

Refugees in Ireland, the EU and Worldwide

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Note 3: Legal and Policy Developments at the EU Level

This is the third of a series of three Notes concerning Refugees in Ireland, the EU and worldwide. This Note:

- introduces the Common European Asylum System;
- discusses the increase in the number of individuals seeking international protection in the EU territory since the early 2010s and considers the EU's response to this development;
- outlines the legal obligation to assist and rescue persons found in distress at sea under international law and EU law; and
- examines recent legal and policy developments at the EU level concerning asylum seekers and migrants.

The other Notes in this series:

- examine the protections afforded to refugees under international law and discuss the global context [[Note 1](#)]; and
- provide an overview of the legal and policy framework governing the treatment of refugees in Ireland [[Note 2](#)].



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Table 1: Glossary and Abbreviations

Term	Meaning
ECRE	European Council on Refugees and Exiles
FRA	EU Fundamental Rights Agency
Frontex	EU Border and Coast Guard Agency
IOM	International Organization for Migration
OHCHR	UN Office of the High Commissioner for Human Rights
OLAF	European Anti-Fraud Office
SAR	Search and Rescue
TFEU	Treaty on the Functioning of the EU
UNHCR	UN Refugee Agency

Summary

This Note is the third and final of a series of three Notes, which provide information concerning refugees in Ireland, the EU and worldwide. This Note:

- introduces the EU's Common European Asylum System;
- discusses the increase in the number of individuals seeking international protection in the EU territory since the early 2010s, and the actions undertaken by the EU in response to this development;
- outlines the legal obligation to assist and rescue persons found in distress at sea under international law and EU law; and
- examines recent legal and policy developments at the EU level concerning asylum seekers and migrants.

The other two Notes in this series:

- examine the protections afforded to refugees under international law and discuss the global context [[Note 1](#)]; and
- provide an overview of the legal and policy framework governing the treatment of refugees in Ireland [[Note 2](#)].

Box 1: Explanation of Key Terms

A **refugee** is “someone who is **unable or unwilling to return** to their country of origin owing to a **well-founded fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group, or political opinion” [UN Refugee Agency [[UNHCR](#)].

An **asylum seeker** is a person seeking international protection, in the form of refugee status or subsidiary protection, in a State outside of their country of origin/habitual residence and whose application has yet to be determined by the authorities.

A national of a non-EU Member State or a stateless person who does not qualify as a refugee may nonetheless be granted a “**subsidiary protection**” declaration in an EU Member State if substantial grounds are found to exist for believing that they would face a real risk of suffering serious harm if they were returned to their country of origin/former habitual residence and that, owing to such risk, they are unable or unwilling to avail of the protection of their country of origin/former habitual residence. [[European Commission](#)]

“**Irregular migrant**” does not have a universally accepted definition under international law. It “is generally used to identify persons moving outside regular migration channels. The fact that they migrate irregularly does not relieve States from the obligation to protect their rights” [International Organization for Migration (IOM), see [here](#)].

