

The concept of vulnerability in European asylum procedures



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The information contained in this report is up-to-date as 31 August 2017, unless otherwise stated.

THE ASYLUM INFORMATION DATABASE (AIDA)

The [Asylum Information Database](#) is a database containing information on asylum procedures, reception conditions, detention and content of international protection across 20 European countries. This includes 17 European Union (EU) Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Spain, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Sweden, United Kingdom) and 3 non-EU countries (Switzerland, Serbia, Turkey).

The overall goal of the database is to contribute to the improvement of asylum policies and practices in Europe and the situation of asylum seekers by providing all relevant actors with appropriate tools and information to support their advocacy and litigation efforts, both at the national and European level. These objectives are carried out by AIDA through the following activities:

❖ **Country reports**

AIDA contains [national reports](#) documenting asylum procedures, reception conditions, detention and content of international protection in 20 countries.

❖ **Comparative reports**

Comparative reports provide a thorough comparative analysis of practice relating to the implementation of asylum standards across the countries covered by the database, in addition to an overview of statistical asylum trends and a discussion of key developments in asylum and migration policies in Europe. Annual reports were published in [2013](#), [2014](#) and [2015](#). This year, AIDA comparative reports are published in the form of thematic updates, focusing on the individual themes covered by the database. Thematic reports have been published on [reception](#) (March 2016), [asylum procedures](#) (September 2016) and [content of protection](#) (March 2017).

❖ **Comparator**

The [Comparator](#) allows users to compare legal frameworks and practice between the countries covered by the database in relation to the core themes covered: asylum procedure, reception, detention, and content of protection. The different sections of the Comparator define key concepts of the EU asylum *acquis* and outline their implementation in practice.

❖ **Fact-finding visits**

AIDA includes the development of fact-finding visits to further investigate important protection gaps established through the country reports, and a methodological framework for such missions. Fact-finding visits have been conducted in [Greece](#), [Hungary](#), [Austria](#) and [Croatia](#).

❖ **Legal briefings**

Legal briefings aim to bridge AIDA research with evidence-based legal reasoning and advocacy. [Briefings](#) have been published so far, covering legality of detention of asylum seekers under the Dublin Regulation; key problems in the collection and provision of asylum statistics in the EU, the concept of "safe country of origin"; the way the examination of asylum claims in detention impacts on procedural rights; age assessment of unaccompanied children; duration and review of international protection; length of asylum procedures; travel documents; accelerated procedures; and detention expansion. In addition, statistical updates on the Dublin system have been published for 2016 and the first half of 2017.

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Glossary

Acquis	Accumulated legislation and jurisprudence constituting the body of European Union law.
(recast) Asylum Procedures Directive	Directive 2013/32/EU on common procedures for granting and withdrawing international protection.
Asylum Procedures Regulation	European Commission proposal for a Regulation establishing a common procedure for international protection in the European Union, tabled on 13 July 2016.
Asylum seeker(s) or applicant(s)	Person(s) seeking international protection, whether recognition as a refugee, subsidiary protection beneficiary or other protection status on humanitarian grounds.
Dublin system	System establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application, set out in Regulation (EU) No 604/2013 .
(recast) Reception Conditions Directive	Directive 2013/33/EU laying down standards for the reception of asylum seekers.
Need of special procedural guarantees	As defined in Recital 29 Directive 2013/32/EU , this may be due to age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence
Need of special reception guarantees	As defined in Article 2(k) Directive 2013/33/EU : a vulnerable person who is in need of special guarantees in order to benefit from the rights and comply with the obligations in the reception context
Vulnerable person	As defined in Article 21 Directive 2013/33/EU , includes minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation

List of abbreviations

AIDA	Asylum Information Database
ADCS	Association of Directors of Children's Services (United Kingdom)
ASGI	Association for Legal Studies on Immigration Associazione per gli Studi Giuridici sull'Immigrazione (Italy)
AWAS	Agency for the Welfare of Asylum Seekers (Malta)
BAMF	Federal Office for Migration and Refugees Bundesamt für Migration und Flüchtlinge (Germany)
BFA	Federal Agency for Immigration and Asylum Bundesamt für Fremdwesen und Asyl (Austria)
CAS	Temporary reception centre Centro di accoglienza straordinaria (Italy)
CAT	United Nations Committee Against Torture
CEAR	Spanish Commission of Aid to Refugees Comisión Española de Ayuda al Refugiado
CEAS	Common European Asylum System
Ceseda	Code on the entry and residence of foreigners and the right to asylum Code de l'entrée et du séjour des étrangers et du droit d'asile (France)
CGRS	Commissioner-General for Refugees and Stateless Persons Commissaire général aux réfugiés et aux apatrides Commissariaat-generaal voor de vluchtelingen en de staatlozen (Belgium)
CJEU	Court of Justice of the European Union
CPR	Portuguese Refugee Council Conselho Português para os Refugiados (Portugal)
CRC	United Nations Committee on the Rights of the Child
EASO	European Asylum Support Office
EAST	Initial reception centre Erstaufnahmestelle (Austria)
ECCHR	European Centre for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EDAL	European Database of Asylum Law
ELENA	European Legal Network on Asylum
EPIM	European Programme for Integration and Migration
EU	European Union
Eurostat	European Commission Directorate-General for Statistics
EXCOM	United Nations High Commissioner for Refugees Executive Committee
FARR	Swedish Network of Refugee Support Groups Flyktinggruppernas Riksråd (Sweden)
FGM	Female genital mutilation
FMMU	Forensisch Medische Maatschappij Utrecht (Netherlands)
HIAS	Hebrew Immigrant Aid Society
IPSN	EASO quality tool on Identification of Persons with Special Needs

IRC	Initial Reception Centre (Malta)
IND	Immigration and Naturalisation Service Immigratie- en Naturalisatiedienst (Netherlands)
JRS	Jesuit Refugee Service
KEELPNO	Centre of Disease Control and Prevention Κέντρο Ελέγχου και Πρόληψης Νοσημάτων (Greece)
KSMM	Coordination Unit against Trafficking and Smuggling of Migrants Koordinationsstelle gegen Menschenhandel und Menschenschmugge (Switzerland)
NGO(s)	Non-governmental organisation(s)
OAR	Office of Asylum and Refuge (Spain)
OFPRA	French Office for the Protection of Refugees and Stateless Persons Office français de protection des réfugiés et apatrides (France)
OFII	French Office for Immigration and Integration Office français d'immigration et d'intégration (France)
PTSD	Post-traumatic stress disorder
RAO	Regional Asylum Office (Greece)
RIS	Reception and Identification Service (Greece)
RMV	Board of Forensic Medicine Rättsmedicinalverket (Sweden)
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum (Council configuration)
SEM	State Secretariat for Migration (Switzerland)
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

Introduction

This report discusses the concept of vulnerability and the complexities underlying its use in asylum procedures in Europe. Vulnerability bears different meanings and dimensions in asylum systems. It points to a *definition*, whether describing the precarious and sensitive position of all people seeking protection, not least due to their legal status, or demarcating specific classes of individuals who face distinct needs due to their particular physical, mental or social circumstances. Beyond being a concept, vulnerability can be a tool for categorisation of the asylum-seeking population, which may create ground for procedural fragmentation at European Union (EU) and national level.

Addressing the predicament of vulnerable groups seeking protection in the asylum procedure presupposes an understanding of who they are and what they need. Vulnerability therefore connotes a *process* of identification and assessment, where the state apparatus comes into contact with the individual asylum seeker. Such a process requires adequate systems, drawing on the capacities and skills of different official and non-governmental actors involved in the asylum procedure to ensure that vulnerabilities are recognised in a timely and effective manner. European countries offer a wide variety of approaches to that end, ranging from formal identification mechanisms to informal arrangements with civil society actors, to medical methods for identifying certain vulnerable groups.

Once identified as vulnerable, applicants enjoy specific rights and safeguards in the asylum process under EU law. Vulnerability should therefore trigger additional or tailored *support* to ensure that people have the necessary conditions to bring forward a claim for protection. Against the backdrop of a multi-track Common European Asylum System (CEAS),¹ which foresees different administrative arrangements depending on the location or the presumed merits of an asylum application, vulnerable asylum seekers may benefit from more protective procedures and be safeguarded from truncated ones.

The effective implementation of special obligations owed to vulnerable asylum seekers remains one of the most challenging aspects of the CEAS and a central feature of the ongoing reform of the EU asylum *acquis* following the legislative proposals presented by the European Commission in 2016. The analysis of legislative frameworks and practice of European countries covered by the Asylum Information Database (AIDA) provides a useful basis for a better understanding of disparities, good practices and gaps in the way states have translated vulnerability into a concept and process.

This report draws on desk research, primarily based on AIDA Country Reports, as well as on information and statistical data obtained by civil society organisations from national authorities. Given the range of state actors involved in the identification and support of vulnerable groups in the asylum process, national authorities approached for the purpose of this research include determining authorities taking decisions on asylum applications, as well as other authorities responsible for receiving applications, Dublin Units and border authorities. Information was also provided by the European Asylum Support Office (EASO) on its specific activities relating to vulnerable groups.

The report is structured in three chapters:

- **Chapter I** discusses vulnerability as a legal concept and its implications on the categorisation of asylum seekers, as well as the definitions of “vulnerable” applicant, “applicant with special reception needs” and “applicant in need of special procedural guarantees” set out by EU law and diversely codified in national legislation;

¹ For further discussion on this point, see AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: <http://bit.ly/2plAyqS>.

- **Chapter II** provides an overview of national practice concerning mechanisms for identification of vulnerable asylum seekers, institutional and training arrangements in asylum administrations to ensure that the needs of such applicants are met, and the role of EASO in vulnerability assessments. This Chapter includes a focus on age assessment of unaccompanied children as a specific form of identification;
- **Chapter III** examines the procedural effects of vulnerability identification in the law and practice of European countries, particularly as regards the prioritisation of asylum claims by vulnerable persons, their exemption from accelerated and border procedures, as well as the adaptation of the Dublin procedure to their specific situation and needs.

A final part draws conclusions and puts forward recommendations to European countries and EU institutions for the establishment of efficient systems for the identification and support of vulnerable asylum seekers.

Asylum seekers' (degree of) vulnerability and special needs have become a prominent distinguishing feature in the asylum process in Europe in recent years. Acknowledging that some asylum seekers are more vulnerable than others due to their individual characteristics or circumstances, and therefore require special attention, this categorisation has translated into special procedural safeguards and reception guarantees corresponding to their needs. EU asylum legislation in particular has incorporated an open-ended definition of vulnerable persons and linked it to a legal obligation on EU Member States to establish specific mechanisms to identify them in the asylum process. At the same time, European jurisprudence has recognised asylum seekers as a vulnerable category *per se* under the European Convention on Human Rights (ECHR).

This chapter first briefly discusses the way in which the concept of vulnerability in the field of asylum is entrenched in the case-law of the European Court of Human Rights (ECtHR) and in the EU legal framework. Strasbourg case-law has triggered debates on the actual meaning and implications of the Court's acknowledgement of asylum seekers' intrinsic vulnerability, as well as concerns relating to the inherent risk of the vulnerability concept fuelling stereotypical notions of asylum seekers as individuals lacking agency and being completely dependent on the welfare state. A second section analyses the definitions used in EU asylum legislation and how they have been translated into the national legal frameworks of AIDA countries and provides the theoretical backbone for the analysis of the practical implementation of those concepts in [Chapter II](#) and [Chapter III](#).

1. Concepts and theoretical framework

While the legal concepts of vulnerability and special needs of applicants for international protection have been mainly developed and refined in the EU asylum *acquis*, discussed in [Section 2](#), the categorisation of specific groups as vulnerable is not a phenomenon exclusive to EU law. Various human rights treaties acknowledge the special legal position of certain groups requiring specific measures to safeguard their rights.

In this respect, the United Nations Convention on the Rights of the Child is a notable example, as it recognises in its Preamble that:

“[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” and establishes the entitlement of a child temporarily deprived from his or her family environment to “special protection and assistance provided by the State.”²

In the same vein, the UN Convention on the Rights of Persons with Disabilities, for instance, recognises that girls and women with disabilities are at greater risk of violence, abuse or exploitation.³

While an analysis of vulnerability as a notion under international human rights law is beyond the scope of this report, it is important to highlight that the particular vulnerability of certain groups within the asylum context is acknowledged in international human rights instruments, inciting states to adopt the necessary measures to address their special needs. For instance, the need for special procedural safeguards for unaccompanied children in asylum procedures is emphasised in guidance from the Committee on the Rights of the Child (CRC), which calls for the appropriate measures under Article

² Article 20(1) United Nations Convention on the Rights of the Child.

³ UN Convention on the Rights of Persons with Disabilities, 6 December 2006.

22(1) of the Convention “to take into account the special vulnerability of unaccompanied and separated children” as well as for a child-sensitive assessment of their protection needs.⁴

The 1951 Refugee Convention as such does not identify specific groups of refugees as vulnerable or requiring special attention from national authorities. However, numerous Executive Committee (EXCOM) Conclusions of the United Nations High Commissioner for Refugees (UNHCR), as well as UNHCR guidelines, have been dedicated to certain groups distinguishable by sex, age or disability within the refugee population, and acknowledge their specific vulnerability compared to others and the need to take measures to accommodate their special needs.⁵ Moreover, UNHCR resettlement priorities are determined almost entirely on the basis of vulnerability of specific groups within the refugee population, including in protracted refugee situations.

Asylum seekers as a vulnerable group / particularly vulnerable asylum seekers

For a proper understanding of state practice and the adaptability of asylum processes to certain applicants, it is important to distinguish between the vulnerability of certain groups within the population of applicants, on one hand, and the vulnerability of asylum applicants as a group on the other. The latter was proclaimed for the first time by the European Court of Human Rights (ECtHR) in its landmark *M.S.S. v. Belgium and Greece* judgment concerning the transfer of an Afghan asylum seeker under the Dublin system.⁶ In finding a violation of Article 3 ECHR on behalf of Greece for not providing M.S.S. access to decent reception conditions and forcing him into homelessness, the Court departed from previous jurisprudence according to which Article 3 did not entail an obligation to give refugees financial assistance or enable them to maintain a certain standard of living. Given that the obligation to provide accommodation and decent material reception conditions has entered into positive law for EU Member States bound by the Reception Conditions Directive, Article 3 ECHR must be interpreted accordingly.⁷

In developing this argument, the applicant’s status as an asylum seeker was given considerable weight by the Court. It defined asylum seekers as members of “a particularly underprivileged and vulnerable population group in need of special protection” and noted the “existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and activities of UNHCR and the standards set out in the European Reception Directive.”⁸ The Court’s explicit citation of the Refugee Convention acknowledges that this treaty has carved out a privileged legal position for the persons falling within its scope and, through its declaratory nature, also for asylum seekers as presumptive refugees. It also echoes similar references to the need for special assistance or protection of certain categories of individuals in other human rights treaties, such as the abovementioned Convention on the Rights of the Child. Scholars have pointed to the Court’s approach in *M.S.S. v. Belgium and Greece* constituting an extension of its notion of group vulnerability in its jurisprudence relating to other groups such as

⁴ CRC, General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside of their country of origin.

⁵ See for instance UNHCR EXCOM Conclusion No. 105 (LVII) – 2006 stating that while forcibly displaced men and boys also face protection problems, women and girls can be exposed to particular protection problems related to their gender, their cultural and socio-economic position, and their legal status, which mean they may be less likely than men and boys to be able to exercise their rights and therefore that specific action in favour of women and girls may be necessary to ensure they can enjoy protection and assistance on an equal basis with men and boys.

⁶ ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application No 30696/09, Judgment of 21 January 2011.

⁷ This should not be interpreted as setting a different human rights standard for Council of Europe Member States not bound by the Reception Conditions Directive. It has been argued that the Court’s reasoning could also be read as meaning that compliance with the Reception Conditions Directive should be “treated as an aggravating factor that compounded the systemic frustration of MSS’s needs and increased his sense of lack of redress.” See G Clayton, ‘Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*’ (2011) 11:4 Human Rights Law Review 768.

⁸ ECtHR, *M.S.S. v. Belgium and Greece*, para 251.

Roma, people with mental disabilities and people living with HIV. Unlike the aforementioned cases, the particular vulnerability of asylum seekers is more sweepingly proclaimed “as though it were an inherent attribute of an entire class”.⁹

The reference to the intrinsic vulnerability of asylum seekers as a group is repeated in the Court’s conclusion on the violation of Article 3 ECHR as regards the living conditions in Greece considering that the Greek authorities “have not had regard to the applicant’s vulnerability as asylum seeker”.¹⁰ A similar reference is made in the Court’s finding of the applicants’ detention conditions violating Article 3 ECHR where it held that the applicant’s distress resulting from his detention “was accentuated by the vulnerability inherent in his situation as an asylum seeker”. The Court’s qualification of asylum seekers as a particularly underprivileged and vulnerable population group was dissented by Judge Sajo who did not consider “asylum seekers as a group of people who are incapacitated or have lost control over their own fate” nor as a homogeneous group. Contrary to other groups such as Roma, he argued that asylum seekers are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion.¹¹ This means that many asylum seekers may be vulnerable, but this does not amount to a rebuttable presumption vis-à-vis all members of the “class”. In rejecting the majority’s reasoning, Judge Sajo’s furthermore points at its potentially huge financial implications, as in his view it only stops short of establishing an “unconditional positive obligation of the State to provide shelter and other material services to satisfy the needs of the ‘vulnerable’”.¹²

However, as observed by Costello and Hancox, it is important to keep in mind that the Court’s qualification of asylum seekers as inherently vulnerable is rooted in their disadvantaged legal position compared to other groups or nationals.¹³ Their right to remain on the territory of a country is by definition precarious as long as their refugee status is not formally established, while the likely lack of command of the national language of the host state and the lack of any support network further contribute to their predicament. The capacity to participate in the host society is to a large part dependent on state authorisation and in this respect the Court seems to assert in particular the applicant’s vulnerability to the state, rather than vulnerability stemming from a shared characteristic other than flight. As mentioned above, since the *M.S.S. v Belgium and Greece* jurisprudence, the ECtHR has reiterated the reference to asylum seekers as members of a particularly underprivileged and vulnerable population group on a number of occasions.¹⁴ In hindsight, this seems to minimise the importance of the state of the Greek asylum system at the time of *M.S.S. v Belgium and Greece* in the Court’s qualification of asylum seekers as an inherently vulnerable group.

Beyond the categorical qualification of asylum seekers as inherently vulnerable, the ECtHR has confirmed the particular vulnerability of certain categories of asylum seekers, independently from their qualification as such in EU asylum legislation. Under the Court’s case law relating to children, their extreme vulnerability is recognised as a decisive factor taking precedence over any considerations regarding their (lack of) legal status. This is due to their specific needs arising not only from their age and lack of independence but also from their asylum seeker status.¹⁵ Such vulnerability implies a

⁹ L Peroni and A Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11 Int J Con Law 1068. See also I Truscan, ‘Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights’ (2013) 36 *Retfoerd Journal* NR. 3/142, 64-83.

¹⁰ ECtHR, *M.S.S. v. Belgium and Greece*, para 263.

¹¹ *Ibid*, 102.

¹² *Ibid*, 103.

¹³ C Costello and E Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill 2016), 442-443

¹⁴ See for instance ECtHR, *Tarakhel v. Switzerland* [GC], Application No 29217/12, Judgment of 4 November 2014, para 9; *A.S. v. Switzerland*, Application No 39350/13, Judgment of 30 June 2015, para 29.

