

Study on the exchange of information between European countries regarding persons excluded from refugee status in accordance with Article 1F Refugee Convention

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December 2015

Acknowledgements

This report was written by Maarten Bolhuis and Joris van Wijk, researchers working at the Department of Criminal Law and Criminology, Faculty of Law, Vrije Universiteit Amsterdam, the Netherlands. The research was commissioned by the Norwegian Directorate of Immigration (*Utlendingsdirektoratet*, UDI). Members of the Reference Group included Mi Hanne Christiansen, Grethe Sand and Hanne Rossing Jensen (representatives of UDI), Anne Kari Braathen (representative of the Norwegian Ministry of Justice), Katrine Kleiven Mentzoni (representative of the Norwegian Immigration Appeals Board, UNE) and Per Zimmer (representative of the Norwegian National Criminal Investigation Service, Kripos).

The authors would like to thank the Norwegian Directorate of Immigration and all members of the Reference Group for their valuable feedback and practical assistance in performing the research. Furthermore, the authors would like to thank Evelien Brouwer for her feedback on parts of the report. Finally, the authors would like to thank all respondents for sharing their knowledge and views.

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List of acronyms/glossary

CGRS	Office of the Commissioner General for Refugees and Stateless persons (Belgium)
CJEU	Court of Justice of the European Union
CPS	Crown Prosecution Service (UK)
DIS	Danish Immigration Service
Dublin III Regulation	Regulation EC 604/2013 of 26 June 2013
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRIS	European Criminal Record Information System
EDPS	European Data Protection Supervisor
EMN	European Migration Network
EU	European Union
eu-LISA	European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
Eurodac	European Dactyloscopy database
Eurodac III Regulation	Regulation EC 603/2013 of 26 June 2013
Eurojust	European Union's Judicial Cooperation Unit
FCC	Five Country Conference
Fedasil	Federal Agency for the Reception of Asylum Seekers
Kripos	National Criminal Investigation Service (Norway)
IGC	Intergovernmental Consultations on Migration, Asylum, and Refugees
IGO	Intergovernmental organisation
IND	Immigratie en Naturalisatiedienst (Dutch immigration service)
DVZ	Dienst Vreemdelingenzaken/l'Office des étrangers (Belgian immigration service)
MoU	Memorandum of Understanding
OSCT	Office for Security and Counter-terrorism
PST	Politiets Sikkerhetstjeneste (security police Norway)
Refugee Convention	United Nations Convention relating to the Status of Refugees of 1951

RVV	Raad voor Vreemdelingenbetwistingen/Conseil du Contentieux des Etrangers (Belgian immigration appeals institution)
SCU	Special Cases Unit (UK)
SIRENE	Supplementary Information Request at the National Entry
SIS	Schengen Information System
SIS II Regulation	Regulation EC 1987/2006 of 20 December 2006
Smart Borders	Database for external border control of the Schengen area
SO15	Metropolitan Police Counter Terrorism Command (UK)
SOIK	Særlig Økonomisk og International Kriminalitet (Serious Economic and International Crime office Denmark)
UDI	Utlendingsdirektoratet (Norwegian immigration service)
UNE	Utlendingsnemnda (Norwegian immigration appeals board)
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

Summary

This study discusses exchange of information on persons excluded from refugee status in accordance with Article 1F of the Refugee Convention. The study's objective is twofold: firstly, to obtain a comprehensive and up-to-date understanding of how European states handle the exchange of information on 1F-excluded individuals; secondly, to contribute to the possible development of a system that can provide an overview of foreign nationals residing outside the European state where they have been excluded and to facilitate better cooperation between European states on exclusion matters. The study answers the questions what exchange of information on the application of 1F exclusion currently takes place and whether it is desirable and feasible to enhance international information exchange on 1F-excluded individuals.

The study uses a variety of research methods to answer these questions; interviews with relevant stakeholders in six focus countries (Belgium, Denmark, Norway, Sweden, the Netherlands and the United Kingdom), an analysis of literature, relevant rules and regulations and policy documents and a survey distributed via the European Migration Network (EMN).

On a national level, information exchange is generally well organised, both within the immigration authorities and with other actors such as security services and specialised investigative and prosecutorial bodies. Internationally, the information exchange about 1F exclusion is much more limited. Immigration authorities hardly ever share information about 1F-excluded individuals with foreign law enforcement actors. Information exchange with foreign counterparts is also very unusual. 'Like-minded' countries to a very limited extent exchange information on an ad-hoc basis by means of bilateral or multilateral arrangements. Existing information systems such as Eurodac and SIS II are neither used, nor suited to include information on 1F exclusion. Compared to the immigration authorities, law enforcement and prosecution services have a more established practice of exchanging information.

With respect to desirability of enhancing information exchange, the study suggests that the majority of respondents favour enhanced information exchange, because it could promote better informed decision making by immigration authorities, might help in identifying individuals who may pose a security risk and could be beneficial for prosecuting perpetrators of international crimes. Some respondents, however, stress that it is important to balance the scale and nature of problems stemming from a current lack of information exchange against the 'costs' of implementing changes or developing a system that would enhance information exchange.

In terms of feasibility of enhancing the exchange of information between immigration authorities, the study identifies four issues that need to be taken into account: firstly, it has to be acknowledged that a consistent European approach to Article 1F is currently lacking; secondly, it has to be acknowledged that information stemming from asylum procedures in principle needs to be treated confidentially; thirdly, that the limits posed by the purpose limitation principle should be taken into account; and fourthly, questions arise as to what type of information should be shared, when it should be shared and with what number and type of actors.

The study concludes by identifying three possible ways in which the exchange of information on 1F exclusion could be enhanced: using or tailoring existing common European information systems such as Eurodac and SIS II; having states close bilateral or multilateral arrangements on information exchange on 1F exclusion between immigration authorities; or distributing lists with information about 1F-excluded individuals. In terms of privacy, efficiency and practical use all have their strengths and weaknesses.

On the short run, enhancing information exchange on 1F exclusion is not a self-evident priority for many states. The scale and nature of the problems caused by the current lack of information sharing are difficult to assess. For this reason it is arguably challenging to garner wide support for the adaptation of existing systems or the creation of a new system that allows for more information exchange. The urgency of finding an all-inclusive solution is further undermined by the lack of a consistent approach to, and different prioritisation of, 1F exclusion in Europe. At the same time, as the scale and nature of the refugee influx has been changing, attention for 1F exclusion seems to be growing and the number of exclusions may in the near future be on the rise.

Those states already willing to take steps in promoting information exchange could consider creating a European Exclusion Network. Except for the question which institution or organisation should host or facilitate such a network, there seem to be no major objections against creating such a network. In particular when initiated by a limited number of like-minded states, setting up a network would not require very substantial investments. Such a network will support participants in getting more acquainted and come to increasingly trust each other, which allows them to take steps to develop Memoranda of Understanding which would enable formal exchange of information about individuals.

A network, however, will also have to overcome challenges. If information on 1F exclusion would be available to more states, the question remains what these states want to and can do with that information. Besides, both a European Exclusion Network and MoU's do not entail an infrastructural solution for exchanging or storing information. Immigration authorities are arguably most interested in having access to an information system which enables them to identify whether or not an applicant has previously been excluded in another country or not. Currently existing data-sharing systems, however, have significant shortcomings with respect to including information on 1F exclusion.

As a final point for consideration, the authors argue that although enhanced international information exchange between immigration authorities could lead to the identification of more 1F-excluded individuals who cross European borders, that in itself would not solve the fundamental problem of how European countries, and Europe as such, deal with non-returnable 1F-excluded individuals. In addition to discussing possible modes of information exchange, an exclusion network could also be useful in shaping a consistent post-exclusion policy.

Sammendrag

Denne studien drøfter informasjonsutveksling om personer som er ekskludert fra flyktningstatus i henhold til artikkel 1F i Flyktningkonvensjonen. Formålet med studien er todelt: For det første å få en omfattende og oppdatert forståelse av hvordan europeiske stater håndterer informasjonsutvekslingen vedrørende 1F-ekskluderte individer; for det andre å bidra til den mulige utviklingen av et system som kan gi en oversikt over utenlandske statsborgere som oppholder seg utenfor det europeiske landet de har blitt ekskludert fra, og å fremme et bedre samarbeid mellom europeiske stater i eksklusjonssaker. Studien besvarer spørsmålene om hvilken informasjonsutveksling som i dag finner sted om anvendelsen av 1F-eksklusjon, og om det er ønskelig og mulig å forbedre internasjonal informasjonsutveksling om 1F-ekskluderte individer.

Studien benytter en rekke forskningsmetoder for å besvare disse spørsmålene: intervjuer med relevante aktører i seks fokusland (Belgia, Danmark, Norge, Sverige, Nederland og Storbritannia), analyse av litteratur, relevante regler og forskrifter samt politiske dokumenter, og en undersøkelse distribuert via det europeiske migrasjonsnettverket (European Migration Network, EMN).

På nasjonalt nivå er informasjonsutvekslingen generelt sett godt organisert, både internt hos utlendingsmyndighetene og med andre aktører, som for eksempel sikkerhetstjenester og spesialiserte etterforsknings- og påtaleorganer. Internasjonalt er informasjonsutvekslingen om 1F-eksklusjon mye mer begrenset. Utlendingsmyndighetene deler nesten aldri informasjon om 1F-ekskluderte individer med utenlandske aktører som er ansvarlige for opprettholdelse av lov og orden. Informasjonsutveksling med utenlandske kolleger er også helt uvanlig. 'Likesinnede' land utveksler i svært begrenset grad informasjon på ad hoc-basis ved hjelp av bilaterale eller multilaterale avtaler. Eksisterende informasjonssystemer, som Eurodac og SIS II, blir ikke brukt og er heller ikke egnet til å omfatte informasjon om 1F-eksklusjon. Sammenlignet med utlendingsmyndighetene, har politi- og påtalemyndigheter en mer etablert praksis for utveksling av informasjon.

Hva ønskeligheten av å styrke informasjonsutvekslingen angår, antyder studien at flertallet av respondentene er tilhenger av økt informasjonsutveksling. Dette kan nemlig gjøre utlendingsmyndighetene bedre i stand til å ta informerte avgjørelser, det kan bidra til å identifisere personer som kan utgjøre en sikkerhetsrisiko og gjøre det enklere å forfølge personer som har begått internasjonale forbrytelser. Noen respondenter understreker imidlertid at det er viktig å avveie omfanget og arten av problemene som skyldes dagens manglende informasjonsutveksling, mot 'kostnadene' forbundet med gjennomføring av endringer eller med å utvikle et system for bedre informasjonsutveksling.

Når det gjelder muligheten for å styrke informasjonsutvekslingen mellom utlendingsmyndigheter, identifiserer studien fire spørsmål som må tas i betraktning: For det første må man erkjenne at det i dag ikke finnes noen konsekvent europeisk tilnærming til artikkel 1F. For det andre må man erkjenne at informasjon som stammer fra asylprosedyrer i prinsippet må behandles konfidensielt. For det tredje må man holde regning med de grenser som settes av prinsippet om formålsbestemthet. Og for det fjerde

oppstår det spørsmål om hva slags informasjon som skal deles, når den skal deles, med hvor mange og med hvilken type aktører.

I studiens konklusjon identifiseres tre mulige måter for å forbedre informasjonsutveksling om 1F-eksklusjon: Bruk eller tilpasning av eksisterende felles europeiske informasjonssystemer som Eurodac og SIS II; la stater inngå bilaterale eller multilaterale avtaler om informasjonsutveksling om 1F-eksklusjon mellom utlendingsmyndighetene; eller distribuere lister med informasjon om 1F-ekskluderte individer. Alle valgene har sine fordeler og ulemper med hensyn til personvern, effektivitet og praktisk bruk.

For mange stater er ikke en bedre informasjonsutveksling om 1F-eksklusjon noen selvfølgelig prioritet på kort sikt. Det er vanskelig å vurdere omfanget og arten av de problemer som forårsakes av dagens manglende informasjonsdeling. Dette kan muligens gjøre det utfordrende å finne bred støtte for tilpasning av eksisterende systemer eller etablering av et nytt system som tillater økt informasjonsutveksling. Muligheten til raskt å finne en altomfattende løsning blir ytterligere undergravet av mangelen på en konsekvent tilnærming til, og en annen prioritering av 1F-eksklusjon i Europa. Samtidig synes oppmerksomheten rundt 1F-eksklusjon å være økende og antallet eksklusjoner kan stige i nær fremtid, dette som følge av endringen i omfanget og arten av flyktningtilstrømmningen.

De statene som allerede er villige til å iverksette tiltak for å fremme informasjonsutveksling, kan overveie å opprette et europeisk eksklusjonsnettverk. Med unntak av spørsmålet om hvilken institusjon eller organisasjon som skal sørge for eller tilrettelegge et slikt nettverk, synes det ikke å være noen store innvendinger mot å skape et slikt nettverk. Spesielt hvis initiativet tas av et begrenset antall likesinnede stater, vil ikke opprettelsen av et nettverk kreve omfattende investeringer. Et slikt nettverk vil bidra til at deltakerne blir bedre kjent og får mer tillit til hverandre, noe som gir dem anledning til å ta initiativ til å utvikle *Memoranda of Understanding* (MoU) som vil gjøre det mulig med formell informasjonsutveksling om enkeltpersoner.

Et nettverk vil imidlertid også måtte takle utfordringer. Hvis informasjon om 1F-eksklusjon blir tilgjengelig for flere stater, gjenstår spørsmålet hva disse statene vil og kan gjøre med denne informasjonen. Dessuten medfører verken et europeisk eksklusjonsnettverk eller MoU-er en infrastrukturløsning for utveksling eller lagring av informasjon. Utlendingsmyndighetene er kanskje mest interessert i å ha tilgang til et informasjonssystem som gjør dem i stand til å konstatere hvorvidt en søker tidligere har blitt ekskludert fra et annet land eller ikke. Nåværende datadelingssystemer har imidlertid vesentlige mangler, blant annet med hensyn til informasjon om 1F-eksklusjon.

Et siste punkt man bør ta i betraktning er at forfatterne hevder at selv om bedre internasjonal informasjonsutveksling mellom utlendingsmyndigheter kan føre til identifisering av flere 1F-ekskluderte personer som krysser Europas grenser, vil dette i seg selv ikke løse det grunnleggende problemet med hvordan europeiske land, og Europa som sådan, håndterer ikke-returerbare 1F-ekskluderte individer. I tillegg til å diskutere mulige former for informasjonsutveksling, kan et eksklusjonsnettverk også være nyttig for utformingen av en konsekvent post-eksklusjonspolitik.

1. Introduction

1.1. Objective of the study

This study was commissioned by the Norwegian Directorate of Immigration (UDI) and was carried out by Maarten Bolhuis and Joris van Wijk, researchers working at the Department of Criminal Law and Criminology, Faculty of Law, Vrije Universiteit Amsterdam, the Netherlands.

The primary objective of this study, as defined by the Norwegian Directorate of Immigration, is to obtain a comprehensive and up-to-date understanding of how European states handle the exchange of information on persons excluded from refugee status in accordance with Article 1F of the Refugee Convention.¹ With the study, UDI also aims to obtain specific and knowledge-based recommendations on how to strengthen and develop its routines and practices regarding these cases to meet the states' needs in this field. The study aims to contribute to the possible development of a system that can provide an overview of foreign nationals residing outside the European state where they have been excluded from refugee status and may facilitate better cooperation between European states on exclusion matters. For this reason the report is expected to be of interest to immigration authorities and responsible ministries in all European countries dealing with Article 1F exclusion.

1.2. Rationale and research context

On the basis of Article 1F of the Refugee Convention, European countries can exclude alleged perpetrators of serious criminality from asylum and subsidiary protection.² The rationale behind Article 1F is often said to be twofold: persons who are believed to have committed certain crimes should not benefit from refugee protection because the gravity of the acts deems them 'undeserving' of such protection, and should not abuse the protection offered to refugees to avoid being held criminally accountable for their acts.³ In this context, the international protection regime should not offer perpetrators of serious criminality a 'safe haven'.⁴ Some European countries that actively apply Article 1F

¹ In this study, 'European states' are understood to include the member states of the European Union, as well as non-EU members that take part in the Schengen and Dublin regulations (see Chapter 4).

² The United Nations Convention relating to the Status of Refugees (hereinafter the Refugee Convention) was adopted in 1951. Article 1F reads: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.' In this report the term exclusion refers solely to Article 1F Refugee Convention; the other exclusion clauses (Articles D and E), are not addressed. Whenever mention is made of 'excluded' individuals, asylum applicants who have been denied refugee protection due to Article 1F are referred to, for practical reasons in the masculine pronoun.

³ See United Nations High Commissioner for Refugees (UNHCR) (2003a).

⁴ While the 'no safe haven' concept is often understood in a more narrow sense, i.e. in connection to the exercise of universal jurisdiction (see e.g. Langer (2015: 247): "*a state may exercise universal jurisdiction in order not to be a refuge for participants in core international crimes*"), countries like Canada and the Netherlands have extended the concept by explicitly referring to it in relation to their immigration policies. See e.g. Rikhof (2004: 6) on Canada: "*The government of Canada has the ability to take action against individuals who are suspected of committing modern*

are faced with the question what to do with these excluded individuals. Not all of them can be expelled or returned to their country of origin,⁵ and criminal prosecution – either in the country of refuge or, after extradition, in the country of origin – is difficult and costly.⁶ Despite these challenges, attention for exclusion has increased significantly over the last fifteen years,⁷ and so has the number of excluded individuals.⁸

A considerable number of excluded asylum seekers ‘disappear from the radar’ after exclusion. The lack of oversight on the whereabouts of 1F-excluded individuals can for various reasons be regarded to be problematic. Firstly, if an excluded individual disappears from the radar before a criminal investigation has been initiated or concluded, this increases the chances that he avoids being held criminally accountable for his alleged acts. Secondly, as some of these individuals are considered to pose a threat to public security because of their alleged involvement in serious criminality, losing these possibly dangerous individuals out of sight carries a security risk. Thirdly, it is known that some excluded individuals eventually managed to obtain legal residence in other European countries than the ones who excluded them. In such instances, it could be argued that the idea that Europe should not offer a safe haven for perpetrators of the most serious crimes is undermined.

At current, it seems challenging for immigration authorities to keep track of excluded individuals once they travel abroad, and for the authorities in the countries they travel to, to properly identify such individuals. This study aims to systematically discuss how and to what extent European countries currently exchange information on excluded individuals, and explores the desirability and feasibility of improving the existing system.

war crimes or crimes against humanity [...] by using the most appropriate of seven complementary tools: criminal prosecution, [extradition, transfer], revocation of citizenship, denial of access to Canada, denial of refugee protection and deportation”, or in the case of the Netherlands, e.g. the Letter of the Minister of Justice to Parliament, Kamerstukken TK 2007–2008, 31 200 VI, no. 160, p. 4: “It is our conviction that the Netherlands should not offer a safe haven to [persons who fall within Article 1F]. It is in the interest of the Dutch society and the international legal order that they are not granted a residence permit”.

⁵ The refoulement prohibition of Article 33(1) of the Refugee Convention states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 33(2) states that “[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. The refoulement prohibition that follows from Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), stating that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”, however, is absolute. See *Chahal v UK*, European Court of Human Rights (ECtHR), decision of 15 November 1996, 70/1995/576/662; *Ahmed v Austria*, ECtHR, decision of 17 December 1996, 25964/94; *Saadi v Italy*, ECtHR, decision of 28 February 2008, 37201/06.

⁶ On the difficulty of prosecution, see Bolhuis & Van Wijk (2015). On the difficulty of extradition, see Bolhuis, Middelkoop & Van Wijk (2014).

⁷ Gilbert (2003: 429-432).

⁸ This is at least true for the countries of focus in this study, as will become clear in Chapter 3.

1.3. Study outline

At the outset, UDI formulated eight questions it wanted to have addressed in the study:

1. To what extent do European countries transmit, receive and/or collect information about whether foreigners residing within their territory have been excluded from refugee status in other countries?
2. In what way, and through which channels, is this information exchanged between European governments?
 - a. Under which circumstances do they receive this kind of information?
 - b. In which context do governments in one country transmit this kind of information to other governments?
3. Which experiences and existing practices with bilateral solutions can be collected from government and NGO representatives included in the study?
4. Which practical hindrances are there to the exchange of such information between European countries?
5. Which legal hindrances are there to the exchange of such information?
6. Which ideas on how to improve the information exchange on these matters can be collected from the government and NGO representatives included in the study?
7. Could any of the existing common European information systems be developed so as to include information about decisions on exclusion?
8. What legally and practically feasible recommendations follow from the findings?

On the basis of these questions, four core objectives for this study were established. The first objective is to *map the current state* of information exchange between European countries regarding persons excluded from refugee status. The second objective is to *identify challenges* in the information exchange. The third objective is to *explore possibilities for improvement* of the information exchange. The final objective is to *draft recommendations* on how to improve the information exchange between European countries, so as to ensure that exclusion decisions in one country are communicated and can be followed up in other countries.

On the basis of this broad outline, the following three main research questions were formulated in the initial phase of the research:

1. What exchange of information on the application of 1F exclusion currently takes place?
2. Is it desirable to enhance international information exchange on 1F-excluded individuals?
3. Is it feasible to enhance international information exchange on 1F-excluded individuals?

The first question is addressed in Chapter 4. The second and third question are addressed in Chapter 5. Before turning to this core part of the study, two issues firstly need to be addressed: Chapter 2 provides an overview of the methodology of this study, while Chapter 3 provides a (brief) overview of some relevant aspects of the application of Article 1F in the six focus countries of this study.

2. Methodology

In this study, a variety of research methods and tools have been used to meet the objectives listed in the previous chapter. Different methods were combined by means of triangulation. Considering the sensitive nature of the topic at hand, interviews with relevant stakeholders turned out to be the most fruitful way of obtaining the necessary data. However, to be in a position to place these data in the right context, besides stakeholder interviews, the research also involved a number of expert interviews, a review of available academic literature, relevant rules and regulations and formal and informal policy documents. Furthermore, a survey has been distributed through the European Migration Network (EMN).⁹ At the start of the study, a research protocol was drafted that was presented to and accorded by VU University Faculty of Law's internal ethical commission CERCO.¹⁰ The different methods are outlined below.

2.1. Interviews

2.1.1. Selection of respondents

The research has focused on a selective sample of countries and a number of relevant intergovernmental organisations (IGOs) and (inter-)national non-governmental organisations (NGOs). The selection of sample countries was done in consultation with the UDI. The six main countries of interest were Belgium, Denmark, the Netherlands, Norway, Sweden and the United Kingdom. These countries were selected because they are known for their interest in 1F cases. Furthermore, all of these countries have units within law enforcement and/or prosecution services specialised in the investigation and prosecution of international crimes. Except for Belgium and Sweden, the countries were also included in an earlier study commissioned by UDI on rules and practices concerning refugee exclusion that was carried out in 2013.¹¹

Within the selected countries, relevant respondents have first and foremost been identified within governmental bodies. There were three strands of governmental bodies of interest: 1) immigration authorities in charge of identifying asylum seekers to whom Article 1F may apply; 2) (specialised) prosecutorial and investigative bodies charged with criminal investigations of war criminals and other perpetrators of crimes that fall under 1F; and 3) policy makers and advisors in the relevant ministries. In all of the focus countries, except Belgium, persons within all of these bodies have been interviewed.

In addition to these country studies, experts on information exchange and immigration- and police cooperation within intergovernmental organisations, such as Eurojust and Europol, and non-governmental organisations, such as Human Rights Watch and Civitas Maxima, have been interviewed. Interviews were also conducted with representatives of intergovernmental organisations concerned with (the execution of) the asylum policy in the EU, such as the European Asylum Support Office (EASO) and the European Migration Network (EMN). Where relevant, experts from academia have also been interviewed. The foregoing can be summarised in a stakeholder chart:

1. Countries
 - a. Governmental bodies
 - i. Immigration services, representatives of units responsible for application of Article 1F (if applicable)

⁹ See paragraph 2.3.