Timeline of Recent Events

- **2015:** nearly one million asylum seekers and migrants attempt to reach Europe via the Eastern Mediterranean maritime crossing ([IOM](#)). This route is predominantly used by refugees fleeing armed conflict and instability in Syria, Afghanistan and Iraq.
- **2015:** Irish naval service vessels are dispatched to the Mediterranean to rescue asylum seekers and migrants under Operation Pontus (an agreement with Italy).
- **2015 (September):** the EU launches an [emergency relocation programme](#). [34,700 asylum seekers](#) are relocated from Italy and Greece to other European countries under the programme. It closes in 2017.
- **2016:** 5,136 individuals die or go missing in the Mediterranean in 2016 alone ([IOM](#)).
- **2016 (March):** the [EU and Turkey](#) reach an agreement to address the refugee and migrant crisis in the Eastern Mediterranean. It is criticised by many [human rights organisations](#) who argue Turkey is not a safe country to which to return refugees.
- **2017 (February):** European Council members agree under [the Malta Declaration](#) to increase cooperation with the Libyan authorities and Libyan National Coast Guard in order to combat people smuggling activities on the Central Mediterranean route. The agreement is criticised by many human rights NGOs (see, for example, [here](#)).
- **2017 (July):** the Government and Dáil [approve](#) “the redeployment of Naval Service assets from primarily humanitarian search and rescue operations to primarily security and interception operations as part of Operation Sophia”. [Operation Sophia](#) is operated by the EU naval force, EUNAVFOR Med. It terminates on 31 March 2020.
- **2018:** some EU Member States pledge to voluntarily relocate asylum seekers rescued in Search and Rescue operations in the Central Mediterranean. About [3,000 individuals](#) have been voluntarily relocated from Italy and Malta since 2018.
- **2018:** Seán Binder, a German national who has lived in Ireland for most of his life, and Sarah Mardini, a Syrian refugee, are arrested on the Greek island of Lesbos. Several human rights NGOs (see [here](#) and [here](#)) argue that the charges and allegations are baseless and an example of the criminalisation of humanitarianism
- **2018 (July):** the European Parliament adopts a [Resolution](#) to end the criminalisation of humanitarian assistance.
- **2020 (April):** a [voluntary EU scheme](#) begins for relocating asylum seekers from Greece to participating European States. Over 5,000 relocations occur by October 2022.
- **2020 (23 September):** the European Commission announces a [New Pact on Migration and Asylum](#), accompanied by various legislative proposals.
- **2020 (23 September):** the European Commission publishes [Guidance on the EU Facilitation Directive](#), which clarifies that the Directive cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised.

Timeline of Recent Events continued

- **2022 (21 February):** [UN High Commissioner for Refugees](#), Filippo Grandi, states that pushbacks of asylum seekers are being regularly reported at multiple entry points at land and sea borders, within and beyond the EU.
- **2022 (March):** the Council of the EU activates the [Temporary Protection Directive](#) to enable Ukrainian refugees to be afforded temporary protection in EU Member States.
- **2022 (22 June):** 21 EU Member States, including Ireland, sign a [Declaration](#) providing for a Voluntary Solidarity Mechanism. Signatory States can accept asylum seekers relocated from another EU State or make financial contributions.
- **2022 (22 June):** [Council of the EU](#) agrees positions on the proposed Eurodac and screening regulations to form the basis of negotiations with the European Parliament.
- **2022 (July):** [European Court of Human Rights](#) finds that Greece violated the right to life and the right not to be subjected to degrading treatment in its response to the sinking of a boat in the Aegean Sea, which resulted in the death of 11 individuals.
- **2022 (October):** a partially redacted version of the report of an investigation by the [European Anti-Fraud Office](#) highlights serious shortcomings in actions undertaken by [Frontex](#) in response to credible allegations of human rights violations.
- **2022 (31 December):** almost one million applications for international protection are made in [EU Member States](#) in 2022, a record since 2016, including 13,651 in Ireland.
- **2023 (March 27):** a [United Nations Independent Fact-Finding Mission on Libya](#) finds that [crimes against humanity were committed](#) against migrants in places of detention under the actual or nominal control of Libya's Directorate for Combating Illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus, bodies that received technical, logistical and monetary support from the EU and its member States for the interception and return of migrants.
- **2023 (26 April):** Dáil Éireann approves the deployment of a Naval Service vessel as part of EU NAVFOR Med's [Operation Irini](#) for seven weeks in June and July 2023.
- **2023 (16 May):** Supreme Court in Greece begins hearing an appeal against a judgment by the Court of Appeal of Mytilene, Greece, annulling misdemeanour charges against [Seán Binder and Sarah Mardini](#).
- **2023 (8 June):** the [Government agrees](#) to contribute €1.5 million to the EU's Voluntary Solidarity Mechanism instead of accepting 350 relocated asylum seekers.
- **2023 (8 June):** the [Council of the EU](#) agrees a negotiating position on the asylum procedure regulation and the asylum and migration management regulation.

