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European Asylum Policy: Two Major Accords to Break the Impasse

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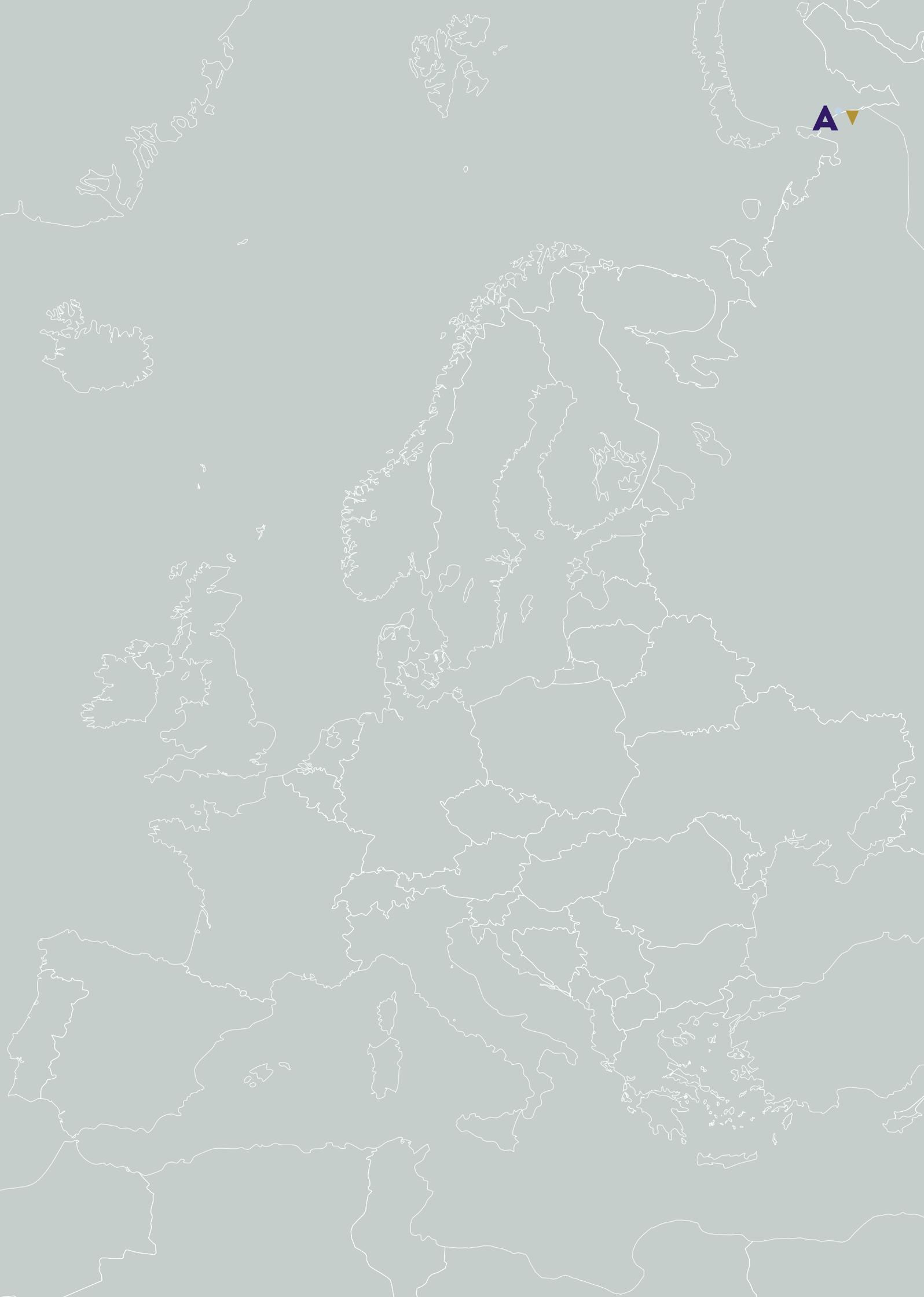
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Summary



Since the refugee crisis of 2015-2016, the European asylum system has been in crisis. The refugee camps in the countries on Europe's external border, and the appalling conditions that exist there, are only the most visible consequence of the system's considerable shortcomings. At the same time, the failure to efficiently process the large numbers of arriving asylum seekers continues to give rise to a lot of frustration in the EU member states. In practice, the solidarity and allocation of responsibilities between member states on which the system relies is breaking down. Fundamental disagreements between member states on how to reform the system have stood in the way of a solution for many years. Against this background, the Minister of Foreign Affairs, together with the Minister of Justice and Security, requested the Advisory Council on International Affairs (AIV) to advise the government on how to break the political impasse in the field of European asylum policy.

In this advisory report, the AIV therefore focuses on determining what political-strategic approach has the most potential to provide a way out of this stalemate. The report does not attempt to provide an exhaustive analysis of the various aspects of the global asylum and migration crisis. In many cases, however, measures aimed at reforming the European asylum system cannot be separated from the wider issue of asylum and migration. The AIV therefore examines aspects of this issue in so far as they relate to its advice on breaking the European asylum impasse.

In the Netherlands and Europe, asylum policy is based on a normative framework that includes the 1951 Refugee Convention and the European Convention on Human Rights. This remains the framework within which a solution must take shape. In the AIV's opinion, this is not just a matter of common humanity and legal obligation but also one of self-interest, since a solution on this basis would play a key role in promoting stability and the rule of law along Europe's external borders and beyond. Moreover, the European asylum system cannot function without the cooperation of countries of origin and transit, since we depend on their participation in international migration management and their compliance with return policy. Asylum and migration policy must therefore encompass cooperation on protection in the region and credible opportunities for legal migration to EU member states.

However, it is also impossible to ignore realities that undermine the functioning of and support for the asylum system, such as the large number of arriving migrants who apply for asylum in Europe despite not qualifying for this status and the growing problems involving persons who are not allowed to stay ('safe country nationals') but fail to return to their countries of origin. Moreover, insufficient vetting of arriving migrants poses a security threat. All of this may give rise to difficult political choices in emergency situations.

The AIV notes that Europe's asylum system is urgently in need of reform. The current impasse is dangerous, as Europe is currently ill-prepared for another major migration crisis – a threat that is certainly not diminished by the COVID-19 pandemic. At the same time, the failure of Europe's asylum system, and a perception among European citizens that we have lost control over who enters our countries, are leading to a loss of faith in both the fairness of the asylum system and the functioning of the EU.

In order to be able to respond to the government's request for advice, the AIV started by analysing strategies that can help provide the political latitude needed to break the impasse (chapter 2), such as identifying the advantages and disadvantages of pursuing either a comprehensive or a step-by-step approach. In this chapter, the AIV also discusses the events that gave rise to the impasse and the conflicting political motives and underlying imbalances it reflects. Staunch ideological views, deeply-

held convictions and strong feelings in favour of or against the generous admission of refugees play an important role in this area. The only basis for restoring trust and taking steps to end the impasse is a good mutual understanding of the people's experiences within various member states and the impact of those experiences on the positions of political parties and governments.

Next, the advisory report discusses several political and judicial developments, as well as the advent of the COVID-19 pandemic, which are relevant to the scope for breaking the current impasse (chapter 3). Political momentum is also being provided by the von der Leyen Commission, which took office at the end of 2019 and is looking for ways to reform the asylum system – gradually or otherwise. To this end, it presented a New Pact on Migration and Asylum in September 2020. A political appraisal of the pact appears in chapter 4.

The AIV subsequently connects the above-mentioned strategies and developments to the relevant parts of the asylum and migration system and to 'Schengen'. The contours of the conclusions and recommendations begin to emerge in the corresponding sections of the report (chapters 5, 6 and 7). In essence, the AIV is of the opinion that the current impasse can be broken only through the adoption of two major accords: an *internal accord* based on a recalibration of solidarity and responsibility-sharing between member states and an *external accord* aimed at bolstering internal policy through the conclusion of effective readmission agreements with third countries on the basis of shared interests.

As regards the internal accord, the AIV supports the approach in the von der Leyen Commission's proposal to remove one of the main obstacles to such an accord by employing the concept of 'flexible solidarity'. In the AIV's view, this approach should be subject to the condition that efforts undertaken in solidarity with external border countries involve tangible actions (not just financial support) and that those efforts demonstrate substantive solidarity with refugees and/or third countries (instead of being limited to support for instruments such as return policy or border control). In the AIV's opinion, scaling back 'Schengen' is not an effective form of leverage to break the impasse on asylum policy, since the associated political and economic costs would be disproportionately high.

As regards the external accord, the AIV believes that agreements should be part of a broad, comprehensive partnership that encompasses not only socioeconomic development, including instruments of trade policy, but also joint migration management and legal migration pathways. The Commission's proposals are not very detailed on this point. For this and other reasons, the AIV believes that the Netherlands has a role to play in ensuring that this external element is given the priority it deserves in the debate on the reform of European asylum policy.

In its conclusions and recommendations, the AIV fleshes out these ideas in the form of five recommendations concerning the internal accord and five recommendations concerning the external accord. Without an external accord there can be no internal accord. Only through tangible and simultaneous progress in both areas can the Netherlands and other EU member states regain their capacity to act in the area of the common asylum policy and make it future-proof.

Recommendations in brief

▶ Recommendation 1

Stimulate public debate on asylum issues, for example through an annual ‘State of migration’ debate, and acknowledge the political nature of the asylum issue while identifying its normative aspects, in part to ensure continued public support for asylum.

▶ Recommendation 2

Enter negotiations in the knowledge that the positions of member states have a strong ideological component and ensure that key decisions are taken by consensus.

▶ Recommendation 3

Start with a step-by-step approach that focuses on making progress on specific components of the Common European Asylum System (CEAS) instead of laying all the pieces of the puzzle in one go.

▶ Recommendation 4

Seize opportunities for bilateral cooperation with other member states on specific issues, in so far as such cooperation enhances – or at the very least does not undermine – cooperation at EU level.

▶ Recommendation 5

Strengthen the role of EU agencies such as Frontex and the European Asylum Support Office (EASO).

▶ Recommendation 6

Support the European Commission’s efforts to conclude an internal accord within the Union that strikes a balance between solidarity and responsibility as regards the registration and reception of asylum seekers.

▶ Recommendation 7

Prevent the (further) decoupling of the Dublin Regulation and the Schengen system: a reform of the asylum system cannot be forced through by threatening to create a ‘mini-Schengen’, as such a strategy would entail major economic and political risks.

▶ Recommendation 8

Take the lead in or support initiatives to achieve a more uniform asylum policy in the member states as soon as possible, as an inseparable part of the internal accord.

▶ Recommendation 9

Work with the Commission to examine how a fully-fledged external dimension of the CEAS can be developed as a matter of priority, in conjunction with the EU’s foreign and security policy.

▶ Recommendation 10

Provide the external dimension of the CEAS with a well thought-out component focusing on refugee resettlement and legal migration for work and study that is embedded in partnerships with third countries and forms part of the ‘flexible solidarity’ between member states.



Introduction

▶ 1.1 Initial description of the problem

During the refugee crisis of 2015-2016, it became clear that the EU does not have a properly functioning Common European Asylum System (CEAS) at its disposal. The events gave rise to major conflicts and tensions in the EU, both within and between member states, making it extremely difficult to reach agreement on how to improve the asylum system. Negotiations on reforming the system have dragged on ever since. As a result of this impasse, it has not been possible to resolve a number of pressing problems.

The first problem is the legacy of the crisis of 2015-2016. For several years now, large groups of asylum seekers have been living in appalling conditions in refugee camps in countries on Europe's external border. The fire in the Moria refugee camp on the Greek island of Lesbos in September 2020 has drawn renewed attention to this tragedy. In addition, refugees continue to arrive in Europe on a regular basis following perilous journeys in small, ramshackle boats.

The second problem is the imbalance in the existing European asylum system. The countries on Europe's external border are faced with numbers of arriving migrants and asylum seekers that they are not equipped to deal with. 'Countries of destination', including the Netherlands, are faced with the uncontrolled onward movement of migrants, which is known as 'secondary migration'.¹ These countries are often unable to return asylum seekers to the member states that are responsible under EU law for processing their asylum applications. In addition, substantial differences remain between national asylum procedures.

The final problem is that across the EU two-thirds of all applications for international protection are rejected.² This causes the system to become overburdened, resulting in delays and high costs. In addition, many rejected asylum seekers subsequently fail to return to their countries of origin and often end up staying on illegally.³ This contributes to a perceived loss of control in host countries, not least because illegal residence can lead to involvement in criminal activity.⁴ A watertight domestic policy in respect of this group does not appear to be possible in an open society such as ours.⁵ A more effective return policy is therefore urgently required.⁶

'A comprehensive approach that improves the asylum system and restores the necessary trust between member states is needed.'

Nevertheless, both the individual member states and the EU as a whole have been unable to rectify these invariably undesirable situations by concluding better agreements on the CEAS. There is too much criticism of the current system and too much mutual distrust between member states. On the one hand, member states in southern Europe regard the existing asylum system as fundamentally unfair, given that they are required to receive and register large numbers of asylum seekers at their borders. On the other hand, member states in northwestern Europe accuse their southern counterparts of failing to take responsibility for properly managing reception and registration at the border, thus exposing them to large numbers of unregistered asylum seekers who move on from the

initial country of entry. Finally, central and eastern European member states feel that other member states are doing far too little to contain migration and that their concerns in this regard are being ignored. It thus appears that all member states have something to complain about.

In the AIV's opinion, a comprehensive approach that improves the asylum system and restores the necessary trust between member states is needed to resolve this situation. This will require the adoption of two accords: an internal accord between the EU member states and an external accord between the EU and partner countries outside Europe that are involved in migration issues.

► 1.2 Urgency

The AIV is of the opinion that breaking the asylum policy impasse is urgent for several reasons. First and foremost, in the absence of progress on the legislative front, the highly undesirable specific situations mentioned above will continue to exist: the appalling humanitarian conditions in the refugee camps on Europe's external borders, paralysed asylum procedures and an inadequate return policy in respect of migrants who do not have a right to stay. But that is not all.

Second, the continuing impasse impairs the EU's ability to take appropriate action in the event of a new refugee crisis. This is a cause for concern, as a sudden rise in migrant numbers, for example in response to the eruption of another serious conflict in the Middle East, the Sahel, North Africa or elsewhere, is a distinct possibility. The COVID-19 crisis, which has hit many countries of origin hard, adds a new dimension to the uncertainty.

Third, the lack of a solution to the impasse also affects cooperation in other fields, in particular concerning the area without internal borders established by the Schengen Convention ('Schengen').⁷ As a trading nation, the Netherlands has a vital interest in the survival of Schengen.

'The impasse threatens to further erode popular support for the right to protection in Europe as enshrined in international human rights instruments and EU law.'

Finally, the impasse is causing the public to lose faith in both the fairness of the asylum system and the functioning of the EU. The long-standing and fundamental disagreements between EU member states in an area as politically and socially sensitive as asylum and migration are undermining the EU's credibility as a forum for cooperation. Citizens in southern Europe feel that they have been abandoned by their neighbours and partners, while those in eastern Europe feel that they have been put on the spot by 'Brussels'. At the same time, the perception in northwestern Europe is that the EU has lost its ability to manage and control asylum and migration. Given the profound political sensitivity of this issue, such public perceptions also serve to harden the positions of the various governments. In this way, the impasse threatens to further erode popular support for the right to protection in Europe as enshrined in international human rights instruments and EU law.

This oft-neglected point merits further attention. Extensive recent opinion polling indicates that support among the Dutch population for the right to asylum declined by 10% to 59% between March and August 2020.⁸ Support for asylum is also falling in many other EU countries, as is apparent in particular from the increase in support for anti-immigration parties. These developments can be attributed largely to two factors: the feeling of loss of control precipitated by the irregular arrival of large numbers of asylum seekers and the perception that migrants who are clearly not eligible

for protection as refugees are increasingly abusing the asylum procedure.⁹ For these reasons, too, it is important to make swift progress on reforming the CEAS before support for the right to asylum declines even further.



▶ 1.3 Basic principles of European asylum policy

From the moment that the European countries created the Schengen border-free travel area and started sharing a single external border, it became essential to establish a common asylum system. The CEAS, and particularly the 'Dublin system' for determining the member state responsible for examining asylum applications in the EU, was thus originally conceived as a counterweight to Schengen.

The CEAS is normatively based on international refugee law. The foundations are the 1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the European Convention on Human Rights (ECHR). The right to asylum is also enshrined in the Charter of Fundamental Rights of the European Union. A core element of these human rights instruments is the prohibition of *refoulement*, that is to say, the prohibition against the expulsion or return of persons to a country where they would face persecution or might otherwise be subjected to inhuman treatment. The right to asylum also encompasses the examination of asylum applications in every individual case in which a person requests such protection. Finally, the provisions on border control, asylum and migration in the Treaty on the functioning of the European Union (TFEU) are also applicable in this regard.¹⁰

In a practical sense, the Dublin Regulation underpins the CEAS by regulating the sharing of responsibility for examining asylum applications.¹¹ The Treaty of Amsterdam (1997), which integrated the Schengen acquis into the community framework, also laid the foundations for the harmonisation of other aspects of EU asylum policy. For the most part, this harmonisation was achieved on the basis of directives that the member states were required to implement. In addition to 'Dublin', the current CEAS therefore consists of several directives and other instruments that mainly seek to harmonise the member states' asylum policies by setting certain (minimum) standards.¹²

The CEAS actually leaves member states a lot of leeway to decide how to implement the standards laid down in the directives. Thus, in practice, asylum policy has only been partially harmonised. For instance, there are still no substantive criteria for the reception of refugees and asylum seekers. In addition, the extent to which the asylum and migration services charged with implementing the CEAS in the member states have been furnished with the resources they require varies widely. In addition, the common standards are implemented differently. As a result, there remain substantial differences in the way that member states implement asylum policy, which acts as a strong incentive for secondary migration.¹³

Furthermore, the EU still lacks a truly common policy towards countries of origin (and potential return).

▶ 1.4 Political principles

At the outset the AIV wishes to articulate four key political principles that inform the thinking behind this advisory report and guide its recommendations.

First, granting asylum is not only a matter of compliance with international and European law and of solidarity and common humanity, but also one of enlightened self-interest. The suffering of countless refugees around the world defies all description; mitigating humanitarian emergencies validates the self-image of the Netherlands and Europe as guardians of human rights and human dignity. At the same time, our societies have an interest in stability on their external borders and beyond, based on wide-ranging cooperation with neighbouring states and other countries aimed at improving living

conditions, preventing violence and human rights violations and protecting refugees. In the absence of stability and economic development in the region surrounding Europe, there will be no peace on Europe's external border and fewer commercial opportunities for Dutch companies. Acknowledging this dual motivation helps advance the public debate on asylum and migration.