¹⁰ See <<http://www.rechten.vu.nl/nl/organisatie/commissies/commissie-ethiek/>> (in Dutch only).

¹¹ Aas (2013).

- ii. Prosecution, representatives of units responsible for prosecution of war crimes (if applicable)
 - iii. Police, representatives of units responsible for investigation of war crimes (if applicable)
 - iv. Ministries
 - b. Non-governmental organisations
- 2. International organisations
 - a. Intergovernmental organisations (IGOs)
 - b. International non-governmental organisations (INGOs)
- 3. Academics

2.1.2. Interviews

The main data collection consisted of conducting interviews with relevant stakeholders.

Qualitative research was most suitable considering the wish of the UDI to obtain in-depth knowledge on a limited number of countries and because of the sensitive nature of the issue at hand. Between January and November 2015, 43 semi-structured interviews with 64 respondents have been conducted.

Throughout this report, respondents will be referred to with a number (e.g. R1, R2, etc.). An overview of the affiliations of respondents is presented in Annex 1.

Where possible, respondents were approached through the researchers' and UDI's existing network. The topic of study was stressed in all initial communications. It was also mentioned that all obtained information could be used in a publicly available report and that the respondent's anonymity would be guaranteed. Where a considerable number of actors responded swift and positively, at times it also proved extremely challenging to gain access to certain stakeholders, identify the most suitable respondent within an organisation or get approval to conduct an interview. Delayed response and non-response to requests has caused considerable delays in the project. In some instances it may even mean that the report omits relevant information about existing practices in some of the focus countries. This has in particular affected the paragraphs which cover information exchange at the national level. What may have played an important role in the non-response is that the influx in all of the focus countries started to increase significantly over the course of the period in which the study was carried out. For the same reason, authorities in some other countries that the authors wished to include in the study saw themselves compelled to turn down requests for an interview. While they acknowledged the relevance of the study, they argued they had to deal with more pressing operational issues.

Interviews typically took place at the respondent's office and lasted from 30 minutes up to two hours. After the interviews, all respondents were sent a copy of the interview report and were requested to correct or clarify any inaccuracies. In five instances, the interview were not conducted in person or by telephone, but respondents submitted answers to questions in writing; the list of respondents in Annex 1 indicates which of the respondents this concerns.

2.2. Review of academic literature and rules, regulations and policies

The starting point for a good understanding of the issue is to assess what is already known. For this reason, all relevant academic literature and policy reports on information exchange between European countries regarding persons excluded from refugee protection was reviewed. Perhaps surprisingly, this

led to the conclusion that the issue has so far hardly been addressed. Much more has been written about the application of Article 1F in (some) European states. This literature has been reviewed and has been taken into account as far as it was relevant. In addition, European and national regulations and formal policies that exist with respect to 1F exclusion, including relevant guidelines, documents concerning relevant practice, reports, and memos by the concerned law- and policymakers, were reviewed.

2.3. EMN ad-hoc queries

On the request of the researchers, the Norwegian National Contact Point for the European Migration Network (EMN) has sent out two ad-hoc queries on 26 June 2015.¹² Through EMN ad-hoc queries, EMN members and the European Commission can collect comparative information from other members on a wide range of asylum- and migration-related issues. The EMN produces compilations of the responses.¹³ 21 of the 29 EMN Member States responded to the first query and 22 out of 29 to the second query. Findings have been incorporated in this report. The questionnaire is included in Annex 2. Summaries of the responses are available via the website of the UDI.¹⁴

¹² 'Ad-Hoc Query 1 & 2 related to study on exchange of information regarding persons excluded from international protection, Requested by NO EMN NCP on 26.06.15'.

¹³ See <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/index_en.htm>.

¹⁴ See <<http://www.udi.no/en/statistics-and-analysis/european-migration-network---norway/ad-hoc-queries/>>.

3. The application of Article 1F in the focus countries

Before turning to the core questions of this study, it is useful to provide a brief overview of the policies and regulations that are in place in the different focus countries.¹⁵ Per country, this chapter provides a description of 1) the exclusion policy and procedure, 2) the characteristics of the ‘population’ of 1F-excluded individuals, and 3) existing post-exclusion policies. As will become apparent in subsequent chapters, all these three elements may impact current practices of information exchanges and relate to the question whether and why actors regard improvements to the current system feasible or desirable.

3.1. Belgium

3.1.1. Exclusion policy and procedure

In Belgium, four different bodies are involved in the asylum procedure. The Office of the Commissioner General for Refugees and Stateless persons (CGRS) assesses the asylum application and decides on asylum or subsidiary protection; the Immigration Office (*Dienst Vreemdelingenzaken*, DVZ) is responsible for registration of asylum applicants and ‘Dublin’ checks (see paragraph 4.2.2.1.) and decides on the (forced) return of applicants whose procedure has ended; the Council for Aliens Disputes (*Raad voor Vreemdelingenbetwistingen*, RVV) is competent to decide on appeals against decisions made by CGRS and DVZ; and the Federal Agency for the Reception of Asylum Seekers (Fedasil) is responsible for reception.¹⁶ CGRS is the sole authority competent to examine the content of asylum applications in Belgium. It is an independent government agency and not an integral part of a Ministry. Within the CGRS, there is no specialised unit for 1F cases; cases with 1F indications are handled by experienced case officers who have developed an expertise for 1F cases and for certain countries of origin.¹⁷ These officers can also rely on assistance by reference persons who have specialised legal knowledge of Article 1F exclusion. Article 1F is incorporated through Articles 55/2 (asylum) and 55/4 of the Immigration Act (subsidiary protection).¹⁸ Inclusion under Article 1A Refugee Convention is, except under highly exceptional circumstances, considered before exclusion under Article 1F.¹⁹

3.1.2. Characteristics of the population of 1F-excluded individuals

From 2007 to 2014 CGRS has excluded 118 asylum applicants on the basis of Article 1F; in 2015, so far, 6 individuals have been excluded.²⁰ Excluded persons come particularly from Afghanistan, Iraq, Rwanda and Sierra Leone.²¹

¹⁵ The policies and regulations of all focus countries, excluding Belgium and Sweden, have already been extensively described in another UDI-commissioned study (Aas, 2013).

¹⁶ See <<http://www.cgra.be/en/about-the-cgrs>>.

¹⁷ R57.

¹⁸ Act of 15 December 1980 concerning the access to the territory, the stay, the settlement and the removal of aliens, available online (in Dutch) at <https://dofi.ibz.be/sites/dvzoe/NL/Documents/19801215_n.pdf>.

¹⁹ R57.

²⁰ Statistics provided by CGRS; on file with the authors.

²¹ R57.

3.1.3. Post-exclusion policies

A negative decision by the CGRS is followed by the issuing of an order to leave the territory by the Asylum Department of the DVZ. The DVZ does not by definition issue entry bans to excluded individuals, but if the person in question is found on the Belgian territory after the expiration of his/her order to leave the territory and apprehended to be expelled, an entry ban could be issued.²² No temporary residence permit is granted to excluded individuals. Excluded individuals are refused (temporary) stay on or entry to the territory on the basis of Article 57/32 Aliens Act. Although in theory it is (legally) possible for an excluded to be granted a residence permit on other grounds than asylum, in practice authorities are not keen to grant a residence permit to someone excluded on the basis of article 1F of the Refugee Convention.²³ Each residence permit application is examined on a case-by-case basis. All known elements contained in the file of the foreigner in question are taken into account in the decision-making process. The Immigration Act of 15 December 1980 stipulates that each residence permit application can be denied when the Minister or his authorised representative considers that the person in question might harm the public tranquillity, public order or the security of the country. In those cases, a reference is always made to Article 3(1)(5°) to (8°) of the Immigration Act ((7°) refers to public tranquillity, public order and national security). Negative decisions on applications for residence permits on the basis of family reunification are based on Article 43 of the Immigration Act. In the case of excluded individuals, the family reunification can be denied for reasons of public order and following an analysis of the threat that the applicant represents, as well as a fair balance test (examination of articles 8 and 3 of the European Convention on Human Rights). The elements which led to the exclusion on the basis of Article 1F will also be important in this regard.²⁴

3.2. Denmark

3.2.1. Exclusion policy and procedure

In Denmark, exclusion cases are handled by officers from all asylum divisions within the Danish Immigration Service (DIS).²⁵ Section 10(1) Aliens (Consolidation) Act²⁶ states that “[a]n alien cannot be issued with a residence permit under sections 7 to 9f or 9i to 9n if [...] (iii) the alien is deemed to fall within Article 1 F of the Convention Relating to the Status of Refugees (28 July 1951).” This means that an applicant who is excluded under Section 10(1) is excluded from refugee status under Section 7(1) and subsidiary protection under Section 7(2) and from any other residence permit as set out in Sections 9 to 9(n). Inclusion is considered before exclusion.²⁷ The stay of excluded individuals who cannot be refouled is referred to as ‘tolerated stay’.²⁸

²² Answers to EMN Ad Hoc Queries 1 and 2, above note 12.

²³ Ibid.

²⁴ Ibid.

²⁵ Once an asylum application has been denied on the basis of Article 1F, the excluded individual will be subjected to a ‘tolerated stay’ policy and the 4th Asylum Division becomes solely responsible for the case.

²⁶ Consolidation Act No. 863 of June 25th 2013. English translation available online at https://www.nyidanmark.dk/NR/rdonlyres/2A42ECC8-1CF5-4A8A-89AC-8D3D75EF3E17/0/aliens_consolidation_act_863_250613.pdf.

²⁷ See Aas (2013: 124).

²⁸ The term ‘tolerated stay’ is a popular denomination, not a legal term and not as such defined in the Aliens Act.

3.2.2. Characteristics of the population of 1F-excluded individuals

Since 1996, the total number of tolerated stay cases totals approximately 120; about one third of these cases concerns 1F exclusion. Of the around 65 individuals currently on tolerated stay, 23 have been excluded on the basis of Article 1F.²⁹ As to the exclusion grounds, only a handful of exclusion decisions have been based on Article 1F(a). The far majority of cases are excluded on the basis of Article 1F(b). The 1F-excluded individuals mainly stem from Afghanistan (young Taliban fighters) and Syria. A more limited number originate from Libya, Turkey, Lebanon and Iran.³⁰

3.2.3. Post-exclusion policies

Excluded individuals can by definition not be expelled or returned, as inclusion is considered before exclusion. The exclusion decision, however, does include a decision stating that the stay of the individual is illegal.³¹ Excluded individuals are also signalled in the Schengen Information System (SIS) in accordance with Section 58(g)(1)(iii) Aliens Act, on the basis of Article 24(3) SIS II Regulation (Regulation EC 1987/2006). There is a political demand to very strictly monitor the group of individuals on tolerated stay. As noted above, this group is not only comprised of 1F-excluded individuals, but also comprises e.g. unremovable aliens convicted for a crime committed in Denmark. Sections 34 and 42(a)(9) of the Aliens Act regulates the conditions for ‘tolerated stay’. These conditions include that the tolerated individuals have to remain in a designated asylum centre (Sandholm) and report themselves to the police daily.³² If they do not report themselves, the national police report them to the local police. Multiple times of not reporting may lead to being fined or imprisoned. According to section 49(b)(1) of the Danish Aliens Act the Danish Immigration Service has to check every six months, or when an occasion otherwise arises, whether there is a basis for making a decision under Section 32(b) Aliens Act; that provision determines that *“a decision according to which an alien whose application for a residence permit under section 7 or section 8(1) or (2) has been refused cannot be returned from Denmark on the basis of the non-refoulement principle, see Section 31, must be revised if the basis referred to in the decision is no longer present.”* Every six months, the DIS issues a new decision on the obligations linked to the tolerated stay in Sandholm.³³ The national police also review the obligation of the excluded individuals with respect to reporting themselves every six months.³⁴ As noted above, Section 10(1) Aliens Act explicitly mentions that 1F-excluded individuals do not have access to any residence permit, neither on the basis of international protection, nor on other grounds such as family reunification. The fact that excluded individuals have to report to the police everyday makes that the authorities have an accurate idea of who of them still remains in the country. It seems that only a limited number of 1F-excluded individuals leave Denmark after exclusion.

²⁹ R34.

³⁰ R34.

³¹ This decision also qualifies as a ‘return decision’ in the sense of Article 3(4) Return Directive 2008/115/EC: *“‘[R]eturn decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return”.*

³² R34.

³³ R28.

³⁴ R34.

3.3. Netherlands

3.3.1. Exclusion policy and procedure

All caseworkers of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatie Dienst, IND*) handling applications for asylum who have reasons to believe that Article 1F may apply in a certain case should refer the case to the specialised '1F-unit'. Asylum applicants who are excluded on the basis of Article 1F Refugee Convention are not regarded to be a refugee as defined by the Refugee Convention and cannot be granted asylum under Article 29(1)(a) of the Dutch Aliens Act.³⁵ In the Netherlands, exclusion is considered before inclusion. This means that before it is assessed whether an individual would qualify for asylum, it is first assessed whether he would fall within Article 1F. The consequence is that the number of 1F-excluded individuals is relatively high compared to States that consider inclusion first. Different from countries which consider inclusion first, excluded individuals in the Netherlands can be deported, *unless* human rights put a bar on *refoulement*.

3.3.2. Characteristics of the population of 1F-excluded individuals

In the Netherlands, Article 1F has been invoked against 920 persons between 1992 and 2014.³⁶ An analysis of all 1F decisions between 2000 and 2010 shows that only 48 out of 745 1F-decisions in that period were based solely on Article 1F(b) or a combination of 1F(b) and (c).³⁷ The other cases are mostly based on a combination of Article 1F(a) and (b) or solely on Article 1F(a). The top five of countries of nationality of these 920 individuals are Afghanistan (about half of all cases), Iraq, Turkey, Angola and Iran.³⁸

3.3.3. Post-exclusion policies

In accordance with Article 3.107 Aliens Regulation,³⁹ a 1F-excluded individual does not qualify for asylum on any other ground mentioned in Article 29 Aliens Act. On the basis of Article 3.77 Aliens Regulation, every 1F-excluded individual is considered to pose a threat to public order and on that ground he does not qualify for a residence permit on other grounds either.⁴⁰ 1F-excluded individuals also do not receive any form of temporary leave to stay or a residence permit. Article 45 Aliens Act determines that the refusal of a residence permit is equal to a return decision, which means that, unless there is another ground for legal stay, the alien has to leave the Netherlands within 28 days, or a shorter period if the alien constitutes a danger to public order, public security or national security. Although return decisions are in practice hardly ever enforced when individuals cannot be refouled, it is argued that such decisions can still be taken because non-deportable excluded individuals may theoretically be relocated to another country. No matter how difficult this in practice may be, excluded individuals are expected to leave the

³⁵ *Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet, Vw, 2000).*

³⁶ State Secretary of Security and Justice, *Kamerstukken* 19637-1808, 14 April 2014, p. 14; State Secretary of Security and Justice, *Kamerstukken* 19637-1952, 3 March 2015.

³⁷ Bolhuis & Van Wijk (2015).

³⁸ State Secretary of Security and Justice (2014: 15), above note 36.

³⁹ *Vreemdelingenbesluit (Vb) 2000.*

⁴⁰ Article 3.77 Aliens Regulation reads: "1. *The application for a temporary residence permit [can be denied] because of danger to the public order, when: a. there are serious reasons for considering that the alien has been guilty of acts as referred to in Article 1F of the Refugee Convention*" (translation by the authors). See also Rikhof (2012: 403).

country. In addition to this legal obligation to leave, Dutch government encourages excluded individuals to leave the country with additional measures. From 2002 to 2011, the Dutch government had a policy of declaring 1F-excluded individuals *persona non grata* on the basis of Article 67 Aliens Act, on the grounds that excluded individuals pose a threat to public order or to national security (Art. 67(1)(c)) and/or in the interest of international relations (Art. 67(1)(e)).⁴¹ An individual who is declared *persona non grata* is ordered to leave the Netherlands within 24 hours after the declaration. To remain in the Netherlands while having been declared *persona non grata* is a criminal offence (Art. 197 of the Dutch Criminal Code), punishable by up to six months detention, whether someone may be *refouled* or not.⁴² Since 31 December 2011, when Return Directive 2008/115/EC was implemented in Dutch legislation, 1F-excluded individuals receive an immediate EU entry ban for a maximum of twenty years on the basis of Art. 66a Aliens Act (Reijven & Van Wijk, 2014). An Article 3 ECHR impediment to *refoulement* does not stand in the way of imposing an entry ban.⁴³ Once there is a 1F decision, the alien has no right to stay on the Dutch territory because of the entry ban, and for this reason any residence permit is out of the question. If an applicant would want to marry a Dutch national, this is only possible after he has travelled out of the Netherlands, in which case re-entry will be refused on the basis of the entry ban.⁴⁴ Because of the entry ban, 1F-excluded individuals will also be signalled in the Schengen Information System (SIS), on the basis of Article 66a(3) Aliens Act and Article 24(2)(b) SIS II Regulation; unlike in Denmark, the entering of an alert in SIS II is not based on a return decision (even though, as noted above, Article 45 Aliens Act determines that the refusal of a residence permit is equal to a return decision), but on the fact that an individual is considered a threat to public policy, public security or national security (see paragraph 4.2.1.2.). When the whereabouts of the unreturnable excluded individual are known, the Ministry of Security and Justice's Repatriation and Departure Service (DT&V) periodically visits him to inform him that he has to leave the country.

As was noted above, because exclusion is considered before inclusion there is no *refoulement* prohibition for all excluded individuals. The DT&V monitors how many of the excluded individuals have 'demonstrably' left the country (forced deportation or independent departure), and how many are still residing in the Netherlands. Its most recent figures show that a total of 100 1F-excluded individuals have demonstrably left the country between 2007 and 2014 and that it had another 170 1F cases in its caseload at the end of 2014.⁴⁵ In addition, a group that is labelled as 'MOB' (left with an unknown destination) is *believed* to have left the country. However, these individuals may still (illegally) reside in the Netherlands without the authorities being aware of their whereabouts.⁴⁶ The actual number of 1F-excluded individuals still residing in the Netherlands may thus be higher than 170. Some available figures suggest that the number of MOB cases is significant. Of 250 individuals who are believed to have left the

⁴¹ Minister of Justice, *Kamerstukken* 30800-VI-78, 21 March 2007, page 9.

⁴² Reijven & Van Wijk (2014: 9). However, the Advisory Committee on Migration Affairs in the Netherlands (ACVZ) (2008: 46) notes that a *persona non grata*-declaration can only serve as a basis for a criminal conviction if the alien realistically has an alternative to stay somewhere outside the Netherlands; see also Administrative Division of the Council of State, judgment of 7 August 2006, 200602402/1. It furthermore notes that 1F-excluded individuals who *can* be expelled are typically not prosecuted either.

⁴³ See Administrative Division of the Council of State, judgment of 3 December 2014, ECLI:NL:RVS:2014:4530.

⁴⁴ R4.

⁴⁵ State Secretary of Security and Justice (2014: 19), above note 36.

⁴⁶ Reijven & Van Wijk (2014).

country between January 2009 and March 2014, 75% had been labelled MOB.⁴⁷ A *refoulement* prohibition may also be in place in these MOB cases. The number of excluded individuals that has moved to other European countries is unknown. There is, however, anecdotal evidence that individuals excluded in the Netherlands have later applied for residence permits in e.g. Belgium, Germany and Norway.

3.4. Norway

3.4.1. Exclusion policy and procedure

If there is an indication that Article 1F might apply, the case is referred to the 'F1-unit' within the Directorate of Immigration in Oslo (UDI). Section 31 of the Norwegian Immigration Act⁴⁸ determines that applicants for residence permits shall not be entitled to recognition as a refugee if they fall under the exclusion clauses of the Refugee Convention. Similar to Belgium and Denmark, inclusion is considered before exclusion.

3.4.2. Characteristics of the population of 1F-excluded individuals

In Norway, 111 people have been excluded on the basis of 1F as of November 2015. In addition to that, 1 asylum seeker has been extradited on the basis of a suspicion that he committed a serious crime before arriving in Norway.⁴⁹ As far as UDI is aware, less than ten of the excluded individuals have left Norway, and less than ten have received a residence permit on the basis of family reunification.⁵⁰ A study by Aas shows that around 2013, Article 1F(b) was used about twice as often as Article 1F(a).⁵¹ Most excluded individuals originated from Iraq, Eritrea, Sudan and Afghanistan or are stateless Palestinians.⁵²

3.4.3. Post-exclusion policies

Since inclusion is considered before exclusion, excluded individuals can in principle not be refouled. Rejection of an asylum status does not automatically lead to expulsion and consequently also does not lead to an entry ban. In fact, excluded individuals receive a (temporary) residence permit on the basis of Section 74 Immigration Act, which was specifically developed for 1F exclusion cases.⁵³ The permit is valid for six months; the individuals concerned will have to reapply at the local police every six months. It gives excluded individuals the right to work, but does not give them a passport or the right to travel. This permit differs from permits that might be given in case someone has committed a crime after entry to Norway.⁵⁴ Norway does not issue an expulsion order for excluded individuals who have a temporary residence permit.⁵⁵ Even if the excluded person commits a crime in Norway, UDI cannot issue an

⁴⁷ State Secretary of Security and Justice (2014: 16), above note 36.

⁴⁸ Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act). A translation is available online via <<https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/>>.

⁴⁹ R10, R11.

⁵⁰ R10, R11.

⁵¹ Aas (2013: 61).

⁵² Aas (2013: 60).

⁵³ R14.

⁵⁴ The appeal board (UNE) has granted the same permit to between ten and fifteen asylum seekers who have not been excluded due to *sur place* reasons.

⁵⁵ R10, R11.

expulsion order as long as the person is protected against *refoulement*. These principles are expressed in Section 73(2) Immigration Act. Even if the foreigner is excluded from protection on the basis of Section 31 Immigration Act, or constitutes a danger to society because of having committed a particularly serious crime (Section 73 (1)(b) Immigration Act), no expulsion order can be issued as long as the foreigner is in real danger to be subjected to the death penalty, torture or other inhuman treatment upon return to his/her home country.⁵⁶

Different from the Belgium, Denmark and the Netherlands, a 1F-excluded individual in Norway can still obtain a regular residence permit on other grounds. Excluded individuals cannot act as a reference person to reunify with family members living abroad. Yet, if the excluded individual would want to marry a Norwegian national or a naturalised immigrant, 1F exclusion does currently not prevent someone from obtaining legal residence in this way. Respondents indicated that it would be possible to refuse residence, but there is currently no clear legal basis for this. Some respondents suggested that Section 59 Immigration Act could be used to deny family reunification because of 1F exclusion. This Section reads: *“A foreign national who otherwise satisfies the conditions for a residence permit may be refused such permit if there are circumstances that will give reason to refuse the foreign national entry to or residence in Norway under other provisions of this Act [...]”* Section 59 does not list any specific conditions or circumstances, e.g. that a permit can only be refused if the foreign national poses a threat to public order or national security. The section might, however, leave room for refusing a permit after someone has been excluded; exclusion would in this view fall under the mentioned “circumstances”.⁵⁷ It can, however, also be argued that Section 31 Immigration Act, which is the basis for 1F exclusion, is merely concerned with excluding individuals from asylum. It would therefore not *per se* exclude individuals from a residence permit on the basis of family reunification, since this falls outside of the reach of asylum.⁵⁸ The Ministry of Justice is preparing legislation that should offer a clear legal basis for refusing applications for residence permits on other grounds than asylum after 1F exclusion.⁵⁹

On an annual basis about ten 1F-excluded individuals apply for family reunification.⁶⁰ The family reunification department can decide on these applications themselves, or forward these to the Ministry of Justice for an assessment. When the Ministry decides that the individual poses a threat to the public order or national security, no residence status is given. Although the Ministry is most likely to decide that no residence permit shall be given,⁶¹ there have been several – less than ten – cases where the excluded individual was not deemed a threat to the public order or national security and was granted a residence permit.⁶² Future legislation might make 1F exclusion a ground for expulsion and – consequently – change this practice. Additionally, this may also make it possible to give excluded individuals an entry ban.⁶³

⁵⁶ There is one exception; in accordance with Section 126 Immigration Act, the Ministry of Justice has the competence to issue an expulsion order *“out of regard for fundamental national interests or foreign policy considerations”*. In those cases, the applicant is not excluded under Section 31.

