

ASYLUM DETENTION IN EUROPE: STATE OF PLAY AND WAYS FORWARD

Marie Walter-Franke | *Affiliate research fellow, Jacques Delors Institut – Berlin*

SUMMARY

For the second time in 10 years, EU asylum legislation is being overhauled. In a tumultuous political season marked by the recent “refugee crisis”, the temptation to go for severe asylum policies is ever more prevalent. Despite the detailed rules already binding EU member states to common standards, human rights violations in border transit zones, hotspots and specialised facilities have been repeatedly condemned. What is the state of play in administrative detention and what is the best way to move forward with the reform launched in 2016? In this policy paper, Marie Walter-Franke untangles this controversial aspect of asylum policy in three steps.

Firstly, **five core principles** of EU detention rules are identified:

1. Detention is an **exception** that must be justified;
2. Detention **should not be punitive**;
3. **Less coercive alternatives measures** should be examined before resorting to detention;
4. There should be **procedural guarantees** to protect the fundamental rights of applicants;
5. Adequate **protection for vulnerable applicants** should be in place.

Secondly, a **comparative analysis** scrutinises the transposition and implementation of these principles in EU member states. While the adoption of EU rules on detention has had a measurable impact, questionable practices persist, due to deficient enforcement and to the **vagueness, parsimony and built-in flexibility** of EU rules that allow the continuation of a wide spectrum of policies.

Finally, on the basis of this assessment of current practice, we propose ways forward:

1. **Better implementation of existing rules** to uphold the premier principle of EU rules on asylum detention: the freedom of movement of applicants.
2. **More ambitious reforms**: In spite of its deficiencies, the detention regime is left largely untouched in the Commission’s 2016 proposals. Clearer, stronger rules are required in order to deliver on procedural rights and protect vulnerable groups.
3. **Constraint-based dispersal and sanctions will mean more detention**: The introduction of a new ground for detention in the event of non-compliance with residence restrictions is a potentially dangerous development that should be abandoned.
4. **Enhanced cooperation instead of a stronger Dublin system**: detention for Dublin transfer remains general practice, a costly business that has not succeeded in establishing fair responsibility sharing. Rather than reinforcing a broken system, we argue that member states should have flexibility to skip Dublin in their admissibility assessment. Instead, willing states should be empowered to experiment with responsibility-sharing schemes which take the preferences of applicants into account.

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INTRODUCTION

In the wake of the “refugee crisis” and in reaction to terrorist attacks, European governments are exercising tighter control over the whereabouts of migrants and refugees. Where migration and security political agendas conflate, stepping up restrictions on liberty for foreigners is a tempting policy solution. According to data from 16 EU member states¹, at least 123,987 applicants for international protection² were detained in 2016, the equivalent of 11% of new applications in these countries³. At the moment, Hungary’s harsh policies make the headlines. After closing the Balkan route with barbed wire in 2015, the Orbán government is now enforcing the blanket detention of all asylum applicants in container “transit camps” on its border with Serbia⁴. This measure is part of the government’s efforts to deter migration, which Orbán, who faces elections next year, depicts as “the Trojan horse of terrorism”⁵. Hungary resorts to extreme measures, but it is certainly not an isolated case. The “hotspot” processing centres established in “frontline countries” follow a similar logic to “transit camps”: containing the asylum issue on the EU’s borders. And indeed, after the EU-Turkey deal, hotspots were initially established as detention facilities on the Greek islands⁶. Harsh policies towards migrants also enjoy wide support in the ongoing electoral season. For example, after the Hungarian law was passed on 7 March, the Bavarian CSU [tried to revive](#) the idea of “transit zones” on Germany’s borders even though the idea had long been dropped by Merkel’s coalition government.

Though such practices might suggest otherwise, states are not at liberty to detain third-country nationals arbitrarily. Detention is the most severe form of punishment in our penal systems. The application of this extreme liberty restriction to persons seeking protection is thus morally problematic and is closely regulated under international human rights law. Over the last 20 years, as part of the development of common legal standards in the field of asylum, the EU also adopted its own set of rules on administrative detention. Following major problems with implementation⁷, the initial set of Directives and Regulations was overhauled by 2013. Under pressure from the “refugee crisis”, the Commission published another round of proposals in the summer of 2016, only a year and a half after the deadline for transposition of the previous legislative package. These new proposals are now being discussed by the Council and the European Parliament.

Against the background of current controversies surrounding extreme detention practices and of another reform of EU asylum law, we propose to explore the current state of compliance across the Union. What is the state of play as regards implementation of EU rules on administrative detention? What is the practice on the ground? And how should the EU’s reform efforts move forward?

This policy paper identifies five principles as the core of the body of EU rules regulating detention in [part 1](#):

1. Detention is an exception that must be justified;
2. Detention should not be punitive;
3. Less coercive alternative measures should be examined before resorting to detention;
4. There should be procedural guarantees to protect the fundamental rights of applicants;
5. Adequate protection for vulnerable applicants should be in place.

On the basis of these five principles, a comparative analysis in [part 2](#) scrutinises the implementation of EU rules on detention in current member state practice. The paper argues that the adoption of EU rules on administrative detention has borne fruit, and that most member states comply with at least a narrow interpretation of all five principles as they are formulated in EU law. Though applicants for international protection are not

1. Data compiled from AIDA reports.

2. EU law uses this phrase to refer to persons applying either for asylum or for subsidiary protection. Hereafter, the term applicant or asylum applicant will be used to refer to applicants for international protection.

3. This figure does not include failed applicants facing return.

4. A law to that effect was adopted by the Hungarian Parliament on 7 March 2017.

5. Bilefsky, Dan “Hungary Approves Detention of Asylum Seekers in Guarded Camps” *New York Times*, 7 March, 2017.

6. Amnesty international, “Greece: A blue print for despair. Human rights impact of the EU-Turkey deal”, 14 February 2017.

7. As stated by the Commission in its recast proposal for the Reception Conditions Directive COM(2008) 815 final, p. 6.

”DETENTION
CONTINUES TO BE
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PRACTICE.”

detained as a general rule, detention continues to be entrenched in national practice for the purpose of Dublin transfers, return and border procedures. Applicants are generally no longer detained in ordinary prisons, but the conditions of detention remain problematic in many states, and alternatives to detention are not yet being implemented in a way that would minimise the human rights impact of restrictions on liberty. As to procedural guarantees, many states still do not provide effective access to legal advice and judicial remedy even if they have transposed these provisions into their national law. Finally, in practice, the protection of vulnerable applicants remains limited to children and women.

Part 3 then discusses the Commission’s reform proposals and assesses how well they tackle these challenges. We criticise the fact that the detention regime is left widely untouched: no steps are taken to address the failings of the existing provisions that lead to low-impact or disparate compliance. To the contrary, the introduction of a new ground for detention in the event of a breach of residence restrictions is a potentially dangerous development.

1. The EU detention regime: Ending arbitrary detention through Regulation?

1.1. Why regulate detention at the EU level?

With the Common European Asylum System, the EU is developing a regulatory regime designed to harmonise national asylum legislation and practice. Defining rules on appropriate restrictions on liberty has been an area of EU legislative endeavours since the early 2000s. At that time, the confinement of applicants for international protection in jails and closed facilities was widespread and on the rise throughout the Union.

Why were member states detaining more asylum applicants then? One major factor for the hardening of national practice was the “asylum crisis” linked to the end of the Cold War and the disintegration of Yugoslavia. Another factor pushing detention was emerging intergovernmental cooperation among EU countries in asylum policy, according to a report written for the European Commission in 2000⁸. Indeed, in a general context of criminalisation of migration, the routine detention of asylum applicants increased significantly with the implementation by member states of the 1990 Dublin Convention⁹ as well as the 1992 Council Resolutions on [safe third countries](#) and [safe countries of origin](#). The Resolutions established common guidelines on third countries to which applicants could be safely returned. For applicants who would stay in Europe, the Dublin Convention’s aim was to make sure that they could apply for protection in only one country, to be determined on the basis of four criteria (family reunification, previous legal residence or visa, country of first entry into Europe, humanitarian clause).

In practice, most member states increasingly resorted to detention while determining how applicants had arrived and, if possible, to transfer them to the state responsible for their application¹⁰. This detention practice raised considerable issues, potentially breaching EU member states’ obligations under the Geneva Refugee Convention as well as international human rights law (see [Box 1](#)) which led to several judgments by the European Court of Human Rights, starting with [T.I. vs UK](#) as early as 2000.

8. European Commission, “Study on the legal framework and administrative practices in the member states of the European Communities regarding reception conditions for persons seeking international protection”. Final Report, Part A: Comparative Analysis of Reception Conditions for Persons seeking protection in the Member states of the European Union, p. 97, 2000.

9. [Dublin Convention](#) determining the State responsible for examining applications for asylum lodged in one of the Member states of the European Communities which was signed in 1990 and entered into force in 1997.

10. European Commission, “Study on the legal framework and administrative practices in the member states of the European Communities regarding reception conditions for persons seeking international protection”. Final Report, Part A: Comparative Analysis of Reception Conditions for Persons seeking protection in the Member states of the European Union, p. 97, 2000.

BOX 1 ► International law on the detention of asylum applicants

Liberty is a core human rights protected under:

- Article 9 of the International Covenant on Civil and Political Rights (ICCPR)
- Article 5 of the European Convention on Human Rights (ECHR)
- Article 6 of the EU Charter of Fundamental Rights.

Detention is the most extreme limitation of liberty. As such, it is the highest punishment provided for in modern criminal systems aside from the death penalty. The use of detention in the context of immigration and especially asylum is thus morally questionable.