Second, in the final analysis, the right to asylum can lead to a clash between our highest values. That too is a lesson of the refugee crisis of 2015-2016. For the first time ever, politicians and the public experienced the full extent of the tension between, on the one hand, their countries' obligations under international law, their moral principles and the appeal of Europe's wealth, freedom and tolerance to millions around the world and, on the other, the need to control the admission of third-country nationals to their territories, guarantee domestic security and protect Europe's free and democratic societies, which are under threat from radical Islamism and rising right-wing extremism. The EU-Turkey deal was an early expression of the kind of tragic choices to which such tensions can lead.¹⁴ In crisis situations, it becomes clear that the right to asylum is not automatic, at least not in terms of its practical application, and that it is ultimately contingent on political choices, democratic debate and public support.

Third, a functioning asylum system – one that in addition to providing a point of entry and a place of refuge necessarily encompasses an effective return policy for rejected asylum seekers – is impossible without the cooperation of third countries. Migration and border policy should therefore be at the forefront of EU foreign policy in relations with neighbouring countries, countries of transit and countries of origin. Under the current balance of power, this takes the form of a search for shared interests in what can occasionally become a tough game of give and take. Europe needs to be mentally prepared to deal with the associated choices and dilemmas.

Fourth, a functioning European asylum system requires solidarity and responsibility from all member states. That is simply how the EU – a Union of states with an integrated system of laws but without a strong central executive – works. It is wrong to disproportionately burden countries that happen to be located on the EU's external border with a problem that affects the entire territory of the Union. This means that every member state, including the Netherlands, must be willing to make concessions – whether on major or minor issues – in order to break the political impasse. That is the only way to safeguard the greater interest of a functioning Union, not least as an area of free movement.

Lastly, a terminological clarification is called for. The terms solidarity and responsibility frequently feature in policy discussions concerning the EU asylum system, but they are not always used in the same way. In discussions in Brussels, the term solidarity generally refers to solidarity with countries that bear the heaviest burden when it comes to the registration and reception of asylum seekers at Europe's borders, while the term responsibility relates to the implementation and application of the rules on asylum. The AIV would emphasise that solidarity in asylum matters should not just be a guiding principle for relations between member states but should also encompass two other forms of solidarity, namely solidarity with third countries that receive refugees and solidarity with actual refugees. In other words, terminological flexibility should not go so far as to exclude meaningful solidarity with refugees and/or third countries from the tasks that the member states have taken upon themselves.

► 1.5 Approach, scope and timing of the report

The request for advice on asylum and migration sent to the chair of the AIV by the Minister of Foreign Affairs, together with the Minister of Justice and Security, on 15 May 2019 focuses on how to break the political impasse in the field of asylum policy. In addition, it asks what opportunities and options the AIV sees for decision-making in this area, especially with the entry into office of a new Commission and European Parliament. Finally, it makes the link to Schengen and asks how the continued functioning of Schengen can be ensured.¹⁵

The following outline will help readers navigate the report:

- Chapter 2 analyses the main underlying conflicts between member states in the area of asylum and discusses strategies to break the impasse.
- Chapter 3 examines the most significant political and legal shifts that have occurred since the emergence of the impasse in 2015 and the opportunities they create.
- Chapter 4 describes the Commission's recent proposals for reforming the European asylum system, which will serve as a framework for the European asylum debate and European asylum policy in the coming years.
- Chapters 5 and 6 relate the findings of the preceding chapters to the various internal (chapter 5) and external (chapter 6) aspects of the asylum and migration system and identify two major accords – one internal and one external – that are required to break the impasse.
- Chapter 7 briefly considers the future of Schengen in the light of European asylum policy.
- Chapter 8, finally, presents the report's conclusions and recommendations.

The scope of this report can be surmised from the above. Specifically, the report focuses on answering the political-strategic question raised in the request for advice. It thus does not purport to advise the government on all aspects of the asylum and migration issue as identified, for example, in the government's Integrated Migration Agenda. Topics such as the root causes of migration and national asylum policy are not discussed in the report. Nevertheless, attention is devoted to the many aspects of asylum and migration that touch on or are intertwined with the aforementioned question of how to break the impasse in European asylum policy. The same applies to 'Schengen', which is specifically mentioned in the request for advice owing to its links to asylum policy. The AIV restricts itself to discussing these topics only in so far as they relate to the political impasse.

On the issue of timing, the AIV notes that it decided to await the publication of the Commission's proposals for a New Pact on Migration and Asylum before publishing its report. These proposals were initially expected at the beginning of 2020 but were not published until 23 September 2020, due in part to delays caused by the COVID-19 pandemic.¹⁶ The current German EU Council Presidency was keen to ensure that several key ideas relating to the proposals could be passed on to the Portuguese Presidency (in the first half of 2021). However, the actual negotiations on the pact will only commence later in 2021. The present report can thus contribute to the determination of the Netherlands' position in this legislative process.

In terms of the Netherlands' domestic political calendar, this report is appearing prior to the parliamentary elections of March 2021. The AIV hopes that it will contribute to the exchange of ideas on the European dimension of the asylum issue in the run-up to the elections and during the subsequent coalition negotiations.

Characteristics of the impasse and potential solutions

► 2.1 Immediate cause

During the refugee crisis of 2015, 1.25 million people – including many from Syria but also from elsewhere – applied for asylum in the EU.¹⁷ The authorities in the countries at the external frontiers of the Union lost control of their external borders, other countries reintroduced controls on the EU's internal borders and the European asylum system almost collapsed under the pressure. The political impasse regarding the European asylum system, which forms the focus of this AIV advisory report, arose from fierce disagreements between member states concerning the appropriate response to the crisis. Although the underlying causes of the impasse lie deeper, it is also instructive to consider the immediate cause.

In the summer of 2015, the Juncker Commission proposed a solidarity mechanism in order to reduce the burden on the countries on the EU's external border. The aim of the mechanism was to relocate asylum seekers from Italy, Greece and Hungary across the EU, as part of a wider package of measures. The mechanism would initially relocate 40,000 asylum seekers (June 2015), subsequently rising to 160,000 asylum seekers in total (September 2015). However, a few member states were unwilling to contemplate any deviation from the responsibilities of the member states of entry, as set out in the Dublin Regulation, and saw the remedy in the tightened control, or even closure, of the EU's external borders. In their view, the high number of asylum applications submitted in EU member states such as Hungary and Slovenia could be attributed primarily to the lawlessness on Greece's external border, where almost all the asylum seekers concerned had first set foot on EU territory (before heading north). The binding character of the proposed relocation mechanism in the Commission's proposal also encountered firm resistance.

In the European Council of heads of government, where decisions are adopted by consensus, this resistance resulted in a stalemate. However, in the Council of Ministers of Justice and Home Affairs, where qualified majority voting applies, a decision was adopted on 22 September 2015.¹⁸ The opponents of mandatory relocation – the Czech Republic, Slovakia, Hungary and Romania – were outvoted. These countries, who were later joined by Poland, are deeply frustrated at this turn of events and have therefore adopted an inflexible approach towards attempts to reform the Dublin system. Against this background, the Juncker Commission was unable to integrate the emergency decision of 2015 on the relocation of asylum seekers into the common asylum system as a safety net for crisis situations, leading to the current impasse.¹⁹

The intractability of the impasse is due in part to the interlocking nature of a number of underlying conflicts that have given rise to a seemingly inextricable knot of problems, differences and imbalances. In the following sections, the AIV seeks to identify the four main strands in this knot, before examining what solution strategies could be used to disentangle it.

▶ 2.2 Underlying conflicts

Ideological positions: open or closed

Opinions on asylum and migration, which are often expressed in emotional terms, vary widely both within and between member states. From Finland to Italy and from the Netherlands to Slovakia, these issues feature prominently in the domestic political debate and often serve as an important issue in national elections. Such intense publicity generally makes it difficult to reach compromises within the EU, as every step by national governments towards their partners is scrutinised by the media and domestic opposition parties. While in many areas of EU law technical depoliticisation can smooth off the rough edges and joint action has clear benefits (e.g. product standards in support of the internal market), this is less true when it comes to asylum.

‘Opinions on asylum and migration, which are often expressed in emotional terms, vary widely both within and between member states.’

Public support for asylum and migration fluctuates, and is not equal in all member states. Different historical experiences clearly play a role. The EU has member states, such as the Netherlands and France, which as former colonial powers have been used to the presence of non-European migrants for generations. There are also member states, such as Germany, that relied on non-European foreign workers from countries such as Turkey and Morocco from the 1950s onwards. There are member states, such as Sweden, that only experienced noticeable demographic shifts from the 1990s onwards as a result of more generous asylum policies. In addition, there are member states, such as Poland and Hungary, where ethnic and linguistic homogeneity has actually increased as a result of developments during and after the two World Wars. Such diverse experiences of migration and multiculturalism do not point in one direction, but they can flip domestic majorities on issues relating to asylum and migration.

In northwestern European member states such as Germany, France and the Netherlands, a deeply held conviction concerning the duty and necessity of protecting refugees exists in society alongside widespread scepticism regarding the social integration of migrants from other cultures and religions. Over the past two decades – ever since the 9/11 Islamist terror attacks – this scepticism has hardened into deep dissatisfaction within certain small groups. Violent conflicts, from hate crimes to acts of terrorism, are putting pressure on societal relations in a number of member states. Not surprisingly, moreover, they are inflaming the asylum debate.

Diverse experiences and ideological polarisation, both between and within member states, have hardened divisions and seriously hindered efforts to find a joint solution at EU level. The most promising way forward therefore lies in the adoption of balanced decisions that simultaneously respect the right to asylum, curtail irregular migration and do their best to ensure the return of persons who are not eligible for asylum. Democratic majorities for such a ‘fortress Europe with gateways for asylum and migration’ can be found in almost all member states.

Geographical variation: South, North and East

The varied geographical location of the member states is a key factor in the asylum impasse, not least because current EU law is not well equipped to deal with such diversity. From a migration perspective, the member states can be roughly divided into three categories.²⁰ The first category

comprises the countries of arrival in southern and southeastern Europe, where most regular and irregular migrants arrive: Spain, Greece, Italy, Cyprus and Malta, which all have a maritime border, and Bulgaria, which has a land border. The second category comprises the countries of destination. The most popular of these (in 2019) are located in western and northern Europe: Germany, France, Belgium, the Netherlands and Sweden.²¹ The third category comprises the countries of transit. During the refugee crisis of 2015-2016, these were mostly the countries along the 'Balkan route' between the Greek islands and Germany: Slovenia, Croatia, Austria, Serbia, Macedonia and Hungary.²² These geographical differences, which partly overlap with the above-mentioned ideological differences, are so significant that the asylum impasse can essentially be described as a conflict between 'South', 'North' and 'East'.²³

In this context, the most significant imbalance is that, in practice, the Dublin Regulation generally imposes responsibility for asylum seekers on the member state of entry. According to the southern member states, this places a disproportionate burden on the countries of arrival. While *all* member states benefit economically from the EU's open internal borders, under the Dublin system the responsibility for controlling the EU's external border and examining asylum applications, which makes this open border policy possible, falls primarily on the states located on the external border. These states regard the Dublin rules as unfair and no longer accept the North's phlegmatic response that it is simply a matter of 'bad geographical luck'.

For many years, this imbalance in responsibilities was unofficially redressed through a lax application of the Dublin rules. Southern member states neglected to develop an effective asylum administration, and many migrants were able to travel northwards without interference as border police and other official agencies regularly looked the other way. The northwestern European countries were aware of these practices but did not make an issue of it, being fully aware of the benefits they derived (and continue to derive) from the Dublin system. This pragmatic hypocrisy on both sides was obviously undesirable from a legal perspective, but it preserved a precarious political balance as long as the number of migrants and asylum seekers remained relatively small.

With the dramatic and highly visible rise in the number of asylum seekers to 1.25 million in 2015, this was no longer the case. Since then, the South has called for the reform of the Dublin system (under the banner of 'solidarity'), in return for which the North has demanded tighter border controls and better reception of asylum seekers ('responsibility'). Even countries in or bordering the Balkans were suddenly confronted with the migration issue in 2015, when large groups of asylum seekers sought a way to reach northern Europe via Budapest and Vienna. In their eyes, migration is a western European problem – since that is where the asylum seekers wish to go – for which they should not bear any responsibility. That is why they are opposed to the relocation of asylum seekers to their countries ('an unacceptable form of solidarity'), while countries in northern and southern Europe insist that they too should contribute. This is a key aspect of what essentially amounts to a three-way stalemate.

Administrative capacity

There is a substantial difference in administrative capacity between northwestern Europe, on the one hand, and southern and southeastern Europe, on the other. The arrival of consistently large numbers of asylum seekers and migrants from Africa and the Middle East is a relatively new phenomenon. The Dublin arrangements – drafted at a time when the EU was smaller and more homogeneous than it is at present and before smartphones and social media, before cheap air travel and mass people smuggling, and before civil wars in the Arab world and climate refugees from Africa – made no allowance for such developments. The administrative infrastructure of the Mediterranean member states is not designed to deal with these numbers and has not been expanded sufficiently since 2015. The southern countries of arrival also have greater economic problems to contend with than the member states in northwestern Europe. This inequality further contributes to the perception that

the Dublin system is unfair: under its rules the heaviest burden falls on the weakest shoulders in matters relating to asylum and migration.



Northwestern Europe attaches great importance to oversight and good governance. National and local governments and the public are concerned about Europe's inability to control primary and secondary migration and the rising number of asylum applications, especially because there is a feeling that the southern member states are not taking their concerns about registration and better oversight sufficiently seriously. In this area, the North has a natural ally in the European Commission, which as a supervisory body is inclined to push for compliance with whatever agreements are ultimately adopted.

Differing concepts of sovereignty

A fourth and final major source of conflict concerns the extent of the member states' attachment to national sovereignty. It is not one of the root causes of the political impasse (in contrast to ideology, geography and administrative capacity) but it does place obstacles in the path to certain solutions.

Cooperation in the area of border control is a particularly sensitive issue. The Schengen Borders Code does not grant the Commission the power to intervene in cases where a member state loses control of its external border, even after the revision of the code following the refugee crisis of 2015-2016.²⁴ This means that assistance from or intervention by EU institutions or other member states, for example to compensate for administrative weaknesses, is not always welcome. Spain and Italy are quick to perceive the arrival of foreign 'eyes and ears' as demeaning. On the other hand, under the pressure of recent developments Greece, Cyprus and Malta have become more willing to accept outside support.

▶ 2.3 Solution strategies

Interests, opinions and situations are bound to differ in a Union of 27 member states; uniformity and unanimity would be much more surprising. In each case, the aim is to find a strategy that facilitates the adoption of joint decisions and solutions. The EU has a large number of tried and tested strategies at its disposal for this purpose. The following sections briefly analyse these strategies in the light of the asylum impasse.

Majority decision-making

The classic method for breaking a stalemate is majority voting, which effectively cuts the proverbial knot rather than seeking to disentangle it. Qualified majority voting (QMV)²⁵ in the Council is the standard voting procedure for the adoption of EU law, although in practice consensus is usually preferred. However, as noted above, it was precisely the use of this method by the Luxembourg Presidency, at the urging of the Commission, in the decision on mandatory asylum quotas in September 2015 that worsened the atmosphere between the member states and deepened the impasse. In addition, it transpires that the option of employing QMV, as provided for in the Treaties, does not guarantee that a decision will actually be implemented. Some member states are willing to disregard existing legislation if they consider it to be incompatible with their national interest. A functioning asylum system therefore requires the commitment of all relevant member states.

Against this background, any *political* route out of the impasse must involve decision-making by consensus. This is reflected in the proposals presented by the von der Leyen Commission in the autumn of 2020. Asylum policy cannot be developed without due regard for the concerns of all member states. The existing QMV rule does not need to be amended for this purpose; it remains a useful instrument of leverage when all else fails.

Differentiated integration via lead groups

A second way to circumvent a blocking minority is to continue with a smaller group of committed member states. Lead groups are a form of differentiated integration in which the participating countries agree on new rights and obligations that are not shared by the other member states. The Treaty on European Union (TEU) makes provision for such enhanced cooperation, but lead groups have also been formed outside the framework of the Treaty or in its margins.²⁶ However, this strategy is difficult to implement in the field of asylum. The common asylum system (which started with ‘Dublin’) was originally designed as a counterweight to the opening of the EU’s internal borders (‘Schengen’), and the two are closely connected both politically and in the public’s perception.²⁷ Those who want open internal borders should not be surprised that the EU’s external border has become a matter of shared concern. It is therefore hard to imagine that a lead group on asylum would not have repercussions on free movement in the internal area (see chapter 7).

Division of labour between member states: flexible solidarity

Another form of differentiated integration is based on the division of tasks between member states. In the debate on reforming the CEAS, this is referred to as ‘flexible solidarity’.²⁸ The transition from ‘solidarity’ (a fair division of the same tasks) to ‘flexible solidarity’ (a fair division of tasks but not necessarily the same tasks) is a key innovation in the approach proposed by the Commission in its New Pact on Migration and Asylum. Besides relocating asylum seekers, non-external-border states could, subject to certain conditions, help reduce the burden on external-border states in crisis situations in other ways, for example via contributions in the area of return policy or capacity-building. The difficulty lies in the weighing of the various elements, especially when the calculation involves political as well as financial costs. In the case of asylum and migration, the political element is always a factor. However, given that the impasse emerged in connection with a core aspect of ‘solidarity’, namely relocation of asylum seekers, the above-mentioned alternative at least creates an opening. Defining flexible solidarity will nevertheless be one of the trickiest aspects of the present asylum proposals (see chapter 5).

Step-by-step approach

Another way to circumvent the resistance to certain aspects of such a complex set of legislative proposals as the migration and asylum pact is to cut it up into smaller pieces and pursue accords on specific issues. The Juncker Commission rejected this option and stuck to its ‘package approach’. Given the interwoven nature of the various aspects of asylum policy, there was definitely something to be said for this decision, but the result was stagnation on all fronts. The von der Leyen Commission has also presented a single package, but it has provided more scope for flexibility and decoupling. The European Parliament and the Council Presidency, which is currently held by Germany, also appear to be open to a step-by-step approach.

As part of this strategy, it is important to identify the aspects that (a) are amenable to practical progress in the absence of a final agreement on all other issues and (b) do not upset the balance of the negotiations, for example by giving one group of member states so much that they lose their incentive to compromise on other issues. The AIV believes that such opportunities for practical progress do indeed exist (see chapter 5).