Timeline of Recent Events continued

- **2023 (14 June):** a ship carrying asylum seekers and migrants, the *Adriana*, sinks off the coast of Greece resulting in the deaths of up to 650 people. An article published by [The Guardian on 10 July 2023](#) reports that prior to the sinking, Frontex offered support to the Greek authorities; however, received no reply.
- **2023 (27 June):** journalists and human rights NGOs reiterate concerns regarding alleged [non-voluntary returns](#) of Syrian refugees from Lebanon and Turkey to Syria.
- **2023 (July 6):** the 2022 [Annual Report of Frontex's Fundamental Rights Officer](#) is published. It states that Libya cannot be considered a port of safety for migrants and asylum seekers rescued at sea.
- **2023 (16 July):** the EU enters a [Memorandum of Understanding](#) with Tunisia involving the provision of over €105 million to fund training and technical support for Tunisian border management. It is criticised by many [human rights NGOs](#).
- **2023 (24 July):** the European Ombudsman opens an [own-initiative inquiry](#) to clarify Frontex's role in search and rescue operations in the Mediterranean sea.
- **2023 (14 September):** the European Ombudsman opens [an own-initiative inquiry](#) into how the European Commission plans to ensure respect for human rights in the context of migration-related activities arising from the EU's Memorandum of Understanding with Tunisia.
- **2023 (17 September):** the European Commission announces a [10-point Plan for Lampedusa](#), which reinforces the EU's support for the Memorandum of Understanding with Tunisia. Over 80 NGOs criticise the Plan in a [joint statement](#).
- **2023 (October 31):** 5,840,000 refugees from Ukraine have availed of temporary protection across Europe ([UNHCR](#)).
- **2023 (10 December):** 253,905 refugees and migrants have arrived by sea and land to EU Member States in the Mediterranean region thus far in 2023 ([UNHCR](#)).

Common European Asylum System

Articles 67 (2), 78 and 80 of the [Treaty on the Functioning of the EU](#) (TFEU) and Article 18 of the [EU Charter of Fundamental Rights](#) form the legal basis for the EU's asylum policy.¹ Article 80 of the TFEU requires that EU policies on border checks, asylum and immigration, and their implementation are “governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.” Article 67 (2) of the TFEU requires the EU to “frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals” and stateless persons. Article 78 of the TFEU requires the European Parliament and the Council of the EU to adopt measures for a Common European Asylum System. Article 18 of the [EU Charter of Fundamental Rights](#) provides that the right to asylum shall be guaranteed with due respect for the rules included in the [1951 Refugee Convention and the 1967 Protocol relating to the status of refugees](#).²

Since 1999, the EU has had a [Common European Asylum System](#) to provide for “common standards and co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply” within the EU territory.³ The system's legal framework is centred around a number of core legislative instruments, including:

- the Asylum Procedures Directive (recast) (see [here](#) and [here](#)), which is intended to establish the conditions for fair and efficient asylum decisions across the EU;
- the Reception Conditions Directive (recast) (see [here](#) and [here](#)), which seeks to ensure common standards in terms of reception conditions for asylum seekers across the EU;
- the Qualification Directive (recast), (see [here](#) and [here](#)) which seeks to clarify the grounds for granting international protection across the EU;
- the Dublin III Regulation (see [here](#) and [here](#)), which seeks to establish the State responsible for examining an international protection application; and
- the [EURODAC Regulation \(recast\)](#), which allows law enforcement authorities in EU Member States access to an EU database containing the fingerprints of asylum seekers for strictly limited persons.

The [EU Agency for Asylum](#) provides support to EU Member States in implementing these laws.

In accordance with [Protocol 21](#) to the TFEU, Ireland may decide whether or not to opt-in to a proposed EU legislative measure in the area of freedom, security and justice (which includes migration) within three months of the proposal being presented to the Council of the EU.⁴ Ireland may also indicate its desire to participate in a legislative measure after the measure has been

¹ EU Parliament, ‘Factsheet on Asylum Policy’ (2022), available [here](#), last accessed 11 December 2023.