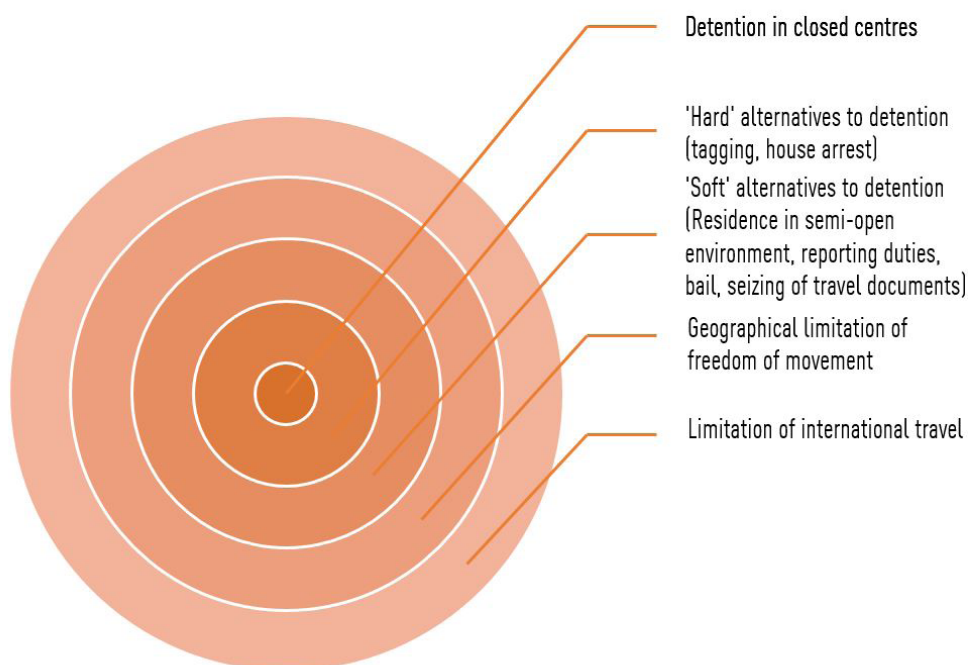
International refugee law protects asylum-seekers against arbitrary detention: Under Article 31 of the 1951 Refugee Convention, “a person should not be held in detention for the sole reason that he or she is seeking international protection”.

To be lawful, administrative detention must be properly justified based on the basis of the principles of necessity and proportionality¹¹, with due regard for the rights of the person detained. This is what the Council of Europe¹² and the Guidelines of the UNHCR demand¹³.

The gradation of restrictions on liberty and in particular the scope of admissible administrative detention has thus become one of the major issues to be tackled in the elaboration of common minimum standards on the treatment of refugees and migrants. [Figure 1](#) illustrates the layers of restrictions on liberty that were codified at the EU level over time.

Developing a clear catalogue of rules on detention was a difficult exercise. In 2008, the Commission had to acknowledge that the first round of legislation had failed to deliver on ending the routine detention of asylum applicants and on guaranteeing basic rights to detainees¹⁴. To address this problem, the Commission proposed that detailed rules on administrative detention be established as part of the Common European Asylum System. These were adopted after a painstakingly negotiated policy-building process characterised by a remarkable expansion of the volume of legislation.

FIGURE 1 ► Restricting freedom of movement: Liberty layered



Source: Author's compilation

11. Reception Conditions Directive (recast) 2013/33/EU, recital 15.

12. Council of Europe, Committee of Ministers, “Recommendation on measures of detention of asylum seekers”, 16 April 2003.

13. UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention”, 2012.

14. European Commission, recast proposal for the Reception Conditions Directive COM(2008) 815 final p. 6.

1.2. What is the state of play in the EU rules on detention?

Three different instruments in the EU's legislative arsenal on asylum and migration allow for administrative detention, addressing different categories of persons depending on the status of their asylum claim (see Table 1). Taken together, the provisions on detention contained in these legislative instruments establish the set of rules and conditions on the grounds of which a person can be detained in the course of her or his asylum application trajectory. The texts are distinct but also deeply intertwined.

TABLE 1 ► EU instruments allowing administrative detention

STEP IN THE ASYLUM CLAIM	TARGETED GROUP	EU INSTRUMENT
Admissibility Procedure	Applicants for international protection without a designated responsible state	Dublin III Regulation (604/2013/EU) • Convention adopted in 1990 • Turned into a regulation in 2003 • Reformed in 2013 • New reform ongoing
Refugee Status Determination Procedure	Applicants in the state responsible for their claim	Reception Conditions Directive (2013/33/EU) • Adopted in 2003 • Reformed in 2013 • New reform ongoing
After a negative decision	Rejected applicants and irregular migrants	Return Directive (2008/115/EC) • Adopted in 2008 • Reform is envisaged for late 2017

Source: Author's compilation

1.2.1. General rules for all applicants

Since 2013, the [Reception Conditions Directive](#) sets detailed standards which limit the member states' ability to detain applicants for international protection. In the first version of the Directive dating back to 2003, detention had only been touched upon in a short and vague provision authorising the confinement of asylum-seekers "for legal reasons or reasons of public order"¹⁵. This changed with the 2013 recast: the short provision was turned into four new articles. With the aim of ending the practice of routinely detaining asylum applicants during the processing of their claims, they lay down rules on detention (Article 8), establish guarantees for detained asylum-seekers (Article 9), regulate the conditions while in detention (Article 10) and specify the principles limiting the use of detention of vulnerable groups and persons with special needs (Article 11).

The core of the Directive's framework boils down to five principles:

1. Detention is an exception from the right to liberty that must be proportional and justified.

This means that as a rule, applicants should enjoy freedom of movement. That does not exclude certain geographical restrictions in terms of residency and movement¹⁶. An exclusive list of grounds for detention is set out in Article 8(3): (a) ascertaining identity or nationality; (b) to ensure cooperation, especially when there is a risk of absconding; (c) admissibility procedure at the border (d) return; (e) national security or public order; (f) Dublin transfer. Two of

15. Directive 2003/9/EC, Article 7 (3): "When it proves necessary, for example for legal reasons or reasons of public order, member states may confine an applicant to a particular place in accordance with their national law." In addition, there were scattered provisions authorising member states to derogate from their obligations in terms of rights to information of applicants and standards of living during detention".

16. Article 7 of the 2013 Reception Conditions Directive.

these grounds for detention, return and Dublin transfer, refer to the Dublin III Regulation and the Return Directive that contain specific rules (see Table 1 and further explanations below). To detain an applicant, national authorities must state the reasons for their decision by showing that detention is necessary on the basis of these six grounds and that they cannot resort to alternative measures having a lesser impact on the right to liberty.

2. Detention should not be punitive.

EU law makes a clear distinction between criminal detention which is meant to punish a crime and migration-related detention used in the context of asylum to enforce national migration policies. This distinction stems from international law. Under the Geneva Refugee Convention, asylum applicants are protected from being treated as criminals even if they cross borders illegally, since they are potential refugees. The new EU rules on detention of 2013 incorporated this aspect and the Reception Condition Directive states that applicants should not be held in ordinary prisons¹⁷. Furthermore, asylum applicants should be detained in dedicated facilities distinct from general migration detention centres¹⁸.

3. Alternatives to detention should be available and preferred to detention.

A major contribution of the recast Reception Conditions Directive is that it codifies the obligation for national authorities to consider “less coercive alternative measures” before resorting to detention. The assessment of potential alternatives should be included and the reasons stated in the detention decision¹⁹. Such alternatives to detention may include compulsory check-ins with the authorities (reporting duties), the surrender of travel documents (handing IDs or passports), bailing systems (financial guarantees), residence restrictions and further measures—some borrowed from the criminal monitoring system such as ankle bracelets.

These kinds of measures come into play when grounds for detention are fulfilled—when, for instance there is a risk of absconding—but the proportionality assessment shows that the aim pursued—in our example compliance with a transfer or removal decision—can be attained with a milder reduction of a person’s liberty.

The impact of alternatives to detention on the quality of life should not be underestimated, but they have less harmful effects on mental health, the right to family life, the right to work, etc. For that reason, alternatives to detention are put forward as a preferable form of state control.

4. Procedural guarantees must be in place.

While the final Directive is less ambitious than what the Commission initially proposed, it acknowledges the rights to information, to a speedy judicial review of the legality of detention and to free legal assistance and representation²⁰. However, these rights are subject to a number of derogations. The member states are not obliged to set up an automatic review of the detention by judicial authorities, leaving it up to applicants to go to a judge if they are aware of that possibility. Member states may also restrict free legal assistance in a variety of ways.²¹ While the Directive’s section on procedural guarantees pools and codifies important rights and principles, it still allows member states a great deal of leeway.

5. The rights of vulnerable applicants must be protected.

There are provisions in EU asylum law to ensure that the detention of vulnerable persons takes into account the potentially serious impact on their health, in particular their mental health. Under the CEAS as a whole, persons considered as “vulnerable” and/or “with special needs” are granted additional rights at all stages of their application. Article 21(1) of the Reception Conditions Directive (which also applies to Dublin transferees) defines the addressees of these provisions in the following exhaustive list: “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.” As regards detention, however, Article 11 on vulnerable applicants mainly focuses on restricting, as far as possible, the detention of children, both when detained with their families and when unaccompanied²². Separate accommodation for women is also provided for²³. There are no specific provisions for any of the categories of vulnerabilities detailed in Article 21.

17. Article 10(1) of the 2013 Reception Conditions Directive.

18. Article 10(2) of the 2013 Reception Conditions Directive.

19. Article 8(2) of the 2013 Reception Conditions Directive.

20. Article 9(2) to 9(6) of the 2013 Reception Conditions Directive.

21. Article 9(7) to 9(9) of the 2013 Reception Conditions Directive.

22. Article 11(2) to (4) of the 2013 Reception Conditions Directive.

23. Article 11(5) of the 2013 Reception Conditions Directive.

1.2.2. Specific rules for transfers between member states

The [Dublin III Regulation](#)²⁴ is based on a convention adopted in 1990 by the then twelve EU member states. It establishes the rules under which national authorities may assess whether another participating state is responsible for an applicants' claim for protection, and transfer them thither. Detention for the purpose of enforcing the Dublin system became a significant issue but no specific rules on detention were included in the 2003 Dublin II Regulation. The 2013 recast (Dublin III) addressed this legal void by creating a whole new section on detention²⁵.

Persons subject to a transfer to the EU member states responsible for their asylum claim may be detained if there is a significant risk of them absconding²⁶. This notion of "risk of absconding" remains for the national level to define and operationalise, which leads to variance in national practice, as underlined by recent case law of the CJEU²⁷.