Linkage

Linkage is an inverse strategy, which has also been tried and tested many times in the EU. Instead of reducing the package that forms the subject of the negotiations (as in the case of the step-by-step approach), the aim of this strategy is to *expand* the package by establishing links to other legislative dossiers or political decisions. In the spring of 2020, for example, the stalled negotiations on the establishment of a COVID-19 recovery fund were revived by linking them to the ongoing discussions on the Multiannual Financial Framework (MFF). In a similar way, the asylum dossier could in theory have been linked to the MFF or the climate negotiations. However, it requires a great deal of political manoeuvring to achieve the *concurrent alignment* necessary for such an all-encompassing balancing

act. Due to its complexity, the migration and asylum pact does not really lend itself to this purpose. Moreover, given the political and ideological nature of the migration conflict (see above), there is a risk that the impasse would spread to the newly added dossier (cf. the recent attempts to link the EU's new multiannual budget to rule-of-law conditionality). In light of the above, linkage has little chance of success and should be discouraged.

An expanded executive role for the Commission and EU agencies

Asylum policy is largely about practical implementation and administrative capacity: reception, registration, oversight and so forth. Administrative weaknesses in a particular member state can be counterbalanced by other parties. One option is to allocate such executive tasks to the Commission or certain EU agencies. Although member states have traditionally been reluctant to grant EU institutions an executive role in political sensitive areas such as border policy, they established the Frontex border agency in Warsaw in 2008, followed by the European Asylum Support Office (EASO) in Malta in 2011. The official mandates of these agencies, which initially focused on providing coordination and support, were functionally expanded at the height of the migration crisis of 2015. As a result, Frontex was officially relaunched as the European Border and Coast Guard Agency in 2016.²⁹ In Greece, in particular, both agencies have taken the lead in setting up initial reception and registration hotspots, and EASO is in practice carrying out a large share of the asylum procedures

Strengthening EU agencies is a promising strategy. For one thing, it can help member states improve procedures at the EU's external borders. However, there are three conditions. First, the necessary additional resources must obviously be allocated via the EU budget. Second, the member state concerned must be willing to put up with such outside interference and set aside potential sensitivities concerning sovereignty. This is because support of this nature cannot be imposed against a member state's will under the EU's current constitutional framework. Third, this approach calls for detailed public accountability. Traditional regulatory agencies are perfectly able to carry out their technocratic activities on the sidelines on the basis of a clearly defined mandate, but this does not apply to the performance of administrative tasks that go to the heart of the political debate. Regardless of any procedural precautions, action at the EU's external border, including maritime search and rescue and the initial assessment of asylum applications, also requires political backing, judicial oversight and democratic accountability.

Cooperation between member states

As an alternative to entrusting executive tasks to the Commission or EU agencies, *bilateral* cooperation between member states can also offset administrative weaknesses and facilitate solidarity. One advantage of this strategy is that it is built on an explicit and steadfast commitment by both sides to rectify a problem. In addition, it can strengthen mutual trust and lead to the sharing of best practices. At the same time, the scope of such bilateral initiatives is limited, as their implementation does not result in an EU-wide approach. They accordingly do not offer a way out of the impasse as such, but they can help improve the general atmosphere and/or lead to practical progress. In the AIV's opinion, both advantages make it worthwhile to pursue this strategy, where applicable, and explore its application in other areas in greater depth, especially against the backdrop of the numerous obstacles standing in the path of other strategies.

International cooperation

A final way to tackle the problem that is overwhelming the member states – due to disagreement or insufficient implementing capacity – is to externalise it, that is, to enter into partnerships with third countries that are willing to take on (part of) the work in exchange for a non-monetary consideration or financial compensation. This is an obvious strategy for dealing with an inherently cross-border issue such as asylum. Since the 2000s, Spain and Italy have been gaining experience in the externalisation of border control, in particular with Morocco, Mauritania, Senegal and Libya. The EU and the member states also work together with various international organisations, such as the office of the UN High Commissioner for Refugees (UNHCR) and the International Organization

for Migration (IOM), in the field of refugee protection. Another example of international cooperation is the EU-Turkey Statement of 2016, which comprises agreements on European support for the reception of (mostly Syrian) refugees in Turkey and the resettlement of some of these refugees in Europe in exchange for effective control of the Turkish border.³⁰

A recurring question is whether Europe is in a position to externalise this problem and what political, financial and/or moral price it would pay for doing so. The balance of power between the EU and its member states, on the one hand, and countries of origin and transit in Africa, the Middle East and Central Asia, on the other, is shifting in favour of the latter. This is due in part to a relative decline in Europe's financial power and the fact that these countries can also turn to China for support. The recent discovery and weaponisation of irregular migration across Europe's external border by third countries (including occasionally by Morocco and Turkey) is also a factor.

Given that externalisation can only succeed if it is in the interests of all parties, Europe will have to offer more incentives than it has in the past. Although it still has considerable leverage, for example via market access and visas, the EU needs to think about other trump cards that it could play, such as opportunities for legal migration (see chapter 6).

In general, this form of international cooperation requires strict management and a capacity to act at geopolitical level, with diplomatic tasks being divided appropriately between national capitals and 'Brussels' (e.g. on the basis of geographical or historical ties) and national and EU efforts reinforcing each other. The EU's common foreign policy has not always been capable of such resolve. As regards the call for a more 'geopolitical' Union, which is heard in Brussels, Paris, Berlin and also The Hague, such efforts to engage in 'border politics' would serve as something of an experiment.

Developments since the impasse arose

Since the impasse arose in 2015-2016, developments on various fronts have produced a new dynamic, especially in relation to border policy, court judgments, the balance of power within member states and EU institutions, and the COVID-19 pandemic. As a result, circumstances have changed in certain respects over the past five years, and in some ways for the better.

▶ 3.1 Border policy: the external border is our common border

Although the negotiations on the asylum system ground to halt in 2016, EU member states and institutions were able to provide a different policy response to the refugee crisis, namely in the form of border policy. Individual member states introduced various forms of control at the EU's internal borders, and the EU as a whole took far-reaching decisions to strengthen its external borders. Both developments are significant in relation to the asylum impasse, although it should be noted that there are obviously limits – both legal and moral – to the way we protect our borders.

Temporary introduction of internal border controls

During the refugee crisis, the reintroduction of border controls was an early political reflex that was adopted by many member states. While few were surprised when Prime Minister Viktor Orbán of Hungary closed off his country's southern border with fences in June 2015, many were struck by the fact that Sweden, a country known for its generosity in granting asylum, closed its bridge to Copenhagen – a symbolic and practical cornerstone of the free movement of persons – in January 2016. Incidentally, this did not constitute a direct violation of European law, which permits the reintroduction of internal border controls in certain circumstances.³¹

During the crisis of 2015-2016, internal border controls were used to stem the tide of uncontrolled migration. This not only put pressure on the area without internal borders but also resulted in violations of the right to asylum in a number of cases. In addition, these controls have now well exceeded the maximum time limit for their reintroduction under the Schengen Borders Code.³² Almost five years after the refugee crisis, the continued need for and proportionality of these internal border controls are therefore open to question.

Strengthening Frontex and tightening the Schengen rules

In a joint response to the crisis, the EU relaunched the Frontex border agency as the European Border and Coast Guard Agency in 2016.³³ As part of this process, it established a standing corps of 1,500 border guards who are required to be available on call to assist member states in controlling the EU's external borders. Their role is thus not to replace national border guards. A new Frontex regulation adopted in 2019 provides for the expansion of this corps to 10,000 border guards, which represents a substantial reinforcement.³⁴

In addition, in order to encourage member states to take responsibility for controlling their section of the EU's external border, a vulnerability assessment mechanism that can penalise member states for failing to make improvements was introduced in 2016. In this context, Frontex liaison officers carry out yearly assessments in the member states to detect vulnerabilities in their border control systems.

In extreme cases, failure to comply with Council recommendations based on these assessments can lead to the introduction of internal border controls by other member states. In other words, a member state that neglects its responsibilities regarding external border control can – as a last resort – be temporarily excluded from Schengen. Together with the Schengen evaluation mechanism, which was introduced in 2013 to monitor the implementation of the Schengen rules by member states, these measures are meant to instil a high level of confidence in the proper functioning of the EU's external border control procedures so that its internal borders remain open.

Implications for the asylum impasse

These two important developments in the field of border policy have two implications for the asylum issue. First, they provide an *incentive*. As long as the impasse continues, the cloud of new border closures will loom over the internal market. Such closures amount to a restriction of Schengen, with all the economic consequences this entails, especially for a trading nation such as the Netherlands. Second, these developments set a *precedent*. The strengthening of Frontex implies that the member states have assumed joint responsibility for the EU's external borders. This goes hand in hand with a public acknowledgement of certain facts, for example that, from a Dutch perspective, the Greek-Turkish border is *de facto* also our border. This new insight concerning the nature of border control has already been translated into responsibilities and institutional balances. In addition, all member states can be ordered to take political and institutional steps to look after individuals who seek asylum at Europe's common external border.

► 3.2 European case law: exposing shortcomings

In order to define the scope of European asylum policy it is also important to examine judicial rulings, especially those of the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union (CJEU) in Luxembourg. Both courts have recently handed down judgments that are relevant to the political impasse. They have adopted important interpretations of the current asylum system that clarify the limits of European asylum policy.

Lawfulness of the relocation mechanism

First of all, it is relevant that the CJEU affirmed the lawfulness of the emergency measures taken during the refugee crisis of 2015-2016 and that it subsequently determined that countries that did not implement those measures had violated EU law. It did so in the framework of infringement proceedings brought by the Council and the Commission against Poland, Hungary and the Czech Republic. The CJEU rejected the defence of these member states, which was based on arguments concerning public order and ethnic homogeneity.³⁵

However, these cases also reveal the limitations of such infringement proceedings in situations where member states lack the political will to comply with the Court's judgments.³⁶ Despite the fact that the Treaty on the functioning of the European Union (TFEU) provides for the possibility of imposing a fine or penalty payment for non-compliance with CJEU judgments, this was not possible in the case at hand because the relocation decisions in question had already expired. Thus, although the CJEU ruled that the refusal to consent to the relocation of asylum seekers was unlawful, its judgment had no further consequences for the countries concerned.

Shortcomings in reception

Both Courts have ruled that the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFR) do not permit 'Dublin transfers' in cases where the receiving country's asylum system is characterised by systematic shortcomings.³⁷ These judgments shine a light on the varying quality of reception in the member states. Cooperation within the CEAS presupposes mutual trust in each other's legal systems, but when this trust is no longer justified the system grinds to a halt. This places additional pressure on member states dealing with inbound secondary migration, since they are not allowed to send asylum seekers back to their country of first entry in such situations.

In a number of judgments concerning the situation in the hotspots on the Greek islands, the European Court of Human Rights determined that reception conditions were very poor. Despite ruling, in line with previous judgments, that the arrival of large numbers of refugees did not justify violations of article 3 of the ECHR, it noted that this factor should be taken into account in the evaluation of the facts. According to the Court, the threshold for a violation of article 3 had not been exceeded.³⁸ However, a new case could yet produce a different outcome, thereby undermining the practical functioning of the Dublin system.

Legal routes and judicial protection

In 2020, the European Court of Human Rights issued a judgment on Spain's removal in 2014 of asylum seekers who had scaled the border fence surrounding the Spanish enclave of Melilla.³⁹ The central question in this case was whether Spain had violated the prohibition on collective expulsion. The Court ruled that Spain had not acted unlawfully by immediately expelling the asylum seekers, as the individuals in question had not taken advantage of existing legal options for obtaining lawful entry into Spain, which they could have done at a nearby border crossing. In the Court's opinion, the prohibition on collective expulsion had therefore not been violated in this case.

Prohibition of detention

The European Court of Human Rights also took account of practical realities in *Ilias and Ahmed v. Hungary*.⁴⁰ In this case, it ruled that refugees in the transit zone on the Hungarian border had not been deprived of their liberty, as they were able to return to Serbia, a safe third country. In its judgment, the Court noted that it had given due consideration to the exceptional situation at the border: 'its [i.e. the Court's] approach should be practical and realistic, having regard to the present-day conditions and challenges'. In contrast, in a case concerning the same transit zone, the CJEU concluded that detention had occurred in violation of EU asylum law.⁴¹ While the details of the two cases differ – and EU law imposes stricter requirements than the norms of the ECHR – these judgments show that balancing the basic principles of asylum law against its limits does not always produce an obvious outcome.

Implications for the asylum impasse

Some of the above-mentioned judgments clearly expose the current shortcomings of the Dublin system and the failure of member states to carry out their responsibilities in practice. However, the judicial path offers no answer in cases where member states are unwilling or unable to comply with politically controversial aspects of the CEAS. This is true of both the political implementation (by the Visegrád countries) of the contested relocation decisions of December 2015 and the improvement of unacceptable reception conditions (notably in Greece). Although the Courts' judgments set the parameters of European asylum policy, the effective implementation of member-state obligations remains of paramount importance. In other words, the impasse in European asylum and migration policy cannot be resolved by judicial means: a political solution is required.

It is also worth noting that the highest European courts approach asylum law in light of the circumstances of each particular case. It goes without saying that the European Court of Human Rights and the CJEU will continue to interpret and apply European legal norms – including the fundamental principles of asylum and migration law – without restriction. At the same time, their reasoning in recent cases confirms that they are not losing sight of the need to strike a balance between effective legal protection and the importance of enforcement.⁴²

► 3.3 National governments and EU institutions: renewed engagement

Since 2015, developments in the political situation of the member states and the EU institutions have created opportunities for breaking the political impasse in European asylum policy.

Political developments in Greece

Greece was in the news in 2020 owing to the appalling conditions in the reception centres on the Greek islands, which reached a low point with the fire in the Moria refugee camp in September, and on account of its decision to turn back migrants at its land border with Turkey in March, after the Turkish authorities had brought thousands of migrants to the border in order to put pressure on Greece and the EU. Greece allegedly violated asylum law in these cases, possibly even with the cooperation of Frontex. The country's new asylum laws, adopted in March 2020, have also attracted considerable criticism.⁴³

At the same time, it is important not to lose sight of the fact that the Mitsotakis government, which took office in July 2019, is actively seeking to improve the situation. It is working harder than the Tsipras government (2015-2019) to adopt structural measures aimed at improving reception, speeding up asylum procedures and ensuring the more effective return of rejected asylum seekers. It is also serious about strengthening its national asylum agency, which it is doing with the help of European resources and expertise. One example of this is the June 2020 agreement on cooperation between the Netherlands and Greece in the area of unaccompanied minor refugees.⁴⁴ Similarly, the country is seeking to tighten controls at its borders, which in many cases double as European external borders, with support from Frontex.

Expanding the Visegrád Group

Against the background of the asylum impasse, the Visegrád Group or V4, a quartet of central European member states comprising Poland, Hungary, the Czech Republic and Slovakia, has in recent years been supported in its opposition to the mandatory relocation of asylum seekers by several other member states. This applies in particular to Slovenia (especially following the return to office of Prime Minister Janez Janša 2020), Estonia and Lithuania. In substantive terms, the position of Austria and Denmark is also close to that of the Visegrád countries. This new constellation is referred to as Visegrád Plus. This reinforcement of the group of member states that show reluctance to engage in asylum solidarity and emphasise the importance of external border control is a significant political factor that would make it harder to isolate the V4 in the future.

Political developments in Italy, France and Germany

While Germany was preoccupied with a divisive domestic debate on migration in 2015, Italy felt abandoned and France effectively remained on the sidelines, the three largest EU member states have since demonstrated renewed political will to find a shared solution.

In Italy, the political situation has changed as a result of the formation of a new government. Since the departure of the nationalist Lega party (and thus of Minister of the Interior Matteo Salvini) from the first Conte government in the summer of 2019, followed by the arrival of the Partito Democratico as the Five Star Movement's new coalition partner, the second Conte government has proved to be a more constructive participant in the asylum debate than its predecessor. This is a significant development given Italy's status as an external border state. In spite of these developments, the new government also regards the current proposals on mutual solidarity as inadequate, and the northwestern member states' concerns about Italy's weak border procedures will likewise not disappear at a stroke.

France's position has changed as a result of a sharp increase in the number of migrants arriving in the country since 2017.⁴⁵ It accordingly feels a greater need to contribute actively to solving the asylum issue than it did in 2015-2016. Paris has lent its support to the Commission's migration and asylum pact. Relations between France and Italy, which were at an historic low during the first Conte government, due in part to disputes over asylum and migration, have also improved.⁴⁶

In Germany, in the aftermath of the refugee crisis of 2015, the CDU/CSU spent many years fighting internally over the direction of German asylum and migration policy. The main protagonists in this

fight were Chancellor Angela Merkel and current Minister of the Interior and then CSU party leader Horst Seehofer. Seehofer's proposals to unilaterally impose a ceiling on the number of refugees that Germany would admit (much like Austria had done) could not count on Merkel's support and in any case did not survive judicial scrutiny. Since 2018, however, the Chancellor and the Minister of the Interior appear to have moved closer together on this issue. In particular, Seehofer now acknowledges that a solution must be found in the political centre and that this is only possible at European level rather than through German *Alleingang*. This rapprochement in the area of asylum and migration within the CDU/CSU has increased the effectiveness of Germany's actions at EU level, where it currently holds the rotating Council Presidency.

The Malta Declaration and the letter from France, Germany, Italy and Spain on flexible solidarity

In September 2019, the renewed engagement of France, Germany and Italy resulted in their adoption, together with Malta, of a declaration on the reception of migrants rescued at sea. The cornerstone of this declaration is a mechanism that facilitates the relocation of such migrants in cases of disproportionate migratory pressure on Italy or Malta. Berlin and Paris were keen to provide a concrete demonstration of solidarity with the new government in Rome. In addition, the four EU member states wished to make a joint contribution to the debate on reforming this aspect of the CEAS.

To date, however, only a limited number of member states have signed up to the declaration. Most member states, including the Netherlands, believe that it does not provide sufficient assurances concerning the controlled disembarkation of migrants rescued at sea.⁴⁷ Nevertheless, search and rescue has become an inseparable part of the asylum debate. In the AIV's opinion, it would be useful for the Netherlands to reach out to the Mediterranean member states on this matter.

In April 2020, France, Germany and Italy launched another, broader initiative, this time with Spain, to lend direction to the asylum debate. In a letter to the Commission, the ministers with responsibility for migration in these four countries, including the aforementioned Seehofer, called for reform of the CEAS.⁴⁸ The four countries advocated the establishment of a new mechanism for the relocation of asylum seekers, based in part on the idea that member states could, by way of exception, resort to measures of solidarity other than relocation. Picking up the gauntlet, the Commission developed the idea of 'flexible solidarity' in the migration and asylum pact published on 23 September 2020. On this particular issue, the four large member states thus paved the way for the Commission's pact.