¹⁵ ECtHR, *Tarakhel v. Switzerland*, para 99.

positive obligation on states to take adequate measures in order to fulfil their obligations under Article 3 ECHR with respect to children.¹⁶

Furthermore, the Court has considered an applicant's sexual orientation to be a factor to be taken into account when assessing the legality of a detention measure. In the case of *O.M. v. Hungary*, the Court found that authorities should exercise particular care and assess whether vulnerable applicants such as lesbian, gay, bisexual or transgender or intersex (LGBTI) persons were safe or not in custody where many of the detainees included persons from countries with widespread cultural or religious prejudice against such persons. Here too, the Court acknowledged the applicant as a member of a particular vulnerable group by virtue of his belonging to a sexual minority in his country of origin.¹⁷

The other side of vulnerability: Risks of stereotyping asylum seekers

The overall assumption of the legal vulnerability of asylum seekers as accepted by the ECtHR, as well as its acknowledgment of the specific vulnerability of certain categories of applicants, is generally considered as contributing to a more protective legal framework for the operation of asylum systems. As a concept enabling applicants for international protection to assert their fundamental rights, it contrasts sharply with other examples of categorising applicants such as the safe country of origin concept, which have been instrumental to undermining access to protection on the continent.¹⁸ However, the concept of vulnerability may also have unintended negative implications for asylum seekers. One such undesirable consequence is the risk of contributing to stereotypical notions of asylum similar to those inspired by safe country concepts, in particular when contrasted with the growing emphasis on branding unsuccessful claimants as abusers of the asylum system in EU asylum law and national practice. While specific safeguards in the asylum procedure and reception structures are certainly needed and welcomed, the legal "vulnerabilisation" of applicants for international protection should not presume – nor be conflated with – a lack of agency of asylum applicants and refugees.¹⁹ On the contrary, their refugee experience itself is testimony to their agency and their ability to adapt when given the opportunity to do so.²⁰

2. Who is vulnerable? Definitions in EU law and domestic legal orders

The abovementioned developments in the ECtHR's jurisprudence relating to vulnerability in the asylum context are only partly reflected in the EU asylum *acquis*. In fact, it is the Court's recognition of the particular vulnerability of certain applicants for international protection rather than the intrinsic vulnerability of asylum seekers as a vulnerable group *per se*, which has been translated into EU and national legislation.

First-generation CEAS instruments

The existence of a specific group of asylum seekers considered to be vulnerable was already acknowledged in the first generation of legislative instruments under the CEAS but was subject to considerable evolution in EU asylum legislation. Far from including a definition of vulnerability in the

¹⁶ ECtHR, *Rahimi v. Greece*, Application No 8687/08, Judgment of 5 April 2011, para 87.

¹⁷ ECtHR, *O.M. v. Hungary*, Application No 9912/15, Judgment of 5 July 2016, para 53.

¹⁸ For a discussion of the stereotyping and stigmatising nature of the safe country of origin concept, see ECRE, "Safe countries of origin": A safe concept?, AIDA Legal Briefing No 3, September 2015, available at: <http://bit.ly/2tKOG1f>.

¹⁹ See also M Mustaniemi-Laakso *et al.*, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, FRAME, May 2016, available at: <http://bit.ly/2sG6dZ3>.

²⁰ For an analysis of the risks inherent in the concept of vulnerability as developed by the ECtHR, see L Peroni and A. Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 Int J Con Law 1068, distinguishing risks of essentialism, stigmatisation and paternalism.

asylum context, the 2003 Reception Conditions Directive only required Member States to take into account the specific situation of vulnerable persons, who were non-exhaustively listed, in national legislation.²¹ Vulnerability was primarily considered from the perspective of the applicant's physical and mental integrity as the scope of Member States' obligation was limited to those provisions of the Directive that concern material reception conditions and health care. Moreover, the personal scope of the obligation to take the special situation of such asylum seekers into account was further limited to those who have been found to have special needs after "an individual evaluation of their situation".²²

In the absence of any definition of special needs and further specification of what such individual evaluation should entail and when it should take place, the "guarantee" provided by Article 17(1) of the Directive remained dead letter in many EU Member States, as became clear from the European Commission's evaluation of the implementation of the first generation asylum instruments. Consequently, the Commission:

"[I]dentified deficiencies in addressing special needs as being the most serious concern in the area of reception of asylum seekers. Identifying special needs not only has a bearing on access to appropriate treatment, but could also affect the quality of the decision-making process in relation to the asylum application, especially with regard to traumatised persons."²³

Beyond this provision, vulnerability was not extensively regulated in the first-generation CEAS instruments, as both the 2005 Asylum Procedures Directive²⁴ and the Dublin II Regulation²⁵ contained no specific provisions on the procedural consequences of an applicant's identification of special needs, with the exception of unaccompanied children.

Second-generation (recast) CEAS instruments

Among the asylum seekers arriving in European countries in recent years, there are higher numbers of torture or extreme torture survivors, while there has been a sharp increase in the number of unaccompanied asylum seeking children across Europe.²⁶ At the same time, due to increasing legal and practical barriers to accessing the continent, travel modes to Europe have shifted to hazardous sea crossings and other high-risk routes which expose people to exploitation and human rights abuses. As a result, in many cases the journey to safety itself is traumatising and adds to the atrocities refugees have experienced in their country of origin.

The need for asylum systems to further adapt to these challenges was recognised by the EU in the second phase of legislative harmonisation which was concluded in June 2013. Procedural guarantees for vulnerable applicants are strengthened in many respects, thereby acknowledging the vulnerability of particular applicants rather than the ECtHR's notion of group vulnerability, as discussed in [Section 1](#). The different pieces of legislation, however, do not adopt a consistent and principled understanding

²¹ Article 17(1) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereafter "2003 Reception Conditions Directive"), OJ 2003 L 31/18. The following are mentioned as vulnerable persons: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

²² Article 17(2) 2003 Reception Conditions Directive.

²³ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, COM(2008) 815, 3 December 2008, Explanatory Memorandum, 6.

²⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter '2005 Asylum Procedures Directive'), OJ 2005 L326/13.

²⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereafter 'Dublin II Regulation'), OJ 2003 L50/1.

²⁶ European Commission, *On the protection of children in migration*, COM(2017) 211, 12 April 2017.

of the vulnerability of individuals undergoing the asylum process. The fragmentation of relevant guarantees in discrete instruments has resulted in the emergence of a variety of concepts in EU law, describing the asylum seeker as “vulnerable”, “in need of special procedural guarantees” or “with special reception needs”.

Special procedural guarantees

Firstly, the recast Asylum Procedures Directive defines an “applicant in need of special procedural guarantees” in terms of his or her reduced ability to benefit from the rights and comply with the obligations under the Directive due to individual circumstances.²⁷ The Directive does not include an exhaustive list of asylum seekers presumed to be in need of special procedural guarantees, although it indicatively refers to need of such guarantees related to age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders, or as a result of torture, rape or other serious forms of psychological, physical or sexual violence.²⁸ Within the class of “applicants in need of special procedural guarantees”, the Directive carves a narrower sub-category singling out individuals whose needs stem from torture, rape or other serious forms of psychological, physical or sexual violence, and may be subject to discrete treatment in relation to special procedures.²⁹ The failure of EU law to define the predicament of “applicants in need of special procedural guarantees” in a clear and unequivocal manner goes beyond semantics, as it has significant impact on their effective access to those guarantees, as discussed in [Chapter III](#).

The recast Asylum Procedures Directive also includes a specific provision setting out the safeguards to be respected when dealing with unaccompanied children.³⁰ The appointment of a representative and presence of such representative and/or legal advisor during personal interviews must enable this particularly vulnerable group of asylum applicants to enjoy the rights and comply with the obligations incumbent on them under the Directive. Furthermore, the recast Directive provides important safeguards as regards the use of medical examinations for the purpose of age assessment as a measure of last resort, discussed in [Chapter II](#), and includes permissive yet extremely complicated provisions concerning the examination of applications of unaccompanied children in accelerated and border procedures, detailed in [Chapter III](#). As mentioned above, beyond unaccompanied children the recast Asylum Procedures Directive only lists the factors that may be used as an indication of the need for special guarantees.

The term “vulnerable persons” is used in the Directive to indicate one of the two types of applications which may be prioritised but only through cross-referring to the recast Reception Conditions Directive,³¹ whereas required competences of persons conducting personal interviews include the ability to take into account the applicant’s cultural origin, gender, sexual orientation, gender identity or “vulnerability”.³² Other than these two provisions, the recast Asylum Procedures Directive does not refer to vulnerability as a concept.

Special reception needs and vulnerability

²⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter ‘recast Asylum Procedures Directive’), *OJ* 2013 L 180/60, Article 2(d).

²⁸ Recital 29 recast Asylum Procedures Directive.

²⁹ Article 24(3) recast Asylum Procedures Directive.

³⁰ Article 25 recast Asylum Procedures Directive.

³¹ Article 31(7)(b) recast Asylum Procedures Directive.

³² Article 15(3)(a) recast Asylum Procedures Directive.

This presents a somewhat different approach compared to the recast Reception Conditions Directive,³³ which refers to the notion of “vulnerable persons” through a non-exhaustive list covering minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.³⁴

While several of its provisions refer to guarantees available to vulnerable persons, the Directive also introduces the separate concept of “applicant with special reception needs”, defined as “a vulnerable person in accordance with [the aforementioned list] who is in need of special procedural guarantees” to benefit from the rights and comply with the obligations under the instrument.³⁵ The implication that any person with special reception needs is *a fortiori* a vulnerable person for the purposes of the EU asylum *acquis* is confirmed by Article 22(3) of the Directive: “Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs.” Yet further confusion arises from other provisions, such as Article 11 which refers to the “detention of vulnerable persons and of applicants with special reception needs”.

The terminological ambiguity surrounding the notion of vulnerability in the CEAS translates not only into potentially superfluous concepts – such as “special reception needs”, which does not seem to differ from vulnerability – but also to a potential variation in the scope of protected categories. This is illustrated when comparing the indicative lists of categories contained in the recast Asylum Procedures Directive and the recast Reception Conditions Directive:

Lists of protected categories in Directives 2013/32/EU and 2013/33/EU		
Category / Factor	“In need of procedural guarantees”	“Vulnerable” / “with special reception needs”
Children	√	√
Unaccompanied children	x	√
Disability	√	√
Elderly	√	√
Gender	√	x
Pregnancy	√	√
Single parents with minor children	x	√
Human trafficking	x	√
Serious illness	√	√
Mental disorders	√	√
Torture	√	√
Rape	√	√
Other serious forms of psychological, physical or sexual violence	√	√
Female genital mutilation	x	√
Sexual orientation or gender identity	√	x

Source: Recital 29 Directive 2013/32/EU; Article 21 Directive 2013/33/EU.

³³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereafter ‘recast Reception Conditions Directive’), OJ 2013 L180/96.

³⁴ Article 21 recast Reception Conditions Directive.

³⁵ Article 2(k) recast Reception Conditions Directive.

It remains unclear whether the variable scopes of the categories of asylum seekers defined as “in need of special procedural guarantees” and “with special reception needs” or “vulnerable” in the two Directives are deliberate or not. A strict reading of the two lists could imply, for instance, that persons fleeing their country of origin for reasons relating to sexual orientation or gender identity may require special attention in the asylum procedure but do not straightforwardly present vulnerability factors that require special attention as regards their reception conditions. As both lists concern non-exhaustive enumerations of categories, this should not create a conceptual problem *per se*, especially since the same assessment mechanism can be used to identify special reception and procedural needs under the two Directives.³⁶

However, even if EU law provides non-exhaustive guidance in the enumeration of vulnerable groups, there is a risk that the inconsistency between the classes of persons in need of special procedural and reception guarantees as defined in EU law translates into ambiguity in domestic legal orders. In fact, European countries do not seem to have taken a consistent approach to the procedural and reception guarantees required by vulnerable groups when transposing the Directives into national law. The definition of vulnerable groups of asylum seekers in most countries follows the wording of the 2003 Reception Conditions Directive and its recast and thus makes no reference to elements listed in the recast Asylum Procedures Directive such as sexual orientation and gender identity. **Croatia** is one example of a country which, through what appears as a literal transposition of the Directive, has included sexual orientation and gender identity as factors demonstrating a need for special procedural and reception guarantees, without deeming them as vulnerability factors.³⁷ **Cyprus**, on the other hand, has literally transposed the definitions of “applicant in need of special procedural guarantees” and “applicant with special reception needs” under the respective Directives, thereby defining two categories with differing scopes in domestic law.³⁸ Most other countries make no mention of sexual orientation and gender identity in their law.

The margin of discretion left to European countries in the definition of vulnerability in the asylum process has led to disparities in the categories of applicants deemed as vulnerable:

Categories of vulnerable asylum seekers in national law	
Category / Factor	Countries recognising as vulnerable persons
Children	BE, BG, CY, ES, GR, HR, HU, IE, IT, MT, PL, SR
Unaccompanied children	BE, BG, CY, ES, FR, GR, HR, HU, IE, IT, MT, NL, PL, SR
Disability	BE, BG, CY, ES, FR, GR, HR, HU, IT, MT, PL, SR
Elderly	BE, CY, ES, FR, HR, HU, IE, IT, MT, PL, SR
Pregnancy	BE, BG, CY, ES, FR, HR, HU, IE, IT, MT, PL, SR
Single parents with minor children	BE, BG, CY, ES, HR, HU, IE, IT, MT, PL, SR
Human trafficking	BE, CY, ES, FR, GR, IT, MT, PL
Serious illness	CY, GR, IT, MT, PL
Mental disorders	CY, HR, IT, MT, PL
Lack of legal capacity	HR, SR
PTSD, in particular survivors and relatives of victims of shipwrecks	GR
Torture	BE, CY, ES, FR, GR, HR, HU, IE, IT, MT, PL, SR
Rape	BE, CY, ES, FR, GR, HR, HU, IE, IT, MT, SR

³⁶ Article 24(2) recast Asylum Procedures Directive.

³⁷ Article 15(1) Croatian Law on International and Temporary Protection, to be contrasted with the definition of “vulnerable groups” in Article 4(14). See further AIDA, Country Report Croatia, 2016 Update, March 2017, available at: <http://bit.ly/2n45FJn>, 38.

³⁸ Articles 2 and 9KΓ Cypriot Refugee Law.

Other serious forms of psychological, physical or sexual violence	BE, BG, CY, ES, FR, GR, HR, HU, IE, IT, MT, PL, SR
Female genital mutilation	CY, HR, IT, MT

Source: AIDA, Country Reports, 2016 Update.

In countries such as **Greece**, national law foresees parallel definitions of vulnerability under different legal frameworks governing newcomers in reception and identification procedures,³⁹ on the one hand, and applicants in the asylum process on the other, who are subject to a narrower definition.⁴⁰ However, a bill transposing the recast Reception Conditions Directive will apply the categories of vulnerable groups foreseen in the reception and identification context in the asylum process.⁴¹ It should be noted that the definition of vulnerable groups in Article 14(8) of the Greek Law 4375/2016, which includes persons with post-traumatic stress disorder and particularly survivors of shipwrecks for instance, has been debated at EU level, especially since it entails particular procedural consequences as mentioned in **Chapter III**. Greece has reportedly received political pressure to restrict the scope of the definition.⁴²

In other countries such as **Austria**, where reception conditions are governed at the federal state level, vulnerable groups are defined in each federal province's Basic Care Act. The Basic Care Acts of Lower Austria, Salzburg, Tyrol, Vorarlberg, Burgenland, Carinthia and Upper Austria categorise the elderly, handicapped, pregnant women, single parents, children, victims of torture, rape or other forms of severe psychological, physical or sexual violence, as well as victims of trafficking are considered as vulnerable persons. Vienna, on the other hand, makes no reference to vulnerable groups.⁴³

In other countries like **Switzerland**, national law does not define vulnerable persons and only contains the obligation to identify victims of trafficking.⁴⁴ **Sweden** has no definition of vulnerable persons in national law but the Migration Agency has set out standards for the reception of vulnerable asylum seekers, mainly including children, women, disabled persons, elderly, persons with mental disorders or serious illnesses, and persons vulnerable to harassment or exploitation due to sexual orientation or gender identity.⁴⁵

Whereas the table above reveals that certain categories of applicants are not considered vulnerable in a number of AIDA countries contrary to the EU asylum *acquis*, this does not allow a clear conclusion as to whether states treat the non-exhaustive EU lists of vulnerable applicants as exhaustive in the asylum process.

Changes proposed under the 2016 reform package: from vulnerability to "special needs", from "special" to "specific"?

The treatment of vulnerable groups in the EU has been one of the priority areas of the reform of the CEAS proposed by the Commission in 2016. Whereas many aspects of the 2016 Commission proposals have met with criticism from NGOs and UNHCR, the changes proposed with respect to the position of applicants with special needs have been more positively received.

³⁹ Article 14(8) Greek Law 4375/2016.

⁴⁰ Article 17 Greek Presidential Decree 220/2007.

⁴¹ Greek Ministry of Migration Policy, *Draft law on the transposition of Directive 2013/33/EU*, 11 October 2016, available in Greek at: <http://bit.ly/2lbQeKq>, Article 16.

⁴² Human Rights Watch, 'EU/Greece: Pressure to Minimize Numbers of Migrants Identified As 'Vulnerable'', 1 June 2017, available at: <http://bit.ly/2qD2fQb>.

⁴³ AIDA, Country Report Austria, 2016 Update, February 2017, available at: <http://bit.ly/2IBT7YI>, 77.

⁴⁴ AIDA, Country Report Switzerland, 2016 Update, February 2017, available at: <http://bit.ly/2kE4LCH>, 73.

⁴⁵ AIDA, Country Report Sweden, 2016 Update, March 2017, available at: <http://bit.ly/2IKGF9G>, 52.

The Commission proposal to recast the Reception Conditions Directive replaces the term “vulnerability” throughout the text by “special reception needs”, while maintaining the individual’s reduced ability to benefit from the rights granted and to comply with the obligations under the Directive as the defining factor. Moreover, the current non-exhaustive list of vulnerable asylum seekers is now part of the definition of “applicant with special reception needs”.⁴⁶ Consequently, any person who requires special guarantees to benefit from rights and comply with obligations is automatically considered an applicant with special reception needs, regardless of whether they are vulnerable or not. Beyond clarifying the text in legal terms, the terminological change does not seem to have a substantial impact on who receives special protection under the Directive, as ultimately an assessment needs to be made of the ability of the person to access entitlements or comply with obligations.

Nevertheless, a further terminological nuance is proposed by the European Parliament. The report on the proposal amends “special reception needs” to “*specific* reception needs”,⁴⁷ a change which seems to be mainly linguistic, although no exact justification thereof has been revealed in the legislative deliberations. A similar modification is proposed by amendments to the draft report on the Asylum Procedures Regulation, so as to refer to “applicants in need of specific procedural guarantees”.⁴⁸ Conversely, the Council seems to have maintained the approach of the Commission proposal.⁴⁹ Beyond being possibly linguistically more accurate, there seems to be no meaningful difference in meaning between “specific” or “special” reception needs or procedural guarantees insofar as they both point to the need for other or additional safeguards to be in place in order to enable the applicants concerned to enjoy their rights and comply with their obligations under the respective instruments.

The Parliament’s position on the reform of the Reception Conditions Directive also advocates for a wider indicative list of categories with specific reception needs, which includes persons with post-traumatic stress disorder, LGBTI persons, non-believers, apostates and religious minorities among others.⁵⁰ The inclusion of sexual orientation and gender identity as factors relevant to identifying specific reception needs could ensure greater harmony between the provision of reception and procedural support by national authorities.

3. How many are vulnerable? Key figures for 2016 and 2017

Understanding the scale of vulnerability in European asylum systems remains challenging, given that statistics on asylum seekers considered as vulnerable or in need of special guarantees are not collected with equal rigour across the continent. Upon request from AIDA experts, different national authorities (**Bulgaria, Cyprus, Greece, Croatia**) have provided figures on vulnerable groups in their

⁴⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465, 13 July 2016, Article 2(13).

⁴⁷ European Parliament, *Report on the proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, A8-0186/2017, 10 May 2017, available at: <http://bit.ly/2spevjL>, Amendment 34 – Article 2(13), Amendment 111 – Article 21(1)(1).

⁴⁸ European Parliament, *Amendments to the draft report on the proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union*, PE597.506, 26 June 2017, available at: <http://bit.ly/2soVlec> and <http://bit.ly/2soVlec>, Amendments 240 and 802-803.

⁴⁹ Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, 7004/17, 8 March 2017, available at: <http://bit.ly/2updz0o>.

⁵⁰ European Parliament, *Report on the proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, A8-0186/2017, 10 May 2017, Amendment 34 – Article 2(13).

asylum systems, while others (**Austria, Belgium, Germany, Spain, Ireland, Malta, Netherlands, Poland, Sweden**) do not collect or disaggregate figures in that way.⁵¹

Even within countries which collect information on people identified as vulnerable, further disaggregation by category or vulnerability factor is not always straightforward. Some countries (**Bulgaria, Cyprus**) keep detailed records distinguishing asylum seekers by ground of vulnerability, while others (**Belgium, Greece, Croatia**) only provide disaggregated figures for children and unaccompanied children; data on the latter can be found in **Annex II**. As explained *inter alia* by the Greek Asylum Service, this is partly due to the fact that multiple vulnerability factors may come into play for the same individual, thereby rendering detailed categorisation difficult and potentially misleading, as double- or triple-counting of the same asylum seekers would be unavoidable.⁵²

Available statistics for 2016 and the first half of 2017 indicate the following general figures of asylum seekers characterised as vulnerable:

Vulnerable persons among the general asylum seeker population: 2016-2017				
*	1 January – 31 December 2016		1 January – 30 June 2017	
	Vulnerable persons	Total asylum seekers	Vulnerable persons	Total asylum seekers
CY	:	3,055	68	1,845
GR	6,485	51,091	3,717	27,853
HR	441	2,234	219	733

Source: Future Worlds Center, 25 July 2017; Greek Council for Refugees, 28 July 2017; Croatian Law Centre, 24 July 2017.

