

KEY ELEMENTS OF THE EU ASYLUM LAW

**Presented by Boldizsár Nagy,
at the training course:
Promoting effective refugee law education in the
CIS+ region
Yerevan, 3 February 2016**



Photo by Aris Messinis

CNN REPORTS, 28 AUGUST, 2015



Fleeing war to be left dead in truck

Austria says 71 bodies likely those of Syrians who suffocated

[Tide of death: Migrants' bodies wash in](#) | [One migrant's journey](#) | ['Better bombed in my homeland than die here'](#)

THREE LEVELS OF REGULATION

- International law (1951 Geneva Convention, 1950 European Convention on Human Rights, etc.)
- European Union Law (in EU member states)
- National law – implementing both

Control (enforcement):

UNHCR

European Court of Human Rights („Strasbourg“)

Court of Justice of the European Union („Luxembourg“)

Domestic courts

**THE RATIONALE BEHIND DEVELOPING
AN EU ACQUIS:**

SCHENGEN

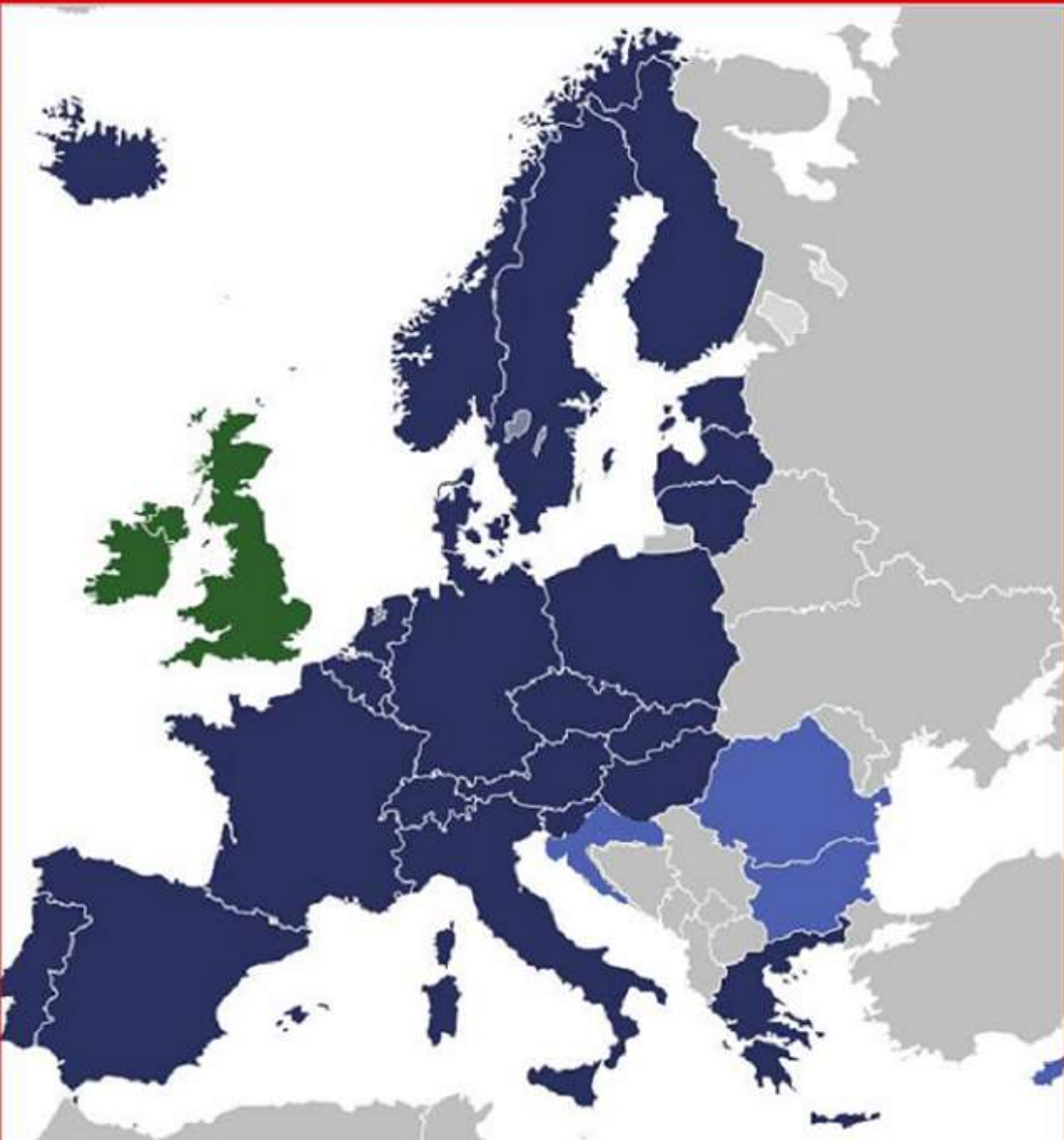
SCHENGEN

Purpose:

Abolition of controls at the internal borders

Measures logically following from the lack of border controls

- protecting the external borders with the same level of security including checks and surveillance
- intensive co-operation in customs, police and criminal justice matters
- establishing a system to determine which state is responsible for the examination of asylum applications („Dublin“)



**THE
SCHENGEN
AREA
IN
2016**

THE BASIC CONCEPTS OF EU LAW

FORMS OF DECISIONS

Article 288 TFEU

...

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **decision** shall be binding in its entirety upon those to whom it is addressed.

DIRECT APPLICABILITY, DIRECT EFFECT, PRIMACY OF EU LAW

Direct applicability: a regulation „automatically forms part of the (highest) provisions of a Member State’s legal order” – without transposition Laenarts – Van Nuffel (Bray, ed), Constitutional Law of the

European Union, second ed. 2005, p. 764

Direct effect: if the *regulation* is clear and precise and leaves no margin of discretion then individuals can rely on it against the state and against each-other

Directive:

- No direct applicability – needs transposition
- *May have direct effect* if unconditional and sufficiently precise – and the state fails to transpose it on time

Primacy/Supremacy of EC law: In case of conflict it has primacy even over later national acts, including statutes.

Votes distribution – qualified majority

After 1 November 2014

1 member – 1 vote

Qualified majority = „double majority”

On a proposal from the Commission
or the High Representative

On any other proposal

**55% of the ministers
(countries) (15)**

72 %

**representing 65% of the
population of the EU**

**representing 65 % of
population of the
EU**

**Blocking minority: minimum 4 countries even if 3 represent more
than 35 % of the population**

The UK and Ireland may decide whether to participate in refugee-related matters, Denmark does not participate