The five principles described above with reference to the Reception Conditions Directive also apply to Dublin transfers. Indeed, The Regulation's framework on detention set out in Article 28 follows the same logic and refers to several of the Reception Conditions Directive's provisions as regards non-punitive detention (principle 2)²⁸, procedural guarantees (principle 4)²⁹, and the rights of vulnerable applicants (principle 5)³⁰. As such, Dublin detainees benefit from most of the standards on detention conditions that are laid down in the Reception Conditions Directive.

There are, however, a few specificities and differences:

- Principle 1 (Detention should not be the rule): Applicants should not be detained for the purpose of a Dublin procedure, only in case of transfer. The decision to detain if there is a risk of absconding should be justified individually³¹.
- Principle 3: Like under the Reception Conditions Directive, less coercive alternatives measures should be considered before resorting to detention³².
- Principle 4, Procedural guarantees: Unlike the Reception Conditions Directive, the Dublin Regulation also lays down time limits on detention where the procedure or transfer fails, with direct effect in national law.³³ Apart from this difference, all provisions of the Reception Conditions Directive on procedural guarantees apply to Dublin detainees as well.

1.2.3. Rules for failed applicants

The third instrument that allows detention is the 2008 [Return Directive](#). This text applies to failed applicants and undocumented migrants facing repatriation, and regulates the extent to which detention can be used to enforce removal decisions. The Return Directive is not strictly speaking part of the Common European Asylum System, but it is nevertheless woven into EU asylum law as it becomes applicable as soon as the exit door of the asylum procedure closes.

Having been refused protection or even facing a removal decision should not automatically mean that a person will be placed in administrative detention. Under the Return Directive, detention is only legal for the purpose of removal itself³⁴, when there is a risk of absconding or the person concerned is resisting the return procedure. The maximum length of detention allowed by the Return Directive is 18 months, all extensions included.

24. The Dublin Convention of 1990 was transformed in 2003 into an EU regulation which was commonly referred to as 'Dublin II'. Overhauled in 2013, the regulation is now nicknamed "Dublin III". The Commission proposal for a new recast is referred to as "Dublin IV".

25. Article 28 of the 2013 Dublin III Regulation No 604/2013, Section V.

26. Article 28(2) of the 2013 Dublin III Regulation.

27. National legislation is required to specify its provisions such as the definition of the "risk of absconding", see CJEU judgment of 15 March 2017 in Case C-528/15, [Al Chodor](#).

28. Article 28(4) of the 2013 Dublin III Regulation.

29. Article 28(4) of the 2013 Dublin III Regulation.

30. Article 28(4) of the 2013 Dublin III Regulation.

31. Article 28(1) and (2) of the 2013 Dublin III Regulation.

32. Article 28(2) of the 2013 Dublin III Regulation.

33. Article 28(3) of the 2013 Dublin III Regulation.

34. Article 15(1) of the 2008 Return Directive.

The Return Directive's provisions on detention appear to have been the blueprint for the detention chapters in the 2013 Reception Conditions Directive and the Dublin III Regulation, as they display a similar structure. The five principles outlined above thus logically appear in the detention provisions of the Return Directive. Chapter VI on detention starts with a general article on grounds for detentions and applicable procedures which specifies potential grounds for detention, preference for less coercive alternatives and procedural aspects such as due process, right to information, and remedies, thus overlapping with principles (1), (3) and (4)³⁵. Next is an article on conditions of detention (Article 16) and provisions on the detention of minors (Article 17), covering principles (2), (4) and (5). There is in addition a last article allowing member states to derogate from some of their obligations in the event of exceptional pressure on the return system (Article 18).

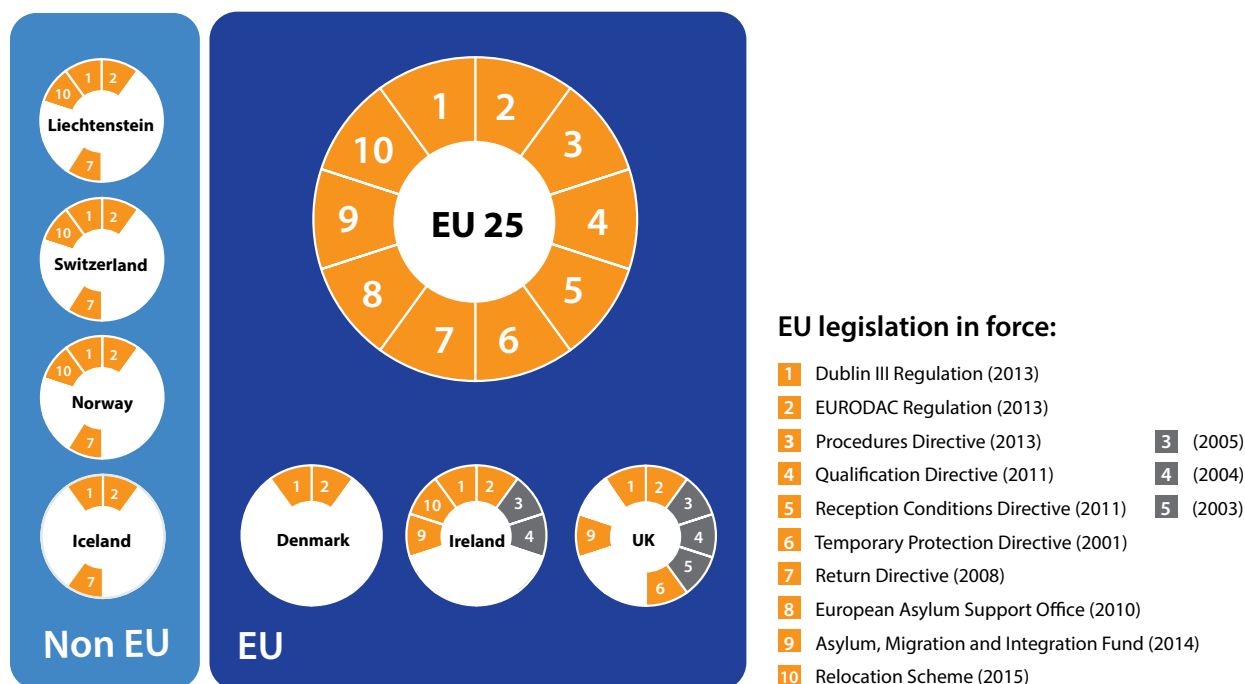
Rules on return detention display the five principles, but these are formulated in very lax, broad terms, essentially allowing member states to carry on with their pre-removal detention practices. This reflects the fact that, despite the overlap in the groups of people targeted, the Return Directive is a tool of migration management tailored for persons that do not enjoy protection under the Geneva Refugee Convention.

1.3. Variable geometry in EU asylum policy: Pick and choose?

While reaching agreement was difficult owing to the wide differences in national approaches, the EU succeeded in developing a detailed set of rules that guarantee, at least on paper, fairly high standards in limiting the arbitrariness of asylum detention. As illustrated in Figure 2, however **these rules do not apply everywhere in the EU, while non-EU countries participate in parts of the framework.**

Agreements with the Union allow four non-EU countries to participate in the Dublin/EURODAC³⁶ system. Iceland, Norway, Lichtenstein and Switzerland thus apply the Dublin III Regulation without being bound by the Reception Conditions Directive. They also apply the Return Directives as part of the Schengen acquis, and three of them are voluntarily participating in the 2015 scheme for the relocation of 120,000 applicants from Italy and Greece.

FIGURE 2 ▶ Variable geometry in EU asylum policy: Opt-ins, opt-outs and associated states



35. Article 15 of the 2008 Return Directive.

36. EURODAC is the EU asylum fingerprint database, created in 2003 as a corollary of the Dublin system. Rules are laid down in Regulation 603/2013/EU.

On the EU side, three EU countries (Denmark, Ireland and the United Kingdom) have specific arrangements allowing them to opt in or out of the EU legislation in the realm of asylum policy. Unlike Denmark³⁷, Ireland and the UK have the flexibility to opt into elements of the CEAS. As appears in [Figure 2](#), the only part of the CEAS that is applied by all EU countries and associated states is the Dublin/EURODAC system, that allows the transfer of applicants among them. The Return Directive as well as other major instruments of the CEAS (the Qualification, Procedures and Reception Conditions Directives) are not in force in their current versions in any of the opt-out countries. Either there was no opt-in, or only one for the old versions (indicated in grey). For the scope of application of EU detention standards, that means that neither Ireland, nor Denmark are bound to apply EU rules on reception conditions or return. In the UK, the old, vague provision authorising the “containment” of applicants “when it proves necessary, for example for legal reasons or reasons of public order” is still valid.

In the context of Brexit, the UK declared it was opting out of almost all reform proposals currently on the table. That includes the proposal for a Dublin IV Regulation. When the reform are adopted, the UK will thus continue to apply the 2013 version of the Dublin Regulation, adding to the existing complexity.

1.4. What could change? The 2016 Commission reform proposals

Although variable geometry formally limits the ability of the EU to establish a genuine level-playing field, harmonisation efforts remain essential: equivalent protection is the premise to the Dublin system and the condition of its legality. The European Court of Human Rights confirmed it in the 2011 landmark judgment [M.S.S. v Belgium and Greece](#) which dealt with a case of wrongful detention³⁸. The consequences of unequal standards of protection for the CEAS came up again most prominently during the 2015-2016 “refugee crisis”, when European and national courts halted transfers to Greece, Italy, Hungary, Bulgaria and Romania because of systemic deficiencies, almost leading to the collapse of the whole system. Despite the fresh new rules that had just entered into force, the Common European Asylum System was once again displaying profound dysfunctions. In 2016, the EU Commission published a new asylum reform package to address these deficiencies. The Reception Conditions Directive and the Dublin Regulation are both extensively reworked, and a revision of the Return Directive is envisaged by the end of 2017.