² The 1951 Refugee Convention and the 1967 Protocol are discussed in [Note 1](#) of this series of L&RS Notes concerning Refugees in Ireland, the EU and Worldwide.

³ European Commission, ‘Common European Asylum System’, available [here](#), last accessed 14 December 2023.

⁴ Department of Justice (DOJ), ‘European Affairs’ (last updated 26 April 2023), available [here](#), last accessed 6 December 2023.

adopted. In accordance with Article 29.4.7° of the 1937 [Constitution of Ireland](#), the exercise of this opt-in power is subject to the approval of both Houses of the Oireachtas.

Ireland participates in the Eurodac Regulation (recast)⁵ and the Dublin III Regulation. In 2018, Ireland also opted in to the Reception Conditions Directive (recast).⁶ Ireland has not opted in to the Asylum Procedures Directive (recast). In July 2013, in a written answer to a parliamentary question, [Minister for Justice and Equality, Alan Shatter T.D.](#), identified some elements of this recast Directive, which were problematic for Ireland, including a requirement to ensure that the examination procedure in respect of applications for international protection is concluded within six months of the lodging of an application (Article 31). Ireland has also not opted in to the Qualification Directive (recast). However, Ireland continues to participate in the first [Qualification Directive](#) (2004/83/EC) and the [first Asylum Procedures Directive](#) (2005/85/EC).⁷

Ireland has also opted to participate in the [Temporary Protection Directive](#) (Council Directive 2001/55/EC of 20 July 2001). The Directive was adopted in the aftermath of the Balkans conflict as a way of providing immediate help, in the form of collective protection status, to large groups of people forced to flee their home country due to armed conflict, endemic violence or systematic human rights violations.⁸ In response to the armed conflict in Ukraine, on 4 March 2022, the [Council of the EU](#) decided to activate this Directive.

The Dublin III Regulation and the Need for Reform

The [Dublin III Regulation](#) is at the heart of the Common European Asylum System. All the EU Member States, as well as Iceland, Switzerland, Norway and Liechtenstein, participate in the Dublin III Regulation (the “Dublin States”). In certain circumstances, a State that has agreed to the Dublin III Regulation can request another Dublin State to “take charge of” or “take back” an application for international protection (that is, a request for a refugee status or subsidiary protection). For example, Ireland could submit a “take charge” request in circumstances where:

- another Dublin State has already issued the applicant a visa, residence document or work permit;
- the applicant irregularly crossed the frontier of another Dublin State before making an application in Ireland; or
- the applicant has close family members in another Dublin State.⁹

⁵ European Parliament Briefing, ‘Recast Eurodac Regulation’ (March 2021), p. 3, available [here](#), last accessed 6 December 2023.

⁶ The Receptions Directive (recast) is given effect by way of the [European Communities \(Reception Conditions Regulations\) 2018 \(S.I. No. 230/2018\)](#) and subsequent amendments: the [Reception Conditions \(Amendment\) Regulations 2021](#) (S.I. No. 52/2021), and the [Reception Conditions \(Amendment\) \(No. 2\) Regulations 2021](#) (S.I. No. 178/2021), last accessed 7 December 2023.

⁷ Janine Silga, ‘Navigating Uncharted Waters: Ireland’s Differentiated Participation in the Common European Asylum System after ‘Brexit’’ (*VerfBlog*, 28 March 2023), available [here](#), last accessed 6 December 2023.

⁸ For more information, see: Rebecca Halpin, ‘Temporary Protection: the activation of the Temporary Protection Directive in response to the crisis in Ukraine’ (L&RS, April 2022) available [here](#), last accessed 6 December 2023.

⁹ International Protection Office, ‘EU Dublin Regulation’, see [here](#), last accessed 6 December 2023.