ASYLUM ACQUIS

Adopted measures

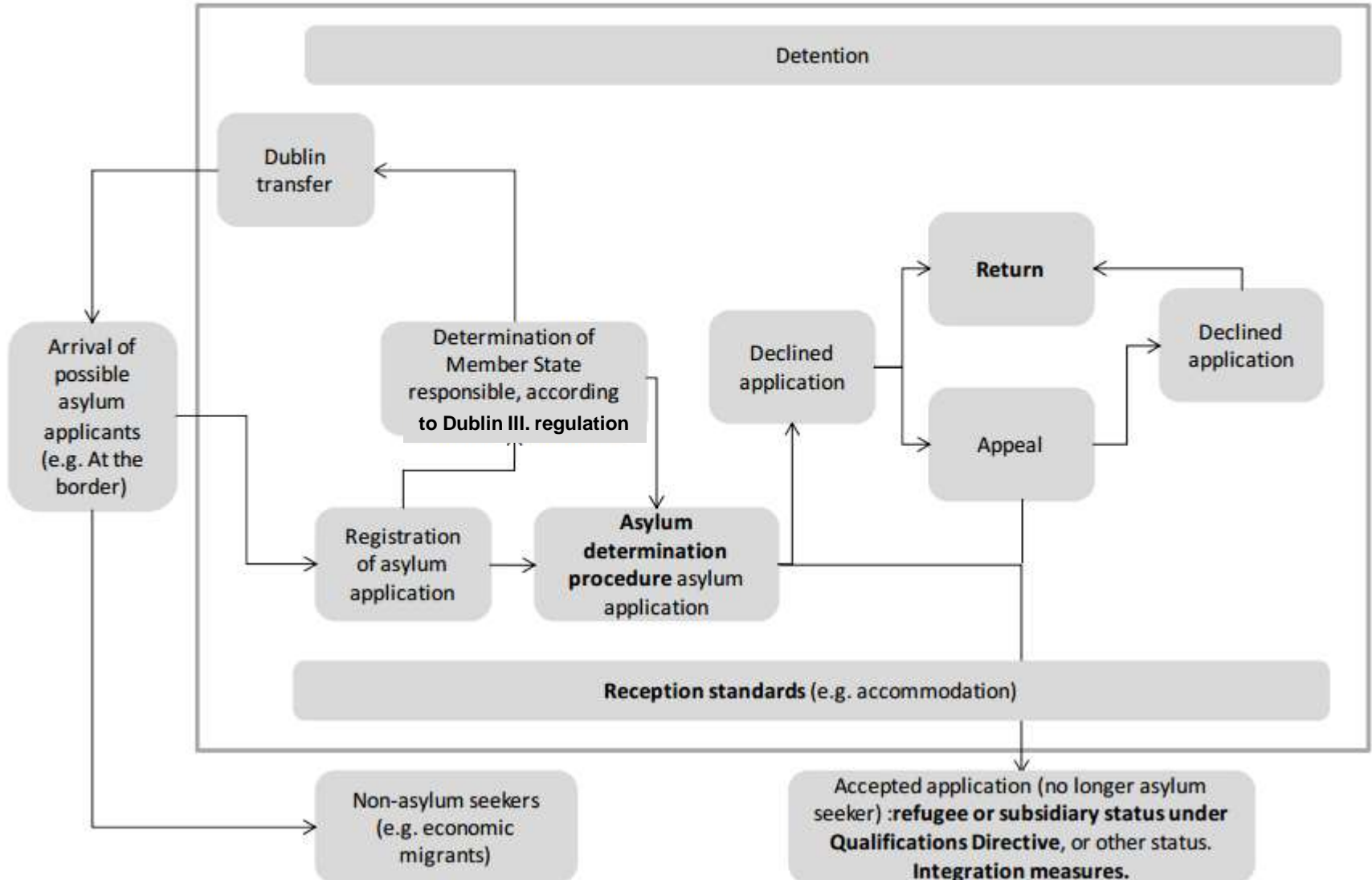
1. Directive on **temporary protection**: **2001 TPD**
2. **Reception conditions** directive (2003) recast: **2013 RD**
3. **Dublin III** Regulation and its implementing rules (2003) recast: **2013**
4. Regulation on **Eurodac** (2000) recast: **2013**
5. Qualification (**Refugee definition**) directive (2004) recast: **2011 QD**
6. **Asylum procedures** directive (2005) recast: **2013 PD**
7. Establishment of an **European Asylum Support Office**: **2010**
8. Decision on the new **Asylum Migration and Integration Fund** : **2014 AMIF**
9. Solidarity measures of 2015 on **relocation and resettlement**

OVERVIEW OF THE RECASTS

Secondary rule	Is there a recast?	State of play
European Refugee Fund 2007/573/EK határozat	New Fund	Regulation (EU) No 516/2014 of 20.5.2014 (OJ 2014 L 150/168) establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC
Temporary Protection Directive Council Directive 2001/55/EC	None	
Eurodac Council Regulation 2725/2000/EC	Yes	Revised Eurodac Regulation: Reg. 603/2013: (OJ 2013 L 180/1) – deadline July 2015
Dublin II regulation Council Regulation 343/2003 EC	Yes	Revised Dublin Regulation: Reg. 604/2013: (OJ 2013 L 180/31) – applicable from 1 Jan. 2014
Reception Conditions Directive Council Directive 2003/9/EC	Yes	Revised Reception Conditions Directive 2013/33 (OJ 2013 L 180/96) – deadline July 2015
Qualification directive Council Directive 2004/83/EK irányelv	Yes	Revised Qualification Directive 2011/95/EU 20 December 2011 transformation deadline Dec. 2013
Procedures directive Council Directive 2005/85/EC	Yes	Revised Procedures Directive 2013/32 (OJ 2013 L 180/60) – transformation deadline July 2015