Surprisingly, the detention regime is left largely untouched by the reform package. A few measures, however, deserve our attention. One worrying development from a human rights point of view is the proposal of a new ground for detention to enhance the [Reception Conditions Directive](#): the imposition of sanctions for non-compliance with residence obligations³⁹ laid down under Article 7 on “residence and freedom of movement”. Article 7 is considerably broadened, setting out all the situations in which member states may lay down residence obligations, including Dublin procedures and after a Dublin transfer. In the event of breach of these obligations, the Commission’s proposal provides for a series of sanctioning mechanisms for non-compliance, from cutting benefits all the way to detention. This is a potentially negative development when seen against the background of current practice, as will be further discussed in [section 3](#).

Articles 9 and 10 on detention conditions and procedural rights are left completely untouched. Article 11 on “Detention of vulnerable persons and of applicants with special reception needs” is edited semantically, without any change in the substance. The core concept of vulnerability is deleted by the Commission and replaced by the more neutral and bureaucratic phrase “applicants with special reception needs”. In its explanatory memorandum, the Commission describes this edit as a generous approach which recognises special reception needs more generally, beyond categories of persons considered vulnerable⁴⁰. How the practice would unfold if this provision were adopted remains to be seen.

37. Denmark’s participation in the Dublin system and EURODAC is based on a multilateral agreement with the EU since it does not take part in EU policies in the area of Justice and Home Affairs, which was one of four opt-outs negotiated to make the ratification the 1992 Maastricht Treaty possible after a negative referendum. Referenda held by several governments in favour of a more flexible opt-in system have so far failed.

38. The case involved the prolonged arbitrary detention of an Afghani asylum applicant in Greece after Dublin transfer back from Belgium. The Court’s decision confirmed that Greece had subjected M.S.S. to inhumane and degrading treatment, but also that Belgium had violated his human rights by transferring him to Greece despite knowledge of the structural problems in the Greek reception and detention regime. On the basis of the M.S.S. judgment, the countries participating in the Dublin system thus remain responsible for protecting the human rights of people they transfer. M.S.S. was a key inspiration for the 2013 reforms of the Dublin Regulation and the Reception Conditions Directive.

39. Article 8(3), new §(c) “to ensure compliance with legal obligations imposed on the applicant through an individual decision in accordance with Article 7(2) in cases where the applicant has not complied with such obligations and there is a risk of absconding of the applicant.” Proposal for a recast of the Reception Conditions Directive (COM(2016) 465 final).

40. Proposal for a recast of the Reception Conditions Directive (COM(2016) 465 final), p. 11.

The only substantial edit regarding detention in the Commission proposal for a [Dublin IV Regulation](#) is that the deadlines set for the various steps of a transfer procedure if the person concerned is detained are shortened⁴¹. From the viewpoint of applicants, this would shorten the length of detention on the one hand, but also the time they have available to access legal counsel in order to effectively appeal against the transfer and the detention order itself.

Are these proposals likely to lead to policy change in the right direction? Where are we in the implementation of the existing rules? What improvements and challenges are there? To answer these questions, the next section compares the practice of EU member states.

2. Administrative detention in practice

What does the EU detention regime look like in practice? This section examines how member states are currently implementing the European rules, based on the five principles identified above in [section 1.2](#). One challenge in comparing member state practice is that they often fail to provide detailed or comparable data on their detention practices in relation to asylum and migration. The dataset compiled for this comparative study relies mainly on detailed information gathered by several specialised NGOs: the Asylum Information Database⁴², the Global Detention Project⁴³ and w2eu⁴⁴, as well as data gathered by the [European Migration Network](#) in various studies. For reasons of data availability, all EU countries are covered with the exception of Estonia, Portugal, Romania and Slovakia, unless otherwise stipulated.

2.1. Detention: Not the rule but still entrenched in state practice

The most prominent achievement of the 2013 reform specifying rules on detention is that applicants for international protection are no longer routinely detained in practice during a normal status determination procedure. EU harmonisation has thus brought about a genuine improvement in the freedom of movement of applicants for international protection.

A few states continue to use the various options allowing detention during the status determination procedure in a questionable way. Upon registration of asylum claims, Austria detains all applicants for up to 48 hours for identification purposes before redirecting them towards open reception centres. In Hungary, Bulgaria and Greece, most applicants will be detained for at least three months. Apart from these problematic cases, detention is used only in the specific contexts of applications from detention, access to the territory and procedures of transfer or return.

- **Detention for the purpose of transfer or return:**

While detention is not the rule during the asylum application process, it remains entrenched in state practice in the context of Dublin transfers and return procedures for failed applicants. According to the Commission, 21 of 31 countries frequently use detention to enforce Dublin transfers⁴⁵ and they all use it to enforce returns⁴⁶. In the eyes of national authorities, detention is still seen as the only efficient way to ensure the success of a transfer or removal: while states have little control over the destination country's willingness to cooperate, they can use detention to keep applicants at arm's length. But in fact, even with detention, only an average of 34% of return procedures⁴⁷ and even fewer Dublin transfer decisions⁴⁸ are successful.

Over-reliance on detention disregards the major human rights implications that detention has for detainees. It also encourages problematic practices such as standardised detention orders assuming a risk of absconding for

41. Article 29(3) of the Dublin IV proposal.

42. AIDA, a project developed by ECRE (the European Council of Refugees and Exiles) and partner NGOs.

43. Database of the non-profit Global Detention Project – last accessed on 2 May 2017.

44. W2eu, or 'welcome to Europe' is a website providing information for refugees on national asylum systems. It is administered by the German NGO [bordermonitoring.eu](#). A limited amount of information from this website was used to supplement missing data from the other main sources.

45. European Commission, [Proposal for a Dublin IV Regulation](#), 2016, p. 11.

46. European Migration Network "EMN INFORM: The Return of Rejected Asylum Seekers: Challenges and Good Practices", 4 November 2016, p. 16.

47. Eurostat, [Statistics on enforcement of immigration legislation: "New statistics on returns for 2014"](#), 2016.

48. See figure 6.2. in the Commission's [Evaluation of the Implementation of the Dublin III Regulation](#).

most persons subject to transfer or return. Standardised orders breach the obligations to make an individual assessment and issue a reasoned decision proving that the detention measure is necessary and justified. The discrepancy with the strict proportionality tests applied in the context of criminal detention is considerable⁴⁹.

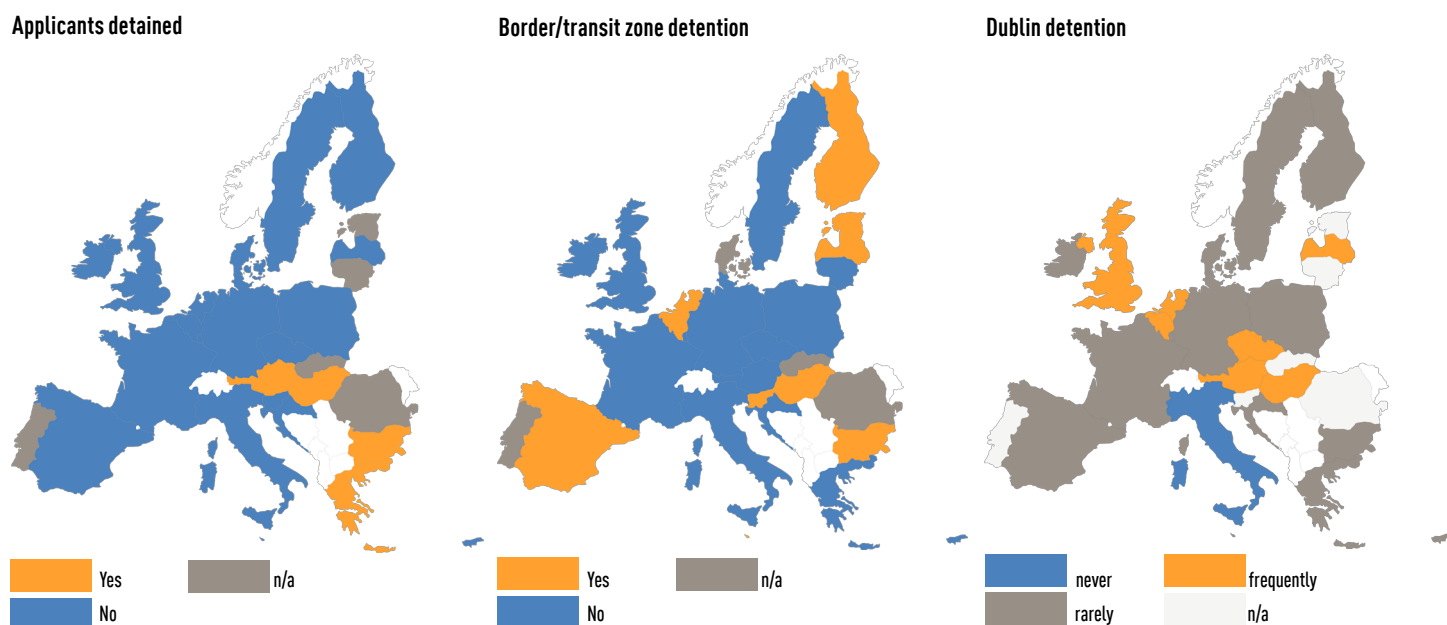
- **Applications by persons in criminal detention:**

Persons who apply for asylum from criminal detention are not covered by the EU asylum detention rules. The assumption is that their claim is a strategy to seek release from prison. Such applicants can thus be kept in custody during the status determination procedure. There are no reliable statistics on the percentage of applicants who are in this situation.

- **Detention upon access to the territory or registration:**

According to AIDA reports, twelve member states detain significant numbers⁵⁰ of applicants upon entry into their territory, either at the border or in airport transit zones: Belgium, Bulgaria, Estonia, Finland, Greece, Hungary, Luxembourg, Malta, the Netherlands, Slovenia, Spain and the United Kingdom.

