷² Council Directive 2004/82, Art. 4. (2).

⁷³ The EUTF's overall budget is EUR 5 billion, incl. EUR 4.4 billion from the European Development Fund (EDF) and EU financial instruments, namely Development Cooperation Instrument (DCI), European Neighbourhood Instrument (ENI), Asylum, Migration and Integration Fund (AMIF) + EU MS contribution of EUR 623 million from Norway, Switzerland and the UK. See: https://ec.europa.eu/trustfundforafrica/content/trust-fund-financials_en. For more information, see Annex.

⁷⁴ European Commission (2015a), 'Agreement establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa, and its internal rules', signed at La Valetta on 12 November 2015, https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/constitutive_agreement_en_plus_signatures_to_date_1.pdf.

strategic board, (b) the EUTF Operational Committee (OpCom), and (c) the EUTF Secretariat, representing a different set of actors and responsibilities⁷⁵:

Figure 8. Governance structure of the EU trust fund for Africa



Source: Disch et al. (2020), p. 18.

For the **EUTF Sahel and Lake Chad Window**, which includes Nigeria, the operational committee consists of the European Commission's Directorate-General for International Cooperation and Development (DG DEVCO, now DG International Partnerships, DG INTPA), the EEAS, as well as EU Member States and other donors.

Since its establishment in October 2015, less than 1.5 % of the EUTF's total budget has been allocated to regular migration channels⁷⁶. In the case of Nigeria, the gap of spending targets is also visible in the total number of persons (124) who benefited from legal migration and mobility programmes, while 70 119 'potential migrants' were reached by

⁷⁵ 'The EUTF Strategic Board meets at least once a year and is mandated to set the strategic orientations and guidelines for the fund. It is chaired by DG DEVCO in close cooperation with DG NEAR and the European External Action Service (EEAS) and other Commission services such as DG HOME and DG ECHO. It is composed of representatives of the donors (EU MS plus Norway and Switzerland). Most EUTF programmes are managed directly in the field by the EU Delegations (EUDs), where some EUD staff have been contracted directly by the EUTF.' Source: Disch, A. et al., 'Mid-term Evaluation of the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa 2015-2019. Final Report', Evaluation commissioned by the Evaluation and Results Unit of the Directorate-General for International Cooperation and Development (European Commission), GDSI Consulting, Galway, October 2020, https://ec.europa.eu/international-partnerships/mid-term-evaluation-european-union-emergency-trust-fund-stability-and-addressing-root-causes_en, p. 18.

⁷⁶ European Parliament (2021a), 'Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey (2020/2045(INI))', PE 680.984v02-00, European Parliament, Brussels/Strasbourg, 11 May, available at https://www.europarl.europa.eu/doceo/document/LIBE-AD-680984_EN.pdf.

information campaigns about (irregular) migration from 2016 until June 2021⁷⁷. Moreover, all of the 12 % EUTF budget (EUR 15.5 million) for migration in Nigeria is allocated to the **EU-International Organization for Migration (IOM) Joint Initiative for Migrant Protection and Reintegration** (EU-IOM JI)⁷⁸ focusing on reintegration and return of migrants⁷⁹.

Following the adoption of the EU's Pact on Migration and Asylum in September 2020,⁸⁰ the concept of "**Talent Partnerships**"⁸¹ introduced another funding target for labour migration projects through "an enhanced commitment to support legal migration and mobility with key partners"⁸². Benefiting from "EU funding streams in the area of external relations, home affairs, research, and education (Erasmus+)"⁸³, this concept aims to facilitate "better matching of labour market needs and skills between the EU and partner countries". Projects running under the Talent Partnerships framework are intended to be a key area under the **Neighbourhood, Development and International Cooperation Instrument (NDICI)** with its total budget of EUR 79.5 billion, including the 10 % earmarked for migration and forced displacement.⁸⁴ Since 2017, several EU co-financed pilot projects on 'labour migration' have been implemented together with EU member states and other actors such as **ICMPD, IOM, ILO and national development agencies (e.g. GIZ)**. These projects are mainly funded under the **EUTF**, but also **AMIF**, which has so

⁷⁷ Davin, E. et al., 'EUTF Monitoring and Learning System SLC. S1 2021 Report covering until 20 June 2021', Altai Consulting, Paris, December 2021, available at https://ec.europa.eu/trustfundforafrica/sites/default/files/2021_first_semester_monitoring_report_for_the_sahel_and_lake_chad_region_-_full_report_3.pdf. Table 12: EUTF common output indicators for Nigeria (p.112), June 2021. Further evidence from independent investigations indicates that of all European migration funds in the country (incl. EUTF and others), only 0.09 %, meaning EUR 300 000, are dedicated to creating legal channels of migration. Refer to Vermeulen, M., Tromp, R., Zandonini, G. and Amzat, A., 'A breakdown of Europe's €1.5bn migration spending in Nigeria', *The Correspondent*, 9 December 2019, <https://thecorrespondent.com/150/a-breakdown-of-europes-eur1-5bn-migration-spending-in-nigeria/19837235550-e86e62a5>.

⁷⁸ Official Website: EU-IOM Joint Initiative For Migration Protection And Reintegration. Online: <https://www.migrationjointinitiative.org/>.

⁷⁹ https://ec.europa.eu/trustfundforafrica/sites/default/files/2021_first_semester_monitoring_report_for_the_sahel_and_lake_chad_region_-_full_report.pdf Davin et al. (2021), op. cit., p.107; *Annex* pp. 23, 55, 62. See also EUTF website - NIGERIA: '[Strengthening the management and governance of migration and the sustainable reintegration of returning migrants in Nigeria](#)'. See also: *EU-IOM Joint Initiative for Migrant Protection and Reintegration* Website: <https://www.migrationjointinitiative.org/countries/sahel-and-lake-chad/nigeria>.

⁸⁰ European Commission (2020b), op. cit.

⁸¹ See https://ec.europa.eu/home-affairs/policies/migration-and-asylum/legal-migration-and-integration/talent-partnerships_en.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ European Commission (2021c), 'European Commission welcomes the endorsement of the new €79.5 billion NDICI-Global Europe instrument to support EU's external action', European Commission Press Release IP/21/1267, Brussels, 19 March, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1267.

far financially supported 10 pilot projects⁸⁵ with an average budget of EUR 1.7 million including through **the Migration Partnership Facility of the ICMPD**.⁸⁶ Exemplary for these projects is the 36-month initiative named *Migration of African Talents through Capacity building and Hiring (MATCH)*⁸⁷ for highly-skilled workers (covering Nigeria)⁸⁸ with a total budget of 2 Mill EUR⁸⁹ or the subregional project *Towards a Holistic Approach to Labour Migration Governance and Labour Mobility in North Africa (THAMM)*⁹⁰ with a total budget of EUR 31 million⁹¹.

With the support of other international and EU **financial instruments and projects**, the potential emigration of Nigerian nationals is being monitored and surveyed. For example, a project funded by the **European Investment Bank (EIB)** to the tune of EUR 250 million and launched at the end of 2020 was designed to create a **digital identity infrastructure** including a biometric identity for all Nigerian nationals⁹². Aimed at facilitating the provision of services to Nigerian nationals, it was also intended to contribute to the fight against poverty, the root causes of migration⁹³.

Likewise, the introduction of a digital ID assists the **Migration Information and Data Analysis System (MIDAS)**, introduced at selected land and sea borders as well as Nigerian airports, which provides an example of the intersection between **financial and technological surveillance instruments supported by the EU**. Its first implementation at land and sea borders was largely sponsored under the 10th **European Development**

⁸⁵ List of projects: <https://www.migrationpartnershipfacility.eu/labour-mobility>.

⁸⁶ Johansson, Y., Answer given by Ms Johansson on behalf of the European Commission to Parliamentary Question E-005307/2021, 15 February 2022, https://www.europarl.europa.eu/doceo/document/E-9-2021-005307-ASW_EN.html; Stefanescu, D., 'Partnerships for Mobility at the Crossroads: Lessons Learnt From 18 Months of Implementation of EU Pilot Projects on Legal Migration', Mobility Partnership Facility (MPF) Policy Brief, International Centre for Migration Policy Development (ICMPD), Vienna, 4 November, <https://www.migrationpartnershipfacility.eu/storage/files/mpf-policy-brief-pilot-projects-1020.pdf>; see also <https://www.migrationpartnershipfacility.eu/>.

⁸⁷ <https://belgium.iom.int/match>.

⁸⁸ Note: "The acronym MATCH stands for: Migration of African Talents through Capacity Building and Hiring. This project is funded by the European Commission and it is implemented in 4 EU countries (BE/LU/NL/IT) and 2 countries of origin (Nigeria and Senegal). The choice for countries was made because of the stable situation in these countries, the language skills, the surplus of qualified employees and the education quality", see EMN (2021a), 'Ad Hoc Query on 2021.44 AHQ for EMN inform on Skills mobility partnerships. Requested by COM on 7 July 2021. Responses from Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden (22 in Total)', https://ec.europa.eu/home-affairs/system/files/2021-10/202144_ahq_for_emn_inform_on_skills_mobility_partnerships.pdf, p.11.

⁸⁹ Note: Budget of "2 million EUR: 80% funded via the AMIF funds and 20% via partner organizations (both private and public)." See *ibid.*, p.23.

⁹⁰ ILO, 'Coherence of labour migration, employment, education and training policies in the ECOWAS subregion', International Labour Office (ILO), Geneva, June 2020, https://www.ilo.org/global/topics/labour-migration/publications/WCMS_748724/lang--en/index.htm.

⁹¹ Johansson (2022), *op. cit.*

⁹² See <https://www.eib.org/en/projects/pipelines/all/20180298>

⁹³ *Ibid.*

Fund (EDF) project *Promoting Better Management of Migration in Nigeria* (PBMMN), including additional funding by Switzerland and Japan⁹⁴. Funded by Denmark, the MIDAS system was first implemented at the Abuja Airport in 2019 in cooperation with the Nigerian Immigration Service (NIS). This Enhancing Air Border Data Systems project is planned to be implemented at another four Nigerian airports in Lagos, Enugu, Kano, Port Harcourt. In addition, MIDAS in Nigeria has also received funding from Germany and Norway⁹⁵.

MIDAS is an **IOM-developed border management information system**, collecting and storing information on Biographic data; Biometric data; Images examined under Infrared, Ultraviolet and White Light; Entry and exit data; Visa data; and Vehicle/flight/vessel data⁹⁶. With this information, MIDAS not only enables the identification of cross-mobility trajectories (planned at 19 land border posts and five international airports)⁹⁷, but also data exchanges with INTERPOL databases and relevant watch lists to track down persons linked to transnational organised crime, including human trafficking and migrant smuggling⁹⁸. Although the IOM as well as a spokesperson for the EU Commission stressed that the Nigerian government has exclusive ownership of the recorded data, **the link to INTERPOL nevertheless raises questions about data protection and its use** in the EU's priority to prevent illegal migration⁹⁹. Added to this, the collection of data and increased border control policy may have profound impacts on the possibilities for others of freely leaving the country.

⁹⁴ See <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ng-04 - migration.pdf>, p.4. See also IOM, 'International Organization for Migration. IOM Nigeria Newsletter', IOM Nigeria, Abuja, 2016 <https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20NIGERIA%20NEWSLETTER.pdf>.

⁹⁵ IOM (2019a), 'Nigeria Immigration Service, IOM Launch Border Management Information System at Largest Airport to Date', IOM News, Abuja, 15 November, <https://www.iom.int/news/nigeria-immigration-service-iom-launch-border-management-information-system-largest-airport-date>.

⁹⁶ IOM (2018a), 'MIDAS – Migration Information and Data Analysis System: A comprehensive and affordable border management information system', available at https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/DMM/IBM/updated/midas-brochure18-v7-en_digital-2606.pdf.

⁹⁷ IOM (2018b), 'IOM Trains Nigerian Immigration Officials on Migration Information and Data Analysis System', IOM News, Moshi, 26 October, <https://www.iom.int/news/iom-trains-nigerian-immigration-officials-migration-information-and-data-analysis-system>.

⁹⁸ Ibid.

⁹⁹ IOM (2019a), op. cit.; Creta, S., 'European funds for African IDs: migration regulation tool or privacy risk?', *Euronews*, 30 July 2021, <https://www.euronews.com/2021/07/30/european-funds-for-african-ids-migration-regulation-tool-or-privacy-risk>.

3.2. Enforcing transit

3.2.1. From Nigeria to Niger

Similar to Nigeria, its neighbour Niger is listed as one of the priority countries in the **EU Partnership Framework on Migration (2016)**¹⁰⁰. The EU's tailor-made partnership is reflected in a number of instruments focusing on the prevention of irregular migration, smuggling of migrants and trafficking in human beings, as well as on border management and enhancing data collection and exchange. In the 5th Progress (2017) Report on the new Partnership Framework on Migration published by the European Commission, for example, an additional top up of EUR 50 million was made available under the EUTF for supporting the EU–Niger cooperation¹⁰¹. Among those projects funded by the above-mentioned EUTF for Africa, this also includes initiatives to facilitate return and raise awareness¹⁰².

The EU facilitated and supported the efforts of the United Nations Office on Drugs and Crime (UNODC) for the adoption of a new **Law Against the Illicit Smuggling of Migrants (Loi 2015-036)** in Niger. By adapting the prevailing crime and insecurity framing of cross-border movement, the new law translated UNODC's *Protocol against the smuggling of migrants by land, sea and air (2000)*¹⁰³ to the local socio-economic contexts in the country. This consultation process between UNODC and Niger, establishing the framework for its enactment, were funded by the EU Member States Italy and Denmark and the EUTF budget as will be explained below¹⁰⁴.

The primary objective of this law, as stated in Article 1, is **to prevent and combat migrant smuggling**, to protect the rights of people who are the object of migrant smuggling and to promote national, and international cooperation to prevent and combat migrant smuggling¹⁰⁵. By criminalising the assistance of unauthorised entry or exit in search of material or financial gain, the sheltering of non-nationals and the issuance of

¹⁰⁰ European Commission (2016b), 'Migration Partnership Framework: A new approach to better manage migration', European Commission Factsheet, https://eeas.europa.eu/sites/default/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

¹⁰¹ European Commission (2017c), Report from the Commission to the European Parliament, the European Council and the Council, 'Fifth Progress Report in the Partnership Framework with third countries under the European Agenda on Migration', COM(2017) 471 final, Brussels, 6 September, p.3-4. See also Carrera (2019), op. cit., pp. 39-40.

¹⁰²

https://eeas.europa.eu/sites/default/files/factsheet_work_under_partnership_framework_with_niger.pdf

¹⁰³ Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, signed in New York on 15 November 2000, https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.

¹⁰⁴ UNODC, 'Niger becomes the first Sahel country to legislate against migrant smuggling', <https://www.unodc.org/westandcentralafrica/en/niger-som-law.html>.

¹⁰⁵ *Niger: Loi No. 2015-36 du 26 mai 2015 relative au Trafic Illicite de Migrants* [Niger], 26 May 2015: Article 1 (translated). Available at: <https://www.refworld.org/docid/60a505e24.html> [accessed 13 December 2021].

irregular documents, the new law makes it more difficult to move freely within Niger and towards its North African bordering countries¹⁰⁶. According to Article 20, all commercial enterprises, especially bus operators, are now obliged to check whether their passengers are in possession of valid entry documents in order to enter a neighbouring country. Failure to comply can result in a fine of CHF 1 000 000 to 3 000 000 (USD 1 720 to USD 5 160)¹⁰⁷.

Transportation without the necessary travel documents, such as an ID, proving the regular stay/entry in/into Niger, is no longer legal¹⁰⁸. This leads to discrimination of all those who have not been registered at birth and/or are living without proper ID documents, and the criminalisation of in-country free movement. According to a recent study by UNICEF, only 43 % of Nigerian children are registered at birth¹⁰⁹. As a result of this law, controls have been tightened at bus stops, especially near major transit hubs like Agadez, where signs with the EU logo remind people of the now criminalised transport¹¹⁰. At the same time, the circular and cross-border economy is put on hold, causing an increase in unemployment and economic downturn, especially for Nigerien youth, in the region¹¹¹. These carrier sanctions on domestic transport¹¹² nevertheless are unable to stop cross-border movements from, for example, the city Agadez in Niger to the Libyan border.

Training, equipping and collaborating with the Nigerien Government on border control and prevention of irregular migration has also become visible in several EU **financial instruments**. Similar to Nigeria, Niger is also part of the **EUTF's Sahel and Lake Chad Window**¹¹³. Since its establishment in 2015, Niger is indeed one of the top recipients of

¹⁰⁶ See also: https://migration-control.info/en/wiki/niger/#_ftn27

¹⁰⁷ *Niger: Loi No. 2015-36 du 26 mai 2015 relative au Trafic Illicite de Migrants* [Niger], 26 May 2015: Article 20. Available at: <https://www.refworld.org/docid/60a505e24.html> [accessed 13 December 2021]. See also: Spijkerboer, T., 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger', in P. Minderhoud, S. Mantu and K. Zwaan (eds), *Caught in Between Borders: Citizens, Migrants and Humans. Liber Amicorum in Honour of prof. dr. Elspeth Guild*, Wolf Legal Publishers, Tilburg, 2019, p. 50-51.

¹⁰⁸ See also Frontex (2018a), 'Africa-Frontex Intelligence Community Joint Report 2017', European Border and Coast Guard Agency (Frontex), Warsaw, February, [https://frontex.europa.eu/assets/Publications/Risk Analysis/AFIC/AFIC 2017.pdf](https://frontex.europa.eu/assets/Publications/Risk%20Analysis/AFIC/AFIC%202017.pdf), Chapter 10. (p. 34).

¹⁰⁹ UNICEF, 'Only 43 per cent of Nigerian children's births registered', UNICEF Press Release, UNICEF Nigeria, Abuja, 10 August 2021, <https://www.unicef.org/nigeria/press-releases/only-43-cent-nigerian-childrens-births-registered-unicef>.

¹¹⁰ Prestianni, S., 'The dangerous link between migration, development and security for the externalisation of borders in Africa. Case studies on Sudan, Niger and Tunisia', Arci Analysis Document, Arci, Rome, July 2018, <https://www.arci.it/documento/the-dangerous-link-between-migration-development-and-security-for-the-externalisation-of-borders-in-africa-case-studies-on-sudan-niger-and-tunisia/>, p.14. For examples of signs with the European logo, see: <http://archive.ipu.org/splz-e/valletta17/gazibo.pdf> (and reference 4.6 'Communication et visibilité' mentioned in the 'Action fiche', see: <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ne-01.pdf>).

¹¹¹ Wali, M., "Es ist, als hätte man uns die Luft abgeschnürt". Perspektiven der Jugend in Agadez auf die Auswirkungen der europäischen Migrationspolitik in Niger", Berlin, Brot für die Welt, August 2018, https://www.brot-fuer-die-welt.de/fileadmin/mediapool/blogs/Fischer_Martina/2018_niger_studie.pdf.

¹¹² Spijkerboer (2019), op. cit., p. 56.

¹¹³ EU Emergency Trust Fund For Africa (EUTF), Sahel & Lake Chad, Official Website: https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad_en

EUTF funds with a total of EUR 279.5 million and 15 projects in 2021. Oxfam found that by 2020, almost 49 % (EUR 122.2 million) of the invested budget (EUR 253 million) was allocated to migration management¹¹⁴. The disparity of the EUTF's spending target is even higher in Niger compared to its neighbouring country Nigeria, as only 14 persons – in the period between 2016 and June 2021 – benefited from legal migration and mobility programmes, while almost 500 000 potential migrants were reached via information campaigns on irregular migration¹¹⁵. Another example refers to the EU's funding of the adoption and implementation of **Loi 2015-036** mentioned above. Here, the funding provided by Italy and Denmark for UNODC's consultation process with Niger was later complemented by targeted EUTF projects ensuring its technological, operational and institutional implementation¹¹⁶.

The **IOM-implemented Migrant Resource and Response Mechanism (MRRM)**¹¹⁷ is a good example of one of these projects implemented since 2015. It shows once more the consolidated and active role played by IOM as one of the key implementing partners of the EU's migration management complex in this African country¹¹⁸. With an EUTF budget of EUR 7 million for its second phase¹¹⁹, the project comprises direct assistance to migrants, voluntary return and reintegration assistance, data collection and analysis, but also aims to strengthen or establish protection frameworks in countries of origin, transit and destination along migration routes¹²⁰. The implementation of the project builds on previous projects coordinated by Italy, the UK or the EU. These include, for example, the EU project *Niger: Strengthening governance of migration and the response to mixed migration flows in the region of Agadez (AGAMI)*, which focused on monitoring and predicting migration flows of the main countries of origin (Senegal, Mali, Gambia, and Nigeria) as well as return and reintegration activities¹²¹.

Next to the EU, the implementation of this project encompasses various EU and non-EU governments and international actors, such as EUCAP Sahel, France, Spain, Germany and

¹¹⁴ Raty, T. and Shilhav, R., 'The EU Trust Fund For Africa: Trapped between aid policy and migration politics', Oxfam Briefing Paper, Oxfam International, Oxford, January 2020, <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620936/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf>.

¹¹⁵ Davin et al. (2021), op. cit. (p.105; Annex pp. 21-23, 55, 62). See also EUTF website - NIGER: https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger_en.

¹¹⁶ UNODC, 'Niger becomes the first Sahel country to legislate against migrant smuggling', op. cit. See also Spijkerboer (2019), op. cit.

¹¹⁷ <https://eutf.akvoapp.org/en/project/5367/#summary>

¹¹⁸ According to a report evaluating the lessons learned from the EUTF, 'IOM received almost €400 million in EUTF migration, mobility and forced displacement-related funding (€394 million)', refer to Davin, E. and Rubira, J., 'Learning Lessons from the EUTF: Phase 2. Paving the way for future programming on migration, mobility and forced displacement', Altai Consulting, Paris, February 2021, [https://www.altaiconsulting.com/insights/learning-lessons-from-the-eu-trust-fund-for-africa-\(eutf\)](https://www.altaiconsulting.com/insights/learning-lessons-from-the-eu-trust-fund-for-africa-(eutf)).

¹¹⁹ <https://eutf.akvoapp.org/en/project/5367/#finance>

¹²⁰ EUTF (Niger): Mécanisme de Réponse et de Ressources pour les Migrants, Action Fiche p.3. Online : <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ne-01.pdf>

¹²¹ EUTF (Niger), Mécanisme de Réponse et de Ressources pour les Migrants, Action Fiche p. 5. Online : <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ne-01.pdf>.

GIZ, Japan and UNDP, that are indirectly or directly involved in improving the country's border management¹²². Part of this cooperation was the creation of a **specialised tripartite police unit** (or: joint investigation team **ECI-Niger**) consisting of Spanish, Nigerien and French police personnel to assist the fight against irregular migration and human trafficking at Niger's cross-border points, and thus the enforcement of Loi 2015-036¹²³.

Set up for a period of six years between 2016 and 2022 and managed by **FIIAPP (International and Ibero-American Foundation for Administration and Public Policies)**, which has very close links to the Spanish government, the unit assists the fight against illegal immigration, people trafficking and smuggling in the country, while at the same time fostering the creation of an international protected area against these crimes¹²⁴. Spending targets of the provided EUR 11 5 million **EUTF budget**¹²⁵ are among others: IT tools trainings provided by the Niger Directorate of Territorial Surveillance (DST)¹²⁶. In this context, the DST serves as an operational backbone of the ECI-Niger project by providing training sessions on how to strengthen the professional capacities of the police officers who serve in the DST. This involves territorial surveillance work carried out at a central and decentralised level, as stated by the Nigerien Police Commissioner and head of the Special Investigations Division within the DST, Abdoul Salam Moumouni¹²⁷.

¹²² See: EUTF Niger: *Action fiche.- 2.4. Actions complémentaires*. Online: <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ne-01.pdf>.

¹²³ 'Société: Décoration de quatre officiers de police de l'Équipe Conjointe d'investigation (ECI-Niger) par l'Ambassadrice d'Espagne au Niger', *Niamey Soir*, 17 December 2021, <https://www.niameysoir.com/societe-decoration-de-quatre-officiers-de-police-de-lequipe-conjointe-dinvestigation-eci-niger-par-lambassadrice-despagne-au-niger/>. See also Spanish Ministry of Foreign Affairs, 'III Plan Africa. Spain and Africa: challenge and opportunity', Spanish Ministry of Foreign Affairs, the European Union and Cooperation, Madrid, March 2019, <http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/Africa/Paginas/III-Plan-Africa.aspx>, footnote 37; Commission Services (2021a), 'Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Action Plan: Niger', Council Document 11950/21 LIMITE, Brussels, 20 September, <https://www.statewatch.org/media/2766/eu-council-com-draft-action-plan-niger-migration-11950-21.pdf>, p. 3; European Commission (2017d), 'Création d'une Equipe Conjointe d'Investigation (ECI) pour la lutte contre les réseaux criminels liés à l'immigration irrégulière, la traite des êtres humains et le trafic des migrants', website of the EU Emergency Trust Fund for Africa, 15 February, <https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/creation-dune-equipe-conjointe-dinvestigation-eci-pour-la-lutte-contre-en>.

¹²⁴ FIIAPP, 'Fight against irregular immigration and people trafficking in Niger', International and Ibero-American Foundation for Administration and Public Policies (FIIAPP), Madrid, https://www.fiiapp.org/en/proyectos_fiiapp/lucha-contra-las-redes-criminales-de-inmigracion-ilegal-y-trafico-de-personas-en-niger/.

¹²⁵ European Commission (2017d), op. cit.

¹²⁶ FIIAPP, 'IT tools training for Niger police forces', FIIAPP News, International and Ibero-American Foundation for Administration and Public Policies (FIIAPP), Madrid, 23 April 2021, <https://www.fiiapp.org/en/noticias/formacion-herramientas-informaticas-las-fuerzas-policiales-niger/>.

¹²⁷ Ibid.

Building on this set of tasks, the ECI-Niger represents a tripartite interlinkage of **hybrid operational-technological-financial instruments** aimed at equipping, training and funding specific forces to assist in data collection and containment of cross-border movement outside the EU, as well as **EUTF-funded projects** that are not officially listed under the formal rubric of migration and mobility. One such project is the one named *Greater Economic and Employment Opportunities*, which assesses their outcome in relation to the **Reduction of (net) irregular migration flows from Niger to Europe**¹²⁸.

The EU and its Member States have also reinforced their cooperation on border controls with the West African state Niger in the scope of **operational instruments**. As a way of illustration, under the framework of the EU Common Security and Defence Policy (CSDP), the **EU Capacity Building (EUCAP) Sahel Niger Mission**, launched in 2012, comprises assistance of European police forces and security experts to Niger¹²⁹. Formerly established to counter terrorism, EUCAP Sahel Niger's mandate was expanded in 2015 to provide support in the fight against irregular migration. This led to the opening of a new permanent field office in Algadez, a major trafficking hub on the road to Libya, the following year¹³⁰.

A key goal of EUCAP Sahel Niger's support is the improvement of border controls following several 'migratory routes'. Training on document fraud thus also ensures the implementation of the EU-supported Loi 2016-036¹³¹. From 2012 to 2020, EUCAP Sahel Niger trained more than 19 000 members of Niger's security forces and authorities and provided equipment with a total value EUR 2.1 million since 2019. The on-site mission is currently being supported by 120 Europeans from 16 EU Member States¹³². In September 2020, EUCAP Sahel Niger's mandate was extended for another two years, until 31

¹²⁸ EUTF Niger: DEC Création d'emplois et d'opportunités économiques à travers une gestion durable de l'environnement dans les zones de transit et départ au Niger (T05-EUTF-SAH-NE-11), Action fiche, Annexe 3. (p. 36), Online : <https://storage.googleapis.com/akvo-rsr-production-media-files/db/project/6686/document/T05-EUTF-SAH-NE-11-developpement%20eco%20local.pdf>.

¹²⁹ Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger), OJ L 187, 17 July 2012, pp. 48–51. See also official 'EUCAP-Sahel Niger' Website: <https://www.eucap-sahel.eu/en/qui-nous-sommes/>.

¹³⁰ Council of the EU, 'EUCAP Sahel Niger to help prevent irregular migration', Council Press Release, 13 May 2015, <https://www.consilium.europa.eu/en/press/press-releases/2015/05/13/eucap-sahel-niger/>; see also EUCAP Sahel Niger (2020a), 'EUCAP Sahel Niger: Partnership for Security in the Sahel', EUCAP Sahel Niger Factsheet, EUCAP Sahel Niger, Niamey, October, <https://www.eucap-sahel.eu/wp-content/uploads/2020/10/EUCAP-Sahel-Niger-Factsheet-EN-low-resolution.pdf>.

¹³¹ EUCAP Sahel Niger (2020a), op. cit.

¹³² Ibid.

September 2022¹³³, with a budget of EUR 73 million, and by stating the fight against irregular migration and human trafficking as the main objective of its mission¹³⁴.

In the period 2012 to 2022, i.e. until the end of the current 5th mandate, the EUCAP Sahel Niger budget increased to more than eight times its original figure at the beginning of its mission (2012: EUR 8.7 million¹³⁵; 2020: EUR 73.7 million)¹³⁶. The use of this budget to secure technical equipment for EUCAP Sahel Niger, to increase staff in the country, **and to train Nigerien police officers** provides the framework to put into practice the underlying objective of Loi 2015-036, namely preventing nationals of sub-Saharan countries from reaching the Mediterranean (Spijkerboer, 2019)¹³⁷.

Alongside EUCAP Sahel Niger, close cooperation between Nigerien authorities and the European Border and Coast Guard Agency (EBCG) **FRONTEX** enables the implementation of cross-cutting **operational-technological instruments** focusing on pre-border surveillance. The opening of the second Frontex Liaison Office in Niamey in 2017, after Turkey in 2016, underlines the importance that EU external migration policies give to Niger.¹³⁸ Just one year later, in 2018, Frontex opened its first **Risk Analysis Cell** in Niger¹³⁹ as part of the **Africa-Frontex Intelligence Community (AFIC)**, a coalition between Frontex and 29 African states¹⁴⁰. These 'Risk Analysis Cells' demonstrate that

¹³³ Council Decision (CFSP) 2020/1254 of 7 September 2020 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger), OJ L 294, 8 September 2020, pp. 3–4; See also 'Niger: Le mandat de la Mission EUCAP Sahel Niger prolongé jusqu'en septembre 2022', *Agence Nigérienne de la Presse*, 29 September 2020, <http://www.anp.ne/article/niger-le-mandat-de-la-mission-eucap-sahel-niger-prolonge-jusqu-en-septembre-2022>.

¹³⁴ EUCAP Sahel Niger (2020b), 'EUCAP Sahel Niger: 5e Mandat 2020-2022', EUCAP Sahel Niger Factsheet, EUCAP Sahel Niger, Niamey, <https://www.eucap-sahel.eu/wp-content/uploads/2020/10/New-mandate-2020.pdf>.

¹³⁵ Council Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger), Art. 13 on 'Financial arrangements': 8 700 000 EUR for the first 12 months.

¹³⁶ Council Decision (CFSP) 2020/1254 of 7 September 2020 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger).

¹³⁷ Spijkerboer (2019), op. cit., p. 49.

¹³⁸ Frontex, 'Other Partners and Projects. Liaison Officers Network. Frontex Liaison Officers to non-EU countries', <https://frontex.europa.eu/we-build/other-partners-and-projects/liaison-officers-network/>. This became also evident during the visit of Frontex Executive Director Fabrice Leggeri in 2017 when he said that: 'Niger's location as a bridge between West Africa, Sahel and Maghreb makes the country an indispensable and pivotal partner when searching for solutions to common challenges that are affecting our two continents. Border control is only part of the solution to the ongoing migration flows and we are looking to establish new channels of cooperation between Frontex and countries in Africa', see Frontex (2017a), 'Frontex Executive Director on official visit to Niger', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 1 March, <https://frontex.europa.eu/media-centre/news/news-release/frontex-executive-director-on-official-visit-to-niger-6LTRB6>.

¹³⁹ Frontex (2018b), 'Frontex opens first risk analysis cell in Niger', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 27 November, <https://frontex.europa.eu/media-centre/news/news-release/frontex-opens-first-risk-analysis-cell-in-niger-HQIoKi>.

¹⁴⁰ Frontex (2018c), 'Africa-Frontex Intelligence Community (AFIC)', Frontex Multimedia (Videos), European Border and Coast Guard Agency (Frontex), Warsaw, 11 October, <https://frontex.europa.eu/media-centre/multimedia/videos/africa-frontex-intelligence-community-afic--OoW3Ti>; Frontex, 'Africa-Frontex Intelligence Community meets in Senegal', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 2 December 2021, <https://frontex.europa.eu/media-centre/news/news-release/africa-frontex-intelligence-community-meets-in-senegal-sRP1tC>.

cooperation with AFIC countries is one priority for Frontex and that technical assistance is nothing but an informal forum for cooperation between Frontex and third countries, which mobilises resources and shapes the policy (Marin, 2020)¹⁴¹.

Similar to the information indicated in the AFIC's joint reports¹⁴², the local Risk Analysis unit, **trained by Frontex, collects, analyses and stores data on cross-border crime including information on document fraud and trafficking of human beings**. This also compromises the profiling of people labelled as migrants and alleged smugglers and surveillance of intra-regional cross-border mobilities – especially from West African states such as Niger to its North African neighbours – which may also be included in the *AFIC monthly* report shared among AFIC partners¹⁴³. However, it remains unclear if the data collected is only shared among the 29 AFIC Member States, or with other actors such as experts in fighting trafficking in human beings from Frontex, Europol and Afripol, that organised an AFIC workshop in 2021¹⁴⁴.

Closer cooperation between Nigerian and Nigerien authorities on cross-border criminal investigations has, indeed, been highlighted as an achievement at the latest AFIC meeting in December 2021¹⁴⁵. In this context it should be noted, that both Niger and Nigeria have implemented a **technological instrument**, namely IOM's new biometric **Migration Information and Data Analysis System (MIDAS)**, storing fingerprints and facial images. According to an investigation by the New Humanitarian, EU funding was allocated for an initial assessment study as well as the electrical units that support the system¹⁴⁶. Although the free-of-charge system, including the data collected, is to remain the exclusive property of the national authorities, in the case of Niger it is closely linked to the US Personal Identification Secure Comparison and Evaluation System (PISCES)¹⁴⁷, which is already installed at the international airport in Niamey and linked to the international police agency INTERPOL¹⁴⁸. In this context, it is not surprising that the information gathered by MIDAS and PISCES is of particular interest to Frontex Risk Analysis Cell and that the office of the Nigerien border authorities, aligning both systems, was funded by the US¹⁴⁹.

¹⁴¹ Marin, L., 'The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions', *European Public Law*, Vol. 26, No. 1, 2020, p.170. See also whole chapter, named: 'The unbearable lightness of ... cooperation outside the framework of working arrangements: the case of AFIC and Risk Analysis Cells in African countries' (pp.168-171).

¹⁴² Frontex (2018a), op. cit.

¹⁴³ Ibid., p. 19, 34.

¹⁴⁴ Frontex (2021), op. cit.

¹⁴⁵ Ibid.

¹⁴⁶ Zandonini, G., 'Biometrics: The new frontier of EU migration policy in Niger', *The New Humanitarian*, 6 June 2019, <https://www.thenewhumanitarian.org/news-feature/2019/06/06/biometrics-new-frontier-eu-migration-policy-niger>.

¹⁴⁷ US Legal, Definition: Personal Identification Secure Comparison and Evaluation System (PISCES), <https://definitions.uslegal.com/p/personal-identification-secure-comparison-and-evaluation-system-piscses/>.

¹⁴⁸ Zandonini (2019), op. cit.

¹⁴⁹ IOM (2020a), 'IOM Inaugurates New Headquarters for National Border Police in Niger, Completing USD 3 Million Effort', IOM News, International Organization for Migration (IOM), Niamey, 15 September, <https://www.iom.int/news/iom-inaugurates-new-headquarters-national-border-police-niger>

3.2.2. Kept in transit

Even before formally entering the EU, the expulsions of African nationals to their country of origin or transit within the region have become another tool used by the EU and its Member States to contain the mobility of would-be asylum-seekers. These ‘anticipatory’ expulsions driven instruments refer to intra-continental returns and ‘voluntary return programmes’ between African countries. This Section focuses on the conglomerate of EU instruments which focus on keeping people in transit *between* African Union states.

3.2.2.1. From Libya back to Nigeria

Since the start of its activities in May 2017 to November 2020, the **joint EU-IOM initiative for Migrant Protection and Reintegration (EU-IOM JI)** has ‘voluntarily’ returned 88 949 people from one African state to another, with an increase in the number of third country nationals repatriated from Algeria, Mali and Niger since 2019¹⁵⁰. This form of Africa-to-Africa returns are not only financially supported via **the EUTF**, but also listed as a key focus area under the **financial instrument** which is the EUTF’s successor, **the Neighbourhood, Development, International Cooperation (NDICI) - Global Europe Fund**, which was launched in January 2021¹⁵¹.

The **EU-IOM JI**, which was funded by **the EUTF** with a budget of EUR 490 million, intervenes at several stages of cross-borders movement of African nationals to save lives, protect and assist migrants along key migration routes in Africa¹⁵². Based on the ‘free will’ of the individual to return to their country of origin, the initiative offers support in the following areas: (i) capacity building; (ii) protection and voluntary return assistance; (iii) reintegration support; (iv) migration data collection and analysis; (v) information and awareness raising and; (vi) community stabilisation. In reality, however, the programme is intended for two main groups, namely forced as well as ‘voluntary returnees’ from transit countries and/or EU Member States¹⁵³. This means that the initiative not only

[completing-usd-3-million-effort](https://www.statewatch.org/observatories/frontex/agreements-with-non-eu-states-and-other-organisations/management-board-decision-authorising-the-executive-director-to-negotiate-working-arrangements-with-selected-third-countries/). Note: Furthermore, Frontex Executive Director Fabrice Leggeri was only authorised in June 2021 to extend the working arrangement with Nigeria and negotiate new agreements with third countries, including Niger, Morocco and Mauritania, see: Frontex Management Board, Frontex Management Board Decision 36/2021 authorising the Executive Director to negotiate working arrangements with selected third countries’, 16 June 2021, <https://www.statewatch.org/observatories/frontex/agreements-with-non-eu-states-and-other-organisations/management-board-decision-authorising-the-executive-director-to-negotiate-working-arrangements-with-selected-third-countries/>.

¹⁵⁰ Ibid.

¹⁵¹ Davin and Rubira (2021), op. cit., p.156.

¹⁵² EU-IOM Joint Initiative for Migration Protection and Reintegration: Official Website: <https://www.migrationjointinitiative.org/>. IOM, ‘EU-IOM Joint Initiative: Facts & Figures’, Fact Sheet, October 2021, <https://www.migrationjointinitiative.org/sites/g/files/tmzbd1261/files/files/articles/eu-iom-joint-initiativefactsheet-1.pdf>.

¹⁵³ Arhin-Sam, K., ‘The Political Economy of Migration Governance in Nigeria’, WAMiG Country Study, Arnold-Bergstraesser Institute (ABI), Freiburg im Breisgau, December 2019, <https://www.medam-migration.eu/publications/research-papers/2019-research-papers/the-political-economy-of-migration-governance-in-nigeria-14227/>.

covers the transportation of, for instance, stranded Nigerians¹⁵⁴ from an African country to Nigeria. It also assists forced expulsions of non-nationals ordered to leave the national territory of an EU Member State¹⁵⁵.

The **focus on Libya** was triggered in particular after a CNN investigation in November 2017 provided evidence of modern-day slavery of migrants in Libya, being sold for USD 400 and forced to work on farms or as sex workers¹⁵⁶. Following the **5th African Union-EU Summit** in Abidjan, which was taking place at the time, a task force was initiated to speed up the return of migrants from Libya to other African countries under the EU-IOM initiative¹⁵⁷. The task force had set itself the goal of repatriating 15 000 migrants ‘voluntarily’ from Libya alone within 6 weeks¹⁵⁸. Several African governments agreed to immediately provide safety for their own nationals under the voluntary return programme. In the three months alone that followed the CNN publication, the Nigerian government evacuated more than 13 000 Nigerians from Libya back to their home country not only through the IOM but also via a government-sponsored programme¹⁵⁹.

3.2.2.2. From Libya back to Nigeria, through Niger

Substantial EUTF funds, namely EUR 115 million, are currently being used for the same purpose under another **sub-financial instrument**, the ‘**cross-window project Protection and sustainable solutions for migrants and refugees along the Central Mediterranean route**’, which specifically focuses on people in need of international protection currently in Libya¹⁶⁰. Since 2017, the United Nations High Commissioner of Refugees (UNHCR), co-financer of the project, not only provides emergency protection and life-saving assistance to persons in need, but it also evacuates refugees and asylum-

¹⁵⁴ IOM (2019b), ‘Traditional and Religious Leaders Join Forces to Curb Irregular Migration’, IOM News, Abuja, IOM Regional Office for West and Central Africa, 14 May, <https://rodakar.iom.int/news/traditional-and-religious-leaders-join-forces-curb-irregular-migration>.

¹⁵⁵ Next to the mentioned EU-IOM II, the EU has also funded another return cooperation between IOM and the Nigerian government dating back to 2012. As stated by the acting coordinator of the National Emergency Management Agency (NEMA), this framework of cooperation was intended for ‘young Nigerians who had intended to leave the country in search of greener pastures but got stranded in Libya’. Including the most recent evacuation of 158 Nigerians, the programme has repatriated over 19 000 Nigerian migrants by the end of November 2021. ‘NEMA receives 158 Nigerian returnees from Libya’, *Pulse*, 24 November 2021, <https://www.pulse.ng/news/local/nema-receives-158-nigerian-returnees-from-libya/2vd7js6>.

¹⁵⁶ Elbagir, N., Razek, R., Platt, A. and Jones, B., ‘People for sale – Where lives are auctioned for \$400’, *CNN Exclusive Report*, 14 November 2017, <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>. See also: <https://edition.cnn.com/specials/africa/libya-slave-auctions>.

¹⁵⁷ European Commission (2017e), ‘Joint press release of the United Nations, the African Union and the European Union’, Commission Press Release STATEMENT/17/5029, Abidjan, 29 November, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_5029.

¹⁵⁸ IOM (2018c), ‘Voluntary Humanitarian Returns from Libya Continue as Reintegration Efforts Step Up’, IOM News, International Organization for Migration (IOM), Brussels, Geneva, Tripoli, Dakar, 13 March, <https://www.iom.int/news/voluntary-humanitarian-returns-libya-continue-reintegration-efforts-step>.

¹⁵⁹ ‘Over 13 000 Nigerians evacuated from Libya in three months’, *The Migrant Project*, 19 February 2018, <https://www.themigrantproject.org/13000-nigerians/>.

¹⁶⁰ EUTF: *Protection and sustainable solutions for migrants and refugees along the Central Mediterranean route*. Online: <https://ec.europa.eu/trustfundforafrica/region/cross-window/regional/protection-and-sustainable-solutions-migrants-and-refugees-along-en>.

seekers from Libyan detention camps to Niger under the umbrella of **the EUTF-funded Emergency Transit Mechanism (ETM)**¹⁶¹. Resettlement programmes and complementary pathways are also part of the ETM, in particular for persons in need of international protection who are nationals or third country nationals and have transited through Niger, Burkina Faso, Cameroon and Chad. Between 2017 and May 2021, the ETM received a total of 30 million EUR from UNHCR and the EUTF, while an additional top up of 15 Mill EUR was provided by the EUTF to continue the mechanism until June-2021. Next to the EU, the ETM was funded by Canada, Italy, Monaco, the United States of America, as well as the AC Milan Foundation, the Nando and Elsa Peretti Foundation, the Fondazione Prosolidar Onlus, and the Fondo di Beneficenza Intesa San Paolo¹⁶².

Based on an **policy instrument**, a **Memorandum of Understanding (MoU)** signed between the State of Niger, and UNHCR in 2017¹⁶³, and extended in February 2020¹⁶⁴, individuals labelled as ‘highly vulnerable refugees and asylum-seekers’ are evacuated from Libyan detention centres to the ETM site (Tan and Vedsted-Hansen, 2021)¹⁶⁵. This process involves (a) refugees recognised by UNHCR in Libya under its mandate, (b) asylum-seekers registered with UNHCR in Libya, (c) stateless persons or persons at risk of statelessness for whom the determination of nationality could not be finalised in Libya, and (d) unaccompanied minors in accordance with the principle of the best interests of the child.

The cooperation between UNHCR and Niger thus represents another example of **EU-assisted hybrid financial-policy and operational instruments** on expulsions or removals from one African state to another even *before* individuals have actually entered EU territory. The Nigerian authorities have voluntarily agreed to allow evacuees from Libya to enjoy legal residence on Niger's territory for a period of up to six months, or longer if necessary. At the space provided for the ETM site, UNHCR determines the refugee status of the person concerned before providing access to resettlement and

¹⁶¹ UNHCR (2021b), ‘Emergency Transit Mechanism’, UNHCR Factsheet, United Nations High Commissioner for Refugees (UNHCR), Geneva, May, <https://reporting.unhcr.org/sites/default/files/Niger%20ETM%20Factsheet%20May%202021.pdf>.

Davin, E., Rubira, J., Hartpence, P. and Bonnet, M., ‘Case study: Emergency Transit Mechanism’, Altai Consulting, Paris, June 2021, https://ec.europa.eu/trustfundforafrica/sites/default/files/etm_case_study_final.pdf; For further information on the ETM, see: Lambert, L., ‘Extraterritorial asylum processing: the Libya-Niger Emergency Transit Mechanism’, *Forced Migration Review* No. 68, November 2021, pp. 18-21, <https://www.fmreview.org/externalisation/lambert>.

¹⁶² UNHCR (2021b), op. cit., p.3.

¹⁶³ The Memorandum of Understanding was first signed in December 2017 and renewed for another two year period in February 2020. It allows the temporary expansion of Niger’s asylum space to evacuated refugees and asylum-seekers on the ETM site. See: Ibid.; https://www.asgi.it/wp-content/uploads/2019/05/memorandum_niger_unhcr.pdf.

¹⁶⁴ UNHCR (2021b), op. cit.

¹⁶⁵ Tan, N.F. and Vedsted-Hansen, J., ‘Inventory and Typology of EU Arrangements with Third Countries: Instruments and Actors’, ASILE Project, Brussels, March 2021, <https://www.asileproject.eu/inventory-and-typology-of-eu-arrangements-with-third-countries/>.

complementary pathways to Europe and North America¹⁶⁶. Nevertheless, the MoU also foresees that claiming asylum in Niger should remain a last resort option for a small number of beneficiaries. In turn, UNHCR and its partners are obliged to provide food, accommodation, medical care, education, psychosocial support etc. to the persons in need¹⁶⁷. Due to the general ban on humanitarian flights, UNHCR's evacuations from Libya only resumed on 3 November 2021. By then, UNHCR had evacuated 3 361 people from Libya to Niger, of whom 3 213 had already left the country on resettlement and complementary pathways to third countries¹⁶⁸.

While the support provided by UNHCR is framed more as emergency assistance to persons in need, the components implemented by ETM's other partner organisation, IOM, focus once more mainly on the assistance of 'voluntary return' of vulnerable and stranded migrants in target countries, information campaigns for informed decision-making about migration, reintegration programmes as well as data collection on mobility patterns and migratory flows – similar to those under the above-mentioned EU-IOM JI¹⁶⁹.

Under the umbrella of the European Commission's **European Agenda on Migration**, adopted in May 2015, another **operational-financial instrument** in Niger was proposed. The Commission Communication stated that a **pilot multi-purpose centre**, implemented by IOM, UNHCR, and Nigerien authorities, should be set up to provide information, local protection and resettlement opportunities for those in need.¹⁷⁰ Officially contracted with IOM for a 12-month period and EUR 1.5 million budget provided by various EU instruments, including the Trust Fund, the project was intended to contribute to 'Stability and Peace'. In practice, this notion was clearly associated with the prevention of irregular migration and return policies as it compromised

¹⁶⁶ 'UNHCR has received a total of 6 351 resettlement pledges for the Libya-Niger/Rwanda situation out of which 1 131 confirmed pledges are for ETM Niger evacuees and 450 for refugees registered in Niger. The following countries have provided confirmed pledges for Niger: Belgium, Canada, Finland, France, Germany, Italy, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States of America. As of 1 May 2021, a total of 2 856 evacuated refugees have departed from Niger to resettlement countries. Due to COVID-19, resettlement flights were suspended between March and August 2020. In total, UNHCR has received 1 530 confirmed pledges for ETM PoCs in Niger in 2020, out of which 1 030 are for ETM and 500 for non-ETM.' Source: UNHCR (2021b), op. cit. See also: Belluccio, D. et al., 'The "Emergency Transit Mechanism" program and resettlement from the Niger: Legal analysis, current and future concerns', Association for Juridical Studies on Immigration (ASGI), Turin, November, 2018, <https://www.statewatch.org/media/documents/news/2019/jul/ASGI%20Resettlement%20ETM%20-%20ENGLISH.pdf>.

¹⁶⁷ For more details on UNHCR's mandate, see official Website: <https://help.unhcr.org/niger/solutions-durables/reinstallation/>.

¹⁶⁸ UNHCR (2021c), 'Libya: First evacuation flight to Niger in over a year brings 172 asylum-seekers to safety', UNHCR Press Release, United Nations High Commissioner for Refugees (UNHCR), Geneva, 5 November, <https://www.unhcr.org/news/press/2021/11/618547c04/libya-first-evacuation-flight-niger-year-brings-172-asylum-seekers-safety.html>.

¹⁶⁹ EUTF: *Protection and sustainable solutions for migrants and refugees along the Central Mediterranean route*. Online: <https://ec.europa.eu/trustfundforafrica/region/cross-window/regional/protection-and-sustainable-solutions-migrants-and-refugees-along-en>.

¹⁷⁰ European Commission (2015b), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda on Migration', COM(2015) 240 final, Brussels, 13 May. See also: IOM, 'IOM Welcomes European Commission Proposals on Migration', IOM News, Geneva, International Organization for Migration (IOM), 14 May 2014, <https://www.iom.int/news/iom-welcomes-european-commission-proposals-migration>.

'[...] direct assistance, medical and psychological support, referral of asylum-seekers to the United Nations High Commissioner for Refugees, information about risks and alternatives to irregular migration, transport towards the countries of origin, assisted voluntary return and reintegration in cooperation with local communities in Senegal, Gambia, Mali and Nigeria.'¹⁷¹

From its launch in November 2015 to July 2016, the EU-funded project thus enabled, *inter alia*, transportation for 2 000 migrants, assisting 400 voluntary returns, developing 18 socio-economic reintegration projects as well as data collection on migratory flows. Furthermore, as stated by the Commission, EUR 7 million in EUTF funding for a period of three years was allocated to support its second phase, namely offering alternatives to irregular migration and development of the region (migrant departure, transit and return zones)¹⁷². This instrument provides another example of EU-funded 'anticipatory' return programmes from one African country to another *before* entering EU territory, which clearly impedes the mobility of African nationals from West to North African countries.

3.3. Preventing entry

The fundamental **political instruments** for dialogue and cooperation between the EU and North African countries like Morocco, Libya and Tunisia¹⁷³ is determined by the **European Neighbourhood Policy (ENP)**, where the **European Commission's Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR)** and the **EU's External Action Service (EEAS)** play a key role. Launched in 2004 and reviewed in 2015 following the Arab Spring, the ENP clarifies the EU's relations with its 16 closest eastern and southern neighbours on stabilising the region in political, economic and security related terms¹⁷⁴.

One important pillar of the renewed ENP is having a close partnership on migration and mobility, which encompasses increased cooperation on root causes of irregular migration and forced displacement, effective cooperation on returns and readmission and sustainable reintegration, expanding cooperation on migration beyond the EU's direct neighbours, and promoting mutually beneficial migration and mobility programmes. Furthermore, it focuses on strengthened border management with interested partner

¹⁷¹ Avramopoulos, D., Answer given by Mr Avramopoulos on behalf of the Commission to Parliamentary Question E-003065/2016, 26 July 2016, https://www.europarl.europa.eu/doceo/document/E-8-2016-003065-ASW_EN.html.

¹⁷² Ibid.

¹⁷³ See tailor-made frameworks for each partner: *Delegation of the European Union to Morocco*, Official website: https://eeas.europa.eu/delegations/morocco_en; *Delegation of the European Union to Algeria*, Official website: https://eeas.europa.eu/delegations/algeria_en; *Delegation of the European Union to Libya*, Official website: https://eeas.europa.eu/delegations/libya_en; *Delegation of the European Union to Tunisia*, Official website: https://eeas.europa.eu/delegations/tunisia_en. | ENP Action Plans (2015) for Morocco (https://eeas.europa.eu/sites/default/files/morocco_enp_ap_final_en.pdf) and Tunisia (https://eeas.europa.eu/sites/default/files/tunisia_enp_ap_final_en.pdf).

¹⁷⁴ European Commission, *European Neighbourhood Policy and Enlargement Negotiations*. Online: https://ec.europa.eu/neighbourhood-enlargement/european-neighbourhood-policy_en.

countries by increasing joint work on the exchange of information, administration, and operational and technological cooperation with the assistance of relevant EU Agencies, like Frontex and Europol¹⁷⁵.

Another important EU **political instrument** has been the **Global Approach to Migration and Mobility (GAMM)**, where the European Commission's **Directorate-General Migration and Home Affairs (DG HOME)** has performed a key role with the EEAS as partner institution sharing responsibility. First established as Global Approach to Migration (GAM) in 2005, it was aimed to address the root causes of migration by decreasing irregular migration, fostering solutions for refugees and setting up pathways of legal migration¹⁷⁶. Following its renewal in 2011, the notion of 'mobility' and the link between migration and development strategies became part of the GAMM, resulting from the changing political landscape after the Arab Spring as well as increasing labour market shortages in European countries¹⁷⁷. Since then, it is characterised by four main pillars: (1) Legal migration and mobility; (2) Irregular migration and trafficking in human beings; (3) International protection and asylum policy; (4) Development impact of migration and mobility. Within the GAMM, the partnership with third countries is presented as 'mutually beneficial' and based on equality, creating a 'triple-win' situation for participating EU Member States, partner countries and third country nationals¹⁷⁸. This framework has consisted of a variety of *legal* (e.g. EURAs) as well as informal *policy* instruments, such as mobility partnerships (Reslow, 2019; Angenendt, 2014; Carrera and Hernandez, 2011)¹⁷⁹.

Building on consultations under several **political instruments**, namely the **Rabat Process (2006)**, a Euro-African dialogue for migration and development¹⁸⁰, and the **Khartoum Process (2014)**, a platform for political cooperation amongst the countries along the migration route between the Horn of Africa and Europe¹⁸¹, the subsequently

¹⁷⁵ European Commission (2015c), Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Review of the European Neighbourhood Policy', JOIN(2015) 50 final, Brussels, 18 November.

¹⁷⁶ Angenendt, S., 'EU Mobility Partnerships: The "most innovative and sophisticated tool" of European Migration Policy?', GMF Migration Strategy Group on Global Competitiveness Policy Brief, German Marshall Fund of the United States, June 2014, <http://www.jstor.org/stable/resrep18992>, p. 4.

¹⁷⁷ European Commission (2011a), op. cit. See also Carrera, Den Hertog and Parkin (2012), op. cit., p. 1.

¹⁷⁸ Angenendt (2014), op. cit., p. 5.

¹⁷⁹ European Commission (2011a), op. cit., p.10. Refer to Carrera, S. and Hernandez i Sagraera, R., 'Mobility Partnerships: "insecurity partnerships" for policy coherence and migrant workers' human rights in the EU', in R. Kunz, S. Lavanex and M. Panizzon (eds.), *Multilayered Migration Governance: The Promise of Partnership*, Routledge, London, 2011, pp. 97-115; Reslow, N., 'Making and Implementing Multi-Actor EU External Migration Policy: The Mobility Partnerships', in S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Brill Nijhoff, Leiden, 2019, pp. 277-298.

¹⁸⁰ The Rabat Process – Euro-African Partnership for Migration and Development (2006), *Political Declaration*, Online: <https://www.rabat-process.org/images/documents/Rabat-Declaration-EN.pdf>; *Action Plan*, Online: <https://www.rabat-process.org/images/documents/Rabat-Action-Plan-EN.pdf>.

¹⁸¹ Political Declaration, 'Rome Declaration', (28 Nov 2014), Online: <https://www.khartoumprocess.net/resources/library/political-declaration/60-khartoum-process-declaration>. See also official website: <https://www.khartoumprocess.net/>.

adopted **Joint Valletta Action Plan (2015)** set out 16 priority initiatives, including the creation of the above-mentioned **EUTF for Africa**¹⁸². Only a few months later, this new emphasis on cooperation in the field of migration and mobility was embedded in a **new Partnership Framework with third countries under the European Agenda on Migration (MFP, 2016)**¹⁸³. Aimed at establishing a win-win relationship with specific third countries, including among others Nigeria and Niger as ‘priority countries’, but also relevant for North African countries like Morocco and Tunisia, it sets out a list of short- and long-term objectives focused on the prevention of unauthorised entry of similar nature to those listed under the ENP and GAMM.

Following the adoption of the **New Pact on Migration and Asylum** in September 2020¹⁸⁴, the European Commission and the High Representative of the EU for Foreign Affairs and Security Policy (EEAS) presented a joint communication on the **Renewed partnership with the Southern Neighbourhood: A new Agenda for the Mediterranean** in February 2021¹⁸⁵. Also in this case, strengthening the border control and readmission capacities of partner countries remains a key priority for the EU, to be promoted, *inter alia*, through the use of all instruments at the disposal of the EU, including EU agencies, the previously mentioned NDICI [successor of the European Neighbourhood Instrument] and relevant internal instruments¹⁸⁶.

Resulting from the above listed **political and policy instruments**, the palette of specific tools enacted and used by EU Member States to prevent entry into their national, and thus the common EU territory, varies in terms of nature, scope and actors involved. In order to understand their impact on the cross-border and in-country mobility of asylum-seekers and refugees, this Section examines the existing EU instruments deployed (*Section 3.3.1.*) between the EU and/or Italy with the North African countries of Tunisia and Libya, and among the EU and/or Spain with the African countries of Morocco and Mauritania (*Section 3.3.2.*)

3.3.1. Central Mediterranean Sea

Cooperation with third countries on border management and prevention of irregular migration has become a top priority for the EU and bordering EU Member States like Italy. This applies foremost to Tunisia and Libya. A wide range of **national (bilateral) and European policy instruments** has been adopted to best equip the neighbouring third

¹⁸² ‘Valletta Summit on Migration, 11-12 November 2015, *Action Plan*’, https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.

¹⁸³ European Commission (2016a), op. cit.

¹⁸⁴ See: https://ec.europa.eu/home-affairs/policies/migration-and-asylum/pact-migration-and-asylum_en.

¹⁸⁵ European Commission (2021d), Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Renewed partnership with the Southern Neighbourhood: A new Agenda for the Mediterranean’, JOIN(2021) 2 final, Brussels, 9 February.

¹⁸⁶ Ibid.

countries to contain entries, to carry out ‘pull back’, readmit and detain third country nationals trying to irregularly enter the Schengen area.

3.3.1.1. EU/Italy and Libya

Implementing delegated containment

A key policy instrument is the **Memorandum of Understanding (MoU) on preventing irregular migration between Italy and Libya**, which was concluded on 2 February 2017¹⁸⁷. Under the scope of this arrangement, which does not qualify as an international agreement, the Libyan authorities agreed to take measures for ‘[stemming] the illegal migrant fluxes and facing consequences’, while Italy agreed ‘to provide technical and technological support to the Libyan institutions in charge of the fight against irregular immigration and that are represented by the border guard and the coast guard’.

The arrangement not only sidelined scrutiny by the Italian national parliament by being presented as a mere implementation of the ‘2008 Treaty of Friendship, Partnership and Cooperation between Italy and Libya’ (di Pascale, 2010)¹⁸⁸, but it also contradicted the view of the former Italian Minister of Interior, Marco Minniti, who stated in 2019, that Libya cannot be considered a ‘safe port’ – thus questioning the compliance with the ‘safe third country’ principle¹⁸⁹. After an initial term of three years, the arrangement was renewed in 2020¹⁹⁰. This occurred despite the Criminal Court of Trapani ruling in 2019¹⁹¹ that **the MoU was incompatible with the Italian Constitution and International law**, and numerous criticisms from several associations, the Council of Europe Commissioner for Human Rights, the UN High Commissioner for Refugees, Filippo Grandi, and IOM’s Director General António Vitorino¹⁹². Instead of halting the application of the

¹⁸⁷ Governo Italiano (2017), Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (02 Feb 2017), <https://www.governo.it/sites/governo.it/files/Libia.pdf>.

¹⁸⁸ ASGI, ‘ASGI requests the immediate annulment of the Italian-Libyan Memorandum’, Association for Juridical Studies on Immigration (ASGI), Turin, 2 February 2020, <https://en.asgi.it/asgi-public-statement-on-italia-libya-memorandum-of-understanding/>. For a background of Italy and Libya cooperation on migration see di Pascale, A., ‘Migration Control at Sea: The Italian Case’, in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, Leiden, 2010, in particular pages 297-300.

¹⁸⁹ Piazza Pulita (2019), *Piazzapulita - Profondo rosso - Puntata 11/04/2019*. Online: <http://www.la7.it/piazzapulita/rivedila7/piazzapulita-profondo-rosso-puntata-11042019-12-04-2019-268755>.

¹⁹⁰ Avvenire, 12 February 2020, *Esclusiva. Memorandum Italia-Libia, la bozza integrale: la partita dei fondi a Tripoli*, available in Italian at: <https://www.avvenire.it/c/attualita/Documents/Avvenire-%20memorandum.pdf>.

¹⁹¹ Criminal Court of Trapani, sentence of 23 May 2019, available in Italian at: <https://bit.ly/3dutMHI>; See also: Bove, C., ‘Country Report: Italy. 2020 Update’, AIDA Country Report, European Council on Refugees and Exiles (ECRE), Brussels, June 2021, <https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-IT-2020update.pdf>.

¹⁹² ASGI, ‘ASGI requests the immediate annulment of the Italian-Libyan Memorandum’, Association for Juridical Studies on Immigration (ASGI), op. cit. See also: Bove (2021), op. cit.; and Vari, E., ‘Italy-Libya Memorandum of Understanding: Italy’s International Obligations’, *Hastings International and Comparative Law Review*, Vol. 43, No 1, 2020, pp. 105-134,

arrangement, the Italian Ministry of Interior provided an additional budget of EUR 1.2 million to implement the measures listed in the renewed MoU¹⁹³.

In terms of **operational instruments**, the MoU builds on the actions implemented by its predecessor, referring to the equipment of Libya with naval units on the Libyan maritime border and provision of technical assistance and training to Libyan personnel involved in border management practices. Additionally, it includes a notion about establishing joint co-ordination centres in Libya and Malta, which (potentially) should assist the Libyan Coast Guard in intercepting migrants at sea¹⁹⁴. Referring to the still pending **case of S.S. and others v. Libya** before the European Court of Human Rights (ECtHR), it becomes clear that the Libyan Coast Guard, mandated by the MoU, has also been deliberately preventing civil society actors such as Sea Watch from carrying out SAR operations at sea without providing other alternatives¹⁹⁵.

Through these measures, Italy indirectly funds Libya for carrying out **pullback practices** towards third country nationals departing from and/or transiting Libyan waters. In practice, asylum-seekers intercepted at sea in Libyan or international waters have been forcibly returned to Libyan territory where many face torture and inhumane treatment in Libyan detention camps. Attempts to escape this dire situation have in some cases been met by the Libyan coast guard opening fire, as evidenced by a recent incident involving 500 migrants in October 2021¹⁹⁶. Between 2017 and January 2020, over 40 000 people, including children, have been intercepted at sea and pulled back to Libya¹⁹⁷. Furthermore,

https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1844&context=hastings_international_comparative_law_review. See also IOM (2019c), “International Approach to Refugees and Migrants in Libya Must Change”: IOM Director General António Vitorino and UN High Commissioner for Refugees Filippo Grandi’, IOM News, International Organization for Migration (IOM), Geneva, 12 July, <https://www.iom.int/news/international-approach-refugees-and-migrants-libya-must-change-iom-director-general-antonio-vitorino-and-un-high-commissioner-refugees-filippo-grandi>; see also Alpes, J., ‘Emergency returns by IOM from Libya and Niger: A protection response or a source of protection concerns’, Brot für die Welt, Berlin and medico international, Frankfurt am Main, July 2020, https://www.medico.de/fileadmin/user_upload/media/rueckkehr-studie-en.pdf p. 7.