The total number of 68 applicants identified as vulnerable in **Cyprus** comprises 54 children, 12 survivors of female genital mutilation (FGM), 4 LGBTI persons, 3 disabled persons, 2 victims of trafficking, 2 persons with psychological problems and 1 victim of rape.⁵³

Bulgaria collects statistics on the number of asylum seekers identified as vulnerable at the end of any given month rather than cumulative data. At the end of December 2016 and June 2017 respectively, the Bulgarian State Agency for Refugees recorded the following numbers of persons belonging to different categories of vulnerable groups:

Vulnerable asylum seekers in Bulgaria: 2016-2017		
Category of vulnerable group	As at 31 December 2016	As at 30 June 2017
Unaccompanied children	552	101
Single parents	59	39
Pregnant women	16	12
Elderly persons	24	4
Disabled persons	20	13

⁵¹ Information provided by Asylkoordination Österreich, 18 August 2017; Informationsverbund Asyl und Migration, 11 August 2017, and obtained from the BAMF, 1 August 2017; the Spanish Office for Asylum and Refuge, 25 July 2017; the Irish Refugee Council, 9 August 2017; aditus foundation, 8 August 2017, and obtained from the Maltese Refugee Commissioner, 17 July 2017; Dutch Council for Refugees, 10 August 2017; Helsinki Foundation for Human Rights, 11 August 2017, and obtained from the Polish Office for Foreigners, 1 August 2017; Information provided by Lisa Hallstedt and FARR, 21 August 2017.

⁵² Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from Greek Asylum Service, 21 July 2017, available in Greek at: <http://bit.ly/2vAOKSs>.

⁵³ Information provided by the Future Worlds Center and obtained from the Cypriot Asylum Service, 25 July 2017.

Victims of physical, psychological or sexual violence	2	6
Persons with chronic or serious illnesses	51	25
Total	724	200

Source: Bulgarian Helsinki Committee, 9 August 2017.

To conclude, while the visibility of vulnerable individuals in European asylum systems remains difficult to assess, delicate conceptual distinctions between vulnerability and need of special (or specific) reception or procedural guarantees in the asylum *acquis* have translated into a fragmentation of terminology and categories in domestic legal orders. Fragmentation, and often inconsistency, informs not only the concepts themselves but also their operability in practice. As will be discussed below, the effective identification of vulnerabilities and the necessary adaptation of asylum procedures to cater for the special needs of the individuals concerned remain a thorny challenge across Europe.

The EU asylum *acquis* requires Member States to assess within a reasonable period of time after an application is made whether the applicant is in need of special procedural guarantees.⁵⁴ Moreover, the need for special procedural guarantees must be addressed also where it becomes apparent at a later stage in the procedure, thereby implying an obligation on Member States to organise their asylum procedures in such a way as to enable detection of special procedural needs throughout the entire procedure. The latter is particularly important to ensure the effectiveness of special procedural guarantees for certain groups of applicants, such as torture survivors or victims of other extreme violence, who may be reluctant to reveal their experiences and possible need of specific procedural guarantees resulting from them at an early stage in the process.⁵⁵

Although no separate procedure for the identification of special needs is strictly speaking required under either the recast Asylum Procedures Directive and the recast Reception Conditions Directive, a proper reading of the relevant provisions and general principles of fairness and effectiveness require the establishment of a dedicated identification mechanism in national law and the possibility for the applicant to be heard in the process and contest the outcome as necessary.⁵⁶ Moreover, the recast Asylum Procedures Directive allows for an integrated approach whereby identification of both special reception needs and the need for special procedural guarantees are assessed using the same mechanism.⁵⁷ This has been recommended by ECRE as the preferable option as it ensures a holistic examination of an applicant's needs and allows for the two assessments as a continuum. This not only avoids unnecessary procedural complexity but also allows for better identification of vulnerabilities which relate to the grounds for applying for international protection.⁵⁸

For its part, the Commission proposal for an Asylum Procedures Regulation strengthens the existing safeguards in the Asylum Procedures Directive in two ways. Firstly, the respective roles of the various authorities that may be involved in the asylum process are more clearly defined and distinguished. While authorities responsible for receiving and registering applications are entrusted with the task of detecting and indicating first indications of vulnerability which may require special guarantees,⁵⁹ the determining authority must continue and complete the assessment of the need for special guarantees. Secondly, consistent with the proposal recasting the Reception Conditions Directive, a clear obligation is introduced for the determining authority to *systematically* assess the need for special procedural guarantees⁶⁰ and for the other authorities to initiate the process of identification *as soon as an application is made*.⁶¹ This addresses partly existing ambiguity under Article 24 of the recast Asylum Procedures Directive, which does not distinguish between the initial identification of physical signs and the actual assessment and leaves considerable flexibility to Member States as to *when* such assessment is carried out.

⁵⁴ Article 24(1) recast Asylum Procedures Directive.

⁵⁵ On this group in particular, see also Hungarian Helsinki Committee, *Unidentified and unattended: The response of Eastern EU Member States to the special needs of torture survivors and traumatised asylum seekers*, May 2017, available at: <http://bit.ly/2xb4v39>.

⁵⁶ ECRE, *Information Note on Directive 2013/32/EU*, December 2014, 29.

⁵⁷ Article 24(2) recast Asylum Procedures Directive.

⁵⁸ ECRE, *Comments on the on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465*, October 2016, 20.

⁵⁹ Article 20(2) proposal for an Asylum Procedures Regulation.

⁶⁰ Article 19(1) proposal for an Asylum Procedures Regulation.

⁶¹ Article 20(1) proposal for an Asylum Procedures Regulation.

1. Mechanisms for identification at national level

The implementation of the obligation to identify those in need of special procedural guarantees has led to wide disparities among European countries in the mechanisms through which the identification of special needs is conducted.

Formal identification mechanisms

Only few countries have formal identification mechanisms in place that systematically identify applicants with special needs in practice. These countries include **France**, the **Netherlands**, **Sweden** and the **UK**. Nevertheless, the formal procedures in these countries are not necessarily similar, thereby adding another layer of noticeable differences in the way special needs are assessed within the EU.

Some countries such as the UK and France make use of a questionnaire that is to be filled out by the applicant.⁶² A difference between the two countries is the thoroughness of the inquiry into vulnerability, which is lacking in the **UK** questionnaire that poses rather basic questions as part of a screening interview with the applicant.⁶³ The **French** questionnaire, used by the French Office for Immigration and Integration (OFII) as the basis for a vulnerability interview when the applicant registers his or her claim at the Prefecture, is mostly focused on objective vulnerability.⁶⁴ During this interview the OFII informs the applicant of the availability of a free medical examination. Any information collected by OFII on the special needs of an applicant is subsequently sent to the French Office for the Protection of Refugees and Stateless Persons (OFPRA). In some cases, however, the interview with OFII does not take place, or in other cases happens without interpretation. While it is possible for asylum seekers to notify OFII of special needs and to transmit medical certificates following the registration of their claim, people in camps or in large cities such as Paris, Lyon or Marseille face considerable difficulties in having their vulnerability taken into account.⁶⁵

On the other hand, in **Belgium**, while the Commissioner-General for Refugees and Stateless Persons (CGRS) has no formal identification mechanism for procedural needs at the moment,⁶⁶ officials of the Aliens Office use a registration form in which they indicate if a person is a child, elderly, pregnant, a single woman, LGBTI, a victim of trafficking, a victim of physical, sexual or psychological violence, has children, or has medical or psychological problems.⁶⁷ The applicant is subsequently referred to the Vulnerability Unit, which consists of officials interviewing vulnerable cases, who have had specific training and are expected to be more sensitive to the specific implications vulnerability might have on the interview.⁶⁸ In practice, however, the Aliens Office's focus on medical vulnerabilities risks overlooking less visible vulnerabilities, as highlighted in a 2017 report of the Belgian reception agency, Fedasil.⁶⁹

Early medical assessments take place in **Sweden**, the **Netherlands** and **Malta**, albeit in slightly different formats.

⁶² A copy of the French questionnaire is available in French at: <http://goo.gl/o2CiuS>.

⁶³ AIDA, Country Report UK, 2016 Update, February 2017, available at: <http://bit.ly/2mLD1wl>, 17-18, 42.

⁶⁴ AIDA, Country Report France, 2016 Update, February 2017, available at: <http://bit.ly/2lPwbCv>, 56.

⁶⁵ *Ibid*, 57.

⁶⁶ Information provided by Vluchtelingenwerk Vlaanderen, 24 August 2017.

⁶⁷ AIDA, Country Report Belgium, 2016 Update, February 2017, available at: <http://bit.ly/2n0RPah>, 48.

⁶⁸ CBAR-BCHV, *Trauma, geloofwaardigheid en bewijs in de asielprocedure* ('Trauma, credibility and proof in the asylum procedure'), August 2014, available in Dutch at: <http://bit.ly/1MiiYbk>, 66-69.

⁶⁹ Fedasil, *Study into vulnerable persons with specific reception needs*, February 2017, available at: <http://bit.ly/2jA2Yhj>.

In the **Netherlands** the formal mechanism of assessing special needs starts with a medical examination from FMMU, an independent agency responsible for providing medical advice on whether an asylum seeker is physically and psychologically capable to be interviewed, during the “rest and preparation” period following the lodging of an asylum application.⁷⁰ This examination is firstly intended to assess whether the applicant is mentally and physically capable of being interviewed and thus not specifically focused on the identification of special needs. With this examination in mind, the Immigration and Naturalisation Service (IND) then starts the procedure in which the second step of the vulnerability assessment takes place. However, such a medical examination is only available in specific “tracks” of the Dutch asylum procedure.⁷¹ Applicants subject to the Dublin Regulation (Track 1) or who come from a “safe country of origin” or benefit from protection in another EU Member State (Track 2) do not undergo an examination by the FMMU.⁷²

The IND has drafted a working instruction to its employees on how to establish vulnerability during this procedure.⁷³ In this working instruction, there is a list of indications on the basis of which it may be concluded that the asylum seeker is a vulnerable person. This list is divided in several categories, for instance physical problems e.g. pregnancy; blindness or handicap, or psychological problems such as trauma, depression and confusion. The instruction explicitly notes that this is not an exhaustive list.

A health screening is offered to all asylum seekers in **Sweden** and at least 50% of applicants make use of this possibility.⁷⁴ The information gathered in this screening, however, is not automatically available to caseworkers due to confidentiality rules, but the legal advisor can request access to the information with permission of the applicant. The principal identification of special needs in Sweden happens by thoroughly trained caseworkers.

In **Malta**, an identification mechanism exists for asylum seekers referred to the Initial Reception Centre (IRC). There, an initial assessment is carried out by the Agency for the Welfare of Asylum Seekers (AWAS).⁷⁵ In practice a social worker and a coordinator are regularly present. Subsequently, AWAS applies the Vulnerable Adults Assessment Procedure (VAAP) during the person’s stay in the IRC. The VAAP is not regulated by publicly available rules, meaning that the individual is not always informed when a referral is rejected and that decisions are rarely motivated and communicated in writing.⁷⁶ It should be noted, however, that applicants who are not referred or who arrive regularly and are therefore not accommodated in reception centres may never be identified.

The situation in **Germany** is more complex, since no formal identification mechanism has been implemented to date. The BAMF and the Federal Ministry of Interior drafted a “concept for the identification of vulnerable groups” in 2015, which was intended to be codified in law as part of the transposition of the recast Asylum Procedures and Reception Conditions Directives. Since the concept has not been implemented, it has been only made available to BAMF staff as an internal guideline.⁷⁷

⁷⁰ AIDA, Country Report Netherlands, 2016 Update, March 2017, available at: <http://bit.ly/2II2TJK>, 36-37.

⁷¹ For a discussion of “tracks” in asylum procedures, see ECRE, *Accelerated, prioritised and fast-track asylum procedures: Legal frameworks and practice in Europe*, AIDA Legal Briefing No 10, May 2017, available at: <http://bit.ly/2tsBE8D>, 5-8.

⁷² AIDA, Country Report Netherlands, 14.

⁷³ Dutch IND, Work Instruction 2015/8 on special procedural guarantees, 17 July 2015, available in Dutch at: <http://bit.ly/1S0RQAU>.

⁷⁴ AIDA, Country Report Sweden, 2016 Update, March 2017, available at: <http://bit.ly/2IKGF9G>, 32.

⁷⁵ AIDA, Country Report Malta, 2016 Update, February 2017, available at: <http://bit.ly/2n5RU95>, 30.

⁷⁶ *Ibid.*

⁷⁷ Information provided by Informationsverbund Asyl und Migration, 11 August 2017, and obtained from the BAMF, 1 August 2017.

A 2016 amendment to the German Asylum Act has introduced wording relevant to the identification of vulnerable asylum seekers.⁷⁸ However, the law stops short of requiring federal states to transmit personal information about an applicant's vulnerabilities to the BAMF, as it only confers them the power to do so. It also fails to properly transpose the recast Asylum Procedures Directive, as it only requires the BAMF to "duly carry out" the interview and not to provide "adequate support" to applicants in need of special procedural guarantees throughout the duration of the procedure. In practice, therefore, identification procedures in Germany have been generally described as "a matter of luck and coincidence".⁷⁹

Ireland, on the other hand, has considered the development of a "Vulnerability Assessment" for newly arrived asylum seekers, in order to implement the recommendations of the June 2015 Working Group Report on improvements to the protection process.⁸⁰ Yet, there has not been an unequivocal commitment to establish a formal vulnerability identification mechanism.⁸¹

Informal identification mechanisms and NGO involvement

Other countries have more informal arrangements in place to identify vulnerabilities, such as **Austria** where applicants are asked in a brochure to raise special needs themselves upon arrival in the initial reception centre (EAST) or where an official may classify applicants as victims of trafficking if this is suspected during the interview.⁸² Following an amendment to the Austrian Asylum Act, entering into force in November 2017, asylum seekers will be required to submit any medical or other evidence available for the assessment of special needs.⁸³ In countries such as **Switzerland** asylum seekers also have to raise vulnerabilities themselves during the interview with the relevant official.

In **Germany, Croatia, Hungary, Italy** and **Serbia** there is no systematic identification of special needs. Authorities rather rely on the official in charge of the interview to detect vulnerabilities. In **Bulgaria**, a systematic detection was set up through Standards of Practice for Sexual and Gender-Based violence but these are not applied in practice, while a revision of the Standard Operating Procedures to include more categories of vulnerable persons is still ongoing.⁸⁴ Standard Operating Procedures have been developed for the treatment of unaccompanied children, yet these failed to be adopted in July 2017 due to objections from the Bulgarian Ministry of Labour and Social Policy.⁸⁵ In **Croatia**, a working group has recently been set up to prepare a new Protocol on the treatment of unaccompanied children.⁸⁶

The role of civil society organisations is central to the identification of vulnerabilities, in the absence of formal mechanisms in some countries. In **Greece**, NGOs play a major role in the identification of vulnerabilities and referral to authorities. NGOs have run specialised programmes to handle the identification and rehabilitation of victims of torture, such as Metadrasi in Athens to whom the authorities refer victims.⁸⁷ Other NGOs involved in the treatment of victims of torture are the Greek Council for Refugees and the Day Centre Babel in cooperation with Médecins Sans Frontières. On

⁷⁸ Section 8(1b) German Asylum Act.

⁷⁹ N Hager and J Baron, 'Eine Frage von Glück und Zufall. Zu den Verfahrensgarantien für psychisch Kranke oder Traumatisierte im Asylverfahren' in Informationsverbund Asyl und Migration (ed), *Beratung und Rechtsschutz im Asylverfahren: Beilage zum Asylmagazin 7-8/2017*, July 2017, 17-26.

⁸⁰ Report of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, *Third and final progress report on the implementation of the Report's recommendations*, June 2017, available at: <http://bit.ly/2w12bLC>, 12.

⁸¹ United Nations Committee Against Torture (CAT), *Concluding observations on the second periodic report of Ireland*, 11 August 2017, available at: <http://bit.ly/2hPIVem> Concluding Observation 12(b) to that effect.

⁸² AIDA, Country Report Austria, 2016 Update, February 2017, available at: <http://bit.ly/2IBT7YI>, 49-50.

⁸³ Article 15(1)(3) Austrian Asylum Act, as inserted by the Aliens Law Amendment Act 2017 (FrÄG 2017).

⁸⁴ AIDA, Country Report Bulgaria, 2016 Update, February 2017, available at: <http://bit.ly/2lw71fy>, 34.

⁸⁵ Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

⁸⁶ Information provided by the Croatian Law Centre, 24 July 2017.

⁸⁷ AIRE Centre and ECRE, *With Greece: Recommendations for refugee protection*, July 2016, 17-18.

the islands, however, due to the extremely short duration of the fast-track border procedure applied since the EU-Turkey Statement, vulnerabilities often go unnoticed. Several sources report serious gaps in vulnerability assessments,⁸⁸ which have been exacerbated by the transition of health services from NGOs to state actors such as the Ministry of Health and the Centre of Disease Control and Prevention (KEELPNO).⁸⁹

Informal mechanisms of referral also operate in **Croatia**, where NGOs coming into first contact with asylum seekers in the reception centres may identify vulnerabilities and inform the authorities accordingly. However, information exchange does not take place systematically and communication may often depend on the individual caseworker. In addition, less visible vulnerabilities of asylum seekers such as victims of torture, trauma or trafficking and LGBTI persons are much less likely to be identified through this arrangement.⁹⁰

Spain has formal protocols for the identification of unaccompanied children and victims of trafficking, which however do not entail special guarantees in the procedure. NGOs also contribute to the vulnerability assessment in practice, more specifically in the enclaves Ceuta and Melilla. NGOs and UNHCR who work in the Migrant Temporary Stay Centres (CETI) in Ceuta and Melilla have been trying to establish a mechanism for early identification but the limited resources, frequent overcrowding of the centres and short-term stay of the persons prevents them from effectively doing so.⁹¹ Until now, only one victim of trafficking has been identified and referred to the Spanish mainland.⁹² The ineffectiveness of identification in practice has been further exacerbated by the recent increase in arrivals in Spain, which has placed higher pressure on the country's asylum system.⁹³

The identification challenges and problems related to the interaction between authorities in the asylum process are acknowledged and partly addressed in the Commission proposal for an Asylum Procedures Regulation which further clarifies and strengthens the current standards on identification. Article 20 of the proposal describes the process of identifying an applicant's need for special procedural guarantees as a continuum in the procedure, while more clearly distinguishing the respective roles of the various authorities involved in the different stages of the process. It also introduces a clearer obligation on the determining authority to systematically assess the need for special procedural guarantees,⁹⁴ and for the other authorities to initiate the process of identification as soon as possible.⁹⁵ As illustrated above, such a division is currently lacking in the practice of most Member States.

⁸⁸ Human Rights Watch, 'Greece: Refugees with Disabilities Overlooked, Underserved', 18 January 2017; AIRE Centre and ECRE, *With Greece: Recommendations for refugee protection*, July 2016, 17-19.

⁸⁹ See *inter alia* Refugee Support Aegean, 'Serious gaps in the care of refugees in Greek hotspots; Vulnerability assessment system is breaking down', 17 July 2017, available at: <http://bit.ly/2vHUmYP>; Médecins Sans Frontières, *A dramatic deterioration for asylum seekers on Lesbos*, July 2017, available at: <http://bit.ly/2vCJzAF>; Joint NGO Statement, 'Lack of handover plans for the response in Greece puts asylum seekers at risk, NGOs warn', 11 July 2017, available at: <http://bit.ly/2i5g1H5>.

⁹⁰ AIDA, Country Report Croatia, 2016 Update, March 2017, available at: <http://bit.ly/2n45FJn>, 38.

⁹¹ AIDA, Country Report Spain, 2016 Update, February 2017, available at: <http://bit.ly/2n1vwNV>, 30.

⁹² Information provided by Accem, 23 August 2017.