European elections and consequences of the European Parliament's new composition

The European elections of May 2019 fundamentally changed the European Parliament's composition. The Christian democrats of the European People's Party (EPP) and the social democrats of the Progressive Alliance of Socialists and Democrats (S&D) no longer share a majority. This means that they need to work with other parties on various issues, including asylum and migration, in order to secure the majorities they require. In this context, it is also worth recalling that the Identity and Democracy (ID) group won 76 seats in the 2019 elections. The views on migration of the right-wing populist parties that make up this group played a key role in their electoral success.

While the main parties in the European Parliament broadly endorsed the Juncker Commission's proposals, they now appear to have realised that a breakthrough in the field of asylum requires a different approach. Centrist parties such as the EPP, S&D and Renew Europe have accordingly responded positively to the Commission's new proposals and are favourably disposed towards the pact as a basis for reforming the CEAS.

A new Commission and the announcement of the migration and asylum pact

As the nominated President of the Commission, Ursula von der Leyen announced the recently published migration and asylum pact as a key part of the political programme that she presented

to the European Parliament on 16 July 2019.⁴⁹ Von der Leyen has adopted a fundamentally different approach to that of her predecessor, Jean-Claude Juncker. Specifically, she has taken a more modest position and does not claim to have all the answers in matters relating to asylum policy. The new Commission has drawn lessons from the events of 2015, when the Luxembourg Council Presidency, with the encouragement of the Juncker Commission, pushed through the adoption of the relocation mechanism against the will of several member states, thus precipitating the legislative impasse, as stated above.

Given that several member states lacked faith in the Juncker Commission's approach, the changing of the guard following the European elections of 2019 was a key prerequisite for relaunching the reform of the European asylum system. In order to restore trust, the von der Leyen Commission launched an extensive consultation process involving all member states and various civil-society organisations from the field of asylum and migration in the autumn of 2019. The purpose of this consultation, which was led by Commissioners Ylva Johansson and Margaritis Schinas, was to do the groundwork for the development of the migration and asylum pact.

► 3.4 COVID-19: the great unknown

The COVID-19 pandemic is clearly having a profound impact on asylum and migration flows. The precise nature and scope of its long-term effects are as yet hard to predict, but the broad outlines of two key developments are already visible.

First, it is clear that migration figures decreased worldwide during the acute phase of the outbreak. Border closures for the sake of public health obviously obstruct both regular and irregular migrant flows. Globally speaking, there has even been a 'reverse flow' since the outbreak of the pandemic. This means that migrants are returning to their countries of origin because there is no work in countries of destination or because they fear infection.

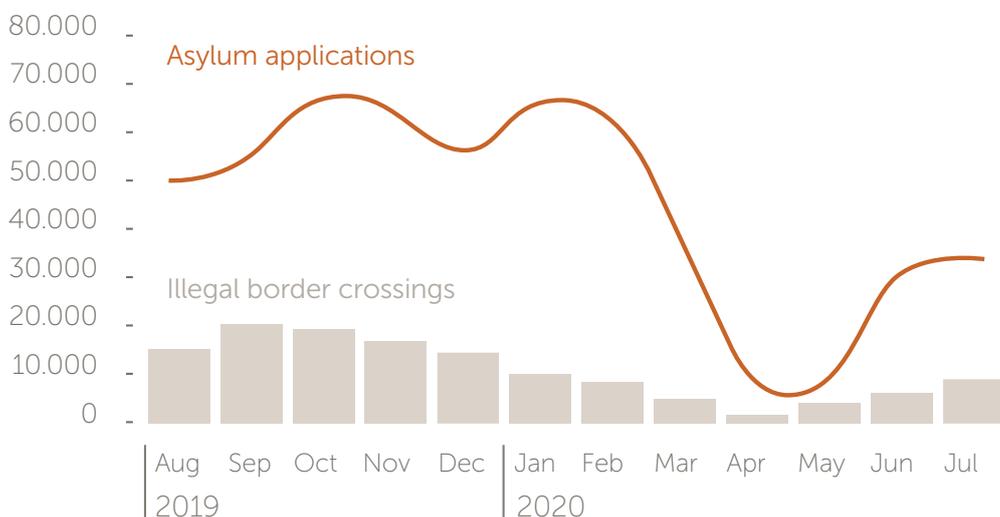


Figure 1 - The number of asylum applications and illegal border crossings fell rapidly in March 2020 as a result of the COVID-19 pandemic. However, applications began to rise again in May 2020. **Source:** EASO

In Europe, too, the partial closure of the EU's internal and external borders in the first half of 2020 led to a substantial drop in the number of irregular migrants arriving in the EU.⁵⁰ This applies primarily to the western and eastern Mediterranean routes, where numbers fell, respectively, by 46% and 64% compared to the same period last year (January-August). On the western Balkan route and the central Mediterranean route, however, the number of illegal border crossings began to rise again fairly quickly. Since the summer of 2020, numbers have been increasing everywhere.

Second, the COVID-19 crisis entails a high risk of increased irregular migration in the near future. Although much remains uncertain, including from an economic perspective, it is clear that the pandemic will lead to a global economic decline that will hit the populations of middle and low-income countries hardest.⁵¹ The first signs of this are already visible in the increased number of irregular migrants travelling from Tunisia to Europe along the central Mediterranean route.⁵²

In its advisory letter 'The Netherlands and the Global Approach to COVID-19' of May 2020, the AIV highlights the link between the financial crisis of 2008 and the Arab uprisings of 2011, which led to the migration crisis of 2015. There is a genuine risk that a new cycle of economic malaise will lead to political instability, or worse. The measures advocated in the AIV's advisory letter with a view to mitigating the economic and humanitarian consequences of the COVID-19 crisis are therefore equally relevant for preventing a recurrence of the situation – potentially on an even larger scale – that the EU faced in 2015.⁵³

'The COVID-19 pandemic increases the need to be prepared for the next migration crisis in Europe.'

In conclusion, although closed borders temporarily reduce irregular migration – a phenomenon that has likewise not escaped the notice of the European public – the COVID-19 pandemic is ultimately more likely to provide people with new reasons to migrate and apply for asylum, as well as to encourage them to look for other routes to their desired destinations. In many cases, this will expose migrants to further dangers and force them to turn to people smugglers. In the AIV's opinion, the COVID-19 pandemic increases the need to be prepared for the next migration crisis in the regions surrounding Europe, making it all the more urgent to develop a solid and shock-resistant asylum system at EU level.



The Commission's new proposals

On 23 September 2020, the European Commission presented its New Pact on Migration and Asylum.⁵⁴ The purpose of this package of measures is to break the current impasse in the negotiations on the common asylum and migration system. The proposals that make up the pact build on the current system, amend several existing reform proposals from 2016 and after, and supplement all this with a number of new elements.⁵⁵

The von der Leyen Commission's approach is more flexible than that of its predecessor. Besides its aforementioned role in creating the impasse in 2015, the Juncker Commission's subsequent 'package approach', under which agreement is possible only once all elements have been agreed, similarly failed to help break the impasse.

Naturally, the new Commission, like its predecessor, takes the view that asylum reform requires a coherent set of measures and that the process will be complete only once all elements have been worked out and agreed. Nevertheless, it now appears to see the merits of making progress on a step-by-step basis in different areas in order to improve the reform's chances of success and start working on key issues.

In substantive terms, the pact's key innovations also reflect a desire to increase the chances of acceptance among the member states. A notable example is the proposed revision of the Dublin Regulation, which is to be renamed the 'Regulation on asylum and migration management'.⁵⁶ Specifically, the Commission proposes to adapt the relocation mechanism for asylum seekers in such a way that efforts to reduce the burden on external border states in crisis situations are not limited to the relocation of asylum seekers but can also take other forms, such as support in the area of return policy or capacity-building. This aforementioned 'flexible solidarity' opens the door to the participation of the Visegrád Plus countries, which are fundamentally opposed to the relocation of asylum seekers. As a result, they have not (yet) rejected the pact out of hand.

The pact's second key innovation lies in the proposals for border screening and mandatory border procedures,⁵⁷ which are meant to improve border registration and ensure the swift examination and classification of asylum applications as either likely to receive a negative decision or likely to receive a positive decision. The purpose of this is to gain a better understanding of who is coming in, prevent secondary migration and ensure the rapid return of asylum seekers who are not entitled to protection. This aspect is of particular importance to countries of destination in northwestern Europe, including the Netherlands, which require more control over the high rate of onward movement by asylum seekers.

In contrast, the pact places the responsibility for implementing these measures on the countries of eastern and – in practice mainly – southern Europe, which will only be willing to do so in exchange for adequate support and solidarity. Spain and Italy have accordingly been critical of the proposals, albeit without rejecting them. Their relatively mild response is due in part to the Commission's efforts to keep these countries onside during the preparatory consultations. It is also linked to the adoption of the European COVID-19 recovery plan, which is of vital importance to Italy and Spain.

The third key innovation is the focus on a more effective return policy, which can count on widespread support among member states. In this case, however, the main hurdles lie in its

implementation and the willingness of third countries to cooperate in this area. Although the pact advocates forming partnerships with countries of origin and transit, the details of this external component have yet to be laid down. The pact also provides for the appointment of a European 'return coordinator' to coordinate EU return policy and increase its effectiveness by means of operational support for and between member states. This component likewise still requires further elaboration.

'In the AIV's opinion, however, the more modest and inclusive tone adopted by the von der Leyen Commission, which is also reflected in the pact's substantive choices, makes the pact an important and well-considered step in the right direction.'

It is clear that the asylum and migration pact cannot instantly break the asylum impasse. The outcome of the initial meetings of the Justice and Home Affairs Council following the publication of the pact confirms that there is still a long way to go. In the AIV's opinion, however, the more modest and inclusive tone adopted by the von der Leyen Commission, which is also reflected in the pact's substantive choices, makes the pact an important and well-considered step in the right direction. Experiences since 2015 show that the impasse cannot be resolved through political 'arm wrestling'. All in all, the pact may have slightly loosened the knot, but it is still far from being disentangled.

The internal accord

In chapters 2-4, the AIV discusses the nature of the impasse in European asylum policy and analyses several potential solution strategies, as well as various relevant shifts in the political balance of power, before finally outlining the Commission's new proposals. In the following two chapters, the AIV relates these findings to the main components of the asylum and migration system. Chapter 5 focuses on the 'internal' components of the system, which lie within Europe, while chapter 6 focuses on the 'external' components, which lie outside it.

In the AIV's analysis, a breakthrough in European asylum policy requires the adoption of two major accords: an accord within the EU, between the member states and supported by the European Parliament, and an accord – or a series of accords – between the EU and countries of origin and transit outside Europe. In chapters 5 and 6, the examination of the various components of the asylum and migration system concludes with a discussion of the relevant elements of the two major accords. Chapter 7 considers the future of 'Schengen' in the light of the internal accord. In its final conclusions, the AIV briefly discusses the two major accords in relation to each other.

The AIV wishes to emphasise once more that its substantive analysis of the various components of the migration system in the following chapters is not exhaustive. This is because the present report is limited to examining how the European asylum impasse can be broken politically and strategically. However, an effective European asylum system can only be achieved by improving all components of the asylum and migration system.⁵⁸ That is why chapters 5 and 6 discuss these components in relation to European asylum policy. Incidentally, the government's Integrated Migration Agenda of 2018 also recognises the strong interdependence between the various components of the migration system.⁵⁹

► 5.1 Screening and border procedures at the EU's external borders

The first internal component of the European asylum system concerns the procedures at the EU's external borders. During border procedures, asylum seekers are kept at the border for the duration of the procedure and are not placed in reception centres in other locations in the member state concerned. This ensures that asylum applications can be examined immediately upon arrival – in some cases even before admission to EU territory is formally granted – thus enabling the authorities to determine at an early stage who is entitled to admission (and thus to residence and integration) and who is not (and so must leave).⁶⁰ The idea is to have more control over who enters – and how, where and why they do so – and to restrict secondary migration within the EU.

This is an essential component. A sound procedure for the registration and initial screening of asylum seekers at the external border is a precondition for a well-functioning European asylum system. However, the border procedure is also of paramount importance for other reasons: what happens there largely determines Europe's image in terms of how it treats asylum seekers. It is also there that the dilemma between upholding legal norms, including the principle of *non-refoulement*, on the one hand, and the practical and political need for rapid decision-making on asylum applications and the swift and effective return of those who are not entitled to protection, on the other, is most acute. The key question is how to design a procedure that guarantees effective legal protection in each individual case while also being efficient in terms of time and resources. This is a challenge for the EU as whole

In practice, this burden falls mainly on the shoulders of the southern member states. Be that as it may, they are not the preferred final destination of most asylum seekers and therefore have less of an interest in carrying out effective registration. This changes when migrants are not (or no longer) able to continue their journey, as is currently the case in Greece. In an area with open borders, however, the basic premise is that little to nothing can be done to prevent the secondary migration of migrants once they have managed to cross the external border.

Under current conditions, the preferred countries of destination, including the Netherlands and other northwestern European member states, have the most to gain from sound and effective border procedures, as they experience most of the consequences of inadequate border procedures and registration, especially in the form of secondary migration. These countries have therefore been calling for the introduction of a mandatory border procedure at the EU's external borders for some time.⁶¹

Developments

For many years, there has been talk of expanding border procedures. Discussion has focused on the idea of performing 'triage' at the border, allowing member states to rapidly differentiate between promising and unpromising asylum applications. Since 2015, this approach has been tested in hotspot procedures in Italy and Greece, with support from EASO. The procedure, which is based on a swift assessment of the need for protection, is linked to a relocation mechanism that allocates a certain percentage of asylum seekers with promising applications to other member states. Those who are not entitled to protection are meant to be returned immediately, with support from Frontex. In 2018, at the suggestion of the European Council, the Commission fleshed out this idea in a proposal on 'controlled centres'.⁶² This proposal has thus far not been incorporated into EU law.

Member states can also introduce accelerated border procedures at their own initiative on the basis of the Asylum Procedures Directive, but so far the majority rarely make use of this option.⁶³ Where they do, there are substantial differences in terms of implementation. For countries such as the Netherlands that favour a mandatory border procedure, this option is therefore not an adequate solution.

In recent years, the proposals concerning border procedures have been a source of controversy in negotiations on reforming the CEAS.⁶⁴ Within the Council, discussion focused on such issues as the mandatory or non-mandatory nature of such procedures, the grounds for applying them and the time limits that should apply. The aforementioned geographical differences between the member states repeatedly came to the fore in these debates. In addition, the Council and a majority in the European Parliament held discussions on the assurance of certain norms of asylum law, such as the right of judicial review. Despite the subsequent shift in the political balance of power in the European Parliament and the relatively positive reception accorded to the migration and asylum pact, many parties in the European Parliament will continue to look at these aspects in a critical manner.

The difficulties experienced with respect to relocation from the hotspots in Greece and Italy in recent years, as well as the toing and froing over the allocation between member states of migrants disembarked following search and rescue operations, has left the southern member states with little confidence that they will be able count on the solidarity they desire. This is because other member states have thus far shown little willingness to share responsibility for migrants showing up at the EU's external border.

A second problem, which is more technical in nature, is that the border procedure model employed by the northwestern member states cannot automatically be applied to other parts of the EU. After all, not all of the EU's external borders can be compared to the external border at Schiphol airport. The southern and eastern member states have longer borders which are more difficult to monitor and where larger numbers of migrants arrive. That is why attempts to introduce accelerated border

procedures in Greece fell short of expectations, despite support from EASO and Frontex.



In addition to the member states' conflicting interests, the application of the normative framework is on the line. The performance of pre-screening, triage and asylum and return procedures at the border has a direct impact on certain fundamental guarantees, such as the right to asylum, the principle of *non-refoulement*, the right to effective legal protection and the use of detention as a last resort. As in the case of the hotspot procedures, there is considerable criticism of the mandatory application of (standardised) border procedures in this regard.⁶⁵

A number of matters are therefore at issue. The first is the willingness of the member states on the EU's external border to implement border procedures effectively. The second concerns their ability to do so in a border environment that is difficult to control. And finally, border procedures need to be implemented in a way that guarantees compliance with asylum and refugee law.

The Commission's proposals

In its migration and asylum pact, the Commission presents proposals for border screening and for mandatory asylum procedures in certain circumstances. The primary objective is the rapid processing of 'unpromising' asylum applications at the border. In such cases, a decision concerning the person's right to protection would be adopted in the framework of an accelerated procedure, followed by their swift expulsion if the application is rejected. Other asylum seekers would be required to complete the regular asylum procedure. In this way, the Commission hopes to bring about a drop in the number of 'unpromising' asylum applications, thereby reducing pressure on the asylum system. Pre-entry screening is also meant to prevent uncontrolled onward migration of asylum seekers within the Schengen area.

This policy proposal is based on the assumption that a majority of migrants who come to Europe are not entitled to protection, and that they will be deterred by the prospect of short border procedures followed by immediate return. The practicability of the proposals will thus be determined in part by their deterrent effect on migrants who are not entitled to asylum and their ability to reduce the number of asylum applications relative to the available administrative capacity in the external border states. To a large extent, this proposal's success depends on whether it can establish credible accelerated return procedures and an effective return policy.

The second assumption is that asylum applications can be processed easily and swiftly by means of triage and border procedures. However, this depends on the available standard and overflow capacity, as demonstrated by the current problems surrounding waiting periods and turnaround times in the Dutch asylum procedure. In addition to being swift, procedures also need to be rigorous. Adequate legal protection is especially important at first instance in order to prevent time-consuming and costly reversals, and judicial review and appeal proceedings and drawn-out return processes.⁶⁶ The truth is that swift and rigorous procedures require substantial investment, and this places considerable demands on the capacity and operational capabilities of the agencies concerned.⁶⁷

Potential solutions

In the AIV's opinion, a border procedure along the lines set out in the pact will have to be part of a compromise on reforming the CEAS. However, this can only be successful if all parties concerned recognise that there is a direct link between mandatory border procedures and a fair allocation of tasks in respect of incoming migrants, both as regards relocation and refugee protection and as regards the effective return of those who are not entitled to such protection. In practice, this means that new agreements on improved border procedures are only likely to succeed if they go hand in hand with efforts to reform the current Dublin rules and restore the southern member states' faith in EU-wide solidarity. If this does not happen, the new agreements will be of little value, as implementation will not improve. In this context, a step towards the Commission's proposal for a

special agreement on the relocation of migrants following maritime search and rescue operations could serve as an initial and politically significant olive branch from countries such as the Netherlands to the southern member states. In return, for instance, those countries could urge Italy to treat registration and screening as a shared European interest. This argument can be made more forcefully now that Italy is also becoming increasingly concerned about the spread of COVID-19 by irregular migrants from countries that are currently subject to an entry ban, and following terrorist attacks committed by unregistered migrants who entered the EU via other member states. The discussion and prospect of such meaningful intermediate steps will focus political energy on shared interests and pave the way for the adoption of a major internal accord, which could keep member states from reverting to maximalist positions based on short-term self-interest.