FIGURE 3 ▶ Detention practices



Source: Author's compilation

Recent developments show that the EU acquis is fragile, as exemplified in the Hungarian case. Hungary had abolished its practice of detaining all asylum applicants in 2013 to comply with the new EU asylum law provisions. The blanket detention law passed on 7 March went back on this improvement, in breach of Hungary's obligations under EU and international law. The Orbán government is already facing legal proceedings in the European Court of Human Rights for its policies⁵¹. Hungary also could be brought to the Court of Justice of the EU for violating European asylum law, but so far, the Commission has been reluctant to hold Hungary accountable for its new detention policy, which was severely criticised by NGOs⁵². Infringement proceedings were started at the end of April concerning the Central European University issue, but not asylum detention⁵³, although it was envisaged⁵⁴. In the meanwhile, Germany announced that it was halting transfers to Hungary⁵⁵, following the Czech Republic, Italy, the Netherlands, Norway and Switzerland.⁵⁶

49. Cornelisse, Galina: A New Articulation of Human Rights, or why the European Court of Human Rights should think beyond Westphalian Sovereignty, in: Marie-Bénédicte Dembour/Tobias Kelly (Hrsg.): *Are Human Rights for Migrants?* Routledge, 2012.

50. This estimate relies on representations given by the AIDA reports' authors. EU member states do not systematically collect data on applicants detained upon entry.

51. Hungary was condemned on 14 March 2017 in the case *Ilias and Ahmed v. Hungary* and interim measures were granted to forbid the transfer of eight unaccompanied children and a traumatised pregnant woman to closed facilities. See ECRE, "Asylum in Hungary: Damaged beyond Repair?", 31 March 2017.

52. Dam, Philippe, *Lost Opportunity In Hungary, EU Commission's Silence Undermining the Rights of Migrants*, Human Rights Watch commentary, 4 April 2017. Originally published by Transitions Online.

53. European Commission, *Daily news 26/04/2017*: "Hungary: Commission takes legal action on Higher Education Law and sets record straight on 'Stop Brussels' consultation".

54. European Commission, *Daily News 12 / 04 / 2017*: "College discusses legal issues relating to Hungary and decides on next steps".

55. AIDA news: "Hungary: Calls for suspension of Dublin transfers and policy shift by Germany", 12 April 2017.

56. Hungarian Helsinki Committee, "Summary of bans on/stopping of Dublin returns to Hungary – as of 14 December 2016", December 2016.

2.2. Detention should not be jail: More efforts needed

According to Article 10(1) of the Reception Conditions Directive which also applies to Dublin detainees, asylum applicants should not be held in ordinary prisons. This principle is not very tightly formulated, since member states are allowed to resort to prison facilities if they cannot do otherwise. The possibility of derogating is very broadly formulated, leaving member states much leeway.

Though the provision is very vague, several member states have changed their policies to comply with European law in this regard, and created specialised detention facilities (e.g. Luxembourg, Germany or Malta). At present, only four EU member states still resort to prisons to detain asylum-seekers: Finland, Greece and Sweden (where use is made of cells in prisons or police stations when the specialised facilities are overcrowded) and Ireland (where detention in prisons occasionally happens though it is forbidden by law). Austria allows the use of prisons if no other alternative is available, but this provision has never been used.

Under Article 10(1), applicants should also be held separately from other third-country nationals who have not applied for asylum. While prisons are seldom resorted to, few member states have created dedicated facilities for asylum applicants. This is consistent with the decrease in the number of applicants detained, other than in situations of transfer, removal or application from detention.

Though most member states have created specific facilities for migration detention, these are still in most cases distinctly custodial in character⁵⁷. Detainees thus have limited access to outdoor spaces, while general healthcare and adequate mental health counselling are rarely accessible. Most problematic is the difficulty of gaining access information and of communicating with lawyers and NGOs when mobile phones are often banned⁵⁸, and limited or no access to internet is provided⁵⁹. This being so, detention in closed facilities leads to an impact on mental and general health similar to that of detention in prison⁶⁰. In addition, detained migrants are socially more excluded than national detainees and the arrangements in place to protect their rights are not enforced as diligently as in the general criminal system. More efforts would thus be needed for detention conditions to be more respectful of applicants and less punitive in practice. Since harsh detention conditions are widely seen as an efficient deterrent against further migration in the national context, stronger EU rules would be a good way to continue pursuing more humane standards.

2.3. Less coercive measures: Unequal practice

Detention is the most extreme form of restriction on liberty (see figure 1) and less coercive alternatives should be considered as a matter of priority under EU law. Looking at the legislation of the EU member states, alternatives to detention appear well established. Over 90% of the countries make provision for reporting duties, over 70% have provisions for residence restrictions, close to 50% may resort to financial guarantees and 37% have adopted the requisition of documents as an option.

As illustrated in Table 2, alternatives to detention are practiced in 20 out of the 27 member states scrutinised—though NGOs report that this is rarely the case in five countries. As to the states flagged in orange, Greece and, since the autumn of 2016, Cyprus have legal dispositions in place which are so far not being used by the authorities. Ireland is not bound by EU law on alternatives to detention and has not autonomously adopted specific dispositions, unlike Denmark and the UK.

57. See also: De Bruycker, Philippe (ed.), “Alternatives to immigration and asylum detention in the EU: Time for implementation” report published by the Odysseus network, January 2015.

58. Allowed only in seven member states (Belgium, Greece, Finland, Malta, Poland, Sweden and Slovakia), see EMN, “The use of detention and alternatives to detention in the context of immigration policies. Synthesis Report for the EMN Focused Study 2014”, November 2014, p. 31 (hereafter EMN report 2014).

59. Available only in 11 member states (Greece, Finland, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, Sweden, Slovenia, Slovakia and the United Kingdom), see EMN report 2014, p. 31.

60. JRS Europe, “Protection interrupted. The Dublin Regulation’s Impact on Asylum Seekers’ Protection” June 2013.

TABLE 2 ► Alternatives to detention in the EU member states

	REPORTING DUTIES	HANDING DOCUMENTS	FINANCIAL GUARANTEE	RESIDENCE RESTRICTIONS	OTHERS	ARE ATD USED IN PRACTICE?	MUST THEY BE APPLIED IN ALL CASES?
Austria	✓	X	✓	✓	X	Yes	Yes
Belgium	X	X	X	X	✓	Yes	No
Bulgaria	✓	X	X	X	X	Rarely	No
Croatie	✓	✓	X	✓	X	Rarely	Yes
Cyprus	✓	X	✓	✓	X	No	No
Czech Rep.	✓	X	✓	X	X	Yes	Yes
Denmark	✓	✓	✓	✓	✓	Yes	Yes
Estonia	✓	✓	X	✓	X	n/a	n/a
Finland	✓	✓	✓	✓	X	Yes	Yes
France	X	X	X	✓	X	Yes	No
Germany	✓	✓	✓	✓	✓	Yes	n/a
Greece	✓	✓	✓	✓	X	No	No
Hungary	✓	X	✓	✓	X	Yes	Yes
Italy	✓	✓	X	✓	X	Rarely	Yes
Latvia	✓	✓	X	X	X	Yes	Yes
Lithuania	✓	X	X	X	X	Rarely	Yes
Luxembourg	X	X	X	✓	X	Rarely	No
Malta	✓	X	✓	X	X	Yes	No
Netherlands	✓	X	✓	✓	X	Yes	No
Poland	✓	X	✓	✓	X	Yes	Yes
Portugal	✓	X	✓	✓	✓	n/a	No
Ireland	✓	X	X	✓	X	No	No
Romania	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Slovenia	✓	X	X	✓	X	Yes	No
Slovakia	✓	X	✓	✓	X	n/a	n/a
Spain	✓	✓	X	✓	X	Yes	Yes
Sweden	✓	✓	X	X	X	Yes	Yes
United Kingdom	✓	X	✓	✓	✓	Yes	No

Key: green for compliance, yellow for limited compliance, orange for non-compliance

Source: authors' compilation based on AIDA country reports from March 2017 and a 2014 EMN study on alternatives to detention

Although many EU countries have introduced alternatives in law and in practice, as reflected by the green and yellow majority in Table 2, there is still a long way to go for alternatives to detention to be used properly and efficiently.

As illustrated in green in the last line of the table, only 12 countries make it obligatory to examine possible alternatives in the decision-making process leading to a detention order. In the absence of such an obligation, alternatives to detention are used rarely (only in few cases), partially (only certain types of measures depending on the state's historical practices) or inefficiently (bad management, lack of investment in human and financial resources). Keeping in mind that they are less costly for member states⁶¹, **alternatives to detention should be further embedded in the institutional culture of national authorities** to become a solid acquis. A dangerous tendency that should be closely monitored is for alternatives to detention measures to become used as a restriction of freedom of movement without the strict justification and procedural oversight applicable to detention (see below in section 3.1.).

61. See De Bruycker, Philippe (ed.), "Alternatives to immigration and asylum detention in the EU: Time for implementation" report published by the Odysseus network, January 2015, from p. 22.

2.4. Procedural guarantees: Common principles – divergent practice

Getting member states on board to establish common procedural limitations on the use of detention has proven difficult⁶². National practices used to differ quite widely in terms of judicial oversight, information of detainees or provision of legal assistance. In the 2013 recast of the Reception Conditions Directive, a compromise was struck with Article 9 after difficult negotiations. The result was the subject of much criticism. The core problem here is that the provisions protecting the rights of applicants⁶³ are not backed by hard state obligations, many derogations and flexibilities being built into the Article⁶⁴. This leads to the marginal convergence of national practices.

A good example of the flexibility and resulting diversity of practices is the length of detention (see Table 3). No agreement could be found on a deadline before judicial confirmation (the Commission was proposing 72 hours). While the Return Directive set a maximum maximum period of detention at 18 months, and the Dublin III Regulation at 3 months, no limit is set in the Reception Conditions Directive. Both the law and the practice vary between member states. Ireland and Britain, not bound by the Return Directive, set no detention limit. The allowed duration including all extensions is shortest in France (45 days)—where detention is only used in transit zones and for removals—and in Spain (60 days), whereas in 17 member states, detention can be extended to a year or more. **In practice, the duration of detention is usually much shorter than the legal maximum:** the average length of detention is below 3 months in 15 member states. Such average numbers, however, hide the extremes of the spectrum, since significant numbers of persons are detained either for very short or for very long periods of time.