⁵⁷ R10, R11.

⁵⁸ R14.

⁵⁹ R36.

⁶⁰ R14.

⁶¹ R14.

⁶² R10, R11.

⁶³ R36.

3.5. Sweden

3.5.1. Exclusion policy and procedure

Similar to Belgium and Denmark, there is no specific unit for 1F cases in Sweden; possible exclusion cases are handled by asylum officers throughout the country.⁶⁴ Each caseworker has received training in order to find indicators for exclusion. In addition, guidance is given by several documents, most importantly a – not publicly available – list of indicators that has been drafted by the security police. If a caseworker has reasons to believe that Article 1F applies, an additional interview will be conducted by an exclusion specialist; each asylum office should have at least one specialist attached to it.⁶⁵ Article 1F has been incorporated in national legislation by a 2009 amendment of the Aliens Act.⁶⁶ Chapter 4, Section 2(b) regulates 1F exclusion; Section 2(c) regulates exclusion from subsidiary protection. Before the amendment, Article 1F was not implemented in national legislation and the most important source for applying it was jurisprudence. Inclusion is considered before exclusion in Sweden.⁶⁷

3.5.2. Characteristics of the population of 1F-excluded individuals

1F cases are not centrally registered, which makes it difficult to produce accurate statistics.⁶⁸ Recently, however, regional exclusion specialists started monitoring how many asylum applications are denied on the basis of Article 1F. In 2014, approximately 20 individuals have been excluded on the basis of 1F; in 2015, as of November, also about 20 individuals have been excluded.⁶⁹ Because an accurate overview is lacking, it is also difficult to say which of the sections (a, b of c) is used most. One respondent believed that while the accent used to be on Article 1F(b), there have recently been more exclusions under 1F(a).⁷⁰ Most of the excluded individuals originate from Iraq, Serbia and Bosnia. At the moment, much attention is directed to Syrians.⁷¹

3.5.3. Post-exclusion policies

Because inclusion is considered before exclusion, expulsion is in principle not possible in the case of exclusion.⁷² Excluded individuals receive a temporary residence permit on the basis of Chapter 5 Section 7 Aliens Act. This permit – which is not only reserved for exclusion cases but is also used in the case of criminal migrants – may have the duration of at least one year.⁷³ If the individuals are unreturnable for several years, they may qualify for receiving a permanent residence permit. If an excluded individual is reported to the police and an investigation is started, no permanent residence permit will be granted. In

⁶⁴ R46, R47, R48, R49.

⁶⁵ R46, R47, R48, R49.

⁶⁶ Act amending the Aliens Act (2005:716) issued on 17 December 2009, SFS 2009:1542, available online at <<http://www.government.se/contentassets/86ebb559cc2d4cf5bee5906236977436/act-amending-the-aliens-act.pdf>>.

⁶⁷ R46, R47, R48, R49.

⁶⁸ R46, R47, R48, R49.

⁶⁹ R62.

⁷⁰ R46.

⁷¹ R46.

⁷² An exception may exist if the person qualifies for international protection but does not fall under the reach of Chapter 12 Section 1 and 2 Aliens Act (R47).

⁷³ R46.

some cases, excluded individuals may be granted a residence permit on the basis of family reunification, because there may be an obligation to grant a residence permit under the Family Reunification Directive (2003/86/EC).⁷⁴ A residence permit on the basis of family reunification can be denied if someone is believed to pose a 'present threat' to the public order, public security or national security. Not all individuals who have committed crimes in the past are by definition considered to pose such a threat.⁷⁵ Respondents believed, however, that cases in which exclusion is followed by an application for a residence permit on the basis of family reunification are very rare.⁷⁶

3.6. United Kingdom

3.6.1. Exclusion policy and procedure

Since the UK Border Agency was disbanded in 2011, 1F cases are assessed by the Special Cases Unit (SCU), which is part of the Office for Security and Counter-terrorism (OSCT) of the UK Home Office.⁷⁷ The SCU assesses a wide array of 'special cases', including 1F cases. When a caseworker in a given case has reasons to believe that Article 1F might apply, the case is referred to the SCU. Within the SCU, cases that fall under Article 1F(a) (war crimes, crimes against humanity, genocide) are dealt with by the SCU in Liverpool, while 1F(b) and 1F(c)-cases are dealt with by the SCU in Croydon, South London. The unit in Croydon has an investigations section that can assist by doing additional research.⁷⁸

Regulation 7 of the Refugee or Person in need of International Protection Regulations 2006 incorporates Article 1F in UK legislation. This provision establishes that a person who falls within the scope of Article 1F of the Convention does not qualify as a refugee. In the UK, inclusion and exclusion are considered at the same time.⁷⁹ The Asylum Instruction on Exclusion notes that *"[i]t is likely that an individual excluded from refugee status under Article 1F will also be excluded from Humanitarian Protection."*⁸⁰

3.6.2. Characteristics of the population of 1F-excluded individuals

Figures from a study by Singer suggest that the number of exclusions was around 20 every year in the period 2008 to 2013.⁸¹ These figures also indicate that about 79% of the individuals are excluded on the basis of Article 1F(a). Article 1F(b) is used in about 13% of the cases, and Article 1F(c) in about 8% of the cases (typically in relation to terrorism cases). The most common nationalities among the 1F-excluded individuals are the Zimbabwean, Afghan, Iraqi and Sri Lankan.⁸²

⁷⁴ R47.

⁷⁵ R47.

⁷⁶ R46, R47, R48, R49.

⁷⁷ R15, R16.

⁷⁸ R15, R24.

⁷⁹ R15, R16. See also Home Office, 'Asylum Instruction on Exclusion: Article 1F of the Refugee Convention', 30 May 2012, p. 5, available online at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257429/exclusion.pdf.

⁸⁰ Asylum Instruction on Exclusion, page 5.

⁸¹ Singer (2015: 12).

⁸² Singer (2015).

3.6.3. Post-exclusion policies

Excluded individuals are, in principle, to be removed.⁸³ Where *refoulement* is not possible, e.g. on the basis of Article 3 ECHR, they are granted 'restricted leave' until removal can be enforced.⁸⁴ To emphasise its short-term nature, restrictive leaves are limited to a maximum of six months at a time.⁸⁵ Every 1F case has a case-owner at the Special Cases Unit of the Home Office who is also responsible for tracking the excluded individual and evaluating whether or not return is possible.⁸⁶ In principle, individuals who are granted restricted leave are allowed to live and work everywhere in the UK. However, based on a risk assessment, they may be subjected to conditions. These may include employment restrictions, having to reside at a particular address, or having to report at an office every week or month.⁸⁷ Which conditions are set depends on the individual circumstances of the case and on the evidence that is available.⁸⁸ According to Singer, 56 individuals were on restricted leave as of March 2015.⁸⁹ All have reporting, education and residence restrictions, while for 54 of them also employment conditions are in place. Applications by excluded individuals to enter or remain in the UK, for instance on the basis of family reunification, would be refused, under the Immigration Rules, on grounds that the person's presence is not conducive to the public good.⁹⁰

3.7. Conclusion

This chapter provided a brief overview of existing exclusion policies and their effects in the six focus countries. The overview demonstrates that there are clear similarities between the exclusion and post-exclusion policies and the population of 1F-excluded individuals in the six countries. All countries have a policy of actively applying Article 1F and all countries are faced with the question how to deal with 1F-excluded individuals who cannot be removed.

There are also significant differences between the various countries. Norway, the Netherlands and the UK have specialised and dedicated units that assess applications in which Article 1F might be applicable. In Belgium, Denmark and Sweden, exclusion cases are handled by officers from all asylum departments. Particular to Belgium is the division of work between the Commissioner General for Refugees and Stateless Persons, which is solely responsible for assessing the asylum claim, and the Immigration Office and Fedasil, which are responsible for all other aspects of the asylum procedure and for issuing permits on other grounds than asylum. Another notable difference relates to the moment at which 1F exclusion is considered. Belgium, Denmark, Sweden and Norway consider inclusion before exclusion, while the Netherlands excludes before it includes. The UK assesses inclusion and exclusion in one single procedure. Countries that include before they exclude cannot expel the individuals they exclude, as it is already established that they need protection. By definition, excluded individuals in

⁸³ Home Office, 'Asylum Policy Instruction on Restricted Leave', 23 January 2015, page 7, available online at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf>.

⁸⁴ R20, R21.

⁸⁵ Home Office, above note 83, page 8.

⁸⁶ R15, R24.

⁸⁷ Home Office, above note 83, page 8.

⁸⁸ R20, R21.

⁸⁹ Singer (2015: 19).

⁹⁰ R15, R16.

Belgium, Denmark, Sweden and Norway therefore temporarily end up in ‘legal limbo’, while in the Netherlands and the UK they can in principle be removed *unless* there are non-refoulement impediments.

The most striking difference about the characteristics of the 1F populations in the six focus countries is perhaps that the number of 1F exclusions varies considerably. While e.g. Denmark has over the past decades excluded about 40 individuals in total, the number of 1F exclusion in the Netherlands has on average been 40 to 50 a year. The relatively high number of 1F exclusions in the Netherlands can partly be explained by the fact that it considers exclusion before inclusion. Obviously, these absolute figures also need to be related to the total number of asylum applications and decisions.⁹¹ Yet, the difference is still significant and suggests that there is no consistent practice of applying Article 1F between the different countries. The fact that there are also considerable differences in the grounds for exclusion support the idea that no consistent approach is taken: while the Netherlands and the UK primarily exclude on the basis of Article 1F(a), Denmark and Norway in particular use Article 1F(b).

In terms of post-exclusion policies, it is important to note that Article 6 Return Directive 2008/115 requires Member States to issue a return decision to third-country nationals staying illegally on their territory, unless it grants an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons. Article 8 of the Directive further requires member states to take action in order to expel illegally residing third-country nationals; tacit condoning is not allowed. The six focus countries all seem to act in line with this Directive, but take different approaches. Belgium and the Netherlands do not issue temporary permits, but a return decision instead. The other countries all provide temporary permits and periodically assess whether *refoulement* is possible.

Some countries are much more aware of the whereabouts of excluded individuals than others. For as long as removal is not possible, Denmark, Norway, Sweden and the UK offer forms of limited temporary stay or residence permits. Excluded individuals have to periodically reapply for such permits, which allows the immigration authorities to monitor their whereabouts. This policy differs significantly from the Dutch approach, which allows excluded individuals no form of leave to stay and actively encourages them to leave the country. This policy does not incentivise excluded individuals to inform the authorities about their whereabouts. As a consequence a significant number of excluded individuals are no longer on the authorities’ radar.⁹² Similarly, in Belgium, no form of temporary residence is available to excluded individuals.⁹³

Finally, there are notable differences between the focus countries in terms of allowing 1F-excluded individuals to apply for non-asylum related residence permits. In the Netherlands and Denmark, residence permits on the basis of for instance family reunification are de facto not available to excluded

⁹¹ Ranking of the focus countries in this study by number of asylum applicants in 2014 (highest to lowest): Sweden, (81.180), UK (31.745), Netherlands (24.495), Belgium (22.710), Denmark (14.680) and Norway (13.205). Ranking by first instance decisions in 2014 (highest to lowest): Sweden (39.905), UK (25.870), Belgium (20.335), Netherlands (18.790), Denmark (8.055) and Norway (7.640 decisions). See EUROSTAT Asylum statistics, available online at <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics>.

⁹² Results from the EMN ad hoc queries suggest that apart from the six focus countries in this study most other reporting Member States provide some form of tolerated and/or conditioned stay for unreturnable excluded individuals (Austria, Croatia, Czech Republic, Finland, France, Greece, Hungary, Ireland, Latvia, Luxemburg and Slovenia). Estonia, Germany, Italy, Slovak Republic and Spain stated that there is no temporary permit or leave to remain available.

⁹³ Answers to EMN Ad Hoc Queries 1 and 2, above note 12.

individuals.⁹⁴ Also in the UK, applications for other permits are refused in case of exclusion. In Norway, Sweden and Belgium, however, 1F-excluded individuals can under certain circumstances still successfully apply for other residence permits. The results of the EMN ad hoc queries suggest that all over Europe different practices exist in this regard. Many of the reporting Member States indicate that 1F exclusion as such does not bar issuing a residence permit on other grounds, but that a threat to public security does. Similar to the Netherlands and the UK, other Member States, however, also have regulations in place which de facto bar 1F-excluded individuals from receiving residence permits on non-asylum grounds.

⁹⁴ The Family Reunification Directive (2003/86/EC) also seems to leave room for that in some cases, i.e. as long as an excluded individual is seen as constituting a threat to public policy or public security. Recital 14 of the Directive reads: *“Family reunification may be refused on duly justified grounds. In particular, the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.”*

4. Current state of information exchange on 1F exclusion

The primary objective of this study is to obtain a comprehensive understanding of how and to what extent information on 1F-excluded individuals is exchanged within and between the six focus countries of this study. The main actors of concern are the immigration authorities, or more specifically, the bodies that have the competence to assess asylum claims. However, these actors do not act in isolation. They may exchange 1F related information with other national actors that could, on their turn, exchange this information with their international counterparts. A comprehensive understanding of the information exchange in relation to 1F exclusion between immigration authorities therefore requires knowledge of information exchange on the national level. For this reason, this chapter does not only focus on the exchange of information within the immigration chain and between immigration authorities, but also discusses the flow of information between immigration authorities and other actors. On the national level, asylum authorities may e.g. interact with bodies within the immigration authority such as those in charge of assessing applications for residence permits on other grounds than international protection (asylum or humanitarian grounds). They may furthermore interact with (specialised) prosecutorial and investigative bodies charged with conducting criminal investigations of crimes that fall under Article 1F and that can be prosecuted in the country of refuge, and in some cases with other actors such as intelligence or security services and the responsible Ministries. On the international level, these various actors may also share information with their counterparts or other actors.

4.1. Information exchange on 1F exclusion at the national level

4.1.1. Information exchange within the immigration chain

It was noted in Chapter 3 that the application of Article 1F will in all countries except Sweden and Norway in principle lead to a refusal of any subsequent application for a residence permit. In the Netherlands, subsequent applications for a residence permit by 1F-excluded individuals are either also considered by the 1F-unit or decided in consultation with this unit:⁹⁵ if other departments come across a case of an individual who has been excluded on the basis of 1F, they will consult the case officer within the 1F-unit responsible for the case. In the UK, if the family reunification department notices a 1F-flag in the shared administrative system they will refer the case to the SCU.⁹⁶ The SCU will then handle the application or consider whether the flag can be removed. In Belgium, Denmark, Norway and Sweden subsequent non-asylum related applications of 1F-excluded individuals are not considered by specialised units. In all countries, however, departments responsible for permits on other grounds than asylum usually have access to information that an individual has been excluded or that his case is being considered for exclusion.⁹⁷ When a case is still being considered for exclusion, the outcome of that procedure will typically be awaited before any other applications are dealt with.⁹⁸

Respondents from different countries indicated that if an applicant would use a new or different identity when applying for a residence permit on other grounds than asylum, it is likely that information

⁹⁵ R4, R6, R60.

⁹⁶ R15, R16.

⁹⁷ R3, R4, R15, R28, R47, R49. In Belgium, if the CGRS applies Article 1F, it will send a copy of the file, as it does with every decision on an asylum application, but in addition notify the DVZ separately (R57).

⁹⁸ R10, R11, R31. In Belgium, this may be different, because the CGRS and the DVZ are two separate organisations that decide independently from each other (R57).

on his earlier exclusion will be missed.⁹⁹ Unlike asylum caseworkers, caseworkers assessing applications for residence permits on other grounds do not have biometric information at their disposal for the identification of applicants. The use of the Eurodac system, which uses fingerprints for identification, is limited to asylum applications.¹⁰⁰

4.1.2. Information exchange between immigration authorities and law enforcement/prosecution services

In all focus countries, immigration authorities cooperate with investigative and prosecutorial bodies. This cooperation is often stronger in one direction than in the other: immigration authorities typically share more information with law enforcement and prosecution services, for the purpose of criminal prosecution on the basis of universal jurisdiction or for security reasons, than they receive from these authorities for the purpose of exclusion. Given the above, emphasis in this paragraph will be on the sharing of information by immigration authorities with law enforcement and prosecution services.

4.1.2.1. Exchanging information for the purpose of criminal prosecution

How the cooperation and exchange of information between the relevant agencies takes place depends first of all on how criminal prosecution in general, and in universal jurisdiction cases in particular, is organised. All focus countries have specialised units for universal jurisdiction cases within their law enforcement and prosecution services. The Netherlands, Norway and the UK also have specialised units for 1F-cases within the immigration authorities. In the UK, the SCU of the Home Office can cooperate directly with the specialised unit of the Metropolitan Police, the Counter Terrorism Command (SO15). If a case is referred to the SO15, it will first conduct a scoping exercise before deciding whether or not to conduct an investigation. If an investigation is considered to be feasible, SO15 will conduct the investigation, while the Crown Prosecution Service will decide independently on prosecution.¹⁰¹ In Sweden, the immigration authority can also report 1F cases directly to the police. The police subsequently inform the prosecutor who decides upon prosecution.¹⁰² In Belgium and the Netherlands the immigration authorities can inform the public prosecution office about 1F cases, which on its turn may inform or instruct the police to initiate investigations.¹⁰³ In Norway and Denmark, the specialised teams for the investigation and prosecution of universal jurisdiction crimes consist of a combination of police officers

⁹⁹ R3, R4, R15, R16.

¹⁰⁰ See paragraph 4.2.1.1.

¹⁰¹ R15, R16, R17, R18. See also the 'Referral Guidelines of the Crown Prosecution Service', available online at http://www.cps.gov.uk/publications/agencies/war_crimes.html#b.

¹⁰² R50, R51. The Stockholm branch of the International Prosecution Office has exclusive competence to deal with war crimes cases.

¹⁰³ In Belgium, universal jurisdiction cases are handled by the *Afdeling Internationaal Humanitair Recht en Militaire Zaken* within the public prosecution office (*Federaal Parket*) in Brussels. This department can cooperate with either the specialised unit within the Federal Police in Brussels (*Opsporingsafdeling 7 - Speciale Zaken, humanitair recht*), or with non-specialised local departments of the Federal Police. In the Netherlands, the public prosecution office has a specialised team within the *Landelijk Parket* in Rotterdam. Similarly, the police has a specialised investigative team, the *Team Internationale Misdrijven*, based in Woerden.

and public prosecutors.¹⁰⁴ In all of the focus countries, the cooperation between the different offices has been established for some years already and is referred to by representatives of both sides as ‘good’. In Denmark and the UK, there are specific contact persons for the specialised universal jurisdiction teams within the immigration authority.¹⁰⁵ In Denmark, the relevant authorities meet regularly to discuss the cooperation and practical issues.¹⁰⁶ The Netherlands established an International Crimes Taskforce in 2012, in the context of which the relevant authorities discuss policies but also practical issues or specific cases.¹⁰⁷ The Swedish authorities have also recently established a Working Group, which involves the immigration authority, the prosecution, the police and the security police, which inter alia focuses on establishing standards for referring cases to the prosecution office.¹⁰⁸ In short, immigration authorities in all focus countries are in the position to exchange information with prosecution and police for the purpose of criminal prosecution on the basis of universal jurisdiction.

Legal basis for information exchange

A clear legal basis for information exchange at the national level is important for at least three reasons. Firstly, it is important because this kind of exchange needs to be in conformity with data protection law. On a European level, the exchange of information, in particular personal data, is governed by Council Directive 95/46/EC.¹⁰⁹ One of its key principles is that of purpose limitation, as laid down in Article 6(1)(b). This provision provides that personal data must be “*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*”. When information from asylum procedures is used in criminal proceedings, its function changes and this principle may be violated. Secondly, information stemming from asylum procedures should in principle be treated confidentially, as is also acknowledged in Articles 22 and 40 of Council Directive 2005/85/EC and stressed by the UNHCR in its 2003 ‘Background Note’ on exclusion.¹¹⁰ If asylum information is shared with law enforcement agencies, this confidentiality is breached. Thirdly, sharing information by immigration authorities with law enforcement agencies involves a change of legal spheres, from administrative law (where subjects are expected to declare) to criminal law (where subjects have the right to remain silent). From the perspective of a criminal defendant, this could be perceived as a breach of the right against self-incrimination. More generally, it could contribute to the asylum process being viewed as an extension of the criminal justice system.¹¹¹

¹⁰⁴ In Norway, the War Crimes Team within the National Criminal Investigation Service (*Kripas*) consists of 14 staff members, two of whom are police prosecutors. In Denmark, the Serious Economic and International Crime office (*Særlig Økonomisk og International Kriminalitet* or SOIK) within the public prosecution office (*Statsadvokaten*) consists of three prosecutors and four to five police officers (R26, R27).

¹⁰⁵ R17, R18, R26, R27.

¹⁰⁶ R26, R27.

¹⁰⁷ Human Rights Watch (2014: 39).

¹⁰⁸ R50, R51.

¹⁰⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 2(a) defines ‘personal data’ as “*any information relating to an identified or identifiable natural person [...]*”.

¹¹⁰ UNHCR (2003b), § 103-104.

¹¹¹ See Human Rights Watch (2014: 9).

In the absence of a clear legal basis, immigration authorities may be hesitant to share information with law enforcement actors. A report by Human Rights Watch on specialised war crimes units in Europe provides an illustration. Despite the legal obligation for public officials to report crimes, French immigration authorities until recently did not share information on excluded individuals with the prosecutor's office because of concerns that the integrity of the asylum procedure might be compromised. The immigration authorities feared that asylum seekers would refrain from telling the whole truth if information from the asylum procedure would be used against them in a criminal case at a later stage.¹¹²

The confidentiality of asylum information and fair trial rights do not have to stand in the way of information exchange, as can be illustrated with the following example. In this case two asylum applicants challenged the fact that information from their asylum procedure was subsequently used in criminal proceedings.¹¹³

The Netherlands had excluded two former officials of the Afghan KhAD/WAD security service and a criminal court had eventually convicted them on counts of torture. The question whether the use of information obtained from immigration authorities in the criminal case was justified, was dealt with before national courts and was eventually considered by the ECtHR. The courts focused on the question how the possibly incriminating information was collected by the immigration services and whether sharing that information with law enforcement actors was justified. With respect to the first aspect, both the first instance national court and the ECtHR considered that the applicants had voluntarily given their statements and were not pressured to incriminate themselves. The ECtHR considered that immigration authorities can be expected to demand the full truth from someone who applies for asylum, since they could otherwise not assess a claim of having a well-founded fear for persecution (§ 75). It furthermore concluded that confidentiality of the asylum procedure does not pose a bar to sharing information from those procedures with other government agencies. The promise of immigration authorities that asylum applicant's statements will be treated confidentially is essential to the functioning of any asylum system, but does not mean that this should "*shield the guilty from condign punishment*". Consequently, the ECtHR considered, fair trial rights such as the right against self-incrimination as protected under Article 6 ECHR do not pose a bar to the transfer of information that is in possession of one governmental body to another governmental body (§ 77-78).

¹¹² Human Rights Watch (2014: 75). The report notes that now that an arrangement establishing more formalised cooperation has been made, information is shared.