Ireland may request another Dublin State to “take back” an application where the applicant already made an application for asylum in that State and the application:

- has yet to be finalised,
- was withdrawn by the applicant before a decision was made, or
- was rejected and the applicant is in Ireland without permission.¹⁰

The Dublin III Regulation has been accused of placing a disproportionate burden on “first point of entry” EU Member States, who have at times been “overwhelmed” by the large number of asylum seekers arriving at their borders.¹¹ This is notwithstanding the fact that solidarity and fair sharing of responsibility is required under EU law. The [European Council on Refugees and Exiles](#) (ECRE), an alliance of 117 non-governmental organisations (NGOs) across 40 European countries, has criticised “the structure and logic of the Dublin system for perpetuating inefficient and unworkable mechanisms for allocation of responsibility”.¹²

The [European Commission has acknowledged](#) that the Dublin III Regulation, ***“by design or poor implementation places a disproportionate responsibility on certain Member States.”***

Increase in individuals seeking international protection in the EU territory since the mid-2010s

Armed conflict, generalised violence and repressive governance contributed to a large increase in the number of people seeking international protection in the EU territory during the early 2010s from States such as Syria, Afghanistan, Somalia and Eritrea.¹³ A 2020 Report by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs reported that “[i]n 2015-16, 2.5 million people applied for asylum in the EU, compared to 562 000 in 2014 and 278 000 in 2012”.¹⁴ The upsurge in applications revealed the limitations of the existing Common European Asylum System. This in turn prompted a legislative and policy reform process, which has been ongoing since 2016, and is discussed in more detail later in the Note.

Russia’s invasion of Ukraine in February 2022 led to a further increase in the number of refugees requiring international protection in EU Member States. As of 31 October 2023, 5,840,000 refugees from Ukraine have availed of temporary protection across Europe.¹⁵ Furthermore,

¹⁰ Ibid.

¹¹ Laura Fletcher, ‘EU’s ‘historic’ asylum seeker hosting deal explained’ (RTÉ, 9 June 2023) available [here](#), last accessed 7 December 2023.

¹² ECRE, ‘To Dublin or not to Dublin?’ (2018), p. 1, available [here](#), last accessed 7 December 2023.

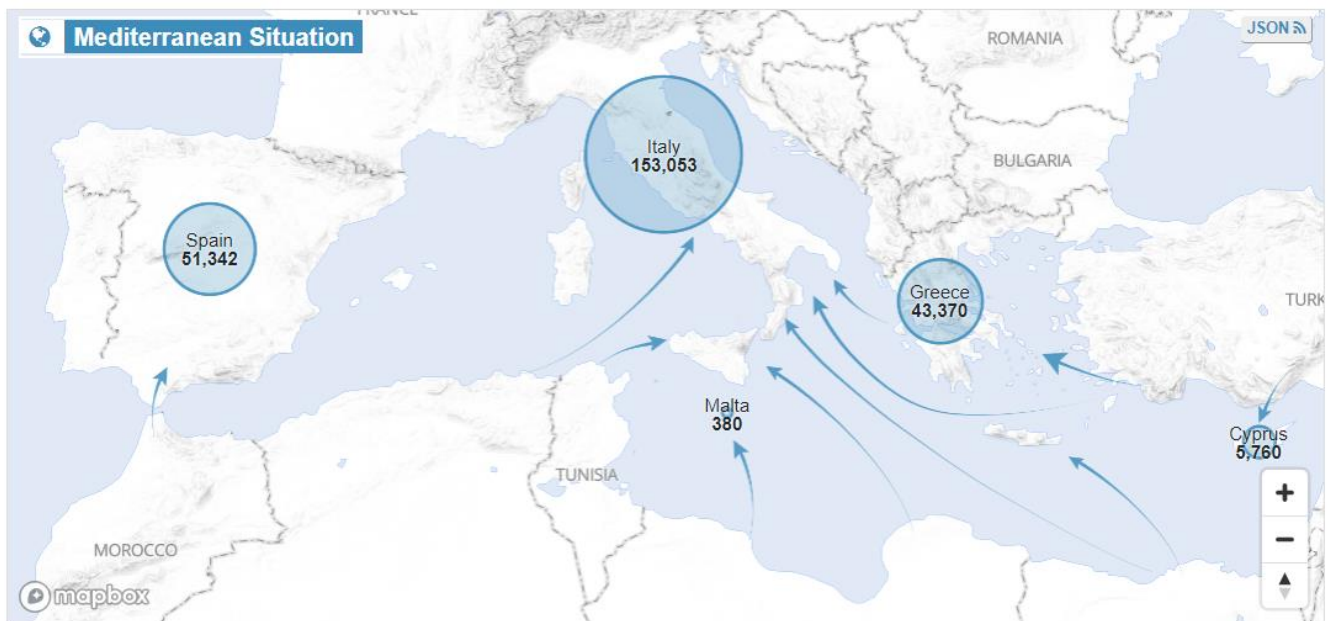
¹³ Human Rights Watch, ‘Mediterranean Crisis’, see [here](#), last accessed 7 December 2023.