¹⁹³ Facchini, D., ‘L’Italia continua a equipaggiare la Libia per respingere i migranti. Il caso delle motovedette da riportare a Tripoli’, *Altreconomia*, 2 March 2020, <https://altreconomia.it/litalia-continua-a-equipaggiare-la-libia-per-respingere-i-migranti-il-caso-delle-motovedette-ricondotte-a-tripoli/>.

¹⁹⁴ On behalf of the mission, Malta should also request more financial support of the EU to fund maritime assets essential for the interception of migrants at sea. See also: Council of Europe, ‘A distress call for human rights: The widening gap in migrant protection in the Mediterranean’, Follow-up report to the 2019 Recommendation by the Council of Europe Commissioner for Human Rights, Council of Europe, Strasbourg, 2021, <https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protectio/1680a1abcd>.

¹⁹⁵ ECtHR, *S.S. and others v. Italy*, Application No. 21660/18, Communicated Case of 26 June 2019.

¹⁹⁶ OHCHR (2021a), ‘Press briefing notes on Libya’, Office of the UN High Commissioner for Human Rights (OHCHR), Geneva, 12 October, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27646&LangID=E..>

¹⁹⁷ UNHCR (n/a), *Interactive map – Activities of disembarkation*. Online: <https://app.powerbi.com/view?r=eyJrIjoiMzBmYWVlOWQtMTdhNS00YTJlLTkzMzYtOTJmZTMwMzY3ZmY1IiwidCI6IjFjMjlyMTRhLTk5NWVtNDVjNi1hODNlTMxMTM1ZTUzMDhmYSIsImMiOiJF9>. See also: Amnesty International, ‘Libya: Renewal of migration deal confirms Italy’s complicity in torture of migrants and refugees’, Amnesty

in the period between January and October 2021 alone, IOM documented a record number of over 27 500 people being pulled back by the **Libyan Coast Guard** since the beginning of the operation in 2017¹⁹⁸. In addition, there is a pattern of **privatised and delegated pushbacks** carried out by the Libyan Coast Guard along with merchant vessels but under the accord of EU actors as well as Italian authorities¹⁹⁹.

In terms of **financial instruments**, Libya, like Tunisia and Morocco, is part of the **EUTF's North of Africa Window**. Its Operational Committee consists of the European Commission's Directorate-General for European Neighbourhood Policy and Enlargement Negotiations (DG NEAR)²⁰⁰, the EEAS, as well as EU Member States and other donors. To date, **the Libyan Coast Guard authorities has received substantial financial support** from the EU and other Member States. Just recently, the European Commission announced that it would provide three additional search and rescue vessels to the Libyan Coast Guard under the umbrella of the **EUTF project *Support to integrated border and migration management in Libya***, which is led by Italy. While the first phase started in 2017 (EUR 42.2 million)²⁰¹, the ongoing second phase of the project was adopted in December 2018, with a budget of EUR 15 million provided by Italy.

In June 2017, the European Council highlighted that **training and equipping the Libyan Coast Guard is a key component of the EU approach** and should be speeded up and that cooperation with countries of origin and transit shall be reinforced in order to stem the migratory pressure on Libya's and other neighbouring countries' land borders²⁰². In this context, over 477 **Libyan Coast Guards were trained under the umbrella of EUNAVFOR MED Operation Sophia**, a Common Security and Defence Policy (CSDP) naval operation²⁰³. Capacity building and training of the Libyan Coast Guard also became part of its successor EURONAVFOR MED IRINI and the SEAHORSE Mediterranean

International News, 30 January 2020, <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/>.

¹⁹⁸ IOM Libya (25 Oct 2021), *IOM Libya's Maritime Update*. Online: https://twitter.com/IOM_Libya/status/1452655865568415747?s=20.

¹⁹⁹ As shown in the investigation on the *Nivin case* provided by *Forensic Oceanography*, the merchant ship under the flag of Panama, was urged to rescue a boat of 70 migrants in distress in the Libyan SAR zone before transferring them to the Libyan Coast Guard. Informed by a Spanish aircraft flying an air patrol as part of the 'EUNAVFORMED - Sophia' and the Maritime Rescue Coordination Centre in Rome, the Libyan authorities instructed Nivin personnel to bring the rescued migrants to the Libyan coast. Against their will and by force, they were later deported by the Libyan coast and border guards.

²⁰⁰ Note: In comparison, both the EUTF's Sahel and Lake Chad Window and Horn of Africa Window fall under the purview of the Directorate General for International Cooperation and Development (DG DEVCO). See also: Disch et al. (2020), op. cit., pp. 18-19.

²⁰¹ EUTF (Official Website), *Support to integrated border and migration management in Libya – First phase*. Online: https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en.

²⁰² European Council, Conclusions of the European Council meeting of 22-23 June 2017, Council Document No. EUCO 8/17, Brussels, 23 June 2017, <https://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf>, para. 21.

²⁰³ Note: 'Training Matrix 265 LCG + 212 Navy trained. Total personnel trained 477 for 580 training spots (some have followed more than one course).' Source: <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, p.4.

Network, managed by DG NEAR²⁰⁴. The provision of training for the Libyan Coast Guard, provided by Italian training experts and specialists of the Italian Coast Guard²⁰⁵, thus emerged to be a primary target of the EUTF's spending, despite its identified high risk level [i]f the treatment of migrants during SAR interventions will not be improved, then it will further damage the narrative and reputation of the EU.²⁰⁶

The project specifically targets **Libya to strengthen its capacity in sea border control and surveillance, Search and Rescue at sea (SAR)**, and addressing smuggling and trafficking of human beings²⁰⁷. This foresees the provision of new SAR vessels and the development of a **mobile Maritime Rescue Coordination Centre (MRCC)** to support the maritime interception operations based in Tripoli (Libya)²⁰⁸. According to information provided to the newspaper *Libya Herald*, this centre focuses on transnational crime, human smuggling and terrorism and is intended to 'enhance... judicial and police cooperation...and increase[] information exchange'. It thus acts as a facilitator between key actors such as Libyan coast guard authorities, the General Director for Combating Illegal Immigration (DCIM) of Libya's Ministry of Internal Affairs, the Libyan Prosecutor-General and Libyan and Italian secret services²⁰⁹. Overall, the allocated EUTF funding is aimed at making the Libyan Coast Guard more efficient in accomplishing its tasks in line with Libya's international SAR obligations.²¹⁰

Another intended outcome of this EUTF project, which also resulted from the MoU consultations and can be seen as part of its implementation, was the unilateral **declaration of the Libyan Search and Rescue (SAR) zone** on 10 August 2017. Even before the International Maritime Organization (IMO) formally recognised the Libyan SAR

²⁰⁴ <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, p.11.

²⁰⁵ <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, p. 17. See also : https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-04_modified.pdf, pp. 6-7.

²⁰⁶ <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, p. 16.

²⁰⁷ EUTF (Official Website), *Support to integrated border and migration management in Libya – Second phase*. Online: https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-second-phase_en.

²⁰⁸ Yet, it remains unclear whether another joint coordination centre between Italy and Libya was set up in Rome. See: Várhelyi, O., Answer given by Mr Várhelyi on behalf of the European Commission to Parliamentary Question E-001268/2021, 27 May 2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-001268-ASW_EN.html; Cuffe, C. and O'Sullivan, G., Parliamentary question for written answer E-005612/2021 to the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy, 16 December 2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-005612_EN.html.

²⁰⁹ Zaptia, S., 'Serraj visits Libyan naval ship fixed by Italians', *Libya Herald*, 13 January 2018, <https://www.libyaherald.com/2018/01/13/serraj-visits-libyan-naval-ship-fixed-by-italians/>. See also: Lösing, S. and Ernst, C., Parliamentary question for written answer E-001511-18 to the Commission, 12 March 2018, https://www.europarl.europa.eu/doceo/document/E-8-2018-001511_EN.html. Mogherini, F. (2018a), Answer given by Vice-President Mogherini on behalf of the Commission to Parliamentary Question E-001511/2018, 22 June, https://www.europarl.europa.eu/doceo/document/E-8-2018-001511-ASW_EN.html.

²¹⁰ <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, pp. 3, 11.

zone in June 2018²¹¹, Libya began forcefully defending the maritime area and threatening NGOs engaged in SAR activities not to enter its waters. The enforced maritime border control and declaration of the SAR zone thus resulted from Italy's, and the EU's operational and financial support provided to the Libyan authorities (Carrera and Cortinovis, 2019)²¹². Despite the recent findings of the United Nations Fact-Finding Mission on Libya, providing evidence of crimes against humanity towards migrants since 2016²¹³, and numerous calls for the EU and Italy to stop funding the Libyan Coast Guard²¹⁴, there is still no end in sight of the programme.

In addition to the EUTF, another national **financial instrument** is the Italian **Fondo Africa** with a total budget of EUR 200 million which is earmarked for funding development projects and border management measures in a number of African countries. One of the beneficiaries of this funding policy is also the Libyan Coast Guard, which has been allocated, among others, EUR 2.5 million for equipment and training, like the 'restoring [of] four patrol vessels of the Libyan Coastguard; purchasing spare parts for the vessels; towing one of the vessels from Tripoli to Bizerte port in Tunisia; training 33 members of the LYCG crew'²¹⁵, and another USD 12 million for border control projects in Libya²¹⁶.

EU Agencies and naval operations and maritime surveillance

²¹¹ See Avramopoulos, D., Answer given by Mr Avramopoulos on behalf of the European Commission to Parliamentary Question P-003665/2018, 4 September 2018 http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html; Cuddy, A., 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants', *Euronews*, 7 August 2018, <https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants>.

²¹² Carrera, S. and Cortinovis, R. (2019a), 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?', *CEPS Paper in Liberty and Security in Europe* No. 2019-10, CEPS, Brussels, June, <https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/>, p. 8.

²¹³ OHCHR (2021b), 'All Parties to the Conflict in Libya, including Third States, Foreign Fighters and Mercenaries, Have Violated International Humanitarian Law, and Some Have Also Committed War Crimes, Chair of Fact-finding Mission on Libya Tells Human Rights Council', OHCHR News, 7 October, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27625&LangID=E>.

²¹⁴ Amnesty International, 'Libya/EU: Conditions remain "hellish" as EU marks 5 year of cooperation agreements', Amnesty International Press Release, 31 January 2022, <https://www.amnesty.org/en/latest/news/2022/01/libya-eu-conditions-remain-hellish-as-eu-marks-5-years-of-cooperation-agreements/>; Wallis, E., 'Human rights organizations denounce Libya/EU cooperation agreements on five-year anniversary', *Infomigrants*, 2 February 2022, <https://www.infomigrants.net/en/post/38295/human-rights-organizations-denounce-libyaeu-cooperation-agreements-on-fiveyear-anniversary>; Human Rights Watch (2021a), 'Plan of Action: Twenty Steps to Protect People on the Move Along the Central Mediterranean Route', Human Rights Watch, New York, NY, 16 June, <https://www.hrw.org/news/2021/06/16/plan-action-twenty-steps-protect-people-move-along-central-mediterranean-route>.

²¹⁵ ASGI, 'Fondo Africa sotto esame al Consiglio di Stato', Association for Juridical Studies on Immigration (ASGI), Turin, 19 July 2019, <https://www.asgi.it/notizie/fondo-africa-sotto-esame-al-consiglio-di-stato/>.

²¹⁶ Campbell, Z., 'Europe's Plan to Close its Sea Borders Relies on Libya's Coast Guard Doing its Dirty Work, Abusing Migrants', *The Intercept*, 25 November 2017, <https://theintercept.com/2017/11/25/libya-coast-guard-europe-refugees/>; See also: Giulia Crescini: <https://www.documentcloud.org/documents/4262423-Allegato-2.html>.

In addition to the mandate set out in the MoU, and enabled by the EUTF, several other **operational instruments** consisting of FRONTEX and military operations are involved in enforcing border control, curbing mobility and fighting human smuggling in the Central Mediterranean. After the mandate of its predecessor, **Operation SOPHIA** (2015-2020)²¹⁷, ended on 31 March 2020, the **European Union Naval Force Mediterranean Operation IRINI** (EURONAVFOR MED IRINI) was launched and recently renewed until 2023²¹⁸ to implement the UN arms embargo on Libya through the use of aerial, satellite and maritime assets. This includes inspections of vessels on the high seas off the coast of Libya suspected to be carrying arms or related material.

Similar to other ongoing operations, the mission should furthermore contribute to capacity building and training of the Libyan Coast Guard and Navy and to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes²¹⁹. Furthermore, it is also mandated to conduct monitoring and surveillance activities and gather information on illicit exports from Libya and on human smuggling and trafficking networks, which may be shared with the legitimate Libyan authorities, the relevant law enforcement officers of EU Member States and competent EU bodies. The latter encompasses information gathering and patrolling carried out by aerial assets above the high seas²²⁰.

In this context, this military operation represents another example of a multi-nature or hybrid instrument, presenting both **operational with technological components**, to track, monitor and ultimately contain human mobility across the Central Mediterranean. Contrary to Operation SOPHIA, which focused on the prevention of human smuggling and trafficking and rescue of migrants, EURONAVFOR MED IRINI is not intended to operate in search and rescue activities. Strategically, Operation IRINI should not exercise its mandate along the 'Central Mediterranean route' but should focus on the eastern part of the Libyan SAR region and the high seas between Greece and Egypt - leaving a rescue gap for many potential migrants who are at risk²²¹. In addition, in January 2021, **FRONTEX and Operation IRINI** concluded a **Working Arrangement** on the exchange of information on cross-border crime and trafficking in human beings between the two

²¹⁷ See also Council of the European Union (Official Website), *Saving lives at sea and targeting criminal networks*. Online: <https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-at-sea/>.

²¹⁸ Council of the EU (2021a), 'Council extends the mandate of the Operation IRINI until 2023', Council Press Release, 26 March, <https://www.consilium.europa.eu/en/press/press-releases/2021/03/26/council-extends-the-mandate-of-operation-irini-until-2023/>.

²¹⁹ Council of the EU, 'EU launches Operation IRINI to enforce Libya arms embargo', Council Press Release, 31 March 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/>. See also official website: <https://www.operationirini.eu/>.

²²⁰ Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), Council Document ST/6414/2020/INIT, OJ L 101, 1.4.2020, pp. 4-10.

²²¹ Laux, M., 'The evolution of the EU's naval operations in the Central Mediterranean: A gradual shift away from search and rescue', Heinrich Böll Stiftung Report, 16 April 2021, <https://us.boell.org/en/2021/04/16/evolution-eus-naval-operations-central-mediterranean-gradual-shift-away-search-and>; Council of Europe (2021), op. cit.

parties. This includes satellite imagery and other information collected by the EUROSUR Fusion Services, the Joint Operations Reporting Application, and the Crime Information Cell (CIC)²²².

Since 2014, FRONTEX has launched two joint operations on the Central Mediterranean Sea²²³. Running from 2014 to 2018 and technically well-equipped with sea and coastal patrol vessels, aircraft and helicopters, its first **Joint Operation TRITON** concentrated on border control and surveillance and search and rescue operations for migrants in distress at sea²²⁴. Guided by the Italian Ministry of Interior, TRITON's mandate covered the territorial waters of Italy as well as parts of the search and rescue (SAR) zones of Italy and Malta, which was later extended to 138 NM south of Sicily²²⁵.

With the closure of the Frontex Operation TRITON in February 2018, its successor, the **Joint Operation THEMIS**, entered into force. Its mandate puts an emphasis on law enforcement to tackle criminal activities, but also search and rescue operations, registration of arriving migrants, and collection and provision of relevant data to be shared with Italian authorities and EUROPOL²²⁶. Following a leaked exchange between the European Commission and Frontex Director Fabrice Leggeri in 2019, FRONTEX should furthermore consider sharing relevant data on vessel surveillance and detection of boats in distress, collected for example by the **EUROSUR Fusion Services** via satellite, with the Libyan Coast Guard. Consequently, Libyan SAR activities in the Central Mediterranean should be operationally and technologically assisted in order to facilitate and strengthen its operational capacity, *before* becoming a SAR responsibility for an EU Member State, notably Italy or Malta²²⁷. Migrants rescued in the THEMIS operational area, meaning the Central Mediterranean Sea from waters covering entries from Algeria, Tunisia, Libya, Egypt, Turkey and Albania, should now be taken to the closest port rather than only Italian ports²²⁸.

²²² Working Arrangement between 'The European Border and Coast Guard Agency (Frontex)' and 'EUNAVFOR MED IRINI' (15 Jan 2021), available at: <https://www.statewatch.org/media/1770/eu-frontex-op-irini-working-agreement-15-1-21.pdf>. See also: Satouri, M. et al., Parliamentary question for written answer E-001701/2021 to the Council, 26 March 2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-001701_EN.html.

²²³ One of the first operations, launched by the Italian military, was TRITON's predecessor *Mare Nostrum*, running from October 2013 to 2014.

²²⁴ Frontex, 'Joint Operation Triton (Italy)', Frontex Focus, European Border and Coast Guard Agency (Frontex), Warsaw, 10 October 2016, <https://frontex.europa.eu/media-centre/news/focus/joint-operation-triton-italy--ekKaes>.

²²⁵ Frontex (2015a), 'Frontex expands its Joint Operation Triton', Frontex New Release, European Border and Coast Guard Agency (Frontex), Warsaw, 26 May, <https://frontex.europa.eu/media-centre/news/news-release/frontex-expands-its-joint-operation-triton-udpbHP>.

²²⁶ Frontex, 'Main Operations – Operation Themis (Italy)', <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/>.

²²⁷ Leaked letter (18 Mar 2019), *Paraskevi Michou, in the name of the European Commission, to Executive Director Fabrice Leggeri*. Online: [http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019\)1362751%20Rev.pdf](http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf). See also Carrera and Cortinovis (2019a), op. cit., p.8.

²²⁸ Frontex (2018d), 'Frontex launching new operation in Central Med', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 1 February, <https://frontex.europa.eu/media-centre/news/news-release/frontex-launching-new-operation-in-central-med-yKqSc7>. 'Frontex launches

In comparison to its predecessor, the THEMIS operational area was reduced to the Italian SAR zone, while also excluding the Maltese SAR zone. In view of the amended mandate of THEMIS, according to which the standardised practice of disembarking persons rescued in the Maltese SAR zone in Italian ports is no longer guaranteed and will now be decided on a case-by-case basis by the Italian Maritime Rescue and Coordination Agency, the Maltese government declined to cooperate in the new FRONTEX joint operation. In fact, under the umbrella of TRITON's mandate, Italy and Malta had concluded an informal deal, 'trading' drilling rights in exchange for taking migrants rescued in the Maltese SAR zone²²⁹.

Another **technological instrument** used by the EU to curb onward maritime travel into the Schengen area is the provision of support with high-tech equipment to third countries. In 2020, the European Coast and Border Agency FRONTEX contracted Airbus and two Israeli defence companies with a budget of EUR 100 million to install **Heron and Hermes drones**²³⁰. These unmanned military drones are intended to facilitate the pullback of migrants at sea by assisting the Libyan coast guard in locating refugee boats leaving Libya. Based in Italy and/or Malta, Heron and Hermes will cover the Libyan search and rescue zone and be able to transmit data in near real-time to Frontex headquarters in Warsaw. The military drones are not only capable of flying for 24 to 36 hours and at altitudes up to 30 000-36 000 feet but are also able to carry weapons if needed²³¹.

The **European Border Surveillance System (EUROSUR)** constitutes a central technological instrument. It was set up in 2013 to improve situational awareness and to increase reaction capacity at the external borders of the Member States of the Union and with the unfulfilled promise to save lives at sea²³². Operated by FRONTEX, EUROSUR closely engages with national authorities of EU Member States responsible for border management and control, including coast guards and the National Coordination Center (NCC), to rapidly exchange information, ensure cooperation and joint action on

new EU border control mission Operation Themis', *Deutsche Welle*, 1 February 2018, <https://www.dw.com/en/frontex-launches-new-eu-border-control-mission-operation-themis/a-42417610>.

²²⁹ Grech, H., 'Italian MEP asks Brussels about "secret Malta-Italy migrants for oil deal"', *Malta Independent*, 18 October 2015, <http://www.independent.com.mt/articles/2015-10-18/local-news/Italian-MEP-asks-Brussels-about-secret-Malta-Italy-migrants-for-oil-deal-6736143776>; Carrera and Cortinovis (2019a), op. cit., p. 7-9.

²³⁰ Monroy, M. (2020a), 'Analysis. Drones for Frontex: unmanned migration control at Europe's borders', *Statewatch*, February, <https://www.statewatch.org/media/documents/analyses/no-354-frontex-drones.pdf>.

²³¹ Ahmed, K. and Tondo, L., 'Fortress Europe: the millions spent on military-grade tech to deter refugees', *The Guardian*, 6 December 2021, <https://www.theguardian.com/global-development/2021/dec/06/fortress-europe-the-millions-spent-on-military-grade-tech-to-deter-refugees>; Jolly, J., 'Airbus to operate drones searching migrants crossing the Mediterranean', *The Guardian*, 20 October 2020, <https://www.theguardian.com/business/2020/oct/20/airbus-to-operate-drones-searching-for-migrants-crossing-the-mediterranean>.

²³² Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ L 295, 6 November 2013, pp. 11–26.

preventing cross-border crime, human trafficking and irregular migration, and on saving lives of migrants in danger.

There is little public knowledge as regards the actual outputs and contribution towards SAR of this system. In April 2021, the EU Commission adopted new standards for EUROSUR's real-time surveillance and satellite images on land, air and sea for all involved EU Member States²³³. This new regulation aims to facilitate and secure the exchange of information, strengthen reporting on search and rescue operations at sea, which will be included in the monthly and case-by-case reports on incidents of concern to all EU Member States, and intensify cooperation with relevant third countries²³⁴.

Essential in this context is Libya's access to the **Service Oriented Infrastructure for Maritime Traffic Tracking (SMART)** provided by the Italian Navy. Set up as an alert and coordination tool for all anti-piracy stakeholders, this internet-based secured communication network shares information between military and civilian maritime stakeholders, including the Libyan Coast Guard²³⁵. In fact, it complements the data collected by EUROSUR and represents another **technological instrument** used for feeding the Libyan authorities with information to prevent European responsibility and accountability for SAR activities in the Central Mediterranean.

Lastly, since 2006 the EU has gradually expanded its members of the SEAHORSE Network. By linking national border countries on the Mediterranean and West African coast, this network is aimed to tackle irregular migration and illicit trafficking by strengthening their border surveillance systems²³⁶. Modelled on the SEAHORSE Atlantic Network (2006), the subsequently established **SEAHORSE Mediterranean Network** (2013) targets Algeria, Tunisia, Egypt, and Libya as participating non-EU member countries and provides synergy with EUROSUR's National Coordination Centres. Connecting the Libyan Coast Guard with EUROSUR, thus also enables FRONTEX to legally pass on confidential information to Libya (Gigli, 2020; Mornoy, 2017; Hayes and Vermeulen, 2012; Jeandesboz, 2011)²³⁷.

²³³ For further information, see: European Commission/Migration and Home Affairs (Official Website), EUROSUR. Online: https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/border-crossing/eurosur_en; European Commission (2018a), Commission Staff Working Document, 'Evaluation of the Regulation (EU) No 1052/2013 of the European Parliament and the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur)', SWD(2018) 410 final, Brussels, 12 September, https://ec.europa.eu/info/sites/default/files/soteu2018-eurosur-evaluation_en.pdf.

²³⁴ Ibid.; See also Riehle, C., 'EUROSUR Upgrade', eucrim News, 2 July 2021, <https://eucrim.eu/news/eurosur-upgrade/>.

²³⁵ Mogherini (2018a), op. cit. See also: Ministero della Difesa, 'Virtual regional Maritime Traffic Centre & Trans Regional Maritime Network', https://www.marina.difesa.it/EN/facts/Pagine/vrmtc_trmn.aspx; Carrera and Cortinovis (2019a), op. cit., p. 7-9.

²³⁶ Mogherini, F. (2018b), Answer given by Vice-President Mogherini on behalf of the Commission to Parliamentary Question E-007458/2017, 29 March, https://www.europarl.europa.eu/doceo/document/E-8-2017-007458-ASW_EN.html.

²³⁷ Gigli, M., 'EUROSUR Funding Policy: How Financial Accountability Challenges the European Strategy for External Border Management', Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute, European University Institute, Florence, 1 October 2020, <https://cadmus.eui.eu/handle/1814/69196>, p.67;

Launched with a budget of EUR 5.5 million in 2013, provided by the Development Cooperation Instrument (DCI), the EU increased its funding for the SEAHORSE program with an additional 1 Mill EUR to strengthen Libyan border surveillance and expand the training offered to the Libyan Coast Guard and Navy in 2017²³⁸. Initially implemented by the Spanish Jefatura Fiscal y de Fronteras de la Guardia Civil, the programme is now managed by DG NEAR²³⁹. Until the conclusion of the project in 2019, Libya was, however, the only North African country participating in the network with 141 Libyan Coast Guards benefiting from EU-funded training on technical and search and rescue (SAR) procedures²⁴⁰. By deploying high-tech equipment and training to third countries, this maritime surveillance network is another **technological-operational instrument** used by the EU to enforce border control at North African countries to prevent people from entering the Schengen area²⁴¹.

3.3.1.2. EU/Italy and Tunisia

In terms of **legal instruments**, the EU supported the former Ben Ali regime in Tunisia in 2004 to pass the **Law 2004-6**²⁴², which criminalises aiding and abetting of the smuggling of irregular migrants, but without making an exception for the provision of i.e. humanitarian aid and medical treatment²⁴³. Since its adoption, the new law allows the punishment of Tunisian nationals as well as foreigners for unauthorised entry, stay and

See also: Monroy, M., 'Migration monitoring in the Mediterranean region – Libyan military to be linked up to European surveillance system', 25 April 2017, <https://digit.site36.net/2017/04/25/migration-monitoring-in-the-mediterranean-region-libyan-military-to-be-linked-up-to-european-surveillance-systems/>; Hayes, B. and Vermeulen, M., 'Borderline: The EU's New Border Surveillance Initiatives. Accessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposal', Study by the Heinrich Böll Foundation, Heinrich Böll Foundation, Berlin, June 2012, <https://www.statewatch.org/media/documents/news/2012/jun/borderline.pdf>, p. 74-76; and Jeandesboz, J., 'Beyond the Tartar Steppe: EUROSUR and the Ethics of European Border Control Practices', in J.P. Burgess (ed.), *A Threat against Europe? Security, Migration and Integration*, VUBPress, Brussels, 2011, pp. 111-132.

²³⁸ European Commission (2017f), 'Questions & Answers: Migration on the Central Mediterranean route. Online', Commission Press Memo MEMO/17/135, Brussels, 25 January, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_135.

²³⁹ <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf>, p.11.

²⁴⁰ Borrell, J., Answer given by High Representative/Vice-President Borrell on behalf of the European Commission to Parliamentary Question E-000892/2020, 7 May 2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-000892-ASW_EN.html.

²⁴¹ EMHRN, 'The Seahorse Mediterraneo Maritime Surveillance Programme: EU Security Dangerously Off-Beam?', Statement by the Euro-Mediterranean Human Rights Network (EMHRN), EuroMed Rights, 27 September 2013, <https://euromedrights.org/publication/the-seahorse-mediterraneo-maritime-surveillance-programme-eu-security-dangerously-off-beam/>.

²⁴² Loi Organique n° 2004-6 du 3 février 2004. <http://www.legislation.tn/sites/default/files/fraction-journalofficiel/2004/2004F/011/TF200461.pdf>; See also: Badalič, V., 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights', *International Migration & Integration*, Vol. 20, 2018, pp. 85-100, <https://link.springer.com/article/10.1007/s12134-018-0596-7>, pp. 92-93.

²⁴³ Ben Jemia, M. and Ben Achour, S., 'Plaidoyer pour une réforme des lois relatives aux migrants, aux étrangers et à la nationalité en Tunisie', Tunis Centre for Migration and Asylum (CeTuMA) and Euro-Mediterranean Human Rights Network (EMHRN), Sousse, December 2014, <https://euromedrights.org/fr/publication/plaidoyer-pour-une-reforme-des-lois-relatives-aux-migrants-aux-etrangers-et-a-la-nationalite-en-tunisie/>, p. 9.

exit²⁴⁴ with prison and fines²⁴⁵. Similar to the previously discussed MoU between Italy and Libya, also the Tunisian Law 2004-6 can be seen as an implementation of the UN Protocol against the Smuggling of Migrants (2000). After several informal consultations between the EU and Tunisia on migration and border management since the 2000s, the adoption of Law 2004-6 was a desirable outcome by Tunisia's EU partners to combat irregular migration, while allowing the incumbent government to increase surveillance of Tunisian society and other local internal dynamics (Cassarino, 2014; Geddes and Lixi, 2019)²⁴⁶.

Tunisia is not only one of the largest recipients of **EU development funds**²⁴⁷, but it has also two ongoing projects under the **EU Trust Fund For Africa (EUTF)**. Both **financial instruments** are dedicated to improved migration management and amount to EUR 18,5 million²⁴⁸, while the total EUTFs support to Tunisia – including funding under the North Africa Window – is worth around EUR 91 million²⁴⁹. This encompasses, for instance, the Border management programme for the Maghreb region – Tunisia component (EUR 34.5 million), the EU-IOM Facility for Migrant Protection and Reintegration in North Africa (EUR 12.5 million), the Tunisian Migration Strategy Governance Program, ProGreS Migration - Phase II (EUR 5.7 million) and the Supporting the implementation of Tunisia's National Migration Strategy (EUR 12.8 million). Ongoing projects focus on supporting Tunisia in establishing an effective border management system, creating a framework for the return and reintegration of migrants and asylum-seekers repatriated from the EU and preventing migration through information campaigns and offers of alternative projects within the country.

Following the EUs priorities in i) border management ii) managing the mobility of people iii) irregular migration, the **EUTF** is also used to assist the implementation of national **operational instruments**. This refers, for instance, to a very significant EU-funded

²⁴⁴ Global Detention Project, 'Country Report. Immigration Detention in Tunisia: Shrouded in Secrecy', Global Detention Project, Geneva, March 2020, <https://www.globaldetentionproject.org/immigration-detention-tunisia-shrouded-in-secrecy>.

²⁴⁵ Since 2018, for instance, it captures overstaying visas with a penalty of \$1,060, see: Uzelac, A., 'The Real Common Interest: The converging EU and North African migration agendas – where do people's interests come in?', Oxfam Briefing Paper, Oxfam International, Oxford, October 2020, <https://policy-practice.oxfam.org/resources/the-real-common-interest-converging-eu-and-north-african-migration-agendas-in-t-621067/>, p. 11.

²⁴⁶ Cassarino, J.-P., 'Channelled policy transfers: EU-Tunisia interactions on migration matters', *European Journal of Migration and Law*, Vol. 16, No. 1, 2014, pp. 105-107; Geddes, A. and Lixi, L., 'New Actors and New Understandings in European Union External Migration Governance? The Case of EU-Tunisian Migration Relations', in S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Brill Nijhoff, Leiden, 2019, pp. 60-80.

²⁴⁷ European Commission, 'European Neighborhood Policy – Tunisia', https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/tunisia_en: 'Since 2011, EU assistance to Tunisia has amounted to almost €3 billion (over €2 billion in grants and €800 million in macro-financial assistance)'.

²⁴⁸ EUTF (Official Website), *EU Emergency Trust Fund for Africa – Tunisia*. Online: https://ec.europa.eu/trustfundforafrica/region/north-africa/tunisia_en.

²⁴⁹ EUTF North Africa Window (May 2021), *EU support on Migration in Tunisia – Factsheet*. Online: https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_tunisia.pdf.

support programme, benefiting the **Tunisian Coast Guard**²⁵⁰. Under the framework of the regional Border Management Project for the Maghreb region²⁵¹, technical and human capacities of the Tunisian Coast Guard (*Garde Nationale Maritime*) in fulfilling its missions at sea, including communication, detection and Search and Rescue tasks in respect of human rights²⁵² are currently being supported by EUTF funding (EUR 34.5 of EUR 55 million for the Tunisian component).

Under the overall guidance of **the International Centre for Migration Policy Development (ICMPD)** (2018-2022), other programme components include the establishment of an integrated border surveillance and coastal communication system,²⁵³ capacity building through training of the Tunisian Coast Guard, which will also be supported by the Italian Ministry of Interior, and close cooperation with relevant stakeholders²⁵⁴. As part of the implementation of the European Commission's 2020 Pact on Migration and Asylum, a Communication of February 2021 stated that:

'[c]ooperation in the field of integrated border management, with the active involvement of Member States and Frontex, including capacity building and training as well as operational cooperation, should be further developed and promoted.'²⁵⁵

To date, Tunisia has not concluded a **Working Arrangement** with the European Coast and Border Guard (EBCG) Frontex agency and its territory is not monitored by EUROSUR, as it rejects the idea of cooperating with the agency. However, the EU pushes the country to cooperate with Frontex, and to complete [additional] working arrangements with Europol [under negotiation] and CEPOL [ready to be signed]. In fact, the EU will take any opportunity (conferences, missions, visits) to clarify the role of Frontex and familiarise Tunisian authorities with the agency²⁵⁶.

In addition, Tunisia has **multiple bilateral projects on integrated border management and counter-smuggling**²⁵⁷ with EU Member States, like Austria, Belgium, Czechia, Denmark, France, Germany, Italy, Malta, the Netherlands, Portugal and Spain²⁵⁸.

²⁵⁰ Council of the EU (2021b), 'Implementing the Pact – strengthening migration partnerships with selected priority countries in North Africa: Tunisia – discussion paper', Council Document No. 5723/21 LIMITE, Brussels, 8 February, <https://www.statewatch.org/media/2176/eu-council-pact-north-africa-tunisia-discussion-paper-5723-21.pdf>.

²⁵¹ See also: ICMPD, 'Border Management Programme for the Maghreb Region (BMP Maghreb)', International Centre for Migration Policy Development (ICMPD), Vienna, <https://www.icmpd.org/our-work/projects/border-management-programme-for-the-maghreb-region-bmp-maghreb>; EUTF (Official Website, 6 Jul 2018), *Border Management Programme for the Maghreb region (BMP Maghreb)*. Online: <https://ec.europa.eu/trustfundforafrica/region/north-africa/regional/border-management-programme-maghreb-region-bmp-maghreb-en>.

²⁵² Borrell (2020), op. cit.

²⁵³ Council of the EU (2021b), op. cit., p.6.

²⁵⁴ Borrell (2020), op. cit.

²⁵⁵ Council of the EU (2021b), op. cit.

²⁵⁶ Ibid., p. 3-5.

²⁵⁷ Ibid.

²⁵⁸ For more details, see: Ibid., Annex II Member States' bilateral agreements.

Supporting Tunisia with *financial, operational and technological* instruments directly serves the EU's underlying objective of curbing migration flows towards the EU. This was lately emphasised in the operationalisation of the *New Pact on Migration and Asylum* in October 2021, as '[t]he EU seeks a reduction of irregular departures of migrants from Tunisia, both Tunisian citizens and third country nationals, which have considerably increased throughout 2020 and 2021'²⁵⁹.

3.3.2. Western Africa and the Atlantic Sea

3.3.2.1. EU/Spain: Pushback practices at the Spanish border

Regarding **legal instruments**, Spain's adoption of the **Organic Law No. 4/2015 of 30 March 2015 regarding Protection and Citizen Security** has formally legalised the practice of pushbacks and collective expulsions (or 'hot returns') without due process at its external border crossing points. The tenth additional provision on the '**Special regime for Ceuta and Melilla**' states that:

1. Foreigners who are detected attempting to irregularly cross the border at the border of the territorial demarcation of Ceuta or Melilla may be refused entry to prevent their illegal entry into Spain.
2. In all cases, entry shall be refused in a manner that respects the international human rights and international protection legislation to which Spain is a party.
3. Applications for international protection shall be formalised at the places provided for that purpose at the border crossing and shall be processed according to the rules on international protection.²⁶⁰

This regulation implies that asylum-seekers and refugees detected on these Spanish enclaves are to be expelled from Spanish territory and handed over to Moroccan border guards through specific passages and without an individual assessment²⁶¹. The tenth additional provision on the 'Special regime in Ceuta and Melilla' not only actively impedes the mobility of migrants towards Spanish (and EU) territory by taking those arriving back to the territory of the neighbouring non-EU state (Morocco). It also tries to make it almost impossible to apply for asylum in Spain. It is worth signalling that Spain ranked second among all EU states with a higher expulsions rate of 12.7 % in 2020²⁶². (See Section 3.4 of this Report below on *Expulsions*).

²⁵⁹ Ibid.

²⁶⁰ Organic Law No. 4/2015 of 30 March 2015 regarding Protection of Citizen Security (translation published by the Venice Commission, CDL-REF(2021)011, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)011-e)) | Original version (Spanish), <https://boe.es/buscar/pdf/2015/BOE-A-2015-3442-consolidado.pdf>. | An earlier version of the first article more clearly stated the intent of pushbacks: '*Aliens attempting to penetrate the border containment structures in order to cross the border in an unauthorised manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal entry into Spain.*' See ECHR Case file.

²⁶¹ See also: De Gasperis, T. (2021), 'Country report: Spain. 2020 Update', AIDA Country Report, European Council on Refugees and Exiles (ECRE), Brussels, March 2021, https://asylumineurope.org/wp-content/uploads/2021/03/AIDA-ES_2020update.pdf.

²⁶² Eurostat, 'Enforcement of immigration legislation statistics', *Statistics Explained*, June 2021, <https://ec.europa.eu/eurostat/>

3.3.2.2. EU/Spain and Morocco and Mauritania

Spain has long-standing bilateral relations with various African countries which have gradually narrowed down the possibilities for legal admission (Carrera et al., 2019)²⁶³. Close cooperation to combat irregular migration and prevent trafficking of human beings is thus embedded in a number of national policies such as the **3rd Africa Plan**²⁶⁴, the **Focus Africa 2023**²⁶⁵, and several bilateral agreements and arrangements with Morocco and Mauritania, providing a forum for exchange and planning of joint operational actions²⁶⁶.

The **operational implementation** of this bilateral cooperation has materialised for instance in **joint patrol and surveillance arrangements** on air, land and sea which are mainly exercised by the Spanish national police, the Spanish Guardia Civil and/or the Moroccan or Mauritanian Gendarmerie. The **FRONTEX operations HERA, MINERVA and INDALO**, on the other hand, have been nearly all led by Spain with the (financial) support of other EU Member States and/or the EUTF, thus representing another example of **multi-nature financial-operational instrument**. So far, Morocco has not concluded a **Working Arrangement with Frontex**, but the Executive Director, Fabrice Leggeri, of the European Coast and Border Guard (EBCG) was authorised in June 2021 to start negotiations with the country²⁶⁷.

Entering into force in 2006, **Frontex' Operation HERA** at the Canary Islands and Mediterranean with joint patrol vessels on the high seas and aerial surveillance by helicopter is now one of the longest-running operations, having been renewed and prolonged several times (Carrera, 2007)²⁶⁸. The mandate of the first module, HERA I,

[statistics-explained/index.php?title=Enforcement of immigration legislation statistics](#), under 'Non-EU citizens ordered to leave the territory of an EU Member State or an EFTA country, 2015-2020'.

²⁶³ See an overview of the main changes in Spanish migration policy and cooperation with African countries see Chapter 2.2 on Spain in Carrera, S. et al., 'Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU', Study for the Open Society European Policy Institute (OSEPI), CEPS and OSEPI, Brussels, September 2018, <https://www.ceps.eu/ceps-publications/offshoring-asylum-and-migration-australia-spain-tunisia-and-us/>.

²⁶⁴ Spanish Ministry of Foreign Affairs (2019), op. cit.

²⁶⁵ Spanish Ministry of Foreign Affairs, 'Focus Africa 2023', Spanish Ministry of Foreign Affairs, European Union and Cooperation, Madrid, March 2021, http://www.exteriores.gob.es/Portal/es/SalaDePrensa/ElMinisterioInforma/Paginas/Noticias/20210328_MINISTERIO06.aspx.

²⁶⁶ For further information, see Annex and: CEAR (2021a), 'Externalización de Fronteras España-Marruecos', Spanish Commission for Refugee Aid (CEAR), Madrid, April, https://www.cear.es/wp-content/uploads/2021/04/FICHA_Externalizacion_Fronteras_Espana-Marruecos.pdf; CEAR (2021b), 'Externalización de Fronteras España-Mauritania', Spanish Commission for Refugee Aid (CEAR), Madrid, April, https://www.cear.es/wp-content/uploads/2021/04/Ficha_Externalizacion_Espana_Mauritania.pdf.

²⁶⁷ Frontex Management Board (2021), op. cit.

²⁶⁸ Carrera, S. (2007), 'The EU Border Management Strategy: Frontex and the challenges of Irregular Immigration in the Canary Islands', CEPS working Document No. 261, CEPS, Brussels, March 2007,

included experts from France, Germany, Italy, Portugal, the Netherlands, Norway and the United Kingdom to identify the country of origin of migrants arriving on the Canary Islands²⁶⁹. This was intended to assist Spain in speeding up the return of asylum-seekers who were irregularly present on its territory.

Based on Spain's close cooperation with Senegal and Mauritania, the second module, HERA II, on the other hand, changed its focus to the points of departure in third countries as the main aim of this joint effort was to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea.²⁷⁰ As stated by one Spanish border officer working in Operation HERA that '[i]f we teach local coast guards to control their own borders, our [EU and/or national] border is more secure'²⁷¹. The logic behind this rationale is to prevent people from *departing* from a neighbouring third country rather than *blocking* them at sea just before entering the EU's maritime territory. The composition of Member States participating in Operation HERA varied in subsequent mandates. Until today, the operation usually run[s] from May to October every year, covering the months of the highest migratory pressure²⁷².

In November 2020, Frontex and Spain started **negotiating another Joint Mission**, which is aimed at **closing the canary route** by stopping the arrival of canoes and small boats to the islands and returning those arriving to their starting point²⁷³. Although Frontex does not yet have an official working arrangement with Morocco and Mauritania, its Executive Director, Fabrice Leggeri, was only authorised in June 2021 to negotiate **new [FRONTEX] Working Arrangements** with the two countries²⁷⁴. Tracking, intercepting and sending back migrants by land and sea through increased border controls and surveillance significantly impedes mobility and frustrates those seeking international protection.

<https://www.ceps.eu/ceps-publications/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary/>.

²⁶⁹ Frontex, 'Longest FRONTEX coordinated operation – HERA, the Canary Islands', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 19 December 2006, <https://frontex.europa.eu/media-centre/news/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc>.

²⁷⁰ Ibid.

²⁷¹ Campbell (2017), op. cit. For more details on previous HERA missions, see: Wriedt, V. and Reinhardt, D., 'Analysis. Opaque and unaccountable: Frontex Operation Hera', Statewatch, February 2017, <https://www.statewatch.org/media/documents/analyses/no-307-frontex-operation-hera.pdf>.

²⁷² Frontex (2017b), 'Focus on Western Mediterranean route: Frontex in Spain', Frontex Focus, European Border and Coast Guard Agency (Frontex), Warsaw, 3 August, <https://frontex.europa.eu/media-centre/news/focus/focus-on-western-mediterranean-route-frontex-in-spain-isGpCE>. For more updated information on the current mission, see: Monroy, M. (2020b), 'Frontex wants to disembark refugees in Senegal', 1 March, <https://digit.site36.net/2020/03/01/frontex-wants-to-disembark-refugees-in-senegal/>.

²⁷³ Martín, M., 'España y Frontex negocian una operación para cerrar la ruta migratoria canaria', *El País*, 6 November 2020, <https://elpais.com/espana/2020-11-06/espana-y-frontex-negocian-una-operacion-para-cerrar-la-ruta-migratoria-canaria.html>.

²⁷⁴ Frontex Management Board (2021), op. cit.

Closely linked to the field of operational cooperation are **technological instruments** to strengthen border surveillance and the prevention of irregular migration. Since 2000, the Spanish maritime border surveillance system, **Sistema Integrado de Vigilancia Exterior (SIVE)**, allows the monitoring of Spain's southern coastal borders via radar technology, high-tech cameras, vessel automatic identification and border guards stationed between Spain and Morocco²⁷⁵. Formerly installed to detect speedboats of drug smugglers, it became an essential tool for the detection and search and rescue operations of small migrant boats. Today, SIVE operates mainly at the Andalusian coast (from Ayamonte to Cabo de Gata), the Canary Islands of Fuerteventura and Lanzarote and the cities of Ceuta and Melilla close the Strait of Gibraltar (Garcia Andrade, 2010)²⁷⁶.

With the intention to expand SIVE's scope of operationalisation and to strengthen control at the EU's external border zones, the programme is not only supported by the national budget but also by substantial **EU funds**. For example, in 2012 alone, over EUR 8.2 million was allocated from **the EU External Borders Fund** – coordinated by the **European Commission Directorate-General for Migration and Home Affairs (DG HOME)** – to the Ministry of the Interior and the Directorate-General of the Guardia Civil to support the Spanish SIVE system²⁷⁷. Another report by the Spanish NGO 'por Causa' indicated that EUR 188.7 million of public funding was provided to support the maritime border surveillance system between 2007 and 2017²⁷⁸. Spain's maritime border surveillance system served as a basis for the above-mentioned **EUROSUR**²⁷⁹.

Strengthening border surveillance at the side of relevant third countries is also part of **Operation SEAHORSE** and the **SEAHORSE Network**, serving as an important network of communication on satellite images for the prevention of irregular migration. Set up in

²⁷⁵ PICUM, 'Dismantling the Use of Big Data to Deport', Platform for International Cooperation on Undocumented Migrants (PICUM), <https://picum.org/data-protection-and-digital-technologies/>.

²⁷⁶ García Andrade, P. (2010), 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, Leiden, 2010, pp. 311-346; Spanish Civil Guard, 'Sistema Integrado de Vigilancia Exterior (SIVE)', Informative Specials, <https://www.guardiacivil.es/es/prensa/especiales/sive/index.html>.

²⁷⁷ External Borders Fund: *Annual Programme 2012*. Online: <http://www.interior.gob.es/documents/642012/1571273/60654.pdf/5e42bd28-e5ce-4bdb-8f10-3b4697e14cd5>.

²⁷⁸ Por Causa (2017), 'The industry of migration control. The Spanish winners of European Union border policies', Executive Summary of a report by the porCausa Foundation, Madrid, November, https://www.porcausa.org/industriacontrolmigratorio/media/porcausaAnalysis_ExecutiveSummary.pdf (full report available in Spanish: Por Causa (2017b), 'La industria del control migratorio. ¿Quién gana en España con las políticas fronterizas de la Unión Europea?', Report by the porCausa Foundation, Madrid, October, https://www.porcausa.org/industriacontrolmigratorio/media/porcausa_LaIndustriaDelControlMigratorio.pdf). See also: Statewatch, 'EU-Spain: New report provides an "x-ray" of the public funding and private companies in Spain's "migration control industry"', Statewatch News, 23 November 2017, <https://www.statewatch.org/news/2017/november/eu-spain-new-report-provides-an-x-ray-of-the-public-funding-and-private-companies-in-spain-s-migration-control-industry/>.

²⁷⁹ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir).

there is no transparency as to whether the EU (in-)directly co-finances the construction of external border fences²⁸³.

Additional financial instruments refer, for instance, to the **Fifth Master Plan for Spanish Cooperation** (2018-2021) in which part of the official development assistance is earmarked for combating irregular migration²⁸⁴. Both, Morocco, and Mauritania are listed as priority countries²⁸⁵. Fostering a close relationship with third countries is also reflected in the allocated **EU funding** of EUR 343 million to Morocco, provided by Spain and the EU, in the period between the end of 2018 and May 2021²⁸⁶. Further investigations, such as the report by the Spanish NGO 'por Causa', indicate that a substantial amount of **EU funding** from the areas of External Borders, Return, Internal Security, and Asylum, Migration and Integration as well as FRONTEX was used to financially support Spain's border management between 2007 and 2017²⁸⁷.

Financial assistance to border control and prevention of irregular migration in the North African countries Morocco and Algeria, and the West African country Mauritania stems from the **EUTF**²⁸⁸. Under the umbrella of the **EUTF's North Africa Window**, Morocco currently has seven projects in place, while over 95 % of the total budget is dedicated to improved migration management, namely more than EUR 174 million. A good example of a current project is the *Support to the integrated management of borders and migration in Morocco*, between April 2019 and April 2022. Exclusively funded by **the Spanish International and Ibero-American Foundation for Public Policy Administration (FIIAPP)**, the EUR 44 million should assist Morocco in improving its operational skills in border surveillance on land and sea, combating migrant smuggling and human trafficking, and improving inter-institutional and cross-border cooperation on irregular migration²⁸⁹. As part of this programme, Spain provided Morocco with 130 vehicles worth more than EUR 8 million²⁹⁰.

²⁸³ Weimers, C. et al., Parliamentary Question for written answer E-003322/2021 to the Commission, 25 June 2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-003322_EN.html.

²⁸⁴ Spanish Ministry of Foreign Affairs, 'V Plan Director de la Cooperación Española. 2018/2021', 23 March 2018, <https://www.aecid.es/Centro-Documentacion/Documentos/Planificaci%C3%B3n/PD%202018-2021.pdf>.

²⁸⁵ CEAR (2021a), op. cit.; CEAR (2021b), op. cit.

²⁸⁶ See: French Ministry of Europe and Foreign Affairs, 'Morocco – Spain – Q&A from the press briefing', France Diplomacy, 19 May 2021 <https://www.diplomatie.gouv.fr/en/country-files/morocco/news/article/morocco-spain-q-a-from-the-press-briefing-19-may-2021>.

²⁸⁷ Por Causa (2017a), op. cit. See also: Statewatch (2017), op. cit.

²⁸⁸ European Commission (2021e), 'EU Support on Migration in Morocco. EU Emergency Trust Fund for Africa, North Africa Window', May, https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_morocco_2.pdf.

²⁸⁹ European Commission (2018b), 'Soutien à la gestion intégrée des frontières et de la migration au Maroc', EUTF Africa, North Africa Window, projects in Morocco, 13 December, https://ec.europa.eu/trustfundforafrica/region/north-africa/morocco/soutien-la-gestion-integree-des-frontieres-et-de-la-migration-au-maroc_en.

²⁹⁰ Martínez, A., 'España entregará 130 vehículos a Marruecos para el control fronterizo y de inmigración', *El Faro de Melilla*, 11 November 2020, <https://elfarodemelilla.es/espana-entregara-130-vehiculos-marruecos-control-fronterizo-inmigracion/>.

3.4. Prioritising expulsions

3.4.1. Nigeria and the EU

Primarily, cooperation on return and readmission is secured under **the Cotonou Agreement**, the ‘backbone’ of the EU’s cooperation with African, Caribbean and Pacific countries (ACP) since 2000, which as a **legal instrument** calls state parties to readmit their *own nationals* if they are irregularly staying in another member’s territory²⁹¹. The extent to which the current Cotonou Agreement imposes such an unconditional obligation remains however contested.

Looking at the Progress Report on the Implementation of the European Agenda on Migration of 2019, the European Commission indicated, that in order to push the development of new arrangements in the field of readmission a wider range of leverage should be mobilised from all EU relevant policy areas, in close coordination with leverage at Member States’ level²⁹². One of these leverages is clearly linked to EU visa policy, as **the reform of the Visa Code** now allows to adopt restrictive visa measures against non-cooperative third countries on readmission²⁹³, which came into force on 2 February 2020²⁹⁴. Since the entry into force of this new amendment to **EU Visa Regulation 2019/1155**, cooperation in return and readmission is regularly assessed by the Commission, which serves as the criterion for prioritised or stricter visa requirements for Nigerians as well as other third country nationals (Art. 25a). This means that access to a visa has become conditional on cooperation in return and readmission requests of EU Member States²⁹⁵. So far, the cooperation between the EU Member States and Nigeria has been rated as ‘good, stable or improving’²⁹⁶.

²⁹¹ The Cotonou Agreement was extended until 30 Nov 2021 and until its successor agreement enters into force. Nonetheless, it can be noted that the draft of the ‘Post-Cotonou’ agreement currently under discussion also contains a similar clause on the repatriation of own nationals in Art.74 as well as Art.78 of the Regional Protocol for African states. Online: https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf. See also: <https://www.consilium.europa.eu/en/policies/cotonou-agreement/>.

²⁹² European Commission (2019a), Communication from the Commission to the European Parliament, the European Council and the Council, ‘Progress report on the Implementation of the European Agenda on Migration’, COM(2019) 126 final, Brussels, 6 March.

²⁹³ Ibid. See also Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 188, 12 July 2019, pp. 25–54.

²⁹⁴ Limam, M. (2020), ‘EU Mobility Partnerships with the South’, Med Dialogue Series No. 28, Konrad Adenauer Stiftung Regional Programme Political Dialogue and Regional Integration in the Southern Mediterranean, Tunis, September 2020, <https://www.kas.de/en/web/poldimed/single-title/-/content/the-eu-mobility-partnerships-with-the-south>, p.4.

²⁹⁵ For further information, see also ECRE (2021a), ‘Playing the Visa Card? ECRE’S assessment of the EU’s plans to use visa leverage to increase readmission to third countries’, ECRE Policy Note No. 35, European Council on Refugees and Exiles (ECRE), Brussels, June, <https://www.ecre.org/wp-content/uploads/2021/06/Policy-Note-36-Playing-the-Visa-Card-June-2021.pdf>.

²⁹⁶ European Commission (2021f), Report of the Commission to the Council, ‘Assessment of third countries’ level of cooperation on readmission in 2019’, COM(2021) 55 final, Brussels, 10 February (EU restricted),

While the EU still seeks to finalise official **European Union Readmission Agreements (EURA)**²⁹⁷, this amendment represents another tool to increase pressure on relevant countries of origin and transit to cooperate with the EU in managing migration flows. The assessment furthermore provides the basis for additional **bilateral agreements as well as non-legally binding arrangements on return and readmission** which, depending on the specific conditions, could also include readmission of third country nationals (TCNs). To date, Nigeria has concluded eight **bilateral repatriation agreements/arrangements** with different EU Member States²⁹⁸, such as Ireland (2001), Spain (2002), Italy (2002), UK (2004), Switzerland (2011)²⁹⁹, Austria (2011)³⁰⁰, and Germany³⁰¹, to facilitate return and readmission of irregular migrants. Some of these arrangements, however, remain under disclosure and are not publicly accessible, not even for the Commission.³⁰²

<https://www.statewatch.org/media/2297/eu-com-readmission-report-on-cooperation-restricted-com-2021-55-final.pdf>, Nigeria p. 63-65.

²⁹⁷ Note on actors involved: In the process of concluding EURAs acts the DG HOME as EU institutional actor and EEAS as partner institution sharing responsibility. See Carrera, S., Radescu, R. and Reslow, N., 'EU External Migration Policies. A Preliminary Mapping of the Instruments, the Actors and their Priorities', EURA-NET Project Report, 2015 https://sites.tuni.fi/uploads/2020/12/bdc49e96-task-3.1-report_um_ceps_final_v4.pdf, p. 49, 'Table 2: Inter-links between legal and policy instruments and European institutional actors implementing them'.

²⁹⁸ European Commission (2021f), op. cit., p. 63. See also ILO (2020), op. cit., pp. 68-70.

²⁹⁹ For Ireland, UK, Spain, Switzerland and Italy, see Zanker, F., Altrogge, J., Arhin-Sam, K. and Jegen, L. (2019), 'Challenges in EU-African Migration Cooperation: West African Perspectives on Forced Return', MEDAM Policy Brief 2019/5, December 2019, <https://www.medam-migration.eu/publications/policy-papers/policy-briefs/challenges-in-eu-african-migration-cooperation-west-african-perspectives-on-forced-return-14152/>, p. 27: 'Switzerland and Nigeria signed a "Return admission agreement" back in 2003. Although the agreement was never ratified by Nigeria, it was nonetheless applied in good faith. In January 2005, Switzerland launched another "Assisted Voluntary Return and Reintegration" (AVRR) program with Nigeria for an initial period of two years, which was then extended on an annual basis. The program was implemented by IOM and the Federal Office for Migration (FOM), offering a fund of CHF 5 000 (since 2010: CHF 6.000) for an individual return project plus 1.000 CHF cash for each returnee. Following the signed return agreement, Switzerland proposed the concept of a "migration partnership" in February 2009, which was then discussed and signed two years later on the basis of a Memorandum of Understanding in 2011. Since then, Nigeria and Switzerland meets twice a year to discuss the content of the agreement'. See: KEK-CDC Consultants and B,S,S, 'Return and Reintegration Assistance. External Evaluation. Country Study Nigeria: Final Report', KEK-CDC Consultants, Zurich and B,S,S Economic Consultants, Basel, June 2013, <https://returnandreintegration.iom.int/en/resources/return-and-reintegration-assistance-external-evaluation-country-study-nigeria-final>.

³⁰⁰ KEK-CDC Consultants and B,S,S, (2013), op. cit.; IOM, 'Voluntary Return and Reintegration Assistance for Nigerian Nationals', International Organization for Migration (IOM) Austria, Vienna, 2009, <https://austria.iom.int/en/voluntary-return-and-reintegration-assistance-nigerian-nationals> (link accessible through the Internet Archive's Wayback Machine, <https://web.archive.org/>).

³⁰¹ German Federal Government, 'Globaler Pakt für eine sichere, geordnete und reguläre Migration. Regionale Überprüfung. Beitrag der Bundesrepublik Deutschland', 2021 <https://www.auswaertiges-amt.de/blob/2411246/d20b5e24ccc3bfa2fd17fb6faef6bd6/201030-gcmbericht-data.pdf>; German Federal Foreign Office, 'Germany and Nigeria: Bilateral relations', German Federal Foreign Office, Berlin, 24 May 2019, <https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/nigeria-node/nigeria/231746>.

³⁰² European Commission (2021f), op. cit., Nigeria p. 63-65. See also ECA, 'EU readmission cooperation with third countries: relevant actions yielded limited results', ECA Special Report 17/2021, European Court of Auditors (ECA), Luxembourg, September 2021, https://www.eca.europa.eu/Lists/ECADocuments/SR21_17/SR_Readmission-cooperation_EN.pdf, p. 16:

According to the Commission's latest assessment of Nigerian cooperation on readmission in 2019, a total of 10 960 Nigerian nationals registered as illegally staying in the EU were issued return requests from all the 27 EU Member States. Altogether, 19 % of these return requests, i.e. 2 025 Nigerians, were implemented³⁰³. In comparison, the recognition rate of EU first-time applicants from Nigeria is less than 20 %, with only 14.7 %, or 4 365 out of a total of 29 660 decisions, in 2019³⁰⁴. Furthermore, it should be noted that the recognition rate of Nigerian asylum-seekers does not exceed the highest EU recognition rate of 39 % in Finland, and especially the EU external border states such as Spain (25 %), Italy (18 %), Greece (8 %), France (8 %) and Malta (17 %) recognise Nigerian asylum-seekers only to a small extent³⁰⁵.

Like other African states, with the exception of Cape Verde, Nigeria has not yet concluded a **legally binding readmission agreement (EURA)** with the EU³⁰⁶. Nonetheless, the **joint declaration on the Common Agenda on Migration and Mobility (CAMM)**, a **policy instrument** adopted in 2015³⁰⁷, already provided the ground for discussions on readmission by listing increas[ed] speed and efficiency on returns, particularly as regards identification of own nationals and issuance of travel documents as one of its priorities³⁰⁸. Next to opening discussions on a EURA, the joint declaration also contains an Annex or Action Plan which provides more details on the concrete actions and projects to be implemented. However, access to this document is confidential and not accessible to the public (Carrera, 2018). According to Paragraph 2 of the CAMM, one key purpose of the joint declaration is, nevertheless, to bring different actors together and provide new venues for exchange and discussion on cooperation³⁰⁹. In practice, the subsequent discussions and high-level dialogues were mainly aimed at concluding a readmission

'The audit did not cover EU Member States' bilateral readmission agreements, arrangements, memoranda of understanding or any other form of bilateral cooperation between the Member States and third countries. These remain within the sole purview of the Member States, and the Commission does not have access to them'.

³⁰³ Ibid.

³⁰⁴ See Table 3. ITFLOWS – Asylum Statistics Paper (p.8, draft). ⇔ Syria recognition rate: 85.41%; Venezuela: 96.26 % in 2019.

³⁰⁵ See Figure 6. ITFLOWS – Asylum Statistics Paper (p.11, draft); See also Commission Services (2021b), 'Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Action Plan: Nigeria', Council Document 11951/21 LIMITE, Brussels, 20 September, <https://www.statewatch.org/media/2898/eu-council-migration-action-plan-nigeria-11951-21.pdf>, Annex III 'Key figures and trends'.

³⁰⁶ ECA, 'EU Migrant return policy – cooperation with third countries on readmission', ECA Audit Preview, European Court of Auditors (ECA), Luxembourg, July 2020, https://www.eca.europa.eu/Lists/ECADocuments/AP20_07/AP_Migrant_return_policy_EN.pdf.

³⁰⁷ Similar to the context of Mobility Partnerships, the Directorate General for Migration and Home Affairs (DG HOME) represents the EU institutional actor, while the EEAS could be seen as a partner institution, sharing responsibilities and working for the same outcome when conducting high-level dialogues. See: Carrera, Radescu and Reslow (2015), op. cit., p. 49, Table 2: 'Inter-links between legal and policy instruments and European institutional actors implementing them'.

³⁰⁸ Joint Declaration on a Common Agenda on Migration and Mobility between the Federal republic of Nigeria and the European Union and its Member States (12 March 2015). Online: https://eeas.europa.eu/archives/delegations/nigeria/documents/page_content/eu-ng-jd_en.pdf.

³⁰⁹ See also Carrera (2019a), op. cit., pp. 31-35.

agreement, while sidelining other priority areas agreed on in the CAMM, namely: legal migration, international protection and development impact of migration and mobility.

In terms of **political instruments**, the focus on Nigeria as one of the priority countries of the above-mentioned **new Partnership Framework on Migration**, in 2016 stepped up the discussion on a readmission agreement, which then formally started in October of the same year³¹⁰. While the negotiations only proceeded at an irregular pace at the beginning, new incentives offered by the EU brought progress until the elections in 2018. With the entering into force of the new government, negotiations on readmission, however, declined. Nonetheless, the new government agreed in a joint communiqué during the last Nigeria-EU Ministerial Meeting in November 2020 to resume negotiations, which then started in January 2021³¹¹. The last call on next steps between the **European Commissioner for International Partnerships (DG NEAR) Urpilainen** and the Nigerian Minister of Foreign Affairs Oneyeama took place in June³¹². The conclusion of a EURA thus remains a primary goal of the EU, while stating that: '[a]ll this [support provided] should result in a better rate of issuance of travel documents, encourage a further increase in the number of readmission cases submitted by Member States, and, subsequently, trigger a higher return rate.'³¹³

Another relevant **operational instrument** to facilitate return procedures refers to the **Working Arrangement between Frontex and the Nigerian Immigration Service (NIS)**, which has been in force since 2012. Through information exchange, capacity building, joint return operations and the participation of Nigerian authorities in joint Frontex operations and pilot projects, this agreement aims to combat illegal/irregular migration and related cross-border crime³¹⁴.

With Frontex providing the 'analytical products' for collecting information but deciding on a 'case-by-case basis' what information to disclose with its Nigerian partner, NIS itself is unable to filter highly sensitive data of its own nationals³¹⁵. Indeed, it enables FRONTEX

³¹⁰ European Commission, 'Nigeria – Action and Progress under the Migration Partnership Framework, June 2016-June 2017', <https://www.statewatch.org/media/documents/news/2017/jun/eu-com-partnership-framework-4th-report-nigeria.pdf>.

³¹¹ EEAS, 'Seventh Nigeria-EU Ministerial Dialogue - Joint Communiqué', EEAS Joint Statements, European External Action Service (EEAS), Brussels, 18 November 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/88909/seventh-nigeria-eu-ministerial-dialogue-joint-communic%C3%A9_en.

³¹² European Commission (2021a), op. cit.

³¹³ European Commission (2021f), op. cit., p.65.

³¹⁴ Frontex: Working Arrangements with non-EU Countries – Nigeria Working Arrangement. Online: <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>; Frontex, 'Frontex signs Working Arrangement with Nigeria', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 19 January 2012, <https://frontex.europa.eu/media-centre/news/news-release/frontex-signs-working-arrangement-with-nigeria-JyDdE8>. However, as the clause on 'information sharing' suggests, the collected data is not intended to be equally accessible for both actors involved: '4.4 Frontex may provide the competent authorities of the Federal Republic of Nigeria with relevant analytical products. The access to Frontex tailored Risk Analyses or other Risk Analyses information is to be decided on a case-by-case basis by the Executive Director of Frontex'.