¹¹³ See District Court of The Hague, judgment of 14 October 2005, ECLI:NL:RBSGR:2005:AV1163, available online at <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2005:AV1163>> and *H. and J. v the Netherlands*, ECtHR, decision of 13 November 2014, 978/09, 992/09, available online at <[http://hudoc.echr.coe.int/eng?i=001-148721#{"itemid":\["001-148721"\]}](http://hudoc.echr.coe.int/eng?i=001-148721#{)>.

The legal basis for sharing information by the immigration authorities with other actors differs considerably in the focus countries. In some countries, there merely is a general basis, while in others more specific regulations are in place.¹¹⁴ An example of the first category is Sweden, where such exchange of information is subject to two general provisions: Section 10 of the Data Protection Act and Section 6 in the Administrative Procedures Act, which requires authorities to cooperate.¹¹⁵ In the UK, such information exchange is possible on the basis of an exemption to the principle that information shall be obtained only for one or more specified and lawful purposes.¹¹⁶ This exemption is offered by Section 29(a) and (b), which allow the immigration authorities to share information in relation to the prevention or detection of crime and the apprehension or prosecution of offenders.¹¹⁷

In Norway, the Norwegian Personal Data Act provides the overall framework, while sections 11 and 13(b), paragraph 2, 5 and 6 of the Public Administration Act (*Forvaltningsloven*),¹¹⁸ form the basis for information sharing by the UDI with the police.¹¹⁹ However, because of the duties of the immigration police (PU) – which include the intake of asylum requests – the police at large have general access to the administrative system of the immigration authority. This includes information relating to 1F exclusion both after a final decision has been taken, but also already in an early phase.¹²⁰ The police, however, need permission from UDI before they can use such information.¹²¹ Respondents indicated that currently, a proper data-processing agreement between UDI and the police is lacking.¹²²

In Denmark, the legal basis for the Immigration Service to share information with the SOIK is relatively precise, as Section 45(c)(1) of the Aliens Act explicitly determines that “[t]he Danish Immigration Service [...] may transmit information from a case under this Act to the public prosecutor without the alien’s consent for the purpose of the public prosecutor’s decision whether to charge the alien with crimes committed in Denmark or abroad”.¹²³ In the Netherlands, the legal basis for the immigration

¹¹⁴ There may also be an obligation for immigration authorities to report to the police crimes they become aware of in carrying out their duties. Eurojust has explored for which countries this is true (a copy of the questionnaire ‘Access to immigration files and data by investigation and prosecution services’ is on file with the authors). In its Strategy Paper (Eurojust, 2014: 36), Eurojust notes that “*Network contact points have pointed out that a specific obligation to exchange information on possible suspects is needed to ensure automatic information flow*”.

¹¹⁵ R46, R50, R51. See these unofficial translations of the Personal Data Act (1998:204) of 29 April 1998, available online at <<http://www.wipo.int/edocs/lexdocs/laws/en/se/se097en.pdf>>; and of the 1986 Administrative Procedure Act (1986:223) of 7 May 1986 (including subsequent amendments), available online at <https://www.kriminalvarden.se/globalassets/om_oss/lagar/forvaltningslagen-engelska.pdf>.

¹¹⁶ See Schedule 1, Part 1, Principle 2 of the Data Protection Act 1998. The website of the Information Commissioner has a listing of what data all governmental and non-governmental agencies are allowed to keep and share, and what their responsibilities are there; available online at <<https://ico.org.uk/about-the-ico/what-we-do/register-of-data-controllers/>>.

¹¹⁷ R15, R16.

¹¹⁸ Translation available online at <<http://www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>>.

¹¹⁹ R10, R11.

¹²⁰ R37.

¹²¹ R12, R13.

¹²² R12, R13.

¹²³ R26, R27.

authorities to share information with law enforcement is offered by Article 107 of the Aliens Act.¹²⁴ In the past a court order, issued by an investigative judge, was needed to actually exchange information. Currently, a covenant exists between the immigration service and the specialist teams within the prosecution and police, which contains the conditions for sharing asylum files of 1F-excluded individuals. If the public prosecution office requires more information, it can request a court order on the basis of Article 126(n)(d) or 126(n)(f) Criminal Procedure Code, ordering the owner of the information to provide it.¹²⁵ Furthermore, it follows from Article 43 Personal Data Protection Act that the further processing of personal data for other purposes than those for which they have been obtained, is allowed where this is necessary in the interest of (inter alia) prevention, investigation and prosecution of criminal offences.¹²⁶

In Belgium, the professional secrecy that the CGRS has to observe can be breached if this information is shared with *inter alia* the intelligence and security services for the performance of its tasks; law enforcement and prosecution services or an investigative judge in the context of a police or judicial investigation; or with respect to indications of crimes that should be brought to the attention of the prosecution in accordance with Article 29 Criminal Procedure Code.¹²⁷

In conclusion, while in all of the focus countries there is a legal basis for immigration authorities to share information on excluded individuals with other actors, they differ in specificity. In some of the focus countries, the legal basis is an integral part of the Immigration Act, while in other countries it takes the form of an exemption to the general principle that information should only be used for the purposes for which it was originally collected.¹²⁸

Practice of information exchange

In practice, the exchange of information on 1F exclusion also differs per country. A first difference relates to the question how immigration authorities refer 1F cases to the relevant investigative or prosecutorial agencies. Belgium and the Netherlands, in principle, refer every 1F-case to a specialised prosecutor.¹²⁹ It is up to the prosecutor to decide whether the asylum file of a 1F-excluded individual offers a good prospect for a criminal investigation. This is different in Denmark, Norway and Sweden,¹³⁰ where representatives of the immigration authorities make a preselection of cases to be forwarded. A possible disadvantage of this approach is that the assessment whether a criminal investigation is feasible or not is

¹²⁴ Article 107(4) Aliens Act requires the IND to share any data and information from the aliens administration, except fingerprints and photos, that other government institutions require for carrying out their tasks.

¹²⁵ R4, R5, R6, R7.

¹²⁶ *Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens (Wet bescherming persoonsgegevens)*, unofficial translation available online at http://www.coe.int/t/dghl/standardsetting/dataprotection/national%20laws/NL_DP_LAW.pdf>. See also District Court of The Hague, above note 113.

¹²⁷ Article 13 of the *Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen om beter rekening te houden met de bedreigingen voor de samenleving en de nationale veiligheid in de aanvragen tot internationale bescherming*, of 10 August 2015.

¹²⁸ See paragraph 4.2.2.1.

¹²⁹ R4, R5, R6, R7, R57.

¹³⁰ In Norway and the UK, all 1F exclusion cases used to be forwarded to the police or prosecutor, but this policy was abandoned due to the high number of cases that was forwarded (R3).

made by people who are not trained as criminal lawyers.¹³¹ On the other hand, it has also been argued that immigration authorities may be in a better position to judge which cases in their own caseload offer good prospects for a criminal investigation, since they have more resources or staff to make the assessment.¹³² In the UK, the immigration authority also used to make a preselection of cases it would forward, but since the summer of 2015, it started to refer all cases that fall under 1F(a) to the police.¹³³

In Denmark and the UK, formal or informal guidelines are in place to guide the selection process.¹³⁴ The degree of specificity of these criteria varies and so does the degree to which they are selective.¹³⁵ In the UK, this led the SCU to refer only about 10% of 1F-cases to the SO15.¹³⁶ One of the main criteria for SCU to refer cases is whether it is practically feasible to conduct a criminal investigation, e.g., whether UK courts have jurisdiction, whether corroborative evidence is available, or whether the police is likely to be in a position to gather evidence in the country where the alleged crimes occurred. Other criteria include whether the case concerns a serious, notorious, high profile offender or whether the person in question is still present in the UK, and prospects of deportation.¹³⁷ If return is an option, cases will typically not be forwarded. In Denmark, all cases concerning 'mandatory crimes' are likely to be forwarded to the SOIK by the Danish Immigration Service (DIS).¹³⁸ These are the crimes for which there is an international obligation to prosecute, most importantly war crimes, torture and terrorism. 1F-cases concerning non-mandatory crimes will not always be forwarded. In the case of Norway, there are no specific guidelines; the F1-unit internally discusses which cases will be shared; the head of the unit takes the final decision.¹³⁹ Cases that could amount to an international crime are likely to be forwarded to the war crimes unit; ordinary crimes can be forwarded to the local police; cases involving terrorism or national security issues can be shared with the security police (PST).¹⁴⁰ The Norwegian criminal police Kripos prefers to receive more referrals, so that it can make its own selection.¹⁴¹ Also in Sweden the immigration authorities select before referring this to the war crimes unit. There are currently no

¹³¹ R8. Understanding the legal criteria of the different crimes may be improved by training case workers at the immigration authorities, as for instance happens in Denmark and Norway (R8, R26, R27).

¹³² R17, R18. Another interesting approach is taken in Canada: here the police, Canada Border Services Agency, Citizenship and Immigration Canada and the Department of Justice have a review committee that meets once a year to discuss all 1F cases and decide together which of those is forwarded to the police (R44).

¹³³ R15, R24.

¹³⁴ R26, R27, R17, R18. The formal guidelines that exist in Denmark were drafted in 2003 in the *Samarbejdsforum* and are in accordance with the explanatory notes to Bill no. L 32 of the 13th of December 2001, which are available online at <<https://www.retsinformation.dk/Forms/R0710.aspx?id=100295>>. The SCU and SO15 also have informal guidelines between them, which are based on the guidelines of the prosecutor (CPS) on how it handles international crimes cases; these are available online at <http://www.cps.gov.uk/publications/agencies/war_crimes.html#b>.

¹³⁵ R15, R24.

¹³⁶ R15, R24.

¹³⁷ R15, R16, R17, R18.

¹³⁸ R26, R27.

¹³⁹ R3.

¹⁴⁰ R3, R8. The referral of cases that are not subject to universal jurisdiction is not only done for the purpose of criminal prosecution but can also be serve the purpose of informing the local police that a potential perpetrator of crimes resides in their area (R3).

¹⁴¹ R8.

guidelines in place, but a recently established Working Group involving immigration, prosecution and criminal and security police is working on these.¹⁴²

A second difference in relation to the practice of information exchange, relates to the moment of referrals. In Belgium and the Netherlands, referrals take place after a 1F decision is taken; before that, information that the invocation of Article 1F is being considered is in principle not accessible to the prosecutor or the police.¹⁴³ In Belgium, the CGRS sometimes requests the police whether they have information on certain individuals that could be used in assessing an asylum case. In such instances the police may, before a 1F decision has been taken, already become aware of the fact that someone is being considered for exclusion.¹⁴⁴ In the Netherlands, only in exceptional circumstances do the immigration service, law enforcement and prosecution exchange information before a 1F decision has been taken, through 'early notification'. There are no specific criteria for cases that qualify for early notification, but respondents indicated that this typically concerns very clear cut cases in which witnesses are (still) present, where there is a risk of absconding, or in case someone might pose a direct danger to the security (think e.g. of someone who is associated with child abuse and is in a close vicinity to children).¹⁴⁵ No information was provided when and how information is shared with security services. The Danish immigration authorities in principle also only inform SOIK after the final decision has been taken,¹⁴⁶ but early notification may take place if it concerns mandatory crimes or 'high profile' cases.¹⁴⁷ In Norway, the Kripas and local police will typically also be informed after a 1F decision has been taken.¹⁴⁸ The Swedish SMA refers cases in different stages: sometimes they send a report before the 1F decision is taken, but the prosecution has also received reports when the asylum decision had already been taken and the administrative court had made a judgment.¹⁴⁹ In the UK the flow of information between SCU and the Command is much more flexible and cases can be referred both during the asylum procedure as well as after someone has been excluded.¹⁵⁰

In all of the countries in the study, law enforcement and prosecution services have full access to the immigration files, once there is a final decision that Article 1F is invoked. In Norway, the UDI sends out a notification of an exclusion case, after which the police can access the digital file. It can also share reports of asylum interviews with the Kripas if the interviews reveal any suspicion of involvement in an international crime.¹⁵¹ In Sweden, the SMA drafts a summary of the case, which it sends to the police. If the prosecution starts up a case, the police can request for the asylum file.¹⁵² In Belgium this is similar, although here it is the police that draft the summary of the case.¹⁵³ In the UK, a member of Home Office

¹⁴² R50, R51.

¹⁴³ R4, R55, R56.

¹⁴⁴ R57.

¹⁴⁵ R4, R5, R6, R7.

¹⁴⁶ R28.

¹⁴⁷ R26, R27.

¹⁴⁸ R10, R11.

¹⁴⁹ R50, R51.

¹⁵⁰ R17, R18.

¹⁵¹ R8.

¹⁵² R50, R51.

¹⁵³ R55, R56.

staff is attached to the Counter Terrorism Command who has full access to Home Office files.¹⁵⁴ In case the Command is interested in more information (e.g. written files because these may contain more information), this can be requested at SCU. The representative at SCU is aware of the Command's limitations; what it can or cannot do. SCU and the Command regularly discuss cases; there is a free flow of information between the two.¹⁵⁵ The Danish Immigration Service forwards all relevant information – including interview reports – to the SOIK.¹⁵⁶ On the basis of Section 45(c)(2) and (3) Aliens Act, the SOIK can also request files of applicants other than the excluded individual (witnesses and victims).¹⁵⁷

Respondents representing investigative and prosecutorial services generally agree that 1F cases can be an important source of information to start universal jurisdiction cases. Respondents in Belgium, Denmark, Norway and Sweden indicated that non-operational information, for instance analytical information that does not relate to individuals but the organisational context in which the alleged crimes occurred or the composition of the diaspora in the country of refuge, is currently hardly exchanged.¹⁵⁸ Some suggested that sharing such non-operational information could be beneficial.

4.1.2.2. Exchanging information for the purpose of exclusion

Where immigration authorities quite actively share information with law enforcement and prosecution, this happens less actively the other way around.

Legal basis for information exchange

Information sharing from law enforcement and/or prosecution services to immigration authorities often requires a specific legal basis. In the UK, respondents indicated that any relevant evidence or intelligence the Command comes across, is in practice passed along to the Home Office.¹⁵⁹ Section 28 Data Protection Act allows sharing of personal data for the purpose of safeguarding national security. Respondents indicate that this offers a basis for sharing information by the police, but only if it is necessary for and proportionate to carrying out immigration investigations.¹⁶⁰ The information could for example concern someone who is not directly under investigation by the police, but comes to their attention in the context of a criminal investigation. It could also concern information on a suspect against whom the Command does not have enough evidence to reach the 'beyond reasonable doubt' threshold, but which would amount to a 'balance of probabilities'.¹⁶¹ Any information that might be useful for the SCU could be shared: names and backgrounds, but for example also relevant witness statements.¹⁶² The Norwegian police can share information with UDI, on the basis of Article 27 Police Registration Act (*Politiregisterloven*), if it is in the interest of the fulfilment of their legal duties according to the Immigration Act, or if it is in the interest of the police to investigate a crime or prevent a future crime (on

¹⁵⁴ R17, R18.

¹⁵⁵ R17, R18.

¹⁵⁶ R28.

¹⁵⁷ R26, R27.

¹⁵⁸ R8, R26, R27, R50, R51, R55, R56.

¹⁵⁹ R17, R18.

¹⁶⁰ R23.

¹⁶¹ R17, R18.

¹⁶² R17, R18.

both the long and short term) to share this information with UDI.¹⁶³ Similarly, under Danish law, the Danish law enforcement and prosecution services can share any information that is relevant to another public authority in carrying out its responsibilities.¹⁶⁴ In Sweden the legal basis for sharing information from the police to the immigration authority is the same as vice versa.¹⁶⁵ Also in the Netherlands, the same provision that offers the basis for exchange from immigration to the police offers the basis for vice versa exchange, be it under a different paragraph.¹⁶⁶

Practice of information exchange

In practice, law enforcement and prosecution services do not often share information with immigration services for the purpose of exclusion.¹⁶⁷ Respondents from Norway, the UK and Denmark indicated that the police at times proactively share information with immigration services, for example when the name of an already accepted asylum seeker pops up in a criminal investigation.¹⁶⁸ Yet, in particular if investigations are still ongoing and if information has been received by making use of investigative measures such as wiretaps, the police generally do not share much information, because this may not be allowed. In the Netherlands, the police would only share information with the IND with permission from the public prosecution office;¹⁶⁹ in practice, the police share information with the immigration service only rarely.¹⁷⁰ In Belgium, the prosecutor would not share information with the body assessing the asylum claim (the CGRS), but with the immigration authority (the DVZ) instead, which can on its turn decide whether information should also be shared with the CGRS.¹⁷¹

4.1.3. Information exchange between immigration authorities and other actors

Above we have discussed that most exchange of information takes place between immigration authorities and law enforcement and specialised police units or prosecution services for the purpose of criminal prosecution. For security reasons the local police may at times also be informed. In all focus countries, other actors may however also be informed about 1F cases, especially if they are sensitive or high profile cases. In such cases, typically the security services or the responsible Ministry are involved. In Belgium, Denmark, Norway and Sweden, cooperation with the security services takes place in a similar way as the cooperation with law enforcement and prosecution services. In Belgium, the CGRS informs the intelligence services of every 1F decision.¹⁷² The CGRS may, also in the process of working on a 1F case, request the intelligence services whether they have information on an individual. In response, the intelligence services can share publicly available as well as classified information. The latter type of information cannot be used to substantiate a decision, but can be used as a lead.¹⁷³

¹⁶³ R12, R13.

¹⁶⁴ R26, R27.

¹⁶⁵ R50, R51.

¹⁶⁶ Article 107(7) Aliens Act.

¹⁶⁷ R2, R8, R15, R24.

¹⁶⁸ R8, R17, R18, R26, R27.

¹⁶⁹ R2.

¹⁷⁰ R4, R5, R6, R7.

¹⁷¹ R57.

¹⁷² R57.

¹⁷³ R57.

In Denmark, the immigration authorities forward any case that is considered ‘relevant’ to the intelligence and security services. Relevant cases e.g. include persons who are associated with a terrorist organisation, suspected of involvement with nuclear weapons, or applicants who may have specific information on terrorist organisations. According to section 45a(1) of the Danish Aliens Act, the Danish Immigration Service may transmit information from a case under the Act to the intelligence services without the alien’s consent, to the extent that such transmission may be of importance to the handling of security tasks by the intelligence services.¹⁷⁴ Not only the Asylum Division, but also e.g. the family reunification department will forward relevant cases, for instance when they relate to immigrants coming from certain countries that are marked as high-risk or in cases where there is something concrete that may be relevant for the intelligence services.¹⁷⁵

In Norway, depending on the case, the F1-unit will forward the file of an excluded individual to either the criminal police Kripos or the Security Police (*Politiets Sikkerhetstjeneste*, PST), or both. The UDI will make a specific assessment whether the person represents a potential threat to national security; if this is the case, it will inform the PST.¹⁷⁶ Notifications to the PST may be sent out in an earlier stage than notifications to Kripos. The PST also has more rights than the police to consult information in the administrative system of the UDI.¹⁷⁷ The PST will also inform UDI if it comes across information that is relevant for the decision making of the UDI.¹⁷⁸ The two authorities have a bilateral agreement on how information should be transferred.¹⁷⁹ The legal basis is offered by Sections 11 and 13(b), paragraph 2, 5 and 6 of the Public Administration Act and by Section 128a of the Immigration Act. In addition to the cooperation with security services, the Ministry of Justice and Security can also have a role in exclusion cases. On the basis of Section 126-128 Immigration Act, combined with Section 66(2)(b)(3) Immigration Act, the Ministry of Justice and Security can take a decision to expel someone for reasons of national security or out of foreign policy considerations.¹⁸⁰ In such cases persons do not necessarily have to be excluded before the Ministry can decide to expel. The UDI has been provided with guidelines on which cases it should send to the Ministry.¹⁸¹ If the F1-unit believes an applicant might pose a threat to national security, it makes a preliminary decision and then shares the file with a special department within the Ministry, asking for further instructions.¹⁸² If the Ministry decides to deal with the case, it will take it over from there, usually with the intention to expel the individual on the basis of Section 126, 127 or 128 Immigration Act.¹⁸³ It also has the competence to exclude the individual on the basis of Article 1F.¹⁸⁴ In

¹⁷⁴ R28, R29.

¹⁷⁵ R31.

¹⁷⁶ R45.

¹⁷⁷ R10, R11.

¹⁷⁸ R45.

¹⁷⁹ R8.

¹⁸⁰ R10, R11, R36.

¹⁸¹ This non-exhaustive list of 18 indicators (*Indikatorlisten*) is available online at <https://www.regjeringen.no/nb/dokumenter/gi-042011-instruks-om-behandling-av-sake/id641064/>> (in Norwegian).

¹⁸² R10, R11.

¹⁸³ R10, R11.

¹⁸⁴ R36. However, while the ground of the ‘fundamental national interest’ may lead to expulsion, it cannot be the basis for the exclusion (Article 126(5) Immigration Act). The reasons why there is an interest and the grounds for exclusion can overlap, but the Ministry cannot not exclude on the basis of fundamental national interests. An

case it is impossible to expel the individual, he will stay in Norway under certain very strict conditions. These individuals do not get a residence permit under Section 74 Immigration Act, but their stay is tolerated ('*tålt opphold*'). Respondents indicated that the family reunification department can also send applications for a residence permit by 1F-excluded individuals to the Ministry for assessment. If such an application is forwarded to the Ministry, it will decide whether the individual poses a threat to the public order or national security or not. If he does not pose such a threat, he may be granted a residence permit as was noted in Chapter 3, provided that he meets the other criteria.¹⁸⁵ In cases where UDI informs PST or the Ministry of Justice about a case, the applicant himself will not be informed about this.

In the UK, decisions on exclusion could be submitted to the Minister for Immigration/Security or the Home Secretary to explain the intention to exclude under 1F. This will usually reflect the high profile or complexity of the case.¹⁸⁶ The Home Office maintains a 'Watch List', which consists of people who are considered to be 'non-conducive to the public good'. Other governmental organisations, such as the Treasury or the Benefits Office, can also provide names to put on the list, while information from international partners can also be included. Someone who has been excluded on the basis of 1F would only be put on the Watch List if he were the subject of an expulsion order, not if he is on restricted leave.¹⁸⁷

In Sweden, both the family reunification and the asylum units may at any stage of the procedure inform the security police, typically by drafting a memo.¹⁸⁸ A list of indicators, drawn up by the security police, is used to decide in which cases a file should be forwarded to the security police. This very same document also lists country specific indicators that could hint on possible application of 1F.¹⁸⁹ Once a month the security police visit the SMA to collect cases and in addition officers from the security police are seconded to the SMA. The security police can take over cases under the Act concerning special controls in respect of aliens (law 1991:572). In those instances, the Ministry and the higher courts will be involved in the decision-making.¹⁹⁰

4.2. Information exchange on 1F exclusion at the international level

In the previous paragraph it was noted that on a national level, information on 1F-excluded individuals is available to many different actors who may have an interest in such information for the fulfilment of their tasks. Increasingly, there is a realisation that excluded individuals may try to travel to other European countries. This leads to the question whether similar modalities of information exchange about 1F-excluded individuals exist at the international level. A first question that comes to mind in this regard is how actors can obtain knowledge that someone is excluded in another country. A subsequent question is whether, and to what extent, actors can obtain knowledge on the reason why someone has been excluded. In the international context actors typically exclusively exchange information with their 'own kin': immigration authorities, law enforcement agencies and security services often only share

expulsion decision and an exclusion decision can occur at the same time; the Ministry can take both of these decisions.

¹⁸⁵ R14.

¹⁸⁶ R15, R24.

¹⁸⁷ R15, R23.

¹⁸⁸ R46, R47, R48, R49.

¹⁸⁹ R46, R47, R48, R49.