THE ASYLUM PROCESS

Figure 1: Overview of the asylum process



KEY QUESTIONS

1. Who should decide if the person is a refugee? = which is the responsible state for the asylum procedure = Dublin
2. Can the asylum seeker be returned to a non EU member state (instead of applying Dublin) = safe third country
3. What to do if the refugee found protection in a non-EU country (e.g. Turkey, Lebanon, Jordan), but after some time moves on = first country of asylum, „secondary movement”
4. Does the refugee have a choice as to the country of asylum? (see also answers to 2 and 3)
5. Can states close their borders, claiming „too many came, the country is full” = non-refoulement
6. Why is the temporary protection directive not applied?
7. Are there persons, who can be excluded („terrorists”)? = exclusion grounds and procedure
8. What solidarity is conceivable among EU member states? = relocation, hotspots, AMIF
9. What solidarity with those state who host most refugees. (Resettlement, EU Trust Fund for Syria /”Madad Trust Fund”/), Emergency Trust Fund for Africa)

**1. WHO SHOULD DECIDE WHETHER THE
PERSON IS A REFUGEE? WHICH IS THE
RESPONSIBLE STATE FOR THE ASYLUM
PROCEDURE? =
THE DUBLIN SYSTEM**

PURPOSE AND PHILOSOPHY OF DUBLIN

Every asylum seeker **should gain access** to the procedure. There must be a MS to determine the case

Only one procedure should be conducted within the Union. **A decision** by any MS be taken as if **in the name of others** = no parallel or subsequent application should take place

**THE PHILOSOPHY OF DUBLIN:
UNDER WHAT CONDITIONS IS TAKING CHARGE BY ANOTHER STATE –
WITHOUT INVESTIGATION OF THE MERITS IN THE FIRST STATE FAIR**

Fairness preconditions

If the **substantive law** (the refugee definition) is identical

If **procedural rules** guarantee equal level of protection at least in terms of

- legal remedies (**appeals**)
- access to **legal representation**
- **reception conditions** (support) during the procedure (detention, e.g.!)

**REGULATION 604/2013/EU (DUBLIN III) CRITERIA 8 – 15. §
(SIMPLIFIED)**

„Coupling principles” = criteria identifying the responsible state (simplified list)

1. Family (narrowly defined)
2. Visa or residence permit
3. External border crossed in irregular fashion
4. Place of submission

BURDEN SHIFTING

**NOT BURDEN
SHARING !**

DUBLIN

Taking charge: no application in the responsible state

Taking back: departure after application

Eurodac not decisive, but **shorter deadlines**

(2 instead of 3 months to request take charge or
back)

No response = acceptance of responsibility

THE LESSON TAUGHT BY GREECE'S NON-PERFORMANCE ARTICLE 3 (2)

Where it is impossible to transfer an applicant to the responsible Member State „because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment” the determining Member State may search for another responsible state or must proceed itself.

Particular pressure on a member state or systemic failure: Commission to call for a preventive action plan

Serious risk of crisis – compulsory crisis management action plan upon invitation of the Commission

Last resort: instead of Dublin resort to Art 78 (3) of TFEU:

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

Two decisions on relocation of September 2015 moving from Italy and Greece 40 + 120 thousand persons

2. CAN THE ASLYUM SEEKER BE RETURNED TO A NON EU MEMBER STATE (INSTEAD OF APPLYING DUBLIN) = SAFE THIRD COUNTRY

THE NOTION OF THE SAFE THIRD COUNTRY (§ 38 PD)

- **Life and liberty are not threatened** on account of the 5 Geneva Convention grounds (race, religion, political views, nationality, belonging to a particular social group) and there is no risk of torture, inhuman or degrading treatment or punishment, or threat because of indiscriminate violence in armed conflict; and
- the principle of **non-refoulement** is respected; and
- the **prohibition of removal** in breach of the right to freedom from **torture and cruel, inhuman or degrading treatment and punishment** as laid down in international law is respected; and
- the **possibility** exists to **request refugee status** and, if found to be a refugee, to **receive protection** in accordance with the Geneva Convention.