If the past few years have taught us anything, it is that the shared interest of a robust European asylum system – which is necessary for controlling the EU’s external border and withstanding potential future migration crises – will remain out of reach as long as member states continue to negotiate from entrenched positions. Instead, they will have to draw closer to each other step by step, meet in the middle, and comply with interim agreements on the path to a major accord. Finalising the proposals on improved border screening could also be helpful in this regard.⁶⁸

Moreover, substantial investments will have to be made in the asylum capacity of the southern member states in order to operationalise such large-scale border procedures quickly, carefully and in accordance with the required legal safeguards. This will necessitate the release of EU budget resources. In addition to practical support from other member states, EU agencies will need to be closely involved.

There are also sensitivities over sovereignty. At present, the border procedures are only being applied in Greece, where EASO is largely responsible for their implementation. The procedures apply to asylum seekers arriving in the Greek islands, who effectively fall under the EU-Turkey agreement. In the other southern member states, cooperation with EU agencies is a sensitive issue because it gives rise to sovereignty concerns. Such cooperation will therefore need to be based on strong networks between such agencies and the member states’ own implementing agencies. The mandates of the EU agencies need to be very specific in this regard, both from the perspective of liability and in order to avoid disagreement on decision-making powers and competences.

Finally, in order to ensure observance of fundamental rights, one option would be to establish a monitoring mechanism at the border similar to the one proposed by the Commission for the screening procedure in the framework of the pact. Such a monitoring mechanism would be specific to the border procedure and would be staffed by independent experts.

► 5.2 Responsibility for the asylum procedure and solidarity

The second internal component of the European asylum system, which politically speaking is directly linked to the first, is the distribution of responsibility for asylum applications, as currently regulated by the Dublin III Regulation.⁶⁹ The Dublin III system sits at the centre of the current CEAS and is simultaneously its most politically divisive aspect, given the solidarity issues that lurk beneath the surface.

Defining the problem

Like its predecessors, the Dublin III system is causing fundamental problems because the mechanism for sharing responsibility does not take account of the geographical location of the member states. This omission is proving unsustainable now that the number of arrivals in several member states is much higher than anticipated at the time the mechanism was established in the early 2000s. According to Dublin III, asylum applications should in most cases be processed by the member state of first entry.⁷⁰ This approach places the heaviest burden on the southern – and potentially also

eastern – member states, which regard the mechanism as fundamentally unfair. Article 80 of the Treaty on the Functioning of the European Union (TFEU) explicitly states that the CEAS is governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the member states. In meetings between the AIV and representatives of various member states, as well as in the CJEU's case law and the Commission's new pact, solidarity consistently emerges as a key theme. Nevertheless, a number of eastern member states are categorically opposed to the mandatory relocation of refugees as an expression of solidarity. However, they say they are willing to implement the principle of solidarity in a 'flexible' (i.e. different) manner.

Against this background, the southern member states have little interest in implementing the CEAS effectively. Poor implementation also impedes the return of 'Dublin claimants'. As noted in section 3.2, the CJEU has ruled that member states may not transfer asylum seekers in cases where the receiving country's asylum system is characterised by fundamental shortcomings. This creates a perverse incentive: member states that treat asylum seekers poorly and do not implement the CEAS correctly end up having to process fewer asylum applications. At the same time, the northern member states see little reason to change an underlying mechanism that, when implemented properly, places the burden elsewhere. Although they currently have to contend with negative consequences in the form of secondary migration, these member states prefer to focus chiefly on effective implementation as the most appropriate solution.⁷¹

Capacity is also an issue, as the responsible member state must comply with the Asylum Procedures Directive, the Reception Conditions Directive and other CEAS instruments. This requirement relates not only to registration but also to reception capacity and quality, and the scope for judicial review. At the same time, attempts by member states (including the Netherlands) to return asylum seekers to the member state responsible for the procedure under the Dublin system rarely succeed in practice: in more than four out of five cases they do not lead to a successful transfer to another member state.⁷²

In short, the main problem with Dublin III is that, under the existing system, a limited number of predominantly southern border states are responsible for processing a large proportion of all asylum applications. Those member states consider this unfair, not least because they already have to contend with economic disadvantages and a lack of administrative capacity. The eastern member states categorically refuse to fulfil the solidarity principle through the mandatory relocation of refugees. In view of this evident lack of solidarity, the southern member states are less inclined to strive for effective implementation or guarantee a minimum standard for the reception conditions of incoming migrants. In practice, this situation exposes incoming migrants to appalling conditions in the southern member states, while also encouraging significant secondary migration and preventing the Dublin system from functioning. In addition, it has given rise to an impasse characterised not only by dissatisfaction on all sides but also by a lack of positive incentives to take concrete steps forward.

The Commission's proposals

In recent times, 'flexible solidarity' has emerged as a way of breaking the impasse in the negotiations on the CEAS. In this scenario, member states would be able to choose how to demonstrate solidarity with EU member states that are responsible for processing the most asylum applications due to their geographical location. The Commission's new proposal adopts this approach. Although it maintains the principle of first entry as a criterion, which means that the above-mentioned geographical and political challenges continue to apply, it proposes a new solidarity mechanism.⁷³ Under this mechanism, the Commission, acting at the request of a member state or on its own initiative, would determine whether a member state requires some kind of assistance. In cases where it does, the other member states would be free to choose to contribute through relocation or by means of 'return sponsorship'. Under the latter option, the member state concerned would assume responsibility for the return of an asylum seeker whose application for international protection has been rejected

to his or her country of origin or to a safe third country. In situations involving disembarkation or a significant increase in migration, the solidarity mechanism could be expanded. In this proposal, the Commission has clearly decided in favour of a more flexible approach in order to ensure that all member states contribute, albeit in a manner of their own choosing.

The Commission's basic premise thus remains that some form of member state solidarity is essential in all components of the system. Flexible solidarity should not be an argument for member states to do less or not commit themselves fully to breaking the current impasse. The only freedom they have is to choose how they wish to demonstrate their solidarity from a menu of options, not whether or not they wish to participate at all, as participation is mandatory.

Potential solutions

The AIV believes that 'flexible solidarity', as set out in the Commission's proposals, provides scope for breaking the impasse. However, there first needs to be some kind of political recognition of the imbalance in the Dublin system, which places the heaviest burden on the receiving member states. This is a precondition for implementing flexible solidarity. Moreover, in order to maintain support for asylum policy, it is vital that all EU member states contribute in a visible and effective manner.

'In order to maintain support for asylum policy, it is vital that all EU member states contribute in a visible and effective manner.'

In the internal accord that is needed to achieve the improved border procedures that the Netherlands desires – and thus a reduction in secondary migration – the member states of northwestern Europe, as well as those of eastern Europe, will have to not only acknowledge the required solidarity but also translate it into concrete measures. The relocation of properly registered asylum seekers whose applications are likely to succeed needs to be a key feature of these measures. A generous initial gesture from the Netherlands, for example towards Greece, which is open to cooperation and where the conditions in the refugee camps remain deplorable, would be compatible with this approach

With regard to search and rescue operations, the AIV understands the government's criticism of the Commission's plan to treat migrants who have been rescued at sea as a separate category for the purpose of relocation in the proposed EU regulation. Here too, however, the government should not rule out a gesture if it simultaneously leads to progress in other areas, for example in the form of measures aimed at improving screening and registration.

► 5.3 Asylum systems in the member states

A functioning EU asylum policy also requires greater uniformity in the rules governing asylum procedures, admission policy and reception in the various member states. This was the original objective of the CEAS, as stated in the Tampere European Council Conclusions (1999), which paved the way for its establishment. More unity in policy, fewer differences in practice: this philosophy is a sine qua non for the effective implementation of the Dublin system. It also has the capacity to significantly reduce secondary migration. That being said, it cannot prevent such migration entirely, as personal choices and circumstances also play a role.⁷⁴

Developments

In practice, however, the EU is still far from achieving such uniformity, and national asylum systems continue to display major differences. This is partly due to the fact that member states have a substantial measure of discretion when it comes to implementing the provisions of the current directives.⁷⁵ In addition, they by no means always fully or correctly carry out instructions contained in directives that leave little room for national discretion.⁷⁶ The minimum reception standards are a clear example of this. The idea was to tackle the considerable differences that existed between member states by converting the relevant asylum directives into binding regulations, but negotiations broke down over fundamental political and legal questions concerning further harmonisation. The odds of obtaining a residence permit also differ considerably from country to country due to the varied nature of national procedures and admission policies.⁷⁷ As previously noted, the asylum systems of certain member states (e.g. Greece, Italy and Hungary) are so inadequate that they hamper the functioning of the Dublin Regulation, either because transfers are not permitted at all (or only when accompanied by specific guarantees) or because transfers are legally contested.

The Commission's proposals

The Commission's migration and asylum pact includes a proposal to establish a European Asylum Agency as a successor to the EASO.⁷⁸ This has already been agreed in negotiations, but owing to the previous Commission's package approach that agreement-in-principle has thus far not been converted into a formal decision. The proposed regulation foresees a larger role for EU agencies in the member states' procedures. For example, in addition to providing support and advice, the asylum agency could take charge of the actual preparation of asylum decisions in certain cases, although the final decision-making power would remain in the hands of the member states. The proposal also provides for the establishment of a monitoring and intervention mechanism. This means that the Commission would be able to deploy the agency to provide assistance in the event of structural problems relating to the implementation of the asylum procedure. Although asylum procedures will remain a national matter, the Commission's proposal increases the scope for centralised intervention in the event of dysfunction.

The Netherlands has an interest in the harmonisation of asylum procedures and the level of protection provided by member states, in order to prevent 'asylum shopping'. This is because the Netherlands provides a comparatively high level of protection⁷⁹ and also because it is convinced of the value of doing so. Under current conditions, however, this increases the pressure on its own asylum infrastructure. The Netherlands therefore attaches great importance to upward convergence in this area.

Potential solutions

Given the aforementioned diversity of the member states' asylum systems, the communitarisation of those systems in the EU is currently not an option. However, a common asylum system in a Europe without internal borders still requires the greatest possible harmonisation of national asylum systems. The starting point must be that the standards of protection laid down in asylum law should continue to apply in full as a guideline for all member states. In addition, sound and rigorous procedures characterised by rapid turnaround times and effective legal protection in safe environments will be needed to avoid unnecessary, lengthy and costly follow-up procedures.

One promising solution strategy is to achieve limited communitarisation by deploying EU agencies. The proposed regulation establishing the European Asylum Agency, which has been on the table for some time, has elicited relatively little disagreement between member states.⁸⁰ The AIV believes that the swift adoption of this decision would have a positive impact on the dynamics of the EU asylum debate, especially if the Netherlands and other northwestern European member states are willing to reach out to southern member states, for example with substantial offers of support for capacity-building. Nevertheless, account should be taken of sensitivities regarding outside intervention in this area. It is therefore important to ensure that the scope of liability for potential violations of the *acquis*

is clear, that the activities of an asylum agency can be independently monitored and that it is held publicly accountable for its actions (see also section 2.3). Furthermore, it is worth noting that an EU agency is always the guest of a member state, which means that the member state concerned should have a say in its tasks and powers.

A second solution strategy is to enhance cooperation between member states, in particular through the exchange of good practices. Although various bodies, including the Asylum, Migration and Integration Fund, already encourage this, the AIV believes that the pact could have devoted more attention to this issue. Noting that the Netherlands has recently intensified its cooperation with Greece in the field of asylum and migration, the AIV further believes that such cooperation should be expanded and extended to other EU member states.

A third key area where more joint action is required is the creation of a uniform list of safe countries of origin to replace the existing national lists. The essence of the 'safe country' concept is that a certain country is deemed safe enough for return, meaning that individuals from that country do not need to be granted protection in the EU. Asylum applications can be processed more rapidly on this basis in the framework of border and asylum procedures.⁸¹ At present, there are EU criteria for drawing up national lists of safe third countries,⁸² but (as yet) there is no EU list.⁸³ This is connected to the political sensitivity of designating countries as either safe or unsafe. A more uniform approach would nevertheless be desirable.⁸⁴ This issue needs to be examined in the context of the detailed development of the pact's proposals, for example in the framework of discussions on potential partnerships with third countries.



Het externe akkoord

Just as the member states need to overcome their mutual distrust by means of an internal accord, they will also need to conclude a major external accord with foreign partner countries. In this chapter, the AIV therefore discusses relevant aspects of European foreign and migration policy; the EU's external policy and its proposed partnerships with third countries; policy in support of refugee reception in the region; and policy on return and legal migration.

Number of illegal border-crossings
Jan - Oct 2019 / 2020

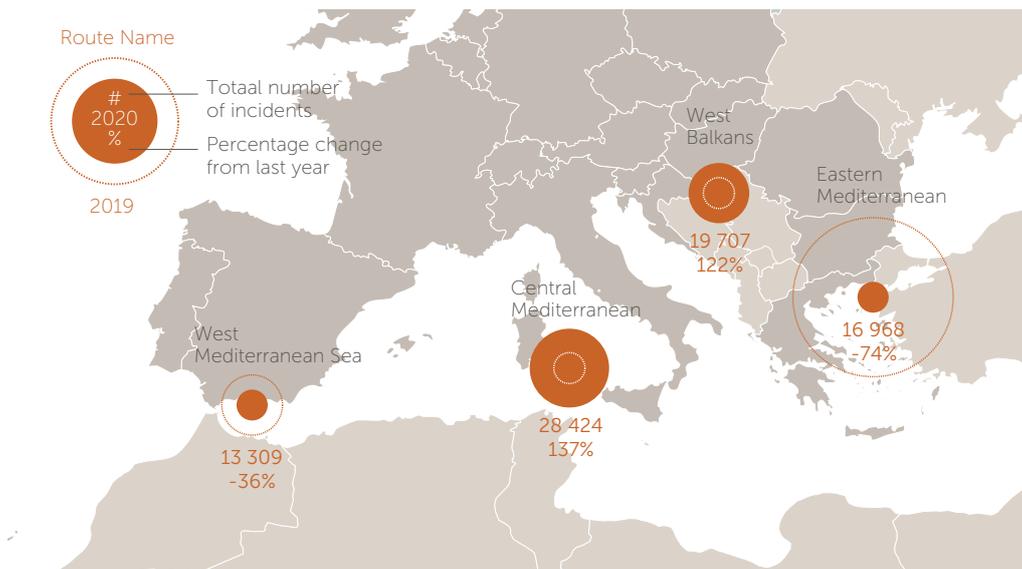


Figure 2 - Number of illegal border crossings between January and October 2020 compared to the same period in 2019. The pressure on European asylum policy has decreased as a result of the COVID-19 pandemic but has by no means disappeared. In fact, on the central Mediterranean route, the number of illegal border crossings has actually increased
Source: Frontex

► 6.1 Effective European foreign and security policy

The force of the pressure on European asylum policy is determined first and foremost by the number of third-country nationals seeking protection in Europe as a result of events and circumstances elsewhere. A new crisis on the edge of Europe involving large numbers refugees, along similar lines to the crisis of 2015-2016, would once again pose major problems for Europe, even if the reform of the CEAS now gains traction.

In order to prevent another large-scale migration crisis in Europe, it is therefore also important to improve Europe's security structure. The main objective is to ensure that Europe is able to take effective action at international level, for example in a UN framework. Past experience shows how urgent this is. The fact is that the crisis of 2015-2016 was triggered in part by a serious loss of direction and control that left the international community and the Security Council powerless in the face of the unprecedented brutality and scale of the internal conflict in Syria.

Incidentally, while Europe's foreign policy efforts have direct repercussions on asylum and migration policy, the reverse is also true. In the absence, in particular, of a proper solution to the humanitarian emergency in the refugee camps on its external borders, Europe is losing the moral and political credibility needed to authoritatively promote an international order based on the values of peace, security and human rights. In this regard, too, the internal and external accords are closely connected.

'The crisis of 2015-2016 was triggered in part by a serious loss of direction and control that left the international community and the Security Council powerless in the face of the unprecedented brutality and scale of the internal conflict in Syria.'

Potential solutions

It is clear from the above that it is also vital from an asylum and migration perspective to strengthen Europe's capacity to act at international level and thus develop an effective EU foreign and security policy. Further improvements are needed to enable Europe to better promote stability in the wider region. In its recent advisory report on European security, the AIV presented a number of recommendations in this regard, including the establishment of a European Security Council that could serve as an informal playmaker between the most important European countries, the EU and NATO in the event of an acute crisis.⁸⁵

However, crisis management alone is not enough. In addition to traditional foreign and security policy tools, tackling the root causes of migration will also require the deployment of instruments in the fields of development cooperation and trade policy. The UN's Sustainable Development Goals (SDGs) provide an excellent guideline in this regard. All these efforts should be integrated and coordinated in such a way that the actions of the EU and the member states reinforce and complement each other, while their potential impact on unwanted irregular migration flows is properly considered. In addition, the resources needed to implement this policy need to be made – and kept – available. Europe cannot do this alone and will therefore have to work together with like-minded international partners.

In this context, it makes sense to concentrate foreign policy efforts on Europe's immediate vicinity, given the potential impact of a political or economic crisis in the countries on the EU's external border on the number of refugees that arrive there.

► 6.2 Partnerships with third countries

Since the turn of the century, large irregular migration flows have driven European countries to focus their efforts on migration cooperation with countries of origin and transit in order to increase their control over migration on the Mediterranean routes and involve African countries in the protection of Europe's external borders. Developing this cooperation has not always been easy, as the interests of third countries and European countries appear to differ significantly at first glance. European countries wish to combat irregular migration and aspire to more effective cooperation with third

countries with a view to returning migrants without residence permits, while countries of origin and transit are chiefly interested in development, remittances and employment, which are all facilitated by outgoing migration.⁸⁶ In addition, governments of countries of origin and transit do not always enhance their domestic popularity by cooperating with European programmes aimed at combating irregular migration and promoting return.⁸⁷

Developments

Despite these hurdles, the initial foundations of an external accord were adopted at a summit of European and African leaders in Valetta in November 2015, based on a shared interest in obtaining more control over migration. Since then, the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration have also been adopted.⁸⁸ These initiatives seek to establish a framework for international cooperation on migration that complements existing cooperation with the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) in countries of origin and transit.

The Commission's proposals

In its migration and asylum pact, the Commission proposes that the EU and its partner countries establish wide-ranging partnerships that focus on migration as a core issue, based on their shared interests.⁸⁹ These partnerships would incorporate agreements on migration management and efforts to combat people smuggling, in addition to covering various other issues, such as development cooperation, security, visas, trade, energy, climate and education. In particular, they would prioritise European support for local job creation and the strengthening of migration management capacity. That being said, the proposals have not been worked out in detail.⁹⁰

Potential solutions

In the AIV's opinion, the proposed partnerships are a crucial step towards the much-needed strengthening of European cooperation with countries of origin and transit. New wide-ranging partnerships with third countries containing agreements on migration management, readmission and legal migration (see below) require a well-considered strategy and substantial financial and political investment in external relations. Certainly when it comes to countries characterised by human rights violations and a lack of transparency in domestic politics, such cooperation will always require a cautious approach that focuses on upholding Europe's moral principles while also meeting the need for practical responsibility and protection of Europe's interests.