¹⁹⁰ R46, R47, R48, R49.

information with their counterparts in other countries. Exceptions exist, but exchange of information between for example an immigration authority in one country and a law enforcement agency in another country is very uncommon. This is, for different reasons, also understandable. The purpose limitation principle, for instance, dictates that information can only be used for the purposes for which it was collected; immigration authorities and law enforcement or prosecution services collect information for very different purposes. An important question in this respect is: who is the owner of the information and does the ownership change when information is shared? If the immigration authorities share information with a law enforcement agency at the national level, and that information becomes part of a criminal investigation, that agency could share this information, proactively or passively, with a law enforcement agency abroad. Whether information exchange is allowed depends on the kind of information that is shared and also at what stage in an investigation it is shared.¹⁹¹ Direct communication between immigration authorities and law enforcement or prosecution services is highly unusual.¹⁹²

This paragraph will first discuss the exchange of information that takes place between the immigration authorities in the various focus countries, followed by the international exchange of information between law enforcement and prosecution services. It falls outside the scope of this study to discuss to what extent security services exchange information about 1F-excluded individuals.

4.2.1. Information exchange between immigration authorities

Immigration authorities use different databases to exchange information about asylum seekers, such as Eurodac, the Schengen Information System (SIS), the Visa Information System (VIS) and Smart Borders. The most relevant systems which could, in principle, contain information about 1F-excluded individuals are Eurodac and SIS. In addition to databases, immigration authorities can also make use of (formalised) bi- or multilateral agreements. This paragraph will discuss the options the various modalities offer and explore to what extent these are currently used to exchange information on 1F-excluded individuals.

4.2.1.1. Eurodac

As was noted above, in the national context, different departments within the immigration authority usually have access to a shared administrative system. If an asylum application is under consideration, the case will be recognisable as such. Similarly, in the international context within Europe, information that an asylum application is under review is also available to immigration authorities in other countries when these are part of the Dublin System.¹⁹³ The Dublin System consists of the Dublin III Regulation¹⁹⁴ and the Eurodac III Regulation, establishing the Eurodac (European Dactyloscopy) database.¹⁹⁵ The purpose of the

¹⁹¹ R8.

¹⁹² R15, R16, R17, R18, R26, R27, R42, R43, R50, R51, R55, R56.

¹⁹³ All EU countries except Denmark are bound by the Dublin Regulation. Denmark does, however, apply the Dublin Regulations. Non-EU countries that apply the Dublin Regulations are Norway, Iceland, Switzerland and Liechtenstein.

¹⁹⁴ Dublin III Regulation (EC 604/2013 of 26 June 2013) came into force on 19 July 2013 and replaced the 2003 Dublin II Regulation, which on its turn had replaced the 1990 Dublin Convention that had come into force in 1997.

¹⁹⁵ Since 20 July 2015, Eurodac II Regulation (EC 2575/2000 of 11 December 2000) has been replaced by Eurodac III Regulation (EC 603/2013 of 26 June 2013). The most relevant change in the context of this study is the fact that the use of Eurodac is now no longer limited to asylum purposes; *“national police forces and Europol are allowed on the basis of the new Regulation to compare fingerprints linked to criminal investigations with those contained in Eurodac”*, under certain conditions and *“only for the purpose of prevention, detection and investigation of serious*

Dublin System is to determine which EU Member State is responsible for assessing applications for international protection under the Refugee Convention and the EU Qualification Directive (2004/83/EC). The Eurodac database, which has been in use since 2003, contains fingerprints of people seeking asylum (Article 9 Dublin III Regulation) and people illegally crossing borders (Article 14 Dublin III Regulation). The fingerprints of people who remain on the territory of a state without a legal status can be compared with the Eurodac database, but will not be stored in it (Article 17 Dublin III Regulation). Eurodac allows states to find out whether someone applying for asylum on their territory has already applied for asylum in another European state; if this is the case, the authorities can request the other state to take the person back on the basis of the Dublin Regulation.

If someone has been excluded on the basis of Article 1F and applies for asylum in another EU state afterwards, the immigration authorities examining his claim will take his fingerprints and transmit these to the Eurodac Central System in accordance with Article 9 Eurodac III Regulation. If there is a match (a 'hit') in Eurodac, the second state where the person applies for asylum will in most cases try to 'Dublin' the case: it will submit a 'take back request' to the country that first registered an asylum claim (the Member State responsible) as specified in Article 23(1) Dublin III Regulation. If the person falls within Article 18 Dublin III Regulation, the Member State responsible has to take him back, unless there are reasons for cessation of its responsibilities (Article 19 Dublin III Regulation). Article 18 does not only concern rejected asylum applications (under subsection 1(d)) but also applications that are still under examination (subsection 1(b)) or that have been withdrawn while under examination (subsection 1(c)). If there is a Eurodac hit, the state where the applicant has lodged his new application will be able to see the status of the earlier application, but in the case of a rejection, information on the reasons for that decision is not available.¹⁹⁶ In other words, in this phase the second country of asylum cannot assess if someone has been excluded in the first country of asylum by means of the information offered by Eurodac. In practice the second country of asylum is also not interested in that information; the primary focus of immigration authorities in cases where another Member State is responsible for the asylum applicant is to 'Dublin' the case. As long as an applicant can be sent back by means of a Dublin claim, various respondents confirmed, the second country of asylum will typically not make any substantive consideration and is not necessarily interested why the applicant's application has been rejected in the first country.¹⁹⁷

In some cases, however, Member States will not or cannot make a Dublin claim even though a 'hit' in Eurodac occurred. This could for instance be the case if the country that first registered the asylum claim is not trusted to honour its obligations. In its 2011 landmark case of *MSS v Belgium and Greece*, the European Court of Human Rights ruled that Belgium had violated Article 3 ECHR by transferring asylum seekers to Greece under the Dublin Convention.¹⁹⁸ The human rights situation of asylum applicants in Greece was considered sub-standard and for this reason Dublin claims to Greece were not accepted.

crimes and terrorism" (see <http://ec.europa.eu/dgs/home-affairs/what-we-do/asylum/identification-of-applicants/index_en.htm>).

¹⁹⁶ Besides the fingerprint data, the information contained in Eurodac includes the place and date of application, sex, reference number, etc. (Article 11) and the status of the data subject (Article 10). The name of the individual concerned is not included in Eurodac.

¹⁹⁷ R3, R20, R21.

¹⁹⁸ *M.S.S. v Belgium and Greece*, ECtHR, decision of 21 January 2011, 30696/09.

Another example of a situation where Dublin claims cannot be made occurred more recently: out of discontent over the functioning of the Dublin system, Germany decided in August 2015 to temporarily suspend all Dublin procedures with respect to Syrian nationals.¹⁹⁹ Finally, it may also happen that member states do not make Dublin claims in time; if a take back request is not made within two months of receiving the Eurodac hit, Article 23(2) and (3) Dublin III Regulation allow Member States not to respond to take back requests.

In instances where no claim is made or where a claim is refused, it may be much more relevant for the second country of asylum to obtain information about the applicant's application and subsequent decision on the request in the first country of asylum. Article 34 Dublin III Regulation makes it possible for the second country of asylum to request for more information, e.g. information concerning the earlier application, but also information relating to the grounds for any decisions taken concerning the applicant, as long as it is in the context of an individual application for international protection (Article 34(3) and (4)).²⁰⁰ Respondents indicate that in general, their experiences with Dublin are that it works relatively well and that most 'Dublin-claims' are accepted by the Member States responsible.²⁰¹ In most cases where an already excluded individual applies for asylum in another European country, he will be sent back to the country where he was excluded, probably without the authorities in the second country ever being aware of the 1F exclusion. Authorities in some countries, however, remarked that certain Member States have in the past refused to take back cases, typically by simply not responding to any requests. This concerns especially some Southern European states.²⁰² Figures by EASO suggest that the acceptance rate of Dublin requests averaged around 73% between 2009 and 2013.²⁰³ However, just over a third of accepted requests actually lead to a physical transfer.²⁰⁴ With the current pressure on the Dublin system, the number of cases where no Dublin claim is made, or where such a claim is unsuccessful or does not lead to a physical transfer, may increase in the future.

It is important to note that the use of the Eurodac system is limited to asylum cases. This means that non-asylum related departments within the immigration authorities responsible for examining applications for residence permits are not allowed to use Eurodac. When a 1F-excluded individual applies for a residence permit on another ground in another European country, for instance on the basis of family reunification, Eurodac will not be of any use to obtain any information about the 1F exclusion.

4.2.1.2. Schengen Information System

Another database that is used by immigration authorities in the European context is the Schengen Information System (SIS). This database is used for sharing information for the purposes of the control of

¹⁹⁹ See e.g. <<http://www.asylumineurope.org/news/24-08-2015/germany-halt-dublin-procedures-syrians>>.

²⁰⁰ Article 34(3) Dublin III Regulation establishes that the requested state may only refuse to provide such information if "*the communication of such information is likely to harm its essential interests or the protection of the liberties and fundamental rights of the person concerned or others*". The communication of the requested information is however subject to written approval of the applicant, obtained by the requesting state.

²⁰¹ R15, R16, R20, R21, R30, R34, R35.

²⁰² R10, R11, R15, R24.

²⁰³ EASO (2014: 34).

²⁰⁴ Ibid.. In the six countries of focus in this study, the proportion of cases that lead to a physical transfer may be higher. Bruin et al. (2015) note that in general, figures like these should be treated with care.

external borders and law enforcement cooperation between Schengen states.²⁰⁵ In SIS, competent authorities (law enforcement and immigration authorities) can signal wanted or missing persons, but also stolen vehicles and lost identity documents.²⁰⁶ The first version of SIS came in operation in 1995, when the internal borders between the Schengen countries were abolished. The second generation (SIS II) is in use since 9 April 2013. Technically, SIS II is composed of a central system (Central SIS II), a national system (N.SIS II) in each Member State and a communication infrastructure between these systems, which also facilitates the exchange of data between the SIRENE bureaus, the authorities responsible for the exchange of all supplementary information.²⁰⁷

One functionality that is particularly relevant in the context of this study is the alert for refusal of entry or stay of Article 24 of the SIS II Regulation (Regulation EC 1987/2006).²⁰⁸ Such alerts can be based either on a decision that an individual poses a threat to public order (Article 24(2)) or on a 'return decision' combined with a prohibition on entry or residence, the 'entry ban' (Article 24(3)). In Chapter 3 it was already noted that two of the countries in this study, Denmark and the Netherlands, as a matter of standard procedure alert 1F-excluded individuals in SIS II on the basis of Article 24: Denmark on the basis Article 24(3), and the Netherlands on the basis of Article 24(2).²⁰⁹ None of the other countries alert 1F-excluded individuals in SIS II. In Norway, for instance, this is because no return decision is issued since excluded individuals cannot be expelled.²¹⁰ The UK, which has only started participating in SIS II since April 2015, cannot alert excluded people in SIS II because it only takes part for purposes of law enforcement

²⁰⁵ Currently thirty-two countries use SIS, four of which are non-EU members (Iceland, Liechtenstein, Norway and Switzerland) and another six are EU-countries that are not part of the Schengen area: Croatia, Cyprus, Romania, Bulgaria, the UK and Ireland. Of those, Croatia and Cyprus are carrying out preparatory activities to integrate into SIS; the UK (since 13 April 2015), Romania and Bulgaria are currently using SIS only for law enforcement cooperation purposes; and Ireland is carrying out preparatory activities to integrate into SIS for law enforcement cooperation purposes. Romania and Bulgaria will start using SIS also for control of external borders once the internal border checks have been lifted. See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm>.

²⁰⁶ Regulation EC 1987/2006 regulates border control cooperation, Council Decision 2007/533/JHA regulates law enforcement cooperation and Regulation EC 1986/2006 regulates cooperation on vehicle registration.

²⁰⁷ SIRENE is an acronym for Supplementary Information Request at the National Entry. Every SIRENE bureau is the contact point for national authorities and SIRENE bureaus in the other Schengen countries. The bureau forwards information from national authorities to SIRENE bureaus in relevant countries and the other way around. It works on behalf of the organisations that 'own' the information. These organisations will not communicate directly on the international level in relation to SIS queries, but will always communicate through the SIRENE bureaus.

²⁰⁸ Other alerts relating to persons can concern persons wanted for arrest (Article 26 of Council Decision 2007/533/JHA); missing persons (Article 32 of Council Decision 2007/533/JHA); persons sought to assist with a judicial procedure (Article 34 of Council Decision 2007/533/JHA); persons and objects for discreet or specific checks (Article 36 of Council Decision 2007/533/JHA). Alerts under Article 38 of Council Decision 2007/533/JHA concern objects for seizure or use as evidence in criminal procedures.

²⁰⁹ Article 24 SIS II Regulation determines that an alert shall be entered where a decision taken by the competent authorities is based on "*a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose*", in particular in the case of "[...] *b. a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence [...]*" (subsection 2) or "*the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals*" (subsection 3).

²¹⁰ R3, R36.

cooperation; this is also the reason why it has no access to Article 24 alerts issued by other countries. The results from the EMN ad hoc query suggest that in addition to the Netherlands and Denmark, of the states that responded only Austria as a matter of standard practice issues an entry ban and alerts 1F-excluded individuals on the basis of Article 24.²¹¹

As it stands, countries can by means of SIS II thus only identify individuals who have been excluded on the basis of 1F in the Netherlands, Denmark, Austria and possibly a number of countries that did not respond to the EMN query. Even in those cases, the value of SIS II is limited, for at least two reasons. Firstly, SIS II is only relevant when a person does not apply for asylum in the second country, because in that case the immigration authorities would by means of Eurodac know that another Member State is responsible for the assessment of his claim and request that country to take him back without any substantive consideration. Secondly, although checking for hits in the SIS II system is typically a mandatory step in the procedure for asylum departments and departments assessing applications for other permits, identifying the right person is not straightforward and obtaining relevant information in practice requires additional action.

An Article 24 alert shall be entered *“on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment”* (Article 24(1) SIS II Regulation).²¹² This means that applicants who have disappeared during the asylum procedure in the first country before a decision on their asylum application is taken are not registered in SIS II, unless another authority, such as an intelligence service, has taken a decision that leads to an alert. An alert consists of three parts: the data on the basis of which the subject can be identified, a reason for the alert and an instruction on the action to be taken when the subject is found.²¹³ SIS II allows inserting photos of applicants and their fingerprints (Article 20 SIS II Regulation). Those photos and fingerprints can, however, not be searched through directly. It is not possible to take a fingerprint and run it through the system, as can be done in Eurodac.²¹⁴ The same is true for photographs; a recognition system is lacking.²¹⁵ If the name is spelt differently in the second country, SIS II should, in principle, still bring up persons with strongly similar names. However, if an applicant uses a different name, there will be no hit in SIS II. Several respondents indicated that it is not uncommon for migrants moving around Europe to change their identity.²¹⁶

The type of information that SIS II produces also complicates identifying 1F-excluded individuals. The reason for the alert that is attached to it is not a summary of the decision that underlies the alert, but

²¹¹ Some states indicated that they would alert excluded individuals if they would pose a threat to public order or public or national security.

²¹² Article 21 requires states, before issuing an alert, to also consider the proportionality of entering an alert, i.e. to determine whether *“the case is adequate, relevant and important enough to warrant entry of the alert in SIS II”*.

²¹³ See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/alerts-and-data-in-the-sis/index_en.htm>.

²¹⁴ R9. See also Article 22(b) and (c) SIS II Regulation. Article 22(c) notes that *“as soon as this becomes technically possible, fingerprints may also be used to identify a third-country national on the basis of his biometric identifier [...]”*. In its ‘EU Action Plan on Return’, the European Commission notes that *“it will propose the development of a central Automated Fingerprint Identification System for SIS, to help establish the identity of persons without confirmed identity, including irregular migrants.”*

²¹⁵ R34, R35.

²¹⁶ R10, R11, R34, R35.

typically very general and limited in nature, e.g.: ‘for the purpose of denying access to Schengen’.²¹⁷ From merely that information, immigration authorities cannot obtain knowledge that 1F exclusion formed the basis for the alert. They do have the possibility to obtain more information about the background of the alert, but therefore they need to start a consultation procedure via their SIRENE bureau.²¹⁸ The SIRENE bureau would try to confirm the hit and ensure that it concerns the same person,²¹⁹ before it could establish the reasons for the hit and include that information into the file.²²⁰ As the SIRENE bureaus were established for the purpose of rapidly verifying the background of cases, this should be an easy and quick process.²²¹ However, the information received may in the end indicate that someone is excluded, but not contain much specific information. In an example the researchers received from the Dutch SIRENE bureau, the additional information for instance consisted of the following:

“The subject a member as mentioned in article 24.2 B of the regulation no. 1987/2006, of 20 December 2006 (sis ii). Subject is by decision of the Immigration Service of [date] included in SIS regarding article 1(F) of the refugee convention, the fact committed are associated with torture and extrajudicial execution of persons.”

The department assessing the application can take this information into account when taking a decision, but might also opt to do an additional interview, or refer the case directly to a specialised unit. SIS II does not facilitate the exchange of more extensive information, such as verbatim interview reports or full decisions.

4.2.1.3. Bilateral or multilateral arrangements

Apart from Eurodac and SIS II, bilateral or other multilateral agreements on the basis of a Memorandum of Understanding (MoU) offer another possible modality to exchange information on 1F exclusion cases. Like the Schengen system, this can take the form of a union where internal border controls are abolished. For instance, the Nordic countries form such a passport union and have an information exchange agreement.²²² This union was created before Schengen came into being. With the current state of Schengen regulations, there are not that many differences anymore between what Nordic countries can share among themselves and what they can share with other countries.²²³ Similarly, because of the common travel area, the UK is sharing information with Ireland about people deported from the UK and vice versa.²²⁴

²¹⁷ R9.

²¹⁸ R9. This happens on the basis of Article 38(3) Convention Implementing the Schengen Agreement

²¹⁹ It is often uncertain whether there is a real hit, due to differences in spelling of names etc. In those cases, case officers can ask for photos or fingerprints in order to confirm that it concerns the same person (R39, R58, R59).

²²⁰ R10, R11, R39.

²²¹ See *Commission v Spain*, Court of Justice of the European Union (CJEU), decision of 31 January 2006, C-503/03, § 56-58: “The Court stressed that the Schengen States have facilities for rapidly verifying whether the threat to public policy meets these conditions: the network of Sirene Bureaux was established to conduct such verifications, and a response by the national authorities consulted must be given within twelve hours.”

²²² R12, R13, R37.

²²³ R37.

²²⁴ R23.

Such bi- or multilateral arrangements can also be created for the purpose of cooperation in specific areas. An interesting example in this regard is the MoU with respect to genocide, war crimes and crimes against humanity that was agreed upon between members of the five-country conference (FCC) in April 2007.²²⁵ Based on this MoU, the immigration authorities in Australia, Canada, New Zealand,²²⁶ the UK and the US can cooperate and exchange information in the context of investigations relating to the mentioned crimes that fall under Article 1F(a) Refugee Convention.²²⁷ SCU works in such a way that the information is protected in accordance with relevant data protection legislation. The majority of information shared via FCC relates to questions such as ‘what do you know of this organisation’ or ‘do you have more information on what happened in this town in 1987’.²²⁸ Information on individuals may however also be shared.²²⁹ Respondents indicate that requests made by FCC-members can be labour and resource intensive to process,²³⁰ but that the FCC is driven by the good will of the people involved in it. The FCC information sharing process works partly because of the mutual trust built up over the years between the officials in each country.²³¹ Respondents further indicate that it is easier to share with FCC-countries because the MoU offers a clear legal basis.²³²

An important aspect that respondents referred to, both in the field of immigration and law enforcement, is that information exchange only really works when you know who your counterparts are; this not only entails knowing where to find them, but also knowing whether you can trust them with the information you share. If you do not personally know the person on the other side of the line, you are no longer in control of what happens with information as soon as you share it. Several respondents from the immigration authorities indicated that the fact that there is little contact between the (specialised units of) immigration authorities in different countries might be the main reason why hardly any information is exchanged on refugee exclusion.²³³

4.2.2. Information exchange between law enforcement/prosecution services

The previous paragraph described how immigration authorities currently have some options to obtain information on 1F cases in other European countries, but these options only allow them to do so to a very limited extent. In paragraph 4.1 it was established that immigration authorities at the national level generally exchange relatively much information on exclusion with law enforcement and prosecution services. Although such information may be more commonly shared in one direction, from immigration to law enforcement/prosecution, some exchange also occurs the other way around. For this reason it is relevant in the context of this study to also look into the possible modes of information exchange between law enforcement and prosecution services in different European countries, for the purpose of

²²⁵ A copy of this MoU is on file with the authors.

²²⁶ New Zealand was originally not part of the MoU but joined in later on (R15).

²²⁷ These authorities are the Department of Immigration and Border Protection (Australia), Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA), Immigration New Zealand, UK Home Office and the US Department of Homeland Security.

²²⁸ R15.

²²⁹ R15.

²³⁰ R15, R23.

²³¹ R15.

²³² R15.

²³³ R4, R14.

the criminal investigation or prosecution of crimes that fall under Article 1F. This relates, in particular, to alleged perpetrators of international crimes (genocide, crimes against humanity and war crimes). Assessing information exchange between law enforcement agencies may furthermore shed a light on how the exchange of information between immigration authorities in different European countries, if desirable, could be improved.

4.2.2.1. *Formal modes of information exchange*

To start with, it can be stated that law enforcement or prosecution services do not have much more efficient ways to identify immigrants who have allegedly been involved in serious criminality than immigration authorities. As it stands, these actors too do not have access to readily available lists with alleged perpetrators or possibly interesting witnesses residing in other countries.²³⁴ They possibly could find relevant information on alleged perpetrators through Interpol Red Notices, or European Arrest Warrants (which are also alerted in SIS II, on the basis of Article 26 SIS II Regulation). In cases where there has been a conviction, the European Criminal Record Information System (ECRIS) possibly offers a source of information.²³⁵ Additional possibly relevant sources are the list of undesirable individuals with travel bans in the EU distributed by the Presidency of the EU to all Schengen countries,²³⁶ and UN Security Council sanctions and travel restriction lists. The most common mode of information exchange between law enforcement agencies is, however, requesting their counterparts for information in the course of an on-going criminal investigation.

If an individual is the subject of a criminal investigation, law enforcement agencies can request for more information on this person through mutual legal assistance (MLA). Generally speaking it would be possible for law enforcement agencies to share information that they receive from immigration authorities with law enforcement agencies abroad, as long as this is within the rules and principles of international police cooperation, including national laws on secrecy and international conventions and bilateral treaties on police cooperation and information sharing (e.g. the European Convention on Mutual Legal Assistance of 20 April 1959, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters,²³⁷ and the SIS II Regulation 1987/2006 and SIS II Decision 2007/533).²³⁸ In this context, information can be shared either passively or proactively. Passive sharing happens on the initiative of the country that runs an investigation. That country has to request for information concerning an individual

²³⁴ This may change in the near future, as Europol may from 2016 onwards be mandated to register information on genocide, war crimes and crimes against humanity. This may lead to the establishment of a Focal Point War Crimes, which could seriously improve and facilitate international information exchange between criminal investigators. Dutch Minister and State Secretary of Security and Justice, *Rapportagebrief Internationale Misdrijven 2014*, p. 14. Available online via <<https://www.rijksoverheid.nl/documenten/kamerstukken/2015/06/30/tk-rapportagebrief-internationale-misdrijven-2014>>.

²³⁵ Currently, this information is only received on request. According to one respondent, there is a discussion to have Member States proactively share information with each other on certain categories of offences, such as terrorism, child sex offences and murder (R22). In cases where there has been a conviction for a 1F crime in a EU country, however, it is likely that the convicted individual has requested for, and has been denied, asylum elsewhere.

²³⁶ One of the respondents (R22) mentioned the existence of this list, but the authors could not find any confirmation of its existence in public documents.