THE NOTION OF THE SAFE THIRD COUNTRY

- **meaningful link** between applicant and the safe third country.
- **investigation if a particular country is safe** for the particular asylum seeker
- **a right** of the asylum seeker **to challenge the safety** at least when torture and inhuman or degrading treatment or punishment is threatening the asylum seeker

If inadmissible because there is a safe third country:

- inform the asylum seeker accordingly,
- provide the asylum seeker with document informing the safe third country that the application has not been examined in substance

3. WHAT TO DO IF THE REFUGEE FOUND PROTECTION IN A NON-EU COUNTRY (E.G. TURKEY, LEBANON, JORDAN), BUT AFTER SOME TIME MOVES ON = FIRST COUNTRY OF ASYLUM, „SECONDARY MOVEMENT”

FIRST COUNTRY OF ASYLUM

The application is **inadmissible** (no examination of the merits) if there is a **first country of asylum** (§ 35 PD).

Definition

If the asylum seeker has been **recognised** in that country as a refugee and he/she can **still avail** himself/herself of that protection,

or

he/she enjoys **otherwise sufficient protection** in that country, including benefiting from the principle of non-refoulement,

provided

that he/she **will be re-admitted** to that country.

Applicant has a right to challenge inadmissibility on the basis of country of first asylum.

Turkey, Lebanon, Jordan?

**4. DOES THE REFUGEE HAVE A CHOICE AS
TO THE COUNTRY OF ASYLUM?
(SEE ALSO ANSWERS TO QUESTIONS 2
AND 3)**

THE CHOICE OF THE REFUGEE

- Family, friends, acquaintances (own diaspora)
- Language
- Past time spent
- Labour market, right to establish a venture (self-employment)
- Reception conditions
- Integration assistance
- Vicinity / distance to country of persecution (fast return / distance from danger, less competition with other refugees)

The **more the refugee chooses** the **less social assistance** (s)he will need.

**5. CAN STATES CLOSE THEIR BORDERS,
CLAIMING „TOO MANY CAME, THE
COUNTRY IS FULL” = NON-REFOULEMENT**

NON - REFOULEMENT

Narrow meaning: Geneva Convention Article 33

„No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Exception (33 (2)): national security danger or final sentence for serious crime in country of asylum (amounting to danger to society)

Broad meaning: Art 3 of the European Convention of Human Rights:

„No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

- ground irrelevant
- applies to any person, not just to refugees
- prohibition is absolute.

But, what if extremely large number of refugees come („mass influx” - Lebanon, Jordan, Turkey) - prevailing view: still applies

6. WHY IS THE TEMPORARY PROTECTION DIRECTIVE NOT APPLIED?

**2001/55 EC Directive on 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
2001 July 20, OJ L 212/12**

TEMPORARY PROTECTION DIRECTIVE

Beneficiaries = 'displaced persons'

who

have **had to leave** their country or region of origin,

or have been **evacuated**,

and are unable to return in safe and durable conditions

in particular:

(i) persons who have fled areas of **armed conflict or endemic violence**;

(ii) persons at **serious risk of**, or who have been the victims of, **systematic or generalised violations** of their **human rights**;

TEMPORARY PROTECTION DIRECTIVE

Mass influx means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area

The **Council decides by qualified majority** the start and end of T.P.

Duration

1 year + max **two times 6 months**
= total max: **2 years**

Council may end it earlier, but must not exceed two years'

Not applied until January 2016

Why?

- The Member States ought to **assist the obtaining of the necessary visas**, including transit visas. Formalities ought to be reduced to a minimum. Visas should be free of charge or their cost reduced to a minimum (§ 8 /3/ TPD)
- The Temporary Protection Directive includes **a solidarity mechanism** (even if voluntary) on the relocation of refugees
- **Right to work**, self-employment and **to family unification** are recognised

**7. ARE THERE PERSONS, WHO CAN BE
EXCLUDED („TERRORISTS“)? =
EXCLUSION GROUNDS AND PROCEDURE**

EXCLUSION OF TERRORISTS

- Terrorists are **unlikely to come as refugees**, as they have to be photographed, give 10 fingerprints and give detailed account about their life
- Before the 2015 November Paris attacks **some returned** to Europe with the mixed flow
- Terrorists **can be excluded from protection** (and returned to their country of origin, unless Art. 3 of the ECHR would be violated)

Exclusion grounds: crimes against peace, war crimes, crimes against humanity, serious non-political crimes, acts contrary to the principles and purposes of the UN.