'Given the current balance of power, these partnerships cannot be a one-way street but will take the form of agreements based on shared interests.'

Incidentally, job creation is not a panacea. In fact, it can provide people with the necessary resources to contemplate migration, especially when there are also other reasons to leave, such as living in an environment characterised by corruption, violence and arbitrariness.⁹¹ There is therefore a need for a differentiated approach that takes account of the relevant opportunities and pitfalls in each country.⁹²

As stated above, given the current balance of power, these partnerships cannot be a one-way street but will take the form of agreements based on shared interests. It is therefore important that the interests of third countries are adequately reflected in the structure of these partnerships. If this is not the case, those countries will make little or no effort to comply with Europe's demands, and the whole migration and asylum pact will show itself to be a house of cards, since the success of

the internal accord will depend on effective cooperation on migrant return. Beyond fragmented projects and occasional ministerial visits, the partnerships accordingly need to be institutionalised and coordinated at European level. It is vital to build up institutional implementing capacity and collective memory, in part through coordination at European level, because it will often be the case that one or more member states take the lead in respect of a specific third country, after which other member states can build on their experience and the institutions developed. The Netherlands would be well-advised to prioritise dialogue on this issue in Brussels.

In this context, the government could also encourage other countries to join the Netherlands in making active *and* sizeable contributions to the partnerships with countries of origin and transit. The AIV believes that such contributions should also fall within the scope of the ‘flexible solidarity’ provided for in the pact.

► 6.3 Protection in the region

In global terms, the overwhelming majority (approximately 85%) of people who flee their own countries are hosted in developing countries.⁹³ Almost 80% of these cases are ‘protracted refugee situations’ with little or no hope of a durable solution. In practice, this often results in poor humanitarian conditions and a lack of prospects for refugees, while placing a heavy burden on countries in the region with regard to reception and protection tasks. Maintaining support in local communities in the region is vital to keeping borders open and providing protection to refugees in emergency situations. Support for countries in the region is therefore essential from the perspective of solidarity with refugees and host communities in countries of reception, but also with a view to the migratory pressure on Europe. Here, too, European countries need to learn the lessons of 2015-2016, when hundreds of thousands of Syrian refugees set off towards the EU from reception camps in the region (Lebanon, Jordan and eastern Turkey) not long after certain EU member states had scaled back their financial contributions to those camps.

Developments

In the pact, the Commission also highlights the need to increase support for refugees in the region and host countries. Examples of such support include the humanitarian evacuation mechanisms for the purpose of resettlement (from Niger and Rwanda), the regional programme in the region around Syria and activities in the framework of the EU-Turkey Statement. However, detailed plans concerning the EU’s efforts in the coming years are still lacking.

EU-Turkey Statement

The cooperation between the EU and Turkey warrants special attention in this context. Given its proximity to the Syrian conflict, Turkey serves both as a country of reception and as a country of transit. The EU-Turkey Statement was issued in March 2016 in response to the huge rise in the number of irregular arrivals via the Aegean Sea.⁹⁴ This ‘deal’ has since been the subject of continuous debate. On the one hand, it is presented as a success because the number of irregular arrivals in Europe via this route has decreased and fewer people have drowned on this route. On the other hand, key elements of the statement have been a failure. There has been much legal wrangling about whether Turkey qualifies as a safe third country, not least in the light of reports concerning ‘push-backs’ at the Turkish-Syrian border. Only a limited number of migrants have been returned to Turkey, in part because Greek law appears to prevent the return of specific categories of migrants. Greece’s asylum system was completely overwhelmed by the large number of arrivals, and far fewer refugees than agreed were resettled from Turkey to EU countries. In addition, Turkey repeatedly threatened to allow migrants to travel on to the EU, which led to a crisis on the EU-Turkish border as recently as February 2020.

The fact remains that Turkey is currently playing host to almost four million refugees. The Facility for Refugees in Turkey (FRIT) funds projects to improve their situation, and is achieving results.⁹⁵ It is therefore important to continue supporting Turkey's efforts to enhance its protection capacity by increasing financial resources. In addition, several conditions for the proper implementation of the EU-Turkey Statement need to be met: restoring order to Greece's asylum and reception procedures; realising returns to and resettlement from Turkey, ensuring compliance with border control agreements with due regard for fundamental rights, and establishing a good monitoring and evaluation system to gain more insight into what is happening in Turkey.

Potential solutions

The AIV endorses the preconditions identified by the Commission for formulating policy on protection in the region, such as developing programmes together with the relevant countries and host communities; setting aside sufficient financial resources that can be deployed on a flexible, multiannual basis; and focusing on multiple related policy areas (decompartmentalisation).⁹⁶ The Netherlands plays a leading role in this area within the EU, together with a small number of member states such as Germany and Denmark, and previously the United Kingdom. On more than one occasion, it has called for more European cooperation and the participation of additional countries besides the usual large donors to UNHCR. Against this background, it might be possible to encourage the Visegrád countries to make a substantial contribution to enhanced protection capacity for refugees in the region, within the framework of the flexible solidarity they desire.

Supporting refugee protection in the region is also a key factor in the establishment of more balanced and effective partnerships between the EU and countries of first reception and transit. From the point of view of reciprocity, however, it is important to understand that simply investing in protection capacity in the region is not enough. The EU will have to actively reduce the burden on third countries by resettling a number of (highly vulnerable) refugees in order to keep convincing these countries that they are not alone and that the professed partnerships are actually being implemented.

► 6.4 Return policy and legal migration: a two-pronged approach

The limited return of people without valid residence permits to their countries of origin is one of the main problems of European asylum policy. It is ultimately hard to justify the vast and costly efforts involved in carefully determining who is entitled to protection as a refugee when two-thirds of those who fail to obtain this status nevertheless remain in Europe.⁹⁷ This undermines the public's confidence in the asylum system and encourages irregular migration. In addition, illegally resident third-country nationals risk having to live in degrading conditions or falling into the hands of criminal or radical networks.

Developments

The EU has the power to conclude readmission agreements with third countries.⁹⁸ It has now concluded several such agreements, chiefly with countries in the Balkans and the Caucasus. In those cases, each agreement is part of a much broader relationship with the EU, in the framework of the Stabilisation and Association Process or a partnership programme (e.g. the Eastern Partnership). However, most refugees and migrants originate from other countries and regions, such as Afghanistan, Iraq, Syria and the Horn of Africa, as well as from countries like Venezuela. It is sometimes impossible – or at the very least much harder – to conclude readmission agreements with these countries. This is true of both the EU and the member states.

It bears noting that the member states themselves can also conclude readmission agreements with third countries. The effectiveness of return policy varies considerably between member states, owing to underlying differences in national rules and capacity and in bilateral relations with specific countries of origin. Bureaucratic and political barriers in member states and countries of origin mean

that return is often unsuccessful or costly and time-consuming. In many cases, the countries of origin of irregular migrants have little interest in taking back their nationals – in so far as the nationality of such persons can even be determined with any certainty. For example, the introduction of the topic of return during negotiations on the successor to the Cotonou Agreement sparked considerable irritation among the African countries, which form a bloc in this regard. In addition, post-return reintegration in countries of origin is often difficult, as returning migrants frequently encounter social and economic problems (such as returnees' loss of links with former social networks or a lack of employment opportunities).

Spain's successful cooperation with Morocco in the field of migration management is particularly striking in this context. This long-term partnership (the readmission agreement between the two countries dates back to 1992) succeeds primarily because it is based on a broad approach that seeks to concretise the notion of shared interests by combining readmission with cooperation in the field of border control and programmes promoting the legal (circular) migration of Moroccan citizens to Spain for work or study purposes. In addition, it is accompanied by substantial financial support from Spain (and the EU) for Moroccan border control and anti-smuggling efforts.⁹⁹

The Commission's proposals

One of the main elements of the Commission's new pact is to develop a more effective return policy and an EU-coordinated approach to return. Specifically, it seeks to create a common EU return system based on plans for more powerful EU structures and more effective cooperation with third countries in the field of return and readmission.

In the pact, the Commission proposes that persons whose applications have been rejected in the asylum border procedure should immediately be subject to an EU return procedure. A swift rejection followed by an effective return procedure would send a strong external signal, especially on arrival routes where a large proportion of asylum seekers originate from countries with low recognition rates. To meet their solidarity obligations, member states can contribute to the system not only by relocating status holders but also by sponsoring return. When a member state chooses the latter option, it must be able to effect the expulsion of the rejected asylum seeker within eight months. If these efforts fail, the individual in question is transferred to the territory of the sponsoring member state, where the return procedure is resumed. In order to improve coordination in this area, the Commission proposes the appointment of a Return Coordinator and return representatives in the member states.

Commentaries on the pact rightly speak of the Commission's 'big bet on returns'.¹⁰⁰ The success of the pact depends on how effectively rejected asylum seekers can be returned to their countries of origin. However, it is unclear whether a maximum time frame of eight months is sufficient for this purpose. Furthermore, several member states are opposed to the relocation of migrants to their territory, even if it occurs in the framework of a return procedure. The question is therefore whether rejected asylum seekers will ultimately just remain in the territory of countries on the EU's external border. In other words, if return within the proposed eight months is not feasible, it will clearly become very difficult to maintain the support of external border states and member states that are unwilling to admit irregular migrants to their territory.

Potential solutions

It is clear from the above that the Commission's migration proposal stands or falls by an effective return policy. This realisation is not adequately reflected in the pact or in the discussions between EU member states that started under the German Council Presidency. In parallel to the negotiations between the EU member states on the internal accord, future Council Presidencies should accordingly develop a strategic diplomatic effort targeting countries of origin, in cooperation with the Commission and the European External Action Service (EEAS). There is a realisation that

institutions – based on guiding principles that are considered fair by all member states concerned and encompassing new rules, procedures, incentives, monitoring mechanisms, agencies and capacity-building measures – are needed to ensure that the internal accord can be implemented in practice. By contrast, however, there is no such realisation that institutions in the broad sense are just as vital to ensuring the long-term functioning of the external accord.¹⁰¹

The pact offers the possibility of imposing restrictive visa measures on nationals of countries that refuse to cooperate on return. The Dutch government is in favour of this too.¹⁰² In the AIV's opinion, however, a purely 'less for less' discourse does not properly reflect the balance of power and the mutual dependence between the EU and third countries when it comes to managing migration. Promoting a discourse that emphasises shared interests, accompanied by positive trade-offs between such objectives as cooperation on return and the establishment of legal pathways for migration to Europe, as well as by a pact to develop the institutions this would require, is a more realistic, effective and durable strategy and also more in keeping with the principle of solidarity. It involves establishing legal migration routes, including the resettlement of refugees, and creating work or study opportunities for individuals that do not qualify for refugee protection. For example, the Netherlands already operates education and training scholarship programmes in the relevant regions. The AIV also supports the IOM's recommendation to incorporate programmes that promote durable reintegration and respond to the needs of returning migrants and local communities in countries of origin into the EU's new return policy.

Third countries that are willing to cooperate with European countries in preventing irregular migration and returning rejected asylum seekers will be better able to justify such policies if they can point to credible opportunities for legal migration to EU member states. Similarly, member states will be better able to justify the asylum system if they can credibly demonstrate that individuals who are not entitled to international protection do actually return to their countries of origin.¹⁰³ These are the foundations of a durable external accord.

Schengen

The refugee crisis of 2015-2016 put considerable pressure on the functioning of the Schengen area.¹⁰⁴ Although certain member states had already introduced border controls in an attempt to control secondary migration, as France did in 2011 along its border with Italy, the 2015-2016 crisis led to the reintroduction of border controls on an unprecedented scale and in various parts of the EU, up to and including Scandinavia. As late as 2020, six countries – Austria, Denmark, France, Germany, Norway and Sweden – had still not lifted these controls. Although the Schengen Borders Code makes provision, under strict conditions, for the reintroduction of border controls for a maximum period of two years in response to a serious threat to public policy or internal security, those countries have now substantially exceeded this time limit.¹⁰⁵

Since 2015, there has also been talk of establishing a ‘mini-Schengen’. The Netherlands is one of the countries that have repeatedly expressed an interest in this idea, and President Macron of France made remarks to this effect as recently as 2019.¹⁰⁶ A ‘mini-Schengen’ composed of countries with similar levels of administrative capacity and similar principles would provide the participating countries with an opportunity to design a ‘fairer’ and more effective asylum policy. After all, they would be able to conclude robust agreements establishing more harmonised asylum procedures, thereby eliminating a key motive for secondary migration between them. In doing so, they would achieve a greater degree of control over the movements of asylum seekers than currently available in the framework of the CEAS. Non-participating countries would be able to join up after placing their asylum policies on a similar footing.

The idea of reducing the size of the European common travel area as a political response to Europe’s failing asylum policy is not illogical, as the Dublin rules were once regarded in part as a necessary counterweight to Schengen. The introduction of border controls during the refugee crisis was also a consequence of the failure of asylum policy in general, i.e. the lack of a harmonised asylum system in the member states, coupled with the failure of external border policy with regard to the registration and reception of asylum seekers. From this perspective, a ‘mini-Schengen’ is an attempt to reopen the internal borders between a small group of countries, as well as a way to put pressure on countries that underperform in the field of border control and/or asylum policy.

However, the AIV believes that there are serious objections to intervening via the introduction of unilateral and indefinite border controls or the potential ‘fragmentation’ of Schengen in order to overcome the shortcomings of the CEAS.

First, the absence of internal border controls is part of primary EU law. This means that the division of the EU into different areas or the permanent exclusion of a Schengen state can only be achieved on the basis of a treaty revision, which requires unanimity.¹⁰⁷

The second objection is that the reintroduction of internal border controls causes disproportionate economic and social harm. While these controls are costly enough to set up, the economic cost arising from their imposition on border traffic is even greater. They are likely to have a substantial negative economic impact on trading nations such as the Netherlands. In addition, they will impose an economically unquantifiable social cost on inhabitants of border regions, consumers, entrepreneurs, workers, tourists, etc., who will find it harder to travel under these circumstances than they do in the current Schengen area. The AIV has examined this issue in depth in a previous advisory letter.¹⁰⁸

Third, unilateral measures and initiatives that weaken EU-wide cooperation will gravely undermine solidarity and trust between the member states. Countries that are not allowed to participate in a core Schengen – and where and by whom will the borders be drawn? – will feel sidelined in a fundamental area of European cooperation. After all, the Schengen rules facilitate the functioning of the internal market by ensuring that the free movement of persons, goods and services across the internal borders is not subjected to time-consuming and costly border controls. Simply put, a well-functioning Schengen is tremendously important from an economic, political and symbolic perspective. Tampering with it is likely to cause the EU to collapse into various blocs. Although proponents talk about having one mini-Schengen, the outcome will be that excluded member states establish one or more alternative mini-Schengens. In other words, a mini-Schengen would put the entire European edifice at risk.

Given the considerable social and political costs involved, it is highly doubtful that a country such as Germany, without which a mini-Schengen is not an option for the Netherlands, would be willing to participate. It is hard to imagine that Berlin would risk the foundations of its European policy, which focus on embedding Germany in a Europe characterised by cooperation and good neighbourliness. This definitely also applies to the country's relations with its eastern neighbours, such as Poland, and the southern EU member states. Chancellor Angela Merkel recently reiterated this fundamental principle in connection with the COVID-19 crisis, when she said that Germany prospers only when the whole of Europe prospers.¹⁰⁹

The Commission has not presented any new proposals regarding Schengen in the migration and asylum pact. However, it has announced that it will publish a future vision for Schengen in the first quarter of 2021. This will include proposals to further strengthen the Schengen evaluation mechanism, creating opportunities to expand the scope under Schengen for border controls as a last resort.

Moreover, the use of modern border control technologies can improve border management without impeding the free movement of persons in practice. Joint border control operations by member states and enhanced bilateral cooperation in areas such as data exchange and police cooperation both contribute to the proper functioning of the area without internal borders. Similarly, when it comes to the EU's internal security and the fight against terrorism, police and intelligence cooperation is a more effective solution than (re)introducing border controls.¹¹⁰ The treaties make ample provision for such enhanced cooperation.¹¹¹

In the AIV's opinion, therefore, there is nothing standing in the way of employing these kinds of 'emergency measures' to strengthen the existing Schengen structure. Such measures could well be part of the forthcoming discussion on reforming the CEAS. However, they should be targeted and practical and in no way entail exclusion from the Schengen area.

For the above-mentioned reasons, the AIV believes that abandoning the link between 'Dublin' and 'Schengen' by introducing border controls or working towards a 'mini-Schengen' is contrary to the Netherlands' interests. The key to maintaining a functioning Schengen is to break the impasse in European asylum policy, not least by improving the protection of the EU's external borders and increasing the effectiveness of registration and reception procedures in respect of irregular third-country nationals. The pressure on Schengen can be eliminated only by increasing the effectiveness and uniformity of the CEAS. That pressure is therefore an urgent incentive for the Netherlands to take action to reform the CEAS.

Conclusions and recommendations

On the basis of the preceding analysis, the AIV concludes that the impasse on the European asylum system is not a mere bump in the road but a consequence of fundamental imbalances in the legal status quo, severe – in some respects even unacceptably severe – practical shortcomings and profound substantive conflicts that have at times been fought out in the full glare of publicity. As a result, all national governments and all strands of public opinion in the EU have some reason to complain, and considerable mutual distrust has arisen, preventing almost all practical and legislative progress for the past five years.

Breaking the impasse is therefore a matter of great urgency. It is the only way to put an end to the appalling humanitarian situation in the external border countries, as well as to other undesirable trends, such as incomplete registration at certain external borders, secondary migration that is difficult to control and ineffective return policy. Reaching an accord is the only way to ensure that the EU asylum system is sufficiently robust to withstand another crisis like the one in 2015-2016, a possibility that cannot be excluded given the instability in Europe's immediate vicinity and the dynamics of the COVID-19 pandemic.

This is not an easy task, as illustrated by the fact that the impasse in EU asylum policy actually arose as a result of the refugee crisis of 2015-2016. European crises are often transitional moments from which the EU emerges stronger after a period of uncertainty and intense political conflict, as in the case of the euro crisis of 2010-2012. It is still too early to come to a similar conclusion regarding the COVID-19 crisis, but even in the midst of a pandemic the EU seems to be capable of coming up with a common strategy. By contrast, this has not been the case with asylum. This is connected to the nature of the underlying diversity and conflicts between the member states, the intense politicisation of the issue and the all-or-nothing strategy of the parties concerned. That is why finding a solution is so difficult, and why the situation requires a basic level of mutual understanding and responsiveness to the strongly held positions of the member states, not to mention the engagement of all the relevant parties in order to reach agreement on a step-by-step basis.

