

Mind the gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System

BACKGROUND INFORMATION

The arrival of persons fleeing persecution, conflicts and human rights abuses at the southern shores of the European Union (EU) has dominated much of the debate in Europe on asylum in the past year. While the boat arrivals continue to make the headlines in the European press and the numbers of persons arriving by sea in Italy reach unprecedented levels, a true European response is lacking.

The dramatic scenes in the Mediterranean add to the long list of challenges the EU Member States are facing in building and maintaining fair and efficient asylum systems. One year ago, the Asylum Information Database (AIDA) partners published the first AIDA annual report entitled “Not There Yet”, referring to the long and difficult road ahead for the EU to establish a Common European Asylum System (CEAS) based on high standards of protection and guaranteeing similar treatment and the same outcome of asylum applications, regardless of where they are lodged in the EU. While there has been progress on a number of areas highlighted last year in some of the EU Member States covered by the database, many of the issues raised last year remain problematic in those Member States today, such as with regard to asylum seekers’ access to material reception conditions, the grounds and conditions of detention and asylum seekers’ access to quality free legal assistance during the asylum procedure.

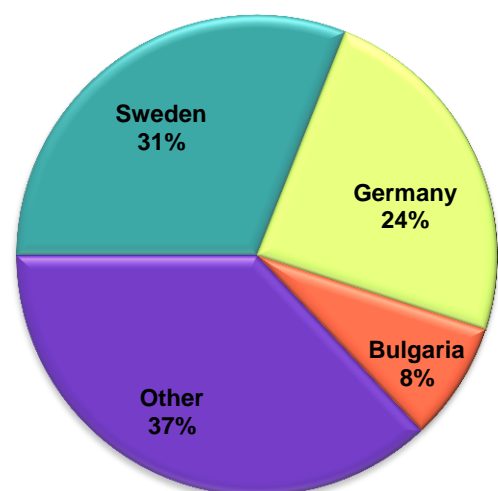
This Annual Report not only presents a number of findings from the national reports drafted in the context of the AIDA project but also reflects on a number of important developments at the EU level in the field of asylum in 2013 and the first half of 2014.

Main countries of origin of asylum seekers in the EU

In 2013, Syria became the main country of origin of asylum seekers in the EU, with 50,470 applicants followed by Russia (41,270), Afghanistan (26,290), Serbia (22,380) and Pakistan (20,885).¹

Syria

As the conflict in Syria continued and worsened throughout 2013, the number of Syrians seeking international protection in the EU consequentially increased. With 12% of the total applicants, Syria became the first country of origin of asylum seekers in the 28 EU Member States, whereas it was the third in 2012. This trend continued in the half of 2014 with circa 6,000 applicants per month in the EU + 4.² As in 2012, about half of the total number of asylum seekers from Syria in the EU were recorded in just two EU Member States: Sweden and Germany.



Percentage of Syrian asylum applicants in EU 28 in 2013

¹ Eurostat, *Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded)*, migr_asyappctza, extracted on 12 August 2014.

² Eurostat, *Asylum and new asylum applicants by citizenship, age and sex Monthly data (rounded)* [migr_asyappctzm], accessed 26 August 2014.

ASYLUM PROCEDURES

Access to an effective remedy and free legal assistance

The right to an effective remedy, i.e. the possibility for a person to effectively appeal against a decision that concerns them, is a crucial procedural safeguard that ensures people in need of protection are not returned to countries where their life or freedom would be at risk, and is enshrined in EU law. The way the appeal system is organised in practice determines to a great extent the effectiveness of the remedy in asylum cases. The table below provides a general overview of three key characteristics of the first appeal against a negative first instance decision of an asylum application that is at the applicant's disposal during **the regular procedure** in relation to the 15 countries covered by AIDA.