See QD Preamble, para 31 „**Acts contrary to the purposes and principles of the United Nations are ... embodied in the United Nations resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations...’**”

**8. WHAT SOLIDARITY IS CONCEIVABLE
AMONG EU MEMBER STATES? =
RELOCATION, HOTSPOTS, AMIF**

RELOCATION DECISIONS

Relocation: distributing among Member States those asylum seekers who are already within the EU and have a good chance of being recognised – i.e. members of groups with 75% recognition rate in the previous quarter (Syrians, Iraqis and Eritreans)

2 decisions:

- COUNCIL DECISION (EU) 2015/1523 of **14 September** 2015
40 000 persons **24,000 from Italy, 16,000 from Greece**
- COUNCIL DECISION (EU) 2015/1601 of **22 September** 2015
120 000 persons First year: **15,600 from Italy and 50,400 from Greece** Second year: 54,000 either from the same two or from other Member States.

No relocation to Denmark, Ireland, UK, Greece and Italy – 23 MS take up the 40 plus 120 thousand

Relocating MS get 6000 Euros/head

In exchange: Greece, Italy must develop „roadmap”

MEMBER STATES' SUPPORT TO EMERGENCY RELOCATION MECHANISM

COMMUNICATED 28 JANUARY 2016

Member States	National Contact Points Appointed	Liaison Officers Appointed		Reply to EASO call - Experts	Reply to Frontex call - Border guards	Relocation			
		Italy	Greece			Places Made Available	Relocated from Italy	Relocated from Greece	Remaining Places from the 160,000
Austria	✓	✓	✗	45	26	✗	✗	✗	1953
Belgium	✓	✓	✓	15	4	30	14	✗	3798
Bulgaria	✓	✓	✓	1	✗	1302	✗	✗	1302
Croatia	✓	✗	✗	2	11	✗	✗	✗	968
Cyprus	✓	✓	✓	✗	✗	30	✗	✗	320
Czech Republic	✓	✗	✗	35	8	✗	✗	✗	2691
Denmark	N/A	N/A	N/A	5	50	✗	✗	✗	N/A
Estonia	✓			1	1	✗	✗	✗	329
Finland	✓	✓	✓	1	2	150	96	44	1958
France	✓	✓	✓	6	59	900	19	43	19651
Germany	✓	✓	✓	13	50	40	11	10	27515
Greece	✓	N/A	N/A	1	✗	✗	✗	✗	N/A
Hungary	✓	✗	✗	1	4	✗	✗	✗	1294
Ireland	✓	✓	✓	2	✗	20	✗	10	590
Italy	✓	N/A	N/A	✗	4	✗	✗	✗	N/A
Latvia	✓	✓	✓	✗	✗	481	✗	✗	481
Lithuania	✓	✓	✓	1	14	40	✗	4	667
Luxembourg	✓	✓	✓	6	✗	90	✗	30	527
Malta	✓	✓	✗	2	✗	131	✗	✗	131
Netherlands	✓	✓	✓	6	23	100	50	✗	5897
Poland	✓	✓	✗	✗	18	100	✗	✗	6182
Portugal	✓	✓	✓	✗	12	130	10	16	2925
Romania	✓	✓	✓	11	23	300	✗	✗	4180
Slovakia	✓	✓	✓	2	20	✗	✗	✗	902
Slovenia	✓	✓	✓	1	✗	✗	✗	✗	567
Spain	✓	✓	✓	30	41	50	18	✗	9305
Sweden	✓	✓	✗	2	6	300	39	✗	3727
United Kingdom	N/A	N/A	N/A	10	29	N/A	✗	✗	N/A
Norway	✗	✗	✗	2	3	✗	✗	✗	tbc
Switzerland	✗	✗	✗	✗	2	✗	✗	✗	tbc
Liechtenstein	✗	✗	✗	✗	✗	43	✗	✗	tbc
Iceland	✗	✗	✗	✗	✗	✗	✗	✗	tbc
TOTAL	All concerned EU Member States have now notified	20	17	201 experts (of 374 requested)	447 border guards (of 775 requested)	17 Member States 4237 places (of 160,000)	257 (out of 39,600)	157 (out of 66,400)	97,860 (of initial 98,256)¹

HOTSPOTS, AMIF

Hotspots = in Italy and Greece: **complex sites** where experts from different EU MS work together in receiving and screening the applications and organising the return of those not in need of international protection. **6 planned for Italy, 5 for Greece.**

AMIF: Asylum, Migration and Integration Fund 2014-2020: 2,6 billion Euros!