²³⁷ Official Journal of the European Communities, C 197, of 12 July 2000.

²³⁸ R8.

case and in response to that request information can be shared.²³⁹ For example, when the Danish SOIK starts up a case, it will start by asking around if someone has been signalled in other countries. This will be done by sending a request – through Interpol – to the countries Denmark cooperates with on a regular basis.²⁴⁰ This form of mutual legal assistance can be used to exchange information, obtained by immigration authorities, between law enforcement agencies as long as the information is in their possession. Although most respondents indicated that direct exchange between a law enforcement agency in one country and the immigration authority in another country – or vice versa – hardly ever occurs, we did encounter one case which illustrates that this can also be considered to be in conformity with national legislation.²⁴¹

In 2011 a UK Court convicted a man because of attempted murder, possession of firearms and two counts of membership of the IRA committed between 1975-1981. The convict objected in appeal to the fact that the UK prosecutor had used information stemming from a 1983 asylum application he had made in Sweden. This documentation, according to the UK prosecutor, constituted admissions to the crimes the applicant was charged with. The documentation had been handed over by the Swedish immigration authorities on the basis of a letter rogatory, a request for mutual legal assistance, in 1990. The Swedish police or prosecution had not been involved. The Appeals Chamber in 2013 confirmed that evidence from the Swedish asylum procedure could be used in the criminal procedure because it had been lawfully obtained, both by the Swedish immigration authorities and the UK police, in accordance with the international conventions applicable at the time. Furthermore, there had been no element of compulsion in relation to the asylum application and the applicant had had access to legal advice.

Apart from ‘passive’ information exchange, it may also be possible to engage in proactive sharing of information about possible perpetrators or witnesses with counterparts. In the Netherlands, surplus information from ongoing or closed investigations that indicates that potential perpetrators of international crimes reside elsewhere in Europe is for example proactively shared with specialised law enforcement agencies in those countries.²⁴² In Denmark, if the SOIK has some level of suspicion that

²³⁹ R2.

²⁴⁰ R26, R27.

²⁴¹ *R v McGeough*, Belfast Crown Court, judgment of 13 September 2010, [2010] NICC 33, COG7937, available online via <http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2010/2010%20NICC%2033/j_j_COG7937final.htm>; *R v McGeough*, Court of Appeal in Northern Ireland, judgment of 7 May 2013, [2013] NICA 22, MOR8859, available online via <http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NICA%2022/j_j_MOR8859Final.htm>.

²⁴² Dutch Minister and State Secretary of Security and Justice, above note 234, p. 13.

someone whom it is familiar with might move to one of the countries with which Denmark has regular cooperation, it will also proactively inform their counterparts there.²⁴³ In two cases so far, the SOIK has also informed counterparts about possible perpetrators residing in other countries. The first case related to guards from the Dretelj camp in Bosnia. The SOIK in the course of its investigations had come across an individual which allegedly resided in Norway. For this reason the SOIK informed the Norwegian police.²⁴⁴ The other case concerned a Rwandan national suspected of involvement in the 1994 genocide. When it became clear to the SOIK that this individual had moved to Belgium, the Belgian police were accordingly informed.²⁴⁵ Respondents representing UK's SO15 confirmed that they at times too proactively share information about possible perpetrators or victims in other countries or in the UK itself. They stressed that this only takes place if the investigators know who they are dealing with in these other countries and if they are aware that these countries are working on relevant cases. It regularly happens that investigators from other countries come to visit the UK to interview possible witnesses.²⁴⁶ This kind of information exchange is typically only permitted if national legislation permits it, there is an agreement with the country in question (an MoU) or an international convention makes it possible.²⁴⁷

4.2.2.2. Informal modes of information exchange

Respondents indicated that they would not be inclined to share information, formally or informally, with countries with which there is no existing relationship.²⁴⁸ With countries with which there is an existing relationship, however, there can be a relatively free flow of information, even informally. Several respondents indicated that with certain 'trusted' countries, they would pick up the phone to inform whether it would be worthwhile to do a formal request for information by means of MLA.²⁴⁹ This kind of information exchange is also promoted by initiatives such as the Genocide Network, which is supervised by the European Union's Judicial Cooperation Unit, Eurojust,²⁵⁰ and the regional Nordic annual conference on war crimes, between Sweden, Denmark, Norway and Finland.²⁵¹ The Genocide Network organises biannual meetings where practitioners can exchange non-operational as well as operational information. These meetings have a thematic open session on the first day. The second day is only accessible only to the National Contact Points and their counterparts in Observer States, where in a closed session confidential operational information on past, ongoing and future investigations can be

²⁴³ R26, R27.

²⁴⁴ R26, R27. Whether the Norwegian police on its turn have informed Norwegian immigration authorities is unclear.

²⁴⁵ R26, R27. Also in this case it is unclear whether the Belgium immigration authorities had subsequently been informed.

²⁴⁶ R17, R18.

²⁴⁷ R37.

²⁴⁸ R15, R16.

²⁴⁹ R17, R18, R50, R51.

²⁵⁰ The European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes ('the Genocide Network') is a body established by the Council of the European Union (Council Decisions 2002/494/JHA and 2003/335/JHA) to ensure close cooperation between national authorities in investigating and prosecuting core international crimes, as defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court; see <<http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/Genocide-Network.aspx>>.

²⁵¹ At these conferences, each country gives a summary of its on-going cases and guest lecturers are invited to speak on certain topics (R50).

exchanged.²⁵² Especially in the margins of these sessions, a lot of informal information exchange takes place.²⁵³ It could, for example, happen that war crimes units approach each other with a specific request for witnesses.²⁵⁴ One respondent remarked that while it is possible to share much information informally, it can be legally challenging to formalise such information in a later stage, in cases where a law enforcement agency wants to be able to use the information it has received on an informal basis.²⁵⁵

4.3. Conclusion

This chapter discussed how and to what extent information on 1F-excluded individuals is exchanged within and between the six focus countries. On the national level practices differ slightly. In all countries, all departments of the immigration authorities can access information on 1F exclusion. Approaches differ as to whether the department that assessed the asylum claim also deals with any subsequent applications on other grounds, or whether these are the responsibility of other departments. In most of the focus countries, the immigration authorities actively cooperate with investigative and prosecutorial bodies. It however differs per country whether or not all 1F cases are referred to the relevant investigative or prosecutorial agencies, and at what stage in the procedure. In some countries specialised divisions of the police are informed about every exclusion case (e.g. Belgium and the Netherlands); in other countries the immigration authorities only forward a pre-selection of cases, often based on a specific set of criteria (Denmark, Norway, Sweden, UK). All countries allow immigration authorities to proactively share information with law enforcement or prosecution services before a final 1F decision is taken if immediate action is required. Once a final 1F decision has been taken, law enforcement and prosecution services in all countries have full access to the immigration files.

International information exchange between immigration authorities is not very common. Immigration authorities of 'like-minded' countries can, and do, to a limited extent exchange information on an ad-hoc basis by means of bilateral or multilateral arrangements, such as MoU's. Immigration authorities furthermore exchange large quantities of information through the Eurodac and SIS II databases, but these systems do not, or only to a very limited extent, contain information on 1F exclusion. Eurodac is only accessible to asylum departments within the immigration authorities and is used to establish whether an asylum claim has already been processed in another EU country. It does not contain any information on 1F exclusion. SIS II is accessible to asylum as well as non-asylum departments within the immigration services and is used to obtain information about the background of applicants. 1F-excluded individuals can be 'alerted' in the system if countries consider them to be a threat to the public order or if they have received an entry ban (Article 24 SIS II Regulations). These alerts in itself, however, do not reveal that, let alone why, an individual has previously been excluded. Of the focus countries, only Denmark and the Netherlands as a matter of standard practice alert excluded individuals in SIS II.

Law enforcement and prosecution services have a more established practice of international information exchange in universal jurisdiction cases. A European network of contact points has been established, which allows for information exchange on an informal basis. Information might be related to 1F-excluded individuals, either because they are a suspect or a witness. Passive and proactive information

²⁵² See <<http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Network-Activities/Pages/Activities.aspx>>.

²⁵³ R26, R27.

²⁵⁴ R17, R18.

²⁵⁵ R8.

exchange also takes place through mutual legal assistance. Direct exchange of information between an immigration authority in one country and a law enforcement agency in another country or vice versa is very uncommon.

In sum, though differences exist, information exchange on a national level generally takes place. Internationally, law enforcement and prosecution services have a rather well established system in place for information exchange. International information exchange on 1F-excluded individuals between immigration authorities hardly takes place. The following chapter will discuss to what extent relevant actors deem it desirable to enhance the exchange of information between immigration authorities, and if so, if such is feasible.

5. Desirability and feasibility of enhancing international information exchange between immigration authorities on 1F exclusion

In the previous chapter, it was established that international information exchange on 1F exclusion between immigration services is currently limited. This chapter will assess different views on whether there is a need to enhance the exchange of this type of information. Subsequently, it will assess which possible ways to enhance international information exchange on 1F exclusion exist, and to what extent these options are feasible. In the interviews three possible ways of enhancing information exchange recurred: 1) making use of existing functionalities in currently used information systems or tailor such systems so as to include information on 1F exclusion; 2) closing bilateral or multilateral arrangements with a limited number of countries to facilitate and enable information exchange; and 3) distributing lists with names of 1F-excluded individuals. In addition to these ways of directly facilitating information exchange, the exchange of information could also be enhanced in a more general way, by promoting international cooperation through the creation of a network of immigration authorities with a specific focus on 1F exclusion.

5.1. Desirability of enhancing international information exchange

The introduction to this study listed several reasons why the lack of international information exchange on 1F exclusion could be seen as problematic. In short, a lack of information exchange may lead to a situation where 1F-excluded individuals are lost out of sight, which may 1) reduce chances of holding them criminally accountable, 2) increase security risks connected to the roaming around of possibly dangerous individuals through Europe, or 3) enable perpetrators to find a safe haven. This suggests that a wide range of actors, including law enforcement and prosecution services, security services, immigration authorities, policy makers and interest groups, have an interest in the enhanced exchange of information between immigration authorities.

Respondents representing immigration authorities in the countries in this study, in particular those representing specialised units dealing with 1F-excluded individuals, are generally of the opinion that there is a strong need to have more information exchange on this issue, arguing that more background information on applicants allows for making better informed decisions, both in asylum and in other immigration procedures.²⁵⁶ Besides advantages for the decision making process, respondents mainly referred to the fact that a lack of information exchange could enable perpetrators to obtain legal residence, rather than to the possibility that excluded individuals roaming around in Europe could pose a security threat. At times, respondents illustrated the possible consequences of a lack of information exchange by referring to 1F-excluded individuals who used what is called the ‘Europe-route’ to obtain a permanent residence permit in country Y after being excluded in country X. In particular the Dutch authorities have knowledge that several excluded individuals have used this strategy.²⁵⁷ One case, of an Afghan national named Rafiq Naibzay, has made the national headlines:

²⁵⁶ R3, R4, R5, R6, R7, R14, R15, R16, R46, R60.

²⁵⁷ *Kamerstukken*, 2013, ah-tk-20122013-1774.

In 1998, Rafiq Naibzay, an Afghan national, applied for asylum in the Netherlands. Years later he was excluded from refugee protection on the basis of Article 1F. He lived in legal limbo for years. Early 2013 it turned out that he had obtained a residence permit in Belgium. According to media reporting two of Naibzay's children, who are EU citizens, lived and studied in Antwerp. On the basis of Article 10 Free Movement of Citizens Directive (2004/38/EC), an EU citizen has the right to live in another EU country for three months, as long as s/he does not *"become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence"* and as long as he is not considered to pose a *"genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"* in accordance with Article 27(2) of the Directive. Family members of EU citizens are free to travel and stay in the same EU countries as their kin, as long as their identity and a sustainable family relation are determined. If after three months the family member meets the criteria posed by article 7 of the Directive, s/he can apply for family reunification. In the case of Rafiq Naibzay, the Belgian immigration authorities apparently approved this application. For this reason he could obtain a temporary residence permit for five years after which he and his children can apply for a permanent residence permit.

The UK authorities were aware of at least one similar case, where an asylum applicant in Germany had been under investigation to be excluded, but just before or after being excluded moved to the UK. As a family member of a UK resident, upon arrival in the UK he requested to reside as an EEA national.²⁵⁸ At the time the UK was not aware he had been excluded in Germany. Currently, he still lives in the UK as an EEA national.

Where the representatives of immigration authorities in the six focus countries generally favour enhancing the exchange of information on 1F exclusion, it is important to acknowledge these countries were specifically selected for this study as they have policy of a relatively actively applying Article 1F.²⁵⁹ The consequence is that the sample in this study is not representative for the perspective of immigration authorities in other European countries. In this respect it is interesting that the EMN ad-hoc queries also included a question on whether countries see a need to improve the information exchange on 1F exclusion. Five reporting EMN member states (Germany, Greece, Slovak Republic, Slovenia and Spain) indicated that it would not be of particular interest to them to have information on an earlier 1F exclusion in another European country, while the UK representative – who was not a respondent in this study – maintained that there is no need for special measures since information about asylum claims made elsewhere in Europe would come to light as a result of Eurodac checks. However, all fifteen other responding states indicated that they would applaud more information exchange. In general terms, it was noted that such information would be useful in order to be able to take all relevant elements into account

²⁵⁸ R15, R24.

²⁵⁹ The justification to focus on these countries in particular is that it is less likely to obtain information about practices in relation to 1F exclusion if there is a very limited focus on the application of Article 1F to begin with.

and make an informed decision. Similar to the respondents interviewed, they referred to cases where an individual excluded in another EU country (and not alerted in SIS) might try to obtain legal residence in a Member State, be it through family reunification, EU free movement regulations or otherwise. Reference was also made to asylum cases in which no Dublin claim could be made, the fact that certain excluded individuals may pose a threat to public order and security in another European country, and the fact that information on exclusion could possibly entail information on possible involvement in terrorist or organised crime activities or related networks. In conclusion, it seems that not all, but most of the immigration authorities in European countries favour enhanced exchange of information on 1F exclusion.

Some respondents representing the law enforcement/prosecution perspective shared the view that increased information exchange between immigration authorities would be welcome.²⁶⁰ They believe a stronger information position of the immigration authorities would also be beneficial for criminal investigations and prosecutions. One respondent, for example, indicated that it would be an asset to find people that have information on certain incidents: people who have been excluded on the basis of Article 1F are also possible suspects, victims and witnesses.²⁶¹ Other respondents from law enforcement and prosecution agencies were less convinced and did not see a direct need to increase the information exchange on 1F-excluded individuals.²⁶² Representatives of NGOs that aim to promote the criminal prosecution of perpetrators of international crimes generally applauded increased exchange of information.²⁶³ In their view, this could be beneficial to the work of law enforcement and prosecution services, for the reasons mentioned above. One respondent did note that this could only happen if the immigration authorities would take sufficient measures to ensure that the applicants are aware that any information they provide in the context of an asylum claim may be forwarded to the police.²⁶⁴

A limited number of respondents, however, nuanced the need to enhance information exchange.²⁶⁵ They basically argued that it is important to balance the scale and nature of the problem stemming from a current lack of information exchange against the 'costs' of implementing changes or developing a system that would enhance information exchange. With respect to the *scale* of the problem, it was noted that if only a very limited number of 1F-excluded individuals cross European borders, the question comes up why an enhanced system should be set up. It is yet very difficult to estimate the number of 1F-excluded individuals that travels to another European country after being excluded. Firstly, many European countries do not have a proper overview of the number of 1F exclusions to begin with. Secondly, not all countries that do have such an overview (are able to) keep track of the excluded individuals. As was noted in Chapter 3, those countries that provide a temporary permit or set certain conditions (Denmark, Norway, UK) generally monitor the whereabouts of the excluded individuals quite strictly, but e.g. the Dutch or Belgium authorities lack a good overview. When possible push factors for crossing European borders are analysed, there are also differences between countries to be noted. Unless extremely demanding conditions are set, excluded individuals who still have access to temporary permits arguably do not have a very high incentive to apply for permits in another country. This certainly

²⁶⁰ R2, R8, R17, R18, R50, R51, R52, R53.

²⁶¹ R8.

²⁶² R26, R27, R55, R56.

²⁶³ R25, R41.

²⁶⁴ R25.

²⁶⁵ R19, R26, R27, R34, R35.

is different in countries where excluded individuals do not have any access to a residence permit, employment or insurances, such as the Netherlands. Assessing the scale of the ‘problem’ is in other words very difficult because of different post-exclusion policies in terms of monitoring and access to forms of temporary residence or leave to stay.

With respect to the *nature* of the problem, the question comes up what type of cases is excluded. Excluded individuals have in common that they allegedly committed serious crimes. But politically, in terms of assessing security risks and in relation to chances of successful prosecution, it matters much what type of alleged crimes took place, when they took place, how they were motivated and what level of personal involvement the alleged perpetrator had. To illustrate this with a hypothetical example, the exclusion of a 24-year-old ISIS member who was allegedly involved in the killing of hostages differs considerably from the exclusion of a 67-year-old Eritrean who is believed to have been a conscripted soldier in the early 1980s. Such differences also matter in legal terms. Of the six focus countries, the Netherlands takes a unique approach by considering that all excluded individuals pose a threat to public order and that any residence permit should be denied on that ground.²⁶⁶ It is questionable, however, to what extent excluded individuals can and should all be regarded as such. An analysis of all exclusion cases in the Netherlands between 2000 and 2010 shows that, while the crimes that excluded individuals are associated with are very serious, much of these cases were relatively ‘low-profile’ in nature; it concerned low-ranking officials who years ago, in far-away countries allegedly had facilitating roles in committing the crimes.²⁶⁷ In the other focus countries an excluded individual is considered to pose a threat to public order only under specific conditions and on the basis of an individual assessment.²⁶⁸

Whether or not excluded individuals are considered to pose a threat to public order makes a world of difference. Some countries (Denmark, Netherlands) have explicitly determined that 1F exclusion poses a bar to all forms of permanent residence, in line with a broad conception of the ‘no safe haven’ idea, but other countries have not. The assumption that an exclusion on the basis of Article 1F also should block other forms of permanent residence is, however, not self-evident. The primary objective of Article 1F is to safeguard the integrity of the asylum system.²⁶⁹ As one respondent argued in this regard: exclusion on the basis of 1F is not the same as a criminal conviction. If there is no ground to expel someone, a request for family reunification should be assessed on its own merits, and rights to family life need to be adequately protected.²⁷⁰ This perspective problematizes the concept of a ‘no safe haven policy’ and brings into question how 1F exclusion relates to such a policy. Does a no safe haven policy merely mean that alleged perpetrators of serious crimes should not be allowed to benefit from refugee protection, or does it encompass much more and should it entail that alleged perpetrators of serious

²⁶⁶ See Article 3.77 Aliens Regulation (above note 40) or e.g. Administrative Division of the Council of State, judgment of 16 June 2015, ECLI:NL:RVS:2015:2008.

²⁶⁷ Bolhuis & Van Wijk (2015).

²⁶⁸ In a recent decision the CJEU determined that in order to be able to revoke a residence permit granted to a refugee who supported a terrorist organisation, “*the competent authorities are [...] obliged to carry out, under the supervision of the national courts, an individual assessment of the specific facts concerning the actions of both the organisation and the refugee in question*” (§ 99). *H.T. v Land Baden-Württemberg*, CJEU, decision of 24 June 2015, C-373/13. This may have consequences for the e.g. the Dutch categorical refusal of a residence permit on the ground that someone poses a threat to public order (R38).

²⁶⁹ UNHCR (2009: 6).

²⁷⁰ R19.

crimes should not have access to *any* residence permit? In case of the former, what would then be the purpose of exchanging information between immigration authorities? In case of the latter, what would be the legal and moral basis to deny any other residence permit?

In sum, although a limited number of respondents questioned whether enhancing international information exchange on 1F-excluded individuals between immigration authorities is desirable, a large majority clearly was in favour.

5.2. Feasibility of enhancing international information exchange

It has been discussed above that there generally is support for the idea of enhancing information exchange between immigration services. Before describing the different ways in which such could be done, this paragraph briefly discuss four overarching issues that need to be taken into account in this regard. It discusses 1) to what extent the lack of a consistent 1F approach may hamper such information exchange, 2) how confidentiality issues need to be taken into account, 3) how the principle of purpose limitation may affect information exchange and, 4) what type of information should actually be shared with whom and at what stage.

5.2.1. Consistency in applying Article 1F

The information in Chapter 3 already indicated that the six focus countries apply Article 1F differently. This is not exceptional; despite the existence of a shared legal framework in the form of the Common European Asylum System,²⁷¹ exclusion practices across Europe differ considerably. For instance, it differs from country to country whether inclusion is considered before exclusion, which standard of proof is used, what level of involvement in the alleged crimes is required for exclusion, what defences are available and which paragraphs of Article 1F (a, b or c) are used.²⁷² Together with the fact that the issue of refugee exclusion is not equally prioritised – only few countries have specialised 1F units²⁷³ – this explains that the number of excluded individuals differs considerably per country.

Of the countries in this study – but also in a wider EU context – the Netherlands is in absolute numbers the frontrunner when it comes to the number of invocations of Article 1F: the Netherlands has had almost a thousand 1F-cases since the 1990s, a number that currently grows with an average of forty to fifty new cases every year. The number of exclusions in Belgium, Norway, Sweden and the UK is lower and averaged around twenty on an annual basis in the last years. Of the focus countries, while numbers in Denmark are lowest in absolute terms, relative to the number of asylum applications in the EU the number of exclusions in Sweden is the lowest. This raises the question how many individuals are excluded in other countries that receive a great number of asylum applications, such as Germany and France; unfortunately, no figures are available. Anecdotal information suggests that countries like Italy or Greece – countries that over the years have also received considerable numbers of asylum applications²⁷⁴ – have hardly excluded anyone. By offering training modules, the European Asylum Support Office (EASO) aims

²⁷¹ See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm>.

²⁷² For more on these differences, see the studies by Rikhof (2012) and by Aas (2013).

²⁷³ See Human Rights Watch (2014).

²⁷⁴ Italy registered 206.675 asylum applicants from 2008 to 2014 (average of 29.525 per year); Greece 82.625 (average of 11.800 per year). See Eurostat database, available online at <<http://ec.europa.eu/eurostat/data/database>>.

to promote consistent application of Article 1F across Europe, yet these modules have only become available fairly recently. Despite the fact that all EU countries are bound by the same asylum acquis under the Qualification Directive,²⁷⁵ and by the Refugee Convention, the interpretation of Article 1F (and its Article 12 QD equivalent) continues to differ across the EU.

Several respondents warned that the lack of a consistent European approach to Article 1F affects any system of information exchange that may be developed. For example, a call to increase the exchange of information on 1F exclusion could be regarded threatening by some states, as this might expose that they do not live up to their obligations under the asylum acquis. Some states may because of a lack of proper information simply not be in the position to provide an overview of the number of exclusion decisions.²⁷⁶ Additionally, the question arises what case workers working on e.g. family reunification are expected to do when they have knowledge that an applicant has been excluded in another European country and, in principle, want to use such information to deny a permit. On the one hand, EU Member States are on the basis of the principles of mutual recognition and mutual trust supposed to take into account or even apply certain decisions or laws of other Member States, trusting the quality and lawfulness of these foreign legal systems. Both the Dublin and the Schengen system imply mutual trust and recognition.²⁷⁷ The Schengen Borders Code (Regulation EC 562/2006) e.g. contains a strict demand not to let an alerted individual enter the Schengen territory or grant him a visa (Article 5(1)(d)). On the other hand, given the seemingly considerably divergent practices amongst Member States, it seems unconceivable that the immigration authorities dealing with family reunification would 'blindly' follow 1F decisions issued in other countries and act accordingly. Several respondents were also aware of cases where they decided not to exclude an individual who had earlier been excluded in another European country.²⁷⁸ Rather than using information about a previous exclusion in another country directly when making a decision, such knowledge will more probably be used indirectly and just trigger further investigation and requests for additional information about the reasons underlying the exclusion. This, in turn, may create a situation in which an exclusion decision by country X will be re-assessed by country Y in the context of a family reunification procedure. What should happen if country Y does not agree with the interpretation of country X? How would such situations affect harmonisation efforts in the EU?