⁹³ Human Rights Watch, 'Spain: Migrants held in poor conditions', 31 July 2017, available at: <http://bit.ly/2wd5Wdl>.

⁹⁴ European Commission, *Proposal for an Asylum Procedures Regulation*, COM(2016) 467, 13 July 2016, Article 19(1).

⁹⁵ *Ibid*, Article 20(1).

2. Special administrative and training arrangements in national authorities

Alongside formal or informal mechanisms made to identify special needs, some European asylum systems have set up different organisational arrangements and training within their administrations with a view to dealing with applicants with vulnerabilities.

Organisation of determining authorities

Different countries have special units in place to handle caseloads related to applicants with special needs. Since 2013, OFPRA in **France** has set up five thematic groups (*groupes de référents thématiques*) of about 20-30 staff each, covering the following elements: sexual orientation and gender identity; unaccompanied children; torture; trafficking in human beings; and violence against women.⁹⁶ While officers dealing with claims from unaccompanied children must be specifically trained on this matter, any protection officer may interview an applicant presenting other vulnerabilities. The thematic groups follow internal guidelines developed by the *référents*. OFPRA has also established a position of Head of Mission – Vulnerability as of 2016.⁹⁷

In **Belgium**, the Aliens Office has a “Vulnerability Unit” of 6 staff members in total, responsible for screening all applicants upon registration on their potential vulnerability.⁹⁸ Also, the CGRS has two vulnerability-oriented units established in order to render support to protection officers dealing with cases of applicants with special procedural needs:

- A “Gender Unit” of 15 officials deals with all gender-related asylum applications, including applications based on sexual orientation or gender identity, as well as applications concerning female genital mutilation (FGM), honour retaliation, forced marriages and partner violence or sexual abuse;⁹⁹
- A “Minors Unit” of 3 officials and 108 specially trained participating protection officers ensures a harmonised approach and exchange of information and best practices on children;¹⁰⁰
- Previously, a “Psy Unit” assisted protection officers in cases where psychological problems might have had an influence on the processing of the application or on the assessment of the application itself. The Psy Unit was abolished in September 2015 at the height of the reception crisis in Belgium, due to prioritisation of other internal projects.¹⁰¹

In **Hungary**, the Immigration and Asylum Office has a specialised unit dealing with vulnerable groups, namely unaccompanied children, at the Regional Directorate of Budapest and Pest County Asylum Unit. Caseworkers within this unit are specialised in unaccompanied children.¹⁰²

Most AIDA countries have no dedicated units dealing with vulnerable groups, though some foresee specialised staff to that end. In **Germany**, the BAMF has no specialised units but “special officers” (*Sonderbeauftragte*) responsible for interviews and decisions on claims by applicants with special needs. The BAMF employs the following number of special officers and related staff for such groups: 376 for unaccompanied children, 125 for victims of gender-related persecution, 74 for traumatised persons and victims of torture, as well as 79 for victims of trafficking.¹⁰³

⁹⁶ OFPRA, *2016 Activity report*, April 2017, available in French at: <http://bit.ly/2pHqMI7>, 28.

⁹⁷ Information provided by Forum réfugiés – Cosi, 10 August 2017.

⁹⁸ Information provided by Vluchtelingenwerk Vlaanderen, 22 August 2017.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ AIDA, Country Report Belgium, 48-49.

¹⁰² Information provided by the Hungarian Helsinki Committee, 11 August 2017.

¹⁰³ Information provided by Informationsverbund Asyl und Migration, 11 August 2017, and obtained from the BAMF, 1 August 2017.

The **United Kingdom** Home Office has recently introduced the notion of “safeguarding leads”, supervised by a senior official as head of the “safeguarding hub”. Civil society has limited information on the work of these hubs, however, as the safeguarding policy is an internal document.¹⁰⁴ Conversely, the State Secretariat for Migration (SEM) in **Switzerland** has specific collaborators responsible for thematic areas, including gender-related persecution and human trafficking. These collaborators develop decision-making guidance but also treat asylum applications individually.¹⁰⁵ One to three collaborators per SEM unit are specialised in dealing with unaccompanied children.¹⁰⁶ However, these specialised collaborators are not the only ones who treat applications of these vulnerable asylum seekers; in fact all collaborators treat all cases.

Greece has 27 specialised caseworkers – 16 staff members of the Asylum Service and 11 provided by the European Asylum Support Office (EASO) – working on cases concerning vulnerable groups.¹⁰⁷ **Cyprus** has 4 specialised Asylum Service officers.¹⁰⁸

Training of caseworkers

In most countries (**Austria, Belgium, Cyprus, Spain, France, Greece, Croatia, Ireland, Hungary, Malta, Netherlands, Poland, Sweden, United Kingdom**),¹⁰⁹ asylum authorities provide specific training to case officers dealing with vulnerable applicants, making use of dedicated EASO e-learning training modules focussing on the procedural implications of assessing applications from vulnerable applications such as “Interviewing vulnerable persons” and “Interviewing children”, albeit to varying degrees. Moreover, in 2016, a limited number of caseworkers from regional departments of the Immigration and Asylum Office (IAO) in **Hungary** have also been trained by NGOs with specific expertise such as the Cordelia Foundation and the Hungarian Helsinki Committee on the victims of torture.¹¹⁰ Also in **Poland**, all staff members of the Asylum Department of the Office for Foreigners have received training on dealing with vulnerable groups during the interview, while training has also been provided by the Foundation Różnosfera with the aim of improving their skills in identification of vulnerable applicants.¹¹¹ Although promising examples of incorporating the expertise of civil society actors in training curricula, such initiatives seem to remain rather *ad hoc* and limited in scope.

In **Ireland**, caseworkers and panel members of the Irish International Protection Office are to attend information sessions with UNHCR, while staff also receive the Children First Guidelines and additional specialised training on unaccompanied children.¹¹² Similar to other countries, interviews of unaccompanied children may only be conducted by specially trained officials.¹¹³ *Ad hoc* training on victims of torture is provided by the NGO Spirasi.¹¹⁴ It should be noted that the issue of training of public officials was touched upon by the United Nations Committee Against Torture (CAT) periodic

¹⁰⁴ Information provided by the British Refugee Council, 8 August 2017.

¹⁰⁵ Information provided by the Swiss Refugee Council, 11 August 2017, and obtained from SEM, 10 August 2017.

¹⁰⁶ *Ibid.*

¹⁰⁷ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

¹⁰⁸ Information provided by the Future Worlds Center and obtained from the Cypriot Asylum Service, 25 July 2017.

¹⁰⁹ In the case of Croatia, such training has ceased since 2014: Information provided by the Croatian Law Centre, 24 July 2017.

¹¹⁰ Information provided by the Hungarian Helsinki Committee, 11 August 2017.

¹¹¹ Information provided by the Helsinki Foundation for Human Rights, 11 August 2017.

¹¹² Information provided by the Irish Refugee Council and obtained from the Irish International Protection Office, 28 August 2017.

¹¹³ *Ibid.*

¹¹⁴ Information provided by the Irish Refugee Council, 9 August 2017.

review concluded in August 2017.¹¹⁵ On the other hand, **Serbia** does not foresee systematic training on vulnerable groups.

Training of authorities operating at the border

Authorities coming into first contact with asylum seekers, such as border guards, play a crucial part in timely identification of vulnerabilities.

Spain has established protocols for unaccompanied children and victims of trafficking, which are applied by authorities at the border.¹¹⁶ In **Bulgaria**, training to border guards is conducted by UNHCR on a quarterly basis, while UNICEF also organised three trainings in 2016 for border guards and immigration police staff together with child protection departments on available referral mechanisms for unaccompanied children, in particular with a view to avoiding detention. Both agencies have relied on their own training materials for that purpose.¹¹⁷ In **Croatia**, the Annual Plan of Police Education also covered fundamental rights and referred to vulnerable groups in different themes, including the identification of victims of trafficking, asylum procedures, deprivation of liberty, Dublin and others. Training to border guards relies on material from Frontex, UNHCR and the EU Fundamental Rights Agency.¹¹⁸

Border guards in **Ireland** only receive limited training from UNHCR, which does not necessarily cover vulnerable groups.¹¹⁹ In **Poland**, the Border Guard participates in a project on identification of vulnerable persons seeking protection in the territory of Poland, which includes training and organises since 2012 a workshop entitled “Identification of vulnerable groups – victims of human trafficking, persons with PTSD and mental disorders in the context of administrative procedures”.¹²⁰

In addition to the’ abovementioned e-learning training modules, EASO has also developed a quality tool on Identification of Persons with Special Needs (IPSN). This publicly available web-based tool aims at supporting officials involved in asylum procedures or the reception of asylum seekers in the timely identification of special needs at any stage of the process. Designed for officials without any medical background or other specific expertise, the tool is supposed to be applicable in any national context and allow for a first special needs assessment tailored to the applicant’s individual circumstances. It is structured around 7 groups of indicators reflecting the vulnerable persons listed in Article 21 of the recast Reception Conditions Directive as well as LGBTI applicants and persons with gender-related special needs. However, its practical relevance in national asylum processes seems limited, in particular for more experienced caseworkers, including in EU Member States where EASO is providing operational support, as discussed in [Section 3](#).

Whereas the information provided by the authorities on specialised training and tools to support identification of vulnerable applicants does not allow for any conclusions to be drawn as regards the quality of asylum decisions taken in EU Member States, the absence of such training has successfully been litigated. In this regard, the lack of specialised training has been taken into account by courts in the **Netherlands** as a decisive element to uphold appeals against first instance decisions. In a case

¹¹⁵ CAT, *Concluding observations on the second periodic report of Ireland*, 11 August 2017, available at: <http://bit.ly/2hPIVem>, 4-5. See also Irish Refugee Council, *Submission to CAT on the examination of Ireland’s national report*, June 2017, available at: <http://bit.ly/2w2dzU6>; Irish Human Rights and Equality Commission, *Submission to CAT on Ireland’s second periodic report*, July 2017, available at: <http://bit.ly/2wettOs>.

¹¹⁶ Information provided by Accem, 23 August 2017.

¹¹⁷ Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

¹¹⁸ Information provided by the Croatian Law Centre, 24 July 2017.

¹¹⁹ Information provided by the Irish Refugee Council, 9 August 2017. The Irish Border Management Unit was inquired on their training programme, however no response has been received at the time of writin.

¹²⁰ Information provided by the Helsinki Foundation for Human Rights, 11 August 2017 and obtained from the Polish Border Guard Headquarters, 28 October 2016.

concerning an LGBTI applicant, the Regional Court of Zwolle declared the appeal well-founded on the basis that the IND caseworker who had interviewed the applicant had not followed the training module “Interviewing Vulnerable Persons”.¹²¹ In another case, where the Court considered that it was unclear whether the asylum case worker had followed the training module, it ordered the IND to ensure that the caseworker would have received the relevant training if the LGBTI applicant concerned had to be interviewed again.¹²²

3. The role of EASO in vulnerability assessment processes

EASO has an important role in supporting national authorities’ efforts to identify vulnerable asylum seekers in line with their obligations under the EU asylum *acquis*. One of the multiannual objectives of the EU Agency for 2017-2019 is to “contribute to the better identification of and adequate support to vulnerable applicants in asylum processes”.¹²³ The EASO Work Programme for 2017 adds to that a focus on the context of “hotspots” and relocation. Specifically in relation to Italy, the 2017 work programme lists the identification of applicants that could be relocated to participating Member States, giving priority to vulnerable applicants as a main action for 2017.

Beyond the general priorities of EASO, the agency has developed particular cooperation with specific EU countries through the creation of Operating Plans (**Greece** and **Italy**) or Support Plans (**Cyprus** and **Bulgaria**) and foresee different levels of involvement in the area of identification of vulnerability.

Special Operating Plan Greece

In December 2016, Greece and EASO signed a new Special Operating Plan for 2017.¹²⁴ This Special Operating Plan follows on earlier Operating Plans agreed in 2014, 2015 and 2016 and contains the various measures supporting the Greek authorities in the field of international protection and reception.

The Operating Plan foresees EASO support in several areas affecting vulnerable groups. These include: legal advice to the Greek Dublin Unit on vulnerabilities with a view to handling outgoing Dublin requests to other Member States;¹²⁵ training of selected caseworkers on vulnerable groups;¹²⁶ and practical support to enhance the identification and quality of the Asylum Service and Reception and Identification Service (RIS) response to vulnerable applicants, which includes the development of Standard Operating Procedures for carrying out vulnerability assessments in the asylum procedure and reception system.¹²⁷

EASO also has a key role in the implementation of the EU-Turkey Statement, where vulnerability assessment is explicitly stated as a deliverable in order to identify vulnerable persons and refer them to the appropriate procedure.¹²⁸ In practice EASO assists Greece with identifying vulnerable applicants on the Eastern Aegean islands, as these are exempt from the fast-track border procedure applicable since 20 March 2016.¹²⁹

¹²¹ Regional Court of Zwolle, Decision of 28 March 2017.

¹²² Regional Court of Arnhem, Decision No 17/5771 of 24 July 2017.

¹²³ EASO, *Multiannual programming 2017-2019*, December 2016, available at: <http://bit.ly/2miey0z>, 13.

¹²⁴ EASO, *Special operating plan to Greece*, December 2016, available at: <http://bit.ly/2h1M2dF>.

¹²⁵ *Ibid*, Activity HEL 2.

¹²⁶ *Ibid*, Activity HEL 6.

¹²⁷ *Ibid*, Activity HEL 11.

¹²⁸ *Ibid*, Activity HEL 4.

¹²⁹ Article 60(4)(f) Greek Law 4375/2016, citing Articles 8-11 Dublin III Regulation and the categories of vulnerable persons defined in Article 14(8) Greek Law 4375/2016.

Primary responsibility for the identification of vulnerability lies with the RIS,¹³⁰ although this is in practice usually limited to “visible” vulnerability and medical cases, for which a template has recently been developed by the Ministry of Health. Medical and psychosocial screening was until recently carried out through the services of NGOs in the hotspots. In particular in Lesbos, it was conducted by Médecins du Monde, while in Kos, Chios and Leros, it was carried out by PRAKSIS. However, in the summer of 2017 medical screening was temporarily (and in some of these hotspots partially) taken over by the Hellenic Red Cross, pending the appointment of medical doctors by the Ministry of Health. In Samos the medical services under the RIS procedures are still carried out by the NGO MedIn. In the Chios hotspot, the Hellenic Red Cross announced that the provision of health services would be terminated by the end of August and that on the 1st of September the Ministry of Health would be taking over these activities.¹³¹ As vulnerable applicants are exempted from the fast-track border procedure and should be referred to the regular procedure, EASO caseworkers operating in the hotspots are not supposed to handle such applications. However, on Lesbos, due to considerable delays and at times dysfunctional identification processes, a considerable number of applicants for international protection are subjected to an asylum interview, including by EASO deployed caseworkers, without their vulnerability being assessed first.¹³² As a result, indications of vulnerability often surface for the first time during admissibility interviews carried out by EASO caseworkers, who *de facto* play a crucial role in identifying and determining vulnerability and therefore the exemption from the fast-track border procedure.

Where a person’s vulnerability is not manifest but identified during the asylum procedure, the vulnerability expert of EASO takes over and drafts an opinion. Following this opinion, a decision of the competent Regional Asylum Office or Asylum Unit is issued, referring the case to the regular procedure in case the applicant belongs to a vulnerable group.¹³³

The referral to the EASO vulnerability expert is at the discretion of the Asylum Service caseworker, though EASO caseworkers are required to make such a referral if they come across signs of vulnerability.¹³⁴ Although every interview starts with generic questions relating to the applicant’s well-being or general health, NGOs on Lesbos have criticised the superficial nature of such questions and the passive way in which the vulnerability indicators are being used.¹³⁵ Moreover, in some cases in eligibility interviews, strong indications of vulnerability have been ignored and superseded by the perceived lack of general credibility of the applicant, resulting in a recommendation to reject the application. Such an approach prevents these applicants from being exempt from the fast-track border procedure and referred to the regular procedure, in violation of the law.¹³⁶

However, an EASO vulnerability expert is not always available in practice.¹³⁷ Moreover, persons identified by RIS as vulnerable may again be subject to vulnerability assessments, within the scope of the examination of their claim, by an EASO vulnerability expert, since there is no clear referral pathway between the vulnerability assessment conducted by the RIS and the one conducted by EASO.¹³⁸ In such cases, it is unclear (i) whether EASO must conduct the assessment by taking into

¹³⁰ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

¹³¹ Hellenic Red Cross, ‘Διακοπή παροχής Υγειονομικών Υπηρεσιών Ερυθρού Σταυρού στο Κέντρο Υποδοχής και Ταυτοποίησης Βιάλ στη Χίο’, 30 August 2017, available in Greek at: <http://bit.ly/2gBzStR>.

¹³² Information provided by the EASO Coordinator in Athens, 11 July 2017; the EASO Coordinators on Lesbos, 12 July 2017; HIAS Lesbos, 12 July 2017; the Deputy Director of the Moria Reception and Identification Centre, 12 July 2017.

¹³³ AIDA, Country Report Greece, 61.

¹³⁴ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

¹³⁵ Information provided by HIAS Lesbos, 12 July 2017.

¹³⁶ Information provided by HIAS Lesbos and European Lawyers in Lesbos, 12 July 2017.

¹³⁷ GCR, *GCR Mission to Lesbos*, November 2016, available in Greek at: <http://bit.ly/2nqGEEf>.

¹³⁸ ECRE et al., *The implementation of the hotspots in Italy and Greece*, December 2016, 38 and 44.

account the relevant provisions and safeguards of national law,¹³⁹ (ii) why the assessment of the RIS is not sufficient, and (iii) in cases of contradiction between RIS and EASO on the existence of vulnerability, which finding should prevail. It should be also noted that the vulnerability assessment by an EASO officer and the drafting of an opinion to this end is not clearly provided by any provision of Greek law.¹⁴⁰

Concerns have also been raised by the European Centre for Constitutional and Human Rights (ECCHR) as to the thoroughness of the vulnerability assessments executed by EASO.¹⁴¹ The ECCHR claims that the admissibility interviews conducted by EASO do not give room for a thorough investigation of vulnerabilities. Due to a failure to follow up on vulnerabilities raised by the applicant, EASO's concluding remarks do not always include crucial information on vulnerability. A complaint filed by the ECCHR on the inadmissibility decisions taken under the EU-Turkey Statement with the EU Ombudsman in April 2017 was declared admissible on 1 June 2017.¹⁴²

Special Operating Plan Italy

EASO and the Italian government signed a Special Operating Plan to Italy in December 2016.¹⁴³ Ever since 2013, when the first Special Support Plan between Italy and EASO was concluded,¹⁴⁴ Italy has been supported by EASO in a number of areas, including information to relocation candidates with special needs.¹⁴⁵ Specific focus is also placed on unaccompanied children, where EASO supports the Italian authorities in developing a national age assessment mechanism and Standard Operating Procedures for guardians.

In terms of identification of vulnerabilities in the hotspots, the Italian authorities exchange information of screened and identified persons at different stages of the procedure. This is facilitated by medical staff together with EASO, UNHCR, the International Organisation for Migration (IOM) and Save the Children. It was noted, however, that specific referral mechanisms for identification of vulnerabilities, needs and services are not applied. Research on the implementation of the hotspots in Italy has revealed that the IPSN is in place, but not used in a systematic way in each hotspot.¹⁴⁶ Persons with visible vulnerabilities such as pregnant women or single-parent households, unaccompanied minors or people with disabilities are usually identified already at the port, whereas those with non-visible vulnerabilities such as victims of trafficking or torture tend to be identified much later, in the regional hub where people stay for longer periods than in the hotspots.¹⁴⁷

The legal ambiguity surrounding the involvement of EU agencies such as Frontex and EASO in the procedures operated in the hotspots have been raised by various actors and remains a source of controversy. The need for legal clarification of the extent to which EU agencies operating on the ground in hotspots can be held liable for their actions was among the recommendations resulting from a European Parliament study on the hotspot approach.¹⁴⁸ Still according to the same report, while executive powers rest with Member States, the enhanced operational support of EU agencies in the

¹³⁹ Article 14(8) Greek Law 4375/2016.

¹⁴⁰ Article 60(4)(b) Greek Law 4375/2016 as amended by Law 4399/2016 provides that EASO staff may conduct a personal interview, but no clear provision exists as regards the vulnerability assessment.