The AIV believes that the new Commission's approach and the proposed migration and asylum pact have given the search for a solution fresh momentum. At any rate, it is positive that the pact's proposals provide a basis for a new discussion between the member states. In the AIV's opinion, the solution lies in navigating in the direction of two major accords.

Disentangling the asylum knot firstly requires the adoption of an *internal accord* between the member states. Owing to the depth of their mutual distrust, this process should start with a few small measures to restore a modicum of trust, based on the step-by-step approach proposed by the von der Leyen Commission and the current German Council Presidency. However, this will not suffice to get things moving again, and all parties will need to make a fundamental political and practical effort in this regard.

In practice, the geographically unfair distribution of responsibility for processing asylum applications under the current Dublin rules inevitably leads to non-implementation, due to insufficient political will and a lack of practical capacity in the South, and thus also to secondary migration to the North. If the Netherlands is serious about wanting to end this situation and establishing a

functioning European asylum system, it needs to acknowledge the disproportionate burden resting on the southern and southeastern border states and – conversely – the advantages enjoyed by the northwestern member states under the current legal (not factual) status quo. This means that it will have to provide much more financial and practical support for registration and border management at the EU’s external borders, either via the EU or bilaterally. Insisting on better ‘implementation’ by other member states, as The Hague often does, is not realistic as long as they regard the system’s basic rules as unfair.

The categorical refusal of the Visegrád countries and several like-minded, mostly eastern, member states to cooperate on reforms aimed at reducing the burden on the external border states by agreeing to share responsibility for asylum seekers who arrive at the EU’s external borders is obviously regrettable. At the same time, it is a political fact that cannot be resolved – as apparent since 2015 – by legal or institutional means. It therefore makes sense that the von der Leyen Commission is looking for other ways to implement this shared responsibility based on the concept of ‘flexible solidarity’. The Dutch government would be well advised to go along with this. In doing so, it can specify that the principle of mutual solidarity should not be undermined and that alternative contributions should not be expressed in financial terms (so that obligations cannot be ‘bought off’), but also that these burdens should be shouldered by means of efforts and activities that are visible to the public. In contrast to the Commission’s proposals, moreover, the AIV believes that these efforts should be intrinsically linked to solidarity with third countries and refugees, rather than simply taking the form of border control or ‘return sponsorship’. Examples of such efforts include development cooperation and the creation of pathways to legal migration, areas in which member states such as the Netherlands will have to take the lead. It goes without saying that these efforts must also be roughly commensurate with each other and compatible with the rule of law. In the AIV’s opinion, it is not feasible to threaten member states that refuse to grant asylum with exclusion from Schengen, as the economic, social and political costs of doing so would be too high. On the contrary: in order to safeguard Schengen, the asylum system needs to be reformed.

In the AIV’s opinion, the *internal accord* between the member states can only succeed if it is accompanied by an *external accord* between the EU as a whole and foreign partner countries. Without the cooperation of countries of origin and transit, the key component – an effective return policy – is missing. A situation in which many rejected asylum seekers unlawfully remain in the country of destination undermines the rule of law and support for asylum. The AIV therefore believes that the EU should focus more heavily on establishing partnerships with countries of origin and transit than advocated by the Commission (which admittedly is not the only player in this area) in its recent pact.

‘In the AIV’s opinion, the internal accord between the member states can only succeed if it is accompanied by an external accord between the EU as a whole and foreign partner countries.’

Much like the internal accord between the member states, the external accord with partner countries will be all about striking a balance between different interests. Given the new geopolitical and demographic balance of power, in which countries of origin and transit are able to exert more pressure on the EU than in the past, the EU will have to expand the traditional benefits it offers in this area (market access, visas, development cooperation and forms of operational support) to include a

pathway to legal (circular) migration for work or study purposes. This is both an essential component of the much-needed external accord and a counterpart to an effective return policy.



The need to swiftly arrive at a well-functioning and robust CEAS, which is equipped to absorb the potential shock of a new migration crisis, remains as urgent as ever. Any relaxation of efforts towards this end, now that the migratory pressure appears to have decreased somewhat, could cost the Netherlands and other EU member states dearly. At the same time, it is clear that there is no miracle solution. Even following the publication of Commission's balanced, well-considered and consensus-oriented new proposal in September 2020, there is a substantial risk that the parties concerned will return to their entrenched positions, if they have not done so already after one or two Council meetings. It is therefore important to maintain some momentum, for example by finalising the proposals on the establishment of a European Asylum Agency and Eurodac and by gradually restoring trust by means of small trade-offs.

Incidentally, success does not depend solely on diplomatic efforts; sufficient public support is also an essential requirement. This is because domestic support has a substantial impact on the government's room for manoeuvre in the area of foreign policy. The AIV therefore believes that the government would be well advised to actively inform and stimulate public debate on asylum and migration and, in particular, devote attention to the European and international aspects of these issues.

These considerations lead the AIV to the following ten recommendations, divided into two categories, which reflect the structure of the advisory report.

- Five recommendations concern the *strategy* underlying the actions needed to break the impasse in the common asylum policy. These recommendations are based mainly on chapters 1 and 2 of the report.
- Five recommendations concern the *direction* of actions needed to break the impasse and reform the common asylum system to enhance its durability. These recommendations are based mainly on chapters 5, 6 and 7 of the report.

Recommendations concerning the *strategy* underlying the actions needed to break the impasse in the common asylum policy:

- 1. Stimulate public debate on asylum issues, for example through an annual 'State of migration' debate, and acknowledge the political nature of the asylum issue while identifying its normative aspects, in part to ensure continued public support for asylum.** Granting asylum is a matter of solidarity and common humanity and an obligation in the context of the international protection of vulnerable persons, as well as a matter of enlightened self-interest. In the final analysis, the right to asylum can lead to a clash between our most important values, making sustained public support all the more essential. It is also important to recognise that a functioning asylum system is impossible without the cooperation of third countries, which should see their own interests reflected in the system, and without mutual concessions at EU level aimed at breaking the impasse. All these points deserve greater emphasis in official communications and public debate.
- 2. Enter negotiations in the knowledge that the positions of member states have a strong ideological component and ensure that key decisions are taken by consensus.** Given the nature of the asylum issue, which besides being grounded in practical implementing capacity also has a strong ideological component, member states will generally not implement decisions that do not enjoy domestic support. This means that majority decision-making and, more generally, various types of trade-offs, which are common in many other European policy areas, do not work in relation to key aspects of asylum policy. Decisions concerning the main direction of asylum policy therefore need to be based on consensus. The von der Leyen Commission appears to have understood this. The Netherlands should also be acutely aware of this point when determining

its position on reforming the European asylum system.



3. **Start with a step-by-step approach that focuses on making progress on specific components of the Common European Asylum System (CEAS) instead of laying all the pieces of the puzzle in one go.** Focusing on success in specific areas of European asylum policy builds trust and demonstrates that progress can be achieved without sorting out all components of the CEAS at once. This is all the more advisable in light of the expectation that it will take time to reach agreement on certain components of the CEAS, in particular the renewal of 'Dublin'. However, a key condition of any step-by-step approach is to maintain a balance, so that the advantages and disadvantages of the various steps are evenly distributed between the member states. In addition to adopting a formal decision on the European Asylum Agency (see below), a good place to start would be with the adoption of the decision on Eurodac and the compilation of a uniform list of safe countries of origin and safe third countries.
4. **Seize opportunities for bilateral cooperation with other member states on specific issues, in so far as such cooperation enhances – or at the very least does not undermine – cooperation at EU level.** Bilateral cooperation on administrative implementation can promote an atmosphere of trust and lead to best practices that could be followed by others. The AIV believes that the cooperation between the Netherlands and Greece in the field of asylum falls under this heading. It is also important to explore the option of concluding agreements concerning the division of tasks, as proposed in the migration and asylum pact, in order to create more opportunities to work together on solutions. In such cases, there must be agreement between the participating partners and the advantages and disadvantages of their respective efforts must be fairly distributed.
- **Strengthen the role of EU agencies such as Frontex and the European Asylum Support Office (EASO).** An obvious initial concrete step is to adopt the proposed regulation concerning a European Asylum Agency. More generally, strengthening EU agencies is a promising strategy for improving the implementation of the CEAS and increasing the chance of further reform. Expanding the role of such agencies nevertheless requires careful handling of sensitivities relating to sovereignty, which can be eased in part through bilateral cooperation. In addition, the necessary resources need to be (or be made) available in the EU budget, while the outsourcing of implementing tasks must be subject to adequate democratic accountability, at the very least through the Commission and the European Parliament.

Recommendations concerning the *direction* of actions needed to break the impasse and reform the common asylum system to enhance its durability:

6. **Support the European Commission's efforts to conclude an internal accord within the Union that strikes a balance between solidarity and responsibility as regards the registration and reception of asylum seekers.** The toughest obstacle within the impasse is the reform of the Dublin system for allocating responsibility for incoming asylum seekers. It is important to recognise that this is essentially a political problem, the solution to which lies neither in the implementation of existing rules nor in the introduction of new rules as such, but rather in new rules that are supported by all participating member states – and which must be agreed simultaneously and as part of a coherent strategy in order to overcome the lack of trust. The von der Leyen Commission, which has demonstrated greater awareness of this than its predecessor – as witness its extensive consultation with the member states and civil-society organisations – deserves support for the approach it has employed in the proposed asylum and migration pact. This is the area in which small, confidence-building steps should begin. For the Netherlands, this means extending a helping hand and making concessions to the southern member states, for example in the areas of search and rescue and the relocation of asylum seekers from the Greek islands, as well as in the form of additional financial or other efforts, in exchange for concurrent steps towards a more effective and responsible border policy in the external border states. This

is the only way to reduce the current scale of uncontrolled secondary migration and ensure that the European asylum system embraces a more integrated approach.



7. **Prevent the (further) decoupling of the Dublin Regulation and the Schengen system: a reform of the asylum system cannot be forced through by threatening to create a ‘mini-Schengen’, as such a strategy would entail major economic and political risks.** Any measures that go beyond the temporary introduction, under strict conditions, of controls at the internal borders of the Schengen area or any movement towards the creation ‘mini-Schengens’ would entail major economic and political risks. In practice, the pressure exerted on Schengen by the malfunctioning of the Dublin system only serves to underline the need and urgency of effectively reforming the CEAS.
8. **Take the lead in or support initiatives to achieve a more uniform asylum policy in the member states as soon as possible, as an inseparable part of the internal accord.** The disparities between national asylum systems encourage secondary migration and asylum shopping, and this would remain true even if registration at the external border were watertight. Greater uniformity of national asylum policies in the EU therefore remains as important as ever. One of the outcomes of this should be an equal and decent standard of refugee protection in all member states. To this end, the Netherlands should actively offer to share its expertise with other member states. As mentioned above, this can only succeed if the Netherlands is willing to make concessions in other areas, such as search and rescue and relocation. The further development of EASO is also an important tool in advancing this aim.
9. **Work with the Commission to examine how a fully-fledged external dimension of the CEAS can be developed as a matter of priority, in conjunction with the EU’s foreign and security policy.** Although the Commission addresses the external dimension in its migration and asylum pact, it does not adequately develop it. This does not square with the urgency of this aspect of the asylum issue. A substantial part of the solution lies outside Europe, and in recognising that an *external accord* is needed to break the impasse on the CEAS. The only way to develop lasting cooperation with countries of origin and transit is by creating institutional structures that cut across policy areas and provide a platform for coordinating efforts at EU level and between individual member states, on the basis of equality between partners but without losing sight of European interests. Only at EU level will the member states have the necessary clout, in terms of resources and influence, to shape such partnerships effectively.
10. **Provide the external dimension of the CEAS with a well thought-out component focusing on refugee resettlement and legal migration for work and study that is embedded in partnerships with third countries and forms part of the ‘flexible solidarity’ between member states.** This external dimension should encompass support for reception and protection in the region, a fair European contribution to refugee resettlement from countries and regions that host a disproportionate number of refugees, and reasonable access to pathways to legal migration (including migration to meet European needs). An effective return policy will only be achieved if it is accompanied by opportunities in the area of refugee resettlement and meaningful pathways to legal migration from countries of origin and transit. Legal migration can also include temporary migration for work, study or educational purposes that is of benefit to both parties (circular migration). The government should work to maintain support for this, and to employ the argument of ‘enlightened self-interest’ alongside the humanitarian argument in this context. These efforts are essential if the Netherlands and Europe are to retain effective control over asylum and migration issues.

Notes

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- ¹ On the problem of secondary migration, see Advisory Committee on Migration Affairs (ACVZ), *Advisory Report: Secondary Movements of Asylum Seekers in the EU* (2019). The full scale of secondary migration is difficult to quantify, see pp. 12-13 of this report.
- ² 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, p. 1.
- ³ Ibid. Around 370,000 asylum applications are rejected in the EU every year. Approximately one-third of rejected asylum seekers return to their countries of origin.
- ⁴ See e.g. Martin Kuiper and Romy van der Poel, *Jonge Marokkaanse asielzoekers: de straatjongens van Europa (De jonge Marokkaanse asielzoekers die nergens welkom zijn)* [Young Moroccan asylum seekers: the street children of Europe (The young Moroccan asylum seekers who are not welcome anywhere)], *NRC Handelsblad*, 20 and 23 November 2020.
- ⁵ See ACVZ, *Kwetsbaar en onzichtbaar: Migranten zonder geldige verblijfstitel* [Vulnerable and invisible: migrants without valid residence permits], press release, 13 May 2020.
- ⁶ See J. Snippe and R. Mennes, Research and Documentation Centre (WODC), *Vooronderzoek data en methoden illegalschatting* [Preliminary study on data and methods for estimating illegal migration], for global estimates of the number of migrants residing illegally in the Netherlands (p. 1) and the EU (p. 2). In addition to rejected asylum seekers, the number of persons residing illegally in the Netherlands includes other third-country nationals residing illegally in the Netherlands.
- ⁷ Convention implementing the Schengen Agreement of 14 June 1985.
- ⁸ Mark Elchardus, Christopher Houtkamp and Monika Sie Dhian Ho, *Een fort Europa met poorten* [A Fortress Europe with gates], *Clingendael Barometer Alert*, forthcoming (January 2021).
- ⁹ The EU has a large backlog of unprocessed asylum applications that has risen to over 900,000 cases, see *Latest Asylum Trends*, EASO figures, June 2020.
- ¹⁰ Treaty on the functioning of the European Union (TFEU), articles 77-80.
- ¹¹ 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 (Dublin III Regulation). This regulation replaced the Dublin Convention of 1990. In addition to the EU member states, Iceland, Liechtenstein, Norway and Switzerland also participate in 'Dublin'. By extension, they also participate in most other areas of the common asylum and migration policy.
- ¹² The most important directives and instruments are:
 - the Asylum Procedures Directive, which applies to all applications for international protection submitted in the territory, in the territorial waters or in the transit zones of EU member states;
 - the Qualification Directive, which sets out criteria for identifying 'refugee' status or other grounds for protection;
 - the Reception Conditions Directive, which concerns the reception of refugees and asylum seekers during the asylum procedure;
 - the Eurodac Regulation, which facilitates the development of a system for identifying and comparing fingerprints of asylum seekers and irregular migrants;
 - the Return Directive, which concerns the return of asylum seekers to safe third countries;
 - the Schengen Borders Code, which concerns issues such as the temporary introduction of controls at the Schengen area's internal borders.

- ¹³ See ACVZ research report, *Secondary Movements of Asylum Seekers in the EU*, ref. supra note 1, p. 114.
- ¹⁴ EU-Turkey statement, 18 March 2016.
- ¹⁵ The request for advice is attached to this report in annexe 1.
- ¹⁶ See European Commission, *Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020*.
- ¹⁷ See Eurostat, *Record number of over 1.2 million first time asylum seekers registered in 2015*, news release, 4 March 2016.
- ¹⁸ Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 22 September 2015.
- ¹⁹ See Luuk van Middelaar, *Improvisatie en oppositie: de nieuwe politiek van Europa* [Improvisation and opposition: the new politics of Europe] (Groningen: Historische Uitgeverij, 2019), pp. 112-120.
- ²⁰ This is a simplified picture: asylum-based migration to and within the EU is more complex and multifaceted than this three-way classification implies. However, this particular depiction of the situation attracts the most attention and is also the cause of the disagreements that have led to the impasse in the CEAS.
- ²¹ The United Kingdom was and remains a key country of destination, which means that France and Belgium are also transit countries thanks to their North Sea ports at Calais and Zeebrugge.
- ²² See e.g. *Refugee Crisis - Western Balkan route, Syria Regional Crisis - ECHO Daily Map*, 5 November 2015, ECHO (2015).
- ²³ For asylum applications numbers, see e.g. Eurostat, *Asylum Quarterly Report*, December 2020. Countries of arrival in southern Europe have to deal with large numbers of incoming irregular migrants, whom they wish to relocate regardless of whether or not they are asylum seekers. Countries of destination such as France and Germany have the highest number of asylum applications.
- ²⁴ 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), in particular article 29(4).
- ²⁵ QMV is the customary abbreviation for qualified majority voting.
- ²⁶ Article 20 of the Treaty on European Union (TEU) provides that member states may establish enhanced cooperation between themselves.
- ²⁷ See section 1.3.
- ²⁸ The principle of solidarity is enshrined in article 80 TFEU. The concept of ‘flexible solidarity’ dates back to the Slovakian Council Presidency in the second half of 2016, where it was renamed ‘effective solidarity’. It has resurfaced in the framework of the migration and asylum pact as ‘flexible solidarity’ or ‘flexible contributions’.
- ²⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.
- ³⁰ EU-Turkey Statement, see supra note 14.
- ³¹ 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), article 29 (1). See also chapter 7 of this report.
- ³² The maximum time limit laid down in article 29 (1) of the Schengen Borders Code is two years.
- ³³ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.
- ³⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.
- ³⁵ CJEU, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and the Czech Republic*, Judgment, 2 April 2020.
- ³⁶ Article 260 TFEU.
- ³⁷ European Court of Human Rights, *M.S.S. v. Belgium and Greece* (Application no. 30696/09), Judgment (2011).