5.2.2. Confidentiality

In principle, asylum applications should be treated confidentially, as is also acknowledged in Articles 30 and 48 of Council Directive 2013/32/EC²⁷⁹ and stressed by the UNHCR in its 2003 'Background Note' on exclusion.²⁸⁰ This confidentiality also extends to information on someone's exclusion from refugee protection. The main interest at stake here seems to be that information obtained during asylum proceedings, or even information on the mere fact that someone has applied for asylum, should not be

²⁷⁵ With the exception of Denmark, Ireland and the UK. As a non-EU member, Norway is also not bound by the acquis.

²⁷⁶ R2, R4.

²⁷⁷ Meijers Committee (2011).

²⁷⁸ R3, R57.

²⁷⁹ Article 48 refers to the confidentiality principle as defined in national law; hence, on this issue, there is no harmonisation.

²⁸⁰ UNHCR, 2003, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', § 103-104.

disclosed to the alleged persecutor, because that could jeopardize the safety or liberty of asylum applicants or that of their families or associates. Another reason why information on someone's exclusion should not be readily available to anyone is arguably that such information is incriminating and that a 1F 'label' can have a stigmatising effect and thus a negative impact on the individual concerned.

In Chapter 4 it was noted that if proper arrangements are in place, confidentiality of asylum information does not necessarily stand in the way of exchanging information, for instance in the interests of justice, both at the national level (see the example in paragraph 4.1.2.2), and the international level (see the example in paragraph 4.2.2.1). An arrangement such as the MoU that was closed in the context of the FCC, as described in paragraph 4.2.1.3, could possibly also set conditions for breaching confidentiality if this is required in the interests of justice or in the context of immigration procedures. If the confidentiality of the asylum procedure does, in principle, allow for the exchange of information on 1F exclusion between the immigration pillar and the law enforcement pillar at the national level, it seems that as long as information is collected and shared in accordance with national legislation, international information exchange between immigration authorities is also possible. It falls outside the scope of this report to discuss per country if and when such information exchange would be in accordance with national legislation. It should, however, always be taken into account that information on someone's exclusion is sensitive information and should not, in any way, be made available to the alleged persecutor. This, in combination with possible other negative effects for the individuals concerned, highlights the need to process such information carefully.

5.2.3. Purpose limitation

The above attests the importance of properly storing and securing information on 1F exclusion. In addition, it follows *inter alia* from the right to privacy and data protection, as protected under Article 8 ECHR and Articles 7 and 8 EU Charter of Fundamental Rights,²⁸¹ that information should only be used for the purposes for which it was collected (purpose limitation) and stored only for as long as is necessary.²⁸² The purpose limitation principle is relevant in particular in relation to the exchange of information on 1F exclusion, e.g. in cases where information obtained in asylum proceedings is passed on to other actors such as law enforcement or intelligence and security agencies. Article 6(1) of Council Directive 95/46/EC determines that "*Member States shall provide that personal data must be [...] (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes [...]*". The two central elements of this principle are purpose specification and compatible use.²⁸³ Purpose specification implies that any additional purpose for which data are collected must be specified, prior to the collection of the data.²⁸⁴ Compatible use is more difficult to define, but in general terms, *incompatible* use is more likely if a.) the purposes of collection and of further processing are not clearly related, b.) the

²⁸¹ Article 8 ECHR reads: "(1) *Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of [the right to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

²⁸² See Brouwer (2011: 275).

²⁸³ See Opinion 203/2013, adopted on 2 April 2013 of the Article 29 Data Protection Working Party, an independent advisory board that was set up under the Directive 95/46/EC.

²⁸⁴ *Ibid.*, p. 12 and 15.

further use is unexpected or surprising from the point of view of the 'data subject', c.) it concerns sensitive information and d.) inadequate measures are taken to ensure fair processing and to prevent any undue impact on the data subject.²⁸⁵

The principle of purpose limitation is especially relevant when it comes to the different databases that are used by immigration authorities to exchange information on the international level, as described in paragraph 4.2. It can be questioned whether an extension of the originally envisaged uses of such databases, a phenomenon also referred to as 'function creep', is in conformity with this principle.²⁸⁶ An example of function creep, as given by Brouwer, is the fact that law enforcement agencies can now consult Eurodac for the purpose of preventing or investigating crimes.²⁸⁷ Here, the purposes for which law enforcement agencies are given access deviates from the original purpose of the system, namely determining which Member State is responsible for an asylum claim. Paradoxically, as Brouwer notes, initiatives like this fit in a broader development towards interoperability of databases in the EU that seems to undermine the purpose limitation principle, while at the same time the meaning and importance of this principle are reinforced in European law and jurisprudence of the ECtHR and the CJEU.²⁸⁸

In conclusion, the principle of purpose limitation requires that it should be clear to an asylum applicant for which purposes his personal data are collected and possibly further processed. When the feasibility of existing databases for including information on exclusion is considered, there exists a risk of function creep.

5.2.4. What type of information should be exchanged and who should have access?

The more actors will have access to information that someone has been excluded, and the more information is available to these actors, the greater the possible tension with confidentiality and data protection requirements. In that sense, exchanging limited information with a limited number of actors is, where possible, the preferred option. At the same time, the added value of any system of international information exchange between migration services is questionable if the information contains hardly any details or is only available to a very limited number of actors. A balance has to be struck between considerations with respect to efficiency and usefulness to the actors on the one hand, and principles of privacy and confidentiality on the other hand.

In the first place, whether or not enhancing international exchange of information on 1F exclusion between immigration authorities is feasible, depends on the number of actors that will have access to the information. In most of the focus countries, requests for international protection are handled by other departments within the immigration authority than requests for residence on other grounds. If information concerning excluded individuals at the international level is shared only between the departments responsible for assessing asylum claims, one might argue the added value is limited. The

²⁸⁵ Ibid., p. 23-27.

²⁸⁶ See Brouwer (2011: 272).

²⁸⁷ Brouwer (2011: 282). The European Data Protection Supervisor (EDPS) criticised the proposal. See EDPS, Opinion of 7 October 2009, available online via <<http://www.statewatch.org/news/2009/oct/eu-edps-eurodac-access-2009-opinion.pdf>>, § 53-56. Since 20 July 2015, law enforcement agencies can consult Eurodac on the basis of Article 20 Eurodac III Regulation (above note 195).

²⁸⁸ Brouwer (2011: 293).

‘Europe route’ phenomenon, for example, cannot be addressed by merely informing asylum departments. The only way to address such problems would be to exchange information of excluded individuals also with non-asylum departments in other countries. However, one has to be careful not to exchange information with many more actors. From the perspective of purpose limitation, sharing information for no particular purpose with actors that have no need for the information, is objectionable. Sharing information with more actors may furthermore mean that actors that do not have specific knowledge on Article 1F, will not know how to interpret this information and how to act upon it. This could, on the one hand, lead to indifference and passivity. On the other hand, misinterpretations could also lead to ‘overreactions’, e.g. when 1F exclusion is believed to mean that someone is ‘wanted’ by or has been convicted for serious crimes.

Apart from the number of actors that will have access, the feasibility of enhancing international information exchange also depends on the amount of information that is made available. From a privacy perspective, the amount of information that is exchanged is ideally kept to a minimum: it should be just enough information for the relevant actors to identify excluded individuals. On the other hand, information on merely the identity of an individual and the fact that he has been excluded will never suffice to base a decision on. As discussed above, more information on the earlier procedure would certainly have to be available. In order to be able to make well-informed decisions, decision makers would ideally have access to the entire immigration file. The above demonstrates that any system one can think of has its downsides from the perspectives of efficiency, user-friendliness, the ability to identify possible perpetrators or privacy. A ‘one-size-fits-all’ modality of information exchange is not feasible.

5.3. Possible ways of enhancing international information exchange on 1F exclusion

5.3.1. Use or tailor existing information systems

A first option to enhance the international exchange of information is to use or tailor existing common European information systems. Many respondents agreed that, where possible, it is always better share information via an existing system than to create new systems. There already are so many information systems and creating a new system would require significant investments. Chapter 4 already discussed that immigration authorities currently in particular share information by means of Eurodac and SIS II.²⁸⁹

Including information about 1F-excluded individuals in Eurodac has certain advantages, but will probably not have much added value. A strong asset of the system is that it includes fingerprints, which allows individuals to be quickly and easily identified. To what extent identification of 1F-excluded individuals in Eurodac has much added value is, however, questionable. As was already noted, the use of Eurodac is limited to the determination of the state responsible for the asylum application and – since

²⁸⁹ Other existing systems, such as the Visa Information System (VIS) and Smart Borders, are less suitable for including information on 1F exclusion, since these systems focus on *external* borders of the Schengen community. See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm> and <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index_en.htm>. One respondent representing the European Commission (R54) remarked that the Mutual Information Mechanism (MIM, established through Council Decision 2006/688/EC) might also offer a platform for this kind of exchange. The MIM is, according to Article 1 of the Decision, “a mechanism for the mutual exchange of information concerning national measures in the areas of asylum and immigration that are likely to have a significant impact on several Member States or on the European Union as a whole.” However, it is unclear what ‘measures’ are included and, more importantly, the system is currently not being used by Member States.

July 2015 – the use for law enforcement purposes.²⁹⁰ Immigration authorities are excluded from checking the system when assessing applications for residence permits on any other grounds such as family reunification or study purposes. In paragraph 4.2.1.1 it was already noted that if Eurodac produces a hit in the course of an asylum procedure, the primary focus is to return the individual to the country responsible for the asylum claim without any substantive consideration.²⁹¹ They may be able to see antecedents, e.g. with respect to public order, but this would only provide information on possible 1F exclusion in a very indirect manner. Under the current circumstances, Eurodac is not suitable for including information on exclusion. Besides, including such information would also deviate from the purposes of the system and would amount to function creep.

SIS II seems a more promising system for including information on 1F exclusion. The information in this system is available and accessible to a wide range of actors in all Schengen countries. Unlike in Eurodac, information on exclusion in SIS II would not only be available to asylum departments, but also to departments responsible for assessing applications for other types of residence permits and the border or immigration police. This is not to say that the use of SIS II comes without any disadvantages. It should, for example, be taken into account that countries that do not have access to SIS II for the purpose of immigration control – such as, the UK – will not have access to SIS II alerts. As discussed in paragraph 4.2.1.2., for the time being, only alphanumeric searches are supported, while fingerprints or photos cannot be searched. Several respondents furthermore remarked that there can be a considerable time lag before information in SIS II is updated. They mentioned that a lag of six months is not exceptional.²⁹² It should be mentioned, however, that not all respondents were aware of any considerable delays.²⁹³

Notwithstanding its shortcomings, most respondents agreed that *if* information about 1F-excluded individuals is to be shared via an existing information system, SIS II would be the most likely candidate. Exchanging information on 1F exclusion by means of SIS II could basically occur in two ways.

5.3.1.1. Article 24 alerts in SIS II

A first option would be to alert excluded individuals in SIS II on the basis of Article 24 SIS II Regulation. This would entail that Schengen states would decide to refuse entry to the Schengen territory to all 1F-excluded individuals and either consider them a threat to public policy, public security or national security as defined in Article 24(2), or to decide that 1F exclusions should always be followed by a return decision combined with a prohibition on entry or residence (Article 24(3)).²⁹⁴ As discussed in Chapter 3, such an approach is currently taken in *inter alia* Denmark and the Netherlands. Using Article 24 alerts would have certain advantages, but there are also considerable disadvantages and obstacles that need to be taken into account.

²⁹⁰ R40; see also Brouwer (2011: 282).

²⁹¹ This might, however, change with the current pressure on the Dublin system, as was noted in paragraph 4.2.1.1..

²⁹² R10, R11

²⁹³ R58.

²⁹⁴ R40.

Strengths:

- Technically, this option is relatively easy to implement. As the functionality already exists, no technical changes would have to be made to the SIS II-system, nor would it require adaptations to the SIS regulations.
- This option is possibly inclusive of all EU countries and could be conducive to a harmonised post-exclusion approach in the EU.
- No prior consultation between all Schengen states is needed for individual states to decide to give an entry ban to all 1F-excluded individuals and alert them in SIS.

Weaknesses:

- An Article 24 alert in SIS II merely indicates that an individual has an entry ban. The alert does not provide a reason for the entry ban. Someone can be alerted because of 1F exclusion or e.g. a criminal conviction in the country which inserted the alert in SIS. If authorities would want to find out why an individual is alerted they would need to start a process of requesting for more information at the SIRENE bureau abroad. The experiences with these requests from the respondents in this study suggest on the one hand that this information requests can be dealt with very rapidly and efficiently, but on the other hand, some respondents indicated that making these requests is a bureaucratic process and may take time to process.
- If only a number of states would implement the policy of making an Article 24 alert as a matter of standard practice, this would not be conducive to the harmonisation of European asylum policy.
- If the alert is based on Article 24(2), as is the case in the Netherlands, this means that the excluded individual is believed to pose a threat to public policy, public security or national security. Article 24(2) mentions that *“such a situation shall arise in particular”* in case *“a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.”* By referring to the ‘serious grounds to believe’, which closely resemble the ‘serious reasons for considering’ threshold used in Article 1F and Article 12 (2) Qualification Directive, the text arguably suggests that the drafters of the SIS regulation had in mind that 1F-excluded individuals could also be alerted in SIS on the basis of Article 24. However, different views exist on whether all excluded individuals indeed pose a threat to public policy, public security or national security.²⁹⁵ Given the contextual character of the alleged crimes the 1F-excluded individuals are associated with, some respondents indicated that not all excluded individuals in the country could be considered to pose such a threat.²⁹⁶ Considering all 1F-excluded individuals a threat to public order, public security or national security would, in many countries where this is not yet the case, mean that residence permits on other grounds than asylum are no longer available to 1F-excluded individuals.²⁹⁷ Family reunification, for instance, could be denied on that ground.²⁹⁸

²⁹⁵ See also paragraph 5.1.

²⁹⁶ R3, R10, R11.

²⁹⁷ This is suggested by the results from the EMN ad hoc queries, but see also e.g. Section 17(a)(3) of the Swedish Aliens Act.

²⁹⁸ See Recital 14 Family Reunification Directive (2003/86/EC), above note 94.

- If the alert were to be based on Article 24(3), as is the case in Denmark, this would require a return decision: “[...] *an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return*” (Article 3(4) Return Directive 2008/115/EC). Countries that provide a temporary permit or status to unreturnable excluded individuals typically do not in tandem issue a return decision. In Denmark, where a return decision is issued, excluded individuals can only remain on ‘tolerated stay’, which is not a residence permit and sets very strict conditions.
- Moreover, arguably issuing an entry ban and alerting someone in SIS II who has been granted a (temporary) residence permit is not possible.²⁹⁹ The purpose of the alerts in SIS II, as becomes clear from inter alia recital 10 and 11 and Article 2(1) SIS II Regulation, is refusing entry into, or a stay in, a Member State.³⁰⁰ Hence, when states decide to alert all excluded individuals in SIS II on the basis of either Article 24(2) or (3), this would mean that a temporary residence permit can no longer be granted to non-returnable 1F-excluded individuals and that states would have to choose another mode for the post-exclusion phase, modelled on e.g. either the Danish or the Dutch approach. This would require significant changes in national policies and legislation in many states.
- Ideally, information that an individual has been excluded in another country is made available ‘real time’, or at least soon after the decision has been issued. If, as suggested by some respondents, there indeed is a considerable time lag before information submitted to SIS II is actually included and available, this could be problematic.

5.3.1.2. A ‘1F-flag’ in SIS II

A second option to enhance the exchange of information on exclusion through SIS II would be to create a marker – a ‘1F-flag’ – that could be attached to every excluded individual.³⁰¹ Such a flag could be an ‘annex’ to the already existing Article 24 alert, in which case the flag could e.g. be simultaneously introduced with a policy to alert all excluded individuals, as discussed above. Another possibility would be to disconnect the marker from any existing alerts. Since individuals are only registered in SIS II when they are alerted, such a new marker would constitute a new registration ground and thereby de facto a new alert. Advantages and disadvantages of both options are discussed below.

²⁹⁹ R40.

³⁰⁰ Article 25 of the Convention implementing the Schengen Agreement (Official Journal L 239 , 22/09/2000, p. 19) and Article 11(4) of the Return Directive 2008/115 also determine that where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests, and if a residence permit is issued, the Member State issuing the alert shall withdraw the alert. This also suggests that an alert and a (temporary) residence permit cannot be in place simultaneously. In e.g. Dutch legislation, this is also made explicit: Article 66a(6) Aliens Act determines that a person who has an entry ban or has been signalled for the purpose of refusing entry cannot have lawful residence.

³⁰¹ A flagging functionality in SIS II is currently used in cases “[w]here a Member State considers that to give effect to an alert entered in accordance with Articles 26, 32 or 36 is incompatible with its national law, its international obligations or essential national interests, [...] to the effect that the action to be taken on the basis of the alert will not be taken in its territory” (Article 24 EC Decision 2007/533/JHA of 12 June 2007; R63).

Strengths:

- This option is inclusive of all European countries and could be conducive to a harmonised post-exclusion approach in the EU.
- Compared to ‘merely’ inserting an Article 24 alert, ‘flagging’ 1F individuals has the clear advantage that actors who have access to SIS II, can easily and readily identify 1F-excluded individuals. This saves decision makers time, because they do not have to start up a consultation procedure to find out what the reason is for the Article 24 alert.³⁰²
- Information about excluded individuals is sensitive in nature, while information in SIS II is available to a wide range of actors. By limiting information exchange to a plain marker, the interference with the privacy of the individual concerned is limited.

Weaknesses:

- Some respondents were hesitant about the idea to add a new flag or a ground to SIS II. SIS II already contains a lot of information and if the amount of information keeps growing, it will be increasingly difficult to keep oversight and information might be overlooked. While it may be an advantage that information included in SIS II is available to a wide range of actors, it also means that there are a lot of people working with SIS II, who need to be made aware how to act when they have a ‘1F-hit’. Some respondents therefore suggested accompanying a 1F-flag with a clear instruction on how to act, e.g. an instruction to contact the authorities in the country that alerted the individual. They noted that in the absence of clear instructions, there could be a risk that e.g. border police officers would take action on the basis of the alert that could violate established refugee law principles such as *non-refoulement*.
- In principle, the 1F-flag is only relevant for immigration authorities. By including a specific 1F-flag in SIS II many other actors have access to information that someone is excluded. It is not ideal that potentially sensitive information on exclusion becomes available to a wide range of actors. In addition, it would be problematic if it were unclear what additional action would need to be taken. If the flag is based on Article 24 alert, it amounts to a refusal of entry and authorities will, because of mutual trust and recognition, in any case refuse entry or stay when someone tries to cross the border, without making any substantial consideration.
- Some respondents questioned whether a plain 1F marker would have much added value. As was noted in Chapter 5, some respondents – especially those representing immigration authorities – were generally of the opinion that it is always helpful to know that Article 1F has been applied elsewhere, as that would help them in making informed decisions. Other respondents emphasised that merely the information that someone has been excluded would not suffice and that, despite the fact that a marker would make information on exclusion readily available, it would still mean that one would have to contact the relevant authorities in order to find out what the reasons were for the 1F exclusion.

³⁰² One of the possible adaptations to SIS II that have been proposed by the Netherlands in the context of the evaluation of SIS II that is currently being carried out, is to always show the reasons for the Art 24 alert in SIS (not only for 1F cases, but also other reasons for 1F) (R58).

- Adding a flag in SIS II is technically feasible. If the flag would constitute a new registration ground, however, this would require a complete change of the logic and structure of SIS. Currently, people can only be signalled in SIS by entering an alert; not through a marker.
- Besides the fact that including a new marker requires technical adaptations, it would require very substantial political support. As mentioned above, creating a new marker would de facto mean creating a new registration ground, which means that the SIS II Regulation would have to be adapted. There is ‘competition’ between issues for which SIS II is being considered for offering a solution, and the Member States typically have different opinions on what particular issue is a priority. Compared to e.g. terrorism related issues, the issue of movement of 1F-excluded individuals between EU Member States is of yet not highly politicised. The group is small and there have not yet been any security related incidents. The inclusion of a 1F-flag in SIS II is only likely if a number of countries would undertake significant lobbying efforts to push the idea forward and if the necessary changes in the SIS II regulation can take place in the slipstream of other suggested changes to the system.
- Schengen Member States themselves will have to pay for the necessary technical adaptations to their national systems to create a 1F-flag. Past experiences prove that this can be a complicating factor. Recently, a set of changes was adopted by the European Commission in order to improve the effectiveness of SIS II for counter-terrorism purposes, also in relation to the monitoring of ‘foreign fighters’.³⁰³ Some Schengen member states opposed some of the proposed changes, because they did not see the added value to all users and foresaw practical problems.³⁰⁴ While the adaptations in relation to the ‘foreign fighters’ were finally accepted, respondents indicated that some Schengen Member States take much more time than others to implement the necessary changes.³⁰⁵ This may be because they either lack the financial means or have other priorities.
- Being alerted in SIS II by means of a 1F-marker may have seriously inconvenient consequences for the individual concerned and may be considered to be a too drastic measure. It is questionable whether all countries would agree that this is justified with respect to all excluded individuals.
- If the 1F-marker is disconnected from the Article 24 alert and from the entry ban and the sole purpose is exchanging information on 1F exclusion, this deviates from the original purpose of the SIS, namely refusing entry to the Schengen territory. This would amount to function creep.

5.3.2. Close bilateral or multilateral arrangements

The previous paragraph showed that making use of the existing Article 24 alert in SIS II requires quite some ‘legal flexibility’, while the added value may in the end be rather limited. Tailoring SIS II furthermore requires substantial political and financial commitment of a large number of European countries. Rather than using or tailoring existing information systems, another option to enhance the exchange of information could be to have countries close bilateral or multilateral arrangements on information exchange on 1F exclusion between immigration authorities. This could for instance take the form of the

³⁰³ Commission Implementing Decision (EU) 2015/219 of 29 January 2015.

³⁰⁴ R35, R58, R59.

³⁰⁵ R34, R35.

Memorandum of Understanding that was agreed between the members of the Five Country Conference as discussed in Chapter 4.³⁰⁶ This approach too, has its strengths and weaknesses.

Strengths:

- Once an arrangement has been agreed upon in the form of an MoU, there is a clear legal basis to share information on 1F exclusion, within the boundaries of national legislation, privacy and confidentiality legislation. An MoU can include very clear arrangements on what kind of information could be shared, with whom, and under what conditions.
- Bi- or multilateral arrangements facilitate personal communications and building trust between the actors involved. As was noted in Chapter 4, many respondents consider the existence of trust to be very important before they are willing to share information.

Weaknesses:

- This option is not inclusive of all European countries. Bi- and multilateral arrangements only allow like-minded countries to cooperate. The FCC members, for example, generally have a similar mind-set with respect to refugee exclusion, both from a security and an immigration perspective.³⁰⁷
- Respondents indicated that such a model would only work if the interpretation and application of Article 1F in the countries taking part is similar. When there are significant differences in exclusion policies, decision makers may be less inclined to exchange information because the information they receive will be less valuable for their own decision making processes.
- Respondents familiar with the FCC MoU indicate that requests made by other FCC members can still be labour and resource intensive to process.
- An MoU itself does not create an infrastructure to enable or to facilitate the exchange of information. In particular if several countries participate, this information is ideally exchanged by means of an online stand-alone database. This would require considerable investments and could be regarded to be an unwelcome addition to the already substantial number of existing information systems.
- To ensure the commitment of all involved parties, respondents indicated that there would have to be a means of enforcement that information is actually shared.³⁰⁸
- Although a similar attitude and mind-set towards 1F exclusion expedites negotiation processes, it would still take time, energy and determination to negotiate Memoranda of Understanding.³⁰⁹

³⁰⁶ It must be noted that the FCC MoU is limited to certain crimes that fall under Article 1F(a): war crimes, genocide and crimes against humanity. This means that a memorandum in the same form would only be useful if most 1F cases concern 1F(a). As noted in Chapter 3, in e.g. Norway and Denmark, the number of cases excluded under 1F(a) is very limited.