¹⁴¹ ECCHR, *Case report Greece: EASO's influence on inadmissibility decisions exceeds the Agency's competence and disregards fundamental rights*, April 2017, available at: <http://bit.ly/2uhlhZF>.

¹⁴² ECCHR, *Greek Hotspots: EU Ombudsman probes work of European Asylum Support Office (EASO)*, 6 June 2017, available at: <http://bit.ly/2saj5pC>.

¹⁴³ EASO, *Special operating plan to Italy*, December 2016, available at: <http://bit.ly/2k5ZToe>.

¹⁴⁴ EASO, *Special support plan to Italy*, June 2013, available at: <http://bit.ly/2sWMMXnd>.

¹⁴⁵ EASO, *Special operating plan to Italy*, December 2016, Activity ITA 1.

¹⁴⁶ ECRE et al., *The implementation of the hotspots in Italy and Greece*, December 2016, available at: <http://bit.ly/2s0I37g>.

¹⁴⁷ *Ibid.*

¹⁴⁸ European Parliament, *On the frontline: the hotspot approach to managing migration*, May 2016, 44, available at: <http://bit.ly/1U35rtg>.

pressurised environment of the hotspots calls for much clearer accountability and liability provisions.¹⁴⁹

Special Support Plans Bulgaria and Cyprus

EASO has also provided operational support in countries beyond the hotspot approach. The EASO Special Support Plan to **Bulgaria** was originally supposed to be in place from December 2014 until June 2016, but was extended by 12 months until 30 June 2017.¹⁵⁰ The main activity that relates to groups with special needs is support with the identification and referral of vulnerable groups at entry points and with the asylum registration process.¹⁵¹ Given that the screening of persons with special needs in Bulgaria was carried out in a fragmented and non-systematic way and lacked timely intra-institutional exchange of information, identification and referral, EASO cooperated with Bulgaria in an attempt to improve the capacity to identify and refer vulnerable applicants and to improve exchange between relevant institutions. The identification and referral mechanism was set to build on the IPSN. However, no national identification and referral system has been set up to date, nor has there been specific training to national caseworkers on its implementation.¹⁵² EASO support appears to have produced more tangible results as regards unaccompanied children. Specifically on age assessment, the Special Support Plan supports with the development, implementation of relevant methodology and training in the field of age assessment which was aimed at introducing a multi-disciplinary and holistic age assessment procedure.¹⁵³ EASO organised a training on age assessment in June 2016 and on guardianship in June 2017.¹⁵⁴

For its part, the EASO Special Support Plan to **Cyprus** was extended until 31 January 2018.¹⁵⁵ The Special Support Plan has been running since 2014 and aims at improving the Cypriot asylum and reception system. Contrary to the other support agreements mentioned before, the Special Support Plan to Cyprus merely contains objectives and does not envisage specific actions or deliverables. EASO supports the Cypriot authorities in the creation of a systematic approach to identifying vulnerabilities and the exchange of relevant information between the different institutions.¹⁵⁶ In the light of this EASO measure, trainings for professionals who are part of the assessment of claims by victims of torture took place in early 2017.¹⁵⁷ Specifically on age assessment, EASO provides support with development, implementation of relevant methodology and training in the field of age assessment,¹⁵⁸ with a view to developing a multi-disciplinary and holistic approach to age assessment. This age assessment training has been executed throughout 2016.¹⁵⁹ Nevertheless, as will be discussed below, age assessments in Cyprus remain primarily medical.

4. Doubts in identification: Age assessment of unaccompanied children

A prime example of the importance of and sensitivities in the identification of vulnerabilities is the age assessment of unaccompanied children. Being misidentified as an adult rather than a child when seeking international protection can have considerable implications on the level of rights and protections afforded to them by a receiving state. This ranges from being unable to access welfare

¹⁴⁹ *Ibid*, 31.

¹⁵⁰ EASO, *Special support plan to Bulgaria – Amendment No 1*, 10 June 2016, available at: <http://bit.ly/2udwSZM>.

¹⁵¹ *Ibid*, Measure BG 2.

¹⁵² Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

¹⁵³ EASO, *Special support plan to Bulgaria – Amendment No 1*, 10 June 2016, Measure BG 5.

¹⁵⁴ Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

¹⁵⁵ EASO, *Special support plan to Cyprus – Amendment No 3*, February 2017, available at: <http://bit.ly/2tfNcvU>.

¹⁵⁶ *Ibid*, Measure CY 3.

¹⁵⁷ AIDA, Country Report Cyprus, 39.

¹⁵⁸ EASO, *Special support plan to Cyprus – Amendment No 3*, February 2017, Measure CY 4.

¹⁵⁹ AIDA, Country Report Cyprus, 36.

services and support, to being detained as an adult, to not receiving publicly funded legal representation during the asylum process.¹⁶⁰

The scarcity of data on the use of age assessment poses a substantial challenge to understanding the scale of the practice. Most European countries do not collect figures on age assessment procedures and decisions, with only a few exceptions:

Unaccompanied children undergoing age assessment: 2016-2017		
*	1 January – 31 December 2016	1 January – 30 June 2017
AT	2,800	:
BE	1,274	:
GR	17	42
HR	0	0
MT	23	:
SE	:	6,000
UK	928	314

Source: Asylkoordination Österreich, 18 August 2017; Vluchtelingenwerk Vlaanderen, 22 August 2017; Greek Council for Refugees, 28 July 2017; Croatian Law Centre, 24 July 2017; aditus foundation, 8 August 2017; UK Home Office, 24 August 2017.

Note that the UK figures refer only to age assessments requested by the UK Home Office.

Note a discrepancy between the figure reported by the Austrian Federal Agency for Immigration and Asylum (2,800) and the figure reported by the Federal Ministry of Interior (3,943) on X-ray photographs ordered 2016: Reply 11324/AB to parliamentary question 11814/J (XXV.GP), 6 April 2017, <http://bit.ly/2uOAYWx>

Some countries also collect statistics on the number and outcome of age assessments concluded:

- **Austria** received 2,252 expert opinions on age assessment in 2016, out of which 1,333 found the applicant to be a minor and 919 to be an adult.¹⁶¹ A similar rate in decisions has been witnessed so far in 2017.¹⁶²
- The outcome of age assessments differs in **Belgium**: out of 1,274 age assessments conducted last year, 902 found the applicant to be an adult and 372 found the applicant to be underage.¹⁶³ The Belgian Council of State received 37 challenges against age assessment decisions during the same period, out of which 34 have been rejected and 3 are pending.¹⁶⁴
- The **United Kingdom** resolved 945 age disputes last year, out of which 370 found the person to be underage and 575 to be an adult. In the first half of 2017, there were 315 disputes resolved, where 103 concluded on the applicant's minority and 212 concluded on the applicant being an adult.¹⁶⁵

Greece took 19 decisions on age assessment in 2016 and another 40 in the first half of 2017, while **Sweden** has taken 500 in the first half of 2017. The outcome of these decisions is not available,

¹⁶⁰ See further ECRE, *Detriment of the doubt: Age assessment of unaccompanied asylum-seeking children*, AIDA Legal Briefing No 5, December 2015, available at: <http://bit.ly/1PdpH6H>.

¹⁶¹ Austrian Federal Ministry of Interior, Reply 11324/AB to parliamentary question 11814/J (XXV.GP), 6 April 2017, available in German at: <http://bit.ly/2uOAYWx>.

¹⁶² Information provided by Asylkoordination Österreich, 18 August 2017.

¹⁶³ Information provided by Vluchtelingenwerk Vlaanderen, 22 August 2017.

¹⁶⁴ *Ibid.*

¹⁶⁵ UK Home Office, *Asylum statistics: April-June 2017*, 24 August 2017.

however.¹⁶⁶ In other countries such as **Cyprus**, the authorities do not keep records of the number of age assessments conducted but only of those finding the applicant to be over the age of 18. Such decisions were taken in 18 cases so far in 2017.¹⁶⁷

Legal standards governing age assessment

The key principles governing age assessments are codified in both international and European instruments. Most notably, the United Nations Convention on the Rights of the Child, the Charter of Fundamental Rights of the EU and the recast Asylum Procedures Directive are of paramount importance to the legal protection of the child. The guiding principles on age assessment are the best interests of the child and the benefit of the doubt.

As codified in the United Nations Convention on the Rights of the Child, protecting the best interests of the child must be a primary consideration in all actions and decisions.¹⁶⁸ With respect to unaccompanied children, the Committee on the Rights of the Child (CRC) has noted in General Comment No 6 (2005) that protecting the best interests of the child must be the guiding principle for determining the priority of protection needs and the measures to be applied. This encompasses age assessment, which should not only take into account the physical appearance of the individual, but also his or her psychological maturity.¹⁶⁹

Specifically on age assessments, the General Comment further clarifies that in the event of uncertainty, the individual must be accorded the benefit of the doubt, such that if there is a possibility that the individual is a child, he or she should be treated as one.¹⁷⁰ UNHCR's guidelines on international protection relating to child protection claims under the 1951 Refugee Convention and its 1967 Protocol further mention the centrality of the "benefit of the doubt" principle in age assessment procedures, stating the margin of appreciation inherent to these procedures needs to be applied in such a manner that in cases of uncertainty, the individual will be considered a child.¹⁷¹

Both the principle of benefit of the doubt and best interests of the child are incorporated in EU law through the recast Asylum Procedures Directive and the Charter. Article 25(5) of the recast Asylum Procedures Directive provides that:

"Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor."

This provision sets out a hierarchy in decision-making with a medical examination only to be ordered when a person's statements or other indications do not conclusively establish such age. If, after the medical age assessment, there are still doubts concerning the age, the benefit of the doubt must be granted to the asylum-seeking child. Especially given the fact that children may be less likely to have

¹⁶⁶ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017; Information provided by Lisa Hallstedt and FARR, 21 August 2017.

¹⁶⁷ Information provided by the Future Worlds Center and obtained from the Cypriot Asylum Service, 25 July 2017.

¹⁶⁸ Article 3(1) Convention on the Rights of the Child provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

¹⁶⁹ ECRE, *Detriment of the doubt: Age Assessment of Unaccompanied Asylum-Seeking Children*, AIDA Legal Briefing No 5, December 2015, 2.

¹⁷⁰ CRC, General Comment No. 6 (2005).

¹⁷¹ UNHCR, *Guidelines on International Protection No. 8*, para 75.

documentary evidence, this principle is vital and a particularly important safeguard for unaccompanied children.

On the protection of the best interests of the child, Article 24(2) of the Charter provides that all actions relating to children, whether taken by public authorities or private institutions, must take into account the child's best interests as a primary consideration.

Methods for assessing age in practice

Priority given to medical assessments

Despite the clarity of the principle of the best interests of the child and the European Parliament and EASO recommendations for clear priority to be given to documentary evidence and other indications such as a multidisciplinary assessment by qualified professionals,¹⁷² countries such as **Sweden, Finland, Cyprus, Greece, Austria, Bulgaria, Belgium, Spain, Croatia, Hungary, Poland**, as well as **Switzerland** and **Norway**, continue to over-rely on medical methods for assessing the age of unaccompanied children,¹⁷³ the reliability of which remains disputed.¹⁷⁴ Conversely, the **Netherlands** has not recently resorted to medical age assessments,¹⁷⁵ as it prioritises age inspections (*leeftijdsschouw*) by officials, detailed below.

On 9 September 2016, the Migration Agency and the National Forensic Medicine Agency (*Rättsmedicinalverket*) of **Sweden** unveiled their new medical method for age assessments, consisting of taking X-rays of wisdom teeth, and MRI scans of knee joints, which are then analysed by dentists and radiologists.¹⁷⁶ This is despite the fact that the Swedish Board of Forensic Medicine (RMV) had previously explained that “there is no method for medical age assessment that can determine a person's exact age.”¹⁷⁷ Nevertheless, even though it is established that these can only define an age range rather than an exact birth date,¹⁷⁸ the first assessments carried out between March and May 2017 could “possibly suggest that the person is over the age of 18” in three out of four cases.¹⁷⁹ This high number stems from the fact that the cases referred to the National Forensic Medicine Agency are those where the Migration Agency believes that existing evidence is not sufficient.

In **Austria**, even though the law prescribes that a medical examination should be a measure of last resort, this is not strictly applied.¹⁸⁰ Children have to undergo a medical age assessment without the asylum authorities' acknowledging submitted documents or giving sufficient time to obtain the relevant documents. The medical age assessment in Austria states a minimum age and consists of three

¹⁷² European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)); EASO, Age assessment practice in Europe, December 2013, 6; See also Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012.

¹⁷³ Information exchanged by the European Legal Network on Asylum (ELENA) in early 2017 and information extracted from the AIDA Country Reports 2016 Updates, available at: www.asylumineurope.org.

¹⁷⁴ See e.g. A Aynsley-Green et al, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control', 2012, *British Medical Bulletin*; G Noll, 'Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum', January 2015.

¹⁷⁵ Information provided by the Dutch Council for Refugees, 30 August 2017.

¹⁷⁶ Swedish Ministry of Justice, *Åldersbedömning tidigare i asylprocessen*, Ds 2016:37, available in Swedish at: <http://bit.ly/2snU7Dv>.

¹⁷⁷ RMV, *Återrapportering avseende regeringsuppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar*, Ju2016/03931/A, 15 November 2016, available in Swedish at: <http://bit.ly/2g2p7Ak>.

¹⁷⁸ See, for instance, UNICEF, *Age Assessment Practices: A Literature Review and Annotated Bibliography*, Terry Smith and Laura Brownlees, 2011, 13.

¹⁷⁹ The Local, 'First results of Sweden's asylum age assessment tests', 30 May 2017, available at: <http://bit.ly/2rzajRe>.

¹⁸⁰ AIDA, Country Report Austria, 2016 Update, February 2017, available at: <http://bit.ly/2IBT7YI>, 51.

medical examinations: a general medical examination; an X-ray examination of the wrist; and a dental examination by a dentist. If the X-ray examination of the wrist is not conclusive i.e. it shows a high level of ossification, a further X-ray (CT) examination of the clavicle may be ordered.

In addition, **Belgium** has recently proposed a law obliging asylum-seekers to retroactively pay for an age assessment if the assessment leads to the conclusion that the person is over 18 years old.¹⁸¹ This despite the previously stated caveat that medical age assessments define an age range and not exact birth date and despite previous guidance by UNHCR, UNICEF and the International Rescue Committee clearly putting forward that a child should never bear the financial costs of an age assessment.¹⁸² Age assessments in Belgium consist of scans of a person's teeth, wrist and clavicle.

Despite these practices, courts and legal frameworks in several countries have recalled the need to award priority to social assessments before resorting to medical examinations. In **France**, the law now states that the assessment must be conducted according to a multidisciplinary approach.¹⁸³ This echoes a Circular issued in January 2016,¹⁸⁴ and welcomed by the French Ombudsman,¹⁸⁵ which specifies that a social evaluation should prevail over medical bone examinations, especially when it cannot be established that available documentation is not authentic. This principle has also been recalled by the Court of Appeal of Lyon in early 2017.¹⁸⁶ However, practice is not uniform throughout the country and only a few *départements* have followed the guidance so far.¹⁸⁷

Italy adopted Law 47/2017 on special provisions for the protection of unaccompanied children in April 2017.¹⁸⁸ The legal framework clarifies as a rule that age assessments are conducted by a multidisciplinary team at public health facilities and include social interaction, a paediatric evaluation and a psychological or neuropsychiatric evaluation, in the presence of a cultural mediator, in accordance with the best interests of the child principle.¹⁸⁹ The legal framework in **Greece** also requires priority to be awarded to an assessment by a paediatrician, and a subsequent assessment by a psychologist and social worker to evaluate the cognitive, behavioural and psychological development of the individual if doubts persist. Only where a conclusion cannot be reached following this procedure may a medical examination be ordered. Despite the safeguards available in the law, the application of the procedure seems to be severely limited in practice, since the Asylum Service usually defers to the first age assessment made by the RIS.¹⁹⁰

Malta's age assessment procedure also presents positive elements as regards compliance with the best interests of the child principle. The procedure starts when the person enters the Initial Reception Centre (IRC) with an interview by an AWAS staff member and a transcultural counsellor ("first phase"), and if a birth date cannot be concluded, a further assessment is conducted ("second phase"), consisting of an in-depth interview by three transcultural counsellors. The "third phase" consists of a

¹⁸¹ Theo Francken, *Botscans*, 18 May 2017, available at: <http://bit.ly/2rgNC18>.

¹⁸² UNHCR, UNICEF and International Rescue Committee, *Discussion paper on a possible way forward to strengthened policies and practices for unaccompanied and separated children*, 20 January 2017, 6, available at: <http://bit.ly/2s05LTw>, 6.

¹⁸³ AIDA, Country Report France, 57.

¹⁸⁴ French Circular NOR: JUSF1602101C relating to State resource mobilisation for minors temporarily or definitely deprived from their family protection, 25 January 2016, available in French at: <http://bit.ly/2jghM16>.

¹⁸⁵ French Ombudsman, Decision MDE-2016-052, 26 February 2016, available in French at: <http://bit.ly/2stqSuu>.

¹⁸⁶ French Court of Appeal of Lyon, Decisions Nos 16/0043, 16/00602 and 16/00770, 11 January 2017.

¹⁸⁷ French Law n. 2016-297 of 14 March 2016 relating to child protection, available in French at: <http://bit.ly/2jd6t9b>; Decree n. 2016-840 relating to reception and minority assessment conditions of minors temporarily or definitely deprived from the protection of their family, 24 June 2016, available in French at: <http://bit.ly/2j01GrO>.

¹⁸⁸ Italian Law 47/2017 of 7 April 2017 "Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati", available in Italian at: <http://bit.ly/2sYgFd8>.

¹⁸⁹ Article 19bis Italian Reception Decree, as inserted by Article 5 Italian Law 47/2017.

¹⁹⁰ AIDA, Country Report Greece, 70-71.

decision taken by the Chairperson, which either concludes on the outcome, or orders a bone density test to be done by the Ministry of Health, if further doubts persist.¹⁹¹ The procedure is usually completed within 10 days.¹⁹²

Guidance published by the **UK** Association of Directors of Children's Services (ADCS) in October 2015 provides detail on lawful procedures and good practice.¹⁹³ Social workers conducting age assessments must *inter alia* be registered social workers, trained in conducting age assessments, and take into account all relevant information.

Contrary to the recast Asylum Procedures Directive, the proposal for an Asylum Procedures Regulation contains a separate provision to medical examinations of unaccompanied children with a view to assessing their age. Article 24(1) of the proposal only allows an examination when doubts persist after exhaustion of other elements such as statements by the applicant or other relevant indications such as a psychosocial assessment. Even though the introduction of a psychosocial assessment as a prerequisite for a medical examination is a welcome improvement, the proposal stops short of stating that a medical examination should only be used as a measure of last resort. This important principle is introduced in the draft report of the European Parliament.¹⁹⁴ In the Council, only very little progress has been made relating to the proposal for an Asylum Procedures Regulation.

Disregard of the benefit of the doubt

The principle of the benefit of the doubt is crucial, given the widely contested reliability of medical methods in determining a person's age, as discussed above. Not every country applies this principle in the same way. The weight attached to the principle also differs between Member States.

The importance given to the benefit of the doubt principle varies considerably across Europe. Countries such as **Sweden** increasingly rely on the dubious outcome of medical methods, effectively outweighing information from non-medical professionals suggesting that a person is likely to be underage, and thereby disregarding the benefit of the doubt principle. At least 1,801 Afghan unaccompanied children have had their age raised to 18 by the Migration Agency throughout 2016.¹⁹⁵ In some cases, the Migration Agency has arbitrarily assigned a birth date to the applicant.

Spain is also a problematic example, where applicants' statements and documentation attesting their minority have been disregarded by police authorities at airports. In seven cases reported in 2017, the Ombudsman has requested that the benefit of the doubt be awarded to the individuals concerned.¹⁹⁶

In **Germany**, on the other hand, the High Administrative Court of Bavaria has set certain standards for age assessment by the authorities.¹⁹⁷ The Court rules that an assessment could only be done in exceptional cases in which there can be no doubt that an asylum seeker is older than 18 years. All other cases should be treated as "cases of doubt" and a "grey area" (margin of error) of one to two years should be taken into account in favour of the asylum seeker. Even following a medical examination a margin of error of another two to three years should be considered as a margin of tolerance, in order to avoid any risk of incorrect assessments.¹⁹⁸

¹⁹¹ AIDA, Country Report Malta, 31-32.

¹⁹² Information provided by aditus foundation, 8 August 2017, and obtained from AWAS, 1 August 2017.