TABLE 3 ► The length of detention in the member states

	MAXIMUM DURATION IN LAW	AVERAGE LENGTH OF DETENTION IN PRACTICE
< 2 WEEKS		Finland (11,8 days) Latvia (12 days) France (12,3 days)
≤ 1 MONTH		Spain (25 days) Sweden (27 days) Austria (28 days) Croatia, UK (1 month)
≤ 3 MONTHS	France (45 days) Spain (2 months)	Lithuania (38 days) Italy (38 d to several weeks) Belgium (18 to 60 days) Poland (66 days) The Netherlands (67 days) Greece, Malta (3 months)
≤ 9 MONTHS	Croatia, Czech Republic (6 months) Belgium (8 months) Malta (9 months)	Bulgaria (9 d to 5 months) Hungary (1 to 5 months)
≤ 12 MONTHS	Finland, Hungary, Lithuania, Luxembourg, Slovenia, Sweden (12 months)	
≥ 18 MONTHS	Austria, Bulgaria, Cyprus, Denmark, Germany, Greece, the Netherlands, Poland (18 months)	Cyprus (1 to over 18 months)
NO LIMIT	Ireland, The UK	
N/A	Estonia, Latvia, Portugal, Romania, Slovakia	Czech Republic, Denmark, Estonia, Germany, Luxembourg, Portugal, Ireland, Romania, Slovenia, Slovakia

Source: authors' compilation based on AIDA country reports from March 2017 and the 2014 EMN study on alternatives to detention

62. UNHCR, "Moving further toward a Common European Asylum System. UNHCR's statement on the EU asylum legislative package", June 2013, p. 1.

63. Article 9(2) to (6) of the 2013 Reception Conditions Directive.

64. Article 9(6) to (9) of the 2013 Reception Conditions Directive.

Another important issue in the negotiations on the recast Reception Conditions Directive was access to legal assistance. Research shows that there is a considerably higher rate of success in asylum proceedings when applicants benefit from legal aid⁶⁵. In the Directive, this issue was essentially left for the national level to regulate. **The law of all countries provides for access to legal assistance in detention**⁶⁶. Malta, Germany, Greece, Croatia are the only member states where legal support for the review of detention is not free. In practice, however, effective access to free legal assistance is only guaranteed in 11 countries, either for lack of an effective national system, owing to the lack of well-funded NGOs, or, paradoxically, because removals and transfers are carried out too fast for detainees to get in touch with legal aid.

Limited access to legal aid is even more problematic considering that **only 16 member states have established an automatic judicial review**⁶⁷, which comes into play within less than four weeks in ten member states (Denmark, Finland, France, Germany, Italy, Ireland, Lithuania, Malta, the Netherlands and Spain) whereas it takes two to six months in Austria, Bulgaria, Hungary, Latvia and Slovenia. Without adequate information and advice on their situation, and with weeks passing before they see a judge, detainees are likely to be unable to apply in time for remedies and to defend their case efficiently.

2.5. “Vulnerability”: Only children are granted appropriate protection

Since the adoption of the three relevant instruments, the detention of minors has drastically decreased in favour of alternative measures. Twenty-one member states still detain minors in practice. In particular, unaccompanied minors are frequently detained if there is a doubt as to their age, and many states deem it in the best interest of young children that they should stay with their parents if they are detained. Generally, however, the detention of minors is limited to a few hours or days on the border, prior to return or Dublin transfer. Many member states have established separate accommodation for families and unaccompanied minors.⁶⁸ There are worrying tendencies coming to light at the moment. France alone was condemned by the ECtHR five times in 2016 for detaining children. While it had stopped detaining children after being [condemned by the ECtHR in 2010](#), Belgium intends to create a closed centre for families next to Brussels airport.

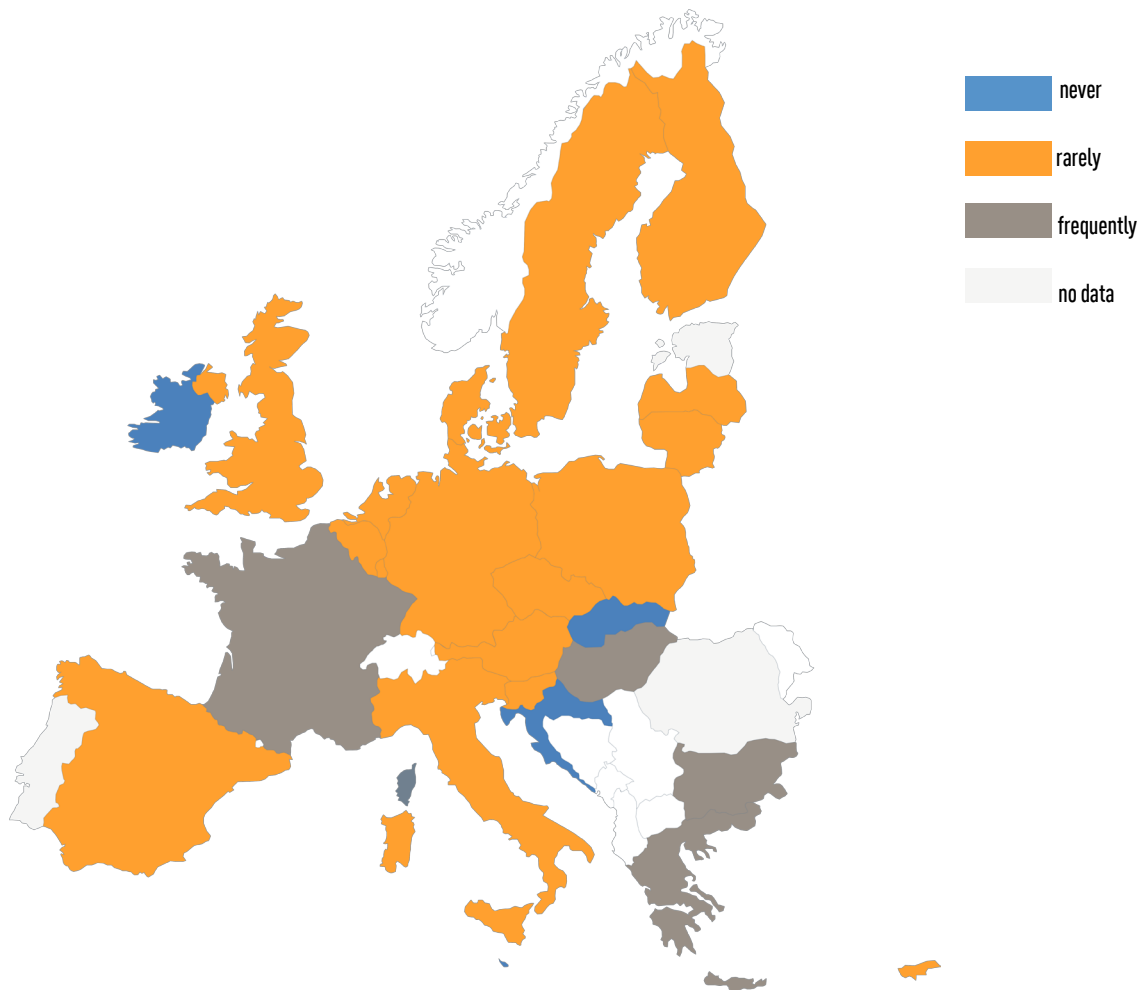
65. Jaya Ramji-Nogales, Andrew I. Schoenholtz and Phillip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review*, 2007, vol. 60 (2), p. 325.

66. EMN study 2014, p. 31-32.

67. Out of 24 states studied.

68. EMN Study 2014 p. 30-31.

FIGURE 4 ► Detention of minors



Source: Author's compilation

Aside from children, only women get special treatment throughout the EU. They are accommodated separately from men in all member states.⁶⁹ For further categories of vulnerable persons identified in Article 21 of the Reception Conditions Directive, only a few member states have specific identification procedures, adequate reception conditions in place or trained personal in detention centers. In addition, despite ample evidence that detention worsens and even creates situations of vulnerability⁷⁰, only pre-existing conditions are considered in most member states and mental healthcare is rarely available.

There are, nevertheless, examples of good practice with respect to certain vulnerable groups. The Netherlands and Sweden have well-established procedures for the early identification of various types of vulnerability. Certain German federal states such as Berlin have set up vulnerability identification systems in cooperation with specialised NGOs, and the federal asylum agency BAMF is using AMIF funds to improve the identification of and care for unaccompanied children, victims of gender-specific persecution and victims of torture and trauma. Some states are in the process of implementing new policies for vulnerable applicants. In the Czech Republic, mechanisms are now in place to identify vulnerabilities with a view to preventing detention. Though implementation is uneven, Poland has also introduced a new vulnerability assessment, and, since 2015, victims of violence, applicants with disabilities, unaccompanied minors as well as persons with severe health and mental health conditions are no longer supposed to be detained.⁷¹