First appeal in the regular asylum procedure

	AT	BE	BG	DE	CY	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
<i>Judicial or Administrative appeal</i>	J	J	J	J	A ³	J	A	J	J	J	A	J	A	J	J
<i>Time limit for lodging appeal</i>	2 weeks ⁴	30 calendar days	14 days	14 calendar days	20 days	1 month	30 calendar days	8 days	10 or 15 working days	30 calendar days ⁵	2 weeks	1 week in short reg. proc. ⁶	14 calendar days	3 weeks	10 working days
<i>Suspensive effect</i>	Y ⁷	Y	Y	Y	Y	Y	Y	Y	Y	YW ⁸	Y	Y ⁹	Y	Y ¹⁰	Y

A: Administrative - J: Judicial – Y: Yes - N: No – YW: Yes with exceptions

Whether the **time limits** within which asylum seekers and their lawyers or legal advisors have to lodge an appeal against a negative first instance decision in the respective EU Member States is sufficient, depends very much on the availability and quality of legal assistance, which is in principle guaranteed in the national legislation of all 15 Member States covered by AIDA. However, as it was reported in the first AIDA Annual Report, in a number of countries asylum seekers face obstacles in accessing free legal assistance at the appeal stage in practice, which are often specific to the national legal framework and context.

Appeals, during regular procedures have suspensive effect, i.e. the applicant cannot be returned before a decision on the appeal has been taken, in all Member States covered by the Database. However, in Austria, Italy, the Netherlands and Sweden suspensive effect is not always automatically granted but must be requested separately, even in the regular procedure. Where an appeal does not have such automatic suspensive effect, this may undermine the effectiveness of the remedy and increase the possibility of returns carried out in violation of the principle of *non refoulement*. This has been considered as problematic by the ECtHR in recent cases concerning Cyprus, Belgium and Spain as undermining the effectiveness of the appeal.

³ Alternatively a judicial appeal can be lodged before the Supreme Court within 75 calendar days, which only deals with points of law and is not suspensive. A separate application can be lodged before the Supreme Court to request suspensive effect pending the appeal.

⁴ 4 weeks in case of an appeal against a decision concerning an unaccompanied asylum seeking child.

⁵ 15 calendar days (in detention centre or reception centre (CARA)).

⁶ 4 weeks in extended regular procedure.

⁷ Except where the FAA does not allow the appeal to have suspensive effect, such as when the application is considered to be without substance.

⁸ Suspensive effect must be requested in case the asylum application was made after notification of an expulsion order, in case of a manifestly unfounded application; where the applicant is accommodated in a CIE or CARA after being apprehended while trying to avoid border controls or where the applicant left the CARA without justification.

⁹ Suspensive effect must be requested in short regular procedure, whereas automatic suspensive effect in case of extended regular procedure.

¹⁰ Not in manifestly unfounded cases.

Access to quality free legal assistance during the asylum procedure is becoming more and more crucial for asylum seekers as asylum procedures become more and more complicated. Access to free legal assistance from the initial stage of the procedure is only considered to be guaranteed in practice in 4 countries covered by AIDA (BE, FR, SE and NL). In all other countries covered by AIDA access to free legal assistance is either not guaranteed under the law or in practice is only available through NGOs or committed lawyers willing to take cases on a pro bone basis. In a number of countries, such as Hungary, Poland and Cyprus, access to free legal assistance at the first instance continues to be dependent on projects funded by the European Union. Gaps in funding during periods in between projects remain problematic and cause interruptions in the provision of free legal assistance through NGOs. Budget cuts in the provision of free legal aid and other financial disincentives in the provision of legal aid are reported in countries such as the UK, Ireland and The Netherlands.

Safe country concepts

Safe country concepts allow States to examine certain asylum applications on the basis of general presumptions about the safety of the country of origin of the asylum seeker or of the country where they last resided or were granted some form of protection. This allows states to speed up the examination of certain caseloads often in the context of accelerated procedures offering reduced procedural safeguards. State practice in this regard varies considerably across the EU. The risk of undermining the quality of the examination of international protection needs is inherent in such concepts because of the procedural disadvantage and the increased burden of proof they tend to create for the applicants concerned from the start of the procedure.

The recast Asylum Procedures Directive distinguishes between the concept of first country of asylum (Article 35), safe country of origin (Article 36 and Annex II), safe third country (Article 38) and European safe third country (Article 39). The concepts of safe country of origin and safe third country are the ones that are the most relevant for the practice of some of the Member States covered by the Asylum Information Database.