³¹⁵ See also Marin (2020), op. cit.

to closely track the trajectory of Nigerian nationals, which is of particular importance when considering readmission and return and deciding where to return the person to. For example, in the same year the arrangement between FRONTEX and NIS was signed, hundreds of refugees protested in and in front of the Nigerian Embassy in Berlin, accusing its officials of facilitating return procedures to Nigeria by providing (allegedly false) information and documents on national identity to the host country Germany³¹⁶. Following a FRONTEX Management Board decision in June 2021, the established Working Arrangement is currently under review and should be updated in the following months³¹⁷. The establishment of a **Frontex Risk Analysis Cell** also remains a high priority of the EU and is yet to be implemented (Moser, Ferahkaya and Märtin, 2020)³¹⁸.

The above-mentioned **EU-IOM Joint Initiative on the Protection and Reintegration of Migrants** is also relevant here. The EU-IOM JI falls within the EUTF budget to facilitate return procedures to transit countries of non-EU nationals whose asylum claim is inadmissible or whose residence permit has expired.³¹⁹ The mandate of this initiative is to support voluntary and forced returns and provide reintegration programmes for migrants³²⁰. This includes not only repatriation from one African state to another, but also return from the territory of an EU Member State back to the respective country of origin³²¹.

Since the expansion of its mandate in 2016 and 2019, Frontex, the European Border and Coast Guard Agency, has become another important **operational instrument** in the EU's return policy. Under the umbrella of the **Frontex European Centre for Returns** established in 2015, the agency now supports all EU Member States in the stages *before*, *during* and *after* a return decision takes place. As planned, it will take over the mandates of the European Return Liaison Officers Network (EURLO), the European Integrated Return Management Initiative (EURIN), and the European Regions Research and Innovation Network (ERRIN) by July 2022 and plans to collaborate with IOM on assisted returns by land, air or sea³²².

³¹⁶ German Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Gehrcke, Sevim Dagdelen, weiterer Abgeordneter und der Fraktion DIE LINKE. – Verdacht der Falschidentifizierung von Geflüchteten aus Afrika durch nigerianische Botschaftsvertreter. Drucksache 18/204', Drucksache 18/341, German Bundestag, Berlin, 24 January 2014, <https://dserver.bundestag.de/btd/18/003/1800341.pdf>.

³¹⁷ Frontex Management Board (2021), op. cit.

³¹⁸ Moser, C., Ferahkaya, R. and Märtin, L. (2020), 'Frontex goes Africa: On Pre-emptive Border Control and Migration Management', *Verfassungsblog on Matters Constitutional*, 6 February 2020, <https://verfassungsblog.de/frontex-goes-africa-on-pre-emptive-border-control-and-migration-management/>.

³¹⁹ See also: Official Website: <https://www.migrationjointinitiative.org/>; IOM (2021), op. cit. Note: The overall budget dedicated to the EU-IOM Initiative and its cooperation with 26 African partner countries is EUR 490 million.

³²⁰ See for example IOM (2018d), 'Assistance for Migrants Returning to West and Central Africa', EU-IOM Joint Initiative for Migrant Protection and Reintegration Information Leaflet, <https://www.migrationjointinitiative.org/sites/g/files/tmzbd1261/files/files/pdf/flyeren-august.pdf>.

³²¹ See also Arhin-Sam (2019), op. cit., p. 30.

³²² Davin and Rubira (2021), op. cit.

3.4.2. EU instruments on return with Third Countries: Niger, Mauritania, Morocco, Tunisia and Libya

The EU already promotes readmission and repatriation instruments between states of the African Union. In return, no *bilateral* agreements/ arrangements on return and readmission *from EU territory* with either **Libya** nor **Niger** are in place³²³. The EU has not yet concluded a **European Union Readmission Agreement (EURA)** with Morocco (2000-), Mauritania, Niger, Libya, nor with Tunisia (2016-)³²⁴. In the absence of official EURAs, other bilateral agreements and informal and legally non-binding **policy and political instruments** have been created to facilitate the discussion and cooperation on readmission policy through a combination of other incentives and forms of collaboration.

3.4.2.1. Mauritania

Mauritania and Spain concluded a **Bilateral Agreement on immigration in 2003**³²⁵. This arrangement includes a readmission clause for own nationals, but also third country nationals that have transited through Mauritania prior to their arrival in Spain. As stated in the document, both parties have to respond within 10 days after the readmission request was issued and proceed with a return procedure in the following 15 days. Furthermore, readmitted nationals of an ECOWAS member state are offered the option to stay in Mauritania, while all others must return to their country of origin³²⁶. This arrangement was used more recently, in January 2020, when Spain conducted ‘express or hot returns’ of third country nationals arriving at the Canary Islands. Based on this agreement, return procedures and deportation flights, operated by FRONTEX, were facilitated and accelerated³²⁷.

3.4.2.2. Morocco and Tunisia

The EU concluded a **Mobility Partnership (MP)** with Morocco in 2013³²⁸, and Tunisia in 2014³²⁹. Resulting from a lengthy negotiation process, these **policy instruments** include

³²³ European Commission (2021f), op. cit., Libya p. 51-52, 103; Niger is not listed under the ‘Overview of readmission instruments in place’, p. 103.

³²⁴ For more information on TCs, see Commission Services (2022), op. cit. See also ECA (2020), op. cit.

³²⁵ Available at [https://www.boe.es/eli/es/ai/2003/07/01/\(1\)](https://www.boe.es/eli/es/ai/2003/07/01/(1)). See also the 2018 bilateral agreement on security which includes as one of its objectives the deepening of bilateral cooperation and exchange of information in the areas of fighting against irregular immigration and trafficking of human beings, available at <https://www.boe.es/boe/dias/2018/05/15/pdfs/BOE-A-2018-6447.pdf>.

³²⁶ CEAR (2021b), op. cit. Furthermore, Spain and Mauritania signed another cooperation agreement to carry out joint surveillance operations of the Mauritanian coastline in 2006.

³²⁷ Wallis, E., ‘Back to Mauritania: Frontex repatriates migrants arriving on Canary Islands’, *Infomigrants*, 20 February 2020, <https://www.infomigrants.net/en/post/22908/back-to-mauritania-frontex-repatriates-migrants-arriving-on-canary-islands>.

³²⁸ ‘Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States’, Council Document No. 6139/13 ADD 1 REV 3, Brussels, 3 June 2013, https://ec.europa.eu/home-affairs/system/files/2020-09/20130607_declaration_conjointe-maroc_eu_version_3_6_13_en.pdf.

³²⁹ ‘Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l’Union Européenne et ses Etats membres participants’, <https://ec.europa.eu/home-affairs/system/files/2016->

a clause to (re-)start negotiations on a EURA and thus serve as another tool to accelerate the discussion³³⁰. In this case, the **European Commission's Directorate-General for Migration and Home Affairs (DG HOME)** represents the EU institutional actor, while the **EU External Action Service (EEAS)** could be seen as a partner institution, sharing responsibilities and working for the same outcome when conducting high-level dialogues (Carrera, Radescu and Reslow, 2015)³³¹.

In the European Commission's **Dialogue on Migration, Mobility and Security** with the Southern Mediterranean countries in 2011, mobility partnerships were presented as long-term framework based on political dialogue and operational cooperation³³². Formerly established in 2007, MPs represent a multidimensional concept (Broczka and Paulhart, 2015)³³³, but also a conditionality-based approach, as rather limited mobility and legal migration incentives are offered *as long as* the third country shows willingness to collaborate in preventing irregular migration, border management and support in EU readmissions policy (Tittel-Mosser, 2019; Garcia Andrade, Martin, Vita and Mananashvili, 2015)³³⁴.

Therefore, MPs are perceived as a 'one package deal'³³⁵, as their implementation seeks to enable or facilitate negotiations on EU visa facilitation and readmission agreements (Carrera, Cassarino, El Qadim, Lahlou and den Hertog, 2016)³³⁶. These tools consist of a

[12/declaration_conjointe_tunisia_eu_mobility_fr.pdf](#). See also European Commission, 'EU and Tunisia establish their Mobility Partnership', Commission Press Release IP/14/208, Brussels, 3 March 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_208.

³³⁰ See also Abderrahim, T., 'A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia', EuroMeSCo series IEMed Paper 41, European Institute of the Mediterranean (IEMed), Girona, May 2019, <https://www.euromesco.net/publication/a-tale-of-two-agreements-eu-migration-cooperation-with-morocco-and-tunisia/>.

³³¹ See Carrera, Radescu and Reslow (2015), op. cit., p. 49, Table 2: 'Inter-links between legal and policy instruments and European institutional actors implementing them'.

³³² European Commission (2011b), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A dialogue for migration, mobility and security with the southern Mediterranean countries', COM(2011) 292 final, Brussels, 24 May, [https://aei.pitt.edu/38018/1/COM_\(2011\)_292.pdf](https://aei.pitt.edu/38018/1/COM_(2011)_292.pdf), p. 11.

³³³ Broczka, S. and Paulhart, K., 'EU mobility partnerships: a smart instrument for the externalization of migration control', *European Journal of Futures Research* Vol. 3, Article No. 15, 2015, <https://link.springer.com/article/10.1007%2Fs40309-015-0073-x>, p.2.

³³⁴ Tittel-Mosser, F., 'Mobility partnerships: a tool for the externalisation of EU migration policy? A comparative study of Morocco and Cape Verde', in S. Carrera, J. Santos Vara and T. Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar Publishing, Cheltenham, 2019, pp. 238-256. See also García Andrade, P., Martin, I., Vita, V. and Mananashvili, S., 'EU Cooperation with Third Countries in the Field of Migration', Study for the European Parliament LIBE Committee PE 536.469, European Parliament, Brussels, October 2015, [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU\(2015\)536469_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf), p.31; see also European Commission (2011b), op. cit., p. 11.

³³⁵ Carrera, S. et al., 'EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?', CEPS Paper in Liberty and Security in Europe No. 87, CEPS, Brussels, January 2016, <https://www.ceps.eu/ceps-publications/eu-morocco-cooperation-readmission-borders-and-protection-model-follow/>, p. 6.

³³⁶ Note on actors involved: In the process of concluding Visa facilitation agreements and EURAs acts the DG HOME as EU institutional actor and EEAS as partner institution sharing responsibility. See Carrera, Radescu

joint declaration between the EU, participating EU Member States and the third country, here: Tunisia and Morocco, as well as of a steadily evolving and (in this case) unpublished annex and scoreboard, listing all the information about initiatives, partners, funding and indicators for evaluation³³⁷. Under the Southern Neighbourhood Programme, both MPs (Morocco, Tunisia) were funded by **the European Neighbourhood Instrument (ENI)**, supported through loans of the **European Investment Bank (EIB)** and **the European Bank for Reconstruction and Development (EBRD)**. The implementation was led under the overall guidance by the **Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR)**³³⁸.

In the case of **Morocco**, the Commission was authorised by the Council to negotiate a EURA with the country as early as 2000. Despite several attempts to negotiate an agreement, discussions were interrupted and resumed only in 2013 with the signing of the MP. In this case, the political commitment to resume negotiations on a EURA was facilitated by additional financial resources, including projects funded by the EU and Member States, and mobility offers for the country. Nevertheless, even the additional offer to conclude a visa facilitation agreement in 2015 has not led to a conclusion³³⁹.

Since 1992, Morocco and Spain have concluded a **bilateral readmission agreement** that focuses exclusively on the return of third country nationals who are irregularly present on Spanish territory³⁴⁰. According to the document, the return must be made within 10 days of receipt of the request. As a result, there is insufficient time to verify the identity of the individual and perform due process, taking into account the individual's particular protection criteria³⁴¹. To date, Morocco has concluded a total of five bilateral readmission arrangements/agreements with EU Member States³⁴².

In the case of **Tunisia**, negotiations on a readmission agreement and visa facilitation began two years after the conclusion of the MP in 2016³⁴³. Although the EU has since attempted to reach an accord with the Tunisian government in the form of several rounds

and Reslow (2015), op. cit., p. 49, Table 2: 'Inter-links between legal and policy instruments and European institutional actors implementing them'.

³³⁷ García Andrade, Martín, Vita and Mananashvili (2015), op. cit., p. 31.

³³⁸ See European Commission (2019b), 'Programmes' Performance Overview. EU budget 2014-2020, Extract from Programme Statements of operational expenditure, Draft Budget 2020, COM(2019) 400, Publications Office of the European Union, Luxembourg, June, https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/ppo_db2020.pdf, pp. 110-111.

³³⁹ See also Carrera et al. (2016), op. cit.

³⁴⁰ Spain-Morocco bilateral readmission agreement: 'Acuerdo entry el Reino de España y el Reino de Marruecos relative a la circulación de personas, el transito y la readmission de extranjeros entrados ilegalmente', signed in Madrid on 13 February 1992, <https://www.boe.es/boe/dias/1992/04/25/pdfs/A13969-13970.pdf>.

³⁴¹ CEAR (2021a), op. cit.

³⁴² European Commission (2021f), op. cit., Mauritania pp. 56-57, 103.

³⁴³ European Commission (2016c), 'The EU and Tunisia start negotiations on visa facilitation and readmission', Commission Press Release IP/16/3394, Brussels, 12 October, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3394.

of negotiations, the agreement was not concluded to date with its latest negotiation round taking place in January 2019³⁴⁴. The pressure on the Tunisian government is further illustrated by the use of high-level visits by Heads of State ‘en visite d’amitiés’ (Adouani, 2020)³⁴⁵, which are not only intended to indirectly intimidate but also to further promote the idea of a readmission agreement (Collett and Ahad, 2017)³⁴⁶. Despite linking legal migration possibilities, in the form of *visa facilitation agreements*, with the EU’s focus on accelerating return through readmission agreements, this *policy* strategy has yet not proven to be effective from the perspective of the EU³⁴⁷.

On a bilateral level, Italy and Tunisia have a close relationship on readmission and return with six adopted arrangements up to August 2020³⁴⁸. In 1998, the two countries adopted their first **bilateral readmission arrangement**, named ‘Exchange of notes between Italy and Tunisia concerning the entry and readmission of persons in an irregular situation’, as a *note verbale* which came into force in September the following year. Driven by the ambition to prevent irregular migration the arrangement not only encompassed enforced border control by Tunisia with Italy’s assistance in the provision of technical and financial equipment but also the building of detention camps on Tunisian territory. In return, Italy offered specific immigration quotas for Tunisian nationals aiming to enter the country because of economic reasons³⁴⁹.

Following the 2nd agreement on police cooperation in 2003, the subsequent 3rd agreement, signed in 2009, is of particular relevance as it accelerated not only the return procedure but also encompassed the return of third country nationals staying illegally on Italian territory. In return, Italy announced that it would provide financial assistance for the creation of detention centres back in Tunisia for the returned nationals and TCNs³⁵⁰. In addition to strengthening border controls and technically assisting Tunisian authorities, subsequent agreements focused on speeding up repatriation procedures for Tunisian nationals by increasing the number of returns per month from 320 to 600, as in

³⁴⁴ Commission Services (2022), op. cit.

³⁴⁵ Adouani, S. (2020), ‘Pacte européen sur la migration et l’asile: l’illusion de la forteresse imprenable’, FTDES Press Release, Tunisian Forum for Social and Economic Rights (FTDES), Tunis, 7 October 2020, <https://ftdes.net/pacte-europeen-sur-la-migration-et-lasile-lillusion-de-la-forteresse-imprenable/>.

³⁴⁶ Collett, E. and Ahad, A. (2017), ‘EU Migration Partnerships: A work in progress’, Migration Policy Institute Europe, Brussels, December 2017, <https://www.migrationpolicy.org/research/eu-migration-partnerships-work-progress>, p.5.

³⁴⁷ ECA (2021), op. cit.

³⁴⁸ See also EuroMed Rights, ‘Return Mania. Mapping policies and practices in the EuroMed Region. Chapter 4: The Policy of Forced Returns Between Italy and Tunisia’, EuroMed Rights, Brussels, 2021, https://euromedrights.org/wp-content/uploads/2021/04/EN_Chapter-4-Italy-Tunisia-1.pdf.

³⁴⁹ Cociglio, M., Figoni, L. and Mattiolo, M. (2021), ‘Italy-Tunisia repatriation agreements: as numbers of enforced removals rise, much is still to be known’, ASGI Sciabaca & Oruka – Oltre il Confine project, 2 March 2021, <https://sciabacaoruka.asgi.it/en/italy-tunisia-repatriation-agreements-as-numbers-of-enforced-removals-rise-much-is-still-to-be-known/>; EuroMed Rights (2021), op. cit. https://euromedrights.org/wp-content/uploads/2021/04/EN_Chapter-4-Italy-Tunisia-1.pdf

³⁵⁰ EuroMed Rights (2021), op. cit., p. 5.

2020³⁵¹. To date, Tunisia has adopted a total of six bilateral readmission arrangements/agreements with EU Member States, including Italy³⁵².

³⁵¹ Ziniti, A., 'Migranti, al via i rimpatri straordinari verso la Tunisia. Più voli charter per rimandare indietro chi arriva con gli sbarchi autonomi', *La Repubblica*, 21 September 2020, https://www.repubblica.it/cronaca/2020/09/21/news/migranti_al_via_i_rimpatri_straordinari_verso_la_tunisia_voli_charter_aggiuntivi_per_rimandare_indietro_chi_arriva_con_gli-267981368/. For more details on the agreements, see EuroMed Rights (2021), op. cit.

³⁵² European Commission (2021f), Tunisia pp. 85-86, 103.

4. Case study II: Afghan nationals cross-border mobilities

This case study examines the range of EU instruments designed and implemented with the goal to affect cross-border mobility of Afghan nationals, including those seeking international protection, including as regards Afghanistan directly, as well as those measures targeting countries framed by EU policy as transit.

Following the seizure of Afghanistan by the Taliban in 2021, numerous sources have presented the situation in Afghanistan as unstable or a humanitarian crisis³⁵³. In response to these developments, the EU has suspended most of its earmarked funding towards Afghanistan, including development cooperation funds³⁵⁴, until such time as the caretaker Taliban government meets the five conditions set out by the Council in its Conclusions of 15 September 2021³⁵⁵. For the purpose of the case study, however, the EU (funding) instruments targeting Afghanistan (many of which were programmed and/or allocated prior to the Taliban crisis) will be considered, notwithstanding the possible suspension thereof pursuant to the above-mentioned Council conclusions.

4.1. Obstacles to leave

Similar to Case study I above, a first instrument to observe is the EU's visa policy. Under the EU's internal **legal instruments** on border management and entry of third country nationals, Afghanistan is on the list of third countries whose nationals must be in the possession of a Schengen visa in order to cross the EU external borders (the so-called EU negative visa list)³⁵⁶. Even transiting through EU territory is restricted for Afghan nationals, as they are one of the nationalities that are required to be in the possession of an Airport Transit Visa to transit through the international transit areas of all EU Member States³⁵⁷. The number of Afghan nationals issued with visas is extremely low. According to data from the Commission, in 2020, 353 applications for Schengen visas (including

³⁵³ EASO, 'Afghanistan Country Focus. Country of Origin Information Report. January 2022', EASO COI Report, European Asylum Support Office (EASO), Valletta, 10 January 2022, <https://euaa.europa.eu/publications/coi-report-afghanistan-country-focus>; United Nations, 'Abandoning Afghanistan Now, amid Humanitarian Crisis, Would Be 'Historic Mistake', Special Representative Tells Security Council', UN Meetings Coverage SC/14706, United Nations, 17 November 2021, <https://www.un.org/press/en/2021/sc14706.doc.htm>; UNHCR (2021d), 'UNHCR warns of imminent humanitarian crisis in Afghanistan', UNHCR Press Briefing, United Nations High Commissioner for Refugees (UNHCR), Geneva, 13 July, <https://www.unhcr.org/news/briefing/2021/7/60ed3ba34/unhcr-warns-imminent-humanitarian-crisis-afghanistan.html>.

³⁵⁴ See European Commission (2021g), 'Afghanistan: Commission announces €1 billion Afghan support package', Commission Press Release IP/21/5208, Brussels, 12 October, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5208.

³⁵⁵ See Council of the EU (2021c), 'Council conclusions on Afghanistan', Council Document No. 11713/2/21 REV 2, Brussels, 15 September, <https://data.consilium.europa.eu/doc/document/ST-11713-2021-REV-2/en/pdf>.

³⁵⁶ See Art. 6(1)(b) Schengen Borders Code and Art. 3 and Annex I of Regulation (EU) 2018/1806.

³⁵⁷ See Art. 3(1) and Annex IV EU Visa Code.

ATVs) have been submitted at Member States' consulates in Afghanistan, of which 349 visas (including ATVs) have been issued³⁵⁸.

The EU visa policy vis-à-vis Afghan nationals also affects any means of Afghans to take any form of direct transportation from Afghanistan to an EU Member State. Other EU **legal instruments**, including the **Carriers Sanctions Directive 2001/51/EC**, all (air) carriers are obligated under EU law to ensure that no passengers are allowed to board without the necessary documents required for entry³⁵⁹. As explained in *Section 3* of this Report above, failure to do so not only entails a liability for the carrier concerned to take charge of the return of the Afghan national denied entry³⁶⁰, and to ensure that, pending his or her return, that he or she does not enter the EU irregularly³⁶¹, but also comes with a possible fine for the air carrier concerned³⁶².

The general framework for EU-Afghanistan cooperation in respect of mobility of persons is created by the **Cooperation Agreement on Partnership and Development (CAPD)**³⁶³ and the **Joint Declaration on Migration Cooperation (JDMC)**³⁶⁴. The CAPD is a **legal instrument**, more specifically an international agreement, between the EU and Afghanistan on cooperation in a multitude of areas, including development aid, trade, cooperation in matters of justice and home affairs, etc. For the purpose of this case study, attention can be drawn to Article 28 CAPD, stipulating cooperation between the EU and Afghanistan on matters of migration with the aim of preventing irregular migration flows between Afghanistan and the EU. Article 28 CAPD specifically highlights EU-Afghanistan migration cooperation through the tool of a comprehensive dialogue and cooperation on migration-related issues, intending to cover all aspects of asylum, migration-development nexus, regular and irregular migration, return and readmission, visas, border management, etc³⁶⁵. It is important to note that the CAPD specifically highlights capacity building measures as a potential form of migration cooperation between the EU and Afghanistan³⁶⁶.

In respect of Afghanistan, migration cooperation with the EU is further contained in the **Joint Declaration on Migration Cooperation (JDMC)**. While the JDMC explicitly states that it is not intended to create legal rights or obligations under international or domestic law³⁶⁷, it should nonetheless be seen as a **policy instrument** or a readmission

³⁵⁸ See European Commission (2021c), op. cit.

³⁵⁹ See Art. 26(1)(b) Schengen Convention.

³⁶⁰ Schengen Borders Code, Art. 14(6) and Annex V, Part A, under 2(a).

³⁶¹ Schengen Borders Code, Art. 14(6) and Annex V, Part A, under 2(b).

³⁶² See Art. 4 Council Directive 2001/51/EC.

³⁶³ Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ L 67, 14.3.2017, p. 3-30.

³⁶⁴ European Commission (2021h), 'Joint Declaration on Migration Cooperation between Afghanistan and the EU', 5223/21 ADD 1 LIMITE, Brussels, 13 January, <https://www.statewatch.org/media/1801/eu-council-joint-declaration-afghanistan-5223-21-add1.pdf>.

³⁶⁵ Article 28(2) CAPD.

³⁶⁶ Article 28(3) CAPD.

³⁶⁷ European Commission (2021h), op. cit., p. 2.

arrangement determining expectations or commitments from both the EU and Afghanistan. IT has been penned or authored on the part of the EU by **the European Commission (DG Home) and the EEAS**³⁶⁸, and adopted by the Council as the successor to the *Joint Way Forward on migration issues between Afghanistan and the EU* (JFW)³⁶⁹. The JDMC, in its introductory part, states explicitly that the EU-Afghanistan migration cooperation is focused on managing migration flows from (and to) Afghanistan, including the prevention of irregular migration and the return of irregular migrants. As set out further below in the relevant sub-sections, the JDMC aims to effect this through various means, including readmission of irregular migrants, information and awareness raising, and data sharing. The JDMC has been signed for an indefinite period³⁷⁰, and its implementation is monitored by the Joint Working Group³⁷¹.

EU cooperation on migration management with Afghanistan is not solely bilateral in nature. The EU also cooperates with Afghanistan and its neighbouring countries (including Pakistan and Iraq) through the **Budapest Process**³⁷², as well as under the auspice of the **Support Platform for the Solutions Strategy for Afghan Refugees (SSAR)**³⁷³. The EU also cooperates with Serbia (and other Western Balkan States) and Turkey on *inter alia* migration-related issues through the **Prague Process**³⁷⁴. The Budapest Process is an interregional dialogue on migration stretching from Europe to the Silk Routes Region, run or implemented by the **International Centre for Migration Policy Development (ICMPD)**, that provides a platform for Senior Officials' dialogue and operational cooperation aimed at strengthen[ing] regional dialogue and cooperation on migration and mobility and to promote safe, orderly and regular migration³⁷⁵.

The **SSAR Support Platform**, set up by Afghanistan, Iran and Pakistan, aimed to build a framework for host countries, countries of origin and interested third parties to cooperate and provide support for the humanitarian response to Afghan protection seekers³⁷⁶. As of

³⁶⁸ Cf. European Commission (2021i), 'Commission's request for endorsement of the Joint Declaration on Migration Cooperation between Afghanistan and the EU, Council Document No. 5223/21 LIMITE, Brussels, 13 January, <https://www.statewatch.org/media/1693/eu-council-com-call-approval-afghanistan-deportation-agreement-5223-21.pdf>, p. 2.

³⁶⁹ Cf. ECRE (2021b), 'The JDMC: Deporting People to the World's Least Peaceful Country', ECRE Policy Note #35, European Council on Refugees and Exiles (ECRE), Brussels, <https://ecre.org/wp-content/uploads/2021/03/Policy-Note-35.pdf>, p. 1. The Joint Way Forward on migration issues between Afghanistan and the EU (text available at <https://www.asyl.at/files/93/18-eu-afghanistan-joint-way-forward-on-migration-issues.pdf>) was adopted in 2016, setting out a number of areas of migration in which the EU and Afghanistan would cooperate, including readmission of irregularly staying nationals (and facilitation of the return process), support for return and reintegration, etc.

³⁷⁰ ECRE (2021b), op. cit., p. 4; European Commission (2021i), op. cit., p. 4.

³⁷¹ European Commission (2021h), op. cit., p. 10.

³⁷² <https://www.budapestprocess.org/>.

³⁷³ <https://ssar-platform.org/>.

³⁷⁴ <https://www.pragueprocess.eu/en/>.

³⁷⁵ 'About the Dialogue', Budapest Process website, <https://www.budapestprocess.org/about-us/who-we-are/about-the-dialogue>.

³⁷⁶ 'Support Platform for the Solutions Strategy for Afghan Refugees', SSAR Support Platform website, <https://ssar-platform.org/support-platform/>.

2020, the EU has chaired the Core Group for the SSAR Support Platform, with the EU being represented at the SSAR Support Platform Core Group by **the EEAS, DG DEVCO/INTPA and DG ECHO of the European Commission**³⁷⁷.

In the framework of the Budapest Process, various projects related to migration management have been funded in Afghanistan. Under the *Improving Migration Management in the Silk Routes Countries* project (also referred to as the Silk Routes project)³⁷⁸ and the Integrated Border Management in the Silk Routes Countries project (IBM Silk Routes project)³⁷⁹ – both funded by the European Commission under the MFF 2014-2020³⁸⁰, the EU employs **funding instruments** to support a variety of migration-related activities in Afghanistan, implemented by the International Centre for Migration Policy Development (ICMPD). This funding has led to:

- The establishment of a *Migrant Resource Centre* (MRC) in Kabul. The (Kabul) MRC aims to provide prospective emigrants from Afghanistan with information and services to help them make informed decisions³⁸¹, including on return preparedness to migrants during their pre-departure phase of going abroad for work. (as part of a pre-departure training and orientation for departing migrants)³⁸²;
- The development of the *Comprehensive Migration Policy for Afghanistan* (CMP) by the Afghan government, defining policy measures across four main areas, namely

³⁷⁷ 'Core Group', SSAR Support Platform website, <https://ssar-platform.org/core-group/>.

³⁷⁸ See 'Improving Migration management', Budapest Process website, <https://www.budapestprocess.org/migration-in-the-silk-routes/148-improving-migration-management>.

³⁷⁹ 'IBM in the Silk Routes Countries', Budapest Process website, <https://www.budapestprocess.org/integrated-border-management-in-the-silk-routes/165-integrated-border-management-in-the-silk-routes-countries>.

³⁸⁰ Commission Services (2021c), 'Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Action Plan responding to the events in Afghanistan', Council Document 10472/1/21 REV 1 LIMITE, Brussels, 10 September, <https://www.statewatch.org/media/2726/eu-council-afghanistan-com-draft-action-plan-migration-10472-1-21-rev1.pdf>, p. 6. Cf. [https://ec.europa.eu/transparency/documents-register/api/files/C\(2019\)5151_1/de00000000098635?rendition=false](https://ec.europa.eu/transparency/documents-register/api/files/C(2019)5151_1/de00000000098635?rendition=false).

³⁸¹ See 'Migrant Resource Centres', Budapest Process website, <https://www.budapestprocess.org/migration-in-the-silk-routes/migrant-resource-centre>.

³⁸² ICMPD (2020a), 'Budapest Process. Return and Reintegration: what works, what doesn't – A few examples. Expert Thematic Meeting Return and Reintegration held on 3-4 March 2020 in Budapest', Background Document, International Centre for Migration Policy Development (ICMPD), Vienna, <https://www.budapestprocess.org/resources/meeting-documents/category/3-general-documents-and-publications>, pp. 5-6.

return and reintegration, regular migration, prevention of irregular migration, and migration and development³⁸³, under the *Silk Routes Facility*³⁸⁴;

- Capacity building of Afghan authorities in border management, as part of the *Integrated Border Management in the Silk Routes Countries* project, including the development of two inter-agency IBM coordination bodies³⁸⁵, as well as operational support for border agencies, such as through document security trainings in 2019 and 2020 that provided *inter alia* Afghan border guards with the knowledge and practical experience in the context of detection of forged documents and passenger profiling³⁸⁶.

Other projects funded by the EU, such as the **EU Border Management Northern Afghanistan (EU BOMNAF) project, funded by the European Commission (DG DEVCO/INTPA**, under the Development Cooperation Instrument, DCI)³⁸⁷, have contributed to increasing border management capacity at the northern borders of Afghanistan³⁸⁸, e.g. through training of Afghan Border Police at Afghanistan's northern borders³⁸⁹.

In the context of leaving Afghanistan, it is appropriate here to observe the efforts on the part of the EU and its Member States to **evacuate persons out of Afghanistan**, particularly in mid-August 2021. According to ECRE, EU countries had evacuated over 28 000 Afghan nationals as of December 2021³⁹⁰. However, these evacuation flights were organised by individual Member States, with ECRE citing **a clear lack of an EU approach**³⁹¹. Moreover, Afghan evacuees face different treatment after arrival in Europe depending on the country of arrival, with some Member States granting protection status

³⁸³ Council of the EU (2021d), 'Implementing the Pact – strengthening comprehensive migration partnerships with priority countries. Afghanistan: State of Play', 8953/21 (LIMITE), Brussels, 25 May, <https://www.statewatch.org/media/2675/eu-council-afghanistan-implementing-pact-discussion-paper-8953-21.pdf>, p. 3; ICMPD (2019a), 'Comprehensive Migration Policy for Afghanistan Presented', Budapest Process News, 25 June, <https://www.budapestprocess.org/about/news/161-comprehensive-migration-policy-presented-in-kabul-afghanistan>.

³⁸⁴ ICMPD (2020b), 'Improving Migration Management in the Silk Routes. Activities of the Silk Routes Facility Factsheet', International Centre for Migration Policy Development (ICMPD), Vienna, November, <https://www.budapestprocess.org/migration-in-the-silk-routes/149-silk-routes-facility>.

³⁸⁵ ICMPD, 'Integrated Border Management in the Silk Routes today', <https://www.budapestprocess.org/resources/reports-analyses-guidance>, p. 2.

³⁸⁶ Ibid.

³⁸⁷ Cf. <http://www.secheresse.info/spip.php?article39086>. Cf. UNDP Tajikistan, 'Annual Project Report (July-December 2015). United Nations Development Programme, Tajikistan, Border Management in Northern Afghanistan (EU-BOMNAF)', 13 July 2016, http://www.tj.undp.org/content/dam/tajikistan/docs/projects/democratic_governance/BOMNAF/2015_Annual_Report_BOMNAF_II.pdf, pp. 6-7.

³⁸⁸ European Commission (2021f), op. cit., p. 3.

³⁸⁹ Cf. UNDP Tajikistan (2016), op. cit., p. 11.

³⁹⁰ ECRE (2021c), 'EU Support to Afghanistan: Scoring High on Humanitarian Assistance and Low on Protection in Europe?', ECRE Policy Note # 39, European Council on Refugees and Exiles (ECRE), Brussels, <https://ecre.org/wp-content/uploads/2021/12/Policy-Note-39.pdf>.

³⁹¹ Ibid.

automatically, while others require Afghan evacuees to apply for asylum through the regular channels, or issuing residence titles in lieu of protection status³⁹².

Afghan nationals have not traditionally benefited from resettlement opportunities, which have ranged from 358 persons in 2018, 585 in 2019 and 124 in 2020³⁹³. This has continued after the overthrow of the constitutional government by the Taliban on 15 August 2021. Resettlement from the country and neighbouring states has continued to be strikingly low, despite the unsuccessful attempts to coordinate EU efforts by the European Commission's DG HOME through a High-Level Forum on providing protection to Afghans at risk on 7 October 2021.

4.2. Enforcing transit

The EU has adopted many different types of instruments to address the issue of migration and mobility management with third countries. These instruments, many of them through funding, aim at improving the capacity of countries neighbouring Afghanistan and other transit countries to host Afghan protection seekers or otherwise deter further movement of persons towards the EU.

In order to have a more comprehensive picture of the impact of EU instruments which are designed with the big narrative of migratory movements of Afghan nationals towards the European Union in mind, it is also necessary to examine the EU instruments focused on countries which are often officially framed or presented as transit. For Afghan asylum-seekers, these are usually its neighbouring countries (including Pakistan, Bangladesh, Iraq and Iran)³⁹⁴, as well as specific third countries neighbouring the EU external borders (e.g., Turkey). For the purpose of this overview, an examination will be done for EU instruments targeting Pakistan, Iran, Iraq (*Section 4.2.1*) and Turkey (*Section 4.2.2*).

4.2.1. EU instruments affecting movement from Afghanistan to Pakistan, Iran and Iraq

Cooperation with Afghanistan's neighbours in areas of migration management and hosting of Afghan refugees in the region is not novel. According to the (draft) **Action Plan on Afghanistan**³⁹⁵, an EU **policy instrument** drafted by **the European Commission**

³⁹² Ibid.; see also ECRE (2021d), 'Afghans Seeking Protection in Europe. ECRE's compilation of information on evacuations, pathways to protection and access to asylum in Europe for Afghans since August 2021', European Council on Refugees and Exiles (ECRE), December, https://ecre.org/wp-content/uploads/2021/12/Evacuations-pathways-to-protection-and-access-to-asylum-for-Afghans-in-Europe_FINAL.pdf.

³⁹³ According to IOM data. Ibid., p. 3.

³⁹⁴ Cf. European Commission, 'Silk route countries', website of the European Commission, DG Migration and Home Affairs, https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/silk-route-countries_en.

³⁹⁵ See Commission Services (2021d), 'Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Action Plan: Afghanistan', Council Document 10472/2/21 REV 2 LIMITE, Brussels, 8 October,

(Commission Services), the EU aims to further increase efforts to convene a regional political platform of cooperation with neighbouring countries of Afghanistan, in order to address issues of *inter alia* management of migration flows from Afghanistan³⁹⁶. Moreover, the EU engages itself to increase its political dialogue with individual neighbouring countries on migration management³⁹⁷. The Council of the EU, in its Council Conclusions of 15 September 2021, called for, as a matter of high priority, the initiation of a regional political platform of cooperation (a **political instrument**) with Afghanistan's direct neighbours³⁹⁸, with the initiation thereof entrusted to **the EEAS**³⁹⁹. The aim of the regional platform is to enhance cooperation to prevent negative spill-over effects in Afghanistan's neighbourhood [...] and for humanitarian and protection needs⁴⁰⁰.

Cooperation on migration management with Afghanistan's neighbours, including Pakistan and Iraq⁴⁰¹, takes place *inter alia* within the context of **the Budapest Process**. As previously noted, the Budapest Process is an interregional dialogue on migration⁴⁰², and can therefore be seen as a **political instrument**, involving the EU, the ICMPD, as well as Afghanistan, Pakistan and Iraq (among others). In its capacity as a platform for **migration dialogue** (a **political instrument**), the highest level of political dialogue at the Budapest Process sees the ministers for migration-related matters of states party to the Budapest Process come together, with the European Commission represented by the **Commissioner responsible for migration matters**⁴⁰³. The annual Senior Officials Meeting sees senior officials of member countries come together with representatives from the EU (European Commission, EEAS, EASO, Frontex) and international partners and actors (ILO, IOM, UNHCR, UNODC)⁴⁰⁴.

Through the Budapest Process, a variety of actions and projects have been initiated, including the Silk Routes and IBM Silk Routes projects mentioned above. The Silk Routes project consists of four components addressing different aspects of migration

<https://www.statewatch.org/media/2899/eu-council-migration-action-plan-afghanistan-10472-21-rev2.pdf>.

³⁹⁶ Ibid., p. 2.

³⁹⁷ Ibid., p. 4.

³⁹⁸ Council of the EU (2021c), op. cit.

³⁹⁹ See Borrell, J., 'Afghanistan: Press statement by High Representative Josep Borrell at the informal meeting of Foreign Affairs Ministers (Gymnich)', European External Action Service (EEAS), Brdo pri Kranju, 3 September 2021, <https://eeas.europa.eu/headquarters/headquarters-homepage/103712/afghanistan-press-statement-high-representative-josep-borrell-informal-meeting-foreign-en>.

⁴⁰⁰ Ibid., para. 14.

⁴⁰¹ Iran participates in the Budapest Process as an observer; see 'Where we work', Budapest Process website, <https://www.budapestprocess.org/migration-in-the-silk-routes/where-we-work>, under Iran.

⁴⁰² 'About the dialogue', Budapest Process website, <https://www.budapestprocess.org/about-us/who-we-are/about-the-dialogue>.

⁴⁰³ Cf. ICMPD (2019b), 'The Istanbul Commitments on the Silk Routes Partnership for Migration and its Call for Action, A five year plan', Declaration at the Budapest Process 6th Ministerial Conference, 19-20 February 2019, Istanbul, 2019, <https://www.budapestprocess.org/resources/ministerial-declarations>.

⁴⁰⁴ Cf. ICMPD (2020c), 'Summary of Budapest Process 30th Senior Officials Meeting', International Centre for Migration Policy Development (ICMPD), Vienna, November, 2 December, <https://www.budapestprocess.org/resources/meeting-documents/category/4-som-conclusions>.

management (**funded** by the EU (European Commission) through the **MFF 2014-2020, Heading 4: Global Europe**): the *Silk Routes Facility*, the *Migrant Resource Centres*, *MIGRA.P*, and *RELEC*⁴⁰⁵. The **Silk Routes Facility**, described as a capacity building instrument to support measures enhancing migration management⁴⁰⁶, has, for example, provided technical and expert support to Pakistan in building capacity of its Federal Investigative Agency and its Academy through trainings and equipment provision⁴⁰⁷. *RELEC*⁴⁰⁸, an initiative within the Silk Routes project, aims to enhance cooperation on tackling irregular migration, human smuggling and human trafficking, through the exchange of information and statistical data between law enforcement authorities of Silk Routes countries and the EU (and participating Member States) on irregular migration and human smuggling and trafficking⁴⁰⁹.

The **Integrated Border Management in the Silk Routes** (IBM Silk Routes) project, **funded** by the European Commission under the MFF 2014-2020⁴¹⁰, seeks to improve cooperation on border management in *inter alia* Afghanistan, Iraq and Pakistan⁴¹¹, by supporting the application of the integrated border management concept in these countries⁴¹². Examples of activities funded or effected under the IBM Silk Routes project

⁴⁰⁵ The *Migrant Resource Centres* component of the Silk Routes project provide support to Silk Route countries in establishing centres to provide prospective migrant with information and raise awareness on the dangers of irregular migration and avenues of legal migration (see ICMPD (2020d), 'Improving Migration Management in the Silk Routes. Activities of the Migrant Resource Centres Factsheet', International Centre for Migration Policy Development (ICMPD), Vienna, November, <https://www.budapestprocess.org/migration-in-the-silk-routes/migrant-resource-centre>), while *MIGRA.P* (which stands for 'Protecting the rights of migrant workers') supports governments of Silk Routes countries in ensuring more and better protection of migrant workers (see ICMPD (2020e), 'Improving Migration Management in the Silk Routes. MIGRA.P Activities Factsheet', International Centre for Migration Policy Development (ICMPD), Vienna, November, available at <https://www.budapestprocess.org/migration-in-the-silk-routes/151-migrant-protection>).

⁴⁰⁶ Cf. ICMPD (2020b), op. cit.

⁴⁰⁷ Ibid., p. 3.

⁴⁰⁸ *RELEC* stand for Regional Law Enforcement Cooperation on irregular migration, trafficking in human beings and smuggling of migrants.

⁴⁰⁹ ICMPD (2020f), 'Improving Migration Management in the Silk Routes. RELEC Factsheet', International Centre for Migration Policy Development (ICMPD), Vienna, November, available at <https://www.budapestprocess.org/migration-in-the-silk-routes/152-regional-law-enforcement>.

⁴¹⁰ Commission Services (2021d), op. cit., p. 8.

⁴¹¹ See ICMPD, 'Integrated Border Management in the Silk Routes today', op. cit.

⁴¹² The concept of integrated border management (IBM), originally developed within the context of the EU's external border management, is also used in the context of the IBM in the Silk Routes project. It is described as a concept that 'calls for cooperation and coordination between all actors involved in border management at the national and international level', comprised of a modular structure broken down into three (3) IBM pillars (intra-service, inter-agency and international cooperation), six (6) main fields (legal and regulatory framework, institutional framework, procedures, human resources and training, communication and information exchange, and infrastructure and equipment) and four (4) spatial tiers of control access (measures within the country, border control measures conducted in the border region, cooperation with neighbouring countries, and measures in third countries); see 'Integrated Border management', Budapest Process Website, <https://www.budapestprocess.org/integrated-border-management-in-the-silk-routes/164-integrated-border-management>.

include training of Afghan, Iraqi and Pakistani border control officers in detecting forged documents and profiling passengers in 2019 and 2020, as well as supporting training activities and providing training equipment for female border officers of the Pakistani Federal Investigation Agency⁴¹³.

The EU also cooperates with Afghanistan's neighbours, including Pakistan and Iran, through the previously mentioned **SSAR Support Platform**. In 2012, Afghanistan, Pakistan and Iran, together with UNHCR, concluded the Solutions Strategy for Afghan Refugees to Support Voluntary Repatriation, Sustainable Reintegration and Assistance to Host Countries (SSAR), serving as a platform for international solidarity and collective responsibility for durable solutions in refugee protection⁴¹⁴. Under the United Nations Global Compact on Refugees, Afghanistan, Iran and Pakistan established a **Support Platform for the Solutions Strategy for Afghan Refugees (SSAR)**, in order to draw on stronger international political and financial commitments to achieve solutions for Afghan refugees⁴¹⁵. As part of the SSAR Support Platform, a Core Group – comprised of States and institutions committed to demonstrating solidarity with the Afghan refugee situation and intending to make concrete commitments to the initiative and its aims – was formed in 2020, chaired by the European Union (and represented in the Core Group by the **EEAS, DG INTPA and DG ECHO**)⁴¹⁶.

The EU's role as Chair of the SSAR Core Group has been highlighted in various EU policy documents as an important tool for the EU's endeavours to managing migration and forced displacement in Afghanistan⁴¹⁷. The Terms of Reference of the SSAR Core Group notes that the core group is established to bring together a group of states to mobilise contributions and support, with States party to the Core Group committing to engaging with the SSAR Support Platform on *inter alia* mobilising diverse stakeholders in support of SSAR's operational priorities, as well as hosting technical-level meeting to review the implementation of progress under SSAR and co-hosting the annual High-Level meetings of the SSAR Support Platform⁴¹⁸. As such, the SSAR Platform (and the EU's chairing of the core group) can be considered as similar to a high-level migration cooperation dialogue, and therefore a form of a **political instrument**.

Regionally, the **European Commission (DG DEVCO/INTPA)** is **funding**, through the **Development Cooperation Instrument (DCI)**⁴¹⁹ under MFF 2014-2020 and to the tune

⁴¹³ ICMPD, 'Integrated Border Management in the Silk Routes today', op. cit., p. 2.

⁴¹⁴ Council of the EU (2021d), op. cit., p. 5.

⁴¹⁵ 'Support Platform for the Solutions Strategy for Afghan Refugees', SSAR Support Platform website, <https://ssar-platform.org/support-platform/>.

⁴¹⁶ 'Core Group', SSAR Support Platform website, <https://ssar-platform.org/core-group/>.

⁴¹⁷ See Commission Services (2021d), op. cit., p. 2.

⁴¹⁸ 'Core Group of the Solutions Strategy for Afghan Refugees Support Platform. Terms of Reference', United Nations High Commissioner for Refugees (UNHCR), Geneva, 18 February 2020, <https://data2.unhcr.org/en/documents/details/75620>.

⁴¹⁹ On the designation of the European Commission's Directorate-General for International Partnerships (DG INTPA, formerly DG International Cooperation and Development, DG DEVCO) as the lead DG in charge of the DCI, see e.g. European Commission (2019b), op. cit., p. 112.

of EUR 12 million⁴²⁰, the *Global Action against Trafficking in Persons and Smuggling of Migrants – Asia and the Middle East* (GLO.ACT Asia and the Middle East) initiative⁴²¹. Implemented by **the UNODC and the IOM**, the GLO.ACT Asia and Middle East initiative supports actions and projects in Afghanistan, Pakistan, Iran and Iraq to develop and implement more effective national and international responses to trafficking in persons and migrant smuggling, focusing on five pillars, including on strategy and policy development, legislative assistance, and capacity building⁴²².

In Pakistan, the GLO.ACT Asia and Middle East initiative led to a set of trainings for Pakistani policy and federal officers to standardise data collection on human trafficking and migrant smuggling⁴²³. In Iraq, GLO.ACT Asia and Middle East supported the review and amendment of Iraq's legislation on trafficking in persons through a workshop, where the Iraqi legislation was presented and recommendations for action were issued⁴²⁴. An agreement was reached in 2020 (between UNODC and Iran) to launch GLO.ACT in Iran, with support primarily envisaged in the form of capacity building and promoting bilateral and regional cooperation⁴²⁵. Moreover, according to the EU, GLO.ACT Asia and the Middle East has contributed to funding operational actions in supporting the investigation and prosecution of 184 migrant smuggling cases, leading to 80 investigations and 68 court cases in the 'Silk Routes' countries⁴²⁶.

The importance given to migration management in the EU's funding of projects and activities the region is further reflected in the **Regional Multiannual Indicative Programme (RMIP) 2021-2027 for Asia and the Pacific** (hereinafter also Asia/Pacific RMIP 2021-2027)⁴²⁷, setting out the priority areas for funding cooperation in the Asia-Pacific region by the **European Commission** (more specifically, **DG DEVCO/INTPA**) under the EU's **MFF 2021-2027 Global Europe** heading (more specifically, the Global

⁴²⁰ European Commission (2020d), 'The Global Action against Trafficking in Persons and the Smuggling of Migrants – Asia and the Middle East', European Commission, DG International Partnerships projects, 29 June, https://ec.europa.eu/international-partnerships/projects/global-action-against-trafficking-persons-and-smuggling-migrants-asia-and-middle-east_en.

⁴²¹ See UNODC, 'GLO.ACT Asia and the Middle East. Overview', <https://www.unodc.org/unodc/en/human-trafficking/glo-act2/overview.html>; and IOM, 'GLO.ACT Asia and the Middle East', <https://www.iom.int/gloact-asia-and-middle-east>.

⁴²² UNODC, 'GLO.ACT Objectives', <https://www.unodc.org/unodc/en/human-trafficking/glo-act2/objectives.html>.

⁴²³ UNODC, 'GLO.ACT Newsletter Issue #1', United Nations Office on Drugs and Crime (UNODC), Vienna, 2020, <https://joom.ag/guvC>, pp. 19-20.

⁴²⁴ Ibid., pp. 17-18.

⁴²⁵ Ibid., pp. 15-16.

⁴²⁶ European Commission (2021j), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed action plan against migrant smuggling (2021-2025)', COM(2021) 591 final, Brussels, 29 September, https://ec.europa.eu/home-affairs/system/files/2021-09/COM-2021-591_en_0.pdf, pp. 10-11.

⁴²⁷ European Commission (2021k), 'Asia and the Pacific. Regional Multi-annual Indicative Programme 2021-2027', Annex to Commission Implementing Decision adopting a multiannual indicative programme for the Asia Pacific region for the period 2021-2027, C(2021) 9251, Brussels, 15 December, https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-9251-asia-pacific-annex_en.pdf.

Europe: Neighbourhood, Development and International Cooperation Instrument (NDICI))⁴²⁸.

The Asia/Pacific RMIP 2021-2027 broadly sets out the EU's priorities in regional cooperation with the Asia-Pacific region. Not only is migration one of the three priority areas of focus in the RMIP 2021-2027 (Priority Area 3 – Migration, Forced Displacement and Mobility), with a total of EUR 422 million allocated to it⁴²⁹, it also permeates the other priority areas. For example, under Priority Area 1 (Regional Integration and Cooperation), the focus of building resilience in Central Asia explicitly refers to migration, regional refugee protection and reception, integrated border management, combating irregular migration and cooperation on return and readmission as points of focus for regional peace and stability⁴³⁰. Linked to the EU's Asia/Pacific RMIP 2021-2027 is *inter alia* a Team Europe Initiative⁴³¹, with an indicative EU contribution of EUR 79 million, to address the Afghan displacement situation, focusing on support for dialogue and regional reception of Afghan protection seekers⁴³².

EU **financial instruments** for migration-related activities in the region can also be seen in the Special Measure on **'Addressing migration and forced displacement challenges in Asia and the Middle East: a comprehensive regional EU response'**⁴³³. Funded by the **European Commission (DG DEVCO/INTPA)** through its **Development Cooperation Instrument** to the tune of EUR 215.7 million, and with implementation in the hands of the EU and a variety of international organisations⁴³⁴, the Special Measure aims to fund activities designed to enhance resilience and self-reliance of protection seekers, returnees and host communities, to improve national migration management

⁴²⁸ On the link between the Asia-Pacific RMIP 2021-2027 and the EU's MFF 2021-2027, Global Europe heading, see European Commission (2021m), 'Global Europe: the European Union sets out priority areas for cooperation with partner countries and regions around the world', Commission Press Release IP/21/7021, Brussels, 21 December, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7021.

⁴²⁹ See *ibid.*, p. 40.

⁴³⁰ *Ibid.*, pp. 5, 14-15.

⁴³¹ For an overview of what a Team Europe Initiative (TEI) entails, see CONCORD, 'Team Europe Initiatives (TEI) – first insights and questions to Member States' agencies', CONCORD, Brussels, September 2021, <https://concordeurope.org/resource/team-europe-initiatives-first-insights-and-questions-to-member-states-agencies/>.

⁴³² See European Commission (2021k), *op. cit.*, pp. 33-34.

⁴³³ European Commission (2017g), Commission Implementing Decision on the Special Measure 2017 and 2018 on 'Addressing Migration and Forced Displacement in Asia and the Middle East: A comprehensive regional EU response', C(2017)6190, Brussels, 18 September. See also European Commission (2017h), Annex to the Commission Implementing Decision on the Special Measure 2017 and 2018 on 'Addressing Migration and Forced Displacement in Asia and the Middle East: A comprehensive regional EU response', https://ec.europa.eu/international-partnerships/system/files/aap-financing-asia-middle-east-annex-amendment-c-2020-1872_en.pdf.

⁴³⁴ Including ICMPD, IOM, ILO, UNESCO, UNHCR, UNICEF, UNODC and the World Bank; see European Commission (2017h), *op. cit.*, p. 2.

systems, policies and implementation, and to support results from EU migration dialogues with Afghanistan, Pakistan, Bangladesh, Iran and Iraq, among others⁴³⁵.

Following the 2021 Taliban governmental crisis in Afghanistan, European Commission President Ursula von der Leyen announced a **support package** of around EUR 1 billion for Afghan people and neighbouring countries⁴³⁶. Concretely, the EU adopted a **Special Measure in favour of Afghanistan for 2021**⁴³⁷ (channelled through international and non-governmental organisations and intended to directly benefit Afghans) and a **Special Measure for a regional response to the Afghanistan refugee and displacement crisis for 2021** (which includes a component on supporting Afghan refugees and displaced Afghans in Pakistan, Iran, Central Asia, and Afghanistan)⁴³⁸. The special measures are funded under **the Neighbourhood, Development and International Cooperation Instrument (NDICI-Global Europe)** to the tune of EUR 53 million and EUR 79 million respectively⁴³⁹.

On migration management cooperation, various EU actors engage with the countries neighbouring Afghanistan (Pakistan and Iraq, and to a more limited extent, Iran). For Pakistan, the EU-Pakistan cooperation is firstly framed by the **EU-Pakistan Cooperation Agreement**⁴⁴⁰. A **legal instrument** in the form of an international agreement adopted in 2004, the EU-Pakistan Cooperation Agreement sets out the principles and areas of cooperation between the EU and Pakistan, ranging from trade to development cooperation, environmental issues, economic and industrial cooperation, etc. It can be noted, however, that the agreement does not expressly mention migration cooperation, yet other EU instruments (detailed below) often refer to the EU-Pakistan Cooperation Agreement as the basis for further EU-Pakistan migration-related cooperation.

EU-Pakistan bilateral cooperation is further shaped by **policy instruments** concluded between both parties, the latest of which is the **EU-Pakistan Strategic Engagement Plan (SEP)**⁴⁴¹. Concluded in 2019 following the expiry of the previous (5-year) Engagement Plan, the SEP is composed of a variety of areas in which both the EU and Pakistan agree to strengthen their cooperation. In respect of migration and mobility, the SEP specifically contains references to the effective implementation of the **EU-Pakistan readmission**

⁴³⁵ See *ibid.*, p. 36.

⁴³⁶ European Commission (2021g), *op. cit.*

⁴³⁷ European Commission (2021n), Commission Implementing Decision on the financing of a special measure in favour of Afghanistan for 2021, C(2021) 9830 final, Brussels, 20 December 2021.

⁴³⁸ European Commission (2021o), Commission Implementing Decision on the financing of the Special Measure for a regional response to the Afghanistan refugee and displacement crisis for 2021, C(2021) 9312 final, Brussels, 16 December 2021.

⁴³⁹ Presumably, the Special Measures will be managed by DG INTPA (as the overall Directorate-General responsible for the NDICI-Global Europe).

⁴⁴⁰ See Council Decision of 29 April 2004 concerning the conclusion of the Cooperation Agreement between the European Community and the Islamic Republic of Pakistan, *OJ L* 378/22, 23.12.2004, pp. 23-26.

⁴⁴¹ Council of the EU (2021e), 'EU-Pakistan Strategic Engagement Plan', Council Document No. 7857/19, Brussels, 28 March, <https://data.consilium.europa.eu/doc/document/ST-7857-2019-INIT/en/pdf>.

agreement⁴⁴², cooperation in stemming irregular migration and tackling its challenges, broader dialogue on migration and mobility, as well as support for refugees and host communities in Pakistan⁴⁴³.

The EU further engages with Pakistan on issues of migration (management) through the use of **financial instruments**. Attention can be drawn, for example, to the priorities set for funding of projects and activities in Pakistan by the European Commission under **MFF 2021-2027 (Global Europe heading)**⁴⁴⁴ in the *Multiannual Indicative Programme (MIP) 2021-2027* for Pakistan⁴⁴⁵. In 2021-2027, the MIP for Pakistan will focus on three key priority areas: Green Inclusive Growth, Human Capital, and Governance, including the Rule of Law and Human Rights⁴⁴⁶. Importantly, the MIP considers the topic of migration and forced displacement as a cross-cutting theme, stating explicitly that: ‘migration and forced displacement will be mainstreamed throughout all priority areas of the MIP’⁴⁴⁷. Specific objectives to be funded as pertains to migration include Objective 6.1 – Improved access to skills and jobs for returning and prospective migrants in the context of an improved migration management and Objective 9.1 – Improved cooperation on, and better functioning of, migration management⁴⁴⁸.

The EU further contributed towards funding for migration management-related initiatives in Pakistan through the **European Readmission Capacity Building Facility (EURCAP)**⁴⁴⁹. Funded by the **European Commission (DG HOME) under the Asylum, Migration and Integration (AMIF) fund** and implemented by **IOM**, the EURCAP Facility earmarks EUR 38.5 million with the aim to contribute to effective and efficient cooperation in migration governance between the EU and partner countries, with a focus primarily on strengthening partner countries’ capacities to manage returns and cooperate with the EU on readmission and to prevent irregular migration⁴⁵⁰. Under EURCAP, a project was funded in *inter alia* Pakistan in order to develop a Readmission Case Management System (RCMS), a **technological instrument** designed to automate readmission processes and procedures, integrate stakeholders [...], reduce overall case-

⁴⁴² The Readmission Agreement concluded between Pakistan and the EU will be addressed further below in the section on the EU instruments concerning expulsion.

⁴⁴³ Council of the EU (2021e), op. cit., p. 6-7.

⁴⁴⁴ On the link between the MIP 2021-2027 Pakistan and the EU’s MFF 2021-2027, Global Europe heading, see European Commission (2021r), op. cit.

⁴⁴⁵ European Commission (2021p), ‘Islamic Republic of Pakistan. Multi-annual Indicative Programme 2021-2027’, https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-8992-pakistan-annex_en.pdf.

⁴⁴⁶ Ibid., pp. 12-16.

⁴⁴⁷ Ibid., p. 16.

⁴⁴⁸ Ibid., pp. 28-29

⁴⁴⁹ See IOM, ‘European Readmission Capacity Building Facility – EURCAP’, <https://eea.iom.int/european-readmission-capacity-building-facility-eurcap>.

⁴⁵⁰ Ibid.

processing time, and provide up-to-date statistics and information⁴⁵¹. The Pakistani RCMS was developed by the semi-governmental Pakistan National Database and Registration Authority (NADRA), with Belgium, Germany, Greece and France involved in pilot testing the system during Phase I. Under Phase II, access to Pakistan's RCMS will be extended to other (interested) EU Member States⁴⁵².

Similar to Pakistan, the EU's engagement and cooperation with Iraq is framed by an international **legal instrument**, namely **the EU-Iraq Partnership and Cooperation Agreement (PCA)**⁴⁵³. Signed in 2012, but only approved in 2018⁴⁵⁴, the EU-Iraq PCA broadly sets out the areas of cooperation between the EU and Iraq. Unlike with Pakistan, the EU-Iraq PCA explicitly contains a provision on migration cooperation (Article 105). This provision on EU-Iraq migration cooperation not only contains a *readmission clause* (Article 105(3) to (5) EU-Iraq PCA), but also lists a number of topics of focus, including addressing the root causes of migration, migration and development, establishing an effective and preventative policy against illegal migration, smuggling of migrants and trafficking in human beings, as well as border management and control (Article 105(2) EU-Iraq PCA).

EU-Iraq cooperation on migration-related matters is moreover framed (from the EU's side) by its **political instruments**, including the **EU Strategy for Iraq (2018)**⁴⁵⁵. Specifically on migration, the EU strategy for Iraq calls for the establishment of a migration dialogue with Iraq in order to *inter alia* assist Iraqi authorities in migration management, including on border management, organising information campaigns on risks of irregular migration and fighting against migrant smuggling and human trafficking⁴⁵⁶, as well as developing a tailor-made approach to managing migration to that effect⁴⁵⁷.

Despite the above-mentioned framework for EU-Iraq migration cooperation, little to no further EU instruments to this effect have been identified. An examination of the **EU's Multiannual Indicative Programme for Iraq (2021-2027)**⁴⁵⁸ shows that the EU's

⁴⁵¹ ECA (2021), op. cit., para. 94-95; see also IOM (2020b), 'EURCAP: Building Capacity for Return Management', IOM Factsheet, International Organization for Migration (IOM), Brussels, IOM, https://ec.europa.eu/home-affairs/system/files/2021-10/EURCAP-Facility-Brochure-2020_en.pdf.

⁴⁵² See IOM, 'Pakistan', <https://eea.iom.int/pakistan>.

⁴⁵³ Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, OJ L 204, 31.7.2012, pp. 20-130.

⁴⁵⁴ See Council Decision (EU) 2018/1107 of 20 July 2018 on the conclusion of a Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, ST/10209/2012/REV/1, OJ L 203, 10.8.2018, p. 1.

⁴⁵⁵ European Commission (2018c), Joint Communication to the European Parliament and the Council, 'Elements for an EU strategy for Iraq', JOIN(2018) 1 final, Brussels, 8 January.

⁴⁵⁶ Ibid., p. 6.

⁴⁵⁷ Ibid., pp. 13-14.

⁴⁵⁸ European Commission (2021q), 'Republic of Iraq: Multiannual Indicative Programme 2021-2027', annex to Commission Implementing Decision adopting a multiannual indicative programme for Iraq for the period 2021-2027, C(2021)9133, Brussels, 15 December, https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-9133-iraq-annex_en.pdf.

priorities towards funding instruments targeting Iraq for the period 2021-2027 are focused on crisis management and state-building, as exemplified by the MIP's focus on job creation, human development and participatory governance and democracy⁴⁵⁹. The sole EU-Iraq migration-related instrument observed is the **political instrument of Informal Migration Dialogues**. To date, four such informal dialogues have been held between the EU and Iraq, with discussions on issues of irregular migration and return, migration governance and migration cooperation at high political levels⁴⁶⁰. Moreover, the EU has expressed in various policy documents that cooperation with Iraq on migration-related matters, notably non-voluntary returns and readmission, has been 'unsatisfactory'⁴⁶¹.

EU-Iran cooperation, particularly migration cooperation, is even more limited. The main **political/legal instrument** setting the framework for the EU's cooperation with Iran is **the Joint Comprehensive Plan of Action (JCPOA, also referred to as the Iran Nuclear Deal)**⁴⁶². The JCPOA, in line with its focus on nuclear disarmament, is extremely restrictive in terms of other areas of cooperation, and migration-related issues have not been included therein. The **Joint Statement** by the EU HR/VP and the Iranian MFA in 2016 (a **policy instrument**) set out the broader goals and areas of EU-Iran cooperation. On migration cooperation, the joint statement notes both the EU and Iran's commitment to launching a comprehensive migration dialogue⁴⁶³.

The framework for this migration dialogue was given form by the Council of the EU with the **Framework for a Comprehensive Dialogue Between the Islamic Republic of Iran and the European Union on Migration and Refugee Issues**⁴⁶⁴, a **political instrument** for the purposes of this Report. This migration dialogue would cover issues relating to knowledge and information exchange on migration and refugee management, support for Iran's hosting of Afghan (and Iraqi) protection seekers, addressing root causes of illegal migration and refugee situations, as well as preventing irregular migration and promoting

⁴⁵⁹ See *ibid.*, pp. 4-6.

⁴⁶⁰ Commission Services (2022), *op. cit.*, p. 25. See also European Commission (2021r), Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Iraq, COM(2021) 414 final, Brussels, 15 July, p. 1.

⁴⁶¹ *Ibid.*

⁴⁶² Cf. European Commission (2016d), 'Joint statement by the High Representative/Vice-President of the European Union, Federica Mogherini and the Minister of Foreign Affairs of the Islamic Republic of Iran, Javad Zarif', Commission Statement STATEMENT/16/1441, Brussels, 16 April, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_16_1441; Council of the EU (2019a), 'Iran: Council adopts conclusions', Council Press Release, 4 February, <https://www.consilium.europa.eu/en/press/press-releases/2019/02/04/iran-council-adopts-conclusions/>. The text of the JCPOA can be found at <https://www.un.org/securitycouncil/content/2231/background>.