69. EMN Study 2014 p. 46-47.

70. JRS Europe, "Protection interrupted. The Dublin Regulation's Impact on Asylum Seekers' Protection" June 2013.

71. See AIDA reports on these countries.

2.6. Findings at a glance

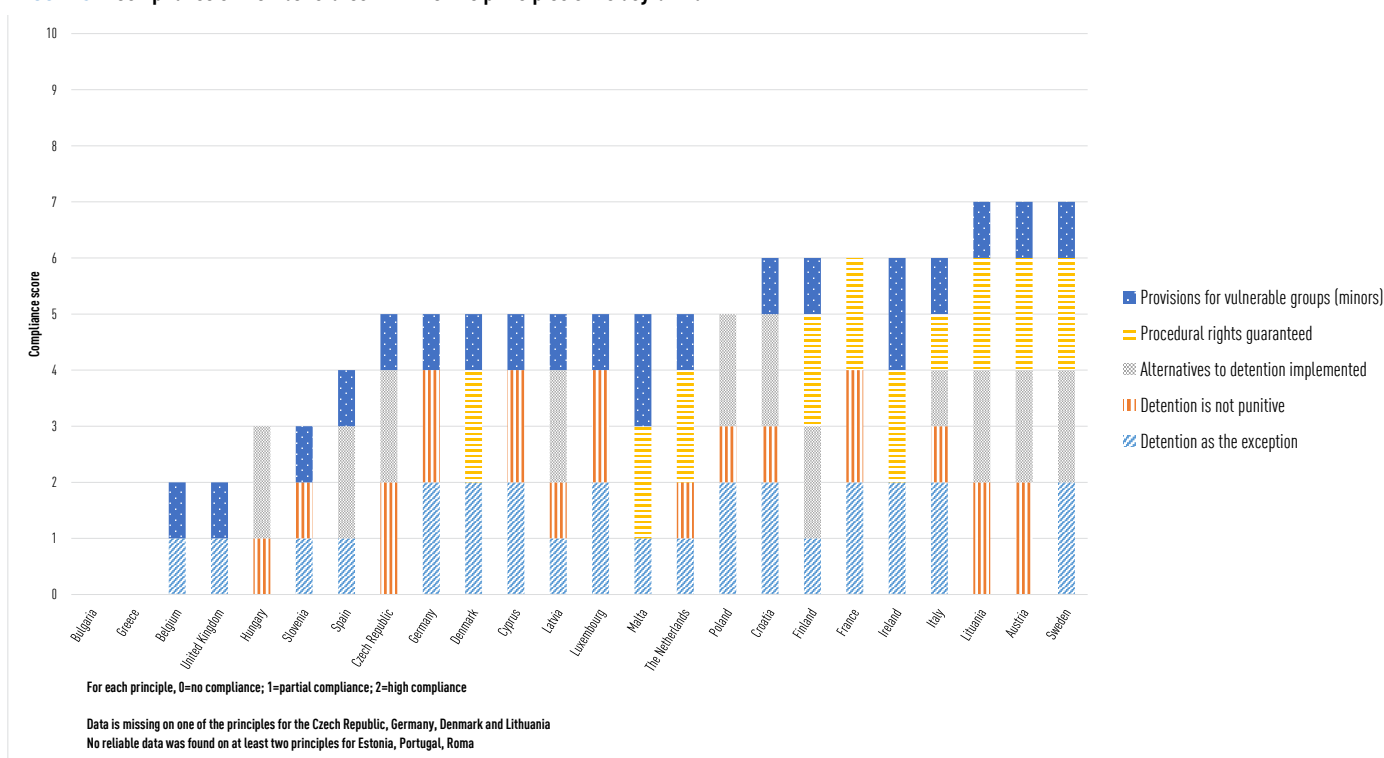
The review of detention practices EU member states confirms that harmonisation has had a measurable effect on member states, but that there remains divergence in practice. [Table 4](#) provides an overview per principle of the main findings, indicating the relevant good and bad practices. [Figure 5](#) then provides an overview per country of its level of compliance with the five principles.

TABLE 4 ► Overview of detention in practice in the EU

PRINCIPLE IN EU LAW	AGGREGATED COMPLIANCE ASSESSMENT	GOOD PRACTICE (KEY CRITERIA)	BAD PRACTICE (KEY CRITERIA)
Principle 1: Detention as an exception	Since the adoption of detailed European rules, most EU member states no longer detain applicants during status determination. Administrative detention is now mostly confined to the context of arrival at the border, Dublin transfers and return procedures. There are however worrying moves towards reversing this acquis.	<i>No detention at the border, rare Dublin detention, rare detention during normal procedure:</i> Croatia; Cyprus; Denmark; France; Germany; Ireland; Luxembourg; Poland; Sweden	<i>Systematic detention:</i> Austria; Hungary; Bulgaria; Greece
Principle 2: Detention conditions	Most member states comply with the obligation to detain migrants, including asylum applicants, in dedicated facilities rather than ordinary prisons. But these facilities often are built and managed like prisons. Administrative detention thus has a damaging effect similar to that of criminal detention.	<i>Specialised facilities, good health care access:</i> Austria; Cyprus; Czech Republic; France; Germany; Lithuania; Luxembourg	<i>Accommodation in prisons or poor healthcare access:</i> Belgium; Bulgaria; Finland; Greece; Ireland; Malta; Sweden; Spain; United Kingdom
Principle 3: Alternatives to detention	Alternatives to detention are in the process of being incorporated into national practices, but national authorities doubt their efficiency and they are therefore underused.	<i>Alternatives to detention compulsory:</i> Austria; Croatia; Czech Republic; Denmark; Finland; Hungary; Italy; Latvia; Lithuania; Poland; Spain; Sweden	<i>Alternatives to detention optional:</i> Belgium; Bulgaria; Cyprus; France; Greece; Luxembourg; Malta; Netherlands; Portugal; Ireland; Sloveni; United Kingdom
Principle 4: Procedural rights	Procedural rights are upheld as EU principles but national provisions and practices continue to differ quite widely.	<i>Average length of detention under 2 months, access to free legal assistance, automatic judicial review:</i> Austria; Denmark; Finland; France; Lithuania; Malta; The Netherlands; Ireland; Sweden	<i>Longer average detention, no access to free legal assistance, or no automatic judicial review:</i> Belgium; Bulgaria; Croatia; Cyprus; Czech Republic; Germany; Greece; Hungary; Latvia; Luxembourg; Poland; Slovenia; Spain; United Kingdom
Principle 5: Vulnerability	Reflecting the formulation of EU law, children are the only vulnerable group efficiently protected from detention in almost all member states, even though problematic practices persist in the context of transfers and removals. For all other categories of vulnerable persons, good practice should inspire further policy initiatives.	<i>Minors are never detained:</i> Croatia; Ireland; Malta; Slovakia	<i>Minors are frequently detained:</i> Bulgaria; France; Greece; Hungary

In order to estimate the overall practice of each EU member state, [figure 5](#) gives an overview of the level of compliance with the five principles.⁷² As shown, the most satisfactorily implemented is Principle 1 on “detention as the exception”, and the most problematic is Principle 4 on procedural guarantees. The low compliance rates in Bulgaria, Greece and Hungary reflect their policies but also the challenge they faced in 2016 as “frontline countries”. The bulk of countries scoring 5-6 points includes countries that have received very high numbers of applicants and thus struggled with implementation, such as Germany, Italy or Malta, but also countries under less pressure such as the Czech Republic or Luxembourg. Interestingly, the three countries with the best scores have very different asylum profiles, Lithuania being a minor destination with a fairly recent asylum legislation, Sweden a major recipient with a very liberal tradition, and Austria an important recipient most affected by the situation in the Balkans. Interestingly, the lack of applicability of detention rules results in harsh policies way below EU standards in the UK, but not in Denmark or Ireland.

FIGURE 5 ► Compliance of member states with the five principles of EU asylum law



3. Policy recommendations: How to move forward?

European asylum policy leads to ambivalent results because it seeks to combine two objectives that are hard to reconcile. On the one hand, it seeks to coordinate the member states' efforts in enforcing their territorial sovereignty by preventing asylum applicants and other third-country nationals from freely circulating in an area without physical borders. Detention is a significant part of this expression of sovereignty.

On the other hand, the Common European Asylum System is designed to protect the right to asylum and the human rights of applicants, since all EU member states are committed to respecting international and European human rights law. EU asylum policy thus attempts to establish a level-playing field in the quality of protection. As the analysis suggests, harmonisation remains limited owing to variable geometry, diverging levels of member state compliance and the built-in flexibility of the EU standards themselves. This makes the achievements of EU asylum policy fragile, especially in crisis mode. What is the best way to move forward and do the Commission's reform proposals go in the right direction?

⁷² The criteria used to grade each country are detailed in Table 4 among good and bad practice.

3.1. Continue implementation efforts, but with caution

The development of European standards has had a significant virtuous impact on national detention practices. The implementation of EU law and enforcement through the CJEU and national courts have marginalised the routine detention of asylum applicants (principle 1) and led to policies that are more proportional and more respectful of the rights of detainees. Efforts, however, are still needed. As Yves Pascouau stresses, for EU asylum policy to be successful, “all players at EU and national levels have to deliver on their promises to show that decisions taken are implemented and produce effects”.⁷³ For detention, more and better implementation mean to further decriminalise the treatment of applicants for international protection in detention according to principle 2, promote more effective and more automatic implementation of alternatives to detention (principle 3), make sure that procedural guarantees such as legal aid are implemented in reality (principle 4), and that vulnerable applicants are protected from wrongful detention (principle 5).

To guarantee further improvements in current practice, member states and European actors should **continue to invest in the implementation of existing instruments**. This means both carrots and sticks: using incentives, spreading best practices, gathering and publishing reliable data but also, where needed, launching infringement proceedings to make sure that member states comply with the principles of EU law.

While we unreservedly recommend pursuing more humane detention conditions, better procedural guarantees and protection for vulnerable persons, there are grounds for caution as regards alternatives to detention. Alternatives to detention should be used instead of detention, not in place of freedom. All forms of privation of liberty create additional vulnerability. The seriousness of encroaching upon the liberty of applicants should not be overlooked. If measures such as residence obligations or reporting duties are used routinely

“ALTERNATIVES TO
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for all applicants, their restrictive character is diluted and normalised. Individual assessment of the necessity and proportionality of a particular measure, which is essential in the context of detention as a defence against arbitrariness, makes way for a blanket approach which destroys freedom. This can make applicants’ lives considerably harder and may jeopardise the success of integration through work and education.

3.2. Clearer and firmer guarantees for the rights of applicants

The Commission’s reform proposals confirm that the existing set of rules on detention is seen as a satisfactory compromise between sovereignty and protection: there is hardly any alteration to the existing provisions. However, the evidence from this paper shows that **many provisions remain empty promises**. There is thus a considerable amount of streamlining to be done to protect detainees, especially vulnerable persons.

Most states do not have adequate policies in place to protect vulnerable persons besides minors from detention and when they are in detention. This includes victims of trafficking or highly traumatised persons who are likely to suffer severely from detention-related health issues. Even for minors, detention during border procedure, Dublin transfers and removal remains frequent in many member states.

The expansion of Article 21 of the Reception Conditions Directive proposed by the Commission is a step in the right direction, but Article 11 should be made more comprehensive in order to specify the appropriate policy to be followed for all categories of vulnerable persons in the specific context of detention. Removing the concept of “vulnerability and replacing it with “applicants with special needs” throughout the text is unlikely to improve the situation.