¹⁴ Committee of the European Parliament on Civil Liberties, Justice and Home Affairs, ‘Report on the implementation of the Dublin III Regulation’ (2020) Doc. A9-0245/2020, available [here](#), last accessed 7 December 2023.

¹⁵ UNHCR, ‘Europe Situations: Data and Trends - Arrivals and Displaced Populations - October 2023’ (7 December 2023), available [here](#), last accessed 14 December 2023.

according to the UN Refugee Agency (UNHCR), between 1 January and 10 December 2023, 247,098 refugees and migrants arrived by sea to EU Member States in the Mediterranean region.¹⁶ An additional 6,807 refugees and migrants arrived by land between 1 January and 3 December 2023.¹⁷ This marks a significant increase as compared with 2022 when 159,410 refugees and migrants arrived by sea and land in total.¹⁸

Map 1: Mediterranean Situation as of 10 December 2023, UNHCR Operational Portal¹⁹



Migration routes used by individuals seeking refuge in the EU

The main migration routes used by individuals seeking refuge in the EU territory include:

- the Eastern Mediterranean route (see [here](#) and [here](#)), which usually involves a sea crossing from Turkey to Greece and, to a lesser degree, Cyprus and Bulgaria;
- the Central Mediterranean route (see [here](#) and [here](#)), entailing sea crossings from North Africa and Turkey to Italy and, to a lesser degree, Malta;
- the Western Mediterranean route (see [here](#) and [here](#)), encompassing several sub-routes, including a sea crossing from Morocco to Spain and, to a lesser extent, from Algeria to Spain; and
- the [Western Balkans route](#), involving travel through the Western Balkan States (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia).

¹⁶ UNHCR, 'Mediterranean Situation: Operational Portal' (updated as of 10 December 2023) available [here](#), last accessed 14 December 2023.

¹⁷ Ibid.