⁴⁶³ *Ibid.*

⁴⁶⁴ See Council of the EU (2019b), 'Framework for a Comprehensive Dialogue Between the Islamic Republic of Iran and the European Union on Migration and Refugee Issues – Endorsement', Council Document No. 5983/19, Brussels, 4 February, <https://data.consilium.europa.eu/doc/document/ST-5983-2019-INIT/en/pdf>.

returns, among others⁴⁶⁵. It should be noted, however, that – as of January 2022, the text of the framework has yet to be signed, and no migration dialogues have been launched⁴⁶⁶.

The EU's *Multiannual Indicative Programme 2021-2027* on Iran (hereinafter: MIP 2021-2027 Iran) sets out the areas of priority for the EU's funding (under the MFF 2021-2027, Global Europe heading, more specifically the **NDICI**, managed by **DG INTPA**) towards activities in Iran⁴⁶⁷. The importance of migration management issues in EU-Iran relations is reflected, in the MIP 2021-2027, in the fact that one of the three priority areas focuses exclusively on migration-related issues (Priority Area 3: Cross-border issues: Migration, Forced Displacement, Drugs)⁴⁶⁸. According to the MIP, while the EU foresees seeking cooperation opportunities with Iran on migration governance and management, including in the area of research, analysis and data exchange on migration routes, flows and data gathering, as well as integrated border management, among others, EU-Iran cooperation on migrant smuggling and human trafficking has been relegated to regional-level cooperation⁴⁶⁹. A sum of EUR 23.55 million has been earmarked for actions under Priority Area 3 for the period 2021-2024⁴⁷⁰.

4.2.2. EU instruments and transit through Turkey

As one of the EU's neighbours at the EU's external borders with Greece (and Cyprus), Turkey is clearly a country of priority focus for the EU in EU external migration policies. A plethora of EU instruments have been adopted specifically with EU-Turkey cooperation on migration management in mind.

Forming the framework for EU-Turkey migration cooperation is the **EU-Turkey Statement**, published by the European Council in March 2016⁴⁷¹. Despite the importance attached to the EU-Turkey Statement as part of the EU's overall strategy to respond to the 2015 refugee humanitarian crisis⁴⁷², the nature of the EU-Turkey Statement remains unclear (Ineli-Ciger and Yigit, 2020; Carrera, den Hertog and Stefan, 2017)⁴⁷³. Moreover,

⁴⁶⁵ Ibid., pp. 4-5.

⁴⁶⁶ See Commission Services (2022), op. cit., p. 25.

⁴⁶⁷ See European Commission (2021s), 'Islamic Republic of Iran: Multi-annual Indicative Programme 2021-2027', https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-9094-iran-annex_en.pdf.

⁴⁶⁸ See *ibid.*, pp. 3-4, 7-8, 14-16.

⁴⁶⁹ *Ibid.*, p. 14.

⁴⁷⁰ *Ibid.*, p. 18.

⁴⁷¹ See European Council, 'EU-Turkey statement, 18 March 2016', European Council Press Release, 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

⁴⁷² See European Commission (2021t), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum, COM(2021) 590 final, Brussels, 29 September, p. 17; Cf. European Commission (2021j), op. cit., p. 10, which touts the EU-Turkey Statement as an instrument which 'contributes to breaking the business model of migrant smugglers, through increased border controls conducted by the Turkish authorities, and to preventing new sea or land routes for irregular migration'.

⁴⁷³ On the disputed nature and authorship of the EU-Turkey Statement, see e.g. Carrera, S., Den Hertog, L. and Stefan, M., 'It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal', CEPS Policy Insight No. 2017-15, CEPS, Brussels, April 2017, <https://www.ceps.eu/ceps-publications/it-wasnt-me>.

the authorship of the EU-Turkey Statement is also contested, with both the Court of Justice of the EU⁴⁷⁴ and the European Court of Human Rights⁴⁷⁵ seeming to imply that the EU-Turkey Statement was concluded between Turkey and the EU Member States, and not by any European institutions such as the European Council or the European Commission⁴⁷⁶. Despite these issues relating to the authorship of the EU-Turkey Statement, EU institutions and agencies like Frontex and the EUAA have played a key role in operationally and/or financially supporting the implementation of the statement⁴⁷⁷, with the European Ombudsman having called on the *European Commission* to carry out a human rights impact assessment of the EU-Turkey Statement's implementation⁴⁷⁸.

For the purpose of this overview, the EU-Turkey Statement will be considered as a **hybrid policy and legal instrument**, constituting an international agreement under the guises of a non-legally binding readmission arrangement. The EU-Turkey Statement defines a set of actions governing the entry of persons to the EU via Turkey (as well as ancillary measures), including *inter alia* an all-encompassing policy to return to Turkey all new irregular migrants crossing from Turkey into the Greek islands (Greece-Turkey returns), a one-for-one mechanism (for each Syrian national returned to Turkey under the statement, another Syrian protection seeker will be relocated from Turkey to the EU), as well as a duty for Turkey to adopt all necessary measures to prevent irregular migration of persons from its territory into the EU⁴⁷⁹.

Central to the EU-Turkey Statement is the agreement for Turkey to readmit all irregular migrants entering the Greek Islands via Turkey subsequent to the adoption of the statement. This mechanism can be seen as an EU **legal and policy sub-instrument** of the EU-Turkey Statement, as it seems to be based on a combination of multiple sub-components: First, Turkey has signed a **Readmission Agreement with the EU (EURA)** and some of its Member States (notably Greece), which importantly includes a clause

[luxembourg-court-orders-eu-turkey-refugee-deal/](#); Ineli-Ciger, M. and Yigit, O., 'ASILE Country Fiche: Turkey', October 2020, <https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche-Turkey-Final-Pub.pdf>, p. 25.

⁴⁷⁴ See Orders of the General Court of 28 February 2017, *NF v European Council*, T-192/16, EU:T:2017:128; *NG v European Council*, T-193/16, EU:T:2017:129, *NM v European Council*, T-257/16, EU:T:2017:130.

⁴⁷⁵ See ECtHR 25 January 2018, *J.R. and others v Greece*, Application No. 22969/16, para. 7. Cf. Gatta, F.L., 'Detention of migrants with the view to implement the EU-Turkey Statement: the Court of Strasbourg (un)involved in the EU migration policy', Cahiers de l'EDEM, Université catholique de Louvain, Louvain-La-Neuve, March 2018, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/judgment-of-the-european-court-of-human-rights-in-the-case-j-r-and-others-v-greece-appl-no-22696-16.html>.

⁴⁷⁶ On the question of authorship of the EU-Turkey Statement, see e.g. Carrera, Den Hertog and Stefan (2017), op. cit.

⁴⁷⁷ Carrera, S. and Cortinovis, R. (2019b), 'The EU's Role in Implementing the UN Global Compact on Refugees Contained Mobility vs. International Protection', CEPS Papers in Liberty and Security in Europe, No. 2018-04, CEPS, Brussels, April, <https://www.ceps.eu/ceps-publications/eus-role-implementing-un-global-compact-refugees/>.

⁴⁷⁸ European Ombudsman (2017a), 'Ombudsman: EU must continue to assess human rights impact of EU-Turkey deal', Case 506/2016/MHZ, Press release no. 1/2017, 19 January, <https://www.ombudsman.europa.eu/en/press-release/en/75136>.

⁴⁷⁹ See European Council (2016), op. cit.

requiring Turkey to readmit third country nationals that have irregularly entered the EU through Turkey⁴⁸⁰. Second, pursuant to the EU-Turkey Statement, all persons entering the Greek Islands through Turkey are automatically *de facto* detained with no possibility to leave the Greek mainland and are subject to the procedure for their return to Turkey unless they (successfully) apply for international protection in Greece. This procedure has become increasingly politicised in nature following pressures from the European Commission to the Greek authorities to speed up expulsions⁴⁸¹. Third, and importantly, Greek asylum legislation includes a safe third country concept as a ground for rejection of asylum applications⁴⁸².

Initially this only applied to Syrian asylum-seekers falling under the scope of the EU-Turkey Statement⁴⁸³, in June 2021, the Turkish authorities adopted a **Joint Ministerial Decision** designating Turkey as a safe third country for Syrian, Afghan, Pakistani, Bangladeshi and Somali asylum-seekers, resulting in asylum applications from protection seekers from these countries being deemed inadmissible without an assessment of its merits⁴⁸⁴. This returns mechanism of the EU-Turkey Statement has, according to the Commission, led to a return of 2 735 persons between March 2016 and early 2020⁴⁸⁵.

A second key component of the EU-Turkey Statement is the **One-for-One resettlement mechanism**, i.e. one Syrian will be resettled from Turkey to an EU Member State (based on the UN Vulnerability Criteria) for each Syrian returned to Turkey from the Greek islands⁴⁸⁶. This **policy and political sub-instrument** under the EU-Turkey Statement is, on the part of the EU, based on voluntary resettlement pledges by Member States, with up to 72 000 resettlement places mentioned in the statement. According to the Commission. The one-for-one mechanism has resulted in the resettlement of around 31 000 persons from Turkey to EU Member States⁴⁸⁷.

⁴⁸⁰ On these specific readmission agreements themselves and their 'third country national' clauses, see further below in this report. It should be noted that, according to Ineli-Ciger and Yigit, the legal basis for return of persons to Turkey is unclear, given the current status of the readmission agreements with Turkey, see Ineli-Ciger and Yigit (2020), op. cit., pp. 26-27.

⁴⁸¹ See Karagiannopoulou, M.-L. et al., 'Country Report: Greece. 2020 Update', AIDA Country Report, European Council for Refugees and Exiles (ECRE), Brussels, June 2021, <https://asylumineurope.org/reports/country/greece/>, p. 42.

⁴⁸² See *ibid.*, pp. 139-146.

⁴⁸³ *Ibid.*, pp. 95, 140.

⁴⁸⁴ *Ibid.*, pp. 140-141.

⁴⁸⁵ European Commission (2020e), 'EU-Turkey Statement: Four years on', European Commission, Brussels, March, https://ec.europa.eu/home-affairs/system/files/2020-03/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf, p. 3; Kılıç, R. and Akdeniz Bayram, A., 'Revisiting EU-Turkey Cooperation on Migration: Roadmap for an Enhanced Partnership', ICMPD Policy Brief, ICMPD Western Balkans and Turkey Regional Coordination Office, Ankara, 2021, <https://www.icmpd.org/news/revisiting-eu-turkey-cooperation-on-migration-roadmap-for-an-enhanced-partnership>, p. 6.

⁴⁸⁶ European Council (2016), op. cit.

⁴⁸⁷ See European Commission (2021t), op. cit., p. 17; see similarly Refugee Rights Turkey, 'Country Report: Turkey. 2020 Update', AIDA Country Report, European Council for Refugees and Exiles (ECRE), Brussels, January 2022, <https://asylumineurope.org/reports/country/turkey/>, p. 15; Kılıç and Akdeniz Bayram

The commitment of Turkey to adopt all necessary measures to prevent irregular entry into the EU from Turkey in the EU-Turkey Statement (which can be seen as a **political sub-instrument** under the statement) has had a profound impact on migration management in Turkey. Without any attempt to comprehensively map the impact of the statement of Turkey's migration management, reference can be made, for example, to **the border walls** constructed along the Turkish-Iranian⁴⁸⁸ and Turkish-Syrian borders⁴⁸⁹ following the adoption of the EU-Turkey Statement (these walls and fences can be seen as **technological and operational instruments**)⁴⁹⁰, with sources indicating the involvement of **EU funding in their construction (under the EU Facilities for Refugees in Turkey, FRT; see below)**⁴⁹¹. Moreover, as part of its commitments under the EU-Turkey Statement, Turkey had increased its efforts in respect of migration management and border controls⁴⁹².

The hardening of Turkey's migration management and border controls following the agreement of the EU-Turkey Statement can further be observed in a number of developments. Attention can be drawn, for example, to the application of the **safe third country** concept under Turkish asylum law⁴⁹³. Under Turkish law, a country can be considered as a safe third country for specific groups of people if their 'lives and freedoms [...] are not in danger on the basis of race, religion, nationality, membership to a particular social group or political opinion', the *non-refoulement* principle is respected in that country, it is possible to apply for and obtain refugee status in that country, and no risk of

(2021), op. cit., p. 6. See also <https://www.goc.gov.tr/gecici-koruma5638> (in Turkish), citing, as of January 2022, a total of around 31 000 Syrians resettled under the one-to-one mechanism.

⁴⁸⁸ Refugee Rights Turkey (2022), op. cit., p. 26.

⁴⁸⁹ Ibid., p. 144.

⁴⁹⁰ See Üstübcü, A., 'The impact of externalized migration governance on Turkey: technocratic migration governance and the production of differentiated legal status', *Comparative Migration Studies*, Vol. 7, Article No. 46, 2019, <https://doi.org/10.1186/s40878-019-0159-x>, pp. 12-13.

⁴⁹¹ On the involvement of EU funding in construction of the Turkey-Iran border wall, see e.g. Augustová, K., 'Impacts of EU-Turkey Cooperation on Migration Along the Iran-Turkey Border', Mercator-IPC Policy Brief 2020/21, Istanbul Policy Center, Istanbul, May 2020, <https://ipc.sabanciuniv.edu/Content/Images/CKeditor/Images/20210816-20082442.pdf>, p. 5 ('Turkey has begun the construction of a wall and a barbed-wire fence along its border with Iran, together with the deployment of surveillance systems, towers, and drones. According to the Turkish Minister of Interior, Süleyman Soylu, this project is possible due to the EU's financial support of 110 million EUR'); Stamouli, N., 'Turkey puts its migrant security system on display for Europe', *Politico.eu*, 3 January 2022, <https://www.politico.eu/article/turkey-migrant-security-system-iran-border-europe-afghanistan/> ('Recognizing this, the EU has in recent years funneled €6 billion to Turkey to support housing, health care and education for asylum-seekers, and also for security projects. The 103 watchtowers, for example, were co-funded by the EU'); Yackley, A.J., 'The Turkish wall built to keep out refugees from Afghanistan', *Financial Times*, 15 September 2021, <https://www.ft.com/content/49d85b11-4bbe-4518-b6d8-d532e30c373c> ('The European Union is paying Turkey billions of euros to curb migration, including an unspecified amount to secure its eastern border. The European Union is paying Turkey billions of euros to curb migration, including an unspecified amount to secure its eastern border').

⁴⁹² Cf. Augustová (2020), op. cit., p. 12; Ineli-Ciger and Yigit (2020), op. cit., p. 27.

⁴⁹³ More specifically, the Law on Foreigners and International Protection (LFIP) (2013), adopted in 2013, with similarities to the EU asylum *acquis* observed therein; see Refugee Rights Turkey (2022), op. cit., p. 20.

being subjected to serious harm exists⁴⁹⁴. While no official list of safe third countries is available, the AIDA country report on Turkey notes that in practice, Iran and Pakistan are considered as safe third countries for Afghan protection seekers⁴⁹⁵.

Moreover, instances of **pushbacks** by Turkish border authorities have been observed (classified for the purpose of this analysis as a national (Turkish) **legal instrument**). For instance, the AIDA country report on Turkey draws attention to pushbacks of 50 refugees at the Greek-Turkish border by Turkish authorities (as well as the Greek border authorities)⁴⁹⁶, with the asylum-seekers effectively being ‘ping-ponged’ between the Greek-Turkish border⁴⁹⁷. Another instance of (illegal) pushbacks by Turkish authorities was reported in respect of Afghan asylum-seekers at the Turkish-Iranian border⁴⁹⁸.

A key part of the EU-Turkey Statement is the commitment from the EU side to make available EU funding (EUR 6 billion over two tranches) under the financial instrument called the **EU Facility for Refugees in Turkey (FRT)**⁴⁹⁹. EU funding coordinated through the FRT comes from multiple **European Commission-led funding instruments**, including the Humanitarian Aid Instrument (HUMA, **DG ECHO**), the European Neighbourhood Instrument (ENI, **DG NEAR**), the Development Cooperation Instrument (DCI, **DG DEVCO**), the Instrument for Pre-accession Assistance (IPA II, DG NEAR) and the Instrument contributing to Stability and Peace (IcSP, **Commission Service for Foreign Policy Instruments, FPI**)⁵⁰⁰,

Officially, FRT is portrayed as a coordination mechanism to mobilise EU and Member States’ funding swiftly and effectively in order to assist refugees and host communities in Turkey⁵⁰¹. Nonetheless, it is apparent that some of the FRT funding has been allocated towards migration and border management projects⁵⁰², including an **IOM-implemented**

⁴⁹⁴ Refugee Rights Turkey (2022), op. cit., p. 67.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid., p. 29.

⁴⁹⁷ See Border Violence Monitoring Network, ‘They were told to keep their heads down’, 17 April 2020, <https://www.borderviolence.eu/violence-reports/april-17-2020-0000-greek-turkish-border-near-edirne/>.

⁴⁹⁸ See Yeung, P., ‘Afghan refugees accuse Turkey of violent illegal pushbacks’, *The Guardian*, 14 October 2021, <https://www.theguardian.com/global-development/2021/oct/14/afghan-refugees-accuse-turkey-of-violent-pushbacks>.

⁴⁹⁹ See European Commission (2021u), ‘The EU Facility for Refugees in Turkey’, Factsheet, December, https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-12/frit_factsheet.pdf.

⁵⁰⁰ European Commission (2021v), ‘Communication from the Commission to the European Parliament and the Council: Fifth Annual Report on the Facility for Refugees in Turkey’, COM(2021) 255 final, Brussels, 26 May, p. 6. On the European Commission’s Directorates General in charge of the various EU funding instruments, see European Commission (2019b), op. cit., pp. 110-121. It should be noted that projects funded under FRT are not explicitly linked to the proportion thereof funded under each EU instrument concerned.

⁵⁰¹ Cf. *ibid.*, p. 5.

⁵⁰² For a list of project funder under the FRT facility, see European Commission (2021w), ‘EU Facility for Refugees in Turkey: List of project committed/decided, contracted, disbursed’, November, <https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-12/Facility%20table%20November%202021.pdf>.

project worth EUR 20 million to enhance the capacity of the Turkish Coast Guard to carry out search and rescue (SAR) operations⁵⁰³, as well as a EUR 60 million project, implemented by the Turkish Directorate-General for Migration Management (DGMM), which *partly* covers capacity-strengthening of Turkish DGMM staff to detect fraudulent documents and expansion of Turkey's migration-related database system (GÖÇ-NET) with an irregular migration database⁵⁰⁴.

In December 2021, the EU further earmarked EUR 30 million to support Turkey in tackling migration and border challenges, including support for Turkey's effective implementation of its Strategy Document and National Action Plan on Irregular Migration (2021-2025) and capacity building for migration and border management agencies at airports in Turkey (jointly with the IOM)⁵⁰⁵.

Additional EU instruments of migration cooperation with Turkey not expressly mentioned in the EU-Turkey Statement can be observed. Thus, for example, the European Border and Coast Guard Agency (Frontex) has a **Working Arrangement (WA)** – an **operational instrument** – in place with Turkey since 2012⁵⁰⁶. Under the WA, Frontex and the Turkish border management authorities have agreed to cooperate, *inter alia*, in exchanging relevant experiences and best practices in the field of border controls, exchanging of relevant strategic information and analytical products, secondment of Turkish border officials to specific Frontex activities, and border management-related trainings⁵⁰⁷. Moreover, both Frontex and the Turkish authorities will explore possibilities to cooperate in the area of joint return activities, among others⁵⁰⁸. Frontex's cooperation with Turkey is moreover reflected in the Frontex Liaison Officer (FLO) deployed in Turkey in 2017⁵⁰⁹.

⁵⁰³ See *ibid.*; European Commission (2016e), 'Facility for Refugees in Turkey: €47 million to strengthen migration management and to support education of Syrian refugees', Commission Press Release IP/16/1908, Brussels, 26 May, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1908.

⁵⁰⁴ See European Commission (2020w), *op. cit.*; see also EU Delegation to Turkey, 'Support to the Implementation of the EU-Turkey Statement of 18 March 2016', <https://www.avrupa.info.tr/en/project/support-implementation-eu-turkey-statement-18-march-2016-8006>.

⁵⁰⁵ European Commission (2021x), 'EU continues supporting education of refugees and addressing migration in Turkey with additional €560 million', Commission Press Release IP/21/6931, Brussels, 21 December, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6931.

⁵⁰⁶ Memorandum of Understanding on establishing cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the Ministry of Foreign Affairs of the Republic of Turkey (hereinafter Frontex Working Arrangement (WA) with Turkey), available at <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>.

⁵⁰⁷ See Frontex Working Arrangement with Turkey, points 1, 2, 5, and 6.

⁵⁰⁸ Frontex Working Arrangement with Turkey, point 10.

⁵⁰⁹ See Frontex, 'Other Partners and Projects. Liaison Officers Network. Frontex Liaison Officers to non-EU countries', <https://frontex.europa.eu/we-build/other-partners-and-projects/liaison-officers-network/>. See also European Commission (2015d), 'EU-Turkey joint action plan', Commission Memo MEMO/15/5860, Brussels, 15 October, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860.

Operational cooperation with Turkey is further reflected in a **Pilot Project for an EASO – now EUAA - Resettlement Support Facility (RSF)** in Turkey between 2019 and 2021, with the aim to support EU Member States’ resettlement operations in Turkey⁵¹⁰, as well as a Common Operational Partnership (funder under the **EU’s Internal Security Fund (ISF) – Police**)⁵¹¹ with Turkey to enhance joint efforts between Member States’ and Turkish law enforcement and judicial authorities in the fight against migrant smuggling and human trafficking by organised criminal groups⁵¹². Furthermore, negotiations are ongoing between the EU and Turkey for an international agreement on exchange of personal data between Turkish authorities and Europol⁵¹³, and the Commission has been authorised to open negotiations with Turkey on cooperation with Eurojust⁵¹⁴.

EU migration cooperation with Turkey further extends beyond the bilateral level and the EU-Turkey Statement. Attention can first be drawn to the **political instrument** of the **Prague Process**, entailing a targeted migration dialogue and a policy process promoting migration partnership between the EU and its Member States, EEA and Schengen countries, the Western Balkans, Central Asia, Russia and Turkey⁵¹⁵. Meetings under the Prague Process are held annually at senior officials level (with the EU represented therein by the Commission, the EU Council, EASO and Frontex, among others)⁵¹⁶. High-level

⁵¹⁰ See EUAA, ‘Resettlement’, <https://euaa.europa.eu/operations/resettlement>, under ‘Resettlement Support Facility (RSF) in Turkey’; EASO (2019a), ‘Pilot EASO Resettlement Support Facility in Turkey. Information note’, European Asylum Support Office (EASO), Valletta, May, <https://euaa.europa.eu/sites/default/files/easo-resettlement-support-facility-turkey-information-note.pdf>.

⁵¹¹ For the original call for proposals for Common Operational Partnerships (COPs), see European Commission (2020f), ‘Internal Security Fund – Police. Call for Proposals. Call for proposals restricted to EU Member States to establish a Common Operational Partnership (COP) with third countries to prevent and fight against migrant smuggling along migratory routes towards the EU. ISFP-2019-AG-COPS’, European Commission (DG HOME), Brussels, 20 April, <https://www.statewatch.org/media/1403/eu-com-isf-common-operational-partnerships-migrant-smuggling-30-4-20.pdf>.

⁵¹² See European Commission (2021j), op. cit., p. 9-10; EMN (2021b), ‘Annual Report on Migration and Asylum 2020’, European Migration Network, Brussels, June, https://ec.europa.eu/home-affairs/system/files/2022-01/00_eu_arm2020_synthesis_report_en.pdf, p. 41.

⁵¹³ Cf. European Commission (2021y), ‘Commission Staff Working Document. Turkey 2021 Report, Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021: Communication on EU Enlargement Policy’, SWD(2021) 290 final/2, Strasbourg, 19 October, p. 122.

⁵¹⁴ See Council of the EU (2021f), ‘Council Decision authorising the opening of negotiations for Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States’, Council Document 7072/21, Brussels, 16 March, <https://data.consilium.europa.eu/doc/document/ST-7072-2021-INIT/en/pdf>.

⁵¹⁵ See ‘What is the Prague Process’, Prague Process website, <https://www.pragueprocess.eu/en/about>.

⁵¹⁶ Cf. ICMPD (2020g), ‘The Prague Process Senior Officials’ Meeting 2020’, Prague Process News, International Centre for Migration Policy Development (ICMPD), Vienna, 22 December, <https://www.pragueprocess.eu/en/news-events/news/464-the-prague-process-senior-officials-meeting-2020>; ICMPD (2021a), ‘First preparatory Senior Officials’ Meeting for the 4th Prague Process Ministerial Conference’, ICMPD Project News, International Centre for Migration Policy Development (ICMPD), Vienna, 10 December, <https://www.icmpd.org/news/first-preparatory-senior-officials-meeting-for-the-4th-prague-process-ministerial-conference>.

Ministerial Conferences are held regularly to decide on the strategic orientation of the Prague Process (with the EU represented by *inter alia* the European Commission)⁵¹⁷.

Under the Prague Process, migration cooperation is focused on six topics, including preventing and fighting illegal migration and readmission and returns⁵¹⁸. Migration cooperation under the Prague Process was moreover framed (between 2017-2021) by way of the **Bratislava Declaration** (a **political instrument**) in 2018. To support the implementation of the Prague Process and the Bratislava Declaration, **the European Commission (DG HOME)** allocated EUR 2.3 million, under the heading Prague Process: Dialogue, Analysis and Training in Action, to **fund** implementation targeting three specific objectives, namely, to ensure continued migration dialogues, but also to establish a Migration Observatory and a Training Academy, both implemented by **ICMPD**⁵¹⁹.

Under the **Instrument for Pre-accession Assistance (IPA II)**, **the European Commission (DG NEAR)** further **funded** the two phases of the Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey project⁵²⁰. Through this project, Western Balkan States and Turkey were given support in establishing effective and protection-sensitive migration management approaches, including strengthening mechanisms of early identification, registration and proper referral of irregular migrants and asylum-seekers, through trainings and workshops⁵²¹. The implementation of Phase II of this project was led by Frontex (focusing on identification, registration and referral), IOM (focusing on enhancing data collection and information sharing and on assisted voluntary returns), and EASO (focusing on asylum-

⁵¹⁷ See 'Prague Process. 3rd Ministerial Conference of the Prague Process. Bratislava, 19-20 September 2016. Joint Declaration', <https://www.icmpd.org/file/download/49280/file/Bratislava%2520Ministerial%2520Declaration%2520EN%252020-09-2016.pdf>; Lithuanian Ministry of the Interior, 'High Level Migration Officials Met in Vilnius'. 25 November 2016, <https://vrm.lrv.lt/en/news/high-level-migration-officials-met-in-vilnius>.

⁵¹⁸ Ibid.

⁵¹⁹ See 'Prague Process: Dialogue, Analyses, Training in Action (PP DATA)', Prague Process website, <https://www.pragueprocess.eu/en/about/projects/pp-data>. See also 'What is the Migration Observatory?', Prague Process website, <https://www.pragueprocess.eu/en/migration-observatory>; and 'What is the Training Academy?', Prague Process website, <https://www.pragueprocess.eu/en/training-academy>. The EU's general financial contribution to the implementation of the Bratislava Declaration under the Prague Process comes from the Mobility Partnership Facility (MPF) (see 'What is the Prague Process', Prague Process website, <https://www.pragueprocess.eu/en/about>), itself comprised of funding from the Asylum, Migration and Integration Fund (AMIF) 2014-2020, the Internal Security Fund (ISF) – Borders and visa (2014-2020), and the Internal Security Fund (ISF) – Police (2014-2020) (see European Commission, 'Mobility Partnership Facility (MPF)', website of the European Commission, DG Migration and Home Affairs, https://ec.europa.eu/home-affairs/policies/international-affairs/mobility-partnership-facility-mpf_en).

⁵²⁰ See Frontex, 'Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey', Leaflet on the IPA II project, Publications Office of the EU, Luxembourg, May 2019, <https://op.europa.eu/en/publication-detail/-/publication/a1a29056-8b2f-11e9-9369-01aa75ed71a1>.

⁵²¹ See UNHCR (2019a), 'EU supports protection-sensitive approaches integrated into migration management practices in the Western Balkans and Turkey', United Nations High Commissioner for Refugees (UNHCR) South Eastern Europe, 16 May, <https://www.unhcr.org/see/11407-eu-supports-protection-sensitive-approaches-integrated-into-migration-management-practices-in-the-western-balkan-and-turkey.html>.

related mechanisms)⁵²². UNHCR was also involved in the implementation of activities within this project⁵²³. A total of EUR 6 475 million was allocated to this project from the EU's IPA instruments⁵²⁴.

4.3. Preventing entry

At the EU's external borders, EU instruments affecting the entry of persons seeking international protection are many, varying in nature, scope and impact. This sub-section draws attention to a select number of **EU instruments and actors** which either specifically target Afghan asylum-seekers, or which may have consequences on the possibility for Afghans to exercise their right to seek asylum in the EU. The focus will instead be on the following instruments: Frontex operations in the Aegean Sea and indications of Greek pushbacks at the EU's external borders with Turkey (*Section 4.3.1.*), hotspots on the Greek islands the Greek asylum policy and practice of territorial containment on the Greek islands pursuant to the EU-Turkey Statement (*Section 4.3.2.*), and the EU's securitised plan for enhanced checks on persons from Afghanistan following the governmental crisis in late 2021 (*Section 4.3.3.*).

4.3.1. Frontex and push backs

As part of its mandate, Frontex (EBCG) coordinates Member States' border controls and surveillance activities through joint operations⁵²⁵, and specifically in relation to Greece and Turkey– **Operation Poseidon**. As an **operational instrument** for the purposes of this Report, Operation Poseidon's objective has expanded beyond the original objective of border surveillance, migrant interception and identification, further encompassing operational aspects of cross-border crime and coast guard activities, such as SAR⁵²⁶. Frontex, through Operation Poseidon, is also involved in assisting Greek authorities with readmissions from the hotspots⁵²⁷.

Frontex and Operation Poseidon have been the subject of numerous criticisms throughout the years, particularly vis-à-vis intercepted individuals' rights to leave any country, and

⁵²² See Frontex, 'Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey – Phase II', https://frontex.europa.eu/assets/Partners/Third_countries/IPA_II_Phase_II.pdf.

⁵²³ See Frontex (2019), op. cit.; cf. UNHCR (2019a), op. cit.

⁵²⁴ See EASO, 'IPA II project 'Regional Support to Protection-Sensitive Migration Management systems in the Western Balkans and Turkey' (July 2019 – June 2021) – Phase II', <https://euaa.europa.eu/sites/default/files/IPA-II-phase-II.pdf>.

⁵²⁵ See Carrera, S. and Den Hertog, L., 'A European Border and Coast Guard: What's in a name?', CEPS Paper in Liberty and Security in Europe No. 88, CEPS, Brussels, March 2016, <https://www.ceps.eu/ceps-publications/european-border-and-coast-guard-whats-name/>, pp. 5-8.

⁵²⁶ See Frontex, 'Main Operations. Operation Poseidon (Greece)', <https://frontex.europa.eu/we-support/main-operations/operation-poseidon-greece/>. See also Ruiz Benedicto, A., 'Guarding the Fortress: The role of Frontex in the militarisation and securitisation of migration flows in the European Union', Centre Delàs Report No. 40, Centre Delàs d'Estudies der la Pau, Barcelona, November 2019, <http://centredelas.org/publicacions/informe-40-custodiar-la-fortalesa-el-paper-de-frontex-en-la-militaritzacio-i-securititzacio-dels-fluxos-migratoris-a-la-unio-europea/?lang=en>, p. 19.

⁵²⁷ Frontex, 'Main Operations. Operation Poseidon (Greece)', op. cit.

the right to seek asylum⁵²⁸. This ties to reports by media and civil society of instances of **illegal pushbacks** by Greek authorities⁵²⁹, with Frontex reported to have been complicit in certain cases⁵³⁰. A case of attempted pushback was reported in March 2020, where a Danish patrol boat monitoring the Aegean Sea rejected an order by Operation Poseidon's headquarters to put migrants back into their dinghy and tow it out of Greek waters⁵³¹. A joint report by Bellingcat⁵³², Der Spiegel⁵³³, Lighthouse Reports⁵³⁴, and others, have documented four (4) instances where Frontex assets were in range of pushback incidents and two (2) instances of Frontex vessels actively involved in pushbacks in 2020⁵³⁵. Some of these incidents are classified by Frontex as 'prevention of departure'⁵³⁶, a term which Frontex's Director described to MEPs as incidents where Member States' or Frontex

⁵²⁸ See e.g. Migreurop, 'Frontex, 15 years of impunity: The outlaw agency must disappear!', migreurop, Paris, 8 December 2020, <https://migreurop.org/article3013.html>; cf. Nielsen, N., 'Why Frontex won't leave Greece like it left Hungary', *EUobserver*, 27 April 2021, <https://euobserver.com/migration/151664>; Human Rights Watch (2021b), 'Frontex Failing to Protect People at EU Borders. Stronger Safeguards Vital as Border Agency Expands', Human Rights Watch, New York, NY, 23 June, <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>; Bachiller López, C. and Keady-Tabbal, N., 'Validating Border Violence on the Aegean: Frontex's Internal Records', University of Oxford's Border Criminologies Blog, 13 January 2021, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/validating-border>.

⁵²⁹ See e.g. Keady-Tabbal, N. and Mann, I., 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations', *Just Security*, 22 May 2020, <https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/>; PICUM, 'PICUM Input to the UN Special Rapporteur on the Human Rights of Migrants: Report on pushback practices and their impact on the human rights of migrants', Platform for International Cooperation on Undocumented Migrants (PICUM), Brussels, February 2021, available at <https://picum.org/wp-content/uploads/2021/05/PICUM-Submission-on-pushback-practices-and-their-impact-Feb2021-final.pdf>; Amnesty International (2021a), 'Greece: Violence, lies, and pushbacks. Refugees and migrants still denied safety and asylum at Europe's borders', Amnesty International Report, Amnesty International, London, 23 June, <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>.

⁵³⁰ Cf. Sanderson, S., 'Report: EU border agency "involved in illegal asylum pushbacks"', *Infomigrants*, 26 October 2020, <https://www.infomigrants.net/en/post/28127/report-eu-border-agency-involved-in-illegal-asylum-pushbacks>; PICUM (2021), op. cit. p. 3; Human Rights Watch (2021a), op. cit.

⁵³¹ See Tritschler, L., 'Danish boat in Aegean refused order to push back rescued migrants', *Politico.eu*, 6 March 2020, <https://www.politico.eu/article/danish-frontex-boat-refused-order-to-push-back-rescued-migrants-report/>.

⁵³² Waters, N., Freudenthal, E. and Williams, L., 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks', *Bellingcat*, 23 October 2020, <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-implicit-in-illegal-pushbacks/>.

⁵³³ Christides, G. et al., 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign', *Der Spiegel*, 23 October 2020, <https://www.spiegel.de/international/europe/eu-border-agency-frontex-implicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7>.

⁵³⁴ Lighthouse Reports, 'Frontex Chapter II: Complicit in Pushbacks', 23 October 2020, <https://www.lighthousereports.nl/investigation/frontex-chapter-ii-implicit-in-pushbacks/>.

⁵³⁵ Cf. Waters, Freudenthal and Williams (2020), op. cit.

⁵³⁶ See Bachiller López and Keady-Tabbal (2021), op. cit., referring to a Frontex internal document published by Efsyn, a Greek media outlet (available at https://www.efsyn.gr/ellada/dikaiomata/270551_mazi-epanaproothoyn-mazi-sygkalyptoyin).

assets make a 'detection', after which the relevant third country would be informed, and they would subsequently follow up on the call and intercept the migrant⁵³⁷.

In response to the alleged pushbacks and involvement of Frontex therein in 2020, Frontex conducted, by way of the Frontex Management Board Working Group, an internal enquiry into the matter⁵³⁸. The report of the Frontex Management Board WG found that, of the 13 incidents examined, 8 of them did not amount to illegal pushbacks (as, in particular, 6 instances took place in Turkish waters), and that 5 incidents required further investigation⁵³⁹. The **European Parliament (more specifically, the Frontex Scrutiny Working Group, FSWG)** conducted its own scrutiny of the events in question and found *inter alia* that, while Frontex was not *directly* involved in illegal pushbacks, the Agency generally disregarded reported fundamental rights violations observed by several reliable actors, failed to adequately respond to internal observations about certain cases of probably fundamental rights violations, and failed to promptly, vigilantly and effectively follow up on cases of pushbacks in Member States where Frontex conducted joint operations⁵⁴⁰.

A further case of EU **operational instruments** (i.e., Operation Poseidon) frustrating the entry of persons seeking protection in the EU involved a reported case of an alleged pullback operation by a Greek official, deployed on a German vessel as part of Operation Poseidon, arranging for the Turkish coast guards to intercept persons in Turkish waters and return them to Turkey⁵⁴¹. Instances of alleged pushbacks and refoulement to Turkey of asylum-seekers by Greek authorities have also been observed at the Greek-Turkish land borders. The 2020 AIDA Country Report on Greece notes how persistent practices of alleged pushbacks have been reported by UNHCR, the UN Working Group on Arbitrary Detention, the UN Committee Against Torture (CAT), and the Greek National Commission on Human Rights, among others⁵⁴². This has been confirmed by the United Nations

⁵³⁷ See Leggeri, F., Annex to Answers to written questions following the LIBE Committee meeting of 1 December 2020, <https://www.statewatch.org/media/1709/eu-frontex-written-questions-answers-libe-hearing-1-12-20.pdf>, question No. 7.

⁵³⁸ For the final report of the Frontex Management Board Working Group, see Frontex Management Board Working Group, 'Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', Final Report of the Frontex Management Board Working Group, 1 March 2021, https://www.statewatch.org/media/2024/agenda_point_wg_fralo_final_report.pdf.

⁵³⁹ Ibid., p. 4.

⁵⁴⁰ See European Parliament (2021b), 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations', Report by (rapporteur) T. Strik for the EP LIBE Committee, European Parliament, 14 July, https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf, p. 5.

⁵⁴¹ See Statewatch, 'Pullback to Turkey organised by Greek official on German boat as part of Frontex operation', 5 November 2020, <https://www.statewatch.org/news/2020/november/pullback-to-turkey-organised-by-greek-official-on-german-boat-as-part-of-frontex-operation/>.

⁵⁴² See Karagiannopoulou et al. (2021), op. cit., p. 19-20, 37-38.

Universal Periodic Review (UPR) Compilation of Information Report published on 12 August 2021⁵⁴³.

4.3.2. Hotspots and detention

'Hotspots' and the 'hotspot approach' was initially launched in 2015 in the *European Agenda on Migration* (a **policy instrument**) in response to the '2015 European refugee crisis'⁵⁴⁴. Described as facilities for initial reception, identification, registration and fingerprinting of asylum-seekers and migrants arriving in the EU by sea⁵⁴⁵, five (5) hotspots (which can be seen as **hybrid multi-nature instruments with operational, financial and technological components**) are operated on the Greek islands of Lesbos, Chios, Samos, Leros and Kos⁵⁴⁶. Under the hotspots approach, EU agencies (such as Frontex and the EUAA) provide operational support to Member States 'hosting' such hotspots to swiftly identify, register and fingerprint incoming migrants⁵⁴⁷.

A variety of actors are involved in the implementation of the Greek hotspots, including the Greek Police (responsible for guarding the external area of the hotspot facilities and engaged in identification and verification of nationality), **Frontex** (in practice responsible for identification and verification of nationality of new arrivals), and **EASO – now the EUAA** – (conducting first instance personal interviews and issuing opinions on asylum applications), with **UNHCR and IOM** having a minor role in providing newly arriving persons with information⁵⁴⁸.

Where initially the hotspots (and hotspot approach) in Greece were heavily linked to the implementation of the relocation mechanism⁵⁴⁹, the adoption of the EU-Turkey Statement led to the decoupling of the Greek hotspots from relocation and essentially converted them de facto into **pre-removal detention centres**⁵⁵⁰, with all arrivals to the Greek islands (falling within the scope of the EU-Turkey Statement) being detained pending their return to Turkey (unless these individuals successfully apply for asylum in Greece)⁵⁵¹. Where

⁵⁴³ Refer to UN Human Rights Council (2021a), 'Compilation on Greece. Report of the Office of the United Nations High Commissioner for Human Rights', UN Document No. A/HRC/WG.6/39/GRC/2, 12 August, <https://undocs.org/A/HRC/WG.6/39/GRC/2>, para. 60.

⁵⁴⁴ See European Commission (2015b), op. cit., p. 6.

⁵⁴⁵ Cf. Luyten, K. and Orav, A., 'Hotspots at EU external borders: State of play', EPRS Briefing Paper PE 652.090, European Parliamentary Research Service, Brussels, September 2020, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)652090](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)652090), p. 2.

⁵⁴⁶ Ibid., p. 5.

⁵⁴⁷ Guild, E., Costello, C. and Moreno-Lax, V., 'Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece', Study for the European Parliament LIBE Committee PE 583.132, European Parliament, Brussels, March 2017, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2017\)583132](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2017)583132), pp. 44-45.

⁵⁴⁸ Karagiannopoulou et al. (2021), op. cit., pp. 48-49.

⁵⁴⁹ Cf. ibid., p. 45, 48; Karagiannopoulou et al. (2021), op. cit., p. 42.

⁵⁵⁰ Guild, Costello and Moreno-Lax (2017), op. cit., p. 48; cf. Luyten and Orav (2020), op. cit., p. 2.

⁵⁵¹ Karagiannopoulou et al. (2021), op. cit., p. 42.

initially, Greek asylum policy was to detain these persons in the hotspots as closed detention centres, the practice was soon replaced with an indiscriminate policy and practice of geographic restriction, i.e. obligating all persons arriving to the Greek islands via Turkey to remain on the island⁵⁵². A challenge by the Greek Council for Refugees (GCR) against the practice of geographical restriction before the Council of State led to the Decision of the Director of the Greek Asylum Service (underpinning the policy of geographic restriction) being briefly annulled, before the director issued a new decision reintroducing the geographical restriction policy⁵⁵³.

The exception to pre-removal detention and removal to Turkey of all persons arriving to the Greek islands, i.e. applying for asylum in Greece, is further complicated by two (complementing) Greek instruments of asylum law. First, Greece adopted in 2016 a **legal instrument** (Law L 4375/2016) introducing a special, exceptional, border procedure visibly connected to the implementation of the EU-Turkey Statement, which subjects all asylum applications of persons falling under the ambit of the EU-Turkey Statement to an accelerated asylum procedure ('fast-track' border procedure)⁵⁵⁴.

The new Greek asylum law, adopted in 2019, also foresees a **fast-track border procedure**⁵⁵⁵. Essentially, the fast-track border procedure provides a framework where actors other than Greek asylum authorities (including Hellenic Police, EASO personnel, and members of the Greek armed forces) may conduct certain processes (such as registration and interviews of asylum-seekers), where time periods for asylum procedures are shortened (e.g. a first instance decision can be taken within 7 days, appeals against negative first instance decisions must be lodged within 10 days) and appeals do not have automatic suspensive effect⁵⁵⁶.

4.3.3. Insecuritising entry

In light of the 2021 Afghan crisis, the EU adopted a **Counter-Terrorism Action Plan for Afghanistan** (hereinafter: CTAP Afghanistan)⁵⁵⁷. As a **policy instrument**, CTAP Afghanistan calls on Member States to optimise their *systematic* checks on biographical and biometric data of Afghan nationals or presumed Afghans or other nationals coming from Afghanistan or claiming to come from Afghanistan. These systematic checks should, in short, be conducted against all possible IT databases available to the Member States, including EU databases, Europol and Interpol databases, and NATO databases, among

⁵⁵² Ibid.

⁵⁵³ Ibid., p. 24.

⁵⁵⁴ Ibid., p. 93.

⁵⁵⁵ Ibid., p. 93-94.

⁵⁵⁶ Ibid., p. 94.

⁵⁵⁷ EU Counter-Terrorism Coordinator, 'Afghanistan: Counter-Terrorism Action Plan, Council Document No. 12315/21 LIMITE, Brussels, 29 September 2021, <https://www.statewatch.org/media/2932/eu-council-afghanistan-ct-action-plan-12315-21.pdf>.

others⁵⁵⁸. The action plan goes so far as to call for, to the extent possible, to conduct such enhanced checks before the person in question crosses the EU external borders [...] i.e. in the country of origin or transit⁵⁵⁹. The CTAP further calls on Member States to pursue and intensify their exchange of relevant information on possible terrorists.⁵⁶⁰ The CTAP moreover requests EU agencies, including Europol, Frontex and EASO to start preparing for deployment, at Member States' request, to offer support in screening and fingerprinting persons at the EU external borders.⁵⁶¹

In response to CTAP Afghanistan⁵⁶², the **Council's Terrorism Working Part (TWP)** adopted a procedure on enhanced security checks at the EU's external borders⁵⁶³. As a **policy instrument**, the text proposes a three-tiered set of checks of all (presumed) Afghan nationals and persons (presumed to be) arriving from Afghanistan against all **technological / IT databases** accessible to EU Member States – refer to *Section 5* below on technological instruments applicable to intra-EU mobility. Under the first tier of checks, which aims to establish these persons' identity and nationality and ascertain whether they pose a potential risk to EU internal security, all 'Afghanistan'-related persons are checked against biographic and biometric data across databases at national, EU and international levels, including the SIS, SIS-AFIS, and Interpol's SLTD and TDAWN⁵⁶⁴. The second and third tier checks, which apply where checks at the preceding tier(s) do not allow a conclusion on the security threat posed by the individual or where there are indications that the individual may be a potential threat to the EU's internal security, subject the individuals concerned to increasingly severe checks, including the use of all Europol and Interpol databases, use of information from national intelligence and security agencies, extracting and analysing information from mobile electronic devices in the possession of the individuals, in-depth security interviews (with the support of Frontex and Europol), as well as relevant information from trusted third countries⁵⁶⁵.

⁵⁵⁸ Ibid., p. 3, para. 1.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid., p. 4, para 2.

⁵⁶¹ Ibid., p. 5, para 4.

⁵⁶² See specifically *ibid.*, p. 4, para. 3, which calls on the Council's TWP to develop a protocol for the proposed 'enhanced security checks'.

⁵⁶³ Council of the EU Terrorism Working Party (TWP), 'Procedure on enhanced security checks on persons crossing or having crossed the EU's external borders following developments in Afghanistan', Council Document No. 13683/21 LIMITE, Brussels, 16 November 2021, <https://www.statewatch.org/media/2933/eu-council-enhanced-border-checks-afghans-13683-21.pdf>.

⁵⁶⁴ Ibid., pp. 4-5.

⁵⁶⁵ Ibid., pp. 6-7.

4.4. Prioritising expulsions

A number of the EU's instruments have as their aim to ensure that persons deemed not to have a right to stay are removed from EU territory, whether to their country of origin or to a third country. This includes, as set out below, readmission agreement and arrangements (*Section 4.4.1.*), as well as the application of concepts in (EU) asylum law such as safe third country to return persons to *inter alia* Turkey (*Section 4.4.2.*). EU funding used towards promoting return (and reintegration after return) will be briefly highlighted below (*Section 4.4.3.*).

4.4.1. Readmission

The EU does not have a formal international agreement with Afghanistan for the readmission of Afghan nationals who are not or no longer entitled to stay in the EU. The lack of a formal readmission agreement between the EU and Afghanistan does not mean that no efforts have been made by the EU to come to such an arrangement. Specifically, the EU has concluded a non-binding readmission agreement with Afghanistan, namely **the Joint Declaration on Migration Cooperation between Afghanistan and the EU (JDMC)** (a **policy instrument**)⁵⁶⁶, with particularly point 1 thereof, noting that EU-Afghanistan migration cooperation shall be 'in order to organise the [...] *return of Afghan nationals to Afghanistan who do not fulfil the conditions to stay in the EU*'⁵⁶⁷.

Afghanistan commits itself with the JDMC to readmit its citizens who have entered or are staying in the EU irregularly⁵⁶⁸. Moreover, according to a 2021 Commission report on third countries' cooperation on readmission, seven (7) EU Member States have bilateral readmission agreements or arrangements with Afghanistan as of 2019⁵⁶⁹. In 2020, Greece and Afghanistan signed a **Memorandum of Understanding (MoU – a policy instrument)** on voluntary returns of irregular migrants to Afghanistan⁵⁷⁰. The Commission Report notes that in 2019, a total of 29 650 Afghan nationals were issued with return decisions, only 2 260 of whom were effectively returned to Afghanistan⁵⁷¹.

In the immediate aftermath of the 2021 Taliban crisis in Afghanistan, and despite the increasing humanitarian situation in Afghanistan, six (6) EU Member States – Austria,

⁵⁶⁶ European Commission (2021h), op. cit. It should be noted that, owing to the Afghan crisis of 2021, the implementation of the JDMC was suspended; see Commission Services (2021c), op. cit., p. 5.

⁵⁶⁷ European Commission (2021h), op. cit., p. 3.

⁵⁶⁸ Ibid., point 2.

⁵⁶⁹ European Commission (2021f), op. cit., p. 3.

⁵⁷⁰ See Antonopoulos, P., 'Greece and Afghanistan sign memorandum on returning illegal immigrants', *Greek City Times*, 22 October 2020, <https://greekcitytimes.com/2020/10/22/greece-afghan-deals/>; Greek Ministry of Foreign Affairs, 'Συνάντηση Αναπληρωτή Υπουργού Εξωτερικών, Μιλτιάδη Βαρβιτσιώτη, με τον Υφυπουργό Εξωτερικών του Αφγανιστάν Meerwais Nab (Αθήνα, 21.10.2020)', Greek Ministry of Foreign Affairs News, 21 October 2020, <https://www.mfa.gr/epikairoτητα/proto-thema/sunantese-anaplerote-upourgou-exoterikon-miltiade-barbitsiote-me-ton-uphupourgo-exoterikon-tou-afghanistan-meerwais-nab-athena-21102020.html>.

⁵⁷¹ European Commission (2021f), op. cit., p. 3.

Belgium, Denmark, Germany, Greece and the Netherlands called on the European Commission to maintain forced returns to Afghanistan, claiming that halting returns would send ‘the wrong signal’⁵⁷². The Commission did not seem to follow this line, however. As reflected in its **Draft Action Plan on Afghanistan** following the Taliban crisis, the Commission considers the situation in Afghanistan as currently not safe and it will not be safe for the foreseeable future and suspended the operation of the JDMC – and therefore also halting (forced) returns to Afghanistan⁵⁷³.

EU instruments also support the successful return and reintegration of Afghan nationals. Two projects supported through EU funding can be observed here⁵⁷⁴. First, under the above-mentioned **EU Readmission Capacity Building Facility (EURCAP)**, funded by the European Commission (**DG HOME**) under the Asylum, Migration and Integration Fund (AMIF) and implemented by **IOM**⁵⁷⁵, assistance was provided for the post-arrival reception and reintegration assistance to 152 Afghan nationals returned between December 2016 and March 2017 under the EU-Afghanistan Joint Way Forward⁵⁷⁶. Second, the **Reintegration Assistance for Development in Afghanistan (RADA)** project, implemented by the **IOM** and **funded** by the European Commission (**DG DEVCO/INTPA**) under the DCI⁵⁷⁷, foresees EUR 50 million to support sustainable reintegration of returnees within their communities⁵⁷⁸. The RADA project does not only foresee

⁵⁷² See Armstrong, M., ‘Six EU countries want to keep forced return of Afghans despite Taliban offensive’, *Euronews*, 10 August 2021, <https://www.euronews.com/2021/08/10/six-eu-countries-want-to-keep-forced-return-of-afghans-despite-taliban-offensive>.

⁵⁷³ Commission Services (2021d), op. cit., p. 5.

⁵⁷⁴ Of note is further a new project, under the umbrella of the Budapest Process and financed by Denmark, entitled *Capacity Building for Long-term Reintegration of Returnees to Afghanistan and Iraq (CAIR)*, aimed at strengthening the capacity of *inter alia* the Afghan Ministry of Repatriation and Refugees, as well as increasing the capabilities of local communities to reintegrate returnees. The CAIR project also aims to create ‘linkages between the ongoing European Return and Reintegration Network (ERRIN) efforts and development objectives of the local communities’. ICMPD (2021b), ‘New Project: Capacity Building for Long-term Reintegration of Returnees to Afghanistan and Iraq (CAIR)’, Budapest Process News, International Centre for Migration Policy Development (ICMPD), Vienna, 13 May, <https://www.budapestprocess.org/news-events/news/351-new-project-capacity-building-for-long-term-reintegration-of-returnees-to-afghanistan-and-iraq-cair>.

⁵⁷⁵ ECA (2021), op. cit., p. 47, para. 93.

⁵⁷⁶ See IOM, ‘Afghanistan’, <https://eea.iom.int/afghanistan>.

⁵⁷⁷ ECA (2021), op. cit., p. 67.

⁵⁷⁸ See IOM, ‘Afghanistan’, <https://eea.iom.int/afghanistan>; Commission Services (2021c), op. cit., p. 7. An example of an initiative funded under the RADA project is supporting local small and medium-sized enterprises (SMEs) ‘to increase their production capacity and their market research’ that have a potential for growth and who commit to employing a number of Afghan returnees; see Knowledge Management Hub, ‘Reintegration good practices #10 - Supporting SMEs and former returnees to create jobs for migrants returning to Afghanistan’, KHM Good and Innovative Practice Series, 2021 <https://returnandintegration.iom.int/en/resources/good-practice-factsheet/reintegration-good-practices-10-supporting-smes-and-former>.

supporting the return and reintegration of Afghan nationals returning from the EU, but also from third countries, including Turkey⁵⁷⁹, Iran and Pakistan⁵⁸⁰.

In respect of Afghanistan's neighbours (Pakistan, Iraq, Iran), the EU only has a **Readmission Agreement (RA) – a legal instrument** – in place with **Pakistan**. Under the EU-Pakistan Readmission Agreement⁵⁸¹, Pakistan is not only required to readmit its own nationals who are irregularly in the EU (Article 2), but it is further required to readmit irregular third country nationals in the EU who either (a) hold a valid residence title in Pakistan, or (b) who entered EU territory directly from Pakistan (Article 3). Moreover, as of 2019, two (2) Member States are reported to have bilateral agreements or arrangements in place with Pakistan on readmission⁵⁸², including Greece⁵⁸³. The EU does not have an RA with Iraq, but the **EU-Iraq PCA (a legal instrument)** does include a provision on the readmission of Iraqi nationals (the EU-Iraq PCA does not include an obligation to readmit third country nationals)⁵⁸⁴, while four (4) Member States have bilateral readmission agreements or arrangements with Iraq in 2019⁵⁸⁵. In respect of Iran, neither the EU nor its Member States have readmission agreements or arrangements in place⁵⁸⁶.

4.4.2. Unsafe third countries

As part of the EU-Turkey Statement, new unauthorised arrivals on the Greek islands from Turkey are returned to Turkey (following processing of any asylum claims lodged in Greece). Readmission under the EU-Turkey Statement should particularly be seen in light of the following. Greek (national) asylum law applies the concept of **safe third country**, whereby an asylum application may be rejected as inadmissible *inter alia* where the safe third country principle is applied⁵⁸⁷.

Article 86 of the Greek asylum law (IPA) – a Greek (**national**) **legal instrument** – sets out the criteria for applying the safe third country principle, requiring *inter alia* that the asylum applicant is not at risk of harm or will not be subjected to *refoulement* by the third country concerned, that it is possible to apply for refugee status in said third country, and

⁵⁷⁹ Commission Services (2021c), op. cit., p. 7.

⁵⁸⁰ Council of the EU (2021d), op. cit., p. 3.

⁵⁸¹ Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, OJ L 287, 4.11.2010, pp. 52-67.

⁵⁸² European Commission (2021f), op. cit., p. 66.

⁵⁸³ Cassarino, J.-P., 'Readmission Policy in the European Union', Study for the European Parliament LIBE Committee PE 425.632, Brussels, European Parliament, September 2010, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425632/IPOL-LIBE_ET%282010%29425632_EN.pdf, p. 29.

⁵⁸⁴ See EU-Iraq PCA, Article 105(3).

⁵⁸⁵ European Commission (2021f), op. cit., p. 46.

⁵⁸⁶ Ibid., p. 44.

⁵⁸⁷ Ibid.

that a connection exists between the applicant and the third country (including, under certain circumstances, transit through that country)⁵⁸⁸. According to the 2020 AIDA Country Report on Greece, up to the end of 2020, the safe third country concept was applied mainly to persons falling under the EU-Turkey Statement, and in particular Syrian nationals⁵⁸⁹. On 7 June 2021, however, the Greek Minister of Foreign Affairs and Minister of Migration and Asylum adopted a **Joint Decision** which designated Turkey as a safe third country for all asylum-seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, resulting in their asylum applications likely being rejected as inadmissible without assessment on the merits⁵⁹⁰.

Between April 2016 and January 2020, a total of 2 504 persons have been returned from Greece to Turkey under the EU-Turkey Statement⁵⁹¹. As a result of the high degree of legal uncertainty characterising the inherent nature of the statement and its implementation, Commission documents have made reference to two possible **legal instruments** forming the legal basis for such returns under the EU-Turkey Statement⁵⁹²: namely the EU's **Readmission Agreement with Turkey** (EU-Turkey RA or Turkey EURA)⁵⁹³ and Greece's **bilateral readmission agreement** with Turkey (hereinafter also: Greece-Turkey Readmission Agreement)⁵⁹⁴. The **Turkey EURA** not only governs the readmission of own nationals (Article 3), but also includes a third country national clause (Article 4). While the EURA with Turkey entered into force on 1 October 2014, Article 24(3) of the RA postponed the application of the third country national readmission clause until 1 October 2017. According to the Commission, however, Turkey has refused to apply the third country national clause⁵⁹⁵.

The **Greece-Turkey Readmission Agreement**, adopted in 2002 as the protocol implementing Article 8 of the Greece-Turkey Agreement on combating crime⁵⁹⁶, sets out

⁵⁸⁸ Ibid., pp. 139-140.

⁵⁸⁹ Refer to Karagiannopoulou et al. (2021), op. cit., p. 140.

⁵⁹⁰ Ibid., pp. 140-141.

⁵⁹¹ Refugee Rights Turkey (2022), op. cit., p. 43.

⁵⁹² See European Commission (2016f), 'EU-Turkey Statement: Questions and Answers', Commission Press Memo MEMO/16/963, Brussels, 19 March, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963, under 'On what legal basis will irregular migrants be returned from the Greek islands to Turkey?'. Cf. Öztürk, N.O. and Soykan, C., 'Third Anniversary of EU-Turkey Statement: A Legal Analysis', Heinrich Böll Stiftung Turkey, Istanbul, 19 December 2019, <https://tr.boell.org/en/2019/10/03/third-anniversary-eu-turkey-statement-legal-analysis>.

⁵⁹³ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014, pp. 3-27.

⁵⁹⁴ See Law No. 3030/2002, Protocol for the implementation of Article 8 of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Turkey on combatting crime, especially terrorism, organised crime, illicit drug trafficking and illegal migration, text available at <https://www.refworld.org/docid/54eb53124.html>.

⁵⁹⁵ See European Commission (2021f), op. cit., p. 87

⁵⁹⁶ Agreement between the Hellenic Republic and the Republic of Turkey on cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of Internal Affairs of the Republic of Turkey on

in further detail the obligations of Greece and Turkey respectively as concerns the readmission of citizens as well as third country nationals irregularly entering the other Party's territory, including the means by which to prove citizenship (Articles 2 and 3) and to prove irregular entry (Article 4 and 5) and the readmission procedure (Article 6). According to various sources, Turkey suspended its readmission agreement with Greece in 2018 (as a response to a Greek court decision releasing eight former Turkish soldiers), and with the EU in 2019 (citing a lack of development on visa liberalisation)⁵⁹⁷. Furthermore, Turkey suspended readmission under the EU-Turkey Statement in March 2020 in the name of the COVID-19 pandemic and based on wider geo-political interests and controversies with the EU⁵⁹⁸.

combating crime, especially terrorism, organized crime, illicit drug trafficking and illegal migration, signed in Ankara on 20 January 2000 (entered into force on 17 July 2001), available at <https://www.un-ilibrary.org/content/books/9789214030966c020>. Article 8 of the Agreement reads:

'The Parties shall cooperate in the combat against illegal immigration.

Until an agreement of Readmission is concluded, the Parties will readmit the persons, namely their nationals as well as nationals of third countries who have illegally crossed or shall cross the borders of one of the Parties, coming from the territory of the other Party.

For the implementation of the above, the Parties will jointly establish, as soon as possible, the principles and necessary procedures for the readmission of the said persons, through a relevant document.

The Parties shall communicate mutually, through diplomatic channels, specimens of new travel documents, seals and types of visas, in order to prevent and combat the illegal crossing of borders.'

⁵⁹⁷ Ineli-Ciger and Yigit (2020), op. cit., pp. 26-27; See also 'Turkey suspends deal with the EU on migrant readmission', *Euractiv*, 24 July 2019, <https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/>; 'Turkey suspends migrant readmission deal with Greece: Anadolu', *Reuters*, 7 June 2018, <https://www.reuters.com/article/us-turkey-security-greece-idUSKCN1J3100>.

⁵⁹⁸ See Cortinovis, R., 'Pushbacks and lack of accountability at the Greek-Turkish borders', CEPS Paper in Liberty and Security in Europe No. 2021-01, CEPS, Brussels, February 2021, <https://www.ceps.eu/ceps-publications/pushbacks-and-lack-of-accountability-at-the-greek-turkish-borders/>, pp. 10-11; Karagiannopoulou et al. (2021), op. cit., p. 23; Refugee Rights Turkey (2022), op. cit., p. 43.

5. Case study III: Intra-EU mobility of asylum-seekers and refugees

This case study provides an overview of EU instruments contributing to the goal of managing intra-EU mobility of asylum-seekers and refugees and at preventing free movement in the Schengen area. The aim is to map the key measures composing the multi-layered and multi-sectoral normative, policy, and operational framework currently in place at the EU level to prevent, detect, monitor, and police secondary or onward movements. The analysis only focuses on instruments and measures that are in force at the time of writing. Therefore, this case study does not provide an overview of revisions/amendments put forward by the EU Pact on Migration and Asylum⁵⁹⁹, previous CEAS reform proposals⁶⁰⁰, or the most recent proposals for a new Schengen strategy⁶⁰¹, and a regulation amending the Schengen Border Code (SBC)⁶⁰². This section is structured as follows:

- *Section 5.1* studies the relevant provisions included in the different instruments composing the EU asylum *acquis*, but also to the EU asylum policy tools and related actors contributing to the enforcement of the EU strategy of containment and deterrence of intra-EU mobility of asylum-seekers and refugees.
- *Section 5.2.* focuses on relevant provisions in the Schengen *acquis*⁶⁰³ to highlight the means and circumstances enabling national authorities to operate controls (including through internal border checks and police checks) on intra-EU mobility.
- *Section 5.3* provides an analysis of the increasingly integrated and interconnected surveillance apparatus developed by the EU to track and detect asylum-seekers and third country nationals who engage in secondary movements within the EU. Special

⁵⁹⁹ European Commission (2020b), op. cit. For an analysis of the legislative proposals made in the Pact, and the examination of their scope and expected impacts, see, Brouwer et al. (2021), op. cit.

⁶⁰⁰ European Commission (2021z), Communication from the Commission to the European Parliament and the Council, 'A strategy towards a fully functioning and resilient Schengen area', COM(2021) 277 final, Brussels, 2 June.

⁶⁰¹ European Commission (2016g), Communication from the Commission to the European Parliament and the Council, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', COM(2016) 197 final, Brussels, 6 April.

⁶⁰² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). On 14 December 2021, the Commission presented a proposal for a regulation amending the SBC, see European Commission (2021aa), 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. {SEC(2021) 440 final} - {SWD(2021) 462 final} - {SWD(2021) 463 final}, December 2021', 2021/0428(COD), COM(2021) 891 final, Strasbourg, 14 December.

⁶⁰³ For the purpose of this report the term 'Schengen *acquis*' is used with specific reference to: a) relevant provisions of the EU law enabling national authorities to operate controls (including through internal border checks and police checks) on intra-EU mobility (Article 23 of the SBC), and; b) Schengen Borders Code provisions enabling the reintroduction of border control at the internal borders and their use by Member States (Articles 25-30 SBC).

regard is given to cooperation between different EU agencies, and to the functions played by the interoperable system of databases.

- Finally, *Sections 5.4 and 5.5* include an assessment of practices and means in place to physically deter movement within the Schengen areas, as well as to operationalise intra-EU deportation of asylum-seekers apprehended in a Member States different from the one of first irregular entry. Special focus is given to the phenomenon of border fencing within the Schengen area, and to the bilateral agreements or arrangements that a selection of frontline EU Member States - and most notably Greece, Italy and Spain - currently have in place with other EU countries to take back asylum-seekers.