- ³⁸ European Court of Human Rights, *Khlaifia and others v. Italy* (Application no. 16483/12), Judgment (2016).
- ³⁹ European Court of Human Rights, *N.D. and N.T. v. Spain* (Applications nos. 8675/15 and 8697/15), Judgment (2020).
- ⁴⁰ European Court of Human Rights, *Ilias and Ahmed v. Hungary* (Application no. 47287/15), Judgment (2019).
- ⁴¹ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others v. Hungary*, Judgment, 14 May 2020.
- ⁴² See J.P.H. Donner and M. den Heijer, *Terechte zorg, verkeerd aanknopingspunt* [Justified concern, wrong starting point] (2020), p. 15.
- ⁴³ See e.g. the statement of an UNHCR spokesperson on 2 June 2020: *Greece must ensure safety net and integration opportunities for refugees*.
- ⁴⁴ See *Samenwerking met Griekenland voor opvang en voogdij formeel bezegeld* [Cooperation with Greece on reception and guardianship formally approved], government press release, 18 June 2020.
- ⁴⁵ In 2017, the number of asylum applications exceeded 100,000 for the first time, see *Chiffres clés* of the French Ministry of Foreign Affairs.
- ⁴⁶ In 2018, President Emmanuel Macron accused Italy of irresponsible behaviour when it refused a ship carrying refugees permission to dock. Prime Minister Giuseppe Conte responded by describing France's position as hypocritical. The dispute became so heated that France recalled its ambassador from Rome.
- ⁴⁷ See e.g. *Report of a written consultation between the Permanent Parliamentary Committee on Justice and Security and the Minister for Migration*, 1 October 2019, dossier 32 317, no. 570.
- ⁴⁸ Letter from the Ministers of Foreign Affairs of France, Germany, Italy and Spain to EU Commissioners Margaritas Schinas en Ylva Johansson, 9 April 2020, available on the website of Statewatch.
- ⁴⁹ Ursula von der Leyen, *A Union that strives for more: My agenda for Europe* (2019).
- ⁵⁰ Frontex recorded a 85% drop in illegal border crossings in April 2020, see Frontex, *Situation at EU external borders in April – Detections lowest since 2009* (2020).
- ⁵¹ See e.g. World Food Programme, *COVID-19 will double number of people facing food crises unless swift action is taken* (2020).
- ⁵² See e.g. Layli Foroudi, 'COVID-19 fallout drives Tunisians to Italy despite deportations', *The New Humanitarian*, 1 September 2020.
- ⁵³ AIV, Advisory letter no. 34: *The Netherlands and the Global Approach to COVID-19* (2020).
- ⁵⁴ See supra note 2.
- ⁵⁵ In total, the pact comprises five legislative proposals, three recommendations and one proposal for a guideline.
- ⁵⁶ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, COM (2020) 610 final.
- ⁵⁷ See section 5.1.
- ⁵⁸ See 'De schakels van de migratieketen' [The components of the migration system], in M. Sie Dhian Ho, René Cuperus and Annelies Pilon, eds., *Over de grens. De vluchtelingencrisis als reality test* [Over the border: the refugee crisis as a reality test] (Amsterdam: Van Gennep, May 2017), p. 17 et seq.
- ⁵⁹ See *Letter to Parliament on the Integrated Migration Agenda*, March 2018.
- ⁶⁰ Processing asylum applications 'at the border' and 'prior to admission to EU territory' refers to the reception of third-country nationals within the territory of a EU member state without formally granting them admission to that state. Such persons fall under the sovereignty and jurisdiction of the state in question and therefore also enjoy the protection of the legal instruments that apply there, for example in the field of asylum and refugee law. From a legal perspective, this situation is similar to that in an airport's transit area.

- ⁶¹ With regard to the Netherlands, see e.g. the policy document *A renewed European agenda on migration*, March 2019.
- ⁶² European Commission, *Non-paper on controlled centres in the EU - interim framework*, July 2018.
- ⁶³ 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 (Asylum Procedures Directive), article 43.
- ⁶⁴ In 2016, the Commission submitted an initial proposal to amend the existing Asylum Procedures Directive.
- ⁶⁵ See e.g. Joint NGO Statement *The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded*, 6 October 2020. For criticism of the hotspot procedures, see European Union Agency for Fundamental Rights, *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*, March 2019; On the proposals concerning border procedures, see S. Carrera, *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, 25 September 2020.
- ⁶⁶ See ACVZ, *Pieken en dalen* [Peaks and valleys] (2017); Report of the commission of inquiry into long-term resident aliens without a permanent right of residence (Van Zwol Commission) (2019).
- ⁶⁷ See H. Beirens, *The EU Pact on Migration and Asylum – A Bold Move to Avoid the Abyss?*, October 2020.
- ⁶⁸ Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac', COM (2020) 614, 23 September 2020
- ⁶⁹ Regulation (EU) No. 604/2013, supra note 11.
- ⁷⁰ If an asylum seeker has family in – or some other link to – a particular member state, that member state is responsible for processing his or her asylum application rather than the country of first arrival. This situation only arises in a small number of cases. In practice, however, most asylum applications are submitted in countries of destination. This is a direct result of the inadequacy of the procedures at the EU's external borders and the fact that many migrants travel onward from countries of first of arrival to countries of destination.
- ⁷¹ M. den Heijer, J.J. Rijpma and T. Spijkerboer, *Dwang, verbod en grootse verwachtingen. Over het falende Europese asielbeleid* [Coercion, prohibition and great expectations: on the failure of European asylum policy], *Nederlands Juristenblad* 24 (2016), pp. 1672-1682.
- ⁷² See e.g. European Council of Refugees and Exiles (ECRE), *The Implementation of the Dublin III Regulation in 2018*, March 2019.
- ⁷³ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, COM (2020) 610 final, article 55. In addition, article 56 refers to other types of solidarity contributions, such as capacity-building measures and operational support.
- ⁷⁴ The situation in the country of first arrival is often a key factor in this regard; 'deterrence' encourages secondary migration and a race to the bottom in terms of policy rules. See ACVZ, *Secondary Movements*, supra note 1.
- ⁷⁵ This applies in particular to 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.
- ⁷⁶ For a comparative analysis, see the *country reports* of the Asylum Information Database (AIDA) and the European Council on Refugees and Exiles (ECRE), the *country reports* and the *Annual Report* of EASO, and the European Commission's various impact assessments on the implementation of directives in the member states.
- ⁷⁷ See e.g. ACVZ, *Op zoek naar veilige(r) landen* [In search of safe(r) countries], February 2018; ACVZ, *Secondary Movements*, supra note 1; and ECRE, *Analysis of Asylum Statistics in Europe*, 19 June 2020.
- ⁷⁸ Proposal for a Regulation of European Parliament and of the Council on the European Union Agency for Asylum, COM (2016) 271 final.

- ⁷⁹ For a comparison of reception conditions in the EU member states, see e.g. ECRE's *Asylum Information Database (AIDA)*.
- ⁸⁰ Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum, COM (2018) 633 final.
- ⁸¹ For this reason, it is important to comply with international standards when drawing up and applying such lists. In particular, the right of an asylum seeker to appeal against the presumption that a country is safe needs to be guaranteed in order to prevent refoulement.
- ⁸² Asylum Procedures Directive (2013/32/EU), article 31(8)(b), read in conjunction with articles 36-37 and annex I (Designation of safe countries of origin), and article 33(1)(c), read in conjunction with article 38 (The concept of safe third country).
- ⁸³ In fact, the Commission has published a proposal for an EU list of safe countries. See Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin, COM (2015) 452 final. The proposal for a new Asylum Procedures Directive permits the parallel use of national lists.
- ⁸⁴ See e.g. ACVZ, *In search of safe(r) countries*, supra note 77.
- ⁸⁵ See AIV, Advisory report no. 112, *European Security: Time for New Steps* (2020). In this report, the AIV also discusses other aspects of security and crisis management in the wider region.
- ⁸⁶ Remittances are money transfers made by migrants to family members or friends in their country of origin.
- ⁸⁷ See chapter 2, 'Internationale migratiesamenwerking' [International cooperation on migration], in M. Sie Dhian Ho et al., *Gedeeld belang bij circulaire migratie. Naar duurzame partnerschappen* [Shared interest in circular migration: towards durable partnerships], forthcoming (early 2021).
- ⁸⁸ United Nations, *Global Compact on Refugees* (New York, 2018).
- ⁸⁹ See 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, pp. 17-24.
- ⁹⁰ Incidentally, the proposals build on the 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.
- ⁹¹ For an analysis of the complex interplay between aid and migration, see Concord, *Aid and Migration: The Externalisation of Europe's Responsibilities* (2018).
- ⁹² See also S. Carrera, *Whose Pact?*, supra note 65.
- ⁹³ UNHCR, *Global Trends 2019*, June 2020.
- ⁹⁴ See EU-Turkey Statement, supra note 14.
- ⁹⁵ See European Commission, *EU-Turkey Statement: Four years on*, factsheet, March 2020.
- ⁹⁶ On this point, see also M. Wijnkoop, 'De regio. Bescherming in plaats van opvang' [The region: protection instead of reception], in M. Sie Dhian Ho et al., *Over de grens*, supra note 58, at pp. 169-182.
- ⁹⁷ See supra note 3.
- ⁹⁸ Article 79(3) TFEU.
- ⁹⁹ María Martín, 'España inyecta a Marruecos otros 30 millones de euros para frenar la inmigración irregular', *El País*, 19 July 2019.
- ¹⁰⁰ See e.g. Hugo Brady, 'Expert Voice: VDL's migration plan – The fine art of pleasing no-one', International Centre for Migration Policy Development, 24 September 2020.
- ¹⁰¹ See chapter 9, 'Instituties' [Institutions], in M. Sie Dhian Ho et al., *Gedeeld belang bij circulaire migratie*, supra note 87.
- ¹⁰² Ministry of Foreign Affairs, *State of the European Union 2019* (policy document on the Netherlands' priorities regarding the EU), p. 16.
- ¹⁰³ See ACVZ, *Advisory Report: The Strategic Country Approach to Migration: Between Ambition and Reality* (2015); and chapter 2, 'Internationale migratiesamenwerking' [International cooperation on migration], in M. Sie Dhian Ho et al., *Gedeeld belang bij circulaire migratie*, supra note 87.

- ¹⁰⁴ The Schengen area, in which border controls between participating European countries have been abolished, comprises 26 countries: the EU member states, with the exception of Romania, Bulgaria, Croatia, Cyprus and Ireland, and the following non-EU countries: Iceland, Liechtenstein, Norway and Switzerland.
- ¹⁰⁵ Article 29 of the Schengen Borders Code permits border controls at internal borders in the case of 'serious deficiencies relating to external border control' for a maximum period of two years.
- ¹⁰⁶ See e.g. Gerogi Gotev, *Macron pleads for Schengen renegotiation, possibly with fewer members*, Euractiv, 29 April 2019.
- ¹⁰⁷ Article 3(2) TEU; Article 67(2) TFEU; Protocol no. 19 on the Schengen acquis integrated into the framework of the European Union, attached to the TFEU.
- ¹⁰⁸ AIV, Advisory letter no. 28, *The Future of Schengen* (2016).
- ¹⁰⁹ Remarks by Chancellor Angela Merkel during a joint press conference with President Emmanuel Macron on 18 May 2020.
- ¹¹⁰ Regarding the call by President Macron, among others, to reform Schengen in the wake of terrorist attacks in Nice and Vienna, see e.g. Elisa Braun, 'Macron calls for a "refoundation of the Schengen area"', *Politico*, 5 November 2020.
- ¹¹¹ Article 20(1) TEU.

Request for advice



Ministerie van Buitenlandse Zaken

Mr Jaap de Hoop Scheffer
Chairman of the Advisory Council
on International Affairs
P.O. Box 20061
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Date 15 May 2019
Re Request for advice on asylum and migration

Dear Professor de Hoop Scheffer,

My colleague, the Minister of Justice and Security, joins me in requesting your attention to the following matter.

There are a number of European issues that are priorities for the Netherlands about which there is significant disagreement, including the EMU, climate action, the rule of law and migration. However, with regard to migration, and asylum in particular, the impasse is such that no progress has been made for some time and many worry that it can never be broken.

Irregular migrants will continue to attempt to enter the Union, and the issue of migration will remain on the agenda as a result of a number of factors: expected population growth in Africa, climate change, shifting geopolitical relations, dysfunctional states and rule-of-law issues in many countries. Since the migration crisis of 2015-16, the Union has proven incapable of modifying its legislative framework so as to prepare it for the next major influx and the crisis this could unleash.

Migration flows are variable. In 2015-16 the main route for irregular migrants ran via Greece and the Western Balkans and consisted in large part of Syrians fleeing the civil war. After the EU-Turkey statement and the closure of the Western Balkan route, those numbers fell dramatically. The central Mediterranean route then became the primary route, until a sharp drop-off occurred in the summer of 2018, precipitated in large part by agreements with Libya. In 2018 and 2019 the Western Mediterranean route was the most active. In contrast to 2015-16, when the eastern route was dominant, migrants using the other two routes are often motivated by economic factors. Most of these migrants are not entitled to protection and will have to be repatriated after completion of the asylum procedure. However, not enough of these migrants are not being sent back in practice.

Although we are not experiencing a crisis on the level of 2015-16, we are experiencing a political crisis. Since the spring of 2016 the member states have not been able to reach agreement on legislative proposals to amend the Common European Asylum System. In that connection it is clear that the member states that joined the EU in 2004 strongly believe in preventing immigration on any scale. The best-known point of contention is whether a mandatory solidarity mechanism for resettling asylum seekers should be established. There is also disagreement, especially among member states on the southern border, about how long a member state remains responsible for an individual asylum seeker and about whether the use of the 'border procedure' should be made mandatory.

As a result of the dysfunction of the European asylum system, the Netherlands is now dealing with substantial secondary migration flows: over half of all asylum seekers who

report to the Dutch authorities have not yet been registered in another member state. A related and more recent phenomenon that the Netherlands is currently grappling with is the problems in and around asylum seekers' centres caused by asylum seekers who have little chance of being granted asylum, either because they are from safe countries or for some other reason. This is why it is more effective for the Netherlands to take action against secondary flows (and by extension, primary flows too) and why it is essential to return more migrants to their countries of origin. As long as this does not happen, the pressure on the functioning of the Schengen system will continue.

In short, enhancing the effectiveness of European action in the realm of asylum and migration is vital, particularly in the internal domain (support for joint *external* action, such as the EU-Turkey statement, is greater). In the light of the above, the government would appreciate receiving an advisory report from the AIV, no later than the spring of 2020, which addresses the following questions:

- How can we break the political impasse on asylum issues?
- What opportunities does the Council see for decision-making as a new Commission and European Parliament take office?
- What options does the Council see for decision-making on migration? Are there any conceivable alternatives that could lead to a solution (e.g. lead groups, bilateral agreements, decision-making by consensus)? What recommendations can the AIV make on this issue?
- How can we keep Schengen functioning? Is it advisable to restore the link between asylum and Schengen, and if so, through what legislation and in what way can this best be achieved?

In answering the above questions, the AIV could consult the Advisory Committee on Migration Affairs (ACVZ).

Yours sincerely,

Stef Blok
Minister of Foreign Affairs

List of persons consulted

In preparing the advisory report, the Committee spoke to various experts. The AIV is sincerely grateful for their insights and their input.

- **Carmelita Ammendola** Deputy Prefect, Justice and Home Affairs Counsellor, Permanent Representation of Italy to the EU
- **Marije Balt** Executive secretary to joint committees, Advisory Council on International Affairs
- **Marijn Clevers** Analyst, European Stability Initiative (ESI)
- **Dr Nils Coleman** Head of Policy, Policy and Management Support Department, Custodial Institutions Agency
- **Laura Corrado** Head of the Legal Pathways and Integration Unit, DG for Migration and Home Affairs (DG HOME), European Commission
- **Lars-Erik Fjellström** Legal Counsellor at the Permanent Representation of Sweden to the European Union
- **Marie Louise Gammelgaard-Larsen** Justice and Home Affairs Counsellor on Migration and Asylum, Permanent Representation of Denmark to the EU
- **Lise Gregoire-van Haaren** Director of the European Integration Department, Ministry of Foreign Affairs
- **Daan Huisinga** Deputy Director-General for International Migration, Ministry of Justice and Security
- **Time Kaptein** Deputy Head, Asylum, Reception and Return, Migration Policy Department, Ministry of Justice and Security
- **Nanda Kelly-Smit** Senior adviser, Directorate-General for Migration, Ministry of Justice and Security
- **Carin Lobbezoo** Senior officer, European Integration Department, Ministry of Foreign Affairs
- **Professor Matthias Lücke** Senior Researcher, Kiel Institute for the World Economy Coordinator, MEDAM
- **Wolf Mannens** Secretary/Director, Advisory Committee on Migration Affairs
- **Koos Richelle** Member of the AIV, former Chair of the Advisory Committee on Migration Affairs
- **Christine Roger** Director General responsible for Justice and Home Affairs at the General Secretariat of the EU Council
- **Yuri Schutte** Coordinating policy officer, International Migration Policy Section, Directorate-General for Migration, Ministry of Justice and Security
- **Luigi Scazzieri** Research Fellow, Centre for European Reform
- **Pascal Schumacher** Justice and Home Affairs Counsellor, Permanent Representation of Luxemburg to the European Union
- **Vladimír Šimoňák** Head of the Home Affairs Unit, Permanent Representation of the Slovak Republic to the European Union
- **Guy Stessens** Deputy Director of Home Affairs at the Council of the European Union
- **Alexandra Stiglmeier** Senior Analyst and Secretary General, European Stability Initiative
- **István Takács** Justice and Home Affairs Counsellor, Permanent Representation of Hungary to the European Union
- **Willemijn Tiekstra** Senior policy officer, International Migration Policy Section, Directorate-General for Migration, Ministry of Justice and Security
- **Michał Tudorowski** Head of Justice and Home Affairs Unit, Permanent Representation of the Republic of Poland to the European Union
- **Dr Rob Visser** Secretary of the Council of State, former Executive Director of the European Asylum Support Office (EASO)

- **Catherine Woollard** Director of the European Council on Refugees and Exiles
- **Richard van Zwol** Member of the Council of State, former Chair of the Committee on Long-Stay Migrants



List of abbreviations

ACVZ	Advisory Committee on Migration Affairs
AIV	Advisory Council on International Affairs
CEAS	Common European Asylum System
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
CJEU	Court of Justice of the European Union
EEAS	European External Action Service
EP	European Parliament
EPP	European People's Party (EP)
EU	European Union
FRIT	Facility for Refugees in Turkey
FRONTEX	European Border and Coast Guard Agency
ID	Identity and Democracy Group (EP)
IOM	International Organization for Migration
MFF	Multiannual Financial Framework
QMV	qualified majority voting
S&D	Progressive Alliance of Socialists and Democrats (EP)
SAR	search and rescue
SDGs	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
V4	Visegrád Four, Visegrád Group (Hungary, Poland, Slovakia, Czech Republic)

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