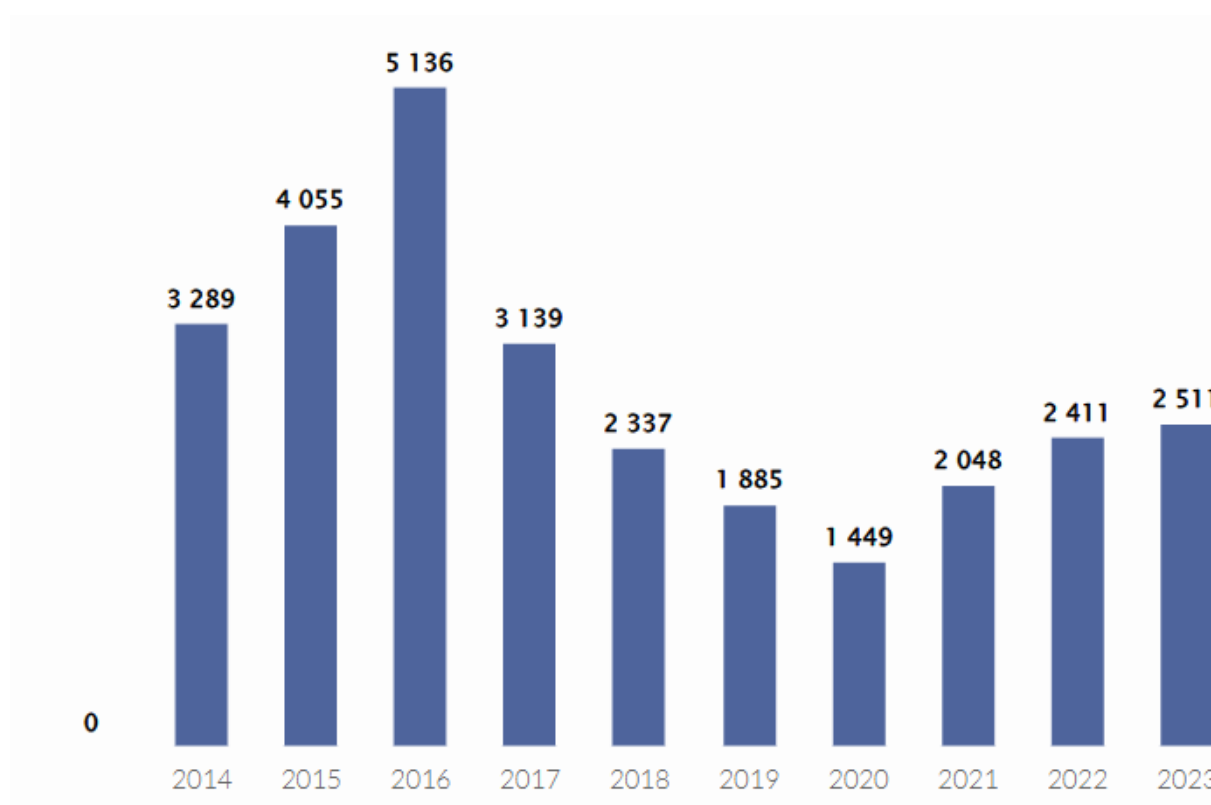
¹⁸ Ibid.

¹⁹ This map is replicated from *ibid*.

People smugglers have capitalised upon refugees' desperation by offering transportation to Europe in return for large sums of money. The transportation provided often transpires to be unsafe and, in the case of boats, unseaworthy. This has contributed to a humanitarian crisis in the Mediterranean. The crisis was epitomised by the shocking image of the body of the three-year old Syrian refugee, Alan Kurdi, washed up on a Turkish beach on 2 September 2015.

Approximately 28,260 victims have died or gone missing in the Mediterranean since 2014, including 5,136 in 2015 alone. The Central Mediterranean route accounts for 22,458 of these incidents. [International Organization for Migration, available [here](#), last accessed 14 December 2023]

Table 2: Migrants who Died or went Missing in the Mediterranean: 2014 - 2023^{*20}



The [International Organization for Migration](#) (IOM) estimates that 2,511 migrants died or went missing in the Mediterranean between 1 January and 12 December 2023.²¹ However, UNHCR estimates that the figure was 2,669 as of 10 December 2023.²²

²⁰ This table is taken from IOM, 'Missing Migrants Project: Migration within the Mediterranean', available [here](#), [last accessed 14 December 2023].

²¹ Ibid.

²² UNHCR, 'Mediterranean Situation: Operational Portal' (last updated 10 December 2023) available [here](#), [last accessed 14 December 2023].

Search and Rescue Obligations under International Law and EU Law

States have a legal obligation under customary international law²³ to require ships flying the State flag, both State and private vessels, to assist and rescue persons found in distress at sea and to bring them to a place of safety.²⁴ This obligation is also provided for under numerous international treaties (agreements between States).²⁵

States have a legal obligation under international law to require ships flying the State flag, both State and private, to assist and rescue persons found in distress at sea and bring them to a place of safety.