The following table provides an overview with regard to whether the safe country of origin concept and the safe third country concept is laid down in national legislation and whether they are applied in practice.

	AT	BE	BG	CY	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
<i>Safe Country of Origin in law</i>	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y
<i>Safe Country of Origin applied in practice</i>	Y	Y	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y
<i>Safe Third Country in law</i>	Y	N	Y	Y	Y	N	Y	Y	Y	N	Y	Y	N	N	Y
<i>Safe Third Country applied in practice</i>	Y	N	N	N	Y	N	N	Y	Y	N	N	N	N	N	Y

The practical relevance of the safe country of origin concept differs considerably between the EU Member States covered by the Asylum Information Database. In particular, the safe country of origin concept is currently widely used in Belgium, France and the United Kingdom. While the safe country of origin concept raises a number of fundamental questions as regards its compatibility with the key focus of human rights and refugee law on the individual assessment of each case and the personal circumstances of the applicant, it seems to be primarily used as a tool to deter asylum seekers from those countries from applying in the EU Member States concerned. Moreover, there are huge differences among the EU Member States covered by the Database as regards the countries that are designated as safe countries of origin in national lists. This and the fact that the concept is not being applied in more than half of the countries covered in the Asylum Information Database raises questions as to the utility of the concept and the use of national lists in the

context of a Common European Asylum System as it undermines the objective of convergence of decision-making.

Guardianship and Legal Representation of Unaccompanied Children

Important gaps exist in many of the 15 EU Member States concerned with regard to the access of unaccompanied children to qualified guardians. EU asylum law foresees the appointment of a legal 'representative' to unaccompanied children whose role is to represent and assist the child in the asylum procedure.¹¹ While the appointment of a legal guardian is foreseen in the national legislation of all the EU Member States covered by the Asylum Information Database that are bound by the recast Asylum Procedures Directive and Reception Conditions Directive,¹² this may happen in different ways and to different extents in the various Member States, and does not mean that in practice the right to guardianship and legal representation is guaranteed.,

A major obstacle to effective guardianship appears to be the frequent delays in the appointment of a guardian in many of the States examined: as in most States no specific time-limit for the appointment of a guardian is foreseen in law, the periods for appointing a guardian vary greatly. In some countries the appointment is swift, as is the case for example in Belgium, the Netherlands, and Hungary. In others, instead, the appointment of a representative may take up to several weeks, or even months. Delays are reported in France, Greece, Italy and Poland. Further to delays, in some cases, such as in Bulgaria¹³ and France,¹⁴ unaccompanied children may sometimes go through the whole procedure without the assistance of a guardian.

The lack of qualifications requested to legal guardians (for example in Germany, Greece, Italy, Malta, Poland and Sweden), complemented by the absence of adequate training in all of the countries examined, is also a factor that may negatively impact the outcome of the asylum procedure and impair children's right to special procedural and reception safeguards.

As unaccompanied children are among the most vulnerable asylum seekers, Member States must take the necessary measures to ensure that their best interest is always a primary consideration throughout the asylum procedure and beyond. In order to do so, effective access to qualified guardians and legal representation as soon as possible is key to ensuring that they can benefit from the safeguards laid down in the EU asylum *acquis*.

¹¹ A legal representative is defined in the recast Asylum procedures Directive (Article 2(n)) and reception Conditions Directive (Article 2(j)) as "a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive."

¹² The UK and Ireland opted out all recast Directives but the initial Reception Condition Directive still applies to the UK.

¹³ Asylum Information Database, *Country report Bulgaria - Age assessment and legal representation of unaccompanied children*.

¹⁴ Asylum Information Database, *Country report France - Age assessment and legal representation of unaccompanied children*.