5.1. Containment, deterrence and sanctioning of secondary movements through EU asylum law and policies

The Common European Asylum systems (CEAS) is composed of a set of **legislative instruments** which, *inter alia*, aimed at establishing common rules for: determining the State responsible for examining the application of asylum-seekers (the Dublin Regulation – *Section 5.1.1* below⁶⁰⁴, and the Eurodac Regulation – *Section 5.1.2* below)⁶⁰⁵; creating a harmonised system for reception for asylum-seekers (Reception Condition Directive – *Section 5.1.3.* below⁶⁰⁶; assessing asylum claims (the Asylum Procedures Directive)⁶⁰⁷; establishing minimum standards for the qualification of a person as refugee or beneficiary of international protection (the Qualification Directive) (*Section 5.1.4.*)⁶⁰⁸; and enabling operational support in the implementation of the asylum *acquis* (Regulation on the

⁶⁰⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29 June 2013, pp. 31-59.

⁶⁰⁵ 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 (recast), OJ L 180, 29 June 2013, pp. 1–30.

⁶⁰⁶ 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 (recast), OJ L 180, 29 June 2013, pp. 96–116.

⁶⁰⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29 June 2013, pp. 60–95.

⁶⁰⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, pp. 9–26.

European Union Agency for Asylum) (Section 5.1.5)⁶⁰⁹. While each of these pieces of legislative instruments tools is designed to serve specific purposes, they also share a common goal, which consists of promoting harmonisation in the field of asylum in order to help to limit secondary movements of applicants for international protection and refugees between Member States⁶¹⁰.

5.1.1. Dublin Regulation

The key function of the Dublin III Regulation⁶¹¹ is that of laying down the criteria for the determination of the Member States responsible for processing asylum applications and assessing international protection claims. The regulation currently in place governs **responsibility-allocation among the 27 EU Member States plus the four EFTA ‘associate’ States.**

By establishing rules for the identification of the responsible EU country, the Dublin Regulation intended to deter forms of so-called asylum shopping (a phenomenon that, despite not proven by exiting statistics, refers to the idea of third country national moving from one country to the next to apply for asylum, as well as applying multiple times for protection in different countries)⁶¹², but also to prevent asylum-seekers from orbiting throughout Europe with no single country taking responsibility for their cases⁶¹³. To this effect, the regulation establishes that every application presented in the Dublin area is to be examined by only one responsible State⁶¹⁴. By mandating that an asylum application must be examined by a single Member State, the Dublin Regulation consolidated the so-called exclusivity principle, which is directed at preventing multiple applications by the same applicant⁶¹⁵.

⁶⁰⁹ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30 December 2021, pp. 1–54.

⁶¹⁰ Cf. Recital 13 of the Asylum Procedures Directive; Recital 12 of the Reception Conditions Directive; Recital 13 of the Qualification Directive; Dublin; Asylum Procedure; Recital 4 of the Regulation on the European Union Agency for Asylum.

⁶¹¹ The Dublin regime was originally established by the Dublin Convention, signed in Ireland on 15 June 1990. It has undergone two significant reforms since it was introduced. The first time it was reformed in 2003 (and replaced by the Dublin II Regulation), and a second time in 2013 (with the adoption of the Dublin III Regulation). The Dublin III Regulation has been in force since 1 January 2014. Further proposals for reforms were tabled in 2016, and 2020 respectively.

⁶¹² Mouzourakis, M. (2014a), ‘Wrong Number? The Use and Misuse of Asylum Data in Europe’, CEPS Liberty and Security Series in Europe, No. 69, CEPS, Brussels, December, <https://www.ceps.eu/ceps-publications/wrong-number-use-and-misuse-asylum-data-european-union/>.

⁶¹³ Recital 4 and 5 of the Dublin III Regulation. See also, Brekke, J-P. and Brochmann, G., ‘Stuck in Transit: Secondary Migration of Asylum-seekers in Europe, National Differences, and the Dublin Regulation’, *Journal of Refugee Studies*, Vol. 28, No. 2, 2014, pp. 145-162.

⁶¹⁴ Art. 3(1) of the Dublin III Regulation.

⁶¹⁵ Boccardi, I., *Europe and Refugees: Towards an EU Asylum Policy*, Kluwer Law International, The Hague, 2002, p. 43.

Dublin's exclusivity principle underlies both the one shot rule on asylum application⁶¹⁶, as well as the rule according to which a country's responsibility for the examination of an application also translates into responsibility to afford protection, if the claim is accepted⁶¹⁷. To consolidate such principle, the **Dublin Regulation does not include provisions allowing mutual recognition of positive asylum decisions**. Under the current Dublin system, **only negative asylum decisions can be mutually recognised among EU Member States**⁶¹⁸.

The identification of the single EU country responsible for examining an asylum application is operated by agreement of the Member States concerned and following a **hierarchy of criteria**⁶¹⁹. These criteria include family ties, or circumstances surrounding entry or stay in the Dublin area (such as the possession of residence documents or visas, irregular entry or stay, visa-waived entry, and place where the first application has been lodged)⁶²⁰.

In practice, **the most frequently applied criterion is the irregular entry one**, meaning that the Member State through which the asylum-seeker first entered the EU is also responsible for examining his or her asylum claim⁶²¹. Except in the case of minor applicants or when the family criteria foreseen in the regulation apply, the first EU country of irregular entry is generally considered to be the one responsible for assessing third country nationals' asylum claims. The generalised applications of the first country of irregular entry criterion has several legal and practical consequences.

From a legal point of view, the application of the first country of irregular entry criterion entails an obligation of the responsible State to complete the examination of the application⁶²². It also involves **the containment of mobility of asylum-seekers**, who are obliged to have their applications processed in the first country of irregular entry. The

⁶¹⁶ Nicolaïdis, K., 'Trusting the Poles? Constructing Europe through Mutual Recognition', *Journal of European Public Policy*, Vol 14, No 5, 2007, p. 689.

⁶¹⁷ Costello, C., 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', *Human Rights Law Review*, Vol. 12, No 2, 2012, p. 314.

⁶¹⁸ Mouzourakis, M. (2014b), "'We Need to Talk about Dublin". Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union', Refugee Studies Centre Working Paper Series No. 105, Refugee Studies Centre, Oxford, December, <https://www.rsc.ox.ac.uk/publications/we-need-to-talk-about-dublin>. The author also observed that 'introducing transfer of protection and mutual recognition of positive asylum decisions would render multiple asylum applications less appealing by conferring upon refugees and beneficiaries of subsidiary protection the right to free movement across the EU'.

⁶¹⁹ Recital 7(1) of the Dublin III Regulation.

⁶²⁰ Art. 3(2) and 8-16 of the Dublin Regulation.

⁶²¹ Art. 13 of the Dublin III Regulation, which stresses that '[w]here it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection.'

⁶²² Art. 18 of the Dublin III Regulation.

regulation sets a 12-month time limit for the applicability of the illegal entry criterion⁶²³. Another condition for the cessation of responsibility contained in the current Dublin Regulation, is the one that include the case of an applicant who has left the territory of the EU for a period exceeding 3 months⁶²⁴.

The Dublin Regulation also includes a set of normative provisions designed to enable the enforcement of the allocation of responsibility to process the applications of asylum-seekers or third country nationals that engaged in onward movements. These provisions regulate the **take charge and take back procedures**.

Take charge requests may be issued where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application request that other Member State to take charge of the applicant.⁶²⁵ The default rule is that an applicant who is 'present in another Member State without a residence document or who there lodges an application for international protection after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back'⁶²⁶.

Take back requests can be issued in two distinct circumstances. The first, is the already mentioned one where an application has been lodged in a Member State, and the latter considers that another Member State is responsible for the assessment of the asylum claim⁶²⁷. The second, concerns cases related to third country nationals apprehended in a situation of irregularity in one Member State, which considers another Member State to be responsible for taking back the concerned individual⁶²⁸. The default rule is that a take back request engages an obligation of the Member States requested to take charge of the individual concerned. Evidence of family ties must be taken into consideration only if produced before another state accepts a take charge request⁶²⁹. If Member States miss deadlines for submitting take back requests or for effecting transfers, the responsibility for assessing the asylum application shift from one state to another⁶³⁰.

When the country identified as responsible for the asylum request has given its approval, a transfer decision is notified to the applicant. The latter may contest this decision, and this appeal suspends the transfer⁶³¹. According to the Dublin Regulation, the sole reason that an individual is subject to take back or take charge procedures does not

⁶²³ Art. 13(1) of the Dublin III Regulation.

⁶²⁴ Art 19 of the Dublin III Regulation.

⁶²⁵ Art. 21 of the Dublin III Regulation.

⁶²⁶ Art. 20(5) of the Dublin III Regulation.

⁶²⁷ Art 23 of the Dublin III Regulation.

⁶²⁸ Art. 24 of the Dublin III Regulation.

⁶²⁹ Art 7(3) of the Dublin III Regulation.

⁶³⁰ Art. 23(3) and Art. 24(2) of the Dublin III Regulation.

⁶³¹ Art. 26 of the Dublin III Regulation.

justify detention. The regulation however expressly permits detention for the purpose of securing transfer procedures when there is a significant risk of absconding⁶³².)

The detention regime under Dublin III is formally subject to necessity, proportionality requirements and insofar as alternatives to detention cannot be applied effectively. The legality of such detention must be indeed by assessed in light of Member States' obligations under other provisions of the EU asylum *acquis* and the EU Charter of Fundamental Rights, as well as under international human rights law on the right to liberty⁶³³. And yet, prior research revealed that **Member States determine the existence of a risk of absconding in Dublin procedures with reference to a too wide range of factors**, which *inter alia* include: non-cooperative behaviour regarding obligations to leave the territory; previous criminal convictions; lack of documents; insufficient means of subsistence; insufficient ties to the country of residence. Some Member States even consider that such exists simply where another Member State is responsible for the claim under the Dublin Regulation⁶³⁴.

It has therefore been noted that **the Dublin Regulation permits *detention* for the purpose of securing transfer procedures** from one EU Member State to another, even though the individual to be removed from the territory is still an asylum-seeker with a right to reside in the Member State detaining him or her⁶³⁵. And yet, the purpose of expelling an asylum-seeker to another Member State bound by the Dublin Regulation before a substantive assessment of his/her claim has taken place, does not constitute one of the grounds that, under the European Convention of Human Rights (Art. 5(1)f), justify the detention of asylum-seekers⁶³⁶. Furthermore, the CJEU has established that the right to remain on the territory of the sending Member State does not cease until the very moment when the asylum-seeker has reached the territory of the responsible Member State, as the standards set out in the recast Reception Conditions Directive apply throughout the entirety of Dublin procedures⁶³⁷.

⁶³² Article 28 of the Dublin III Regulation.

⁶³³ ECRE, 'The Legality of Detention of Asylum-seekers under the Dublin III Regulation', AIDA Legal Briefing No. 1, European Council on Refugees and Exiles (ECRE), Brussels, June 2015, <https://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-the-legality-of-detention-of-asylum-seekers-under-the-Dublin-III-Regulation-June-2015.pdf>.

⁶³⁴ Bloomfield, A., Tsourdi, E. and Pétin, J., 'Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation', Odysseus Network MADE REAL Project Report, January 2015, <https://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf>, pp. 72-74.

⁶³⁵ ECRE (2015), *op. cit.*, pp. 7-8.

⁶³⁶ Costello, C., *The Human Rights of Migrants in European Law*, Oxford University Press, Oxford, 2015, in particular Chapter 7.

⁶³⁷ Judgment of the Court of Justice of 27 September 2012, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, EU:C:2012:594, para 46.

The Dublin III Regulation prohibits transfers to Member States where deficiencies in the asylum system or systemic flaws entail a risk of inhuman or degrading treatment⁶³⁸. This means *inter alia* that transfers carried out in application of the EU Dublin Regulation ('take back' or 'take charge' requests) can be successfully challenged by individuals on wider fundamental rights grounds.

Challenges to Dublin transfers have indeed led to the development of an important body of ECtHR and CJEU case-law which clarified that amongst the admissible grounds for preventing Dublin transfers, is the one that arise where the concerned individual would incur in a deportation to a Member State where asylum-seekers are victims of inhuman or degrading treatments. This line of jurisprudence led national courts to suspend transfers to Member States where an asylum-seeker would be unfairly denied international protection (cases of indirect *refoulement*) or would be denied their rights in the Dublin procedure. However, and problematically, in cases where concerns have been raised with regard to the risk in the event of a Dublin transfer of specific categories of asylum-seekers (most notably, family members with minor children), it has been considered that **declarations made in circular letters sent by the government of the Dublin country of return (e.g. Italy) can replace the actual proof of individual guarantees** for the persons to be transferred⁶³⁹.

At the same time, concerns have been expressed regarding the fact that, the discretionary clause⁶⁴⁰ which under the Dublin III Regulation enables a Member State to take responsibility for an asylum application even if it has not been identified as the responsible Member State, is used 'differently, rarely, and only by a few Member States⁶⁴¹.'

The institutional actors responsible for assessing the Member State responsible under the Dublin III Regulation vary significantly across the EU. While in some Member States this assessment is made by the same **authorities responsible for issuing asylum decisions**, in other countries decisions on Dublin-related matters are taken by officials working for the **national immigration office**, or whose operations falls under the mandate of the Ministry of Interior. Other Member States opted instead for the creation of a **separate unit**, within the national migration authority, which is responsible solely for Dublin matters⁶⁴².

⁶³⁸ Art. 3(2) of the Dublin III Regulation.

⁶³⁹ Vedsted-Hansen, J., 'Current Protection Dilemmas in the European Union', in C. Grütters, S. Mantu, and P. Minderhoud (eds.), *Migration on the Move: Essays on the Dynamics of Migration*, Brill-Nijhoff, Leiden, 2017, p. 108.

⁶⁴⁰ Art. 17 of the Dublin III Regulation.

⁶⁴¹ European Parliament, 'Report on the implementation of the Dublin III Regulation (2019/2206(INI)), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Fabienne Keller', PE 648.425v03-00, 2 December 2020, https://www.europarl.europa.eu/doceo/document/A-9-2020-0245_EN.pdf.

⁶⁴² For a detailed overview of the national authorities responsible for Dublin III 'responsibility assessments', See, Brouwer et al. (2021), op. cit., pp. 148-149.

5.1.2. The Eurodac Regulation

The Eurodac Regulation is a key component of the Dublin system. The original goal of the European Asylum Dactyloscopy Database (Eurodac) – which for the purposes of this Report **is considered as a hybrid legal and technological instrument** – was to establish a database of fingerprints of asylum-seekers entering the Schengen area, and to impose an obligation upon all asylum-seekers who arrive in the EU area to have their fingerprints taken during registration.

Eurodac's biometric identification system has been specifically designed to serve the purpose of preventing third country nationals from deliberately concealing their identity⁶⁴³. By introducing rules subjecting migrants and asylum-seekers to compulsory biometric identification processes, the Eurodac archive created a tool that enables immigration and asylum authorities across the EU to determine whether an individual has applied in or travelled through other European countries.

Each Member State has the obligation to promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age. Such data must be transmitted to the Eurodac database as soon as possible and no later than 72 hours after the lodging of an application for international protection⁶⁴⁴. People whose data can be inserted in the Eurodac system are currently classified in three distinct categories. The *first category* is represented by applicants for international protection. The *second category* consists of third country nationals or stateless persons apprehended while irregularly crossing an EU external border. The *third category* comprises third country nationals or stateless persons found illegally staying in the territory of a member state.

The procedure for taking fingerprints takes place according to the national law and practice of the Member States concerned. This means that **the categorisation of third country national as subjects falling under category 1, 2 or 3, ultimately depend upon national border guards or law enforcement officers responsible for the fingerprinting**. This choice, which is implemented through a simple click on Category 1 or Category 2 by the competent authorities in respective countries, will label concerned individuals as either asylum-seekers, or those irregularly crossing the external border. This choice, which is implemented through a simple click on Category 1 or Category 2 by the authorities in respective countries, will label the individuals concerned as either asylum-seekers, or those irregularly crossing the external border. It has been observed that the wide margin of discretion at the moment of the assessment / categorisation, can be influenced by several factors (e.g. varying attitudes in different Member States towards third country nationals and people on the move), and this entails individuals becoming

⁶⁴³ Aus, J.P., 'Eurodac: A Solution Looking for a Problem?', *European Integration online Papers*, Vol. 10, No. 6, 2006, <http://eiop.or.at/eiop/pdf/2006-006.pdf>.

⁶⁴⁴ Article 9(1) of the Eurodac Regulation.

subject to **arbitrary decisions by Member States' border authorities**⁶⁴⁵. And yet, the labelling has far-reaching legal and practical repercussions for the individuals concerned and their rights and dignity.

The current Eurodac Regulation prescribes different data retention periods, which vary depending on the categories of persons whose data is collected, transmitted and/or compared via this database. Data of individuals seeking asylum (category one) are kept in the database's central system for 10 years⁶⁴⁶. Data of subjects apprehended by competent authorities in connection with irregularly crossing of the EU external border (category two) are only retained for 18 months⁶⁴⁷. Fingerprints of irregularly staying third country nationals (category three) are not however retained⁶⁴⁸. Data of beneficiaries of international protection are made available for comparison purposes for a period of three years⁶⁴⁹. Member States may instead only *transmit* to Eurodac fingerprints of irregular migrants, when the purpose is to check if the person found in a situation of irregularity within their territory has previously lodged an application for international protection or irregularly crossed the EU external border⁶⁵⁰.

Eurodac has been presented as a key technological-legal instrument for the enforcement of the Dublin rules on allocation of responsibility and the tackling of secondary movements⁶⁵¹. By allowing the storing and comparison of asylum-seekers' and migrants' data and enabling Member States' asylum authorities as well as national and EU and border management actors to compare the fingerprints of asylum-seekers and irregular migrants, Eurodac facilitates the issuing and execution of 'take charge'⁶⁵² and 'take back' requests⁶⁵³. Research has found that, in practice, the use of Eurodac allows the subversion of hierarchical order in the Dublin III criteria for the determination of the state responsible for processing an asylum application. Through Eurodac 'hits', lower-ranking criteria (such as the one of the State of first entry) take precedence over other applicable criteria because they are assisted by what is considered to be 'hard' evidence⁶⁵⁴.

⁶⁴⁵ Ferraris, V., 'Economic Migrants and Asylum-seekers in Ten Fingers: Some Reflections on Eurodac and Border Control', Border Criminologies Blog, 8 May 2017, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/05/economic-migrants>.

⁶⁴⁶ Article 12(1) of the Eurodac Regulation.

⁶⁴⁷ Article 18(1) of the Eurodac Regulation.

⁶⁴⁸ Article 17(3) of the Eurodac Regulation.

⁶⁴⁹ Article 18(2) of the Eurodac Regulation.

⁶⁵⁰ Article 17(1) of the Eurodac Regulation.

⁶⁵¹ Recital 30 of the Dublin III Regulation.

⁶⁵² Art 21(1) of the Dublin III Regulation.

⁶⁵³ Art 23(2) of the Dublin III Regulation.

⁶⁵⁴ Jurado, E. et al., 'Evaluation of the Implementation of the Dublin III Regulation. Final report', Study for the European Commission, DG Migration and Home Affairs, 18 March 2016, https://ec.europa.eu/home-affairs/system/files/2020-09/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf, pp. 24-26. See also EASO (2019b), 'EASO Practical guide on the implementation of the Dublin III Regulation: Personal interview and evidence assessment', EASO Practical Guide Series, Publications Office of the

Rather than reflecting the *actual* numbers of individuals having irregularly entered the EU and of asylum applicants in the EU, **the Eurodac system accounts for lodged asylum applications and recorded irregular entries**. Because the system accounts for recorded irregular entries and lodged asylum applications (rather than actual individuals), the total number of Eurodac ‘hits’ do not provide a factual representation of the scale of secondary movements within the EU. **What Eurodac does, instead, is to provide data that affect the distribution of asylum-seekers**⁶⁵⁵. In practice, Eurodac ‘hits’ provide evidence which allow the activation of specific criteria for the allocation of responsibility, such as the one of the State of first irregular entry⁶⁵⁶.

In 2013, Eurodac’s purpose was also expanded **to allow for the comparisons of Eurodac data by Member States’ law enforcement authorities and Europol**. Europol, the EU law enforcement agency facilitating the exchange of criminal intelligence between police, customs and security services, has thus gained access to this database to help national authorities in the fight against terrorism and serious crime. Law enforcement access to Eurodac requires a prior check in relevant national databases, as well as in the Visa Information System (VIS)⁶⁵⁷. Europol is the authority responsible for verifying national law enforcement authorities’ requests for comparison of fingerprints, with data collected in the Eurodac system⁶⁵⁸.

Before the entry into force of the Eurodac Regulation’s 2013 recast, difficulties related to the possibility to reconcile law enforcement access to Eurodac with the ‘purpose limitation’ principle, and questions related to the necessity and proportionality, as well as risks of unequal treatment between asylum-seekers and other individuals had been

European Union, Luxembourg, October, <https://euaa.europa.eu/publications/practical-guide-implementation-dublin-iii-regulation>, p. 23, where it is stated ‘as relevant information for responsibility is, in practice, gathered via the Eurodac database, it should be ensured that the case officer who conducts the interview knows the result of the comparison of fingerprints with the existing Eurodac data. If this is not the case, a second Dublin personal interview should be conducted if the Central system transmits a hit pursuant to Article 9(5), 15(2) or 17(5) Eurodac II Regulation, in order to ask further questions from the applicant in connection with the information based on which another Member State is deemed to be responsible, as there might be individual circumstances which can influence the determination procedure’.

⁶⁵⁵ Brouwer, E., *Digital Borders and Real Rights. Effective Remedies for Third-country Nationals in the Schengen Information System*, Martinus Nijhoff Publishers, Leiden, 2008, p. 126.

⁶⁵⁶ Jurado et al. (2016), op. cit., pp. 24-26. See also EASO (2019b), op. cit., p. 23, where it is stated ‘as relevant information for responsibility is, in practice, gathered via the Eurodac database, it should be ensured that the case officer who conducts the interview knows the result of the comparison of fingerprints with the existing Eurodac data. If this is not the case, a second Dublin personal interview should be conducted if the Central system transmits a hit pursuant to Article 9(5), 15(2) or 17(5) Eurodac II Regulation, in order to ask further questions from the applicant in connection with the information based on which another Member State is deemed to be responsible, as there might be individual circumstances which can influence the determination procedure’

⁶⁵⁷ Jones, C., ‘Eurodac: Member States want wider police access to biometric database despite most having never made use of it’, Statewatch Briefing, December 2016, <https://www.statewatch.org/media/documents/analyses/no-303-eurodac-lea-access.pdf>.

⁶⁵⁸ Article 7(1) of the Eurodac Regulation.

highlighted by the European Data Protection Supervisor⁶⁵⁹. These concerns were also shared by the UNHCR, which regretted that it would “further risk putting persons seeking international protection at risk of stigmatization”⁶⁶⁰.

The remodelling of Eurodac into a system that subjects asylum-seekers to law enforcement and policing controls has been mostly justified on the basis of the assumed inauthenticity of identities of third country nationals and became a way to control movements and behaviours of asylum-seekers in a way that is analogous to that used for controlling identity and for locating criminals⁶⁶¹. Some observers stressed that Eurodac has progressively become **a police tool** for searching for unknown suspects among international protection applicants based on latent fingerprints retrieved from crime scenes⁶⁶².

In 2016, a Eurodac recast proposal⁶⁶³ envisaged the widening of the data system’s purposes: from determining the Member State responsible for examining an asylum application made in the EU, to identifying irregularly staying third country nationals and those who have entered the EU irregularly at the external borders, with a view to use this information to assist Member States in the re-documentation and return of third country nationals. Moreover, the Eurodac 2016 recast foresaw an extension of the categories of data to be collected in and processed through the system: from only dactyloscopic data (fingerprints) to a wider range of biometric (facial images) and alphanumeric data. The Recast proposal also included the reduction of the age limit for collecting and processing biometric information of minors, including children to the age of 6 years old. The proposed recast furthermore envisaged a broadening of law enforcement authorities access rights: not only to provide access to all new categories data processed in Eurodac, but also to ensure availability of such data to law enforcement authorities for a longer

⁶⁵⁹ EDPS (2012), Opinion of the European Data Protection Supervisor on the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No [.../...] [...] (Recast version).

⁶⁶⁰ UNHCR (2012), Comments on Eurodac, UNHCR comments on the Commission’s amended proposal.

⁶⁶¹ Bhatia, M., ‘Turning Asylum-seekers into “Dangerous Criminals”: Experiences of the Criminal Justice System of Those Seeking Sanctuary’, *International Journal for Crime, Justice and Social Democracy*, Vol. 4, No 3, 2015, pp. 97-111.

⁶⁶² Guerra, C., Interoperability and refugees from a data protection perspective, Contribution to MPC Blog Forum ‘Interoperable Information Systems in the EU Area of Freedom, Security and Justice’, 2020, <https://migrationpolicycentre.eu/interoperability-refugees-data-protection/>.

⁶⁶³ Proposal for a regulation of the European Parliament and of the Council 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] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final, hereinafter referred to as the Proposal for a Eurodac 2016 recast.

period⁶⁶⁴.

In a letter addressed to the European Parliament's LIBE Committee on 21 December 2016, the EU27 Member States' data protection supervisory authorities composing the Eurodac Supervision Coordinated Group (Eurodac SCG) regretted that the 2016 recast proposal provided "no sound justification or a data protection impact assessment showing the necessity to extend the data processed in the system to facial image and to alphanumeric data"⁶⁶⁵. The Group also expressed the opinion that such an extension of the purpose and data collection envisaged in the proposed recast raises serious doubts concerning the primary data protection principles such as proportionality, necessity and purpose limitation. **With specific regard to law enforcement access to Eurodac data, the attention has been brought to the persistently low levels of use of this possibility by national police authorities.** Doubts have therefore been expressed with the regard to the lack of evidence required to justify the necessity of the proposal to expand availability (in terms of both, data categories and time limits) of Eurodac data for law enforcement purposes⁶⁶⁶.

On June 19, 2018, the European Parliament and Council reached a partial provisional agreement on the 2016 proposal. Some of amendments agreed upon in the provisional agreement concern changes to provisions related to access to Eurodac for law enforcement purposes.⁶⁶⁷ Under the provisional agreement, the obligation to consult the VIS first has been removed⁶⁶⁸. Aside from the amendments proposed to the Eurodac legal basis, it is important to address the connection between Eurodac and EU regulations on the interoperability of an EU large-scale database adopted in May 2019.⁶⁶⁹ This interoperability framework makes Eurodac part of an integrated information network between existing and future large-scale EU information systems in the AFSJ, which will allow national authorities to check whether information on an individual person is recorded in any of the EU databases that are part of the network (VIS, SIS II, Eurodac, the

⁶⁶⁴ Orav, A. (2021), Recast Eurodac Regulation, European Parliamentary Research Service, Briefing on EU Legislation in Progress, PE 589.808 – March 2021.

⁶⁶⁵ Eurodac SDG (2016), Letter regarding the 2016 recast of the Eurodac Regulation, Brussels, 21 December 2016 EJ/LS/ssp/D(2016)2803 C2005-0156.

⁶⁶⁶ Ibid., p.4.

⁶⁶⁷ Brower and others (2021), The European Commission's legislative proposals in the New Pact on Migration and Asylum, Study for the Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies; PE 697.130 - July 2021, Chapter 5 in particular.

⁶⁶⁸ Following the provisional agreement of June 2018, amended Article 21(1) provide that designated authorities may submit their "reasoned electronic request for comparison of biometric or alphanumeric data with the data in the Eurodac Central System", as, "at the same time they submit a request for comparison with the data stored into the Visa Information System". The amended Article 21 states that searches "shall be carried out with biometric or alphanumeric data".

⁶⁶⁹ Regulation 2019/817 and Regulation 2019/818, OJ EU L 135, 22.05.2019.

Entry/Exit System, ETIAS, and ECRIS-TCN).⁶⁷⁰

In this regard, the EDPS pointed out that the most recent proposals related to the expansion of law enforcement authorities' possibility to access Eurodac **blur the distinction between different policy areas of asylum, migration, police cooperation, internal security, and criminal justice**⁶⁷¹. As noted by the FRA, since Eurodac contains data on persons (i.e. refugees and asylum seekers) not suspected of having committed any crimes, the abandonment pursuant to the Interoperability legislation of the 'cascade system', which obliged EU Member States to first consult national databases that are directly linked to criminal investigations, and only then consult EU-level IT systems has serious negative consequence for **asylum seekers' fundamental rights of privacy and data protection**⁶⁷².

Despite the fact that information on asylum applicants is particularly sensitive, access to data sets on asylum applicants – a group particularly vulnerable to fundamental rights violations – will no longer only be consulted as a measure of last resort. From a fundamental rights perspective, **independent evidence justifying the lawfulness of provisions enabling the use of Eurodac for law enforcement purposes constitutes an absolute requirement**. Clear evidence is needed to demonstrate the necessity and proportionality of the proposed extension of content, scope and use of Eurodac, also taking into account the linkages between Eurodac and other databases in the context of interoperability.⁶⁷³

Prior research has highlighted how **transforming Eurodac into a tool for policing intra-EU mobility has led to more *mistrust* of third country nationals vis-à-vis the CEAS**. It is widely known how, in order to avoid identification and fingerprinting, third country nationals have been led to abscond, resort to smugglers, and even resorted to self-harm and to self-mutilation⁶⁷⁴.

5.1.3. The Reception Conditions Directive

The Reception Conditions Directive is an addition **legal instrument** and has a twofold objective. First, it establishes common rules with the objective of **ensuring a minimum level of material reception conditions standards in all Member States**. Second, it aims at reducing secondary movements within the EU. These two objectives are strictly

⁶⁷⁰ Access to the network is based on different search mechanisms, including a European Search Portal (ESP) which serves as a 'message broker' enabling users to search multiple information systems simultaneously, using both biographical and biometric data

⁶⁷¹ EDPS Opinion 2020/9, 30 November 2020, p. 7.

⁶⁷² FRA (2018), *Under Watchful Eyes*, EU IT Systems and fundamental Rights, p. 14.

⁶⁷³ Bower and others (2021), p. 88.

⁶⁷⁴ Pugliese, J., 'Technologies of Extraterritorialisation, Statist Visuality and Irregular Migrants and Refugees,' *Griffith Law Review*, Vol. 22, No 3, 2013, pp. 571-597.

correlated in the directive. The provision of equivalent reception standards in all EU countries is, in fact, seen as a necessary pre-condition to prevent the existence of better reception conditions in certain Member States from becoming a ‘pull factor’ for asylum-seekers to engage in onward movement within the EU.

With regard to the first objective, the directive frames **reception conditions of asylum-seekers as a tool for migration management**. The rationale behind such framing is that in order to tackle reception-related incentives as a driver of onward movements, EU asylum law shall reduce the margin of discretion that Member States have with regard to the level of material reception conditions provided to asylum-seekers under their systems. At the same time, it is widely acknowledged that the dignified standard of living, which according to the Reception Conditions Directive,⁶⁷⁵ Member States must guarantee to asylum-seekers from the moment they express the intention to seek international protection (for example when apprehended or when interviewed for identification purposes) have been interpreted (and consequently applied) differently across national systems.

The current Reception Conditions Directive still leaves a wide margin of discretion to Member States to autonomously choose the way to deal with third country nationals refused entry at the border or apprehended in a situation of irregularity. This lack of clarity results in divergent domestic practices. Member States have, in particular, retained the power to regulate, through national law, the regime of first reception facilities as well as of border reception facilities established for different purposes, including the processing of asylum application or the detention of irregular migrants⁶⁷⁶.

While reception conditions differ across member states, they may also vary within the same country. In several EU Member States, reception conditions increasingly tend to vary according to the nationality of the asylum seekers. In Italy, certain nationalities considered not deserving of international protection (and identified as “economic migrants” after their arrival) are placed in detention centers.⁶⁷⁷ In some Greek’s islands, hotspots serve the purpose to receive asylum seekers having transited through safe third countries (i.e. Turkey) and function as *de facto* detention centers in which requests of asylum seekers with “low recognition rates” nationalities are assessed, and from which

⁶⁷⁵ Article 1 of the Reception Conditions Directive, read in conjunction with its Art. 2 (a) and 2 (b). For the definition of ‘application for international protection’, see the Qualification Directive (2011/95/EU), Art. 2 (h).

⁶⁷⁶ Art.18(1) of the Reception Conditions Directive allows Member States to provide housing in premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones rather than solely in accommodation centres and private houses or hotels. See Van Ballegooij, W. and Eisele, K., ‘Asylum Procedures at the Border: European Implementation Assessment’, EPRS Study PE 654.201, European Parliamentary Research Service (EPRS), Brussels, November 2020, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2020\)654201](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654201), pp. 201-202.

⁶⁷⁷ Asylum Information Database (AIDA), Italy Country Report: Hotspots, Last updated 20 May 2022.

rejected applicants are detained in view of being returned.⁶⁷⁸ In Hungary, the governmental policy preventing asylum seekers from accessing decent reception conditions resulted in the country's violation of EU asylum law. All asylum seekers arriving at the border have automatically been placed in a transit zone, where they have limited access to reception conditions. The CJEU has found that Hungary's **system of detention was established outside EU law and without observance of the guarantees which must normally govern it.**⁶⁷⁹

In several EU countries, the first reception of asylum applicants, including vulnerable people, entails a **de facto deprivation of liberty regime**⁶⁸⁰. Refusals of entry into the territory, or after being apprehended in a situation of irregularity is often accompanied by restrictions on the concerned person's liberty, and border asylum procedure in most cases implies detention⁶⁸¹. Refusal of entry into the EU is regulated by Schengen Borders Code. The Code which entrusts EU Member States authorities the power and responsibility to ensure that the measures they undertake in the context of border control and surveillance function fully **respect human dignity, are proportionate to the objective pursued, and do not discriminate** on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁶⁸²

Clearly, not every person crossing border irregularly is an asylum seeker, and therefore entitled to reception conditions under EU law. At the same time, the punitive approach toward asylum-seekers that has been adopted by some Member States' through their implementation of the Reception Conditions Directive (e.g. under the EU's hotspot approach, or by the means of the indiscriminate detention of asylum applicants in transit zones) have been found time and again to fall short of EU asylum law and international protection standards.

For example, the CJEU Court declared that the Hungarian practice of detaining an applicant for international protection in the transit zone was precluded by Articles 8 and 9 of Directive 2013/33, as it was based on the sole ground that the applicant was unable to provide for his or her needs. Additionally, such detention was taking place without a reasoned decision ordering the detention, without investigating the necessity and proportionality of such a measure and without the availability of judicial review of the

⁶⁷⁸ ECRE (2021), ECRE's Assessment of Opportunities for and Obstacles to the use of: Legal Challenges to Support Compliance with EU Asylum Law in Greece.

⁶⁷⁹ Judgment in Case C-808/18 Commission v Hungary.

⁶⁸⁰ FRA (2021a), 'Migration: Key Fundamental Rights Concerns, Quarterly Bulletin (01.01.2021/01.06.2021)', European Union Agency for Fundamental Rights (FRA), Vienna, 24 September, <https://fra.europa.eu/en/publication/2021/migration-key-fundamental-rights-concerns-bulletin-2-2021>, p. 25. The expressions 'De facto detention' or 'de fact deprivation of liberty' refer to practices whereby persons are deprived of their liberty in the absence of a detention order. See Van Ballegooij and Eisele (2020), op. cit., pp. 16 and 76. See also EASO, 'Border Procedures for Asylum Applicants in EU+ Countries', European Asylum Support Office (EASO), Valletta, September 2020, <https://op.europa.eu/s/vTSq>, p. 202.

⁶⁸¹ EPRS (2020), p. 11

⁶⁸² Article 7 SBC.

lawfulness of the administrative decision ordering the detention⁶⁸³. The ECHR has also found EU Member States to be in violation of the Convention for their treatment of asylum seekers in the context of hotspots,⁶⁸⁴ and stressed that the detention of an asylum seeker that cannot be expelled pending a decision on his asylum application is illegitimate (since it takes place in a legal vacuum, in the absence of provisions for direct review of detention pending expulsion).⁶⁸⁵

And yet, **Border facilities established at the EU external borders are still used for *de facto* detention of individuals denied entry**, or for persons apprehended or intercepted while attempting an irregular border crossing are designed as prison-like environments (characterised by barbed wire and fencing)⁶⁸⁶. **Regimes of *de facto* detention** are also applied in facilities designed for initial registration and identification purposes⁶⁸⁷.

Similar logics of mobility containment clearly characterise the hotspot approach promoted by the EU in the wake of the refugee crisis of 2015 and mentioned in *Section 4.3.2* of this Report above ⁶⁸⁸. As of today, hotspots – which essentially consist of border facilities designed to secure initial reception, identification, registration, fingerprinting and referral of third country nationals to asylum, return or relocation procedures – have only been set up in two Member States: Italy and Greece. However, **express normative references to hotspots are now included in the founding regulation of EU agencies Frontex and the EUAA**. Such express normative recognition reinforces the nature of hotspots as **hybrid multi-nature instruments with operational, legal, financial and technological components**⁶⁸⁹.

Under the current EU legal framework, hotspots can in fact be established in any Member States faced with disproportionate migratory challenge at its external border. Although

⁶⁸³ Judgment in Case C-808/18 *Commission v Hungary*, para. 302 of the judgment. In the infringement case ECJ 17 December 2020, Case C-808/18, *European Commission v Hungary*, the Court declared that ‘in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33’ Hungary has ‘failed to fulfil its obligations’ (para 317)

⁶⁸⁴ ECtHR, *J.R. and Others v. Greece*, No. 22696/16, 25 January 2018.

⁶⁸⁵ ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009.

⁶⁸⁶ FRA (2021b), ‘Initial-reception facilities at external borders: fundamental rights issues to consider’, European Union Agency for Fundamental Rights (FRA), Vienna, 26 March, <https://fra.europa.eu/en/publication/2021/initial-reception-facilities-external-borders>, pp. 3-4.

⁶⁸⁷ *Ibid.*, p. 2.

⁶⁸⁸ European Commission (2015b), *op. cit.*

⁶⁸⁹ See, for instance, Article 2(23) Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295/1, 14 November 2019. The provision defines a ‘hotspot area’ as an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders.

hotspots present several specificities (i.e., EU funding and operational involvement of EU Justice and Home Affairs Agency), it has been noted that – as reception facilities – they resemble in many respects those established by Member States under their national laws and raise similar challenges from a fundamental rights and rule of law perspective.

It has been noted how the **hotspot approach ‘blur the lines’ between detention and restriction on freedom of movement of third country nationals**⁶⁹⁰, and are *inter alia* characterised by sub-standards material conditions and impede access to the territory. For instance, the FRA found that asylum applicants held in the hotspots created in the Greek islands were staying there, on average, for over five months. During such periods, it had been difficult to deploy the necessary experts to the hotspots, such as social workers, lawyers, doctors and other professionals⁶⁹¹.

The Reception Conditions Directive clearly establishes that Member States shall not hold a person in detention for the sole reason that he or she is an asylum or international protection applicant⁶⁹². However, by failing to outline in a sufficiently clear and prescriptive way the reception conditions standards applicable to persons irregularly crossing the EU external borders, or apprehended in a situation of irregularity within the EU territory, **the Reception Conditions Directive and the hotspot approach** have not only legitimised Member State’s policies of containment of intra-EU mobility of third country nationals, but have also **undermined the latter’ right to liberty, and in certain circumstances also their right not to be subject to inhuman and degrading treatments**.

The Reception Conditions Directive itself adopts a punitive approach toward onward movements. It does so, in particular, by **foreseeing a reduction and, in exceptional and duly justified cases, withdrawal of reception conditions** for asylum-seekers who have infringed EU regulations in relation to the processing of their claims⁶⁹³. The circumstances justifying these measures encompass *inter alia* cases where an applicant: abandons the place of residence determined by the competent authority without informing it or, if requested, without permission⁶⁹⁴; does not comply with reporting duties or with requests to provide information or appear for personal interviews concerning the asylum

⁶⁹⁰ Majcher, I., ‘The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part I)’, Border Criminologies blog post, 4 April 2018, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/eu-hotspot>.

⁶⁹¹ 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’, FRA Opinion 3/2019 [Hotspots Update], European Union Agency for Fundamental Rights (FRA), Vienna, February 2019, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf, p. 6.

⁶⁹² Article 8 of the Reception Condition Directive.

⁶⁹³ Article 20 of the Reception Conditions Directive.

⁶⁹⁴ Article 20(1)(a) of the Reception Condition Directive.

procedure during a reasonable period laid down in national law⁶⁹⁵; has lodged a subsequent application as defined in Article 2(q) of the recast Asylum Procedures Directive⁶⁹⁶; for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State⁶⁹⁷. The punitive approach toward intra-EU mobility of asylum-seekers adopted by the Reception Conditions Directive has been amply criticised. Civil society actors noted that, given that the EU obligatory standards for reception conditions in national legal systems stipulate the *minimum* level of provisions necessary to ensure subsistence, the withdrawal of these conditions is inevitably a source of humanitarian concern⁶⁹⁸. The United Nations High Commissioner for Refugees (UNHCR) has pointed out that withdrawal of reception conditions of relatives can also have negative repercussions on children or family members⁶⁹⁹. The reduction or withdrawal of reception conditions has led to destitution on the part of asylum-seekers, and can contribute to reducing trust in the CEAS, thus generating a risk of creating more irregularity.

As for the detention of irregular migrants at the EU borders for the purpose of determining whether individuals are entitled to international protection in the context of border procedures, a recent European Parliament's Implementation Assessment has found that **current Member State practice does not result in uniform and effective reviews of applications for international protection on the basis of a fair process**. In particular, the Assessment found that "certain Member States apply time-lines within which no serious consideration of an application is feasible. Furthermore, applicants are placed in detention or restricted in their freedom of movement without considering alternatives and deprived of opportunities to effectively exercise their procedural rights"⁷⁰⁰.

Both the reduction of reception condition to discourage asylum claims or divert them to other countries, and the recourse to fast-tracked border procedure with minimum procedural guarantees constitute clear representations of the ways in which asylum and border policies are used by certain Member States to contain mobility of asylum seekers within the Union, in tension with EU *acquis* on borders and asylum.

⁶⁹⁵ Article 20(1)(b) of the Reception Condition Directive.

⁶⁹⁶ Article 20(1)(c) of the Reception Condition Directive.

⁶⁹⁷ Article 20(2) of the Reception Condition Directive.

⁶⁹⁸ ECRE, 'Withdrawal of reception conditions of asylum-seekers: An appropriate, effective or legal sanction?', AIDA Brief, European Council on Refugees and Exiles (ECRE), Brussels, July 2018, https://asylumineurope.org/wp-content/uploads/2020/11/aida_brief_withdrawalconditions.pdf.

⁶⁹⁹ UNHCR, 'Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). To assist with transposition and implementation', United Nations High Commissioner for Refugees (UNHCR) Bureau for Europe, Brussels, April 2015, <https://www.refworld.org/docid/5541d4f24.html>.

⁷⁰⁰ See Van Ballegooij, W. and Eisele, K., 'Asylum Procedures at the Border: European Implementation Assessment', EPRS Study PE 654.201, European Parliamentary Research Service (EPRS), Brussels, November 2020, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2020\)654201](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654201).

5.1.4. The Qualification and Asylum Procedures Directives

EU asylum law allows for differing treatments of asylum-seekers across the EU. It is widely recognised that **differences in the length of asylum procedures**, as well as the inclusion of **optional provisions** in the Qualification Directive (e.g. those limiting social assistance and family reunification for beneficiaries of subsidiary protection) have contributed to intra-EU mobility of asylum-seekers (Vedsted-Hansen, 2017)⁷⁰¹.

The Commission expressly recognised that, while the Qualification Directive sets out the standards for recognition and protection to be offered at EU level, **recognition rates vary between Member States in practice**. Also, available data points to a lack of adequate convergence as regards the decision to grant either refugee status or subsidiary protection status to applicants coming from the same country of origin. The communication concluded that such divergences should be considered as important factors leading asylum-seekers to undertake free movement⁷⁰².

While the design and implementation of the Asylum Procedures Directive and the Qualification contribute in co-creating intra-EU mobility, the same EU asylum legislation puts a strong emphasis **on deterring and sanctioning intra-EU movements of applicants and beneficiaries of international protection**. This is especially the case of the Asylum Procedures Directive. In the latter, the punitive approach proposed to enforce compliance with the obligation to apply and stay in the first Member State of entry or the Member State that granted protection can, under several circumstances, take the form of a possible reduction of procedural guarantees⁷⁰³.

Among the grounds justifying the applications of an accelerated asylum procedure, the Asylum Procedures Directive include the misleading of authorities and use of false documents and the destruction of identity documents in bad faith⁷⁰⁴. According to the EU Asylum Procedure Directive, accelerated procedures can also apply when a person has entered the territory unlawfully and has not applied for international protection as soon as possible⁷⁰⁵. Similar to the concepts of misleading the authorities or bad faith, whether an application is lodged as soon as possible is open to interpretation and leaves a large margin of discretion to competent the Member State authorities. Clearly, these punitive provisions can apply to asylum-seekers who entered the EU irregularly and that had the intention to travel or effectively moved to another country and applied there (including

⁷⁰¹ Vedsted-Hansen (2017), op. cit.

⁷⁰² European Commission (2016g), op. cit.

⁷⁰³ Moreno Lax, V., 'Life after Lisbon: EU Asylum Policy as a Factor of Migration Control', in D. Acosta Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law. After Lisbon and Stockholm*, Modern Studies in European Law Volume 42, Hart Publishing, Oxford and Portland, OR, 2014, pp. 146-167.

⁷⁰⁴ Article 31(8) (c) and (d) of the Asylum Procedure Directive.

⁷⁰⁵ Article 31(8)(h).

for legitimate reasons, for instance because of the presence of family members in that other EU Member State).

The refusal of an asylum-seeker or an irregular migrant to have his or her fingerprints taken for the application of the Eurodac Regulation can also constitute a ground for the reduction of procedural guarantees⁷⁰⁶. This rule is directly aimed at sanctioning non-compliance with the Dublin criteria related to the determination of the Member State responsible for the examination of the asylum application. However, because it entails recourse to an accelerated procedure, its application may prevent a proper determination of genuine international application claims. It has therefore been noted that in these specific cases acceleration could constitute a procedural punishment for the applicant's behaviour, rather than a legitimate and rational reason as to why the application must be accelerated⁷⁰⁷.

Another (optional) provision contained in the Asylum Procedure Directive which can have the effect of sanctioning intra-EU mobility, is the one establishing that **Member States may consider an application for international protection inadmissible when another Member State has granted international protection**⁷⁰⁸. The rationale underpinning this provision is that, pursuant to the EU general principle of mutual trust, it is assumed that every Member State provides an equivalent level of protection as that required from the EU Member State in which the applicant lodged his or her subsequent asylum or international protection claim. Pursuant to such principle, **a previous asylum application taken by Member States triggers by default the notion of 'subsequent application'**, thereby making applicable the ground of **inadmissibility** under Article 33(2)(d) of the Asylum Procedures Directive. However, evidence that an individual who submitted a subsequent application faced a serious risk of inhuman or degrading treatment if returned to the Member State which had already granted him international protection (Greece), recently led the Higher Administrative Court of another Member State (Germany) to consider that the application for asylum could not be rejected as inadmissible⁷⁰⁹.

⁷⁰⁶ Article 31(8)(i) of the Asylum Procedure Directive.

⁷⁰⁷ ECRE, 'Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)', European Council on Refugees and Exiles (ECRE), Brussels, December 2014, <https://www.asylumlawdatabase.eu/en/content/en-ecre-information-note-directive-201332eu-european-parliament-and-council-26-june-2013>.

⁷⁰⁸ Article 33(2)(a) of the Asylum Procedure Directive.

⁷⁰⁹ Referring to *inter alia* the CJEU's judgment in *Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17) the Higher Administrative Court, stated that Art. 33(2)(a) of the Procedures Directive is transposed into domestic law in such a way as to prohibit the rejection of an application for international protection as inadmissible when an applicant has already received refugee status or subsidiary protection in another Member State, if the living conditions in that Member State would expose him to a serious risk of inhuman or degrading treatment under Article 4 of the Charter or the corresponding Article 3 ECHR. It further recalled that the CJEU assumes a violation of Article 4 of the Charter if the indifference of the authorities of a Member State would have the effect of placing a person wholly dependent on public

Another way in which the Asylum Procedure Directive contributes to the objective of preventing and containing intra-EU mobility of asylum-seekers is through “**border procedures**”⁷¹⁰. 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. In 2021, the border procedure resulted applicable in the following EU Member States: Austria, Belgium, Croatia, Czechia, France, Germany, Greece, Italy, Latvia, the Netherlands, Portugal, Romania, Slovenia and Spain⁷¹¹. In some countries (Greece), border procedures have been applied to enable fast-tracked processing of asylum applications in controlled centres, including hotspots⁷¹². Hungary has/had a *de facto* border procedure which the European Commission qualified as not being in compliance with EU law⁷¹³.

5.1.5. The EU asylum agency

Created in 2010⁷¹⁴, the European Asylum Support Office (EASO) is the EU agency tasked with supporting Member States dealing with asylum applicants and in the implementation of EU asylum law on the ground. The national authorities and areas of Member States asylum systems supported by EASO operations depend on the **Operating Plan** agreed with the host Member State. The scope of existing operations therefore differs from one country to another. Among the on-the-ground support activities performed by EASO, those related to the registration of asylum applicants, and the provision of support to national authorities responsible for the implementation of the Dublin III Regulation are directly related to the implementation of the EU policy and normative framework developed to control and address secondary movements.

assistance, irrespective of their will or personal choices, in a situation of extreme material poverty which would not allow him to satisfy his most basic needs- in particular the ability to feed himself, to wash himself and to find accommodation. See, European Database of Asylum Law EDAL, ‘Germany: Higher Administrative Court cancels removal of international protection beneficiary to Greece’, European Database of Asylum Law (EDAL) Case Summaries, European Council on Refugees and Exiles (ECRE), Brussels, 21 January 2021, <https://www.asylumlawdatabase.eu/en/content/germany-higher-administrative-court-cancels-removal-international-protection-beneficiary>.

⁷¹⁰ Article 4 of the Asylum Procedure Directive.

⁷¹¹ EASO (2020), op. cit., p. 9.

⁷¹² Ibid, p. 8

⁷¹³ Ibid, p. 9.

⁷¹⁴ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter referred to as ‘EASO Regulation’), and in particular Articles 2, 8, 10 and 13 to 23. See also Article 18 EASO Regulation.

In Greece⁷¹⁵, Italy⁷¹⁶, Malta⁷¹⁷, and Cyprus⁷¹⁸, EASO operations entailed the provision of substantial support in the registration of asylum applications⁷¹⁹. **Registration tasks** performed by EASO experts ranged from the provision of support to the police or national asylum services during the asylum application's registration or lodging stage, to the collection of different kinds of personal information, the uploading of data in national databases, as well as the creation of digital profiles required *inter alia* for the issuance of asylum documentation.

In Italy, Greece and Malta, EASO also supported national authorities responsible for the **implementation of the Dublin III Regulation**. EASO's support mainly entailed the deployment of experts for the purpose of operationalising the outgoing procedures activated when authorities of an EU country believe that another Dublin state is responsible for the asylum procedure. In the context of these procedures, EASO support involves *inter alia* screening for indications of responsibility of another Member State. In Italy, EASO also provides support in relation to incoming procedures. The latter are activated pursuant to the Dublin III rule imposing upon the first country of irregular entry an obligation to allow the asylum-seeker to (re)-enter the country in order to process his/her asylum application⁷²⁰.

Another way in which EASO participates in the EU system of containment and deterrence of intra-EU mobility of asylum-seekers within the EU is through the **agency's involvement in the hotspot approach**. As already noted, hotspots are physical sites located at the EU external borders. They have been created for the reception of asylum-seekers in areas facing disproportionate migratory pressure flows. One of EASO's duties is precisely to provide support to Member States that are considered as facing exceptional difficulties in maintaining their asylum systems. By design, **EASO responsibilities are therefore interlinked to the hotspot environment and related working methods**⁷²¹.

⁷¹⁵ Operating Plan agreed by EASO and Greece, Valletta Harbour and Athens, 17 December 2020.

⁷¹⁶ Operating Plan agreed by EASO and Italy, Valletta Harbour and Rome, 17 December 2020.

⁷¹⁷ Operating Plan agreed by EASO and Malta, Valletta Harbour, 11 December 2020.

⁷¹⁸ Operating Plan agreed by EASO and the Republic of Cyprus, Valletta Harbour and Nicosia, December 2020.

⁷¹⁹ In these Member States, EASO has reportedly made a substantial contribution to the host authorities' efforts to register asylum applications 'by handling more than half of registrations taking place in the three countries'. Mouzourakis, M., 'The Role of EASO in National Asylum Systems. An analysis of the current European Asylum Support Office (EASO) Operations involving deployment of experts in asylum procedures at Member State level', Report prepared for ECRE, European Council on Refugees and Exiles (ECRE), Brussels, 2019, https://www.ecre.org/wp-content/uploads/2019/11/EASO-Operations_Report.pdf.

⁷²⁰ In the case of Italy, the involvement of EASO experts (rather than of other Member States' experts) aimed at avoiding situations where other countries' officials would be involved in processing incoming requests to Italy, possibly submitted by their own Member State. *Ibid.*, p. 10.

⁷²¹ As already mentioned, hotspots are physical sites located at the EU external border and set up in areas facing disproportionate mixed migration flows. They are avenues where EU and Member States' authorities have experimented new working methods of cooperation in the registration, identification, as well as the

Since hotspots came into operation, the role of the agency has entailed carrying out, **in cooperation with UNHCR and national authorities**, the transfer of asylum-seekers from the hotspot facilities to other reception centres for status determination or relocation. In the implementation of the hotspots approach in Greece, EASO has, however, also played an active role in the processing of asylum claims *within* the hotspots' facilities.

Asylum processing by EASO staff in the Greek hotspots is directly **linked to the implementation of the EU-Turkey Statement**⁷²². After the adoption of the EU-Turkey Statement in March 2016, and the subsequent amendment to the Greek asylum legislation, EASO was entrusted with the duty to perform **admissibility interviews** in the application of the safe third country concept⁷²³. Based on the interviews, EASO agents issue concluding remarks specifying whether the safe third country concept may be applied in the particular case, and thereby provide the ground on which the application can be rejected as inadmissible⁷²⁴.

Through its involvement in the admissibility procedure in the Greek hotspots, **EASO takes an active part in the administrative process that precedes the substantive examination of asylum applications**. Since new arrivals are not allowed to leave the islands before a decision on the admissibility of their cases is taken, EASO involvement in the Greek hotspot is structurally functional to the containment of asylum-seeker's mobility promoted under the hotspot approach.

It has also been observed that, in a context where reliance on EASO interviews and preliminary (in)-admissibility assessments and related recommendation constitutes a regular practice for the Greek Asylum Service, **EASO officers exercise *de facto* power on**

processing of international processing claims by third country nationals directly after their disembarkation or irregular entry.

⁷²² While officially referred to as the EU flagship response to the refugee crisis, this instrument represents an exemplary form of extra-Treaty policymaking in migration and asylum policy. Carrera, S., Den Hertog, L. and Stefan, M., 'The EU-Turkey deal: reversing 'Lisbonisation' in EU migration and asylum policies', in S. Carrera, J. Santos Vara and T. Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar Publishing, Cheltenham, 2019, pp. 155-174. For an analysis of how the statement generated negative repercussions on the ground, including well-documented violations of asylum-seekers' fundamental rights, see Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal', Amnesty International, New York, NY, 14 February 2017, <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

⁷²³ Pursuant to the approach according to which Turkey is considered to be a safe third country, or the first country of asylum claim, asylum claims should be rejected as inadmissible, and the person concerned can be returned to Turkey. On 7 June 2021, a new Joint Ministerial Decision of the Greece's Ministry of Foreign Affairs and the Ministry of Migration and Asylum was issued, designating Turkey as 'safe third country' in a national list for asylum-seekers originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia. See Karagiannopoulou et al. (2021), op. cit. The safe third country concept is increasingly applied also by other EU Member States, including Spain and Italy, where EASO has operations. See De Gasperis (2021), op. cit., p. 64, and Bove (2021), op. cit., pp. 84-87.

⁷²⁴ ECRE (2021e), 'Greece: While the Designation of Turkey as Safe Country and Pushbacks Undermine Protection in Greece, the Country is Criticised for not Preventing Secondary Movement', ECRE News, 11 June, <https://ecre.org/greece-while-the-designation-of-turkey-as-safe-country-and-pushbacks-undermine-protection-in-greece-the-country-is-criticised-for-not-preventing-secondary-movement/>.

(in)-admissibility decisions in relation to applications for international protection⁷²⁵. This task has been performed by EASO in the Greek islands since April 2016, despite the absence in the agency's founding Regulation of a legal basis providing for such competence⁷²⁶.

The way in which EASO's mandate has expanded in practice in the Greek hotspot has been subject to criticisms and concerns related to the absence of a legal basis, and the consequent lack of transparency or appropriate monitoring mechanisms vis-à-vis the agency's activities. The agency's practice also led to a complaint being lodged before the European Ombudsman. The complaint concerned, among other things, 'the conduct of those involved in interviewing an asylum-seeker in Greece, who was subsequently deported'. The European Ombudsman found that EASO failed to adequately address and in a timely manner serious errors committed in assessing the complainant's asylum application. It also urged EASO to deliver on its commitment to set up a **complaint mechanism** as a matter of priority⁷²⁷.

On 12 September 2018, the Commission tabled a **proposal for a Regulation on the European Union Agency for Asylum (EUAA)** as part of the asylum reform package⁷²⁸. The proposal, the aim of which was to amend and expand EASO's mandate, has been relaunched as part of the above-mentioned EU Pact on Asylum and Migration presented by the European Commission in September 2020. On 30 December 2021, the new regulation establishing the EUAA was published in the *Official Journal*⁷²⁹. The EUAA will benefit from expanded competencies to also encompass concrete assistance to member state authorities in the examination of individual asylum claims. In so doing, **the EU regulation will bring the Agency's legal framework in line with the existing Greek hotspots practice**. The post of fundamental rights officer was created⁷³⁰. An individual

⁷²⁵ ECCHR, 'EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights', ECCHR Case Report, European Center for Constitutional and Human Rights (ECCHR), Berlin, April 2019, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/ECCHR_Case_Report_EASO_Greek_Hotspots_042019.pdf.

⁷²⁶ See Saranti, E.K., Papachristopoulou, D. and Vakoul, M-N., 'EASO's Operation on the Greek Hotspots: An overlooked consequence of the EU-Turkey Deal', HIAS Report, Greek Refugee Right Initiative, Lesbos, March 2018, https://www.hias.org/sites/default/files/hias_greece_report_easo.pdf.

⁷²⁷ European Ombudsman, 'Decision of the European Ombudsman in case 1139/2018/MDC on the conduct of experts in interviews with asylum seekers organised by the European Asylum Support Office', Case 1139/2018/MDC, Decision of 30 September 2019, <https://www.ombudsman.europa.eu/en/decision/en/119726>.

⁷²⁸ European Commission (2016h), 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010', 2016/0131(COD), COM(2016) 271 final, Brussels, 4 May.

⁷²⁹ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (hereinafter, the EUAA Regulation).

⁷³⁰ Article 49 of the EUAA Regulation.

complaints mechanism has also been set up⁷³¹. In light of the strong resemblance of the new EUAA complaint mechanism with the one that had been established under the 2016 EBCG Regulation, doubts exist as to whether this accountability venue is in line with the standards required to qualify an administrative remedy as ‘effective’⁷³².

5.2. Controls on intra-EU mobility of asylum-seekers and refugees: The Schengen *acquis*

The key function of the Schengen system is to allow the free movement of persons within an area (comprising 26 EU Members States + Schengen Associated Countries) without internal borders.

As clarified in Section I, the term secondary movement refers to intra-EU mobility of asylum seekers and refugees that, under the standing EU legal framework, do not benefit from the right to free movement within the Union.

The right to freedom of movement in the European Union is guaranteed to every national of an EU Member State. Directive 2004/38/EC provides the right to move and reside freely within the territory of the Member States also to the EU citizens’ family members. These include: the spouse (also of the same sex, as clarified by the CJEU);⁷³³ the registered partner, if the legislation of the host Member State treats registered partnerships as equivalent to marriage; the direct descendants who are under the age of 21 or are dependants, and those of the spouse or registered partner; and the dependent direct relatives in the ascending line and those of the spouse or registered partner.⁷³⁴

Third country nationals holding valid visas or residence permits also have the possibility to travel within the EU, although the rules that apply to enter or stay in an EU country different from the one of first entry vary depending on several factors. These include: the type of visa or residence permit held, how much time the individual plan to spend in the other EU country, and the rules that apply there.⁷³⁵ In addition, free movement rights are also granted to visa-free travellers in the EU. These include nationals of countries benefiting from EU visa liberalisation schemes who have been admitted into the Schengen Area for a 90-days period.

⁷³¹ Article 51 of the EUAA Regulation.

⁷³² Carrera, S. and Stefan, M. (eds.), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice*, Routledge, London, 2020.

⁷³³ C-673/16.

⁷³⁴ European Parliament (2022), “Free movement of persons”, Fact-Sheet on the European Union.

⁷³⁵ European Commission (2022), EU Immigration Portal, https://ec.europa.eu/immigration/general-information/already-eu_en.

The EU Temporary Protection Directive⁷³⁶ recently activated for people fleeing war in Ukraine expressly foresees that Ukrainian national, as visa free-travellers pursuant to the 2017 EU-Ukraine Visa Liberalisation Scheme,⁷³⁷ can move between Member States before obtaining temporary protection. On this basis, Ukrainian nationals are able to choose the Member State in which they want to enjoy the rights attached to temporary protection. Member States have thus agreed to allow “applicants’ choice” as regards seeking temporary protection, facilitated by the short-term free movement of Ukrainians after their visa-free entry. The final version of the Council’s Decision implementing the Temporary Protection Directive is however silent about the position of non-Ukrainians, and thus gives Member States a wide room for manoeuvre when deciding whether to apply or not the Temporary Protection Directive model to non-Ukrainian third country nationals – including permanent residents in the country – and asylum seekers. As for the intra-EU movement of third country nationals after obtaining temporary protection, the Directive states that if a person with temporary protection from one Member State remains on or seeks to enter (without authorisation) the territory of another Member State without authorisation during the temporary protection period, the Member State which granted temporary protection must take them back.⁷³⁸ However, Member States decided not to apply this provision, and allowed for intra-EU mobility of people fleeing the war in Ukraine also *after* they obtained formally the temporary protection status in one Member State.

This Report does not focus on the implications deriving from the activation of the Temporary Protection Directive for the intra-EU mobility of people fleeing war in Ukraine,⁷³⁹ but – as stated in Section I – it covers the instruments and measures, in force at the time of writing, which contribute to containing intra-EU mobility of asylum seekers, and refugees.

However, over the years, the guiding principle that inspired the development of the Schengen *acquis* related to freedom of movement has been derogated through policies and practices aimed at **enforcing the objective of ‘no free movement’ for asylum-seekers and refugees attempting to obtain protection inside the Schengen territory.**

In particular, Member State authorities have made use of provisions contained in the **Schengen Border Code** to control and impede the inter-state movements of third

⁷³⁶ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁷³⁷ Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine).

⁷³⁸ Peers, S. (2022), Temporary Protection for Ukrainians in the EU? Q and A, EU Law Analysis, 27 February 2022.

⁷³⁹ In this regard, see Carrera and others (2022), “The EU grants temporary protection for people fleeing war in Ukraine Time to rethink unequal solidarity in EU asylum policy”, CEPS Policy Insights No 2022-09/ March 2022.

country nationals within the EU. Such diversion of the spirit of Schengen was made possible by the fact that, despite the progressive Europeanisation of the EU *acquis* related to freedom of movement, interior ministries remained steadily ‘in the driving seat at the core of the Schengen machinery’⁷⁴⁰. This is especially the case in relation to : the operationalisation of the SBC rules allowing the temporary reintroduction of internal border checks; as well as the enforcement of the SBC rules on police checks on persons by national and local authorities. In both domains, a relevant decision role is reserved to EU Member States governments.

5.2.1. Reintroducing internal border controls

The SBC includes specific provisions which allow Schengen countries **to exceptionally reintroduce internal border checks**. Reintroduction of internal border controls is presented as a measure of last resort, which can be adopted under difference circumstances⁷⁴¹.