¹⁹³ ADCS, *Age assessment guidance*, October 2015, available at: <http://bit.ly/1MUduDi>.

¹⁹⁴ European Parliament, *Draft Report on the proposal for Asylum Procedures Regulation*, 2016/0224(COD), 12 May 2017, available at: <http://bit.ly/2toGN27>, Amendment 88, Article 24(1).

¹⁹⁵ AIDA, Country Report Sweden, 34.

¹⁹⁶ CEAR, 'Defensor del Pueblo reclama presunción de minoría de edad a refugiados', 2 August 2017, available in Spanish at: <http://bit.ly/2vlp4AW>.

¹⁹⁷ German High Administrative Court Bavaria, Decision 12 CS 16.1550 of 16 August 2016, asyl.net, available at: <http://bit.ly/2m2hPOw>.

¹⁹⁸ AIDA, Country Report Germany, 41.

Some countries attach major importance to the observations of physical appearance and demeanour from officials. An example is **Serbia** where the age assessment procedure merely consists of personal observations by the relevant official, most often a police officer.¹⁹⁹ A similar practice occurs in **Hungary**, and often the Immigration and Asylum Office (IAO) takes the outcome of the physical appearance assessment by a police doctor as granted.²⁰⁰ This poses crucial questions with regards to margin of error and compliance with the benefit of the doubt. In **Ireland**, Section 20(7) of the International Protection Act allows for detention pending an age assessment if two officials – a member of the national police (*Garda Siochana*) and an immigration officer, or two police officers or two immigration officers – believe that the applicant is over 18 years old.²⁰¹ The weight attached to the belief of the relevant official outweighs the benefit of the doubt, thereby leading to detention of persons who may in fact be underage.

In the **UK**, less weight is given to the observations and the opinion of officials after a High Court ruled in June 2016 that a person subject to detention cannot be treated as an adult on the basis of authorities' "reasonable belief", but only after majority has been established as a matter of fact.²⁰² Despite the judgment, the policy has not been changed at the time of writing.²⁰³

The **Netherlands** has also recently modified its age assessment policy due to criticisms levelled against the age inspection (*leeftijdsschouw*),²⁰⁴ by which officials of the IND or the Royal Police (KMar) assess whether the asylum seeker is evidently over or under the age of 18 based on his or her appearance and discussion with him or her. Currently, three officers from the IND, the KMar or the Border Police (AVIM) have to conduct the inspection independently from one another.²⁰⁵ In addition, officials cannot establish that the person is an adult solely based on appearance.²⁰⁶

In its amendments to the Commission proposal for an Asylum Procedures Regulation,²⁰⁷ the draft European Parliament report has added a provision stating that the age assessment shall not be solely based on the applicant's physical appearance or demeanour.²⁰⁸

Right to challenge an age assessment

The recast Asylum Procedures Directive does not provide for a free-standing right to an effective remedy against an age assessment decision, despite the far-reaching impact of such a determination on the individual asylum seeker. Most countries do not foresee the possibility of challenging an age assessment decision directly, or the notification of a separate administrative decision on the outcome of the age assessment procedure. In others like **Belgium**, an applicant may challenge an age

¹⁹⁹ AIDA, Country Report Serbia, 2016 Update, February 2017, available at: <http://bit.ly/2pSRBA1>, 25.

²⁰⁰ AIDA, Country Report Hungary, 44.

²⁰¹ Ireland, International Protection Act 2015, N. 66, 30 December 2015, available at: <http://bit.ly/2inFha1>.

²⁰² UK High Court, *R (AA) v Secretary of State for the Home Department* [2016] EWHC 1453 (Admin), Judgment of 20 June 2016, available at: <http://bit.ly/29enloB>.

²⁰³ Information provided by the British Refugee Council, 8 August 2017.

²⁰⁴ In one case, the court concluded allowed an appeal against an age assessment decision on the ground that the age inspection had not been carried out by experts on the matter: Regional Court of Amsterdam, Decision 16/13578 of 13 July 2016. See also critiques of the age inspection by: Regional Court of Arnhem, Decision 16/10627 of 16 June 2016; Regional Court of Haarlem, Decisions 16/5615 of 19 April 2016 and 16/833 of 12 February 2016.

²⁰⁵ Dutch Parliament, Reply by the Secretary of State for Security and Justice to a parliamentary question on age assessment of unaccompanied children, 7 November 2016, available in Dutch at: <http://bit.ly/2glbqMT>.

²⁰⁶ Information provided by the Dutch Council for Refugees, 30 August 2017.

²⁰⁷ ECRE, *ECRE comments on the Commission Proposal for an Asylum Procedures Regulation*, COM(2016) 467, 27, available at: <http://bit.ly/2ui3Rw1>

²⁰⁸ European Parliament, *Draft Report on the proposal for Asylum Procedures Regulation*, 2016/0224(COD), 12 May 2017, available at: <http://bit.ly/2toGN27>, Amendment 87, new Article 24(-1).

assessment before the Council of State through a non-suspensive appeal, however the court is not competent to review elements such as the reliability of the results of the medical examination or the evidentiary value of identity documents.²⁰⁹

Some positive developments in this regard have emerged in over the past two years. In **Italy**, as of April 2017 the law expressly foresees the possibility to challenge an age assessment decision.²¹⁰ To that end, the law also entitles the individual and their guardian to access the age assessment report, which should indicate the margin of error of the methods used.²¹¹ **France** also requires the outcome of the age assessment interview to be held in a written decision notified to the interviewee, which must mention the available legal remedies against it.²¹² In **Sweden**, the law now deems age assessments as separate administrative decisions, amenable to legal challenge.²¹³ **Malta** also allows for age assessment decisions to be challenged, yet no such appeal has been submitted to the Immigration Appeals Tribunal in 2016 and so far in 2017.²¹⁴

In **Greece**, there is a possibility of appealing an age assessment carried out before the RIS within 10 days from the notification of the decision. Problems related to legal assistance and rejection on the basis of documents not being officially translated have been reported by the Greek Council for Refugees.²¹⁵

In 2016, two UK cases shed some light on the link between challenging a non-medical age assessment and the necessity of undergoing a medical age assessment. In *London Borough of Croydon v Y*, the Court of Appeal held that the asylum-seeker would have to agree to an age assessment by means of a dental X-ray in order to continue his claim against the local authority.²¹⁶ The claimant had argued that he had been incorrectly age assessed as an adult when in fact he was a child. A few months later, in the case *R (ZM and SK) v London Borough of Croydon*, the Upper Tribunal offered some guidance on the application of *London Borough of Croydon v Y* by stating that:²¹⁷

“The decision of the Court of Appeal in *London Borough of Croydon v Y* should not be read as prohibiting a person from refusing to undergo a dental examination. However, (i) the risk inherent in the exposure to x-rays during the taking of the dental panoramic tomograph is not likely to be a reasonable ground for refusing to allow the tomograph to be made, given the advantages stemming from ascertainment of an individual’s true age, and (ii) despite the reservations expressed herein, analysis of a person’s dental maturity may well have something to add to the process of assessing chronological age.”

The European Court of Human Rights is also scrutinising age assessment procedures and related safeguards in the pending case of *Darboe and Camara v. Italy*, relating to age assessment of

²⁰⁹ Information provided by Vluchtelingenwerk Vlaanderen, 28 August 2017.

²¹⁰ Article 19bis Italian Reception Decree, as inserted by Article 5 Italian Law 47/2017.

²¹¹ *Ibid.*

²¹² Law n. 2016-297 of 14 March 2016 relating to child protection, available in French at: <http://bit.ly/2jd6t9b>; Decree n. 2016-840 relating to reception and minority assessment conditions of minors temporarily or definitely deprived from the protection of their family, 24 June 2016, available in French at: <http://bit.ly/2j01GrO>.

²¹³ AIDA, ‘Sweden: Proposal to introduce right to appeal age assessment’, 25 November 2016, available at: <http://bit.ly/2krGKcU>.

²¹⁴ Information provided by aditus foundation, 8 August 2017, and obtained from the Immigration Appeals Board, 3 August 2017.

²¹⁵ AIDA, Country Report Greece, 72-73.

²¹⁶ UK Court of Appeal, *London Borough of Croydon v Y* [2016] EWCA Civ 398, Judgment of 26 April 2016, available at: <http://bit.ly/1VMvs3r>.

²¹⁷ UK Upper Tribunal, *R (on the application of ZM and SK) v The London Borough of Croydon* [2016] UKUT 559 (IAC), Judgment of 11 November 2016, available at: <http://bit.ly/2s9xfor>.

unaccompanied children in the Cona temporary reception centre (CAS) in Italy.²¹⁸ Several organisations had already obtained interim measures from the Court to protect the children against inhuman conditions in the centre.²¹⁹

Similar to the recast Asylum Procedures Directive, the proposed Asylum Procedures Regulation does not foresee a discrete right to an effective remedy against an age assessment decision. The draft European Parliament report has made some steps towards enabling individuals to challenge decisions by requiring any documents related to the medical examination to be included in the applicant's file.²²⁰

²¹⁸ ECtHR, *Darboe and Camara v. Italy*, Application No 5797/17, Communicated on 14 February 2017. See further AIRE Centre, Dutch Council for Refugees and ECRE, *Third party intervention in Darboe and Camara v. Italy*, July 2017, available at: <http://bit.ly/2uqoBFu>.

²¹⁹ AIDA, Country Report Italy, 76.

²²⁰ European Parliament, *Draft Report on the proposal for Asylum Procedures Regulation*, 2016/0224(COD), 12 May 2017, available at: <http://bit.ly/2toGN27>, Amendment 89, Article 24(4).

Identifying an asylum seeker as vulnerable or in need of special guarantees can entail substantial differences in the procedure he or she is subject to during the examination of a protection claim. EU law lays down different sets of rules aimed at granting vulnerable groups swift access to protection, while safeguarding them from unduly expedited procedures that may be detrimental to their effort to support their asylum application. In addition, vulnerability may be a factor affecting the allocation of responsibility between European countries, as it may require specific guarantees for applying the Dublin system in a manner compliant with human rights.

Nevertheless, the terminological complexity surrounding vulnerability in the asylum context, discussed in [Chapter I](#), has visible consequences on the scope and effectiveness of those safeguards. More particularly, while some guarantees such as prioritisation in the processing of applications or individual assurances in the Dublin procedure are available to “vulnerable groups”, exemption from accelerated and border procedures under EU law is a safeguard applicable to “applicants in need of special procedural guarantees” under certain conditions. The ambiguous and somewhat equivocal framing of these conditions seems to have undermined the protective role of the recast Asylum Procedures Directive in practice.

1. Priority in procedural steps

Registration of the asylum application

Some European countries prioritise access to the asylum procedure for persons with special needs, either by granting them priority in the regular process of registration or through separate registration channels.

In **Greece**, vulnerable groups and persons in need of special procedural guarantees are guaranteed priority in the registration of their claims.²²¹ In practice, applicants belonging to vulnerable groups may be able to bypass the requirement of a Skype pre-registration appointment prior to obtaining an appointment with the Asylum Service for registration,²²² as they can be directly referred to the Asylum Service for a registration appointment.²²³ Such referrals are made by the Reception and Identification Service (RIS), as well as NGOs closely cooperating with the Asylum Service.²²⁴

In Athens, vulnerable groups are referred to the Municipality of Athens Centre for Reception and Solidarity in Ffourarchion. The Regional Asylum Office (RAO) of Attica referred a total 1,864 cases to the Ffourarchion centre in 2016.²²⁵

Special channels for accessing the procedure also exist in some overseas regions of **France**. When the Prefecture of French Guiana issued a decision to temporarily suspend the registration of asylum applications from 19 August 2016 until 1 December 2016 at the latest, due to a sharp increase in the number of asylum claims mainly from Haitian nationals, it maintained the possibility of access to the

²²¹ Article 51(6) Greek Law 4375/2016. See AIDA, Country Report Greece, 2016 Update, March 2017, available at: <http://bit.ly/2nwd9nA>, 36.

²²² For more details on this procedure, see AIDA, Country Report Greece, 30 et seq.

²²³ AIRE Centre and ECRE, *With Greece: Recommendations for refugee protection*, July 2016, 13.

²²⁴ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

²²⁵ AIDA, Country Report Greece, 68.

procedure for particularly vulnerable groups. This was a decisive factor in the Council of State's decision to uphold the legality of the suspension of registration on 7 November 2016.²²⁶

Croatia, on the other hand, provides that applications made by unaccompanied children are to be prioritised.²²⁷ However, delays in the organisation of interviews for the purpose of lodging asylum applications occurred in 2016, as guardians were not appointed in time to unaccompanied children.²²⁸ Similar issues arise in **Italy**, where the prioritised procedure is not applied to unaccompanied children mainly because of the delay in appointing their legal guardian by the guardianship judge (*giudice tutelare*).²²⁹

Examination of the asylum application

Many European countries (**Cyprus, Spain, France, Greece, Hungary, Ireland, Italy, Malta, Poland**) provide that asylum applications by persons with special needs are to be examined by way of priority, focusing particularly on unaccompanied children.²³⁰ In the case of **Hungary** and **Switzerland**,²³¹ such priority is awarded only to unaccompanied children, although in Hungary prioritisation does not happen in practice.²³² **Ireland** also foresees the possibility for asylum seekers to benefit from its prioritised procedure on grounds of age or due to medical conditions, though the International Protection Office makes it clear that priority will mainly be awarded to older cases.²³³

In **Italy**, the law states that the Territorial Commission for International Protection must schedule the applicant's interview "in the first available seat" when that applicant is deemed vulnerable.²³⁴ In practice, however, the prioritised procedure is applied to those held in pre-removal detention centres and rarely to the other categories. Victims of torture and extreme violence rarely benefit from priority since they are usually identified at a later stage, through the support of NGOs.²³⁵

Prioritisation leads to decisions being issued more quickly for these cases. While disaggregated statistics are not available in most countries, **France** reported an average processing time for vulnerable persons of 97 days in 2015, compared to an average 216 days for all caseloads.²³⁶ **Ireland** reported an average processing time for unaccompanied children of 141 days in 2015, compared to an average 203 days for all caseloads.²³⁷ A different trend prevails in **Sweden**, however, whereby claims by unaccompanied children take longer to be processed compared to other cases. In the first half of 2017, the average processing time for unaccompanied children was 510 days, compared to 429 days for all caseloads.²³⁸ Civil society organisations witness similar delays in **Austria**, where unaccompanied children may wait up to 15 months for a first instance decision.²³⁹

²²⁶ AIDA, Country Report France, 24.

²²⁷ Article 17(9) Croatian Law on International and Temporary Protection.

²²⁸ AIDA, Country Report Croatia, 21.

²²⁹ AIDA, Country Report Italy, 27.

²³⁰ Article 12E Cypriot Refugee Law; Article 25(1) Spanish Asylum Law; Article L.723-3 French Ceseda; Article 51(6) Greek Law 4375/2016; Section 35(7) Hungarian Asylum Act; AIDA, Country Report Ireland, 40; Article 28 Italian Procedure Decree; Regulation 6(8) Maltese Procedural Regulations; AIDA, Country Report Poland, 19.

²³¹ Information provided by the Swiss Refugee Council, 11 August 2017, and obtained from SEM, 3 August 2017.

²³² AIDA, Country Report Hungary, 20.

²³³ Irish International Protection Office, *Prioritisation of applications for international protection under the International Protection Act 2015*, 27 February 2017, available at: <http://bit.ly/2m1Plbi>.

²³⁴ AIDA, Country Report Italy, 47.

²³⁵ *Ibid*, 27.

²³⁶ AIDA, Country Report France, 28-29.

²³⁷ AIDA, Country Report Ireland, 21.

²³⁸ Swedish Migration Agency, *Asylum decisions statistics*, June 2017. Note, on the other hand, that the Swedish Migration Agency as prioritised the processing of claims by 1,000 vulnerable applicants in the first half of 2017: Information provided by Lisa Hallstedt and FARR, 21 August 2017.

²³⁹ Information provided by Asylkoordination Österreich, 18 August 2017.

At the same time, prioritisation is not always carried out in accordance with other necessary safeguards for the processing of claims by vulnerable groups. In **Cyprus**, prioritisation of cases such as victims of torture, violence or trafficking does not necessarily imply that other important safeguards are followed, such as the evaluation of their vulnerability and psychological condition and how this may affect their capability to respond to the questions of the interview. In some cases, applications may be prioritised but later face delays due to lack of interpreters or the conduct of examinations by the Medical Board or the Anti Trafficking Department of the Police.²⁴⁰

Conversely, **Austria, Belgium, Bulgaria and Germany** do not foresee prioritisation of the processing of claims by vulnerable groups. **Austria** requires consideration to be given to the asylum seekers' specific needs in the course of the procedure.²⁴¹ However, this does not seem to be applied in first instance procedures in practice. Usually the 6-month time limit for deciding on the application is long enough to gather evidence and could be extended without any consequences.²⁴²

2. Exemption from special procedures

The recast Asylum Procedures Directive requires Member States to tailor the use of truncated procedures, including those conducted at the border, to the specific needs of asylum seekers. This is not done through a clear-cut exemption of applicants in need of special procedural guarantees from such procedures, however. Authorities must refrain from applying such procedures where they are unable to offer “adequate support” to applicants requiring special procedural guarantees.²⁴³ For cases where applications from such persons are rejected in any other procedure than an accelerated or border procedure which does not guarantee access to an appeal with automatic suspensive effect, the special procedural guarantees foreseen for appeals against negative decisions taken in border procedures, laid down in Article 46(7) must be applied.²⁴⁴ This means access to the necessary and interpretation and legal assistance, at least one week to prepare and submit arguments, and review in fact and in law of the negative decision.²⁴⁵

The notion of “adequate support” comes as another concept relevant to vulnerability, yet one that is not defined by EU law. The Preamble to the Directive only mentions that such applicants “should be provided with adequate support, including sufficient time, in order to create the conditions necessary” for presenting their claim.²⁴⁶ As detailed elsewhere, the very requirement of “sufficient time” to create such conditions advocates against the use of accelerated and border procedures for these categories of applicants. Yet the Directive stops short of exempting persons with special procedural needs from procedures which are by nature ill-suited to their predicament.²⁴⁷ Regrettably, the transposition of the Directive into national law and implementation in practice has not brought more clarity on the scope and content of “adequate support” in most countries. One notable exception is the **Netherlands**. According to IND guidance, “adequate support” to an applicant in need of special procedural guarantees could entail *inter alia*: additional breaks during interviews; additional explanation about the interview; the opportunity for an applicant with physical impairment such as back aches to walk in the interviewing room during the interview; leniency on small inconsistencies and contradictions.²⁴⁸ In a recent ruling, the Dutch Council of State has also found the presence of a family member during the

²⁴⁰ AIDA, Country Report Cyprus, 19.

²⁴¹ Article 30 Austrian Asylum Act.

²⁴² AIDA, Country Report Austria, 52.

²⁴³ Article 24(3) recast Asylum Procedures Directive.

²⁴⁴ *Ibid.*

²⁴⁵ Article 46(7) recast Asylum Procedures Directive.

²⁴⁶ Recital 29 recast Asylum Procedures Directive.

²⁴⁷ ECRE, *Information Note on Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast)*, December 2014, 29-30.

²⁴⁸ Dutch IND, Work Instruction 2015/8 on special procedural guarantees, 17 July 2015, available in Dutch at: <http://bit.ly/2uHMMf4>.

interview – a sibling in the case concerned – as adequate support.²⁴⁹ Conversely, the Aliens Office in **Belgium** interprets “adequate support” as the availability of certain services at the border for persons placed under an “extra care list”, such as medical psychological care.²⁵⁰

The rules governing the treatment of unaccompanied children are much more complex and incoherent. The Directive recalls the best interests of the child as a primary consideration for Member States, yet allows the use of accelerated and border procedures vis-à-vis unaccompanied children in an exhaustive but long list of cases discussed below.