73. Pascouau, Yves. “From Conflict to Equilibrium: The Construction of a Common Ground for Social and Political Consensus on Migration” Vision Summit Europe – policy paper, 2016.

The need to **cut down on the “mays” and “shalls”** holds for Articles 9 and 10 on guarantees and reception conditions for applicants. Both remain completely untouched in the Commission proposal, even though our data on national practices show that this is where there remains most variation in national practice and the greatest shortfall in compliance. Since high standards of due process requires heavy investment in the justice system and legal aid, tougher obligations in EU law would help motivate member states lagging behind to improve their systems. In complement, the expansion of the Asylum, Migration and Integration Fund AMIF (over €3 billion for 2014-2020) makes resources available for EU co-financing. They should be invested as a matter of priority in member states such as Belgium, Bulgaria, Greece or Spain which struggle with guaranteeing the provision of legal aid, proper healthcare and judicial remedies.

3.3. Non-compliance with freedom restrictions as a ground for detention: A bad solution

While rules on detention per se remain largely untouched, the addition of non-compliance with freedom restriction as a ground for detention in Article 8 raises serious concerns. Limitations on freedom of movement distinct from detention have been provided for in the Reception Conditions Directive since 2003, authorising geographical restrictions and residence obligations. Compliance with these obligations may already be conditional on access to material reception conditions, from housing to healthcare.

Not all member states avail themselves of this option. The sanction mechanism proposed by the Commission in Article 7 of its recast proposal thus models the European blueprint on harsh interpretations of existing provisions governing freedom of movement. The behavioural effect of the threat of sanctions, however, is likely to be overrated. As research shows, technical details of entitlements and threats of benefit cuts are not driving factors in the life decisions of applicants⁷⁴. In practice, the Commission’s model for lowering incentives for secondary movement within and between member states is thus likely to be a flop.

This flop could be dangerous one, since the ultimate sanction envisaged in case of non-compliance with freedom restrictions is detention. If adopted, that proposal could lead to a U-turn as regards the marginalisation of detention in practice. The new non-compliance ground for detention could revitalise old habits and lead to a renewed increase in administrative detention. Capacities are there: many states have invested in brand new reception and detention facilities during the crisis. The number of detention places has now reached 32,029 in 2016⁷⁵.

3.4. Moving away from Dublin detention: Coalitions of the willing for cooperative mobility schemes

As our data shows, the Dublin Regulation is the ground for detention most often invoked apart from return. The Dublin Regulation is thus the instrument to be grappled with in order to make detention less automatic, more proportional and, overall, less costly for member states.

Though innovative alternatives were discussed and attempts made to implement relocation and resettlement schemes in the last two years, the crisis mode has subsided. The EU is thus slipping back into the default “no alternative to Dublin” mode, with a strong emphasis on enforcement as deterrence, which means more transfers and thus more detention. Though the issue may be less salient now than in 2016, the criticism remains valid: In practice, the Dublin system is widely enforced through detention. It is not a fair responsibility-sharing mechanism and it is still not resilient in the face of future crises.

⁷⁴. Thielemann, Eiko and Schade, Daniel, “Buying into Myths: Free Movement of People and Immigration”, in *The Political Quarterly*, Volume 87, Issue 2, April–June 2016, pp. 139–147.

⁷⁵. Estimate from [migreurop](#)

If it is not politically feasible to trigger a thorough overhaul, the negative effects of the current system should be minimised to reduce unnecessary detention. To be specific, the codification of a compulsory admissibility assessment for allocating state responsibility as a first step in the status determination procedure—as envisaged in the Dublin IV proposal and the recast Procedures Directive—is not a good solution and it should be dropped. Instead, the discretionary clause of Article 17 whereby states may decide to take charge of individual asylum claims on humanitarian grounds should be strengthened and not weakened as is foreseen. Room should be left for member states to choose not to rely on the Dublin allocation mechanisms when administering asylum claims if they decide to save scarce resources and diminish the negative impact on applicants in that way, as Germany did for Syrian refugees in 2016. This would allow member states for which Dublin creates more red tape than solutions to be spared having to implement the Dublin slice of the procedural salami. Consequently, there would be less detention for the purpose of transfer.

Using Dublin less in asylum procedures would lower costs and reduce unnecessary detention, but it is not a long-term solution to responsibility-sharing and coercion-based policies. Alternative models of burden-sharing⁷⁶, “Dublin without coercion”⁷⁷, or relocation schemes based on positive incentives and preference matching⁷⁸ are available. The European Parliament has commissioned several studies on such alternatives to Dublin and, in her draft report on the Dublin IV proposal⁷⁹, Rapporteur Cecilia Wikström is endorsing a responsibility-sharing mechanism which takes the preferences of applicants into account.

In the light of the opposition from the Visegrád Four and other solidarity-sceptics, agreement on a Europe-wide approach currently seems unlikely. Considering that variable geometry is a reality in this policy field, solidarity is already limited. We therefore argue in favour of **a coalition-of-the-willing approach to experimenting with enhanced cooperation schemes** as laid down in Article 20 TEU⁸⁰. Enhanced cooperation for a binding burden-sharing mechanism was already put forward jointly by the French and German foreign ministers last year⁸¹.

On the basis of enhanced cooperation, the share of Dublin transfers already taking place among participating states could be replaced with voluntary mobility models based on language skills, cultural and personal links, economic opportunities etc. Participating member states could also experiment with mutual recognition of refugee status, thus allowing access to cross-border mobility earlier than the five years applicable today. This approach would result in fewer detentions and better integration, and would probably not significantly increase the structural pull factors already in place.

76. Thielemann, Eiko et al., “What System of Burden-Sharing between Member states for the Reception of Asylum Seekers?”, European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 419.620, January 22nd 2010.

77. Guild, Elisabeth et al., “New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection” CEPS Paper in Liberty and Security in Europe No 77, January 2015.

78. See Enderlein, Henrik and Koenig, Nicole, “Towards Dublin IV: Sharing norms, responsibility and costs”, Jacques Delors Institut – Berlin policy paper No 169, 29 June 2016. See also Jones, Will and Teytelboym, Alexander on their forthcoming work on preference-matching in “Choices, preferences and priorities in a matching system for refugees”, *Forced Migration review*, 28 April 2017 and their project *refugee say*.

79. Wikström, Cecilia, Draft Report on Dublin IV: Reform of the EU asylum rules - creating a new Dublin system that works, published on 6 March 2017.

80. See the argument of Valentin Kreilinger in favor of using enhanced cooperation for compulsory relocation quotas for more details on the possibilities offered by Article 20 TEU: “Proposal to use Enhanced Cooperation in the Refugee Crisis” Jacques Delors Institut – Berlin blog, 21 September 2015.

81. Joint contribution by the French Foreign Minister Jean-Marc Ayrault and Federal Foreign Minister Frank-Walter Steinmeier, “A strong Europe in a world of uncertainties” 27 June 2016: “As a first step, the Dublin system has to be improved to deal with exceptional circumstances by means of a permanent and binding mechanism which foresees burden sharing among all member states. If necessary, Germany and France stand ready to proceed on this matter with a group of like-minded partners.”

CONCLUSION

Scrutinising the implementation of EU asylum law on detention across the Union, this study shows that the Common European Asylum System has contributed to the convergence of national asylum systems towards higher human rights standards and has marginalised the detention of asylum applicants. It has however also compounded restrictions on liberty in relation to the Dublin Regulation and codified questionable detention practices during border and return procedures.

The comparative analysis of the five core principles of the EU detention regime shows that much can still be accomplished by continuing to push for better implementation of existing rules in practice. Transposition in law is only a first step: the rights of applicants must be upheld in practice, to prevent arbitrary detention and the gross violations of human rights for which EU member states are still regularly being condemned in Strasbourg. Reforms are one thing. Enforcement however should be a top priority as well: if the EU is to be credible politically, member states must not be able to violate their obligations without facing clear sanctions from Brussels.

The Commission's 2016 proposals display a worrying tendency to go back on some achievements of the CEAS, and little evidence of improvements in terms of detention standards. Written at a time when many EU states were struggling with high numbers of arrivals, these proposals prioritise management imperatives to the detriment of the CEAS' protection-related aims. The sanction mechanism built into the allowances for freedom restrictions and detention is a case in point.

Having regard to the political limitations faced by European operators in this field, the European Parliament, the Council and the Commission should follow a three-pronged strategy:

- There is room for improvement in the comprehensiveness of the Reception Condition Directive to ensure better implementation of its guiding principles on vulnerability and procedural rights. It is inadequately addressed in the existing proposal from the Commission. Parliament will play a central role in encouraging a rights-enhancing compromise in the Council. Where there is consistent convergence in practice (e.g. length of detention or accommodation for women and children), EU rules can be made more strict. Where there are good practices and solid case law⁸², these should inform and inspire further work to make EU rules more specific (e.g. in terms of judicial remedy, alternatives to detention and the early identification of vulnerable persons).
- Some of the reforms of the Dublin system are likely to perpetuate controversial practices and lead to more detention. Two of them should be dropped as a matter of urgency: the automatic Dublin assessment as part of the refugee determination procedure and the sanctions-based approach to restrictions on freedom.
- To overcome blockages, countries willing to cooperate further can engage in enhanced cooperation schemes to experiment with innovative schemes that could become a blueprint for further EU-wide harmonisation.

The summer is here and increasing numbers of people are attempting to reach Europe by the Central Mediterranean route despite record numbers of lives lost at sea⁸³. We urgently need a functioning asylum framework in Europe that guarantees the fundamental rights of applicants.

82. On relevant case law from the ECtHR and CJEU, see Achermann, Alberto et al., "European Immigration Detention Rules, Existing standards", November 2013.

83. Dearden, Lizzie, "Refugee death toll passes 1,000 in record 2017 as charities attacked for conducting Mediterranean rescues", *The Independent*, 22 April 2017.

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Hertie School
of Governance

Pariser Platz 6, D – 10117 Berlin
19 rue de Milan, F – 75009 Paris
office@delorsinstitut.de
www.delorsinstitut.de