Firstly, it is allowed when there is a **serious threat to public policy or internal security**⁷⁴². In these cases, border controls can be reintroduced for a total time period that must not exceed six months in cases of foreseeable events (including for instance political events), or for a maximum period of two months in cases requiring immediate action⁷⁴³. Internal border controls can be reintroduced at all or specific parts of its internal borders⁷⁴⁴. As such, it is subject to specific deadlines: up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The SBC laid down procedures that Member States must follow for the temporary reintroduction of internal border controls⁷⁴⁵. Throughout the years, Schengen countries made use of these provisions to reintroduce internal border controls for various reasons, which included *inter alia* the restriction of irregular immigration, and the need to respond to serious health issues⁷⁴⁶.

A second exception to the absence of an internal border within the EU is that one can be invoked in cases of **serious deficiencies in the carrying out of external border controls**⁷⁴⁷. A second exception to the absence of an internal border within the EU is that one can be invoked in cases of serious deficiencies in the carrying out of external border

⁷⁴⁰ Carrera, S. (2019b), ‘The State of the Schengen Area in the Light of the 2019 European Parliament Election’, Robert Schuman Centre for Advanced Studies (RSCAS) Policy Paper 2019/12, European University Institute, Florence, <https://cadmus.eui.eu/handle/1814/61595>.

⁷⁴¹ Art 26 of the SBC.

⁷⁴² Art. 25 to 28 of the SBC.

⁷⁴³ Art. 28 of the SBC.

⁷⁴⁴ Art. 25 of the SBC.

⁷⁴⁵ Art 27 of the SBC.

⁷⁴⁶ Groenendijk, K., ‘Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?’, *European Law Journal*, Vol. 10, No 2, 2004, pp. 150-170.

⁷⁴⁷ Art 29 of the SBC.

controls. Article 219(1) of the SBC stresses that, in “exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control” [...], and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months”.⁷⁴⁸ In the presence of these exceptional circumstance, the SBC allows member countries to introduce internal border controls for an additional period of six months. This period can only be renewed three times consecutively – for similar six-month periods.

In reaction to EU countries’ decisions to reintroduce and extent internal border controls, the European Parliament has called the Member States to stop repurposing the legal basis and unlawfully extending internal border controls.⁷⁴⁹ As for the limits to introduce internal border controls, the CJEU has recently declared the unlawfulness of EU Member States’ prolongations of internal border controls beyond the time-limits expressly stipulated in Art. 25.4 SBC⁷⁵⁰. It confirmed that Member States decisions to introduce or prolong internal border controls must be based on specific objective criteria, be necessary and proportionate, and not compromise the no internal border control principle enshrined in the Treaties.⁷⁵¹ The Court held that any exceptions to free movement of persons must be interpreted strictly, even those related to national security under Art. 72 TFEU. For the time-periods under Art. 25 SBC to restart to run afresh, the Luxembourg Court concluded that Member States must provide objective evidence that internal border controls are justified based on a new serious threat affecting their public policy or internal security.^{752”}

During the 2015 EU ‘refugee humanitarian crisis’, **fears of secondary movements** caused by migratory pressures and the serious deficiencies in external border control by frontline EU Member States (Greece, most notably) justified the introduction, and then the repeated prolongation, by several Member States, of temporary internal border

⁷⁴⁸ Paragraph 2 of Article 29 of the SBC stresses that “The Council may, as a last resort and as a measure to protect the common interests within the area without internal border control, where all other measures, in particular those referred to in Article 21(1), are ineffective in mitigating the serious threat identified, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. The Council’s recommendation shall be based on a proposal from the Commission. The Member States may request the Commission to submit such a proposal to the Council for a recommendation.”

⁷⁴⁹ European Parliament, ‘Report on the annual report on the functioning of the Schengen Area (2017/2256(INI))’, A8-0160/2018, PE 613.539, European Parliament, LIBE Committee, 3.5.2018, para. 9.

⁷⁵⁰ Paragraph 94.

⁷⁵¹ Paragraph 66.

⁷⁵² Paragraphs 79 and 86.

controls⁷⁵³. A decision issued by the Council⁷⁵⁴ allowed five EU countries (Austria, Germany, Denmark, Sweden and Norway) to reintroduce and maintain internal border controls for a period of six months.

The official deadline for all these interior ministries to come back to Schengen was **October/November 2017**. After having exhausted the possibility of extending the measures three times consecutively (as foreseen in the SBC), the five Member States that had reintroduced internal border control following the Council Decision continued performing internal border checks, despite the expiry of the deadline⁷⁵⁵. The wake of the COVID-19 outbreak marked the (re)-introduction of far-reaching cross-border mobility restrictions within the EU and Schengen area⁷⁵⁶.

5.2.2. Police spot-checks

As a general rule, the SBC establishes that any person, irrespective of their nationality, may cross the internal borders without being subjected to **border or identity checks**. The SBC does not prevent a Member State's law from enabling police authorities to carry out checks on persons (e.g. identity checks), but only provide for a (non-exhaustive) list of criteria outlining when police checks should be considered as being equivalent to internal border controls, and therefore incompatible with EU Law. In the first place, **police checks must not have border control as an objective and must not be discriminatory**. Secondly, they must be based on general police information and experience. Thirdly, they must be carried out in a manner **clearly distinct from systematic border checks on persons at the external borders**. Fourthly, they must be carried out on the basis of **spot-checks**⁷⁵⁷.

To a large extent, the main responsibility for conducting internal border controls across Schengen States lies in the hands of **national police authorities**. In some EU countries

⁷⁵³ Carrera, S., Stefan, M., Luk, N.C. and Vosyliūtė, L., 'The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016', Study for the European Parliament LIBE Committee PE 604.943, European Parliament, Brussels, March 2018, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)604943](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)604943).

⁷⁵⁴ Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk OJ L 151, 8 June 2016, pp. 8–11. The Council Decision specified that the 'Member State that carries out internal border control pursuant to the present Implementing Decision should regularly review the necessity, frequency, location and time of controls, adjust the controls to the level of the threat addressed, phasing them out wherever appropriate, and report to the Commission every two months.' It also provided specific guidelines concerning the exact border points where checks would be reintroduced, which constituted small parts of their internal borders corresponding with very specific land border zones and ports, and also concrete reporting procedures.

⁷⁵⁵ Carrera, S. (2019b), op. cit., p. 4.

⁷⁵⁶ Carrera, S. and Luk, N.C. (2020a), 'In the Name of COVID-19, An assessment of the Schengen Internal Border Controls and travel Restrictions in the EU', Study for the European Parliament LIBE Committee PE 659.506, European Parliament, Brussels, September, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)659506](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)659506).

⁷⁵⁷ Article 23 of the SBC.

they even fall under the competence of **the military or armed forces**. The Netherlands deserves a specific mention in this respect, as the responsible agency for intra-Schengen border control is the “Royal Netherlands Marechaussee”, which is a police force with military status responsible for carrying out immigration checks in the intra-Schengen border regions. Other countries, Italy and Portugal in particular, also reported the involvement of armed forces in checks at internal borders⁷⁵⁸.

While the SBC is primarily concerned with checking the administrative status and travel documents of the mobile persons, entrusting police authorities with the responsibility to carry identity checks within the Schengen area pursue a different policy goal: internal border checks for immigration or crime control purposes. This has subsequently led to the development of a line of jurisprudence through which the Court of Luxembourg had to specify that police checks on human mobility within the Schengen area cannot have an effect equivalent to border checks, which is precluded under the SBC

The CJEU has established that SBC⁷⁵⁹, read in light of EU primary law⁷⁶⁰, **precludes national legislation authorising the police authorities of a Member State to carry out identity checks in a given area along the (internal) border** regardless of the behaviour of the affected persons or other special circumstances giving rise to the risk of disturbance of the public order⁷⁶¹. The CJEU stressed that under EU law Member States cannot provide powers to police authorities when national legislation does not establish precise **limits with regard to the intensity and frequency** of the controls⁷⁶².

Most recently, the Court concluded that national rules requiring coach transport companies to check passengers’ passports and residence permits before crossing internal borders, at the risk of fines, fell within the scope of the SBC rules on police checks. The Court established that **when these national rules are not sufficiently precise in terms of limiting intensity, frequency and selectivity of the checks, they amount to measures having an effect equivalent to border checks** and hence are not allowed under the SBC⁷⁶³.

⁷⁵⁸ EMN, ‘Open Summary of EMN Ad-Hoc Query No. 2018.1303. Intra-Schengen border monitoring and border control’, European Migration Network (EMN) Netherlands National Contact Point, 30 November 2018, <https://www.emnnetherlands.nl/sites/default/files/2018-12/AHQ%20NL%202018.1303%20Summary%20-%20Intra-Schengen%20border%20monitoring%20and%20border%20control.pdf>.

⁷⁵⁹ Articles 20 and 21 of the SCB.

⁷⁶⁰ Article 67 (2) of the Treaty on the Functioning of the European Union (TFEU).

⁷⁶¹ Judgment of the Court of Justice (First Chamber) of 21 June 2017, *Criminal proceedings against A*, C-9/16, EU:C:2017:483.

⁷⁶² Judgment of the Court (Grand Chamber) of 22 June 2010, *Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10)*, EU:C:2010:363.

⁷⁶³ Judgment of the Court (Second Chamber) of 13 December 2018, *Bundesrepublik Deutschland v Touring Tours und Travel GmbH and Sociedad de Transportes SA*, Joined cases C-412/17 and C-474/17, ECLI:EU:C:2018:1005.

The ‘equivalent effect doctrine’ developed by the CJEU clarified that the execution of police checks must be restricted to circumstances where there are actual suspicions that the concerned individual is irregularly present in the EU territory, and that random controls on persons shall be executed in a non-discriminatory way. According to the Court, however, EU law does not prevent Member States’ legislation from enabling checks based on general information and experience regarding the illegal residence of persons at the places where the checks were made nor from justifying the performance of police identity checks when these are aimed at obtaining such general information and experience-based data⁷⁶⁴. Research showed that after this judgement, the **national government of the EU Country concerned (the Netherlands) extended the frequency and intensity of police controls**⁷⁶⁵.

It is now widely acknowledged that the proliferation of the usage of Article 23 of the SCB has become a systematic way to control mobility of third country nationals within the EU. Recent scholarly research noted that border controls in the Schengen Area currently take various forms, including police patrols, immigration controls, special operations, preliminary inquiries / investigations, as well as cross-border cooperation between police forces aimed at the deportations of irregular migrants. It has also been noted that, by providing the basis for the development of police cooperation between different Member States, the Schengen process has also led to the **progressively widening of police capabilities** related to control of human mobility within the Schengen Area.⁷⁶⁶ For instance, cross-border observations and chases have been made possible as well as the exchange of data (fingerprints, DNA, vehicles) between police authorities.

In substance, the EU Schengen *acquis* has allowed Member States **to increase the use of police checks in border regions and around internal border areas** as a policy alternative to – or compensation for the absence of – internal border checks. Against this backdrop it is concerning to note that on several occasions, when calling on Member States to lift reintroduced border controls, the European Commission suggested that the

⁷⁶⁴ Judgment of the Court (Second Chamber) of 19 July 2012, *Atiqullah Adil v Minister voor Immigratie, Integratie en Asiel*, C-278/12 PPU, ECLI:EU:C:2012:508.

⁷⁶⁵ Guild, E., Brouwer, E., Groenendijk, K. and Carrera, S., ‘What is happening to the Schengen borders?’, CEPS Paper in Liberty and Security in Europe No. 86, CEPS, Brussels, December 2015, <https://www.ceps.eu/ceps-publications/what-happening-schengen-borders/>.

⁷⁶⁶ Van der Woude, M., ‘A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty’, *Theoretical Criminology*, Vol. 24, No 1, 2020, pp. 110-131, <https://journals.sagepub.com/doi/full/10.1177/1362480619871615>.

same level of security be maintained by using other tools, including most notably reinforced police checks⁷⁶⁷. Unsurprisingly, several Member States supported this call⁷⁶⁸.

5.2.3 Frontex: The European Border and Coast Guard

The mandate of the Frontex Agency (European Border and Coast Guard (EBCG)) is to manage the external borders of the EU and address migratory challenges⁷⁶⁹. The 2019 recast of the founding regulation of the agency entrusted it with a host of new powers, which encompass the performance of a wide range of tasks that are both **strategic, executive and operational in nature**. In certain ways and respects, the powers currently entrusted upon Frontex also relate to the objective of preventing onward movements or secondary movements of asylum-seekers in the EU.

Of particular relevance is **the power that Frontex now has to gather data on secondary movements** with a view to identifying various types of vulnerabilities, including on the functioning of Schengen⁷⁷⁰. In particular, the agency is responsible for feeding the above-mentioned **technological instrument** called EUROSUR (the European Border Surveillance System)⁷⁷¹, *inter alia* with data on unauthorised secondary movements⁷⁷². The current Frontex Regulation also provides the agency with a mandate to report on unauthorised secondary movements⁷⁷³.

These provisions aim at ensuring **situational awareness**, and for this purpose Frontex is enabled to produce risk analyses on the migratory situation *within* the EU. In particular, the 2019 EBCG Regulation foresees that available information on unauthorised secondary movements, for the purpose of understanding migratory trends, volume and routes

⁷⁶⁷ Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate use of police checks and police cooperation in the Schengen area, p. 79, and Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on a temporary reintroduction of border control at internal borders in the Schengen area, p. 25.

⁷⁶⁸ De Somer, M., 'Schengen and Internal border controls', in P. De Bruycker, M. De Somer and J.-L. De Brouwer (eds.), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration*, European Policy Centre (EPC), Brussels, 2020, https://www.epc.eu/content/PDF/2019/Tampere_WEB.pdf, p. 125.

⁷⁶⁹ Recital 1 of Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1 (hereafter 2019 EBCG Regulation).

⁷⁷⁰ Recital 45 of the 2019 EBCG Regulation.

⁷⁷¹ 'Common application of surveillance tools', Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

⁷⁷² In the proposal for the new Frontex Regulation, the Commission pointed out that the new rules would 'evolve' the scope of EUROSUR, to make it possible to 'prevent secondary movements'. See, European Commission (2018) 'Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action no 98/700/JHA, Regulation (EU) no 1052/2013 and Regulation (EU) no 2016/1624', COM(2018) 631 final, 12.

⁷⁷³ Recital 36 of the 2019 EBCG Regulation, which stressed that the 'reporting of events related to unauthorised secondary movements in EUROSUR will contribute to the monitoring by the Agency of migratory flows towards and within the Union for the purpose of risk analysis and situational awareness'.

should be used for the production of situational pictures⁷⁷⁴. The ‘European situational pictures’ are aimed, in particular, at providing national coordination centres and the Commission with effective, accurate and timely information and analysis covering not only the external borders, but also pre-frontier areas and unauthorised secondary movements⁷⁷⁵.

Information gathered for the development of a situational picture compiled by Frontex and distributed via EUROSUR are made up using different sources, which include data relating to incidents in the operational area of a joint operation or rapid intervention coordinated by the Agency, or in a hotspot⁷⁷⁶. At the same time, the current regulation falls short of indicating precisely which exact type of data Frontex can gather in the context of the hotspots.

The regulation expressly established that **Frontex’s internal surveillance role** should not lead to operational activities of the Agency at the internal borders of the Member States⁷⁷⁷. However, by developing situational pictures related to *inter alia* unauthorised secondary movements within the EU, Frontex will provide information that ultimately can lead to possible operational action by national authorities within the Schengen Area. More specifically, **situational pictures (in the form of risk analysis) on intra-EU mobilities circulated by Frontex through EUROSUR might be used by national authorities conducting identity checks at internal borders or elsewhere within the territory**. According to some analysts, the production of this type of analysis will, in turn, raise the risk of ethnic profiling against citizens and non-citizens alike⁷⁷⁸.

In fact, examples already exist of how Frontex’s work towards the containment and policing intra-EU movements of asylum-seekers has been **linked to operational activities by national police and border authorities**. One key example in this respect is the joint police operation codenamed ‘Aphrodite’⁷⁷⁹. This **operational instrument** saw the participation of 25 EU Member States, Schengen associate countries (i.e. Liechtenstein, Norway, Switzerland), along with Frontex. Implemented between late October and early November 2012, the operation aimed at ‘[C]ombating illegal immigration, with the focus being on illegal border crossing, the secondary movements of

⁷⁷⁴ Art. 24 of the 2019 EBCG Regulation.

⁷⁷⁵ Art. 26 of the 2019 EBCG Regulation. See also Art. 28 of the 2019 EBCG Regulation, dealing with ‘EUROSUR Fusion Services’, which says that Frontex will provide national authorities with information on the external borders and pre-frontier area that may be derived from, amongst other things, the monitoring of ‘migratory flows towards and within the Union in terms of trends, volume and routes.’

⁷⁷⁶ Art. 26(3)(c) of the 2019 EBCG Regulation, as well as Article 26(4), 2019 EBCG Regulation.

⁷⁷⁷ Recital 34 of the 2019 EBCG Regulation.

⁷⁷⁸ Jones, C., ‘Monitoring “secondary movements” and “hotspots”’: Frontex is now an internal surveillance agency’, Statewatch Analysis, 16 December 2019, <https://www.statewatch.org/analyses/2019/monitoring-secondary-movements-and-hotspots-frontex-is-now-an-internal-surveillance-agency/>.

⁷⁷⁹ Jones, C., ‘EU: Joint police operations target irregular migrants’, Statewatch Analysis, October 2014, <https://www.statewatch.org/media/documents/analyses/no-258-police-ops-migrants.pdf>.

migrants who enter EU Member States illegally, the routes used and other information regarding smuggling of migrants'.⁷⁸⁰

The aim of Aphrodite was to gather information on interceptions⁷⁸¹ by national authorities (including police and border guards) of irregular migrants. Such information was sent back to the Cyprus police and Frontex for the purpose of *inter alia* generating intelligence on the secondary movements of migrants who enter EU Member States illegally, the routes used and other information regarding smuggling of migrants. Reportedly, the aim of this data collection exercise was to inform the planning of subsequent large-scale police operations⁷⁸².

5.3. Operationalisation: EU financing, inter-agency cooperation, and digital surveillance

The set of norms and policies developed at the EU and national level to implement the Dublin system, and therefore contain mobility of intra-EU mobility of asylum-seekers, relies on a multi-layered enforcement framework.

EU financial instruments have also been disbursed to support frontline Member States in the construction of reception facilities, including most notably hotspots which, at least in certain cases (Greece), are used as *de facto* detention centres for asylum-seekers (*Section 5.3.1.*). At the **operational level**, an increasing number of EU agencies are also deployed at the EU external borders to identify and register apprehended asylum-seekers, to collect and cross-check their data against various migration and law enforcement databases, as well as to operationalise returns of third country nationals whose asylum applications have been declared inadmissible or rejected (*Section 5.3.2.*). Furthermore, the EU is developing new technological instruments and infrastructures and tools aimed at tracking and policing intra-EU mobilities of individuals in search of international protection within the Schengen Area (*Section 5.3.3.*).

⁷⁸⁰ Cyprus delegation, 'Final report on Joint Police Operation Aphrodite', Council Document No. 6224/13, Brussels, 22 April 2013, <https://www.statewatch.org/media/documents/news/2013/oct/eu-council-cyprus-2013-04-22-6224-13-jpo-aphrodite-final-report.pdf>.

⁷⁸¹ Information on the interceptions included the following: Interception details (a unique case reference number; date and time of detection; location of interception; nearest city or town; means of transportation used during interception; means of transportation used to enter the EU); intercepted migrants (nationality; gender; age, first point of entry into the EU; and first date of entry into the EU); routes (main routes taken from third countries to enter the EU and SAC or EU/SAC countries used as transit countries; final intended destination); modus operandi (false/falsified travel documents used (including nationality of passport); asylum application after or during detection; indications of smuggling of illegal migrants; facilitator's nationality). Ibid., p. 3.

⁷⁸² See Jones (2014), op. cit.

5.3.1. Financial support

A specific response to the EU and Member States' concerns about immigration and people seeking protection in Europe has been the increase in **EU funding for migration and asylum-related issues**⁷⁸³. EU funds have, in particular, contributed to the practical implementation of the Dublin system and, with that, directly supported the operationalisation of the EU and Member States' policies and practices focusing on the containment of mobility of third country nationals within the EU. An increase in the budgetary allocations made available to EU agencies, and in particular to Frontex, also aimed at broadening the operational scope and on-the-ground presence of EU agencies involved in the management of border control and migration-related issues.

Key EU **financial instruments** in this specific respect have been **the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF)**. These funds, which are managed by the European Commission's Directorate-General for Migration and Home Affairs (DG HOME) (through shared, direct, or indirect management), played a particularly important role in financing the hotspot approach. The latter envisaged the submission, by the host state, of a roadmap setting out complementary measures to be adopted to manage the situation, including by the means of building reception facilities. In her response to parliamentary questions given on 2 March 2021, the EU Commissioner for Migration and Home Affairs reported that EU funding has been provided under the AMIF and the ISF since 2015 to support Italy and Greece (through the respective national programmes and through emergency assistance) efforts in the management and operation of the Reception and Identification Centres in these countries⁷⁸⁴.

In a report from 2017, the European Court of Auditors (ECA) noted that: 'despite considerable support from the EU, at the end of 2016 the reception facilities' in Italy and Greece were not yet adequate to properly receive (Italy) or accommodate (Greece) the number of third country nationals arriving. The ECA added that there 'was still a shortage of adequate facilities to accommodate and process unaccompanied minors in line with international standards, both in the hotspots and at the next level of reception'⁷⁸⁵. As for returns of third country nationals from the hotspots, it has been reported that substantial

⁷⁸³ Darvas, Z. et al., 'EU funds for migration, asylum and integration policies', Study for the European Parliament BUDG Committee PE 603.828, European Parliament, Brussels, March 2018, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603828/IPOL_STU\(2018\)603828_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603828/IPOL_STU(2018)603828_EN.pdf).

⁷⁸⁴ Johansson, Y., Answer given by Ms Johansson on behalf of the European Commission to Parliamentary Question E-006472/2020, 2 March 2021, https://www.europarl.europa.eu/doceo/document/E-9-2020-006472-ASW_EN.html.

⁷⁸⁵ ECA, 'EU Response to the refugee crisis: the "hotspot" approach', ECA Special Report No 06, European Court of Auditors (ECA), Luxembourg, April 2017, https://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf.

funding assistance has also been made available from the EU budget⁷⁸⁶. The total EU contribution from the 2014-20 Multiannual Financial Framework to Frontex (which has been operationally involved in implementing return operations from the hotspots) has in fact increased over the years⁷⁸⁷. EU financing to the border agency in this particular operational domain complements budgetary efforts from the host state⁷⁸⁸.

5.3.2. Inter-EU agency cooperation

Frontex, Europol, Eurojust and EASO (now relabelled EUAA) have been active in the hotspots since the very establishment of these sites and constitute key actors of the hotspot working methods. The agencies work together with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants⁷⁸⁹.

The EUAA provides support in identifying persons wishing to apply for asylum in relation to relocation and Dublin, in order to channel them either to asylum procedures (including fast-tracked ones), or to relocation. As already mentioned above, the agency also provides operational support to the Dublin Unit and is now also tasked with the responsibility to process asylum applications.

Frontex has a leading role in the hotspots, with the Agency's presence dwarfing that of all other EU agencies⁷⁹⁰. Frontex helps with registration, nationality screening, fingerprinting, and Eurodac registration. Frontex also conducts debriefing interviews to gather intelligence on smuggling routes and supports the organisation of returns. Information gathered by Frontex in the hotspots' operational context will be used to produce analysis on risks of secondary movements within the EU. Furthermore, Frontex helps coordinating the return of irregular migrants⁷⁹¹. In the hotspots created in the Greek islands, Frontex has contributed to the implementation of the EU-Turkey Statement,

⁷⁸⁶ Frontex (2015b), 'Information note on the support to be provided by Frontex to frontline Member States on the return of irregular migrants', <https://www.statewatch.org/media/documents/news/2015/jul/eu-com-frontex-role.pdf>, p. 3.

⁷⁸⁷ Darvas et al. (2018), op. cit., p. 13.

⁷⁸⁸ Maiani, F., 'Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?', *EU Immigration and Asylum Law and Policy* blog post, 3 February 2016, <https://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

⁷⁸⁹ Tsourdi, L., 'Hotspots and EU Agencies: Towards an integrated European administration?', *EU Immigration and Asylum Law and Policy* blog post, 26 January 2017, <https://eumigrationlawblog.eu/hotspots-and-eu/>.

⁷⁹⁰ Danish Refugee Council, 'Fundamental Rights and the EU Hotspot Approach: A legal assessment of the implementation of the EU hotspot approach and its potential role in the reformed Common European Asylum System', DRC Report, Danish Refugee Council, Copenhagen, October 2017, <https://www.drc.ngo/media/epajgkvn/drc-fundamental-rights-and-the-eu-hotspot-approach-october-2017.pdf>.

⁷⁹¹ European Commission (2015b), op. cit., p. 6.

pursuant to which migrants are prevented from reaching the mainland and repatriations under it are carried out directly from hotspot areas.

Europol runs second-line checks to identify possible smugglers and report them to the national authorities. Europol presence in the Greek hotspot has been functional to the cross-checking of the names of migrants and asylum-seekers against relevant terrorist-related databases. Such activity is part of the wider EU law enforcement agency efforts in tackling human smuggling, for the purpose of which Europol gathers intelligence from a variety of actors, including Frontex, Operation Sophia, and national border and law enforcement officials along migration routes⁷⁹².

To a less significant extent, **Eurojust** has also been involved in the implementation of the hotspot approach, reportedly through deployment on the ground of prosecuting authorities tasked with the duty to channel relevant information to Eurojust for judicial follow up and coordination at the EU level⁷⁹³.

Another (increasingly) relevant player in the context of the EU's efforts to predict and prevent secondary movement is **the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)**. The revised 2018 eu-LISA mandate encompasses far-reaching operational, research and policy tasks which also allow for the collection and processing of large volumes of personal data, implementing research projects, as well as providing ad hoc operational support to Member States facing extraordinary security and migration challenges in particular areas of their external borders (e.g., hotspots)⁷⁹⁴.

The latest Eurodac recast proposal also foresees possibilities for eu-LISA to develop new types of statistics, including cross-systems statistics using and collating data from Eurodac, the Entry/Exit System (EES), and the Visa Information System (SIS), but also to aggregate asylum data with data on intra-EU transfers and returns. It is also proposed that these statistical data, which are deemed to supply appropriate input for the right type of policy response in relation to unauthorised movements of third country nationals, should be shared with and used by other relevant EU JHA Agencies, and in particular Frontex⁷⁹⁵.

⁷⁹² Carrera, S., Mitsilegas, V., Allsopp, J. and Vosyliute, L., *Policing Mobilities: Policies against Migrant Smuggling and Their Impact on Civil Society in the EU*, Hart Publishing, Oxford, 2018, p. 32.

⁷⁹³ Ibid., p. 37.

⁷⁹⁴ Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, OJ L 295, 21 November 2018, pp. 99–137.

⁷⁹⁵ Carrera, Stefan, Cortinovis and Luk (2019), op. cit., pp. 24-25.

5.3.3. Surveillance

EU policies and laws related to the control of intra-EU mobility of asylum-seekers cannot be seen in isolation from the EU initiative concerning the **interoperability framework**, which for the purposes of this report qualifies mainly as a **technological instrument**. The interoperability framework was adopted in 2019⁷⁹⁶, and is currently under development. It seeks to ensure improved identity management across **the EU's large-scale IT systems**, and aims at helping prevent and combat irregular immigration and onward movement of asylum-seekers within the EU by, for example, ensuring the identification of persons, improve detection of multiple identities and help prevent and combat illegal migration⁷⁹⁷.

With the entry into force of the EU Interoperability regulations, **Eurodac will become searchable via the interoperability components by competent (law enforcement) authorities**. Via the interoperable components, a wide range of authorities (including national police authorities) will, during identity checks performed anywhere within the Schengen territory, be able to see in which database(s) a person has been registered. Hence, a police officer could check the interoperability system during stop and search measures in order to check whether a person is stored in Eurodac (i.e., applied for asylum or stayed in the EU irregularly) and draw unjustified conclusions about that person⁷⁹⁸.

Data-driven surveillance of mobility has also been at the core of EU and Member States' responses to the Covid-19 crisis⁷⁹⁹. The outbreak of the pandemic has led to a further push toward systematic collection of data for the purpose of controlling cross-border mobility at the EU external borders, as well as within Europe. The European Commission called for **enhanced secondary security checks by national police authorities** against relevant databases including Eurodac, SIS⁸⁰⁰, but also the Visa

⁷⁹⁶ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ L 135, 22 May 2019, pp. 27–84; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, OJ L 135, 22 May 2019, pp. 85–135.

⁷⁹⁷ Council of the EU (2019c), 'Interoperability between EU information systems: Council adopts regulations', Council of the EU Press release, 14 May, <https://www.consilium.europa.eu/en/press/press-releases/2019/05/14/interoperability-between-eu-information-systems-council-adopts-regulations/>.

⁷⁹⁸ Carrera, S. (2020a), 'Towards interoperable justice: interoperability and its asymmetry in access rights by EU digital citizens', Contribution to MPC/EUI Blog Forum 'Interoperable Informations Statems in the EU Area of Freedom, Security and Justice', <https://migrationpolicycentre.eu/towards-interoperable-justice/>.

⁷⁹⁹ Carrera and Luk (2020a), op. cit.

⁸⁰⁰ Three new SIS Regulations (the SIS recast) entered into force at the end of 2019. According to the latest updated calendar, the new legal basis will be fully operational by June 2022. The SIS recast includes new categories of alerts, such as the return decision alert, to better monitor the obligation to return and to enable the enforcement of return decisions and potential entry bans. In addition, both Europol and Frontex will have access to all alert categories in the SIS.

Information System (VIS)⁸⁰¹, in addition to other non-EU systems established for internal security purposes, such as Interpol's Lost and Stolen Travel Documents database⁸⁰².

In addition to the development and interlinking of large-scale centralised information systems and the deployment of a decentralised information exchange mechanism for borders and security, the EU and its Member States are also increasingly turning to artificial intelligence (AI) technologies to strengthen border control and mitigate security risks related to cross-border terrorism and serious crime⁸⁰³. There are various typologies of **AI technological instruments** that the EU is currently developing and/or considering developing for this purpose⁸⁰⁴.

One of these is already operational and consists of **automated biometric identification** for the purpose of identity verification or identification. Automated fingerprint identification technology is already in use in Eurodac, SIS, and VIS. It will also be used in another Entry/Exit System (EES) and the European Criminal Record Information System for third Country nationals (ECRIS-TCNs). Furthermore, it is already foreseen that these types of AI applications will be fed with further categories of biometric data. All EU JHA databases and information exchange systems, except one – the European Travel Information Authorisation System (ETIAS) – are also expected to process facial images for the purpose of verification and/or identification.

The EU has also **funded research projects and initiatives** aimed at exploring the potentials that other AI technologies can have for the purpose of enhancing border control. One of the technologies under consideration is the one performing emotion detection. The EU Horizon 2020 Programme (Secure Societies – Protecting Freedom and Security of Europe and its citizens), which is managed by the European Research Agency (ERA) has funded a EUR 4.5 million research project aimed at developing the (now completed) *Intelligent Portable Border Control System (iBorderCtrl) project*⁸⁰⁵. According

⁸⁰¹ The operation of the VIS and the exchange of data between Member States on short-stay visas, and in particular the implementation of Articles 21 and 22 thereof, should facilitate the application of the Dublin III Regulation.

⁸⁰² European Commission (2020g), Communication from the Commission, 'COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy', C(2020)2050 final, Brussels, 30 March.

⁸⁰³ Dumbrava, C., 'Artificial intelligence at EU borders: Overview of applications and key issues', EPRS In-Depth Analysis PE 690.706, European Parliamentary Research Service (EPRS), July 2021, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA\(2021\)690706](https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2021)690706).

⁸⁰⁴ Vavoula, N., 'Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism', *European Journal of Migration and Law*, Vol. 23, No 4, 2021, pp. 457-484.

⁸⁰⁵ Johansson, Y., Answer given by Ms Johansson on behalf of the European Commission to Parliamentary Question E-000152/2020, 30 March 2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-000152-ASW_EN.html, citing Avramopoulos, D. (2019a), Answer given by Mr Avramopoulos on behalf of the European Commission to Parliamentary Question E-005624/2018, 8 February, https://www.europarl.europa.eu/doceo/document/E-8-2018-005624-ASW_EN.html and Avramopoulos,

to the available information, the iBorderCtrl project entailed the development of an AI-based video lie detector to be used on travellers to the European Union. Reportedly, the technology is supposed to detect whether people are lying when answering questions based on their facial expressions⁸⁰⁶. The secrecy of the project led a Member of the European Parliament (Patrick Breyer) to demand the European Court of in Luxembourg to order the disclosure of the project documents⁸⁰⁷.

Consideration is also given to possible deployment of **AI for risks assessments and predictive purposes**. Algorithmic profiling for assessing individual risks of security and irregular migration is currently being developed in the context of the VIS and the ETIAS⁸⁰⁸. The EU is also reportedly investing in AI tools for monitoring, analysing and forecasting migration trends and security threats. EASO is currently using an early warning and forecasting system to predict the number of asylum applications, and the Commission and EU agencies including Frontex and Europol are exploring other applications in this field. Examples in this respect are the development of the new components of the EUROSUR system, as well as Europol's innovation hub⁸⁰⁹.

5.4. Informalising intra-EU expulsions and readmission practices

In addition to the normative, policy, operational, and technological instruments that the EU and its Members States put in place and implemented to prevent and deter intra-EU mobility of asylum-seekers, EU efforts have also led to emergence of a wide variety of legal and informal policy instruments. Informal containment practices include, for instance, **fictions of non-entry** which apply to the (non-Schengen) transit zones of international airports, and that have been especially designed by certain EU Member States (e.g. Germany) to allow for the expedited expulsion of individuals denied entry⁸¹⁰.

D. (2019b), Answer given by Mr Avramopoulos on behalf of the European Commission to Parliamentary Question E-005639/2018, 13 March, https://www.europarl.europa.eu/doceo/document/E-8-2018-005639-ASW_EN.html.

⁸⁰⁶ Statewatch, 'EU: Secrecy of border control "lie detector" research project examined in court', Statewatch News, 5 February 2021, <https://www.statewatch.org/news/2021/february/eu-secrecy-of-border-control-lie-detector-research-project-examined-in-court/>.

⁸⁰⁷ Judgment of the General Court (Tenth Chamber) of 15 December 2021, *Patrick Breyer v European Research Executive Agency*, T-158/19, ECLI:EU:T:2021:902.

⁸⁰⁸ Brouwer, E., 'Schengen and the Administration of Exclusion: Legal Remedies Caught in between Entry Bans, Risk Assessment and Artificial Intelligence', *European Journal of Migration and Law*, Vol. 23, No. 4, 2021, pp. 485-507.

⁸⁰⁹ Dumbrava (2021), op. cit.

⁸¹⁰ In Germany, for instance, such fiction of non-entry has been designed to allow for controls on German soil to result in refusals of entry and the consequent expulsions of a person outside the State's territory 'into a perceived no man's land between the controlling officer and the Austrian border'. Hruschka, C., 'The border spell: Dublin arrangements or bilateral agreements? Reflections on the cooperation between Germany and Greece / Spain in the context of control at the German-Austrian border', *EU Immigration and Asylum Law and Policy* blog post, 26 February 2019, <https://eumigrationlawblog.eu/the-border-spell->

After having temporarily reinstated internal border controls, other EU countries (e.g., France) have instead opted for a **regressive interpretation of EU migration law** (the EU Return Directive, most notably)⁸¹¹ to bypass formal readmission procedures (which includes the recognition of a due process to the migrant) in case of denial of entry from another EU Member State. This has allowed **immediate push backs** or even the forcible deportation of undocumented third country nationals to neighbouring Schengen countries (e.g. Spain) to be carried out⁸¹².

Intra-EU readmissions without any formal procedure or decision have been largely enabled by **legal instruments** comprising **bilateral administrative arrangements or operative protocols** between national authorities of different Member States. Some of these bilateral arrangements (e.g., the one signed between France and Spain) enable the authorities of one of the signatory states to hand over an intercepted undocumented person to the authorities of the other, if proof is given that such person crossed from the other state and that the crossing occurred within a maximum four hours of interception⁸¹³. No formal procedure is carried out, which also implies that the person being returned is not provided any legal assistance or given the possibility of applying for asylum⁸¹⁴.

Other EU Member States have signed policy instruments in the shapes of **bilateral administrative arrangements** (e.g., between Germany and Greece⁸¹⁵, and between Germany and Spain)⁸¹⁶ that foresee the activation of readmission procedures in the event

[dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/](#).

⁸¹¹ Article 6.3 of such Directive allows a Member State to refrain from issuing a return decision to a third-country national staying illegally in their territory if they are taken back by another Member State under bilateral agreements.

⁸¹² Barbero, I., 'A Ubiquitous Border for Migrants in Transit and Their Rights: Analysis and Consequences of the Reintroduction of Internal Borders in France', *European Journal of Migration and Law*, Vol. 22, No. 3, 2020, pp. 366–385.

⁸¹³ Agreement on the Readmission of Persons in an Irregular Situation between Spain and France, signed in Malaga on 26 November 2002 and entered into force on 21 December 2003.

⁸¹⁴ The 1997 Chambéry Bilateral Agreement, which regulates readmissions between France and Italy, is practically identical to the Malaga Agreement, with the exception of the element regarding the time after crossing. See, Barbero, I. and Donadio, G., 'La externalización interna de las fronteras en el control migratorio en la UE', *Revista CIDOB d'Afers Internacionals*, No. 122, 2019, pp. 137-162, https://www.cidob.org/articulos/revista_cidob_d_afers_internacionals/122/la_externalizacion_interna_de_las_fronteras_en_el_control_migratorio_en_la_ue.

⁸¹⁵ Administrative Arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border.

⁸¹⁶ Administrative Arrangement between the Ministry of Interior of the Kingdom of Spain and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation between German and Spain when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border.

that a person is refused entry on the occasion of a check at certain sections of internal Schengen borders (e.g., the German-Austrian border). The conditions for the applicability of the readmission procedure comprise the submission of an application for international protection (in Germany) and a Eurodac hit showing that an asylum application had already been lodged in the other signatory Member State (i.e. Greece, or Spain). If such a case occurs, the authorities of the latter will be notified (stating the Eurodac number, photograph, itinerary data and place where apprehended) that the expedited transfer of the person shall be initiated (i.e. within 48 hours) after the person has been apprehended at the internal border. Because of their simplification and the shortening of time limits, **similar procedures differ from the Dublin III Regulation take back or take charge procedures and are not compatible with the scope and purpose of Arrangements under Article 36 Dublin III Regulation**⁸¹⁷.

In other cases (e.g., agreement between Italian, Slovenian, and Croatian authorities) such **informal administrative arrangements (protocols)** have also entailed an intensification of **operational instruments**, aimed at tracing irregular third country nationals, as well as through **joint patrol services** and at enacting **expedited readmissions**⁸¹⁸. Rejections at the border, often with the use of violence, constitute a common practice of several Member States. Reports show that several persons have died in the attempt to cross internal Schengen borders (e.g., crossing the Italian borders with, respectively, France, Austria, or Switzerland)⁸¹⁹. Pushbacks of migrants and asylum-seekers are also routinely operated by several Member States at sea and land borders⁸²⁰.

5.5. Border fencing

The 2015/2016 ‘refugee humanitarian crisis’ gave new momentum to border fencing dynamics⁸²¹, and led to the construction of old and new physical barriers, most notably **border fences**, of various shapes and forms at the EU external borders, but also within the Schengen Area. In **Spain**, the construction of a border fence between the Spanish enclaves of Melilla and Ceuta bordering with Morocco started in the mid-90s, and ever since these infrastructures have undergone constant changes. As explained in Case Study I in *Section 3* of this Report, ‘hot or summary returns,’ which entail the automatic expulsion of anyone

⁸¹⁷ See Hruschka (2019), op. cit.

⁸¹⁸ Bove, C., ‘Country Report: Italy. 2019 Update’, AIDA Country Report, European Council on Refugees and Exiles (ECRE), Brussels, June, https://asylumineurope.org/wp-content/uploads/2020/05/report-download_aida_it_2019update.pdf, p. 30.

⁸¹⁹ MSF, ‘Insediamenti informali marginalità sociale, ostacoli all’accesso alle cure e ai beni essenziali per migrant e rifugiati. Fuori campo, secondo rapporto’, Medici Senza Frontiere (MSF) Italia, Rome, February 2018, <https://www.medicisenzafrontiere.it/news-e-storie/pubblicazioni/fuori-campo-secondo-rapporto/>, p. 2

⁸²⁰ See, for instance, UN Human Rights Council (2021a), op. cit., para. 60.

⁸²¹ Carrera, Stefan, Luk and Vosyliute (2018), op. cit.

crossing the border fence without an individual assessment or access to asylum, have been practised in the areas where the fences are erected.

In **Hungary**, the Hungarian government approved the construction of border fences at the border with Serbia⁸²², Croatia⁸²³, and Slovenia⁸²⁴. In some cases, the EU has been present in these operational contexts. Frontex has reportedly deployed officers assisting the Member States to conduct border controls and surveillance at the Hungarian/Serbian border.⁸²⁵

The construction and development of border walls and fences in the EU triggered a domino effect (only in reverse), with single Schengen countries' decisions to erect border fences and reintroduce internal border controls having prompted similar actions in neighbouring countries. **Austria** began to construct a border fence with Slovenia⁸²⁶, and just a week after the construction of the Austrian fence was started, **Slovenia** reacted by building its own fence with Croatia⁸²⁷. By August 2016, **Bulgaria** completed a 30-km-long and 3.5-metre-high fence along its borders with Greece and Turkey. After a year, in March 2017 it was announced that Bulgaria would extend the current 3.5-metre-high, 30-km-long border fence with Turkey to cover the whole 240 km line separating the two countries [Bulgaria/Turkey].⁸²⁸ In January 2017 three Baltic states, **Lithuania, Latvia and Estonia**, also started to build fences. For example, Lithuania has announced that it will build a 130-km-long fence along the Kaliningrad strip (part of the Russian Federation, which lies between Poland and Lithuania)⁸²⁹.

⁸²² Kingsley, P., 'Migrants on Hungary's border fence: "This wall, we will not accept it"', *The Guardian*, 22 June 2015, <https://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia>.

⁸²³ Mullen, J., Watson, I. and Capelouto, S., 'Migrant crisis: Croatia closes border crossings as thousands stream in', *CNN*, 18 September 2015, <https://edition.cnn.com/2015/09/17/world/europe-migrant-crisis/index.html>.

⁸²⁴ 'Hungary Starts Building Razor-Wire Fence along Border with Slovenia', *Novinite*, 24 September 2015, <https://www.novinite.com/articles/170976/Hungary+Starts+Building+Razor-Wire+Fence+along+Border+with+Slovenia>.

⁸²⁵ The latest Frontex joint operation at EU land borders, named 'Terra', was launched in February 2022. The activity – Joint Operation Terra 2022 – will take place across 12 EU Member States and cover 62 border crossing points, including land borders between Croatia, Romania, Hungary and Serbia. Frontex, 'Frontex launches new land operation', Frontex News Release, European Border and Coast Guard Agency (Frontex), Warsaw, 4 February 2022, <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-new-land-operation-WvWFMr>.

⁸²⁶ 'Razor wire fence appears on Slovenian border', *The Local Austria*, 5 November 2015, <https://www.thelocal.at/20151105/razor-wire-erected-at-slovenian-border/>.

⁸²⁷ 'Slovenia starts building fence to control flow of refugees', *The Guardian*, 11 November 2015, <https://www.theguardian.com/world/2015/nov/11/slovenia-fence-refugees-veliki-obrez>.

⁸²⁸ Global Security, 'Border Fence with Turkey', 26 March 2017, <https://www.globalsecurity.org/military/world/europe/bg-border-fence.htm>.

⁸²⁹ Day, M., 'Lithuania to build fence along its border with Russia to protect itself from "provocations"', *The Telegraph*, 17 January 2017, <https://www.telegraph.co.uk/news/2017/01/17/lithuania-build-fence-along-border-russia-protect-provocations/>.

The most recent example of border fencing strategy adopted to contain mobility of asylum-seekers is the one unfolding at the **Polish, Latvian, and Lithuanian borders with Belarus**⁸³⁰. This strategy was compounded by the passing of national laws and the adoption of legislative proposals aimed at containing the possible entry of asylum-seekers at all costs or simplifying expulsion procedures back towards Belarus, even in cases where third country nationals have made an application for international protection⁸³¹. In a recent letter dated 7 October 2021 and addressed to the European Commission, interior ministers from 12 Member States demanded the EU to finance border-wall projects to stop migrants entering through Belarus⁸³².

⁸³⁰ Tondo, L., 'Migrants face "desperate situation" at Poland-Belarus border', The Guardian, 9 November 2021, <https://www.theguardian.com/global-development/2021/nov/09/unacceptable-migrants-face-desperate-situation-at-poland-belarus-border>.

⁸³¹ Carrera, S., 'Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus', CEPS Policy Insights No 2021-18, CEPS, Brussels, November 2021, <https://www.ceps.eu/ceps-publications/walling-off-responsibility/>.

⁸³² <https://s3.eu-central-1.amazonaws.com/euobs-media/59f9f4116a089cec71bf81b76413503a.pdf>

6. Cross-cutting findings

This section draws from the key cross-cutting findings in *Sections 3, 4 and 5* of this Report. It also outlines a set of maps aimed at showing a cartographic visualisation of the scale and objectives of EU migration management policies. The section starts by focusing on the impacts of EU migration management policies (*Section 6.1*),⁸³³ and then moves into an examination of the effects of EU policies on secondary movements inside the EU (*Section 6.2*).

6.1. EU policies on migration management

Figures Figure 10 and Figure 11 below set out and visualise the EU instruments identified in *Sections 3 and 4* above, based on the **typology of instruments** defined in this Report and the substance/priorities of the instruments concerned. The instruments identified in the case studies are each identified with one ‘bubble’ representing *one* instrument. A **list of the EU instruments** visualised in the *Figures* can be found in *Annex 1* to this Report.

Colours are used to identify the typology of the instruments observed (i.e. legal, policy, political, technological, operational and financial), with multi-natured instruments represented in multiple colours. **Icons/symbols** are added to these ‘bubbles’ to identify the broad *substance/scope* of the instruments (with the meaning of the icons set out in the legend). ‘Bubbles’ identified as “others” denote instruments that do not fit within any of the defined list of ‘material scope’ (as set out in the legends).

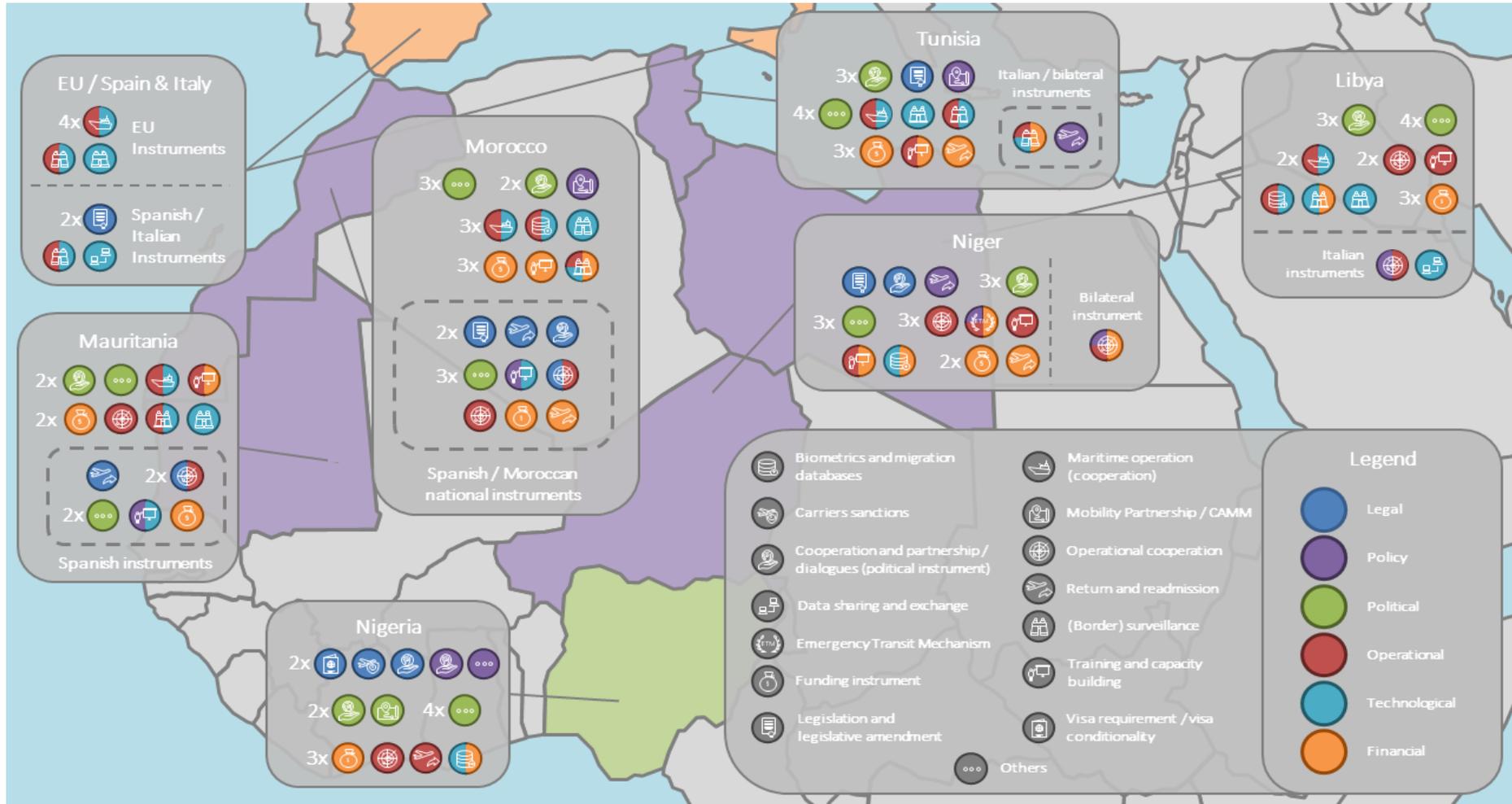
While the majority of these icons and symbols are shared between the two *Figures*, a few are unique and thus solely present in the figures on the Nigerian and Afghanistan case studies respectively (i.e. “Emergency Transit Mechanism” in the *Nigerian* case study, “Hotspots (asylum)” in the *Afghanistan* case study). Where multiple instruments share the **same typology and (broad) substance**, the quantity of such instruments is represented by a number (e.g. “2x”).

The instruments identified in *Figures Figure 10 and Figure 11* are predominantly **EU instruments**. The empirical overview provided in *Sections 3 and 4* of this Report has moreover identified a number of instruments of a **national** (e.g. the MoU between Italy and Libya on ‘preventing irregular migration’) or **bilateral nature** (as is the case, for example, with a number of bilateral readmission agreements and arrangements between EU Member States and certain third countries), which are of crucial importance when examining the place, role and effects of EU instruments. These national/bilateral instruments have been separately identified as such in *Figures Figure 10 and Figure 11*.

⁸³³ As stated in Section 2.3.3. of this Report, this Section doesn’t aim at addressing the extent to which EU instruments affect or not the preferences or ‘choices’ of individuals engaging in cross-border mobilities.

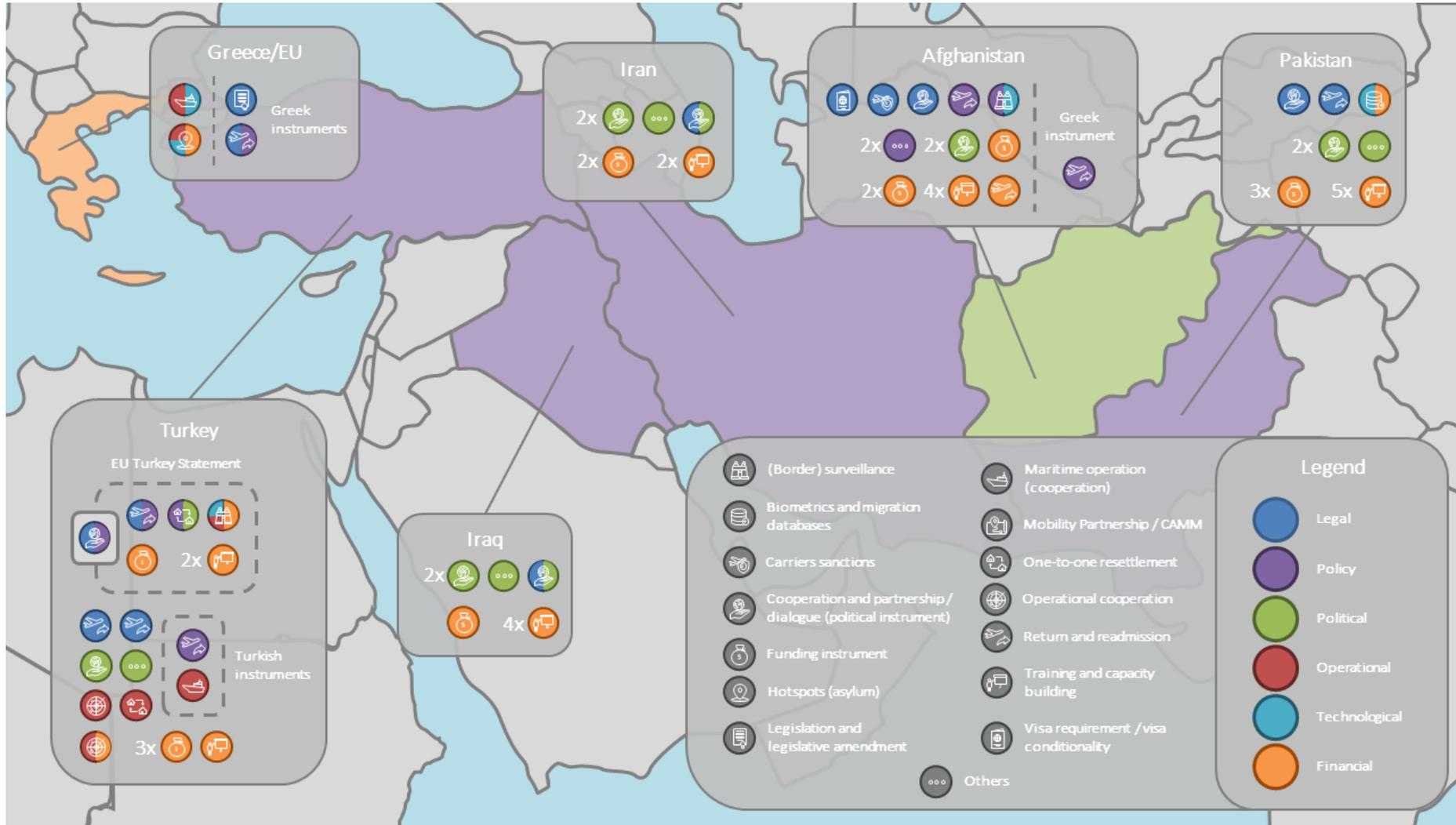
Before addressing these figures, some caveats are warranted. First, two ‘types’ of instruments (the “**Visa requirement/visa conditionality**” and “**Carriers sanctions**”) seem at first glance to only be present in Nigeria and Afghanistan respectively. It is not to be inferred from this that these EU instruments do not apply to other third countries (a quick glance at *Figure 12* below demonstrates this point); rather, it lies in the methodological choice in both case studies to focus on Nigerian and Afghan asylum seekers and refugees. Second, *Figures Figure 10 and Figure 11 do not aim to comprehensively or exhaustively map out* the multitude of EU instruments in the third states concerned (in the same way that Sections 3 and 4 did not comprehensively map out all EU instruments of relevance). Third, the classification of instruments by typology and/or substance in the Figures are not meant to indicate that these instruments do not or may not serve additional functions or substantive roles.

Figure 10. EU external migration management instruments by 'material scope' (Nigeria Case Study)



Source: Authors' own elaboration (see Section 3 of this Report).

Figure 11. EU external migration management instruments by 'material scope' (Afghanistan Case Study)



Source: Authors' own elaboration (see Section 4 of this Report).

Looking at the typological spread of instruments in these visualisations, the **density/quantity** of EU (external) migration management instruments *observed* in the Nigerian and Afghan case studies **increase the closer a third country is located geographically to the EU external borders**. Moreover, a shift can be observed in the nature of these instruments in relation to the country geographical proximity to Europe, as **operational, technological and policy instruments** become more prevalent closer to the EU external borders (e.g. Libya, Tunisia, Morocco, Turkey), while **financial and political instruments** seem to play a stronger role in ‘far-away’ or non-geographical adjacent countries from where individuals can directly try unauthorised entry to EU’s territory (e.g. Niger, Nigeria, Afghanistan and Pakistan). As regards **legal instruments**, these figures need to be read bearing in mind the failing/unsuccessful attempts by the EU to conclude EURAs with countries like Nigeria, Morocco and Tunisia, and the practical implementation obstacles experienced in the scope of EURAs with Turkey and Pakistan (Ineli-Ciger and Ulusoy, 2021; Carrera, 2016).⁸³⁴

Likewise, **technological instruments** focusing on identity management and the collection of biometric data through the introduction of new ID cards and control systems at land, air, and sea borders were more prevalent in the same category of countries. In some cases, these instruments played a critical role in the implementation of previously adopted national legislations, making cross-border mobility without ID documents a criminal offence (e.g., Nigeria, Niger). On the other hand, technological tools deployed near or on the territory of the EU show a wide variety of high-tech tools focused on border and maritime surveillance and physical blockade (e.g., Libya, Tunisia, Mauritania, Morocco, Spain, Italy).

At the same time, **information exchange and access to information** on cross-border mobility are used as tools to monitor regional in-country and cross-border mobilities and **enforce transit and intra-regional expulsions**. However, access and exchange of information proves to be unbalanced and with no purpose limitation, as IT tools installed in third countries are often linked to criminal police actors such as EUROPOL and INTERPOL on the one hand, while on the other hand the information to be disclosed is decided by the EU on a case-by-case basis (e.g. Nigeria, Niger).

It can also be observed that the EU focus on external migration management differs in nature between Africa (as exemplified by the Nigerian case study) and Asia (as in the Afghanistan case study). Where the sheer **amount of EU instruments and the diversity in types** is readily observable in the Nigerian case, **the EU relies more on political,**

⁸³⁴ Ineli-Ciger, M. and Ulusoy, O., ‘A Short Sighted and One Side Deal: Why The EU-Turkey Statement Should Never Serve as a Blueprint’, in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the UN Global Compact on Migration and Asylum*, Florence, European University Institute, 2021, pp. 111-124, <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf>; and Carrera, S., *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Springer Briefs in Law, Springer, Cham, 2016, <https://link.springer.com/book/10.1007/978-3-319-42505-4>.

policy and financial tools in the case of Afghanistan⁸³⁵. The limited quantity of EU instruments pertaining migration management in Iraq and Iran may be attributable to a lack of focus on ‘migration management’ as a topic of priority (particularly as regards funding), or because it is hidden behind other EU priorities⁸³⁶.

Observing the instruments in more substance, the picture that emerges when looking at *Figure 10* and *Figure 11* is one of **hyper-complexity**, i.e. a highly complex multi-instrument landscape, which leads to **legal uncertainty** and makes it **difficult** – if not impossible – to have a **global understanding of the combined interactions, use and impacts** of relevant EU instruments. Likewise, the Figures reveal the EU’s interaction with national instruments or bilateral forms of arrangements and/or cooperation aimed at preventing people from moving towards EU territory. Furthermore, as regards their material scope, **the migration management priority prevails, either at front or masked behind other policies such as neighbourhood, development cooperation and trade / investment.**

In addition to restrictive visa policies and the criminalisation of air carriers, EU instruments emphasise the following **set of priorities** which need to be understood as interwoven and sometimes mutually reinforcing:

- **First**, the criminalisation of human smuggling and irregular migrations in national law and deterrence information campaigns aimed at preventing unauthorised leave;
- **Second**, supporting national asylum legislation for purposes of readmission, or building migration/borders ‘capacity’, supporting with military personnel and training border/coast guards on border management and surveillance and SAR for purposes of preventing cross-border mobility and intersecting boats at sea;
- **Third**, the setting up of identification/surveillance technologies and databases, and information / data exchange on tracing mobility trajectories of individuals, for purposes related to expulsions and readmissions.

This resulting picture justifies and promulgates an **EU ‘home affairs’ or ‘migration’ diplomacy approach** (Anderson and Tsourapas, 2019; Carrera, Den Hertog and Parkin, 2012)⁸³⁷ to issues related to cross-border human mobility which gives priority to policies

⁸³⁵ A further possible explanation for the relatively fewer EU instruments present in the Silk Routes region may also be related to the intentional focus in the Afghanistan case study away from EU instruments and measures specifically addressing the ‘Syrian refugee crisis’. Inclusion of UE measures directed towards Syrian protection seekers may have resulted in additional observations in respect of *inter alia* Turkey, Iran and Iraq, with the inclusion of, e.g. the *EU Regional Trust Fund in Response to the Syrian crisis* (Madad fund).

⁸³⁶ On Iraq, see Fusco, F., ‘De-Securitisating and Re-Prioritising EU-Iraq Relations’, IAI Commentaries 21/18, Istituto Affari Internazionali (IAI), Rome, 22 March 2021, <https://www.iai.it/en/pubblicazioni/de-securitisating-and-re-prioritising-eu-iraq-relations>; On Iran, cf. Adebarh, C., ‘Europe Needs a Regional Strategy on Iran’, Carnegie Europe Briefing Paper, Carnegie Europe, Brussels, 13 May 2020, <https://carnegieeurope.eu/2020/05/13/europe-needs-regional-strategy-on-iran-pub-81769>.

⁸³⁷ Carrera, S., Den Hertog, L. and Parkin, J. (2012), ‘EU Migration Policy in the wake of the Arab Spring What prospects for EU-Southern Mediterranean Relations?’, MEDPRO Technical Report No. 15, CEPS, Brussels, August 2012, <https://www.ceps.eu/ceps-publications/eu-migration-policy-wake-arab-spring-what>

focused on policing, deterrence, criminalisation and containment of human mobility. The few EU instruments that offer or allow for **legal mobility possibilities**, such as the ETM in Niger or the one-for-one resettlement mechanism in Turkey, are often closely **tied to, and in some cases conditional upon, migration management instruments on containment and expulsions (readmission)**. In practice, the underlying EU logic merges and blurs the lines between development, legal mobility and migration management policies falls short on offering non-discriminative and sufficient legal mobility opportunities for third country nationals.

This becomes also evident when looking at the **Talent Partnerships** and pilot projects on labour mobility such as the *Migration Partnership Facility (MPF)* or *Migration of African Talents through Capacity building and Hiring (MATCH)*. Both **focus exclusively on 'highly skilled migrants', targeting tiny numbers of "IT workers, engineers or master's students"** (Rasche, 2021),⁸³⁸ while providing **no alternative mobility channels for lower or medium skilled and qualified workers**. They are therefore characterised by a **selective and utilitarian approach** to labour mobility. Under the framework of MATCH, for example, "105 highly skilled professionals from Senegal and Nigeria will be recruited to work for a period [...] of minimum 9 months and maximum 2 years in a company in one of the 4 participating MS [Belgium, Netherlands, Luxembourg or Italy]" (EMN, 2021a)⁸³⁹. However, partnering EU countries often fail to fulfil their objectives as, for example, Lithuania was only able to provide 26 work visas for Nigerian nationals, despite the originally agreed number under the MPF was 50.⁸⁴⁰

Moreover, it remains **unclear on which basis the beneficiaries of these Talent partnerships are selected**, which raises potential issues of discriminatory treatment, **and if asylum seekers and refugees are equally able to have access and participate in these instruments**. Lastly, it appears that already existing or intended cooperation on border management and readmission remains the main stimulus for EU Member States to participate in these projects.⁸⁴¹ Indeed, a majority of the EU instruments under examination live 'in parallel' with other bilateral instruments of similar restrictive – mobility constraining - nature, objectives and components, which **increases complexity**

[prospects-eu-southern-mediterranean-relations/](#). On the concept of 'migration diplomacy' see Anderson, F.B. and Tsourapas, G. (2019), 'Migration Diplomacy in World Politics', *International Studies Perspectives*, Vol. 20, No 2, May 2019, pp. 113-128. Anderson and Tsourapas use the term 'migration diplomacy' 'to describe states' use of diplomatic tools, processes, and procedures to manage cross-border population mobility', pages 115 and 116.