RECEPTION CONDITIONS:

Well-functioning asylum systems do not only guarantee a fair and efficient asylum procedure but also ensure that asylum seekers have access to the economic and social rights they are entitled to under international human rights law and EU asylum law and that their human dignity is respected and protected as required under Article 1 of the EU Charter of Fundamental Rights. The recast Reception Conditions Directive requires Member States to ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.¹⁵

Reception capacity

The recast Reception Conditions Directive leaves discretion to Member States as to how material reception conditions are provided to asylum seekers and allows for the provision of such conditions through State-provided accommodation in reception centres or private houses or in the form of financial allowances or even vouchers.

Reception centres are the most frequently used type of accommodation across the 15 states surveyed even though accommodation in private houses or flats rented or funded by the authorities is also commonly resorted to in Austria, Belgium, Sweden and the United Kingdom.

The 2012/2013 AIDA Annual Report highlighted problems of overcrowding of reception centres in countries such as Bulgaria, Hungary, Malta or Italy due to insufficient capacity of the reception system. Overcrowding remains an issue in some of those countries (Bulgaria, Italy). Shortage of places in some countries also results in asylum seekers not having access to reception accommodation at all, thus having to arrange – and possibly pay for - accommodation themselves or having to sleep rough, as is the case for instance in France.

	AT	BE	BG	CY	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
<i>Number of places in all the reception centres (both permanent and for first arrivals)</i>	12780	19310 ¹⁶	4150	70-80	N/A	23369 ¹⁷	970	1614	5522	22236 ¹⁸	N/A	N/A	2420	26663 ¹⁹	Around 1200 ²⁰
<i>Number of places in private accommodation</i>	7000	7695 ²¹	0	N/A	N/A	N/A	N/A	N/A	N/AP ²²	N/A	About 400	0	N/AP	14818	N/A ²³
<i>Are there instances of asylum seekers not having access to reception accommodation because of shortage of places?</i>	N	N	Y	Y	Y	Y	Y	N	N	Y	N	N	N	N	Y

RC: reception centres; PH: private housing; HO: hotel/hostel; ES: emergency shelters; N/A: not available; N/AP: not applicable

¹⁵ Article 17(2) recast Reception Conditions Directive. It should be noted that the deadline for transposition of the recast Reception Conditions Directive is 20 July 2015 for Articles 1 to 12, 14 to 28 and 30 and Annex I, whereas Articles 13 (Discretionary provision on medical screening) and 29 (obligatory provision on staff and resources) shall apply from 21 July 2015 (see Article 33 recast Reception Conditions Directive).

¹⁶ As of 1 March 2014.

¹⁷ As of 31 December 2013.

¹⁸ As of 19 March 2014: CPSA: 650 places, CDA/CARA: 7.866 (excluding the CARA in Cagliari, since the Ministry of Interior defined it as CPSA/CARA, therefore this is in the CPSA data. SPRAR centres provide 13.020 places. North Africa Emergency centres: At present, about 700 North African migrants are still accommodated in these centres.

¹⁹ As of February 2013.

²⁰ Places in initial accommodation centres for new claimants.

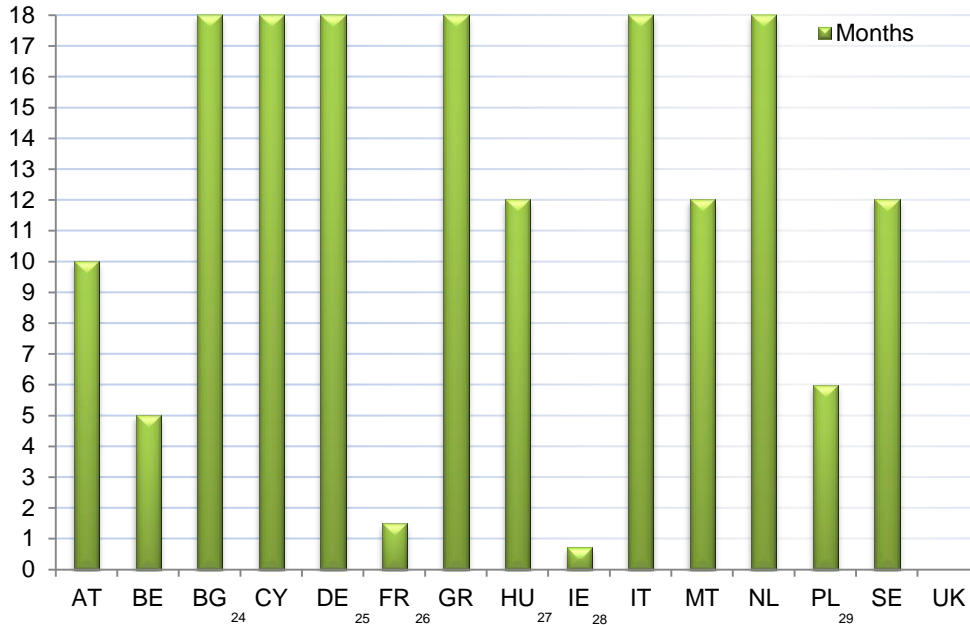
²¹ As of 1 March 2014.