The accelerated procedure

European countries have taken different approaches vis-à-vis the exemption of vulnerable groups from the accelerated procedure in their national systems. Persons identified as requiring special procedural guarantees are always channelled under the regular procedure in **Greece** and **Malta**.²⁵¹ Other countries like **France** foresee the exemption from accelerated procedures at the discretion of the asylum authority, where it deems that the applicant requires special procedural guarantees.²⁵² **Croatia** and **Cyprus** have transposed the wording of Article 24(3) of the Directive, requiring the exemption of such applicants from the accelerated procedure where “adequate support” cannot be provided.²⁵³

Though not bound by the recast Directive, the **UK** also foresaw the possibility for vulnerable persons to be removed from its Detained Fast-Track (DFT) system, since vulnerability is a ground for release from detention.²⁵⁴ **Switzerland**, on the other hand, only applies the test phase accelerated procedure to vulnerable groups where their case is very clear and does not need more time to decide upon.²⁵⁵

Conversely, they are not exempt from the accelerated procedure in **Germany, Croatia, Hungary, Italy, Poland** and **Sweden**. It should be noted that, when transposing the Asylum Procedures Directive, Sweden saw no use of transposing Article 24 on applicants in need of special procedural guarantees, even though many authorities and organisations, including Swedish Migration Agency, Swedish Red Cross and UNHCR, saw a need to do so.²⁵⁶

Statistics on the implementation of the aforementioned exemptions remain scarce across European countries. In **Germany**, for instance, the BAMF does not collect figures on the application of the accelerated procedure.²⁵⁷ Available figures from **France** suggest that no more than 51 claims (0.2%) were exempted from the accelerated procedure out of a total 27,654 claims accelerated in 2016,²⁵⁸ while **Greece** has not exempted any asylum seeker from its accelerated procedure in 2016 and the first half of 2017.²⁵⁹

As regards unaccompanied children, the recast Asylum Procedures Directive does not set out a coherent approach for the adaptation of the accelerated procedure to their needs. It permits Member

²⁴⁹ Dutch Council of State, Decision 201609551/1/V/1 of 3 August 2017, available in Dutch at: <http://bit.ly/2wltyur>.

²⁵⁰ Information provided by Vluchtelingenwerk Vlaanderen, 22 August 2017.

²⁵¹ AIDA, Country Report Greece, 73; Country Report Malta, 32.

²⁵² AIDA, Country Report France, 58.

²⁵³ Article 15(3) Croatian Law on International and Temporary Protection; Article 10A(3)(a) Cypriot Refugee Law.

²⁵⁴ AIDA, Country Report UK, 44.

²⁵⁵ AIDA, Country Report Switzerland, 44.

²⁵⁶ AIDA, Country Report Sweden, 35.

²⁵⁷ Information provided by Informationsverbund Asyl und Migration, 11 August 2017.

²⁵⁸ OFPRA, *Annual Report 2016*, 39, 126.

²⁵⁹ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

States to apply accelerated procedures only where one of the following three circumstances arises: the child comes from a safe country of origin, makes an admissible subsequent application, or represents a threat to public order or national security.²⁶⁰ The remaining seven grounds for applying the accelerated procedure to asylum seekers, including failure to apply as soon as possible or refusal to be fingerprinted,²⁶¹ cannot be invoked when dealing with an unaccompanied child.

The fragmentation of procedural guarantees by the Directive stems from an effort to strike a compromise between the need for a more protective approach to these groups and the risk of “misuse of procedural guarantees”. During the negotiations of the instrument, the Council conceded that it put emphasis on “the political message of the relevant articles; the wording of the text should not constitute an invitation to abuse by those who are not in need of protection.”²⁶² The choice of grounds where the accelerated procedure would be applicable seems to be driven by political concerns of Member States. For instance, there seems in fact to be little – if any – basis in principle for deeming unaccompanied children originating from safe countries of origin as less meritorious claimants than those who raise no grounds relating to protection in their application. Yet the effect of such a compromise has been a highly complex provision in the Directive which severely undermines the effective implementation of protective standards for unaccompanied children.

Member States have transposed the complex obligations set out in Article 25(6) of the Directive as follows:

Application of the accelerated procedure to unaccompanied children	
Treatment in accelerated procedure	Country
Full exemption	BG, GR, NL, UK
Exemption in specific cases	AT, CY, FR, HR, MT
No exemption	BE, DE, HU, IT, PL, SE, CH

Source: AIDA, Country Reports, 2016 Update.

Note: the reference to NL concerns the “track 2” procedure.

Note: the UK Detained Fast-Track System is suspended.

The comparison of legal frameworks reveals an alarming number of countries not respecting the requirements of the Directive, by providing no exemption from accelerated procedures under any circumstances. Most countries (**France, Croatia, Cyprus, Malta**) that have partially exempted unaccompanied children from the accelerated procedure have remained faithful to the wording of the recast Asylum Procedures Directive, thereby applying the procedure in cases where the child comes from a safe country of origin, makes an admissible subsequent application or represents a threat to public order or national security.²⁶³ In **Austria**, on the other hand, unaccompanied children may be subject to the accelerated procedure only where they present a threat to security.²⁶⁴

²⁶⁰ Article 25(6)(a) recast Asylum Procedures Directive. These grounds are covered by Article 31(8)(b), (f) and (j) of the Directive.

²⁶¹ Article 31(8)(a), (c), (d), (e), (g), (h), (i) recast Asylum Procedures Directive.

²⁶² Council of the European Union, *Amended proposal for a recast Asylum Procedures Directive: Review of the outcome of the informal trilogues*, 17075/12, 4 December 2012, available at: <http://bit.ly/2sdGrHO>, para 2.

²⁶³ Article 10(2ΣT)(a) Cypriot Refugee Law; Article L.723-2(4) French Ceseda; AIDA, Country Report Croatia, 40; AIDA, Country Report Malta, 32.

²⁶⁴ AIDA, Country Report Austria, 52.

The border procedure

Many countries, such as **Bulgaria, Cyprus, Croatia, Italy, Malta, Poland, Sweden** or **Serbia**, do not have a border procedure. Countries which apply such a procedure have set out different standards for the treatment of vulnerable groups and unaccompanied children.

Greece unequivocally exempts vulnerable groups from its fast-track border procedure applicable on the Eastern Aegean islands following the EU-Turkey statement.²⁶⁵ However, a Joint Action Plan on the implementation of the EU-Turkey statement issued on 8 December 2016 recommended the Greek authorities to examine whether the fast-track border procedure could apply to vulnerable groups.²⁶⁶ This has resulted in a procedural change in May 2017, leading vulnerable groups exempted from the fast-track border procedure to be still obliged to remain on the islands until their first instance interview. Only Syrian vulnerable asylum seekers are immediately transferred to the mainland.²⁶⁷ In addition, asylum seekers in need of special procedural guarantees are always exempt from the border procedure in Greece.²⁶⁸

Prior to March 2017, **Hungary** exempted vulnerable asylum seekers from its border procedure in the transit zones. Since there is no identification mechanism in place, only visible vulnerabilities were taken into account, meaning that usually only families, unaccompanied minors, single women, elderly and disabled would be excluded from the border procedure.²⁶⁹ The latest asylum reform has removed special procedural safeguards for vulnerable persons and requires all asylum seekers, except for unaccompanied children below the age of 14, to undergo the asylum procedure in transit zones.²⁷⁰

France, on the other hand, requires asylum seekers needing special procedural guarantees to be exempted from the border procedure when they are identified as such by OFPRA.²⁷¹ The application of this safeguard seems to be marginal in practice, however. Out of 902 applications examined in the border procedure in 2016, OFPRA ordered an exemption on grounds of vulnerability only in 5 cases (0.5%).²⁷²

For the **Netherlands**, the need of special procedural guarantees is not tantamount an exemption from the border procedure. The determining factor is whether detention at the border would be disproportionately burdensome for the asylum seeker on the basis of special individual circumstances.²⁷³ These circumstances may for instance stem from a serious mental condition or a situation leading to sudden hospitalisation for long periods, and can be derived from a medical report of the FMMU.²⁷⁴ **Belgium** adopts a similar approach with regard to its border procedure,²⁷⁵ as does **Switzerland** in its airport procedure, whereby medical reports and consultations attest whether stay in the transit zone is reasonable for an individual applicant.²⁷⁶

Austria provides that an asylum application shall not be dismissed in the admissibility procedure where it is highly probable that the applicant is a victim of torture or other serious forms of physical,

²⁶⁵ Article 60(4)(f) Greek Law 4375/2016, citing Article 14(8).

²⁶⁶ AIDA, Country Report Greece, 73.

²⁶⁷ Information provided by the Greek Council for Refugees, 28 July 2017. See also Médecins Sans Frontières, *A dramatic deterioration for asylum seekers on Lesbos*, July 2017.

²⁶⁸ AIDA, Country Report Greece, 73.

²⁶⁹ AIDA, Country Report Hungary, 36, 45.

²⁷⁰ See e.g. ECRE, *Asylum in Hungary: Damaged beyond repair?* March 2017, available at: <http://bit.ly/2rsiWwz>, 6.

²⁷¹ Article L.221-1 French Ceseda.

²⁷² OFPRA, *2016 Activity report*, April 2017, available in French at: <http://bit.ly/2pHqMI7>, 42.

²⁷³ Article 5(1a)(3) Dutch Aliens Decree.

²⁷⁴ Dutch IND Working Instruction 2017/1 on the border procedure, 11 January 2017, available in Dutch at: <http://bit.ly/2wa4v3o>.

²⁷⁵ Information provided by Vluchtelingenwerk Vlaanderen, 22 August 2017.

²⁷⁶ Information provided by the Swiss Refugee Council, 11 August 2017.

psychological or sexual violence.²⁷⁷ In practice, vulnerable groups are unlikely to be subject to the border procedure applicable at the airport.²⁷⁸

In relation to unaccompanied children, the obligations set out in the recast Asylum Procedures Directive introduce even more complexity than in the accelerated procedure. Its Article 25(6)(b) provides that the border procedure may only be used vis-à-vis unaccompanied children in some of the circumstances where admissibility or accelerated procedures would normally be applicable:

Border procedure vis-à-vis unaccompanied children: Article 25(6)(b) Directive 2013/32/EU			
Ground for inadmissibility		Ground for acceleration	
Protection in another Member State	x	Claim unrelated to protection	x
First country of asylum	x	Safe country of origin	√
Safe third country	√	False information or documents	√
Subsequent claim with no new elements	√	Destruction or disposal of documents	√
Application by dependant	x	Clearly unconvincing claim	x
		Admissible subsequent claim	√
		Application to frustrate return proceedings	x
		Application not as soon as possible	x
		Refusal to be fingerprinted	x
		Threat to public order or national security	√

The Directive adds that Member States may apply the border procedure in cases where the unaccompanied child misleads the authorities by presenting false information or documents, or *mala fide* destroys or disposes of documents, “in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions... including by consulting with his or her representative.”²⁷⁹

The complexity of this provision is palpable. The recast Asylum Procedures Directive seems to draw artificial distinctions in the rights guaranteed to unaccompanied children through a mix of grounds for inadmissibility – “safe third country” but not “first country of asylum”, for instance – and grounds for applying the accelerated procedure – safe country of origin, falsifying or destroying documents, but not presenting claims entirely unrelated to protection. Here too, it appears that the Directive departs from the principle of the best interests of the child and makes an uneasy compromise between procedural guarantees and migration control. The effect of such complexity hinders the implementation of protective standards in practice.

Several countries (**Belgium, Greece, Croatia, Netherlands**) have squarely excluded the application of the border procedure to unaccompanied children,²⁸⁰ while **Italy** exempts children from accommodation in hotspots and the procedures applied therein.²⁸¹ In **Hungary**, as of March 2017, only unaccompanied children below the age of 14 benefit from this guarantee.

France, on the other hand, has followed the spirit of the Directive with a view to refraining from affording special guarantees to all unaccompanied children applying for asylum at the border. An

²⁷⁷ Article 30 Austrian Asylum Act.

²⁷⁸ AIDA, Country Report Austria, 52.

²⁷⁹ Article 25(6)(b) recast Asylum Procedures Directive.

²⁸⁰ AIDA, Country Report Belgium, 50; Article 45(7) Greek Law 4375/2016; AIDA, Country Report Croatia, 40; Article 3.109b(7) Dutch Aliens Decree. Note that Croatia does not apply a border procedure in practice.

²⁸¹ Article 19bis Italian Law 46/2017; Article 19 Italian Reception Decree, as amended by Italian Law 47/2017.

unaccompanied child may be held in a waiting zone and undergo the border procedure where he or she: comes from a safe country of origin; introduces an inadmissible subsequent application; falsifies identity or travel documents; or represents a threat to public order or national security.²⁸² In 2016, 38 out of 902 applications examined in the border procedure concerned unaccompanied children.²⁸³

In **Germany** and **Spain** and **Switzerland**, the law foresees no exemption from the border procedure for vulnerable groups or unaccompanied children. In **Germany**, however, unaccompanied children have been channelled out of the airport procedure in practice.²⁸⁴ **Spain**, on the other hand, exempts asylum seekers with health needs, including pregnant women or people requiring medical assistance, from its border procedure and admits them into its territory.²⁸⁵

Only limited figures are available on the exemption of vulnerable groups from border procedures in Europe:

Vulnerable groups exempted from border procedures: 2016-2017		
	1 January – 31 December 2016	1 January – 30 June 2017
GR	2,961	5,665
FR	5	:
CH	217	105

Source: OFPRA, Annual Report 2016, 42; Greek Council for Refugees, 28 July 2017; Swiss Refugee Council, 11 August 2017.

The complex procedural arrangements set out by the recast Asylum Procedures Directive have had a direct detrimental impact on vulnerable asylum seekers navigating truncated procedures, whether on the territory or at the border of European countries. Rather disappointingly, the Commission proposal for an Asylum Procedures Regulation has maintained the possibility for Member States to apply accelerated or border procedures to applicants in need of special procedural guarantees,²⁸⁶ even though it appears clear that the conditions and fast-tracked nature of such procedures is by definition unsuitable for processing such claims. Moreover, whereas the Commission maintains the presumption against the examination in an accelerated or border procedure of applications from persons in need of special procedural guarantees as a result of torture, rape or other serious forms of violence, the requisite additional procedural safeguards at the appeal stage under Articles 24(3) and 46(7) of the recast Asylum Procedures Directive have been deleted from the proposal.

As regards unaccompanied children, the Commission proposal maintains the possibility of applying accelerated and border procedures but prohibits their use in cases of subsequent applications.²⁸⁷

3. Nuances to the Dublin procedure

The Dublin III Regulation makes provision for vulnerability as a factor which may influence the operation of the responsibility criteria. According to Article 16 of the Regulation, Member States “shall normally bring or keep together” applicants who are, on account of pregnancy, a new-born child, serious illness, severe disability or old age, dependent on a child, sibling or parent legally resident in

²⁸² Article L.221-2 French *Ceseda*.

²⁸³ OFPRA, *2016 Activity report*, April 2017, 41.

²⁸⁴ Information provided by Informationsverbund Asyl und Migration, 11 August 2017.

²⁸⁵ Information provided by Accem, 23 August 2017.

²⁸⁶ Article 19(3) proposal for an Asylum Procedures Regulation.

²⁸⁷ Articles 40(5) and 41(5) proposal for an Asylum Procedures Regulation.

one of the Member States.²⁸⁸ In addition, the “humanitarian clause” enshrined in Article 17(2) of the Regulation allows for a Member State to request another country to undertake responsibility for a claim “in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations”.

The impact of the two provisions on the operation of the Dublin system seems to vary from one country to another, however. In the first half of 2017, AIDA countries applied the relevant clauses as follows:

Outgoing Dublin requests based on dependent persons clause and humanitarian clause: 1 January – 30 June 2017			
	Total outgoing requests	Dependent persons clause	Humanitarian clause
BG	86	6	8
CY	81	4	13
DE	29,378	1	31
ES	5	0	0
GR	7,267	80	1,076
HR	18	0	0
IE	148	0	:
MT	46	0	0
PL	88	0	6
CH	4,232	0	229

Source: Bulgarian Helsinki Committee; Future Worlds Center; Federal Government of Germany: <http://bit.ly/2wke0Mp>; Informationsverbund Asyl und Migration; Spanish Office for Asylum and Refuge; Greek Council for Refugees; Croatian Law Centre; Irish Refugee Council; aditus foundation; Helsinki Foundation for Human Rights; Swiss Refugee Council.

It follows that Articles 16 and 17(2) of the Dublin III Regulation have been marginally used, if at all, by European countries this year, with the exception of **Bulgaria** (16.3%), **Cyprus** (21%) and **Greece** (15.9%).

Whereas the Commission Proposal for a Dublin IV Regulation leaves the dependency provision in the Dublin III Regulation intact, it reduces the scope of current Article 17(2) to bringing together “any family relations” beyond those included in the slightly extended family definition, thereby deleting the current reference to “humanitarian grounds based in particular on family or cultural considerations”.²⁸⁹ Furthermore, Member States would only be allowed to trigger this provision before a Member State responsible has been determined rather than before a first decision on the substance has been taken.

These temporal and material restrictions eliminate any discretionary power of Member States to assume responsibility on humanitarian grounds beyond family relations. Instead of encouraging broader use of the humanitarian clause, the Commission proposal sacrifices a tool which has the potential to resolve the precarious situation of much higher numbers of vulnerable applicants and to ensure their access to reception facilities adapted to their needs, which may not be available in the Member State where they are present, to a misconceived concept of effectiveness and sustainability of the Dublin system. The European Parliament rapporteur, on the contrary, proposes to broaden the applicability of the humanitarian clause by introducing an explicit possibility for the applicant to request the Member State in which the application has been lodged to request another Member State

²⁸⁸ On the interpretation of the corresponding Article 15 of the Dublin II Regulation, see CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

²⁸⁹ European Commission, *Proposal for a [Dublin IV Regulation]*, COM(2016) 270, 4 May 2016, Article 19(2).

to assume responsibility “on humanitarian grounds based in particular on family, cultural or social ties or language skills which would facilitate his or her integration into that other Member States.”²⁹⁰ The obligation on the Member State where the application is lodged to forward the request to the Member State indicated by the applicant under the Parliament rapporteur’s proposal would constitute at least a tool to trigger a more meaningful use of the provision. Due to the stalemate in the Council on the solidarity provisions of the Dublin proposal, discussions on other provisions, including the proposed changes to Article 17(2) of the Regulation, have been suspended at the time of writing.

Furthermore, in operational terms, the Member State transferring an applicant to the responsible Member State is also under an obligation to provide the receiving country with the necessary information in order to safeguard the applicant’s rights and “immediate special needs” post transfer. This is primarily defined in terms of the need for medical care or treatment.²⁹¹ The transferring Member State is also obliged to submit any relevant information necessary to ensure that an applicant’s special medical needs are addressed post transfer. Here again special mention is made of vulnerable groups such as “disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence”.²⁹²

The concept and content of individual guarantees

Beyond requiring adaptations to the operational modalities of the transfer, the notion of vulnerability can be a primary consideration in the assessment of the legality of a Dublin transfer *per se*. The need for transfers to comply with the Charter, and in particular its Article 4, triggers specific obligations on sending countries to ensure that an individual applicant will have access to an asylum procedure and appropriate conditions in the receiving country. While these safeguards apply to all asylum seekers, notable judicial interventions in Dublin procedures have highlighted special duties owed to vulnerable groups. European courts have clarified, for example, that states operating the Dublin system must ensure that families with children are accommodated together under suitable conditions,²⁹³ and that individuals with a particularly serious mental or physical illness will not be subjected to a transfer resulting in a real and proven risk of a significant and permanent deterioration in their health.²⁹⁴

Since the *Tarakhel* ruling stressed sending countries’ obligation to obtain individual guarantees that the transfer will comply with the standards of the ECHR, the automaticity of the Dublin system has been significantly nuanced by the requirement of individualised assessments, to ensure the legality of transfers. Yet the scope and binding authority of the duty to obtain individual guarantees remain highly contentious, whether in *Tarakhel*-type family contexts²⁹⁵ or beyond. As European countries’ current practice reveals, there is a still great degree of variance as to the frequency, individualised nature and detail of guarantees sought in the context of Dublin procedures.

Seeking guarantees: the perspective of sending countries

Germany requests individual guarantees for all transfers to Hungary and Greece, to ascertain whether asylum seekers will be treated in accordance with the asylum Directives.²⁹⁶ Its Dublin Unit

²⁹⁰ European Parliament, Report on the proposal for [a Dublin IV Regulation], 2016/0133 (COD), 24 February 2017, Amendment 68 – 70 – Article 19(2) and 19(2a) (new), available at: <http://bit.ly/2wnPYRk>.

²⁹¹ Article 31(2) Dublin III Regulation.

²⁹² Article 32(1) Dublin III Regulation.

²⁹³ ECtHR, *Tarakhel v. Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

²⁹⁴ CJEU, Case C-578/16 PPU *C.K. and Others*, Judgment of 16 February 2017.