⁸³⁸ Rasche, L. (2021), 'EU Talent Partnerships – Fit for purpose?', Jacques Delors Centre Policy Brief, Hertie School, Jacques Delors Centre, Berlin, 16 June 2021, <https://www.delorscentre.eu/en/publications/detail/publication/eu-talent-partnerships>, p.4.

⁸³⁹ See EMN (2021a), op. cit., pp. 15-16, 23.

⁸⁴⁰ Rasche (2021), op. cit., p. 4.

⁸⁴¹ Rasche (2021), op. cit., p. 5.

and poses questions regarding their compatibility with, and value added of, EU agreements and arrangements.

6.1.1. Leaving and accessing legal entry

EU Member States have a **legal obligation to ensure genuine and effective access to means of legal entry in their territories**, particularly – yet not exclusively – for asylum-seekers and refugees. This has been confirmed by the European Court of Human Rights jurisprudence, starting in the case *2020 ND and NT v Spain*⁸⁴² - where the Court assessed that the legality of pushbacks at the Spain-Morocco land borders violated Article 4 of the Fourth Additional Protocol to the ECHR – on whether States party to the ECHR provide **genuine and effective means of legal entry** (Carrera, 2020b)⁸⁴³. The ECtHR held that Council of Europe State Parties must:

...make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention.⁸⁴⁴

Moreover, the **UN Global Compact on Migration (GCM)** – which outlines the commitment of all 193 states, including EU states Italy, Spain and Greece – calls for states to ensure opportunities for safe, orderly and regular migration⁸⁴⁵. The GCM sets up a commitment by signatory states in Objective 5 to ‘enhance availability and flexibility of pathways for regular migration’. This needs to be read in combination with the **UN Global Compact on Refugees (GCR)** call for international solidarity and sharing of responsibility, which are to be guided by relevant human rights instruments and regional refugee protection regimes⁸⁴⁶.

The analysis carried out in *Sections 3 and 4* of this Report reveal a picture focused on **highly restrictive and strictly limited options for authorised leave and movement with regard to options for direct entry into the EU**. This raises fundamental questions

⁸⁴² European Court of Human Rights (Grand Chamber) 13 February 2020, *N.D. and N.T. v Spain*, Application Nos. 8675/15 and 8697/15.

⁸⁴³ Cf. ECHR (GC) 13 February 2020, *N.D. and N.T. v Spain*, para. 201, 209. Carrera, S. (2020b), ‘The Strasbourg court judgment “N.D. and N.T. v Spain”: a “carte blanche” to push backs at EU external borders?’, EUI RSCAS Working Paper 2020/21, European University Institute, Florence, <https://cadmus.eui.eu/handle/1814/66629>.

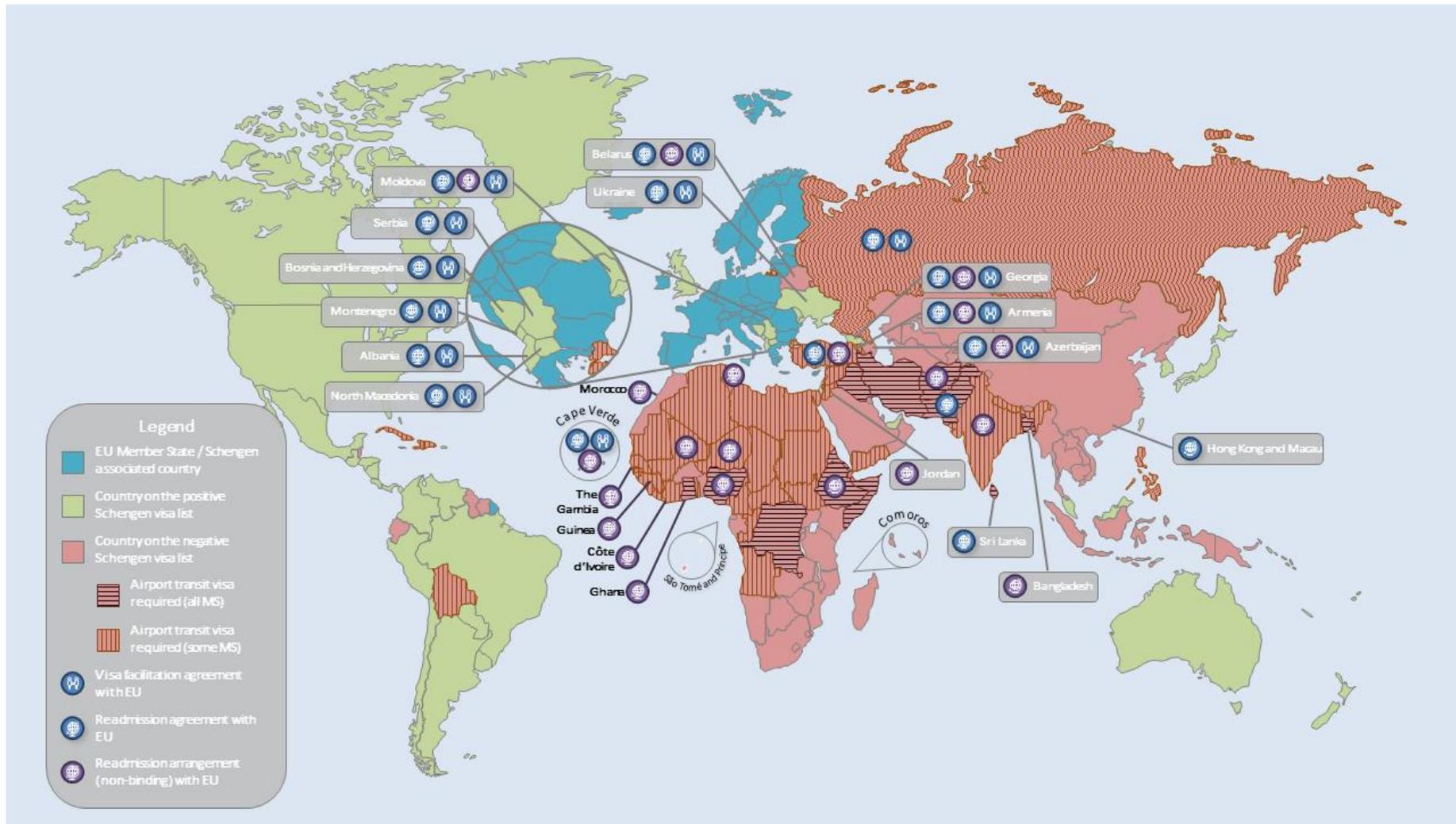
⁸⁴⁴ Ibid., para 209.

⁸⁴⁵ UN Global Compact for Safe, Orderly and Regular Migration, adopted on 13 July 2018. Online: https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf.

⁸⁴⁶ UN Global Compact for Refugees, paragraph 5 on ‘Guiding Principles’ Online: [UNHCR - Global Compact on Refugees – Booklet](#).

of **legal incoherency or inconsistency** as regards the compatibility of current EU external migration policies with the above principles and duties.

Figure 12. Schengen Visa requirements (including ATVs), EU visa facilitation and readmission agreements and arrangements



Source: Authors' own elaboration.

Figure 12 (above) sets out (in **colours**) the requirements under EU law (including the Schengen Borders Code, the EU Visa Code and the EU (negative and positive) Visa Lists) for third country nationals to enter into the EU (Bigo and Guild, 2003)⁸⁴⁷. Figure 12 moreover identifies which third country nationals are required to obtain an Airport Transit Visa to transit through the international transit zone of all or some EU Member States (in **horizontal** and **vertical red stripes** respectively). Finally, the third countries which have an individual visa facilitation agreement and/or a readmission agreement and/or arrangement with the EU have been identified with a **symbol**. It must be noted that, for the purpose of this Report and the visualisation in Figure 12, a **broad definition of EU 'readmission arrangement'** is adopted, with *inter alia* Mobility Partnerships (MPs), Common Agendas on Migration and Mobility (CAMMs), and Joint Declarations on Migration (JDMs) included under this definition.

The Figure demonstrates how the primary and most basic form of legal travel and entry / admission into the EU and Schengen Area is restricted **for all African nationals and most Asian nationals (with Japan, South Korea, and Georgia among the notable exceptions)** through the requirement of an **EU Schengen visa**. Nigeria, which is a country whose nationals must be in possession of visas when crossing the external borders, is also one of the countries with the highest rejection rate among EU countries. Regardless of the reasons for leaving the country, access to visas turns into a privilege that, compounded by carrier sanctions, makes direct and legal migration by air from Nigeria to Europe practically unfeasible for many⁸⁴⁸. Afghan nationals have similarly low visa possibilities and have benefited from an equally short number of resettlement opportunities.

This can be also illustrated by the discrepancy between the EUTF spending target and beneficiaries of legal migration and mobility programmes – including projects funded under the Mobility Partnerships or the Common Agendas of Migration and Mobility⁸⁴⁹. In this context, the European Parliament Civil Liberties, Justice and Home Affairs (LIBE) Committee has highlighted that 'reducing mobility to deter migration mostly **runs**

⁸⁴⁷ See the map used by Bigo, D., and E. Guild, *La mise à l'écart des étrangers: Les effets du Visa Schengen*, Cultures et Conflits Series No. 49, L'Harmattan Editions, Paris, March 2003.

⁸⁴⁸ On the impacts of restrictive visa policies on both emigration and immigration refer to Czaika, M. and De Haas, H. (2014), 'The Effects of Visa Policies on International Migration Dynamics', DEMIG Project Paper 18 / IMI Working Papers 89, International Migration Institute (IMI), University of Oxford, Oxford, April 2014, <https://www.migrationinstitute.org/publications/wp-89-14>. See also Spijkerboer, T. (2018), 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', *European Journal of Migration and Law*, Vol. 20, No 4, 2018, pp. 452-469; Van Houtum, H. and Van Uden, A. (2021), 'The Birth of the Paper Prison: The Global Inequality Trap of Visa Borders', *Environment and Planning C: Politics and Space*, 2021, pp. 20-27; Van Houtum, H. (2010), 'Human blacklisting: The global apartheid border regime of the EU', *Environment and Planning D: Society and Space*, Vol. 28, No 6, 2010, pp. 957-976.

⁸⁴⁹ Davin et al. (2021), op. cit. (p. 105; [Annex](#) p. 21-23, 55, 62). See also EUTF website – NIGER: https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger_en.

counter to development objectives by increasing poverty and threatening to put fundamental rights at risk.'

Due to limited opportunities to meet all the necessary requirements for regular entry into the EU, including possession of an ID card while less than 50 % of children are registered at birth in Nigeria, **the phenomenon of 'irregular migration' and criminalisation of unauthorised leaving is self-reinforcing**⁸⁵⁰. According to Spijkerboer (2021a), this infers a fundamental imbalance in the regulation of international migration and mobility between different world regions, according to which EU policy appears as an enterprise to maintain and strengthen European privileges at the expense of [African and Asian] citizens⁸⁵¹. Furthermore, the EU's emphasis on African countries to enhance pre-departure surveillance and criminalise human smuggling and irregular migrations leads to **cases of criminalisation of in-country free movement and emigration by Nigerian nationals and residents**.

This has also been highlighted by Bisong (2021)⁸⁵², who mentions how national courts in Nigeria have adopted a highly restrictive criminalisation approach with one case where a federal high court in Katsina charged a group of persons for attempting to irregularly migrate to Europe through Niger based on the 2015 Immigration Act. **Increasing in-country controls and penalisation** have also occurred in Mauritania which – as a result of bilateral migration control cooperation with Spain – has engaged in **problematic detention practices** such as the Migrant Reception Centre in Nouadhibou and **arbitrary (extra-legal) arrests** of people assumed to move irregularly towards Spain condemned by the UN and civil society⁸⁵³.

Therefore, a series of **EU instruments negatively impact the right of all persons to leave any country or emigrate** (Guild and Stoyanova, 2018; Guild, 2013)⁸⁵⁴, which poses

⁸⁵⁰ Moreno-Lax, V. (2021), *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press, Oxford, 2017; Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge, 2011.

⁸⁵¹ Spijkerboer, T. (2021a), "I wish there was a treaty we could sign", in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, Florence, <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf>, p. 62.

⁸⁵² Bisong, A. (2021), 'EU External Migration Policies in West Africa', in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, Florence, 2021, pp. 262-273, <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf>.

⁸⁵³ Carrera et al. (2018), op. cit., pp.19-20.

⁸⁵⁴ Cf. Article 13(2) UDHR; Article 12(2) ICCPR. Guild, E. and Stoyanova, V., 'The Human Right to Leave Any Country: A Right to be Delivered', *European Yearbook on Human Rights 2018*, 2018, pp. 373-394; see also Guild, E., 'The Right to Leave a Country', Issue Paper by the Council of Europe Commissioner for Human Rights, Council of Europe, Strasbourg, October 2013, <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510>. The right of persons to leave any country has been

serious questions as regards their compatibility with fundamental rights, as well as their legal coherency /consistency with the commitments under the UN Global Compacts on Migration and Refugees. In such a manner, EU financial instruments **co-create incapacity in the selected countries as regards compliance with international and regional human rights, refugee protection and free movement legal commitments.**

Exercising one's **human right to leave any country is further disincentivised by EU instruments focused on information and awareness-raising efforts.** As demonstrated in the case study on Afghanistan, the EU, through its Development Cooperation Instruments, funds the creation of "Migrant Resource Centres" in Afghanistan (and its neighbouring countries). While these MRCs are designed as centres to provide prospective travellers with information not only on the dangers of irregular migration, but also on legal channels of migration, as well as information to prepare them for the eventual return and reintegration, the EU's internal documents paint a different picture: MRCs function primarily as tools to discourage irregular mobility to the EU. Crucially, the literature has questioned the effectiveness of these forms of instrumentalising information campaigns to discourage irregular mobility⁸⁵⁵.

reaffirmed by all UN Nations, including all EU Member States, in the New York Declaration for Refugees and Migrants (A/RES/71/1, para. 42).

⁸⁵⁵ Cf. Schans, D. and Optekamp, C. (2016), 'Raising awareness, changing behaviour? Combatting irregular migration through information campaigns', Study for the WODC Cahier 2016-11, Dutch Research and Documentation Centre (WODC), The Hague. 2016, <https://repository.wodc.nl/handle/20.500.12832/175>; Hahn-Schaur, K. (2021), 'Leveraging migration information campaigns for state and migrant security: Lessons learned and open questions', Annual Policy Initiative 2021 (Whole-of-route approaches to irregular migration) Policy Brief, International Centre for Migration Policy Development (ICMPD), Vienna, September 2021, https://www.icmpd.org/file/download/55837/file/API2021_PolicyBrief_Campaigns.pdf.

6.1.2. Transit: Right to free movement and non-penalisation

The literature has underlined how by stoking fears of massive migration flows into the Schengen Area, **restrictions on the movement of non-EU citizens are thus sought to be legitimised and reproduced** (Brachet, 2018)⁸⁵⁶. Since the introduction of the new Pan-African passport in 2016, the African Union (AU) has progressively implemented its plan for a borderless Africa for the intra-continental free movement of people and goods⁸⁵⁷. Taking a cue from the 15-member ECOWAS community, which already guarantees visa-free entry for up to 90 days⁸⁵⁸, the AU codified a new protocol on free movement in 2018⁸⁵⁹. While the document, with only four ratifications and 32 signatories, is so far unable to guarantee free entry for all African nationals, it nevertheless demonstrates the different perceptions of human mobility in comparison to the one portrayed by EU foreign policies⁸⁶⁰, where **cross-border human mobility from African countries – including those in search of asylum – are still predominantly treated as a policing or insecurity issue**. The result is that EU foreign policies led African states to **violate their legal commitments under ECOWAS and the African human rights system**.

Moreover, **implementing EU instruments to criminalise ‘onward migration’** within the African Union not only paralyses those in need of protection, but also **artificially creates new categories of criminals that feed the narrative of uncontrolled migration as a threat**. An example of this is the EU's support before, during, and after the enactment of Niger's Loi 2015-036 on the criminalisation of human smugglers and related enforcement tools. In fact, the EU not only financially supported the consultation process between the UNDOC and the Nigerien authorities, but also provided **training, equipment, and support to the Nigerien Police**. This encompassed collaboration of the tripartite police unit ECI-Niger, EUCAP Sahel Niger and Frontex, the installation of a biometric ID system (MIDAS) and assistance in data collection on cross-border movement.

⁸⁵⁶ Brachet, J. (2018), ‘Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara’, *The Annals of the American Academy of Political and Social Science*, Vol. 676, No 1, 2018, p. 29.

⁸⁵⁷ Mukeredzi, T. (2016), ‘Pan-Africa passport to open up borders’, *Africa Renewal*, Vol. 30, No. 2, August-November 2016, <https://www.un.org/africarenewal/magazine/august-2016/pan-africa-passport-open-borders>.

⁸⁵⁸ Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993, available at: <https://www.refworld.org/docid/492182d92.html>; Economic Community of West African States (ECOWAS), *Protocol Relating to Free Movement of Persons, Residence and Establishment*, 29 May 1979, A/P 1/5/79, available at: <https://www.refworld.org/docid/492187502.html>.

⁸⁵⁹ <https://au.int/sites/default/files/treaties/36403-treaty-protocol-on-free-movement-of-persons-in-africa-e.pdf>

⁸⁶⁰ Ratified by Madagascar, Niger, Rwanda, Sao Tome and Principe. See also Okunade, S. (2021), ‘Africa Moves Towards Intracontinental Free Movement for Its Booming Population’, *Migration Information Source*, 21 January 2021, <https://www.migrationpolicy.org/article/africa-intracontinental-free-movement>.

The consequent criminalisation, therefore, not only stands in contradiction with Niger's commitments in ECOWAS. It is also **directly incompatible with the non-penalisation or non-criminalisation obligations** under the 1951 Geneva Convention – Art.31.1⁸⁶¹ – and the 2000 UN Migrant Smuggling Protocol in its Art. 5⁸⁶². Therefore, this also proves that the UN GCM objective 9 (*Strengthen the transnational response to smuggling of migrants*) raises in itself deep human rights-compatibility issues which must be addressed. Overall, the impacts of these EU instruments raise **profound issues of legal incoherency / inconsistency** in light of EU Better Regulation Guidelines / Toolbox, as well as **serious fundamental rights interferences** with crucial refugee protection and human rights guarantees.

It is well known that international organisations play a crucial role as implementing actors of the EU migration management complex. Sections 3 and 4 of this Report reconfirm and provide additional evidence of this reality. By involving international organisations such as UNHCR, UNODC, IOM or ICMPD, development and investment agencies, and private actors in the implementation processes, EU and Member State actors seek, on the one hand, to expand the scope of legitimate action outside the Schengen Area and, on the other hand, **to manifest or transfer European norms on migration and crime in the agenda of external (subcontracted) actors as well as non-European states authorities** (Spijkerboer, 2021b)⁸⁶³. Likewise, international migration has become an industry in and of itself⁸⁶⁴, as sophisticated and professionalised border surveillance instruments require more resources and leads to dependence on external providers and expertise. A key open question remains **the porous accountability and blurred liability regimes of these international organisations in cases of human rights violations.**

For instance, following the adoption of Loi 2015-036 in Niger, any form of assistance for people on the move without legal travel documents became criminalised, thus disturb[ing] a long-standing trans-border migration system that affects North Africa and the Sahel⁸⁶⁵. Even if the 95 % decrease in documented cases was initially celebrated as a

⁸⁶¹ Article 31.1 (Refugees unlawfully in the country of refuge) of the Geneva Convention states that '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.'

⁸⁶² Article 5 (Criminal liability of migrants) of the UN Protocol stipulates that 'Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.'

⁸⁶³ Spijkerboer, T. (2021b), 'Migration management clientelism', *Journal of Ethnic and Migration Studies*, ahead-of-print, <https://doi.org/10.1080/1369183X.2021.1972567>, p. 3, 9.

⁸⁶⁴ The amount of money spent by the EUTF on migration-related projects and the increase in Frontex's budget from its inception to the present day provide some examples (see Annex). | Source: Brachet (2018), op. cit., p. 31. See also: Andersson, R., *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe*. University of California Press, Berkeley, CA, 2014; Gammeltoft-Hansen, T. and Sorensen, N.N. (eds.), *The migration industry and the commercialization of international migration*. Routledge, Oxford, 2012.

⁸⁶⁵ Brachet (2018), op. cit., p. 30.

success by the EU⁸⁶⁶, the law, on the contrary, leads to life-threatening and more costly alternatives such as migrating under the radar through the desert⁸⁶⁷. Sudanese smugglers intervened in this new ‘business’ by offering riskier and five times more expensive routes, which even pass through active conflict areas in Chad and Sudan (Abebe and Mbiyozo, 2020)⁸⁶⁸.

Scholars have proved how international and EU priorities for countries to implement **criminalisation of human smuggling and EU integrated border management concepts policies produce harm and instability by nurturing national/local security and penal actors** (Campana and Varese, 2016)⁸⁶⁹. International terms of crime or criminal activities like human smuggling, not only contest local traditions, livelihood strategies and perceptions of legality and illegality, but also mobilise resistance and produce harm (Stambol, 2019)⁸⁷⁰. They may also end up **nurturing a rule of law backsliding and human rights’ violations** in the countries concerned, which **self-defeats the overall objectives of the European Commission’s neighbourhood and development policies**.

Furthermore, estimates indicate that **the death toll among people on the move in the Sahara is double the death toll in the Mediterranean Sea**⁸⁷¹. According to Brachet (2017), EU instruments in Niger have in fact led to the ‘manufacturing of human smugglers’, a new category that is now punishable by law⁸⁷². Instead of allowing safe passage through Niger towards North African countries, these instruments have imposed severely limit the possibilities for safe cross-border mobility and thus benefit individuals who profit from the increased vulnerability of those who are already in need of protection.

⁸⁶⁶ European Parliament (2018a), ‘European Parliament President Antonio Tajani concludes visit to Niger: calls for more EU resources and investment to support control of migratory flows in Niger and Sahel’, EP News, European Parliament, Niamey, 18 July, https://www.europarl.europa.eu/former_ep_presidents/president-tajani/en/newsroom/european-parliament-president-an.html.

⁸⁶⁷ OHCHR, ‘Pour une protection efficace des droits des migrants au Niger’, OHCHR News, Office of the United Nations High Commissioner for Human Rights (OHCHR), Geneva, 19 December 2019, <https://www.ohchr.org/FR/NewsEvents/Pages/MigrationHRNiger.aspx>; see also: ASGI, ‘Focus Niger. The criminalisation of mobility and the rhetoric of defending migrants: the Niger experiment’, ASGI *Sciabaaca & Oruka – Oltre il Confine* project, Association for Juridical Studies on Immigration (ASGI), 6 August 2021, <https://sciabacaoruka.asgi.it/en/focus-niger/>.

⁸⁶⁸ Abebe, T.T. and Mbiyozo, A.-N. (2020), ‘New Pact’s focus on migrant returns threatens Africa-EU partnership’, Contribution to ASILE Forum ‘The new EU Pact on Migration and Asylum in Light of the UN GCR’, 11 December 2020, <https://www.asileproject.eu/new-pacts-focus-on-migrant-returns-threatens-africa-eu-partnership/>.

⁸⁶⁹ Campana, P. and Varese, F., ‘Exploitation in Human Trafficking and Smuggling’, *European Journal on Criminal Policy and Research*, Vol. 22, No. 1, 2016, pp. 89–105.

⁸⁷⁰ Stambol, E.M., ‘The Rise of Crimefare Europe: Fighting Migrant Smuggling in Africa’, *European Foreign Affairs Review*, Vol. 24, No 3, 2019, pp. 287-307.

⁸⁷¹ Miles, T. and Nebehay, S. (2017), ‘Migrant deaths in the Sahara likely twice Mediterranean toll: UN’, *Reuters*, 12 October 2017, <https://www.reuters.com/article/us-europe-migrants-sahara-idUSKBN1CH21Y>.

⁸⁷² Brachet (2018), op. cit., p. 23.

This provides another example of a **security-driven and Eurocentric (self-interest) view** of migration which disregards the social, economic and historical dimension of cross-border mobility in the region.

6.1.3. Preventing entry and prioritising expulsions

The prominence or intensity of EU instruments aimed at blocking, monitoring, preventing and expelling third country nationals attempting to leave one of the EU's neighbouring states and enter the EU's maritime/land borders increases when one gets closer to the Schengen Area. Driven by the EU maxim of 'fighting human traffickers and smuggling networks' has become a core aspect of EU external migration policy. As evidenced not only by the almost exclusive EUTF funding of migration management-related projects, but also by the allocation of funds by EU Member States, **collaboration with problematic regimes** takes place at the expense of refugees, asylum-seekers and migrants' rights and dignity, and it leads **to situations where the EU is indirectly supporting systemic human rights violations and, in some cases, crimes against humanity**⁸⁷³.

One example is the **equipment, training and joint work between some EU actors and the Italian authorities with the Tunisian and Libyan coast guards** in preventing irregular migration across the Mediterranean, which mainly take the form of **operational and financial instruments**. Despite numerous documented cases of inhumane and degrading treatment of third country nationals in Libya, cooperation with the regime continues to this day. In October 2021, the report of the UN Fact-Finding Mission on Libya provided reasonable grounds to believe that acts of murder, enslavement, torture, imprisonment, rape, persecution and other inhumane acts committed against migrants form part of a systemic and widespread attack at this population, in furtherance of a State policy. In this context, these acts may amount to crimes against humanity⁸⁷⁴.

Between 2017 and January 2020 alone, over 40 000 people were intercepted at sea and forcibly returned to Libyan territory against their will⁸⁷⁵. Crucial to this cooperation is the design and implementation of scattered and non-legally binding instruments which have been instrumentally designed so as to escape responsibility for human rights violations and crimes. By **indirectly funding, strengthening Libyan operational and SAR capacity and sharing satellite information, providing coastal patrol vessels (and maintaining and repairing them) and training Libyan coast guard actors to**

⁸⁷³ For more information on the EU's indirect support of 'crimes against humanity' in Libya, refer to Carrera and Cortinovis (2019a), op. cit.

⁸⁷⁴ UN Human Rights Council (2021b), 'Report of the Independent Fact-Finding Mission on Libya', UN Document A/HRC/48/83, 29 November, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Libya/A-HRC-48-83-AEV-EN.docx>.

⁸⁷⁵ UNHCR (n/a), *Interactive map – Comparison of sea arrivals in Italy and rescued/intercepted at sea in Libya*. Online: <https://app.powerbi.com/view?r=eyJrIjoiMzBmYWVlOWQ0MTdhNS00YTJlLTkzMzYtOTJmZTMwMzY3ZmY1IiwidCI6IjFjMjlyMTRhLTk5NWVlNDVjNi1hODNlLTMxMTM1ZTUzMDhmYSIsImMiOiJF9>, Slide 3. See also: Amnesty International (2020), op. cit.

intercept and ‘pull back’ boats, the EU and the Italian authorities have delegated and sailed away from their own responsibilities (Carrera and Cortinovis. 2019a). Kos (2019) has showed how **the Italian Maritime Search and Rescue Coordination Centre (MRCC) and navy authorities have been directly involved** in these unlawful pull backs by for instance coordinating and directing the interception of boats by Libyan actors.⁸⁷⁶

As documented by the Office for the High Commissioner of Human Rights (OHCHR), many non-Libyan nationals have been detained without access to judicial review and continued to face heightened vulnerability in inhumane, inadequate, and violent detention camps⁸⁷⁷. This has resulted in the normalisation and trivialisation of systematic violations of the fundamental rights of third country nationals, leading both Italian and European **leaders to undermine the democratic and human rights principles enshrined in the EU Treaties, including in the scope of external and extraterritorial policies**. Moreover, and in line with the notion of ‘contained mobility’ put forward by Carrera and Cortinovis (2019b)⁸⁷⁸, the implementation of these EU instruments disregards the fact, that the idea of closing a migratory route is misleading. Mobility continues to take place under unauthorised, high-risk and often live-threatening circumstances **which undermines the overall efficiency and effectiveness of EU policies**.

At the same, the close cooperation with countries like Libya reveals a broader picture of so-called complex externalisation (Tan, 2021), as third country nationals intercepted at sea are not only expelled back to Libyan territory, but in a second step repatriated to other third countries considered safe⁸⁷⁹. As a result of the EU-supported prevention of entry into the Schengen Area, highly vulnerable refugees and asylum-seekers detained in Libya are relocated to a special zone in Niger with the help of **UNHCR's Emergency Transit Mechanism (ETM)**⁸⁸⁰. Given the dire situation in the Libyan detention centres, the basis on which UNHCR staff decides **who is eligible to participate in the programme appears opaque**⁸⁸¹. Based on a recent external analysis of the mechanism, UNHCR continues to have restricted access to the detention centres making the identification of asylum-seekers more difficult: ‘Insufficient time (they can have less than 10 minutes per

⁸⁷⁶ M. Kos (2019), Italy’s Responsibility Under International Law for Human Rights Violations of Migrants Intercepted at Sea and Returned to Libya by the Libyan Coast Guard with the Support of Italy, VU Migration Law Series No. 19, University Amsterdam.

⁸⁷⁷ UN Human Rights Council, ‘Compilation on Libya. Report of the Office of the United Nations High Commissioner for Human Rights’, UN Document A/HRC/WG.6/36/LBY/2, 12 March 2020, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/065/95/PDF/G2006595.pdf?OpenElement>.

⁸⁷⁸ Carrera and Cortinovis (2019b), op. cit.

⁸⁷⁹ Tan, N.F. (2021), ‘Conceptualising externalisation: still fit for purpose?’, *Forced Migration Review* No. 68, November 2021, pp. 8-9, <https://www.fmreview.org/externalisation/tan>.

⁸⁸⁰ UNHCR (2019b), ‘ETM Overview’, United Nations High Commissioner for Refugees (UNHCR), Geneva, <https://reporting.unhcr.org/sites/default/files/UNHCR%20Niger%20ETM%20Overview%20-%20August%202019.pdf>.

⁸⁸¹ Lambert (2021), op. cit., p. 19-20.

person), and the limited availability of interpreters and private rooms also impede UNHCR staff from conducting proper screening interviews'.⁸⁸²

After the arrival in Niger, UNHCR determines the refugee status before having access to resettlement or complementary pathways to Europe and North America⁸⁸³. Moreover, the number of available places in Niger is limited, leading to **a chain logic where an asylum-seeker from Niger's ETM must be resettled to allow space for another asylum-seeker currently in Libya**. In practice, the ETM revealed a 'cherry-picking approach' with Niger as a buffer state that allowed for a selection process before migrants arrived at Europe's borders⁸⁸⁴. The high number of rejected asylum applications and the fact that the security aspect became the main driver for several EU Member States to decide upon the resettlement offer⁸⁸⁵, forced Niger to be no longer just a transit but also a host country.

Given that the joint EU-IOM Return Initiative only allows for voluntary return to the country of origin and a very restricted number of places were available for the ETM resettlement program, Lambert (2021) highlights that some refugees falsified their bio-data in order to be included in the ETM programme (Markous, 2019)⁸⁸⁶. The vicious cycle of this complex externalisation, however, is evident in the fact that some asylum-seekers considered returning to Libya via the Sahara, despite the violence they had suffered in Libya.⁸⁸⁷ **These EU-supported programmes, focusing on intra-continental returns, primarily between North and West African states and especially further away from EU territory, can be considered as an indirect 'chain refoulement'.**

Taken together, the system of complex externalisation (Tan, 2021)⁸⁸⁸ leads to an increase in the legal vulnerability of those seeking asylum in the absence of the necessary means of effective access to protection, while turning the possibility of entry into the EU into an exception. **One effect of this exemplary EU-supported 'chain reaction' and**

⁸⁸² Davin, Rubira, Hartpence and Bonnet (2021), op. cit., p. 16-17.

⁸⁸³ 'UNHCR has received a total of 6 351 resettlement pledges for the Libya-Niger/Rwanda situation out of which 1 131 confirmed pledges are for ETM Niger evacuees and 450 for refugees registered in Niger. The following countries have provided confirmed pledges for Niger: Belgium, Canada, Finland, France, Germany, Italy, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States of America. As of 1 May 2021, a total of 2,856 evacuated refugees have departed from Niger to resettlement countries. Due to COVID-19, resettlement flights had been suspended between March and August 2020. In total, UNHCR has received 1 530 confirmed pledges for ETM PoCs in Niger in 2020, out of which 1 030 are for ETM and 500 for non-ETM.' Source: UNHCR (2021e), 'Emergency Transit Mechanism. Factsheet May 2021', United Nations High Commissioner for Refugees (UNHCR), May, <https://data2.unhcr.org/en/documents/details/87333>. See also Belluccio et al. (2018), op. cit.

⁸⁸⁴ Lambert (2021), op. cit., p. 18.

⁸⁸⁵ Ibid., p. 19.

⁸⁸⁶ Ibid., p. 19. See also: Markous, A. (2019), 'Humanitarian Action and Anti-migration Paradox: A case study of UNHCR and IOM in Libya', Dissertation submitted for the Master of Advanced Studies in Humanitarian Action, Geneva Centre for education and research in humanitarian action (CERAH), Geneva, August 2019, <https://bit.ly/Markous-thesis-2019>.

⁸⁸⁷ Lambert (2021), op. cit., p. 20.

⁸⁸⁸ Tan (2021), op. cit., p. 9.

interlinked instruments is that asylum-seekers are forced into back-and-forth transit migration while having to rely on the willingness of transit countries to provide them with temporary protection. However, knowing that in most cases the ‘transit country is not considered a possible destination for the asylum-seeker, the latter stagnates in a state of limbo in search of international protection, which may reinforce the legal vulnerability and unsafety of the individual concerned.

In this context, the asylum application becomes a subset of irregular migration,⁸⁸⁹ while the answer to what extent a country can be considered as a safe place to receive asylum-seekers seems to be interpreted arbitrarily. Indeed, the secondary relocation of migrants to Niger implies that Libya cannot be regarded as a safe place for those seeking asylum⁸⁹⁰. However, it seems that this may not constitute an exclusion criterion for cooperation in the context of irregular migration.

The EU’s ambition to contain mobility of nationals from countries like Nigeria or Afghanistan becomes evident in **the increase of policy, operational and technical instruments deployed between the bordering EU states**, Spain and Italy, with the neighbouring Maghreb states, as well as those in Greece with Turkey. Consequently, this increases the visibility of the EU’s instruments and their direct impacts on those seeking asylum through active blocking, pushing and sending back. Likewise, this containment logic benefits from EU Member State policies such as the Spanish and Greek authorities’ push backs practices at EU external borders. Push backs have been widely criticised by numerous NGOs⁸⁹¹, international organisations such as UNHCR or the UN Committee against Torture (CAT), and Council of Europe actors like the Europe Commissioner for Human Rights⁸⁹².

⁸⁸⁹ Spijkerboer (2021a), op. cit.

⁸⁹⁰ For more information, see also: Urbina, I. (2021), ‘The Secretive Prisons That Keep Migrants Out of Europe’, *The New Yorker*, 28 November 2021, <https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe>.

⁸⁹¹ See also Pichl, M. and Schmalz, D., “Unlawful” may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T., *Verfassungsblog on Matters Constitutional*, 14 February 2020, <https://verfassungsblog.de/unlawful-may-not-mean-rightless/>.

⁸⁹² CoE Commissioner for Human Rights, ‘Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights. Applications No. 8675/15 and No. 8697/15. N.D. v Spain and N.T. v Spain’, CoE Document CommDH(2018)11, Strasbourg, 22 March 2018, <https://rm.coe.int/third-party-intervention-n-d-and-n-t-v-spain-by-nils-muiznieks-council/1680796bfc>; UN Human Rights Council (2019a), ‘Compilation on Spain. Report of the Office of the United Nations High Commissioner for Human Rights’, UN Document A/HRC/WG.6/35/ESP/2, 18 November, <https://undocs.org/A/HRC/WG.6/35/ESP/2>; UN Human Rights Committee, ‘Concluding observations on the sixth periodic report of Spain’, UN Document CCPR/C/ESP/CO/6, 14 August 2015, <https://undocs.org/CCPR/C/ESP/CO/6>, para. 18, UN Committee against Torture, ‘Concluding observations on the sixth period report of Spain’, UN Document CAT/C/ESP/CO/6, 29 May 2015, <https://undocs.org/CAT/C/ESP/CO/6>, para. 13, UN Committee on the Rights of the Child, ‘Concluding observations on the combined fifth and sixth periodic reports of Spain’, UN Document CRC/C/ESP/CO/5-6, 5 March 2018, <https://undocs.org/CRC/C/ESP/CO/5-6>, para. 44 (d); and UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the twenty-first to twenty-third periodic reports of Spain’, UN Document CERD/C/ESP/CO/21-23, 21 June 2016, <https://undocs.org/CERD/C/ESP/CO/21-23>.

The UN Universal Period Review (UPR) on Spain and Greece has included several calls for these countries **to halt pushback policies as they contravene their international obligations, such as the principle of *non-refoulement* and the prohibition against collective expulsions**, and more generally **the rule of law** (Carrera, 2020b)⁸⁹³. The ECtHR decided to dismiss the complaint against Spain for push backs from Melilla to Morocco as the applicants did not make use of the existing legal procedures for gaining lawful entry into Spain. From this point of view, the criticised lack of due process was thus considered to be a consequence of their own conduct⁸⁹⁴. However, as elaborated in the ‘Leave’ *Section 6.1.1* above, **access to visas and legal admission options remains strictly limited and highly conditional**. Furthermore, the ECtHR decision stands in a difficult relationship with EU asylum law and the fundamental right to asylum enshrined in Article 18 EU Charter of Fundamental Rights (Carrera, 2021)⁸⁹⁵.

6.1.4. Readmission and unsafety

Returns and readmission are omnipresent priorities in a majority of the instruments studied in *Sections 3* and *4* of this Report. To date, however, the EU has not reached an EU readmission agreement with Nigeria, Niger, Mauritania, Morocco, Tunisia, or Libya. Policy instruments and readmission arrangements of cooperation such as Mobility Partnerships (MPs: Tunisia, Morocco) or Common Agendas on Migration and Mobility (CAMP: Nigeria) thus aim at playing a crucial role in facilitating EU readmission negotiations by linking it to new means of pressure such as legal pathways and visa facilitation. These come along still existing bilateral readmission agreements and arrangements between specific EU Member States and relevant third states.

In view of the EU Commission's regular assessment of the cooperation of third countries in readmission and return procedures, **cooperation on readmission appears to be the defining priority issue of EU-Nigeria and EU-Afghanistan relations**. From the perspective of non-EU states, however, the academic literature has shown that **it does not always serve third states authorities own interests** (Carrera, 2016)⁸⁹⁶. For instance, cooperation on readmission with the EU threatens to weaken the legitimacy of national governments by restricting the right to free movement of their own nationals and serving the EU's policy to curb irregular migration which frames their nationals as quasi-criminals.

para. 17. See also UN Committee on the Rights of the Child, ‘Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016’, UN Document CRC/C/80/D/4/2016, 15 May 2019, <https://undocs.org/CRC/C/80/D/4/2016>.

⁸⁹³ Carrera (2020b), op. cit.

⁸⁹⁴ ECtHR, Case of *N.D. and N.T. v. Spain*, para. 231.

⁸⁹⁵ Carrera (2021), op. cit.

⁸⁹⁶ Carrera (2016), op. cit.

Given the lack of legally binding EU agreements with important neighbouring countries, **the EU's support for 'anticipatory' or 'intra-continental' return programmes within the African Union gains more weight and relevance.** In the case of Nigeria, for example, there is a clear discrepancy between the number of returns from EU Member States to Nigeria fluctuating between hundreds compared to over 23 000 returns made from Libya alone to other African countries between January 2017 and March 2018⁸⁹⁷.

As identified in our analysis, these intra-continental return procedures are carried out **by international organisations** like IOM (EU-IOM Joint Return Procedure) and UNHCR (Emergency Transit Mechanism), which have raised **serious concerns about indirectly legitimising the EU external migration policy.** By the end of November 2021, for example, the programme implemented by IOM has repatriated over 19 000 Nigerian migrants⁸⁹⁸. However, it remains questionable to what extent the decision to return can be interpreted as really voluntary if transit opportunities are actively blocked and the lack of legal channels continues. Exemplary for this concern are the testimonies of returned migrants from Libya who had no other choice but to agree to IOM's return programme:

'The second time we were stopped in the sea, IOM took care of us. [...] We were not allowed to leave the centre. When IOM comes, they tell you, if you do not go home, you will not leave the centre.' 'We did not have a choice to accept the return or not. [...] IOM will threaten you if you say you want to stay.'⁸⁹⁹

However, the reception of returnees, whether own nationals or third country nationals, is not only a question of funding but also to what extent the recipient state can provide sufficient means of protection. Closely tied to the EU's return and readmission policy and the ambition to accelerate return procedures is **the notion of a safe third country.** As defined in Art. 38 of the Asylum Return Directive, the notion of a safe third country allows not only nationals but also third country nationals who have transited through its territory to seek international protection. The applicability of this categorisation presupposes that individuals are not discriminated against on any grounds, do not risk serious harm, as well as torture and cruel, inhumane or degrading treatment, have the principle of non-refoulement guaranteed and are able to request refugee status⁹⁰⁰.

Declaring a country as a safe third country also means that the asylum application is to be examined by the country in question – thus, in this case, transferring the responsibility of granting asylum to a state outside the EU. Although the need for streamlined and

⁸⁹⁷ IOM (2018c), op. cit. See also: Bisong (2021), op. cit., p. 266; IOM (2021), op. cit.; Zandonini, G. (2020), 'Nigerians returned from Europe face stigma and growing hardship', *The New Humanitarian*, 28 July 2020, www.thenewhumanitarian.org/news-feature/2020/07/28/Nigeria-migrants-return-Europe.

⁸⁹⁸ Yusuf, Y. (2021), 'NEMA receives 158 Nigerian returnees from Libya', *News Agency of Nigeria*, 25 November 2021, <https://nannews.ng/nema-receives-158-nigerian-returnees-from-libya/>.

⁸⁹⁹ Alpes (2020), op. cit., p. 13.

⁹⁰⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Art. 38. See also: EU Commission, Glossary 'Safe third country', https://ec.europa.eu/home-affairs/pages/glossary/safe-third-country_en.

harmonised rules related to safe countries of origin and safe third countries has been highlighted by the EU several times⁹⁰¹, the Council has not yet come to a decision to harmonise existing national lists to a European list of safe countries of origin and/or a European list of safe third countries⁹⁰².

Until now, the EU as well as several heads of state have still made attempts to use this notion, as it would in their view facilitate the readmission priority. In return, it could be noted that each of the three main transit countries in North Africa, Tunisia, Algeria and Morocco, are designated as Safe Country of Origin (SCO) by nine EU+ countries⁹⁰³, meaning that there an assumption of ‘no persecution [...], no torture or inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict’. Following Art.31(8) of the Asylum Procedures Directive, this could lead to accelerated asylum procedures of *nationals* or *stateless* persons at the border or in transit zones⁹⁰⁴.

The automatic misuse of ‘safe country notions’ for purposes of migration management raises serious fundamental rights issues as **by design they prevent an individualised and case-by-case qualitative assessment** of the kind of links of the person with countries of transit and of the general – and often evolving - situation existing in both countries of transit and/or origin. The Court of the Justice of the EU has recently held in the case C-821/19 *European Commission v Hungary* of 16 November 2021 that: ‘the mere transit by an applicant for international protection through the third country concerned cannot constitute a connection with that third country’ within the meaning of the Asylum Procedures Directive (Para. 40 of the ruling).

Referring back to the pattern of violations amounting to crimes against humanity and practices of modern slavery, **Libya cannot be defined as a safe third country**. In September 2020, UNHCR called on all states not to consider **Libya** a safe third country and thus prevent procedures from being accelerated and applications from being declared inadmissible once the protection seeker has transited through the country. This decision is based on the lack of a functioning asylum system, the widely reported difficulties and abuses faced by asylum-seekers and refugees in Libya, the absence of

⁹⁰¹ European Commission (2020h), Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 2016/0224(COD), COM(2020) 611 final, Brussels, 23 September.

⁹⁰² Ibid.

⁹⁰³ These are: Austria, Croatia, Cyprus, Czechia, Greece, Italy, Malta, the Netherlands and Slovenia. This means that the three countries, together with Ukraine, appear to 41 % in national lists of ‘safe countries of origin’. Source: EASO, “Safe Country of Origin” concept in EU+ countries’, EASO Situational Update Issue No. 3, European Asylum Support Office (EASO), Valletta, 9 June 2021, <https://euaa.europa.eu/sites/default/files/publications/EASO-situational%20update-safe%20country%20of%20origin-2021.pdf>.

⁹⁰⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

protection from such abuses, the lack of protection against refoulement, and the lack of durable solutions.⁹⁰⁵

To date, **Tunisia does not have an official asylum system in place, thus lacking legal protection of refugees and asylum-seekers, and it is therefore unsafe for EU readmission policy purposes.** Even though the new constitution of 2014 agreed within Art.26 on the right to *political* asylum⁹⁰⁶, the final draft of 2018 of a national asylum system has not yet been officially adopted⁹⁰⁷. Due to the lack of a national asylum system, the UNHCR, IOM and Tunisian partner organisations⁹⁰⁸ are until now responsible for the 9 255 refugees and asylum-seekers currently based in Tunisia⁹⁰⁹.

The absence of a legal framework has therefore been criticised by the UN Special Rapporteur on migrants, OHCHR, and other UN committees⁹¹⁰ next to analysts and NGOs, not only because it jeopardises the rights of refugees and asylum-seekers and leaves uncertainty about subsequent procedures (integration measures, transfer to a third country or return), but also because it does not provide reception means for persons in need of international protection, although the Joint Declaration on establishing a Mobility Partnership with Tunisia refers to this point within §24-27⁹¹¹.

From another viewpoint, **the absence of a national asylum system is also perceived as leverage for receiving financial aid of the EU⁹¹² and as a means for prolonging the negotiations of a readmission agreement (Pastore and Roman, 2020)⁹¹³.** Due to the increasing externalisation of EU migration policy, the EU becomes more dependent on the

⁹⁰⁵ UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea', United Nations High Commissioner for Refugees (UNHCR), Geneva, September 2020, <https://www.refworld.org/docid/5f1edee24.html>.

⁹⁰⁶ *Tunisia Constitution of 2014* (English Version), Online: https://www.constituteproject.org/constitution/Tunisia_2014.pdf (last access 23.01.2022).

⁹⁰⁷ Limam (2020), op. cit., p. 7 ff.

⁹⁰⁸ UNHCR (2021f), 'Factsheet. Tunisia. September 2021', United Nations High Commissioner for Refugees (UNHCR), September, https://reporting.unhcr.org/sites/default/files/Tunisia_Factsheet_%20September%202021.pdf.

⁹⁰⁹ UNHCR (2021g), 'Operational Update. Tunisia. November 2021', United Nations High Commissioner for Refugees (UNHCR), November, <https://reporting.unhcr.org/document/1057>.

⁹¹⁰ UN Human Rights Council, 'Compilation on Tunisia. Report of the Office of the United Nations High Commissioner for Human Rights', UN Document A/HRC/WG.6/27/TUN/2, 20 February 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/037/79/PDF/G1703779.pdf?OpenElement>.

⁹¹¹ Castiello d'Antonio, M. (2020), 'Demandeurs d'Asile et Réfugiés en Tunisie: Coincés entre un système d'asile opaque et sous-traitance Européenne', Rosa Luxemburg Stiftung North Africa Office, Tunis, 2020, <https://rosaluxna.org/wp-content/uploads/2020/06/Demandeurs-dasile-et-re%CC%81fugie%CC%81s-en-Tunisie.pdf>, p. 2; EuroMed Rights, 'Joint Statement: Asylum Down the Drain', 21 February 2017, <https://euromedrights.org/publication/joint-statement-asylum-down-the-drain-in-tunisia/>; Migreurop, 'EU-Tunisia Mobility Partnership: Externalisation policy in disguise', migreurop, Paris, 2013, <https://migreurop.org/article2319.html>.

⁹¹² Limam (2020), op. cit., p.3.

⁹¹³ Pastore, F. and Roman, E. (2020), 'Framing migration in the southern Mediterranean: how do civil society actors evaluate EU migration policies? The case of Tunisia', *Comparative Migration Studies*, Vol. 8, Article No 2, 16 January 2020, <https://doi.org/10.1186/s40878-019-0160-4>, p. 14.

cooperation of third country actors, which in turn nurtures its dependency and vulnerability towards the interests of these regimes⁹¹⁴. In this regard, the political blockage by Tunisia could also represent an attempt of ‘reverse conditionality’ (Tittel-Mosser, 2018; Cassarino, 2018),⁹¹⁵ as the Tunisian government is now able to put forward its own interests (Geddes and Lixi, 2019)⁹¹⁶. Instead of perceiving the conclusion of a readmission agreement as a ‘sole burden’ for the third country authorities and actors, it could conversely be used as a strong bargaining chip⁹¹⁷, which opens up negotiations on other priorities.

Under the current circumstances as outlined above, Tunisia and Libya could therefore not be framed as safe third countries. **The use of the safe third country notion also leads to problematic combinations, as highlighted in the case study on Afghanistan.** Criticism of the notion itself and its application by the EU has been frequently expressed in the literature, with many drawing attention to *inter alia* problems of defining safety (and its assessment in concrete situations), the lack of an individual(ised) qualitative assessment where this concept is applied⁹¹⁸. Instead, attention is drawn here to the observation of **unlawful expulsions and ‘chained’ refoulement through the misuse of the safe third country concept and its interplay with the applicability of multiple EU instruments.**

By way of example, Greece considers Turkey as a safe third country for *inter alia* Afghan nationals; Afghan asylum-seekers therefore risk their asylum application being rejected and returned to Turkey without an examination on the merits. The literature has

⁹¹⁴ Limam (2020), op. cit., p. 9; Den Hertog, L. and Tittel-Mosser, F., ‘Implementing Mobility Partnerships: Delivering what?’ in S. Carrera, A. Geddes, E. Guild and Marco Stefan (eds.), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*, CEPS, Brussels, 2017, <https://www.ceps.eu/ceps-publications/pathways-towards-legal-migration-eu-reappraising-concepts-trajectories-and-policies/>, p. 100.

⁹¹⁵ Tittel-Mosser, F. (2018), ‘Reversed Conditionality in EU External Migration Policy: The Case of Morocco’, *Journal of Contemporary European Research*, Vol. 14, No. 4, 2018, pp. 349-363, <https://www.jcer.net/index.php/jcer/article/view/843>, p. 353; and Cassarino J.P. (2018), Beyond the criminalisation of migration: A non-western perspective, *International Journal of Migration and Border Studies*, Vol. 4, No. 4, pp. 397-411.

⁹¹⁶ Geddes, A. and Lixi, L. (2019), ‘New Actors and New Understandings in European Union External Migration Governance? The Case of EU-Tunisian Migration Relations’, in S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Brill Nijhoff, Leiden, 2019, pp. 60-80.

⁹¹⁷ Ibid.

⁹¹⁸ Cf. ECRE, ‘Debunking the ‘Safe Third Country’ Myth’, ECRE Policy Note #08, European Council on Refugees and Exiles (ECRE), Brussels, October 2017 <https://ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf>; Cortinovis, R., ‘The Role and Limits of the Safe Third Country Concept in EU Asylum Policy’, ReSOMA Discussion Brief, Brussels, July 2018, http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Policy%20Briefs_topic3_Safe%20third%20country_0.pdf. See also the guidelines adopted by the European Court of Human Rights on the human rights standards applicable to States party to the ECHR in applying the concept of ‘safe third country’: ECtHR, ‘European Court of Human Rights. Research Division. Articles 2, 3, 8 and 13. The concept of a “safe third country” in the case-law of the Court’, ECtHR Report, European Court of Human Rights (ECtHR), Strasbourg, 9 February 2018, https://www.echr.coe.int/Documents/Research_report_safe_third_country_ENG.pdf.

confirmed that Turkey is in fact an unsafe' place for Afghan and other asylum-seekers (Carrera, Den Hertog and Stefan, 2019)⁹¹⁹. Furthermore, this unsafety only increases when considering that Turkey, in turn, considers Iran and Pakistan as safe third countries for Afghans⁹²⁰, which once more highlights a **serious risk of chain refoulement**. This combination of instruments raises numerous questions, not least whether Greece (and by extension, the EU) considers Iran and Pakistan safe for Afghan asylum-seekers and (if this is not the case) whether Greece and the EU are not *indirectly* complicit in cases of *refoulement* of Afghan asylum-seekers and refugees⁹²¹.

Furthermore, it is yet to be proven that EU legal and policy instruments focused on readmission, including EURA and readmission arrangements, or 'deals' such as the EU-Turkey Statement are indeed effective' in terms of decreasing the number of unauthorised entries and expelling of people falling within their personal scope of application. In fact, previous research has confirmed that **neither EURAs nor readmission arrangements lead to a visible increase in the number of enforced expulsions** from the EU (Carrera, 2016; Carrera, 2019a)⁹²². **Little is also known about the extent to which EU Member States make actually use of them or not in their expulsion practices.**

The overall ineffectiveness of the implementation of EU policy instruments like the EU-Turkey Statement have been questioned by the literature. Ineli-Ciger and Ulusoy (2021) have pointed out the strikingly low number of people readmitted from Greece to Turkey, and resettled Syrians to the EU, since the entry into force of the Statement⁹²³. These and other authors have argued that increased border controls/surveillance in the Western Balkans, along with the right of Syrians to work in Turkey and active media coverage constituted key factors behind the decrease in the number of irregular entries in Greece since 2016, not the EU-Turkey Statement itself (Spijkerboer, 2016; Ineli-Ciger and Ulusoy, 2021)⁹²⁴. The increasing informalisation (Cassarino, 2007 and Cassarino, 2018)⁹²⁵ of Member States and EU-driven readmission policy raises additional legal

⁹¹⁹ Carrera, S., Den Hertog, L. and M. Stefan (2019), op. cit. Cf. ECRE (2021e), op. cit.; Bluett, K. (2021), 'Living in Limbo: The Impact of Greece's Safe Third Country Policy on Afghan Asylum-seekers', *Just Security*, 10 November 2021, <https://www.justsecurity.org/79134/living-in-limbo-the-impact-of-greeces-safe-third-country-policy-on-afghan-asylum-seekers/>.

⁹²⁰ See Refugee Rights Turkey (2022), op. cit., p. 67.

⁹²¹ See Amnesty International (2021b), 'Like an Obstacle Course: Few Routes to Safety for Afghans Trying to Flee Their Country', Amnesty International Advocacy Briefing, <https://www.amnesty.org/en/documents/asa11/4832/2021/en/>.

⁹²² Carrera (2019a), op. cit.; and Carrera (2016), op. cit.

⁹²³ Ineli-Ciger and Ulusoy (2021), op. cit.

⁹²⁴ Spijkerboer, T., 'Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?', Border Criminologies blog post, 28 September 2016, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>.

⁹²⁵ Cassarino, J.-P., 'Informalizing EU Readmission Policy', in A. Ripoll Servant and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, London, 2018, pp. 83-98; and Cassarino, J.-P., 'Informalising Readmission Agreements in the EU Neighbourhood', *The International Spectator*, Vol. 42, No 2, 2007, pp. 179-196.

issues as regards **hijacking rule of law-checks and balances**, including democratic scrutiny by national and European parliaments and judicial control by European Courts (Carrera, 2019a). Furthermore, EU's 'cooperative deterrence' agenda has played **in the hands of neighbouring third country regimes' interests, and it has increased EU's vulnerability in international relations** (Carrera, 2021; Cortinovis, 2021).⁹²⁶

6.2. EU policies on secondary movements

Preventing, deterring, and sanctioning third country nationals' intra-EU mobility and free movement for the purpose of seeking international protection in a Member State other than the one of first arrival has long constituted an EU obsession⁹²⁷. Case study 3 on intra-EU Mobility of asylum-seekers and refugees in this Report has shown that such concern has progressively informed the development of a **wide range of restrictive and criminalising norms, policies, and related operational efforts, which have been directed at enforcing the Dublin III's 'first country of irregular entry' criteria, and at preventing asylum-seekers from relocating themselves autonomously**⁹²⁸.

The justification for the development of a policy framework tackling secondary movements has been anchored upon the presumption that asylum-seekers can systematically find safety and protection in the first EU country of irregular entry. In the EU legal system, there is indeed the legal assumption that, while implementing EU law, national authorities operate in compliance with fundamental rights⁹²⁹. This also means that Member States have been legitimated to **mutually trust that the asylum systems of all the other EU countries are functional and fit to correctly implement EU asylum law and international / regional human rights standards**, so that any asylum-seeker can find safety as soon as she or he crosses the EU external border and enters the Schengen territory⁹³⁰.

⁹²⁶ Carrera (2021), op. cit.; Cortinovis (2021), op. cit.

⁹²⁷ Byrne, R., Noll, G., and Vedsted-Hansen, J. (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, Kluwer Law International, The Hague, 2002.

⁹²⁸ Thym, D., 'Secondary Movements: Overcoming the Lack of Trust among the Member States?', *EU Immigration and Asylum Law and Policy* blog post, 29 October 2020, <https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/>.

⁹²⁹ For an overview of the ways in which the Charter applies to the specific domain of EU asylum law, see ECRE and Dutch Council for Refugees, 'The application of the EU Charter of Fundamental Rights to asylum procedural law', European Council on Refugees and Exiles (ECRE), Brussels and Dutch Council for Refugees, Amsterdam, October 2014, <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>.

⁹³⁰ Battjes, H., Brouwer, E., De Morree, P. and Ouwerkerk J., *The Principle of Mutual Trust in European Asylum, Migration, and Criminal Law: Reconciling Trust and Fundamental Rights*, FORUM, Institute for Multicultural affairs, Utrecht, 2011, <https://www.commissie-meijers.nl/wp-content/uploads/2021/10/the-principle-of-mutual-trust-in-eur.-asylum-migration-0.pdf>.

In the specific context of EU asylum and migration policies, the operationalisation of the mutual trust principle has entailed a critical consequence: the refusal to accept that there can be legitimate reasons for a person to move to another EU Member State to seek asylum or to reside there⁹³¹. Within the Dublin System, mutual trust has also acquired the peculiar meaning of **negative mutual recognition of negative asylum decisions**, which has been defined as a ‘counter-intuitive tool to prevent multiple applications and ‘asylum shopping’⁹³².

This logic, which purportedly disregards the relevance of existing (substantive and procedural) differences in national asylum systems and related standards, as well as the personal circumstances and agency of the individual, is supported by the decision to qualify the decision of an asylum-seeker and refugee to leave the EU country of first arrival as automatically illegitimate⁹³³. By refusing *a priori* that intra-EU mobility of third country nationals can be dictated by legitimate reasons, if not by the actual necessity to receive an adequate level of international protection, this position has justified **the adoption of an increasingly restrictive approach focused on the containment and policing of asylum-seekers’ mobility inside the EU which co-creates the phenomenon that it seeks to address**⁹³⁴.

In spite of the lack of consolidated evidence on the overall size⁹³⁵, and underlying causes (Takle and Seeberg, 2015),⁹³⁶ of asylum-seekers’ movements inside the EU, the assessment conducted in this Report shows how current EU efforts at tackling intra-EU free movement have been not only multi-instrument and multi-actor but also: first, multi-level (pursued by both the EU and its Member States); and second, multi-sectoral (developed through actions that cut across different EU policy fields, including asylum, borders, migration, and law enforcement and judicial cooperation in criminal matters). Such finding confirms the thesis advanced in *Section 2* of this Report.

Figure 13 below provides an illustration of the **multiple layers of control and policing** to which the intra-EU mobility of asylum seekers is currently subject to. The figure does not provide a geographical representation of *where* the efforts to contain or police intra-EU mobility of asylum seekers take place (e.g. the exact location of all asylum reception facilities in each EU Member States, the position of every hotspots built in Italy or Greece,

⁹³¹ Carrera, Stefan, Cortinovis, and Luk (2019), op. cit., p. 4.

⁹³² Mouzourakis (2014b), op. cit., p. 28.

⁹³³ Carrera, Stefan, Cortinovis, and Luk (2019), op. cit., pp. 5-6.

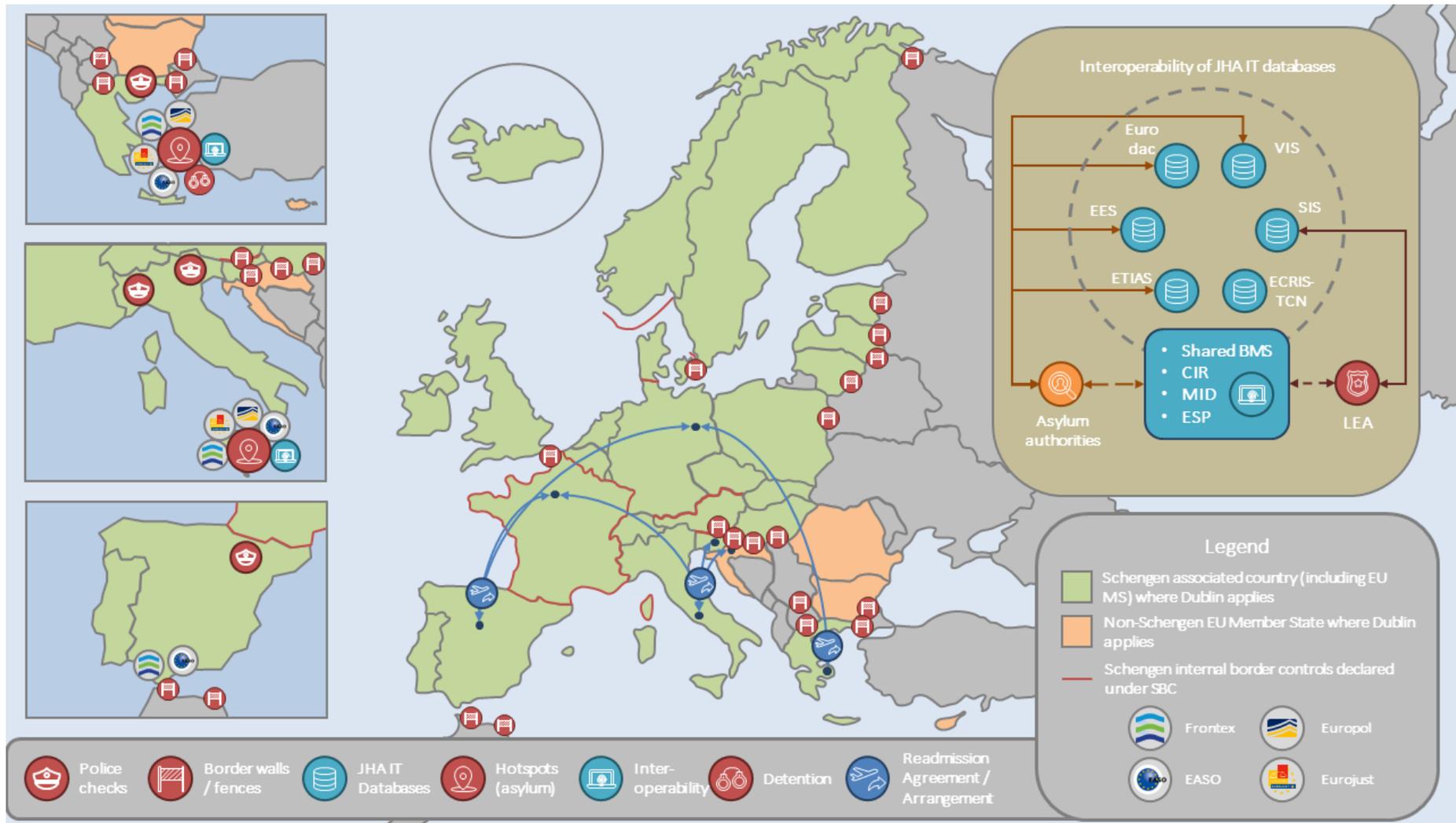
⁹³⁴ Majcher (2021), op. cit.

⁹³⁵ European Commission (2020i), ‘Staff Working Document accompanying the Proposal for a Regulation on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation EU)XXX/XXX [Asylum and Migration Fund]’, SWD(2020) 207 final, Brussels, 23 September, p. 33, footnote 53.

⁹³⁶ Takle, M. and Seeberg, M.L. (2015), ‘All European countries are not the same! The Dublin Regulation and onward migration in Europe’, NOVA Report 12/2015, Norwegian Social Research NOVA, Oslo, 2015, <https://hdl.handle.net/20.500.12199/5093>.

the places where police identity checks take place, the extension of border fences, the sections of the internal Schengen border where border controls have been reintroduced, etc). The aim of the figure is, instead, to visualise **what the main instruments and actors composing the system of intra-EU mobility management are**. Moreover, and particularly where it concerns police checks, the **absence of such a symbol does not indicate a lack of said instrument**

Figure 13. Instruments of intra-EU mobility control and policing



Source: Authors' own elaboration.