²² All reception centres are privately run.

²³ 20,687 asylum seekers are in dispersed accommodation at the end of December 2013.

DETENTION OF ASYLUM SEEKERS:

Detention of asylum seekers, sometimes in appalling conditions remains a major concern in the EU. The devastating impact on asylum seekers' mental and physical health has been largely documented and it has been shown that it adds to their vulnerability and undermines asylum seekers' access to key rights, such as legal assistance and effective remedies. NGOs have also continued to document the negative impact of detention on the fairness of the asylum procedure for the individuals concerned in light of the obstacles it creates in accessing free legal assistance as reflected in the AIDA country reports. The following table provides an overview of the maximum **duration of detention** of asylum seekers in the 15 Member States part of the Asylum Information Database.



Detention of children

The immigration detention of children in EU Member States is now regulated by the EU asylum *acquis* and the EU Return Directive. The recast Reception Conditions Directive only allows the detention of asylum seeking children as a measure of last resort, where no alternatives to detention can be applied effectively and for the shortest period of time. Moreover, unaccompanied asylum seeking children can only be detained in exceptional circumstances while all efforts must be made to release them as soon as possible.³⁰ As regards the detention of children for the purpose of their removal, Article 17 of the Return Directive allows detention only as a measure of last resort and for the shortest appropriate period of time. Additionally, under both legal regimes, children in detention must have the possibility to engage in leisure activities and access to

²⁴ For families with children.

²⁵ Asylum seekers are generally not detained as long as their asylum application is pending (with the exception of the airport procedure). However, it is possible that asylum applications by persons who are already detained are not dealt with by the authorities and those persons may be kept in detention.

²⁶ Information in this table with regard to the maximum duration of detention and detention during Dublin procedures refers to asylum seekers who lodged an asylum application while being in a detention centre (asylum seekers are otherwise not present in detention centres in France).

²⁷ 12 months in case of asylum seekers submitting a subsequent asylum application, 6 months in case of asylum seekers submitting a first asylum application and 30 days in case of families with children (both first and subsequent asylum applications).