²⁹⁵ ECRE/ELENA, *Information Note on Dublin transfers post-Tarakhel: Update on European case law and practice*, October 2015, available at: <http://bit.ly/2vDaCMI>.

²⁹⁶ Information provided by Informationsverbund Asyl und Migration, 11 August 2017, and obtained from the BAMF, 1 August 2017.

also requests individual guarantees for transfers to Italy of families with children below the age of 3, whereby Italy is asked to confirm that the family will have access to accommodation.²⁹⁷ There is no general policy to require guarantees for vulnerable groups, although the Dublin Unit and local authorities make arrangements for the asylum seekers concerned e.g. to ensure the continuation of dialysis treatments, to ensure separate accommodation of families in cases of domestic violence.²⁹⁸

Belgium also asks for assurances when it needs to guarantee continuity of treatment such as psychotherapy or dialysis in the country of destination.²⁹⁹

Switzerland generally requests individual guarantees only for Dublin transfers of families to Italy, in accordance with the *Tarakhel* ruling. In some cases, the Dublin Unit has requested detailed information from receiving countries about possible or ongoing medical treatments of asylum seekers, although it does not consider those as guarantees falling under *Tarakhel*.³⁰⁰

Hungary has requested guarantees relating to reception conditions in Bulgaria in several cases, but these tend to ask for general information and not to refer to the individual situation of the applicants concerned. The Dublin decisions of the Immigration and Asylum Office contain a standard reply from the Bulgarian Dublin Unit.³⁰¹ **Poland** has reported requests to Hungary and Bulgaria for guarantees on the application of the asylum Directives.³⁰² **Cyprus** has also requested guarantees from Member States on their procedures and reception systems, where their asylum systems face difficulties.³⁰³ **Croatia**, on the other hand, has requested assurances in relation to a transfer to Bulgaria to inquire into reception conditions, health care and content of international protection, following a ruling from the Administrative Court of Zagreb. Usually, the Dublin Unit requests guarantees on health grounds.³⁰⁴

In **Austria's** case, the Federal Agency for Immigration and Asylum (BFA) only requests guarantees on an individual basis, therefore their content depends on the circumstances of each case.³⁰⁵

Practice in countries like the **UK** is not clear as regards the type of guarantees sought, as the Home Office still employs outdated guidance referring to the Dublin II Regulation.³⁰⁶ In others such as **Sweden**, the Dublin Unit does not request individual guarantees prior to transferring asylum seekers, but does not transfer vulnerable groups to Hungary and generally refrains from doing so regarding Bulgaria.³⁰⁷ In the case of **Bulgaria**, outgoing transfers relating to vulnerable groups were only carried out with respect to unaccompanied children in the course of 2016 and 2017. Since all transfers were based on family reunification and consent from the children and family members, the Bulgarian Dublin Unit did not request guarantees from receiving countries.³⁰⁸ Similarly, **Spain** operates very few outgoing transfers where individual guarantees have not been relevant.³⁰⁹

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Information provided by Vluchtelingenwerk Vlaanderen, 22 August 2017.

³⁰⁰ Information provided by the Swiss Refugee Council, 11 August 2017, and obtained from SEM, 3 August 2017.

³⁰¹ Information provided by the Hungarian Helsinki Committee, 11 August 2017.

³⁰² Information provided by the Helsinki Foundation for Human Rights, 11 August 2017, and obtained from the Polish Office for Foreigners, 1 August 2017.

³⁰³ Information provided by the Future Worlds Center and obtained from the Cypriot Asylum Service, 25 July 2017.

³⁰⁴ Information provided by the Croatian Law Centre, 24 July 2017.

³⁰⁵ Information provided by Asylkoordination Österreich, 18 August 2017.

³⁰⁶ Information provided by the British Refugee Council, 8 August 2017. See also UK Home Office, *Safe third country cases*, available at: <http://bit.ly/2jvqbkW>.

³⁰⁷ Information provided by Lisa Hallstedt and FARR, 21 August 2017.

³⁰⁸ Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

³⁰⁹ Information provided by Accem, 23 August 2017.

Giving guarantees: the perspective of receiving countries

Greece receives incoming requests from 15 March 2017 onwards, following a European Commission Recommendation of 8 December 2016.³¹⁰ The Recommendation invites Greece to “fully cooperate in providing assurances to the other Member States” that returnees will be treated in accordance with the asylum Directives. Two requests from Germany had been accepted by the Greek Dublin Unit as of the end of the first half of 2017.³¹¹

Bulgaria has provided assurances relating to suitable accommodation in a few cases concerning families with minor children. These guarantees were not provided through the “DubliNet” network but through diplomatic channels, namely the sending country’s embassy in Bulgaria. In one case, the requesting country (Austria) conducted on-site visits prior to and following the Dublin transfer.³¹²

Croatia, on the other hand, provides guarantees concerning the accommodation of families and children, specific medical needs or access to the asylum procedure.³¹³

Spain, for its part, does not provide individual guarantees in the Dublin procedure.³¹⁴ **Austria, Belgium, Cyprus, Sweden** and **Switzerland** have not been requested to provide such assurances to other Dublin Units so far.³¹⁵

Beyond the application of specific clauses or the requirement of guarantees prior to transfers of vulnerable groups, civil society organisations have urged states to apply the Dublin Regulation in a manner respecting the needs of children, families, persons with medical conditions and other vulnerable asylum seekers.³¹⁶

³¹⁰ European Commission, Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013 of the European Parliament and of the Council, OJ 2016 L 340/60.

³¹¹ Information provided by the Greek Council for Refugees, 28 July 2017, and obtained from the Greek Asylum Service, 21 July 2017.

³¹² Information provided by the Bulgarian Helsinki Committee, 9 August 2017.

³¹³ Information provided by the Croatian Law Centre, 24 July 2017.

³¹⁴ Information provided by Accem, 23 August 2017.

³¹⁵ Information provided by Asylkoordination Österreich, 18 August 2017; Vluchtelingenwerk Vlaanderen, 22 August 2017; the Future Worlds Center, 25 July 2017; Lisa Hallstedt and FARR, 21 August 2017; Swiss Refugee Council, 11 August 2017. In the case of **Belgium**, it may occur that relevant information transmitted to Fedasil, the Belgian reception agency, is also sent to the sending Member State upon request.

³¹⁶ In **Switzerland**, see <https://www.dublin-appell.ch/fr/>.

Concluding remarks

The EU asylum *acquis* presents a fragmented legal framework for identifying vulnerable categories of asylum seekers, as well as defining the special guarantees necessary to preserve their ability to enjoy their rights and comply with their obligations in the asylum process. Although increased awareness and adaptability of Member States' asylum systems has been a primary objective of the successive legislative reforms of the CEAS, this has only yielded limited results in practice so far.

The analysis of the transposition of relevant EU law standards in Member States' legal orders and systems has revealed important protection gaps, which result as much from poor implementation as from the complexity of and limitations inherent in current EU asylum law; as illustrated by the rules on exemption of unaccompanied children from special procedures. Moreover, the terminological and conceptual ambiguity relating to the concept of vulnerability and the varying scopes of the categories of asylum seekers considered "vulnerable" in the recast Asylum Procedures and Reception Conditions Directives has contributed to incoherent approaches to the protection of these asylum seekers in national asylum processes.

The observations made in this Thematic Report allow for a number of conclusions and recommendations for improvements in EU law and national practice:

Data collection

As it is the case in other areas of the CEAS, important gaps persist as regards the provision of statistical data relating to the presence of vulnerable individuals in national asylum systems, as well as the special procedural guarantees, such as exemption from special procedures, applied to the various categories of vulnerable groups. Systematic and detailed data collection requires a stronger statistical framework at EU level and should be pursued in the interest of a transparent, well-functioning CEAS. Against this backdrop, the Commission's aim to explore amendments to the Migration Statistics Regulation at least with regard to children in migration may provide an opportunity to address these gaps.³¹⁷

Mechanisms for timely and effective identification

Early identification of applicants with special procedural needs is a crucial aspect of fair and efficient asylum systems. It avoids delays in the examination of applications, contributes to preventing the deterioration of mental and physical health of applicants and allows for more efficient planning of the determining authorities' workload.

The objective of early identification is most effectively achieved through the establishment of reliable formal identification mechanisms that systematically screen all applicants. Targeted questionnaires at the moment of registration as well as during personal interviews constitute useful tools, provided that other procedural guarantees, including interpretation, are in place and that assessments go beyond visible medical vulnerability. Under no circumstances should authorities solely rely on vulnerable applicants' self-identification, as this risks less visible vulnerabilities remaining undetected, thereby exacerbating applicants' suffering and unnecessarily increasing medical costs.

Both formal and informal identification mechanisms should be open to and incorporate expertise from specialised NGOs, including in training curricula, where necessary. In the interest of a well-functioning

³¹⁷ European Commission, *On the protection of children in migration*, COM(2017) 211, 12 April 2017.

identification mechanism asylum authorities should ensure a clear legal framework and financial sustainability for the NGOs' involvement in the identification process.

EASO's role in identifying vulnerable asylum applicants in the hotspots in Italy and Greece has become crucial, although primary responsibility remains with competent national authorities. In Greece in particular, dysfunctional identification mechanisms have resulted in EASO-deployed experts *de facto* establishing vulnerability. In-depth monitoring is urgently needed vis-à-vis the role of EASO-deployed experts in identifying vulnerable asylum applicants, the extent to which perceived lack of credibility of applicants is superseding strong indications of vulnerability in the context of eligibility interviews, and the observance of procedural rules relating to the role of legal counsellors during interviews conducted by EASO deployed experts.

In order for European countries to comply with the best interests of the child principle, age assessment of unaccompanied children should only be envisaged where there are doubts *after* the person's statements, available documentation or other indications have been considered. Medical age assessment should be a measure of last resort both in law and practice, where doubts persist following a psychosocial assessment. Age assessment decisions should respect the principle of the benefit of the doubt and be amenable to legal challenge by the applicant.

Exemption from special procedures

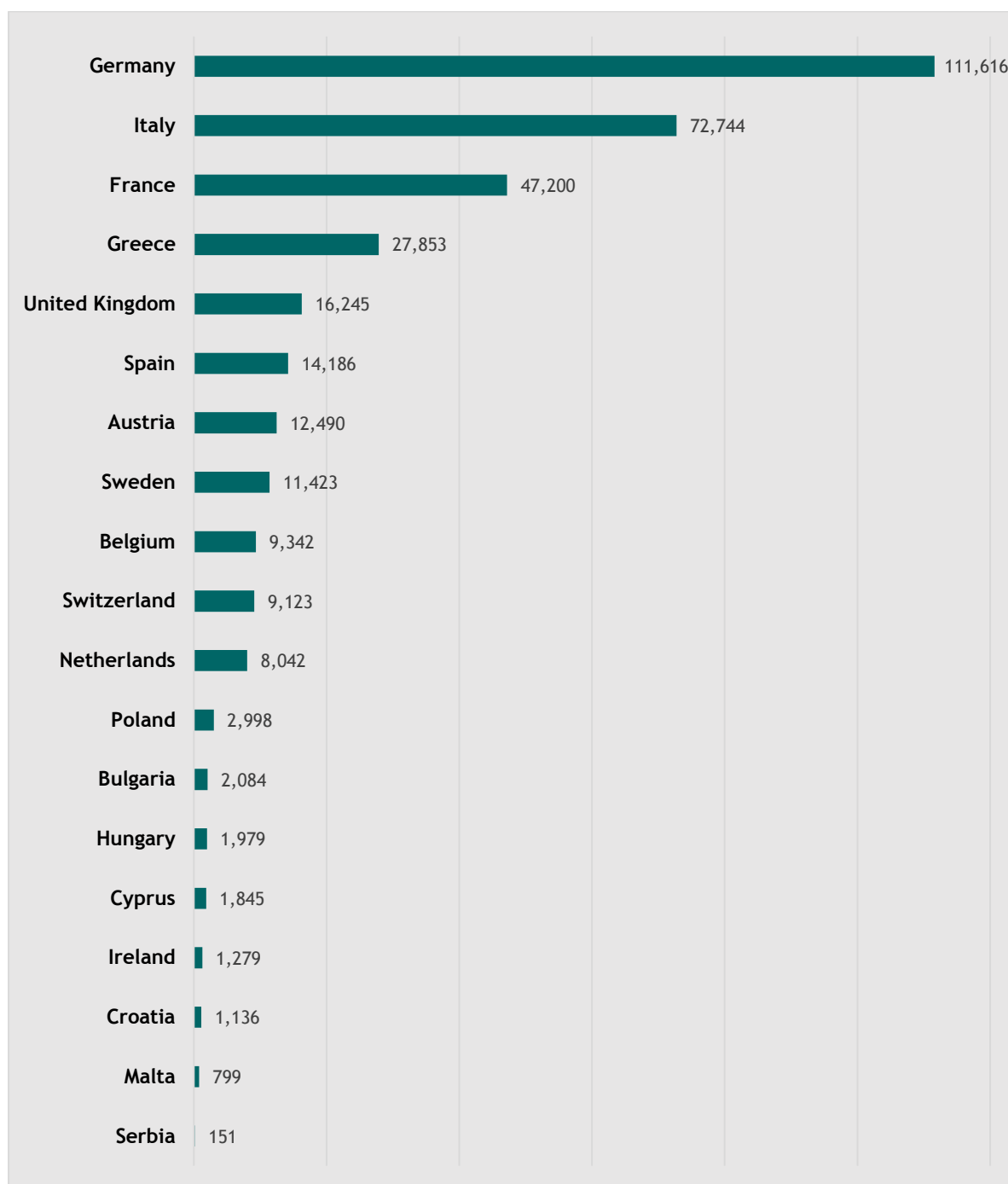
The extreme complexity and incoherence of the recast Asylum Procedures Directive provisions on exemption of applicants in need of special procedural guarantees and unaccompanied children from accelerated and border procedures has neutralised opportunities for genuine support to these groups in the asylum process. Two years following the expiry of the transposition deadline, Europe's practice is equally fragmented: few Member States apply unequivocal exemptions, while others squarely contradict the Directive by providing no exemption, and others apply the regime of the Directive and end up exempting only minimal numbers of claims from truncated procedures. The implementation of these obligations results in individuals falling through the cracks of systems purported to offer them the special care they need when seeking protection. In the interest of clear, predictable and rights-compliant asylum procedures, EU law should lay down an unequivocal exemption of vulnerable groups from any procedure that is by definition unsuitable and not conducive to offering sufficient time and safety for them to put forward their protection claims.

Sensible and protective use of Dublin procedures

The Dublin Regulation provisions offer real possibilities for countries to reunite asylum seekers based on dependency or humanitarian considerations, yet their use in Dublin procedures remains marginal, if not non-existent, in most countries. Despite the attempt by the Commission proposal for the reform of the Dublin Regulation to further restrict the scope of such clauses, EU co-legislators have an opportunity to promote a more effective use of protective Dublin provisions in the aim of more sensible distribution of responsibility across the continent.

At the same time, European countries cannot operate the Dublin system in a manner that places vulnerable individuals at risk of harm. Despite judicial intervention to ensure that Dublin procedures take into account the situation of the applicants concerned, different Dublin Units have relied on general assurances from their counterparts to implement transfers, or request guarantees only for specific categories of vulnerable groups. Transfers of any asylum seekers requiring special guarantees should not be carried out in the absence of concrete, detailed and individualised guarantees from receiving countries that their needs will be taken into account.

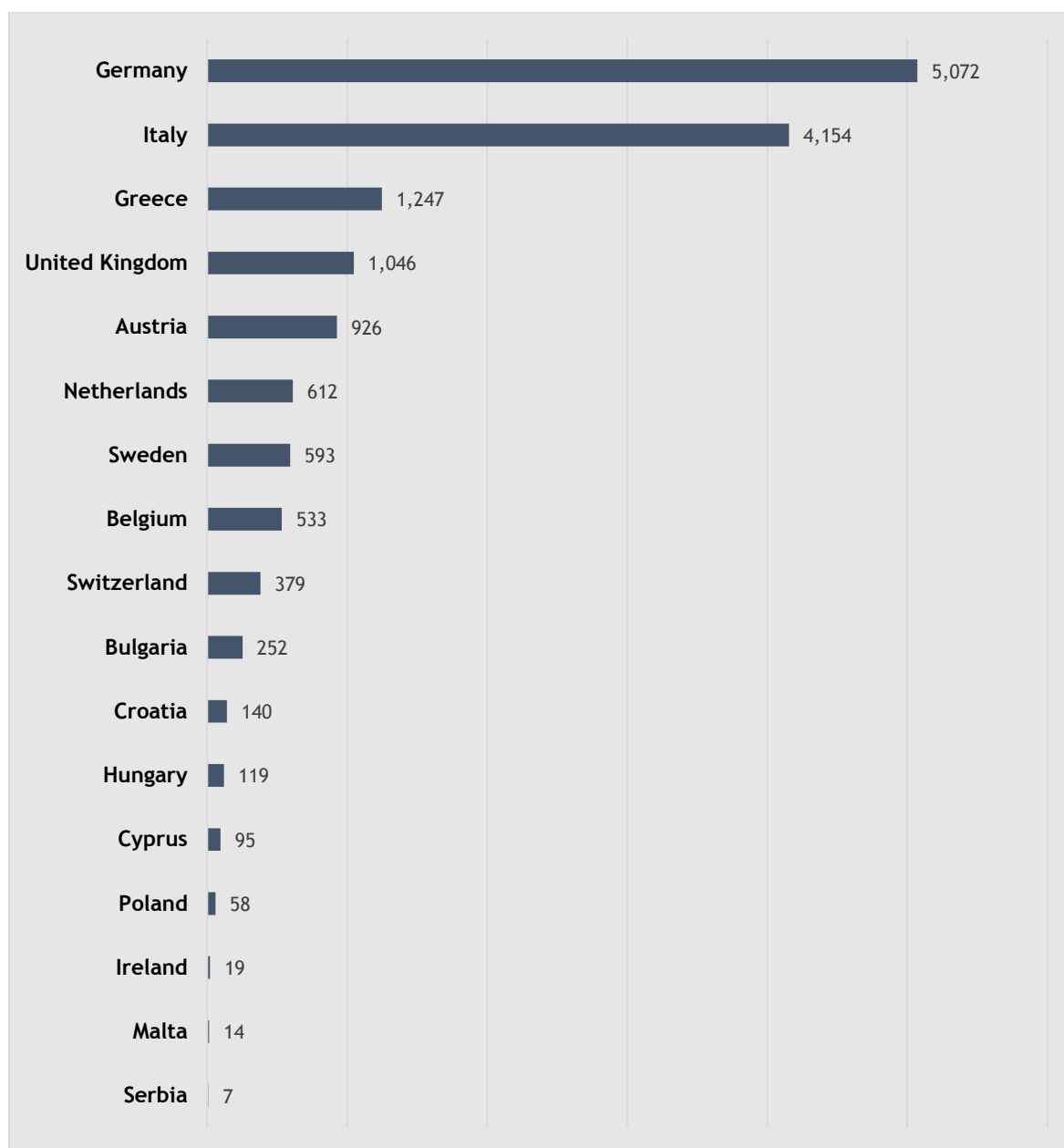
Annex I – Asylum applicants in AIDA countries: 1 January – 30 June 2017



Sources

BAMF: <http://bit.ly/1KoTPK6>; Italian Ministry of Interior: <http://bit.ly/2pzBgnd>; Forum réfugiés – Cosi; Greek Asylum Service: <http://bit.ly/2vAOKSs>; UK Home Office: <http://bit.ly/2xfziJs>; Spanish Office for Asylum and Refuge; Austrian Ministry of Interior: <http://bit.ly/2vs6V8O>; Swedish Migration Agency: <http://bit.ly/2kkz2Vu>; CGRS: <http://bit.ly/2ishVlr>; SEM: <http://bit.ly/2vrZpL6>; IND: <http://bit.ly/2wr8Zm8>; Helsinki Foundation for Human Rights; Bulgarian Helsinki Committee; Hungarian Helsinki Committee; Future Worlds Center; Irish Refugee Council; Croatian Ministry of Interior: <http://bit.ly/2xvq2An>; aditus foundation; Belgrade Centre for Human Rights.

Annex II – Unaccompanied asylum-seeking children in AIDA countries: 1 January – 30 June 2017



Sources

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Data not available for Spain and France.



European Council on Refugees and Exiles

Rue Royale 146

Brussels 1000

Belgium

T. +32 2 234 38 00

F. +32 2 514 59 22

ecre@ecre.org

www.ecre.org