(e.g. police checks near the France-Spain land border on the French side); rather, it results from the methodological choice to limit the case study to three EU Member States (Spain, Italy and Greece).

The scope of application of such system of intra-EU mobility management corresponds to **the one of different EU normative frameworks (the CEAS and the Schengen *acquis*)**.⁹³⁷ The assessment delivered under Case Study 3 to this Report shows that such instruments currently define a geographical area within which the mobility of asylum seekers and refugees, as well as their possibility to seek international protection in a country different from the one identified as responsible pursuant to the Dublin criteria, is obstructed and criminalised.

While *Figure 13* covers the entire Schengen and Dublin areas (and gives account of the EU-wide instruments applying therein), particular focus is given to means and actors deployed by or in certain EU Member States (i.e. France, Italy and Spain) holding specific sections of the EU external borders. As the picture shows, the operationalisation of the intra-EU asylum-seekers mobility strategy relies on the presence of **physical sites of ‘mobility containment’**. These include first arrival reception facilities (including Hotspots) where asylum-seekers and migrants are kept in order to be identified and screened for security purposes. These facilities are increasingly used to implement fast-tracked asylum and border (return) procedures, but also function as *de facto* **detention centres** designed to prevent risk of absconding. A wide range of EU agencies such as Frontex, EASO (in Italy, Spain, Greece) but also Europol, and Eurojust (in Italy and Greece) are present in these sites.

As reported in the picture, **mobility containment practices** targeting asylum-seekers have also proliferated in the form of internal border controls, police checks and patrolling of intra-Schengen cross-border mobility in border regions. Bilateral administrative arrangements and multilateral operational protocols have been signed to enable swift deportation of asylum-seekers in the EU country of first irregular entry or transit. Increasingly, **digital surveillance techniques** and inter-agency cooperation is also used to collect, access, and share data that can be used to control asylum-seekers’ identity and track their mobility trajectories. Technologies are also used to produce intelligence directed at **predicting risks of secondary movements within the EU**. Furthermore, **border fences, and transit zones** punctuate specific sections of the EU external borders but are also erected within the Schengen Area in an attempt to curb irregular entry and unauthorised movements of asylum-seekers.

It has been officially recognised that the multi-layered and multi-faceted EU and Member States’ efforts to enforce the Dublin system have **not succeeded in attempting to contain asylum-seekers’ and refugees; self-relocation**, which raises issues of

⁹³⁷ Articles 77-80 of the Treaty on the Functioning of the European Union.

ineffectiveness⁹³⁸. On the other hand, a wealth of evidence highlights the **negative implications that the punitive approach** adopted towards the mobility of asylum-seekers within Europe has in terms of protection of fundamental rights guaranteed under EU primary and secondary law, some of which are absolute in nature and allow for no derogations or exceptions. Another clear result of such approach has been the far-reaching transformative effects on the EU *acquis* related to asylum and freedom of movement within the EU. **The thematic and teleological demarcation that the EU Treaties lay down between different AFSJ policy domains** including asylum, migration, borders, but also enforcement cooperation, have furthermore been disregarded.

6.2.1. Deterrence of intra-EU mobility through asylum policies?

In the application of different CEAS components, the EU and its Member States have often prioritised mobility policing-related objectives over the fulfilment of humanitarian obligations, as imposed under international refugee law, human rights law, as well as under EU primary and secondary legislation and the EU Charter of Fundamental Rights, which **runs contrary to the EU Better Regulation Tool Box 29 which requires careful assessment of fundamental rights' impacts**. This is clearly reflected in the widespread disapplication, in practice, of the hierarchy of criteria that the Dublin III Regulation establishes to determine the Member State responsible for the processing of an asylum application.

Prior research has shown that the responsibility criteria protecting family unity⁹³⁹, which are at the top of the Dublin III's hierarchy and should be broadly applied⁹⁴⁰, have hardly ever been used. The main reasons for the **disapplication of the family unity criteria** have been attributed to the restrictive wording of the relevant provision in the standing Dublin Regulation, as well as to the fact that Member States 'routinely refuse' to accept evidence of family ties. The discretionary nature of the clauses foreseeing attribution of asylum processing responsibilities for humanitarian purposes, and divergent interpretations by Member States of what constitutes valid humanitarian grounds for transfer, have reportedly determined the scarce relevance of family unity as a criterion for assigning responsibility to process asylum applications (Maiani, 2017)⁹⁴¹.

⁹³⁸ The Commission recently acknowledged that the Dublin III Regulation 'has had little or no effect on reaching the objective of preventing applicants from pursuing multiple applications, thereby reducing unauthorised movements'. European Commission (2020j), 'Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], (Text with EEA relevance), {SWD(2020) 207 final}', 2020/0279(COD), COM(2020) 610 final, Brussels, 23 September, p. 14.

⁹³⁹ Arts. 8-11 and 16 of the Dublin III Regulation.

⁹⁴⁰ Recitals 13-16 of the Dublin III Regulation.

⁹⁴¹ UNHCR, 'Left in limbo: UNHCR Study on the implementation of the Dublin III Regulation. Executive Summary', United Nations High Commissioner for Refugees (UNHCR), Geneva, August 2017, <https://www.refworld.org/docid/59d5dd1a4.html>. See also Maiani, F. (2017), 'The Reform of the Dublin

A report on the evaluation of the Dublin III Regulation, published by the Commission in 2016, concluded that **the hierarchical criteria used for determining the responsible Member State do not sufficiently consider the interests / needs of applicants**. This, in turn, was found to weaken the Dublin Regulation's ability to deter applicants from engaging in onward movements and the lodging of multiple applications. Applicants might in fact be motivated to apply for asylum in a second Member State because of family, friends or existing networks in a different Member State, or because of the availability of better (i.e., more humane) reception conditions and/or integration policies elsewhere⁹⁴².

At the practical level, it has been noted that by discouraging refugees from applying for protection in the first country of irregular entry (out of fear of being stuck there), the current Dublin system provides third country nationals, and in particular asylum-seekers, with incentives to abscond (go underground) and irregularly move towards further destinations⁹⁴³. In other terms, **the very logic underpinning the application of the Dublin system (that is, to predominantly assign responsibility to process asylum claims to the first country of irregular entry) pushes asylum-seekers into the domain of irregularity and precariousness**.

To prevent intra-EU mobility of asylum-seekers, as studied in *Section 5* of this Report, the CEAS justifies '**reception conditions**' of asylum-seekers to be used as a tool for **migration control**. The Case Study shows that under the Reception Conditions Directive, Member States are left with the autonomy to create and run first reception facilities as well as of border reception facilities that, despite being officially established for the purpose of processing international protection claims (including those of vulnerable people)⁹⁴⁴, practically impose **the detention or arbitrary deprivation of liberty of asylum-seekers**⁹⁴⁵. Asylum processing facilities established at the EU external borders are *de facto* used for the deprivation of liberty of individuals denied entry, but also persons apprehended or intercepted while attempting an irregular border crossing.

III Regulation', Study for the European Parliament LIBE Committee PE 571.360, European Parliament, Brussels, June 2017, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2016\)571360](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2016)571360).

⁹⁴² Jurado et al. (2016), op. cit.

⁹⁴³ Pollet, K. (2013), 'Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System', European Council on Refugees and Exiles (ECRE), Brussels, January 2013, <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Enhancing-intra-EU-solidarity-tools-January-2013.pdf>, p. 25.

⁹⁴⁴ Art.18(1) of the Reception Conditions Directive establishes that Member States must provide housing in 'premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones' rather than solely in accommodation centres and private houses or hotels. See Van Ballegooij and Eisele (2020), op. cit., p. 201-202.

⁹⁴⁵ FRA (2021a), op. cit., p. 25. The expressions 'De facto detention' or 'de fact deprivation of liberty' refer to practices whereby persons are deprived of their liberty in the absence of a detention order. See Van Ballegooij and Eisele (2020), op. cit., pp. 16 and 76. See also EASO (2020), op. cit., p. 202.

The compatibility with such national and EU mobility containment regimes with EU and fundamental rights standards on detention has been seriously questioned (Van Ballegooij and Eisele, 2020; and Ecorys, Cornelisse and Campesi, 2021))⁹⁴⁶. A particular concerning aspect of liberty-restricting regimes imposed in reception facilities is that persons subject to them often do not receive a detention order explaining the reasons for detention, and lack legal avenues to challenge them, since they are not subject to judicial review or possibility of appeal⁹⁴⁷. It has been also reported that people held in first reception facilities regularly experience overcrowding and inadequate reception conditions, which have only been exacerbated since the outbreak of the COVID-19 pandemic⁹⁴⁸. Similar treatments stand in stark contrast with **the obligation to respect human dignity, as well as the principle of non-penalisation of refugees and asylum-seekers** included in Article 31 of the 1951 Geneva Convention, as well as fundamental rights standards included in the ECHR and the EU Charter. Such concerns have not prevented the EU from directly sponsoring equivalent forms of mobility containment of asylum-seekers.

The hotspots approach, in particular as implemented in the Greek islands, constitutes a physical representation of the EU efforts to deter intra-EU mobility of asylum-seekers through material containment in the form of new arrivals' prolonged stay in these sites, and delays in processing applications for international protection. Systemic deficiencies have also been identified with regard to the hotspots' poor reception conditions, and lack of adequate means capable of meeting the specific vulnerability and protection needs of unaccompanied children. However, recommendations to avoid the detention of third country nationals for the sole purpose of identification have also been addressed to Italy. In relation to this country, the UN Committee on the Elimination of Racial Discrimination recommended that migrants and asylum-seekers not be held beyond 48 hours⁹⁴⁹.

In light of these systemic gaps, the FRA highlighted that: 'the possibility of swift onward movement of new arrivals to other locations' would avoid overcrowding and is an essential pre-condition for the dignified treatment of migrants and asylum-seekers in line

⁹⁴⁶ Van Ballegooij, W. and K. Eisele (2020), op. cit., Chapter 2; Ecorys, Cornelisse, G. and Campesi, G. (2021), 'The European Commission's new pact on migration and asylum. Horizontal substitute impact assessment', EPRS Study EP 694.210, European Parliamentary Research Service (EPRS), Brussels, August 2021, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2021\)694210](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)694210), pp. 17, 2, 23-24.

⁹⁴⁷ Van Ballegooij and Eisele (2020), op. cit. p. 205.

⁹⁴⁸ Specific reception challenges emerged as a result of the COVID-19 pandemic. To respect lock-down rules and quarantine, for new arrivals, ad hoc solutions emerged. Often, the authorities accommodated new arrivals in hotels. In some instances, these solutions were inadequate. For example, the Council of Europe Commissioner for Human Rights highlighted the sub-standard living conditions of around 500 persons accommodated in the bull-ring in Melilla, following the lockdown of the CETI. She referred to the limited access to showers and toilets, lack of provision of hygiene products and serious overcrowding, and to the lack of identification of vulnerable persons or medical screening. Italy has kept third country nationals quarantined in ships.

⁹⁴⁹ UN Human Rights Council (2019b), 'Compilation on Italy. Report of the Office of the United Nations High Commissioner for Human Rights', UN Document A/HRC/WG.6/34/ITA/2, 21 August, <https://undocs.org/A/HRC/WG.6/34/ITA/2>.

with the requirements of the EU Charter⁹⁵⁰. Instead, the hotspots in the Greek islands have become a site for experimenting with **new forms of fast-tracked asylum procedures and reduced procedural safeguards** with the primary aim of increasing rates of expulsions of asylum seekers through the dubious application of safe third countries' concepts.

6.2.2. Policing through EU agencies, data, and technologies

The operational deployment of EU JHA agencies on the ground, and inter-agency cooperation (a working method which has been implemented in the context of the EU hotspots), constitute other building blocks of the EU strategy to counter intra-EU mobility of asylum-seekers and refugees.

Frontex agents and its national contact points **are involved in the practical implementation of accelerated border procedures**. EUAA involvement in **fast-track asylum processing** (described as 'an extremely truncated asylum procedure with fewer guarantees') in the Greek's islands also aimed at increasing expulsions, at the expense of the independence and responsibilities of professionalised asylum authorities. It has been observed how this way of working challenges the quality and fairness of procedures and presents extremely limited guarantees for individuals by creating serious risks of violating the right to asylum, and the prohibition against *refoulement*⁹⁵¹.

Concerns have also been expressed by the EDPS with regard to the new possibilities that several JHA agencies including Frontex and EASO (but also Europol and Eurojust) are currently granted **to collect and use migrants and asylum-seekers' data**, including when the latter are collected through the EU hotspot model⁹⁵².

International immigration, refugee and criminal law experts highlighted how the 2013 amendments to the Eurodac legislation, which granted access to asylum-seekers and migrants' data for law enforcement-related purposes, expose a group of vulnerable individuals (asylum-seekers, most notably) to **risks of stigmatisation, in stark**

⁹⁵⁰ FRA (2016), 'Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy', FRA Opinion 5/2016 [Hotspots], European Union Agency for Fundamental Rights (FRA), Vienna, 29 November 2016, <https://fra.europa.eu/en/publication/2018/fra-opinion-fundamental-rights-hotspots-set-greece-and-italy>.

⁹⁵¹ Following his visit to Greece in May 2016, the Special Rapporteur on the human rights of migrants stated that the fast-track border procedure lacked 'adequate safeguards'. He added that the procedure's priorities should not be based on one's nationality. OHCHR, 'UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece', OHCHR News, 17 May 2016, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E>.

⁹⁵² The European Data Protection Supervisor (EDPS) remarked, with specific regard to the new possibility granted to Frontex to collect data in the context of hotspots and controlled centres, that the lack of an impact assessment made it impossible: 'to fully assess and verify its attended benefits and impact, notably on fundamental rights and freedoms, including the right to privacy and to the protection of personal data'. EDPS, 'Formal comments on the Proposal for a Regulation on the European Border and Coast Guard', European Data Protection Supervisor (EDPS), 30 Nov 2018, https://edps.europa.eu/data-protection/our-work/publications/comments/formal-comments-edps-proposal-regulation-european_en, p. 2

contradiction with the principle of non-discrimination⁹⁵³. Scholars have also underlined that the changes introduced in the 2013 revision of the Eurodac Regulation enhanced risks of violations of fundamental rights of asylum-seekers, including the right to privacy and data protection (Quintel, 2020)⁹⁵⁴.

Of particular concern is **the extension of Eurodac purposes beyond the policy area of asylum and its connection with the Interoperability framework**. Data gathered in Eurodac during identification and registration of international protection seekers and the processing of asylum claims might be used in the context of checks conducted by law enforcement authorities across the EU. Interoperability will also enable the possibility for borders, asylum, immigration to query the European Search Portal (ESP) to ascertain whether the data of an individual being checked are stored in any of the other existing EU Justice and Home Affairs (JHA) databases, including those established for law enforcement purposes.

Prior research highlighted how these **new functionalities**, which turn EU and national authorities in charge of asylum into law enforcement actors, **generate far-reaching challenges from a privacy and data protection perspective, by unlawfully or arbitrarily disowning third country nationals of their own data** (Vavoula, 2019)⁹⁵⁵. These forms of digitalised surveillance also led to less solidarity. Research has shown how Eurodac ‘hits’ *de facto* reverse the order of criteria for the allocation of responsibility to process asylum-seekers claims. The alleged failure of border States to systematically take fingerprints so as to escape part of their responsibilities is a confirmation of such an instance (Den Heijer, Rijpma and Spijkerboer, 2016)⁹⁵⁶. **The collection of biometrics has also reportedly led to ill-treatment and excessive use of force**, in particular when taking the fingerprints of newly arrived asylum-seekers and migrants⁹⁵⁷. It is well known

⁹⁵³ Meijers Committee (2012), ‘Note on the proposal for a Regulation on the establishment of Eurodac (COM(2012)254)’, Meijers Committee Note CM1216, Meijers Committee, Amsterdam, 10 October 2012, <https://www.statewatch.org/media/documents/news/2012/oct/eu-meijers-committee-eurodac-proposal.pdf>.

⁹⁵⁴ Quintel, T. (2020), ‘Why should we care about the Privacy of Asylum-seekers?’, Contribution to MPC/EUI Blog Forum ‘Interoperable Information Systems in the EU Area of Freedom, Security and Justice’, 2020, <https://migrationpolicycentre.eu/data-privacy-of-asylum-seekers/>.

⁹⁵⁵ Vavoula, N. (2019), ‘Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals’ Privacy?’, EU Immigration and Asylum Law and Policy blog post, 8 November 2019, <https://eumigrationlawblog.eu/interoperability-of-european-centralised-databases-another-nail-in-the-coffin-of-third-country-nationals-privacy/>.

⁹⁵⁶ Den Heijer, M., Rijpma, J. and Spijkerboer, T. (2016), ‘Coercion, Prohibition, and Great Expectations: The continuing failure of the Common European Asylum System’, *Common Market Law Review*, Vol. 53, No. 3, 2016, (footnote 11), p. 612.

⁹⁵⁷ UN Human Rights Council (2019b), op. cit., para. 66.

that migrants and asylum-seekers resort to self-mutilation to prevent their fingerprints from being recorded in the Eurodac system (Feng, Jain and Ross, 2009)⁹⁵⁸.

Forms of ‘predictive policing’ specifically targeting asylum-seekers and directed at preventing unauthorised movements within the EU are also being implemented and/or explored. Case Study III illustrates how **agencies such as Frontex and eu-LISA are increasingly concerned with the collection and processing of data** collected for the purpose of predicting, mapping, and monitoring trends in asylum movements. In other terms, these agencies have been entrusted the role of ‘knowledge producers’ on patterns and trends in irregular migration and secondary movements within the Schengen Area.

Asylum-seekers’ data collected and shared through the interoperability system, or used in an attempt to predict unauthorised movements within the EU are instrumental to the enactment of police controls (e.g., identity checks) over human mobility (including movements of asylum-seekers) within the Schengen Area. This is especially concerning in a context where – as highlighted in *Section 5* of this Report – Member States have been found time and again to be in breach of EU law on freedom of movement due to (unfounded) fears of secondary movements.

6.2.3. Limiting freedom of movement in the Schengen area

The objective of tackling intra-EU mobility of asylum-seekers has been instrumentally used by some Member States’ interior ministers to reintroduce internal border control and police mobility within the Schengen Area. By doing so, Member States have derogated from their obligations to guarantee free movement of EU citizens and their families, as provided under the Schengen regime and EU law. While such derogations have been limited in geographical scope and intensity, they are directly contravening EU rules on borders and asylum.

In the wake of the ‘2015/2016 refugee humanitarian crisis’, five Schengen members referred to secondary movement of undocumented and irregular immigrants as the official justification for the reintroduction of internal border controls. Some Member States also alluded to potential linkages between secondary movements of asylum-seekers and risks related to criminality and terrorism. Despite their obligation to assess the extent to which the reintroduction of internal border controls is likely to adequately remedy a declared threat to public policy or internal security, the **concerned Schengen countries failed to provide evidence clearly substantiating the need and proportionality for maintaining such measures after the prescribed time limits**⁹⁵⁹.

⁹⁵⁸ Feng, K., Jain, A.K. and Ross, A. (2009), ‘Fingerprint Alteration’, MSU Technical Report MSU-CSE-09-30, December 2009, https://www.cse.msu.edu/~rossarun/pubs/FengJainRoss_AlteredFingerprint_TechReport09.pdf.

⁹⁵⁹ Carrera, Stefan, Luk and Vosyliūtė (2018), op. cit.

The European Commission expressly underlined that the use of asylum or migration as the reason for prolonging internal border checks beyond the time limit set out in the SBC cannot constitute a legitimate ground for derogating from the Schengen's freedom of movement regime⁹⁶⁰. The European Parliament also condemned the continued imposition of internal border checks, which in its view were not in line with the existing rules as to their extension, necessity and proportionality, and were therefore unlawful. The Parliament criticised the concerned Schengen countries for having artificially changed the legal basis and not having sufficiently justified such controls or provided enough information on their results. It also underlined that the reintroduction of internal border checks was linked more to a perception of security threats rather than sound evidence of [their] actual existence⁹⁶¹.

New questions of legality in light of the SBC have also raised by **the introduction of cross-border mobility restrictions within the EU and Schengen Area in the wake of the COVID-19 outbreak**. These types of intra-Schengen mobility restrictions have largely been based on the qualification of the COVID-19 pandemic as a threat to national 'public policy or internal security'. However, serious doubts have been expressed as to whether national governments have met the increasing burden of proof required by the SBC to justify entry restrictions on such grounds (Carrera and Luk, 2020a; and Carrera and Luk, 2020b)⁹⁶². The adoption of intra-EU travel bans, which have been compounded by the EU travel ban at the EU's external borders, severely affected mobile individuals, including migrants and asylum-seekers, and can be seen as yet another means to contain their movements within the Schengen Area (Stefan and Luk, 2021)⁹⁶³.

Police spot-checks are increasingly seen as an alternative to the introduction of internal border controls. However, these practices carry profound risks, as they encourage Member States to engage in the proliferation of risk-based policing and arbitrary practices. EU Member States' law enforcement authorities implement these

⁹⁶⁰ European Commission (2017i), Communication from the Commission to the European Parliament and the Council on Preserving and Strengthening Schengen, COM(2017) 570 final, Brussels, 27 September; and an accompanying Press Release (European Commission (2017j), 'State of the Union 2017 - Preserving and strengthening Schengen to improve security and safeguard Europe's freedoms', Commission Press Release IP/17/3407, Brussels, 27 September, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3407).

⁹⁶¹ European Parliament (2018b), 'Annual Report on the Functioning of the Schengen Area (2017/2256(INI))', 30 May, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0228_EN.html.

⁹⁶² Carrera, S. and Luk, N.C. (2020a), op. cit. See also Carrera, S. and Luk, N.C. (2020b), 'Love thy Neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area', CEPS Paper in Liberty and Security No 2020-04, CEPS, Brussels, <https://www.ceps.eu/ceps-publications/love-thy-neighbour/>.

⁹⁶³ Stefan, M. and Luk, N.C. (2021), 'Limitations on Human Mobility in Response to COVID-19: A preliminary mapping and assessment of national and EU policy measures, their sanctioning frameworks, implementation tools and enforcement practices', CEPS Paper in Liberty and Security No 2021-02, CEPS, Brussels, December 2021, <https://www.ceps.eu/ceps-publications/limitations-on-human-mobility-in-response-to-covid-19/>.

kinds of intra-Schengen border checks in a variety of ways. Academic research has shown how police checks carried out in border zones, and falling within the scope of Article 23 SBC, allow too wide a margin for discretion or appreciation by national border police authorities. Scholars have concluded that: 'it is basically **unclear what is happening at Europe's intra-Schengen borders**, and why, when and against whom border controls are exercised' (Van der Woude, 2018)⁹⁶⁴. This poses serious challenges to the compliance of national measures with current SBC standards.

Non-discrimination in the scope of internal border controls also constitutes a central challenge. Recent research findings suggest that **police stops and police checks in the Schengen Area disproportionately target ethnic minority or an immigrant background experience**⁹⁶⁵. Human rights monitoring bodies have noted that in some Member States the discretionary nature of internal police border checks allows for racial profiling and police arbitrariness. Scholars also observed that, stereotypes of race and nationality come to play an important role in selection processes, and that intra-Schengen police checks consequently tend to mainly target individuals who are perceived by authorities as not looking like 'the nationals' (Dekkers, 2019)⁹⁶⁶. However, these practices run counter to basic EU law guarantees. Article 21 of the EU Charter in fact enshrines the prohibition of any discrimination on grounds including *inter alia* sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, age, sexual orientation, and disability.

6.2.4. Informality and illegality

Across the EU Member States, there has been a **proliferation of informal and scattered practices directed at containing or tackling intra-EU movements of third country nationals**, including asylum-seekers. Such practices and techniques (e.g., pushbacks) have been implemented unilaterally at the national level, but might also involve various form of inter-governmental cooperation between different Member States (e.g., readmission arrangements, or internal border-patrolling protocols). While they are directly or indirectly aimed (yet again) at enforcing the 'first country of entry rule' enshrined in the Dublin III Regulation, these instruments enable operational praxis designed to escape procedural guarantees provided by EU law, and have often been found to be in direct conflict with the EU border, migration and asylum *acquis* and the

⁹⁶⁴ Van der Woude, M. (2018), 'Border policing in Europe and beyond: legal and international issues', In M. den Boer (ed.), *Comparative Policing from a Legal Perspective*, Research Handbooks in Comparative Law, Edward Elgar Publishing, Cheltenham, 2018, pp. 264-265; Van der Woude (2020), op. cit., p. 121-122.

⁹⁶⁵ FRA (2021c), 'Your Rights Matter: Police Stops', FRA Fundamental Rights Survey, European Union Agency for Fundamental Rights (FRA), Vienna, 25 May, <https://fra.europa.eu/en/publication/2021/fundamental-rights-survey-police-stops>.

⁹⁶⁶ Dekkers, T.J.M. (2019), 'Selecting in Border Areas: Profiling Immigrants or Crimmigrants?', *The Howard Journal of Crime and Justice*, Vol. 58, No. 1, March 2019, pp. 25-44.

fundamental rights standards provided thereunder, which raises **serious questions of legal incoherency/inconsistency** in light of EU Better Regulation Guidelines.

International human rights bodies have also condemned recourse to some of these practices, which in certain cases amount to stark violations of Member States' duties vis-à-vis migrants and asylum-seekers. It has been observed how simplified return procedures under bilateral readmission arrangements can foster practices of collective expulsions. Legality concerns have been raised with regard to national provisions authorising the summary return of third country nationals identified at their borders (including internal ones). As for external border management practices, preoccupations have also been expressed about **the practice of summary returns, also known as 'hot expulsion' that are operated by certain Member States** (e.g. by Spain at the borders of Ceuta and Melilla) without sufficient guarantees of respect for the principle of *non-refoulement*, where relevant⁹⁶⁷.

Physical barriers have been erected by several Member States in the (rather symbolic) attempt to curb unauthorised movements. **Fences and border walls have not only been built at the EU external borders but also constitute a reality within the EU Schengen territory** (e.g., between Austria, Slovenia, Croatia and Hungary, as well as between Greece and Bulgaria, in several Baltic states as well as in Norway, Denmark and Sweden).

Whereas the EU budget has not directly funded Member States to cover the razor wire and metal constructions, **EU funding has been used for equipping such fences with surveillance systems, radars, cameras and other equipment**. Such funding has been allocated to research projects and security budgets from the External Borders Fund and Internal Security Fund-Borders⁹⁶⁸. Most recently, the option to proceed with the construction of border fences has acquired momentum among EU Member States' ministries of interiors, who described physical barriers to be a border protection measure that can serve the interest of the whole EU, not just Member States of first arrival⁹⁶⁹. The same ministers also asked the EU to use its budget to adequately fund these constructions.

However, noting that the construction of walls and fences at the EU's external and internal borders by various Member States is increasing and is being used as a deterrent for entry and transit of asylum-seekers, the European Parliament condemned their construction and raised doubts as to the compatibility of such actions with the SBC. The Parliament also called on the Commission to thoroughly evaluate existing and future constructions.

Overall, the illegality of border fences in the EU emerges from **their largely disproportionate nature. These measures function as magnifying glasses of violence and systemic human rights violations** in the relevant EU Schengen

⁹⁶⁷ UN Human Rights Council (2019a), op. cit., para 71.

⁹⁶⁸ Carrera, Stefan, Luk and Vosyliute (2018), op. cit., p. 26.

⁹⁶⁹ In the above-mentioned letter, the Ministers stressed that 'this should also apply at the Green Line, in the case of Cyprus, which does not constitute an external border'.

countries⁹⁷⁰. The ECtHR found the Hungarian government practice of detention in the ‘transit zone’ inside the border fence and of sending people back to Serbia in expedited ways contrary to human rights. The Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has documented ill-treatment inflicted on third country nationals by the Hungarian authorities during push backs towards Serbia. The Council of Europe’s Venice Commission and the Organisation for Security Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) also underlined that, through the erection of the border fence the Hungarian government had contributed to a hostile public perception towards all immigrants/foreigners (Parvadi, Matevžič, Iván and Bakonyi, 2021)⁹⁷¹.

Initiatives adopted by certain Member States (Hungary, most notably) to allow their national authorities to reject as **inadmissible applications for international protection based on the ground that the applicant arrived on the country’s territory via a State considered to guarantee a sufficient degree of protection, have been found to be illegal under EU asylum Law**. The CJEU in fact found that such situation is not expressly foreseen, under Article 33(2) of the Asylum Directive, as a ground for inadmissibility⁹⁷². The CJEU also ruled that national provisions capable of strongly discouraging any person or civil society organisation wishing to provide any assistance whatsoever for the purposes of making or lodging an application for asylum, although in fact that assistance is intended solely to enable a third country national or stateless person to exercise the fundamental right to apply for asylum in a Member State, are also unlawful under EU law. According to the CJEU, such provisions are **directly contrary to Article 18 of the Charter**, as given specific expression in Article 6 of EU Asylum Procedure Directive⁹⁷³.

6.2.5. Inhuman and degrading treatments

Similar to the way in which the notion of safe third countries has been used by the EU and its Member States to return asylum-seekers to third countries of origin and transit⁹⁷⁴, and studied *in Section 6.1.* above, the notion of safety has been indiscriminately applied to the entire EU region in order to enforce the Dublin III rules on attribution of responsibility for asylum processing.

Returns to the first country of irregular entry are operationalised through a wide range of instruments. EU and Member States laws and policies directed at limiting intra-EU

⁹⁷⁰ Carrera (2021), op. cit.

⁹⁷¹ Parvadi, M., Matevžič, G., Iván, J. and Bakonyi, A. (2021), ‘Country Report: Hungary. 2020 Update’, AIDA Country Report, European Council on Refugees and Exiles (ECRE), Brussels, April 2021, https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf.

⁹⁷² Judgment of the Court of Justice (Grand Chamber) of 16 November 2021, *European Commission v Hungary (Criminalisation of assistance to asylum-seekers)*, C-821/19, EU:C:2021:930.

⁹⁷³ Ibid., para. 132.

⁹⁷⁴ Cortinovis (2018), op. cit.

mobility of asylum-seekers to the first EU country of arrival progressively increased pressure on the asylum systems of frontline Member States⁹⁷⁵. The focus on allocating the responsibility for assessing asylum applications to the countries of first irregular entry into the Schengen territory, compounded by the persisting lack of solidarity and the inability (or unwillingness) of EU Member States to devise cooperative agreements for durable responsibility-sharing solutions, led **to the progressive deterioration and instrumental use by relevant states of reception conditions and asylum processing capacities of EU countries responsible for managing the EU external land and sea borders**⁹⁷⁶.

The impossibility for first arrivals to continue their journey as asylum-seekers into Europe, led frontline Member States' (e.g. Greece) border facilities and asylum services' capacity to be stretched to the limits. In application of the EU-Turkey Statement, migrants and asylum-seekers were no longer transferred from the Greek islands to the mainland, resulting in overcrowded situations in the reception and identification centres on the islands. Overcrowding, poor sanitary conditions, lack to of access to essential services, and prolonged confinement can also be seen as extreme manifestations of a deliberate **'indirect deterrence' strategy by some Member States authorities designed to discourage asylum claims or divert them to other countries** (Gammeltoft-Hansen and Tan, 2017)⁹⁷⁷.

As the Court of Justice of the European Union (CJEU) found, the operational and structural deficiencies (systematic or not)⁹⁷⁸ in the functioning of the asylum systems of frontline Member States (Greece, most notably), left individuals in a state of unsafety, and exposed

⁹⁷⁵ In this regard, the European Parliament has been consistently calling for fairer sharing of the responsibility borne by the Member States at the EU's external borders in order to prevent any reduction in levels of protection or in the quality of reception conditions. European Parliament, Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), P8_TA(2016)0102, European Parliament, Strasbourg, 12 April 2016, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0102_EN.html.

⁹⁷⁶ EPRS, 'Infographic on Migration and Asylum', Infographic produced by the EPRS, European Parliamentary Research Service (EPRS), Brussels, March 2019, <https://www.europarl.europa.eu/thinktank/infographics/migration/public/index.html>, '2/4 Asylum in the EU', where it is noted: 'Unfortunately, certain Member States on the EU's external borders, such as Greece, Italy and Malta, are overburdened by the numbers of asylum-seekers. This has led to both poor conditions for asylum-seekers (unjustified detentions, mistreatment, etc.) and to lower rates of asylum being granted'.

⁹⁷⁷ Gammeltoft-Hansen, T. and Tan, N.F. (2017), 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', *Journal on Migration and Human Security*, Vol. 5, No. 1, 2017, <https://doi.org/10.1177%2F233150241700500103>, pp. 38-39.

⁹⁷⁸ The decision to abandonment the requirement of 'systemic' flaw or deficiency under Article 3 ECHR in order to rebut the presumption of compliance had already been made by the ECtHR in its decision of 4 November 2014, Appl. no. 29217/12, GC, *Tarakhel v. Switzerland*. See Vedsted-Hansen, J. (2015), 'Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Immigration and Asylum Law and Policy in Europe Volume 39, Brill Nijhoff, Leiden, 2015, (note 12), pp. 347-350.

them to a **real risk of inhuman and degrading treatments** (Vedsted-Hansen, 2015)⁹⁷⁹. Such finding led the Court to admit that the deportation of asylum-seekers to the Member State of first irregular entry – and the EU mutual trust presumption – can and should be challenged, when the latter cannot guarantee reception conditions and levels of protection which are compatible with the fundamental rights standards set out in EU primary and secondary law. This landmark case paved the way for what is now a consolidated line of CJEU jurisprudence⁹⁸⁰ which reflects how EU and Member States' efforts to tackle secondary movements of asylum-seekers not only disregard of individuals' personal circumstances, but often also fail to take into account the possible existence of legitimate reasons for third country nationals to seek asylum in an EU country different from the one of first entry.

At the same time, the Court's clarification that the EU presumption of compliance with fundamental rights can be rebutted in case of serious risk of human and degrading treatment (but also of destitution) in the EU country of readmission, can only provide a **temporary and case-by case solution to the legal problems raised in the context of Dublin transfers to Member States with deficient asylum systems**. In other words, the judicial responses so far delivered by European judges concerning the Dublin Regulation are unlikely to prevent future challenges and controversies over the overall distributive fairness of the existing system towards both Member States and asylum-seekers, as well as legal disputes due to the inherent problem of enforcing the distribution of asylum-seekers (Vedsted-Hansen, 2015)⁹⁸¹.

⁹⁷⁹ Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, EU:C:2011:865.

⁹⁸⁰ Judgment of the Court of Justice (Fifth Chamber) of 16 February 2017, *C. K. and Others v Republika Slovenija*, C-578/16 PPU, EU:C:2017:127; Judgment of the Court of Justice (Grand Chamber) of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218; Judgment of the Court (Grand Chamber) of 19 March 2019, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, joined cases C-297/17, C-318/17, C-319/17 and C-428/17, EU:C:2019:219.

⁹⁸¹ Vedsted-Hansen, J. (2017), 'Current Protection Dilemmas in the European Union', in C. Grütters, S. Mantu, and P. Minderhoud (eds.), *Migration on the Move: Essays on the Dynamics of Migration*, Brill-Nijhoff, Leiden, 2017, p. 109.

7. Conclusions

This Report has provided a detailed and critical assessment of the scope and impacts of EU policies aimed at managing onward migration of nationals from Nigeria and Afghanistan, and secondary movements within the EU. The resulting picture is one revealing an EU external migration policy characterised by hyper-complexity – of both instruments and actors – and the predominance of a policing and surveillance of pre-EU border and intra-EU mobility priorities.

There is at present a knowledge gap and a lack of tools providing a ‘global picture’ to monitor and evaluate the full array of instruments that the EU is currently operationalising or deploying in its different external relations policies, as well as their impacts as regards their effectiveness, coherency and fundamental rights compliance in light of EU Better Regulation guidelines. This raises major political, legal and financial accountability issues. Our assessment, along with a detailed review of the state-of-the-art literature carried out in this Report, reveals that a **cross-instrument and cross-actor analytical approach** is necessary in order to gain an understanding of the shapes of the EU Migration Management Complex, and the actual uses, functions and on-the-ground effects of its different types of instruments. The analysis also reveals that an **instrument-in-chain, linked to actors’ involvement and responsibilities**, analysis is necessary in order to grasp and capture the entirety of human rights effects resulting from EU policies.

The Report shows that EU policies focused on migration management have increasingly found a central place across various foreign affairs policies and **cooperative deterrence** arrangements beyond those related to home affairs and migration. The EU currently has a conglomerate of legal, policy, political, operational, technological and financial instruments which **limit or at times severally restrict the existence of genuine and effective means of leaving a country, as well as legal entry and mobility in the EU**, including for asylum-seekers and refugees.

While the objective and/or practical effects of a majority of these instruments is containment and deterrence, the Report demonstrates that mobility still takes place under highly restrictive, selective, surveyed and often discriminatory dynamics following a **‘contained mobility’ paradigm** (Carrera and Cortinovis, 2019b)⁹⁸². Similarly, existing instruments allowing for legal mobility or resettlement of asylum-seekers come along, or are conditional upon, other EU instruments prioritising containment. EU policy priorities are not only focused on the management of the actual entry of third country nationals through EU external borders. They are increasingly concerned with surveying, monitoring and remotely controlling people’s journeys, and keeping people in transit. This **extra-territorialisation approach** results in preventing people from freely moving and leaving their own countries, arbitrarily interfering with their privacy and data protection, and criminalising their journeys *before* they actually arrive in the Schengen

⁹⁸² Carrera and Cortinovis (2019b), op. cit.

territory. The resulting picture is one where EU policies co-create the very phenomena that they are trying to respond to, i.e. unauthorised/irregular human movements.

A crucial shift in EU policymaking in the external dimensions of migration / asylum policies has been **the increasing use by EU actors of informal or non-legally binding instruments**, which take the shapes of political, policy and financial arrangements and which do not correspond with international agreements. *Informalisation* comes with an ever-plural and highly competing field of EU and international actors – with various mandates – involved behind the authorship or actual implementation of these instruments. The resulting picture is one nurturing legal uncertainty and hijacking the effectiveness of the roles of EU actors responsible for delivering checks-and-balances as regards democratic accountability (European Parliament) and judicial scrutiny (European courts).

The Report confirms the key and long-standing role that DG Migration and Home Affairs (DG HOME) still plays in shaping and implementing EU external migration policies. This comes along with the increasingly active role played by EU agencies, such as Frontex, in EU external migration policy relations. This effectively results in a prioritisation of a Ministries of the Interior-like agendas in the terrain of foreign affairs which, as underlined by previous EU-funded research (Carrera, Den Hertog and Parkin, 2012), jeopardises other crucially important external relations domains such as democratic governance, the rule of law and human rights, as well as trade and investment⁹⁸³.

The analysis sheds light on the increasing role played by, and a blending with, other relevant Commission DGs in the implementation of migration or home affairs diplomacy. These include DGs responsible for international partnerships (including development cooperation) and European Neighbourhood Policy, as well as the European External Action Service (EEAS). The assessment shows a plural setting of EU actors which reproduce or mimic the ‘securitarian’ or ‘migration management’ approach of human mobility. This sometimes happens under the guises of ‘resilience-building’ through humanitarian and development financial instruments (Fakhouri, 2021)⁹⁸⁴, and the so-called root causes of migration, or in a sort of containment development (Landau and Freemantle, 2021; Landau, 2019)⁹⁸⁵. Such an underlying migration management

⁹⁸³ Carrera, Den Hertog and Parkin (2012), op. cit.

⁹⁸⁴ Fakhouri, T., ‘Building Resilience in Strained Refugee-Hosting Countries’, in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the UN Global Compact on Migration and Asylum*, Florence, European University Institute, 2021, pp. 144-156, <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf>.

⁹⁸⁵ Landau, L.B. and Freemantle, I., ‘Containment Development and Africa’s Time-Space Trap’, in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in light of the UN Global Compact on Migration and Asylum*, Florence, European University Institute, 2021, pp. 274-281, <https://www.asileproject.eu/wp-content/uploads/2021/03/EU-pact-migration-asylum-global-compact-refugees.pdf>. See also Landau, L.B., ‘A Chronotope of Containment Development: Europe’s Migrant Crisis and Africa’s Reterritorialisation’, *Antipode*, Vol. 51, No. 1, 2019, pp. 169-186.

approach raises legal incoherency questions in relation to **the Treaties principles that should drive EU development cooperation and foreign affairs policies.**

The analysis highlights the need for the EU to **better understand the crucial role and impacts of current EU Migration Management Complex policies and actors in co-creating crisis and irregular human mobility** in Europe and across various world regions. EU migration policies are lacking a proper *ex ante*, *ongoing* and *ex post* assessment of their impacts to ensure due diligence in policymaking and remedying deficits or negative effects. Here, as recommended by the European Ombudsman and the European Parliament, there is a key role to be played by **human rights impact assessments** (European Ombudsman, 2017b)⁹⁸⁶ and an independent, transparent and effective **monitoring mechanism**, which includes periodic reports on the implementation of formal, informal and financial agreements with third countries (European Parliament, 2021)⁹⁸⁷. This could be implemented through the establishment of an **EU Observatory** monitoring the instruments and actors comprising EU external migration policies.

When it comes to the EU policy tool of ‘secondary movements’, the Report shows **the negative fundamental rights impacts that EU policies designed to ensure the implementation of the EU Dublin system** which lead to the penalisation and criminalisation of asylum-seekers and refugees, contrary to both international refugee and fundamental rights standards. EU policies on secondary movements lead to the use of *de facto* detention, accelerated border procedures and structural reception deficiencies in EU Member States that **co-create unsafety and insecurity** (including cases of inhuman and degrading treatment), unfairly restrict reception conditions and keep families apart.

The Report highlights similar dynamics and priorities to those identified in EU external migration management policies. These include the increasing **usage of informal or extra-legal instruments or arrangements** along with a **non-use of the EU rules by**

⁹⁸⁶ European Ombudsman (2017b), ‘Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement’, Cases 506-509-674-784-927-1381/2016/MHZ, Decision of 18 January 2017, <https://www.ombudsman.europa.eu/en/decision/en/75160>, which in paragraph 27 concluded that ‘the fact that the Agreement [EU-Turkey Statement] has a political dimension does not prevent the Commission from carrying out a human rights impact assessment of its implementation.’ And paragraph 29 says that ‘The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the project’s life. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into’.

⁹⁸⁷ European Parliament (2021), ‘Report on Human Rights Protection and the EU External Migration Policy (2020/2116(INI)). Committee on Foreign Affairs. Rapporteur: Tineke Strik’, PE 660.103v02-00, 25 March, https://www.europarl.europa.eu/doceo/document/A-9-2021-0060_EN.pdf, paragraph 10. In the same paragraph the European Parliament also called on the Commission to ‘establish a follow-up mechanism which duly incorporates evaluation results and expert recommendations in the relevant agreement, arrangement or action’.

some EU Member States when reintroducing internal border controls and when carrying out police spot-checks in the Schengen Borders Code. This results in legal incoherency issues as regards CEAS and Schengen *acquis* principles. There is also a **noticeable wider role for national law enforcement and policing actors**, and EU agencies such as eu-LISA, EUAA, Europol and Frontex, in the management, surveillance (interoperability of EU databases) and criminalisation of asylum-seekers and refugees mobilities inside the Schengen Area. EU policies aimed at managing intra-EU mobility and preventing free movement of asylum-seekers and refugees disregard **individuals' legitimate reasons for engaging or not in cross-border mobility and their agency to self-relocate in the Schengen Area**.

In light of the above, the analysis has shown that the EU notions and policies on irregular 'transit' or onward migration and 'secondary movements', which draw inspiration from the non-neutral assumptions behind predominant EU migration maps, are unsuited to understanding the roles that EU policies play in co-creating these very phenomena. A proper and detailed understanding of the EU Migration Management Complex, and its impacts on fundamental rights and the rule of law, however, is conditional for **the legitimation of the EU's value added and role in these domains**.

Annex 1. List of instruments identified and visualised in this Report

The following Tables set out the EU instruments identified in the case studies for Nigeria (*Section 3*) and Afghanistan (*Section 4*), with indication of their typology or combination of multiple typologies (i.e. legal, policy, political, operational, technological and financial), as well as indication of their material scope. EU instruments have been classified by typology and/or material scope based on the Authors' best assessment. The qualification of EU instruments under a specific typology and/or 'classified material scope' are not meant to indicate that these instruments cannot fit other typologies or material scopes. Graphical constraints as regards the visualisations developed based on the listed instruments (*Figures Figure 10 and Figure 11*) necessitate the limitation of attributing up to *three* typologies and *one* 'material scope' per instrument.

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Table A1.1. List of instruments identified in respect of Nigeria

Name of Instrument	Instrument Typology	Classified Material Scope
Article 25a EU Visa Code (“Cooperation on readmission”)	Legal	Visa requirements / visa conditionality
EU Visa List (Regulation 2018/1806)	Legal	Visa requirements / visa conditionality
Carriers’ liability and carrier sanctions	Legal	Carrier sanctions
ACP-EU Partnership Agreement (Cotonou)	Legal	Cooperation and partnership / dialogues
EU-Nigeria Joint Way Forward (JWF)	Policy	Cooperation and partnership / dialogues
Draft Action Plan on Nigeria	Policy	Others
Global Approach to Migration and Mobility (GAMM)	Political	Others
Common Agenda on Migration and Mobility (CAMM) with Nigeria	Political	Mobility Partnerships / CAMM
Migration Partnership Framework	Political	Others
New Pact on Migration and Asylum	Political	Others
Rabat Process	Political	Cooperation and partnership / dialogues
Valetta Summit & Joint Valetta Action Plan	Political	Cooperation and partnership / dialogues
EU-Sahel Strategy Regional Action Plan	Political	Others
EU-Nigeria Ministerial Dialogue	Political	Cooperation and partnership / dialogues
Frontex Working Arrangement (WA) with Nigeria	Operational	Operational cooperation
Frontex European Centre for Returns	Operational	Return and readmission
Migration Information and Data Analysis System (MIDAS)	Technological Financial	Biometrics and migration databases
EU Trust Fund (EUTF) for Africa, Sahel and Lake Chad Window	Financial	Funding instrument

Name of Instrument	Instrument Typology	Classified Material Scope
European Investment Bank (EIB) funding	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument

Table A1.2. List of instruments identified in respect of Niger

Name of Instrument	Instrument Typology	Classified Material Scope
Law Against the Illicit Smuggling of Migrants (Loi 2015-036)	Legal	Legislation and legislative amendment
ACP-EU Partnership Agreement (Cotonou)	Legal	Cooperation and partnership / dialogues
EU-Niger Joint Migration Declaration	Policy	Return and readmission
Emergency Transit Mechanism (ETM) Libya (including MoU signed by Niger) (funded under EUTF)	Policy Operational Financial	Emergency Transit Mechanism
Global Approach to Migration and Mobility (GAMM)	Political	Others
European Agenda on Migration (EAM)	Political	Others
Regional Action Plan Sahel 2015-2020	Political	Others
Migration Partnership Framework	Political	Cooperation and partnership / dialogues
Rabat Process	Political	Cooperation and partnership / dialogues
Valetta Summit & Joint Valetta Action Plan	Political	Cooperation and partnership / dialogues
Africa-Frontex Intelligence Community	Operational	Operational cooperation
Frontex Risk Analysis Cell Niger	Operational	Operational cooperation

Name of Instrument	Instrument Typology	Classified Material Scope
(Bilateral) Joint Investigation Teams (JITs) Spain/France/Niger	Operational Technological Financial	Operational cooperation
European Union Capacity Building (EUCAP) Mission Sahel Niger	Operational	Training and capacity building
Rapid Action Groups Sahel (GARSI SAHEL)	Operational Financial	Training and capacity building
Migration Information and Data Analysis System (MIDAS)	Technological Financial	Biometrics and migration databases
EU Trust Fund (EUTF) for Africa, Sahel and Lake Chad Window	Financial	Funding instrument
Migrant Response and Resource Facility (funded under EUTF Africa)	Financial	Funding instrument
EU-IOM Joint Initiative for Migrant Protection and Reintegration in Africa	Financial	Return and readmission

Table A1.3. List of instruments identified in respect of Libya

Name of Instrument	Instrument Typology	Classified Material Scope
(Italy) Italy-Libya MoU on “preventing irregular migration”	Policy Operational	Operational cooperation
Rabat Process (observer)	Political	Cooperation and partnership / dialogues
Khartoum Process	Political	Cooperation and partnership / dialogues
Valletta Summit & Joint Valletta Action Plan	Political	Cooperation and partnership / dialogues

Name of Instrument	Instrument Typology	Classified Material Scope
Malta Declaration	Political	Others
European Neighbourhood Policy	Political	Others
Renewed partnership with the Southern Neighbourhood: A new Agenda for the Mediterranean, JOIN(2021) 2 final	Political	Others
Global Approach to Migration and Mobility (GAMM)	Political	Others
EU Border Assistance Mission (EUBAM) Libya	Operational	Training and capacity building
Frontex Working Arrangement (WA) with Operation IRINI	Operational	Operational cooperation
Joint EU / African Union (AU) / -United Nations (UN) Task Force	Operational	Operational cooperation
EU Naval Force – Mediterranean (EUNAVFOR MED) Operation SOPHIA / IRINI	Operational Technological	Maritime operation
Frontex Operation TRITON / THEMIS	Operational Technological	Maritime operation
SEAHORSE Mediterranean Network	Operational Technological	Biometrics and migration databases
Frontex funding for Heron/Hermes drones	Technological Financial	Surveillance
European Border Surveillance system (EUROSUR)	Technological	Surveillance
(Italy) Service-oriented infrastructure for MARitime Traffic (SMART)	Technological	Data exchange
European Neighbourhood Instrument (ENI)	Financial	Funding instrument
EU Trust Fund (EUFT) for Africa, North of Africa Window	Financial	Funding instrument

Name of Instrument	Instrument Typology	Classified Material Scope
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument

Table A1.4. List of instruments identified in respect of Tunisia

Name of Instrument	Instrument Typology	Classified Material Scope
Law 2004-6 (<i>note: law was adopted with support of EU and criminalises aiding and abetting of smuggling of 'irregular migrants'</i>)	Legal	Legislation and legislative amendment
EU-Tunisia Mobility Partnership	Policy	Mobility Partnership / CAMM
(Italy) Italy-Tunisia readmission arrangement	Policy	Return and readmission
Rabat Process	Political	Cooperation and partnership / dialogues
Khartoum Process	Political	Cooperation and partnership / dialogues
Valletta Summit & Joint Valletta Action Plan	Political	Cooperation and partnership / dialogues
Malta Declaration	Political	Others
European Neighbourhood Policy	Political	Others
Renewed partnership with the Southern Neighbourhood: A new Agenda for the Mediterranean, JOIN(2021) 2 final	Political	Others
Global Approach to Migration and Mobility (GAMM)	Political	Others
Frontex Operation TRITON / THEMIS	Operational Technological	Maritime operation

Name of Instrument	Instrument Typology	Classified Material Scope
(Bilateral) Bilateral projects on “integrated border management and counter-smuggling” with EU Member States	Operational Technological Financial	Surveillance
SEAHORSE Mediterranean Network	Operational Technological	Surveillance
European Border Surveillance system (EUROSUR)	Technological	Surveillance
European Neighbourhood Instrument (ENI)	Financial	Funding instrument
EU Trust Fund (EUFT) for Africa, North of Africa Window	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument
Border management programme for the Maghreb region – Tunisia component (funded under EUTF Africa)	Operational Financial	Training and capacity building
EU-IOM Facility for Migrant Protection and Reintegration in North Africa (funded under EUTF Africa)	Financial	Return and readmission

Table A1.5. List of instruments identified in respect of Mauritania

Name of Instrument	Instrument Typology	Classified Material Scope
(Spain) Spain-Mauritania readmission agreement	Legal	Return and readmission
(Spain) Spain-Mauritania Agreement on cooperation on security (2015)	Legal Operational	Operational cooperation
(Spain) Spain-Mauritania Joint Patrol Agreement (2006), Joint Air Patrol Agreement (2009), Maritime and Joint Terrestrial Patrol Agreement (2015)	Legal Operational	Operational cooperation

Name of Instrument	Instrument Typology	Classified Material Scope
Rabat Process	Political	Cooperation and partnership / dialogues
Valletta Summit & Joint Valletta Action Plan	Political	Cooperation and partnership / dialogues
Global Approach to Migration and Mobility (GAMM)	Political	Others
(Spain) 3 rd Africa Plan	Political	Others
(Spain) Focus Africa 2023	Political	Others
Frontex Operation HERA	Operational Technological	Maritime operation
Rapid Action Groups Sahel (GARSI SAHEL)	Operational Financial	Training and capacity building
European Border Surveillance system (EUROSUR)	Technological	Surveillance
SEAHORSE Mediterranean Network	Operational Technological	Biometrics and migration databases
EU Trust Fund (EUFT) for Africa, Sahel and Lake Chad Window	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument
(Spain) 5 th Master Plan for Spanish Cooperation	Financial	Funding instrument

Table A1.6. List of instruments identified in respect of Morocco

Name of Instrument	Instrument Typology	Classified Material Scope
(Spain) Spain-Morocco readmission agreement	Legal	Return and readmission

Name of Instrument	Instrument Typology	Classified Material Scope
(Spain) Spain-Morocco Agreement to prevent illegal immigration from Unaccompanied Minors, their protection and their concerted lathe	Legal	Cooperation and partnership / dialogue
(Morocco) Law 37-17, 38-17 (<i>note: law redefines maritime border between Morocco and Spain/Mauritania</i>)	Legal	Legislation and legislative amendment
(Spain) Spain-Morocco Agreement on cross-border police operation	Legal Operational	Operational cooperation
EU-Morocco Mobility Partnership	Policy	Mobility Partnership / CAMM
Rabat Process	Political	Cooperation and partnership / dialogues
Valetta Summit & Joint Valetta Action Plan	Political	Cooperation and partnership / dialogues
Global Approach to Migration and Mobility (GAMM)	Political	Others
European Neighbourhood Policy	Political	Others
Renewed partnership with the Southern Neighbourhood: A new Agenda for the Mediterranean, JOIN(2021) 2 final	Political	Others
(Spain) MoU within the framework of the Multidimensional Strategic Association (2019)	Political	Others
(Spain) 3 rd Africa Plan	Political	Others
(Spain) Focus Africa 2023	Political	Others
(Spain) Spain-Morocco MoU for Patrolling (Marítimo Conjunto)	Operational	Operational cooperation
Frontex Operation HERA	Operational Technological	Maritime operation

Name of Instrument	Instrument Typology	Classified Material Scope
Frontex Joint Operation MINERVA	Operational Technological	Maritime operation
Frontex Joint Operation INDALO	Operational Technological	Maritime operation
SEAHORSE Mediterranean Network	Operational Technological	Biometrics and migration databases
Funding and construction of high-tech fences at Spain (Ceuta and Melilla) land border zones	Operational Technological Financial	Surveillance
European Border Surveillance system (EUROSUR)	Technological	Surveillance
(Spain) New plan of 'emergency measures'	Policy Technological	Training and capacity building
European Neighbourhood Instrument (ENI)	Financial	Funding instrument
EU Trust Fund (EUTF) for Africa, North of Africa Window	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument
Support to the integrated management of borders and migration in Morocco (funded under EUTF Africa)	Financial	Training and capacity building
(Spain) funding for deportation flights	Financial	Return and readmission
(Spain) 5 th Master Plan for Spanish Cooperation	Financial	Funding instrument

Table A1.7. List of instruments identified in respect of the EU and Spain/Italy

Name of Instrument	Instrument Typology	Classified Material Scope
(Spain) Organic Law No. 4/2015 of 30 March 2015 regarding Protection and Citizen Security	Legal	Legislation and legislative amendment
(Italy) Decree Law 130/2020 (<i>note: law penalises ships of civil society actors or merchant ships seeking to disembark on Italian coasts with migrants rescued at sea</i>)	Legal	Legislation and legislative amendment
(Spain) Sistema Integrado de Vigilancia Exterior (SIVE) system	Operational Technological	Surveillance
(Italy) Service-oriented infrastructure for MARitime Traffic (SMART)	Technological	Data exchange
Frontex Operation HERA	Operational Technological	Maritime operation
Frontex Joint Operation MINERVA	Operational Technological	Maritime operation
Frontex Joint Operation INDALO	Operational Technological	Maritime operation
EU Naval Force – Mediterranean (EUNAVFOR MED) Operation SOPHIA / IRINI	Operational Technological	Maritime operation
Frontex Operation TRITON / THEMIS	Operational Technological	Maritime operation
SEAHORSE Mediterranean Network	Operational Technological	Surveillance
European Border Surveillance system (EUROSUR)	Technological	Surveillance

Table A1.8. List of instruments identified in respect of Afghanistan

Name of Instrument	Instrument Typology	Classified Material Scope
EU Visa List (Regulation 2018/1806)	Legal	Visa requirements / visa conditionality
Carriers' liability and carrier sanctions	Legal	Carrier sanctions
EU-Afghanistan Cooperation Agreement on Partnership and Development (CAPD)	Legal	Cooperation and partnership / dialogues
EU-Afghanistan Joint Declaration on Migration Cooperation (note: successor to the Joint Way Forward)	Policy	Return and readmission
(Greece) Memorandum of Understanding (MoU) on voluntary returns of Afghan nationals	Policy	Return and readmission
Draft Action Plan on Afghanistan (10472/1/21 REV 1 LIMITE)	Policy	Others
EU Counter-Terrorism Action Plan on Afghanistan (12315/21)	Policy	Others
Procedure on enhanced security checks on persons crossing or having crossed the EU's external borders following developments in Afghanistan (13683/21 LIMITE)	Policy Technological	Surveillance
Budapest Process	Political	Cooperation and partnership / dialogues
Solutions Strategy for Afghan Refugees (SSAR) Support Platform	Political	Cooperation and partnership / dialogues
Asylum, Migration and Integration (AMIF) Fund	Financial	Funding instrument
Development Cooperation Instrument	Financial	Funding instrument
EU Readmission Capacity Building Facility (EURCAP) (funded under AMIF)	Financial	Training and capacity building
Border Management Programme in Central Asia and Afghanistan, Phase 10 (BOMCA 10) (funded under DCI)	Financial	Training and capacity building

Name of Instrument	Instrument Typology	Classified Material Scope
Improving Migration Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building
Integrated Border Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building
Reintegration Assistance for Development in Afghanistan (RADA) project (funded under DCI)	Financial	Return and readmission

Table A1.9. List of instruments identified in respect of Pakistan

Name of Instrument	Instrument Typology	Classified Material Scope
EU-Pakistan Cooperation Agreement on partnership and development fields	Legal	Cooperation and partnership / dialogues
EU-Pakistan Readmission Agreement	Legal	Return and readmission
EU-Pakistan Strategic Engagement Plan	Political	Others
Budapest Process	Political	Cooperation and partnership / dialogues
Solutions Strategy for Afghan Refugees (SSAR) Support Platform	Political	Cooperation and partnership / dialogues
Asylum, Migration and Integration (AMIF) Fund	Financial	Funding instrument
Development Cooperation Instrument	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument

Name of Instrument	Instrument Typology	Classified Material Scope
Global Action against Trafficking in Persons and Smuggling of Migrants – Asia and the Middle East (GLO.ACT Asia and the Middle East) initiative (funded under DCI)	Financial	Training and capacity building
EU Readmission Capacity Building Facility (EURCAP) (funded under AMIF)	Financial	Training and capacity building
Readmission Case Management for Pakistan (funded under AMIF)	Technological Financial	Biometrics and migration databases
Special Measure on “Addressing migration and forced displacement challenges in Asia and the Middle East: a comprehensive regional EU response” (funded under DCI)	Financial	Training and capacity building
Improving Migration Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building
Integrated Border Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building

Table A1.10. List of instruments identified in respect of Iraq

Name of Instrument	Instrument Typology	Classified Material Scope
EU-Iraq Partnership and Cooperation Agreement	Legal Political	Cooperation and partnership / dialogues
EU Strategy for Iraq	Political	Others
Informal migration dialogues	Political	Cooperation and partnership / dialogues

Name of Instrument	Instrument Typology	Classified Material Scope
Budapest Process	Political	Cooperation and partnership / dialogues
Development Cooperation Instrument	Financial	Funding instrument
Global Action against Trafficking in Persons and Smuggling of Migrants – Asia and the Middle East (GLO.ACT Asia and the Middle East) initiative (funded under DCI)	Financial	Training and capacity building
Improving Migration Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building
Integrated Border Management in the Silk Routes Countries project (funded by the EU in the context of the Budapest Process)	Financial	Training and capacity building
Special Measure on “Addressing migration and forced displacement challenges in Asia and the Middle East: a comprehensive regional EU response” (funded under DCI)	Financial	Training and capacity building

Table A1.11. List of instruments identified in respect of Iran

Name of Instrument	Instrument Typology	Classified Material Scope
Joint Comprehensive Plan of Action (JCPOA)	Legal Political	Cooperation and partnership / dialogues
Joint statement by the EU HR/VP and the Iranian Minister of Foreign Affairs (16 April 2016)	Political	Others

Name of Instrument	Instrument Typology	Classified Material Scope
Framework for a Comprehensive Dialogue Between the Islamic Republic of Iran and the European Union on Migration and Refugee Issues	Political	Cooperation and partnership / dialogues
Solutions Strategy for Afghan Refugees (SSAR) Support Platform	Political	Cooperation and partnership / dialogues
Development Cooperation Instrument	Financial	Funding instrument
Neighbourhood, Development and International Cooperation Instrument (NDICI)	Financial	Funding instrument
Global Action against Trafficking in Persons and Smuggling of Migrants – Asia and the Middle East (GLO.ACT Asia and the Middle East) initiative (funded under DCI)	Financial	Training and capacity building
Special Measure on “Addressing migration and forced displacement challenges in Asia and the Middle East: a comprehensive regional EU response” (funded under DCI)	Financial	Training and capacity building

Table A1.12. List of instruments identified in respect of Turkey

Name of Instrument	Instrument Typology	Classified Material Scope
EU-Turkey Readmission Agreement	Legal	Return and readmission
(Greece) Greece-Turkey Protocol on readmission	Legal	Return and readmission
EU-Turkey Statement	Legal Policy	Cooperation and partnership / dialogues
EU-Turkey Statement – Returns mechanism	Legal Policy	Returns and readmission

Name of Instrument	Instrument Typology	Classified Material Scope
EU-Turkey Statement – One-to-One mechanism	Policy Political	Resettlement
(Turkey) Safe third country principle	Policy	Returns and readmission
Prague Process	Political	Cooperation and partnership / dialogues
Bratislava Declaration (adopted under the Prague Process)	Political	Others
(Turkey) Maritime surveillance (and alleged pushbacks)	Operational	Maritime operation
Frontex Working Arrangement (WA) with Turkey	Operational	Operational cooperation
EASO Pilot Project for a Resettlement Support Facility (RSF) in Istanbul, Turkey	Operational	Resettlement
Facility for Refugees in Turkey (FRT) (<i>note: integrated into the EU-Turkey Statement</i>)	Financial	Funding instrument
Internal Security Fund (ISF)	Financial	Funding instrument
Instrument for Pre-accession Assistance, Phase II (IPA II)	Financial	Funding instrument
DG HOME funding for the implementation of the Bratislava Declaration	Financial	Funding instrument
Support for the Turkish Directorate General for Migration Management (DGMM) to the Implementation of the EU-Turkey Statement of 18 March 2016 (funded under FRT)	Financial	Training and capacity building
Enhancing the capacity of the Turkish Coast Guard to carry out search and rescue operations (funded under FRT)	Financial	Training and capacity building
Common Operational Partnership (funded under ISF)	Operational Financial	Operational cooperation

Name of Instrument	Instrument Typology	Classified Material Scope
Border walls constructed at Turkey's borders with Iran and Syria (funded under FRT)	Operational Technological Financial	Surveillance
Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey project (funded under IPA II)	Funding	Training and capacity building

Table A1.13. List of instruments identified in respect of the EU and Greece

Name of Instrument	Instrument Typology	Classified Material Scope
Frontex Operation POSEIDON (and alleged pushbacks/pullbacks)	Operational Technological	Maritime operation
Hotspots on the Greek islands	Operational Technological Financial	Hotspots
(Greece) Fast track asylum processing under Greek asylum legislation	Legal	Legislation and legislative amendment
(Greece) Safe third country principle	Legal Policy	Return and readmission