³⁰⁷ R15.

³⁰⁸ R15, R23.

³⁰⁹ R15, R23.

5.3.3. Distribute lists of 1F-excluded individuals

A final option which is also inspired by the field of law enforcement cooperation would be to set up a system of informal or formal ad hoc exchange, as discussed in Chapter 4. To find out if this would be conceivable, respondents were asked to reflect on the idea to e.g. exchange lists of names of all excluded individuals with other actors. In response to this hypothetical example, the respondents could see the benefits of such a model, but also foresaw considerable difficulties.

Strengths:

- This option is flexible. All sorts of information can at all times be shared.
- The option is relatively easy to implement. The countries included in this study have a good overview of their exclusion cases and could produce a list of the names of the individuals excluded in a designated period without having to spend much time and energy.

Weaknesses:

- Theoretically, this option is inclusive of all European countries. In practice, most likely only countries which actively exclude will be interested.
- The technical setup to process a list is currently lacking. If a list is occasionally shared, information is likely to get lost if there is no link to an administrative system.³¹⁰ In countries where immigration services are not centralised but spread out over the country, this is particularly problematic. Respondents warned that without a link to an existing system, one might end up with lists that no one uses in the end.³¹¹
- Questions arise how often and what type of information is to be shared. If this is done only once a year, the added value may be limited. Is ‘real time’ sharing – immediately after exclusion – feasible?
- Migrants may change their identity when they travel through Europe.
- Not all European countries will be equally able to produce names of their excluded individuals. It requires coordination to collect accurate data.
- Legally, it may either not be possible to exchange personal information without a specific need, or because it is not allowed to exchange large datasets.³¹² In many jurisdictions, the only way in which this would work would still be to close specific MoU’s.³¹³
- Respondents indicated that it also does not feel comfortable to exchange a list of names without any specific need.³¹⁴ This may especially be the case if it is unclear with whom the information is shared.³¹⁵

³¹⁰ R3, R10, R11.

³¹¹ R12, R13.

³¹² R3.

³¹³ R10, R11, R23, R37.

³¹⁴ R3.

³¹⁵ R17, R18.

5.4. Promote international cooperation and information exchange by creating a 'European Exclusion Network'

In terms of privacy, efficiency and practical use, all of the options discussed above have their strengths and weaknesses. It seems safe to assume that enhancing information exchange on 1F exclusion is on the short run not a self-evident priority for many states. Those states already willing to take steps in promoting information exchange could consider another option: to create a network of focal points for matters relating to 1F exclusion, modelled on the Genocide Network that exists for law enforcement cooperation in relation to universal jurisdiction prosecutions. In its recent Strategy paper, the Genocide Network has endorsed this suggestion.³¹⁶ Such a network of focal points could exist either in addition to, or apart from, formal arrangements in the form of MoU's. The feasibility of such a network has already been explored in a 2014 study by Human Rights Watch.³¹⁷ According to the report, the establishment of such a network could either be based on a framework decision by the EU Council, or could be created under the auspices of the European Asylum Support Office (EASO) or the Intergovernmental Consultations on Migration, Asylum, and Refugees (IGC).³¹⁸ The report notes that like the EU Genocide Network, an immigration network with a special focus on international crimes, *"could organise regular meetings to discuss topics of relevance, including best practices for screening individual asylum seekers and gathering relevant information on countries of origin. Meetings would allow practitioners to share their experiences, develop common tools for use in these cases, and provide a forum for the exchange of information on specific cases"*.³¹⁹ One respondent in the current study indicated that the Dutch government has been trying to obtain support for setting up a focal point on international crimes for immigration authorities.³²⁰ It is unclear how broadly and to what extent this initiative is currently supported.

Strengths:

- A network could increase and improve informal contact between European immigration authorities. As mentioned above, 'knowing your counterparts' is for many practitioners a precondition for even considering exchanging information.
- This modality would not only facilitate the exchange of names of 1F-excluded individuals, but moreover also promote the exchange of best practices. On the long run, consistency in approaches towards applying Article 1F is key to finding an efficient and more structured mode of information exchange.
- Such a network would put exclusion more firmly on the political agenda. This may on a longer run create leverage to take steps that would need considerable political support such as e.g. bringing consistency in 1F exclusion policies or making changes in SIS II.

³¹⁶ Eurojust (2014: 38).

³¹⁷ Human Rights Watch (2014: 91).

³¹⁸ The report also notes that it has been suggested to include immigration officials in the Genocide Network, but some practitioners believed that it would be better to create a separate network and to e.g. establish periodic meetings between the two networks.

³¹⁹ Human Rights Watch (2014: 91).

³²⁰ R25.

Weaknesses:

- Theoretically, this option is inclusive of all European countries. In practice, most likely only countries that actively apply Article 1F will be interested.
- A network offers a forum, but does in itself not offer an infrastructure, nor a legal basis for exchanging information. As was discussed in Chapter 4, members of the Genocide Network at times experienced difficulties in formalising information that had informally been received from counterparts abroad. Without a clear legal basis to exchange information, immigration authorities most likely experience similar difficulties. Actual information exchange can only take place on the basis of bilateral or multilateral arrangements, as discussed in 5.3.2.
- Countries that do not have a specialised unit, or specialised case officers or coordinators for exclusion cases, may have trouble finding an efficient and effective way of communicating input from the network to relevant actors within the organisation.
- An important question is who should initiate the network. If a network would indeed require an EU Council framework decision, there has to be broad political support, which could pose an obstacle as was noted in paragraph 5.1. The study by Human Rights Watch suggested that a network could perhaps be established under the auspices of EASO or IGC. Other options for consideration are EC's Asylum Unit or the European Migration Network. All have their pros and cons:
 - EASO's mission is to promote cooperation between EU member states in order to contribute to the development of a Common European Asylum System.³²¹ A representative from EASO indicated that EASO does not have a mandate to support the exchange of operational information.³²²
 - The IGC is an informal, non-decision making forum for intergovernmental information exchange and policy debate on issues of relevance to the management of international migratory flows. The IGC brings together sixteen participating states (twelve European countries, the United States, Canada, New Zealand and Australia) and the United Nations High Commissioner for Refugees, the International Organization for Migration and the European Commission.³²³ With these many different actors it may not be easy to find common ground on how to organise and host a network. Besides, not all EU member states participate.
 - EC's Asylum Unit according to an EC representative cannot cover the issue, since it falls outside the scope of the asylum acquis what happens to asylum applicants after they are excluded from international protection and therefore outside of the mandate of the Asylum Unit.³²⁴

³²¹ EASO website; see <<https://easo.europa.eu/about-us/what-is-easo/>>.

³²² R61.

³²³ "The IGC is an informal, non-decision making forum for intergovernmental information exchange and policy debate on issues of relevance to the management of international migratory flows. The IGC brings together 16 Participating States, the United Nations High Commissioner for Refugees, the International Organization for Migration and the European Commission." See <<http://www.igc.ch/>>.

³²⁴ R64.

- The European Migration Network is mainly aimed at knowledge sharing between Member States' authorities and institutions on all kinds of issues related to migration and asylum, with a view to supporting policymaking.³²⁵ Exchanging information on individual cases is not part of that.

5.5. Conclusion

This chapter discussed whether respondents from the six focus countries see added value in enhancing the international exchange of information, and if so, what type of information should be exchanged and which actors should have access to such information. Taking into account that there is a selection bias because all six focus countries were selected for the reason that they have a policy of relatively actively applying Article 1F, it can be concluded that the majority of respondents representing immigration authorities, law enforcement and NGOs favour enhanced information exchange. They argue that it could promote better informed decision making by immigration authorities, might help in identifying security risks and could be beneficial for prosecuting perpetrators of international crimes.

A more limited number of respondents questioned the need to enhance information exchange. They argued that it is important to balance the scale and nature of problems stemming from a current lack of information exchange against the 'costs' of implementing changes or developing a system that would enhance information exchange. How many excluded individuals cross European borders? What can immigration authorities and prosecutors actually do with any information they receive? Do the excluded individuals pose a threat to society and is it realistic that they ever get prosecuted? Such issues, it was argued, have to be balanced against the question how complex and expensive it is to create a system of information exchange.

With regard to the feasibility of enhancing the exchange of information on 1F exclusion, the chapter subsequently discussed four issues that need to be taken into account in exploring how the information exchange could be enhanced. Firstly, it has to be acknowledged that currently a consistent European approach to Article 1F is lacking. This affects any system of information exchange that may be developed. Would more exchange of information on 1F exclusion e.g. lead to reassessments of 1F decisions and consequently possibly even a decrease in mutual trust? Secondly, it has to be acknowledged that information stemming from asylum procedures in principle needs to be treated confidentially and, thirdly, that the limits posed by the purpose limitation principle should be taken into account. This may mean that international information exchange is only feasible if national legislation is adapted. Finally, with respect to the question who should have access to what type of information, a balance has to be struck between considerations on efficiency and user friendliness on the one hand, and the privacy of the individuals concerned on the other hand.

The chapter concluded by exploring four ways in which the exchange of information could be enhanced: using or tailoring existing common European information systems; having countries close bilateral or multilateral arrangements on information exchange on 1F exclusion between immigration authorities; creating a network of focal points for matters relating to 1F exclusion; or setting up a system of informal or formal ad hoc exchange, e.g. in the form of a list with names of excluded individuals. In terms of efficiency and practical use all have their strengths and weaknesses.

³²⁵ Council Decision 2008/381/EC of 14 May 2008.

6. Conclusion and recommendations

This study discussed information exchange on persons excluded from refugee status in accordance with Article 1F of the Refugee Convention. The study's objective was twofold: firstly, to obtain a comprehensive and up-to-date understanding of how European states handle the exchange of information on 1F-excluded individuals; secondly, to contribute to the possible development of a system that can provide an overview of foreign nationals residing outside the European state where they have been excluded and to facilitate better cooperation between European states on exclusion matters. The three central questions in this study were:

- 1) What exchange of information on the application of 1F exclusion currently takes place?
- 2) Is it desirable to enhance international information exchange on 1F-excluded individuals?
- 3) Is it feasible to enhance international information exchange on 1F-excluded individuals?

A variety of research methods has been used to answer these questions, ranging from an analysis of literature, relevant rules and regulations and policy documents, to a survey distributed via the European Migration Network (EMN). Considering the sensitive nature of the topic, interviews with relevant stakeholders in six focus countries (Belgium, Denmark, Norway, Sweden, the Netherlands and the United Kingdom) turned out to be the most fruitful way of obtaining the necessary information.

In response to the first question it can be concluded that information exchange on a national level is generally well organised. While approaches in the six focus countries differ, all departments within the immigration authorities have access to information about 1F exclusion cases. Systems are in place and used to share information with security services and specialised investigative and prosecutorial bodies.

Internationally, the information exchange about 1F exclusion is much more limited. Immigration authorities hardly ever share information about 1F-excluded individuals with foreign law enforcement actors. Information exchange with foreign counterparts is also very unusual. 'Like-minded' countries to a very limited extent exchange information on an ad-hoc basis by means of bilateral or multilateral arrangements. Existing information systems such as Eurodac and SIS II are neither used, nor suited to include information on 1F exclusion. Eurodac can only be accessed by asylum departments and is primarily used to establish whether an asylum claim has already been processed in another EU country. It does not contain any information on 1F exclusion. SIS II can be accessed by all departments of immigration authorities as well as law enforcement agencies and is primarily used to check whether immigrants have an entry ban. 1F-excluded individuals can be 'alerted' in the system if states consider them to be a threat to public policy, public security or national security, or if they have received a return decision (Article 24 SIS II Regulation). Few states alert 1F-excluded individuals as a matter of standard practice and alerts as such do not reveal *that*, let alone *why*, an individual was previously excluded.

Compared to the immigration authorities, law enforcement and prosecution services have a more established practice of exchanging information. In universal jurisdiction cases, which often concern 1F-excluded individuals, trusted and like-minded countries share relevant information about possible

witnesses and suspects, either proactively or upon request. A European network of contact points has been established, which allows for information exchange on an informal basis. Formal information exchange takes place through mutual legal assistance.

The remainder of the study focused on the question whether enhanced international information exchange between immigration authorities is desirable and feasible. The majority of respondents favour enhanced information exchange, arguing it could promote better informed decision making by immigration authorities, might help in identifying individuals who may pose a security risk and could be beneficial for prosecuting perpetrators of international crimes. A limited number of respondents questioned the need to enhance information exchange, arguing that it is important to balance the scale and nature of problems stemming from a current lack of information exchange against the 'costs' of implementing changes or developing a system that would enhance information exchange. Before tailoring or setting up systems to enhance information exchange, in their view it should be assessed what immigration authorities and prosecutors actually can do with any information they receive, how many excluded individuals cross European borders, to what extent they pose a threat to society and whether it is realistic that they ever get prosecuted.

In response to the question whether it is feasible to enhance the exchange of information between immigration authorities, the study identified four issues that need to be taken into account. Firstly, it has to be acknowledged that a consistent European approach to Article 1F is currently lacking. This affects any system of information exchange that may be developed. Would more exchange of information on 1F exclusion lead to reassessments of 1F decisions? If so, how would that affect mutual trust? Secondly, it has to be acknowledged that information stemming from asylum procedures in principle needs to be treated confidentially and, thirdly, that the limits posed by the purpose limitation principle should be taken into account. In some countries national legislation may have to be adapted. Finally, questions arise as to what type of information should be shared (only a name, or the entire immigration files), when information should be shared and with what number and type of actors.

The study concluded by identifying three possible ways in which the exchange of information on 1F exclusion could be enhanced: using or tailoring existing common European information systems such as Eurodac and SIS II; having states close bilateral or multilateral arrangements on information exchange on 1F exclusion between immigration authorities; or distributing lists with information about 1F-excluded individuals. In terms of privacy, efficiency and practical use all have their strengths and weaknesses. Most have in common that considerable political support is needed to make them happen.

It seems safe to assume that enhancing information exchange on 1F exclusion is on the short run not a self-evident priority for many states. Where most respondents wish to enhance information exchange on 1F exclusion, the scale and nature of the problems caused by the current lack of information sharing are difficult to assess. For this reason it is arguably challenging to garner wide support for the adaptation of existing systems or the creation of a new system that allows for more information exchange. The urgency of finding an all-inclusive solution is further undermined by the lack of a consistent approach to, and different prioritisation of, 1F exclusion in Europe. At the same time, as the scale and nature of the refugee

influx has been changing, attention for 1F exclusion seems to be growing and the number of exclusions may in the near future be on the rise. This may lead to an increased realisation that 1F-excluded individuals 'roam around in Europe', and reinforce the wish to enhance information exchange and cooperation. Side effects of the increasing pressure on the asylum system, such as the undermining of the Dublin-system by some states, may give further impetus in this direction. The unfolding European migration crisis could create momentum to bring about changes.

Those states already willing to take steps in promoting information exchange could consider creating a European Exclusion Network. As it is, information on 1F exclusion is not often shared because authorities are uncertain whether or not they are actually allowed to share such information and unfamiliar with their counterparts in other countries, which means they do not know where to find them and whether or not they can trust them with this often sensitive information. A European Exclusion Network could bring about changes in this regard. Except for the question which institution or organisation should host or facilitate such a network, there seem to be no major objections against creating such a network. In particular when initiated by a limited number of like-minded states, setting up a network would not require very substantial investments. Even if it would in first instance merely be used to exchange generic analytical information or provide a platform to informally exchange operational information, this could already be beneficial to immigration authorities. As participants get more acquainted and come to increasingly trust each other, steps can be taken to develop Memoranda of Understanding which would enable formal exchange of information about individuals.

An exclusion network, however, will also have to overcome challenges. If information on 1F exclusion would be available to more states, the question remains what these states want to and can do with that information. Experiences from the cooperation in the context of the Five Countries Conference (consisting of the UK, Canada, USA, Australia and New Zealand) suggest that such an arrangement can only be closed if the interpretation and application of Article 1F in the states taking part is similar. As discussed in Chapter 3, European states currently take rather different approaches. And although a similar attitude and mind-set towards 1F exclusion expedites negotiation processes, it would still take time, energy and determination to negotiate an MoU. Another important caveat of both a European Exclusion Network and MoU's is that these options do not entail an infrastructural solution for exchanging or storing information. States may be in a position to proactively inform another state that an excluded individual is heading its way, but situations in which states have such information are not likely to occur very often. Immigration authorities are arguably more interested in having access to an information system which enables them to identify whether or not an applicant has previously been excluded in another country or not. And this brings us back to the shortcomings of currently existing data-sharing systems with respect to including information on 1F exclusion. Using existing modalities available through SIS II is probably the most suitable option, but as discussed in Chapter 5, fundamental questions arise. 1F-excluded individuals could be alerted in the system if countries follow the example of the Netherlands or Denmark and give an entry ban to all 1F-excluded individuals. If a SIS alert is based on 24(2), countries have to determine that excluded individuals by definition pose a threat to public policy, public security or national security. Whether all 1F-excluded individuals actually pose such a threat is up for discussion. Another option is to alert 1F-excluded individuals on the basis of Article 24(3), which

requires countries to issue a return decision. Yet, giving an individual an entry ban and signalling him or her in SIS II means no (temporary) residence permit can be granted at the same time. States would have to 'trade off' granting temporary residence permits for 1F-excluded individuals to giving an entry ban.

As a final point for consideration, it has to be acknowledged that many 1F-excluded individuals who cross European borders reside in a situation of 'legal limbo'. They are not allowed to stay, but cannot be deported. As of yet, no European state offers an all-encompassing solution to this limbo situation. Although enhanced international information exchange between immigration authorities could lead to the identification of more 1F-excluded individuals who cross European borders, that in itself would not solve the fundamental problem of how European countries, and Europe as such, deal with non-returnable 1F-excluded individuals. In addition to discussing possible modes of information exchange, an exclusion network could also be useful in shaping a consistent post-exclusion policy.

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UK

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- *R v McGeough*, Court of Appeal in Northern Ireland, judgment of 7 May 2013, [2013] NICA 22, MOR8859.

Annexes

Annex 1. List of respondents and affiliations

#	Affiliation	Based in	Interview
R1	Intergovernmental Organisation (IGO)	Netherlands	In person
R2	Police	Netherlands	In person
R3	Immigration authority	Norway	In person
R4	Immigration authority	Netherlands	In person
R5	Ministry of Security and Justice	Netherlands	In person
R6	Immigration authority	Netherlands	In person
R7	Ministry of Security and Justice	Netherlands	In person
R8	Prosecution service	Norway	In person
R9	Police	Norway	In person
R10	Immigration authority	Norway	In person
R11	Immigration authority	Norway	In person
R12	Police	Norway	In person
R13	Police	Norway	In person
R14	Immigration authority	Norway	In person
R15	Home Office	United Kingdom	In person
R16	Home Office	United Kingdom	By phone
R17	Police	United Kingdom	In person
R18	Police	United Kingdom	In person
R19	University	United Kingdom	In person
R20	Home Office	United Kingdom	By phone
R21	Home Office	United Kingdom	By phone
R22	Home Office	United Kingdom	By phone
R23	Home Office	United Kingdom	By phone
R24	Home Office	United Kingdom	In person
R25	Nongovernmental Organisation (NGO)	Switzerland	In person
R26	Prosecution service	Denmark	In person
R27	Police	Denmark	In person
R28	Immigration authority	Denmark	In person
R29	Immigration authority	Denmark	In person
R30	Immigration authority	Denmark	In person
R31	Immigration authority	Denmark	In person
R32	Ministry of Immigration, Integration and Housing	Denmark	In person
R33	Ministry of Immigration, Integration and Housing	Denmark	In person
R34	Police	Denmark	In person
R35	Police	Denmark	In person
R36	Ministry of Justice	Norway	In person
R37	Police academy	Norway	In person

R38	University	Netherlands	In person
R39	Immigration authority	Norway	By phone
R40	University	Netherlands	In person
R41	NGO	Switzerland	By phone
R42	Police	Belgium	In person
R43	Police	Belgium	In person
R44	Ministry of Justice	Canada	By phone
R45	Police	Norway	In writing
R46	Immigration authority	Sweden	In person
R47	Immigration authority	Sweden	In person
R48	Immigration authority	Sweden	In person
R49	Immigration authority	Sweden	In person
R50	Prosecution service	Sweden	In person
R51	Prosecution service	Sweden	In person
R52	Ministry of Security and Justice	Netherlands	In person
R53	Ministry of Security and Justice	Netherlands	In person
R54	Eur. Comm. DG Migration and Home Affairs	Belgium	In person
R55	Prosecution service	Belgium	In person
R56	Police	Belgium	In person
R57	Asylum authority	Belgium	In person
R58	Police	Netherlands	In person
R59	Police	Netherlands	In person
R60	Immigration authority	Netherlands	In person
R61	EASO	Malta	In writing
R62	Immigration authority	Sweden	In writing
R63	eu-LISA	Estonia	In writing
R64	Eur. Comm. DG Migration and Home Affairs	Belgium	In writing

Annex 2. Ad hoc queries European Migration Network

The queries listed below were drafted by the researchers, in consultation with UDI, and distributed via the Norwegian EMN National Contact Point.

Ad hoc query 1

1. If an applicant is excluded from international protection on the basis of Article 1F Refugee Convention and applies for a residence permit on other grounds, for instance in order to be reunited with family members who have obtained citizenship; does the exclusion (pose a) bar (to) granting such a permit?
 - a. Yes
 - i. If “yes”, please elaborate a little on *what legal basis* the exclusion bars granting such a permit?
 - b. No
2. If you have knowledge that an applicant is excluded from international protection on the basis of Article 1F Refugee Convention in another European country and if he applies for a residence permit on *other* grounds in your own country, for instance to be reunited with family members who have obtained citizenship, does the exclusion (pose a) bar (to) granting such a permit?
 - a. Yes
 - i. If “yes”, please elaborate a little on *what legal basis* the exclusion bars granting such a permit?
 - b. No
3. Are applicants who are excluded from international protection on the basis of Article 1F, and who cannot be refouled, granted some form of leave-to-stay, or residence permit in your country?
 - a. Yes
 - i. What is the legal basis for this status?
 - ii. Are any conditions attached to this status or can any conditions be imposed on individuals with this status?
 - iii. Are these individuals allowed to work or receive education?
 - iv. What is the duration of this status?
 - v. Is this status renewable?
 - vi. Can these individuals receive a permanent residence permit after a certain period of time?
 - b. No
 - i. Are there other policy measures that deal with these individuals (individuals in this situation)?

Ad hoc query 2

1. Do you impose an entry ban on applicants who are excluded from international protection on the basis of Article 1F Refugee Convention in your country, as a matter of standard practice?
2. Do you alert the Schengen Information System (SIS) about applicants who are excluded from international protection on the basis of Article 1F Refugee Convention in your country, as a matter of standard practice?

3. Can you think of any concrete cases/examples/applicant profiles, where it would be useful if information were available to you about an individual who has been excluded in another European country?
 - a. Yes
 - i. Please briefly explain.
 - b. No
4. Who is the contact point within the immigration authority in your country in relation to Article 1F exclusion cases? Please provide contact details. (these will not be made public, nor published in the research report)