To support the reception of asylum seekers and the integration of refugees and beneficiaries of subsidiary protection



Source:
Brussels, 14.10.2015 COM(2015) 510 final
ANNEX 5

THE STATE OF PLAY WITH THE HOTSPOTS

END OF JANUARY, 2016

GREECE

Planned site, capacity:

Lesvos (2709) Chios (2250) Samos (650) Leros (330) Kos (290)

Actually functioning:

Lesvos (184 Frontex officers, 8 EASO experts and staff)

Samos (53 Frontex officers, 5 EASO experts and staff)



ITALY

Planned site, capacity:

Lampedusa (650) Pozzallo (300) Porte Empedocle (300) Augusta (300) Taranto (300)
Trapani (400)

Actually functioning:

Lampedusa (24 Frontex officers, 2 EASO experts and staff)

Pozzallo (21 Frontex officers, 2 EASO experts and staff)

Taranto (6 Frontex officers, 0 EASO experts and staff)

Trapani (14 Frontex officers, 2 EASO experts and staff)

**9. WHAT SOLIDARITY WITH THOSE STATE
WHO HOST MOST REFUGEES?
RESETTLEMENT, EU TRUST FUND FOR SYRIA
/“MADAD TRUST FUND”/, EMERGENCY
TRUST FUND FOR AFRICA**

SOLIDARITY WITH THOSE HOSTING REFUGEES AND SUPPORT FOR OTHER AFFECTED STATES

- **Resettlement of 22 thousand** refugees from outside of the EU in the next two years finally decided on 1 October 2015.
- **Madad Fund to support Syrian refugee hosting countries** (500 million Euros from the budget of the EU in 2015, to be matched by another 500 million donated directly by the MS) (See also the later Turkey – EU deal)
- **Emergency Trust Fund for stability** and addressing **the root causes** of irregular migration and displaced persons **in Africa**.
„The Commission considers that national contributions should match the €1.8 billion EU funding.”

COM(2015) 510 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration, p. 10.)

SOLIDARITY WITH THOSE HOSTING REFUGEES AND SUPPORT FOR OTHER AFFECTED STATES

Member States' financial pledges since 23 September 2015, € million

(Communicated as of 28 January 2016)

Member States	Africa Trust Fund	Syria Trust Fund ¹	Humanitarian aid pledged since 23 September 2015 ²			Total
			World Food Programme	UNHCR	Other	
Total Pledged	81.41	52.05	441.99			575.45
Contribution from EU financing	1800	500	500			2800
Total required	3600	1000	1000			5600
Shortfall	1718.59	447.95	58.01			2224.55

THE DEAL WITH TURKEY, 29 NOVEMBER 2015

EU's contribution

- More frequent and regular summits
- **High level dialogue** on economic and on energy cooperation, prospect for a customs union
- **Accession negotiations** revived, concrete talks to resume in December 2015
- **Visa** liberalisation accelerated
- A Refugee Facility for Turkey was established. „The EU is committed to provide an initial **3 billion** euro of **additional resources.**” as „burden sharing within the framework of Turkey-EU cooperation”.

THE DEAL WITH TURKEY, 29 NOVEMBER 2015

Turkey's contribution

Activate Joint action plan of 15 October 2016:

- „stemming the influx of irregular migrants” (including into Turkey!)
- „both sides will, as agreed and **with immediate effect**, step up their active cooperation on migrants who are **not in need of international protection, preventing travel to Turkey and the EU**”
- „ensuring the application of the established bilateral **readmission** provisions and **swiftly returning** migrants who are not in need of international protection **to their countries of origin** [not to Turkey!]”
- „decisive and **swift action** to enhance the fight against **criminal smuggling networks**”
- Turkey intends to adopt measures to further **improve the socio-economic situation** of the Syrians under **temporary protection**.

THANKS!

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