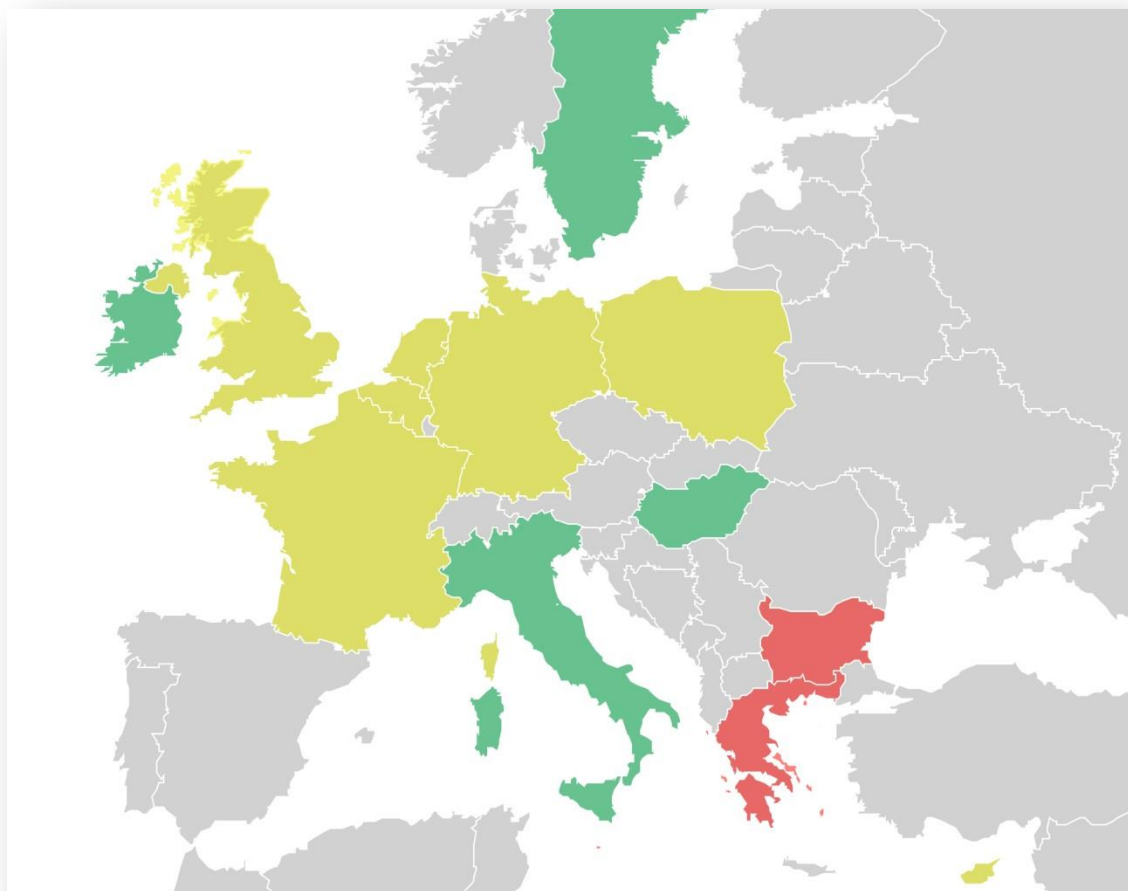
²⁸ This period of detention may be renewed indefinitely if where asylum seekers are detained under Article 9(8)A Refugee Act 1996. The maximum period for detention pending deportation is eight weeks.

²⁹ Since the entry into force of the new law on Foreigners in May 2014, asylum seekers can be detained up to 6 months and migrants awaiting return up to a maximum of 18 months. Failed asylum seekers who are subsequently detained for the purpose of return may therefore be detained up to 24 months.

³⁰ Article 11 recast Reception Conditions Directive.

education.³¹ The table below provides an overview of the practice of detention of children, both unaccompanied and within families.

Detention of unaccompanied children in practice



■ *Frequently* ■ *Rarely* ■ *Never*

Even if in practice children are not or rarely detained in the majority of the countries covered by the Asylum Information Database, detention of unaccompanied children remains a great concern in Bulgaria, Greece and Malta. Only Belgium, Bulgaria, Hungary and Italy have legal provisions in place expressly prohibiting detention of unaccompanied children. However, children continue to be detained in Bulgaria. In Austria, Cyprus, Greece, the Netherlands, Sweden, and the United Kingdom, detention of children is allowed only in exceptional circumstances and/or as a measure of last resort. Nevertheless, children are frequently detained in Greece. Practices and safeguards continue to vary widely also with regard to the conditions of detention, with special detention facilities for children existing only in Austria. In most cases, children are accommodated separately from adults, whereas in Cyprus, Greece and Malta instances of children accommodated with unrelated adults have been reported. In addition, access to education while in detention is always problematic and often not guaranteed in practice.

The full report *Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System* is available at www.asylumineurope.org

³¹ According to Article 17 EU Directive, this must be guaranteed “depending on the length of their stay”, whereas under the EU recast Reception Conditions Directive, the right to access to education for detained children derives from Article 14 of the Directive, which is applicable to detention. Article 14 requires Member States in principle to grant access to education under similar conditions as nationals for so long as an expulsion measures against them or their parents is not actually enforced. Access to education may be postponed for not more than 3 months after the asylum application was lodged.