The duty to assist applies insofar as it is possible to provide assistance without posing a serious danger to the ship, its crew or its passengers. It arises without regard to the nationality or status of the persons in distress or the circumstances in which they are found.²⁶ The Guidelines of the International Maritime Organization on the treatment of persons rescued at sea stipulate that a 'place of safety' is "a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met". The EU Fundamental Rights Agency (FRA) notes that "the selection of a place of safety should take due account of the principle of *non-refoulement*. Disembarkation where the lives of refugees and asylum seekers could be at risk of persecution, torture or other serious harm must thus be avoided".²⁷

The ***non-refoulement principle*** under international refugee law provides that **refugees may not be expelled or returned, in any manner whatsoever, to countries or territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.**

[Article 33 of the [1951 Refugee Convention](#)].

On its website, the European Commission indicates that the determination of a place of safety for disembarkation of assisted persons is the responsibility of the competent national Maritime

²³ Customary international law derives from the general practices of States, which are accepted as being required by law. It binds *all* States regardless of whether or not they have ratified a particular treaty. See: [Statute of the International Court of Justice](#), Article 38(1)(b), last accessed 14 December 2023.

²⁴ Irini Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: a general overview' (August 2016) *International Review of the Red Cross* 902, available [here](#), last accessed 8 December 2023; and European Commission, 'Search and Rescue', available [here](#), last accessed 12 December 2023.

²⁵ For example, the International Convention for the Safety of Life at Sea, 1974; the UN Convention of the Law of the Sea, 1982; and the International Convention on Maritime Search and Rescue, 1979,

²⁶ FRA, 'June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', available [here](#), last accessed 12 December 2023.

²⁷ *Ibid.*

Rescue Coordination Center in charge of the rescue operation.²⁸ However, the Commission also notes that search and rescue (SAR) forms part of integrated border management.²⁹

The EU Sea Borders Regulation ([Regulation \(EU\) No. 656/2014](#)) clarifies that the duty to assist and rescue persons in distress at sea and bring them to a place of safety applies to maritime, land and aerial units of EU Member States participating in sea operations for the purpose of maintaining surveillance of the EU's external sea borders under the coordination of Frontex. [Frontex](#) (the EU Border and Coast Guard Agency) is the EU agency with responsibility for supporting EU Member States and Schengen-associated countries in the management of the EU's external borders. Article 80 (1) of [Regulation \(EU\) 2019/1896](#) (the "Frontex Regulation") requires Frontex to guarantee the protection of fundamental rights, including the principle of *non-refoulement*, when discharging its obligations.

Ireland's involvement in SAR Initiatives

In 2015, Naval Service vessels belonging to the Irish Defence Forces were dispatched to the Mediterranean to rescue migrants at sea in accordance with Operation Pontus, a bi-lateral agreement between Ireland and Italy. According to an *Irish Times* article published on 27 March 2019, 18,000 migrants were rescued at sea by Irish Defence Forces personnel.³⁰ In July 2017, the Government and Dáil Éireann approved "the redeployment of Naval Service assets from primarily humanitarian search and rescue operations to primarily security and interception operations as part of Operation Sophia".³¹ [Operation Sophia](#) was operated by the EU naval force, EU NAVFOR Med, and sought to disrupt criminal networks of smugglers and traffickers. It officially terminated on 31 March 2020.

On 26 April 2023, Dáil Éireann approved the deployment for a seven-week period in June and July 2023 of a Naval Service vessel as part of EU NAVFOR Med's [Operation Irini](#). The core purpose of Operation Irini is to help prevent arms trafficking within an agreed area in accordance with relevant UN Security Council resolutions, which impose an arms embargo on Libya. During a [Dáil debate on 25 April 2023](#), the Government confirmed that members of the Irish Naval Service would not have any involvement in capacity building and/or training of the Libyan Coast Guard. The motion ultimately approved by the Dáil included an [amendment](#) reiterating that the Irish Naval Service vessel participating in Operation Irini would be obliged under international law to assist persons in distress at sea.

During a [Dáil debate on 24 May 2023](#), the Minister of State at the Department of Housing, Local Government and Heritage, Kieran O'Donnell, T.D., confirmed that whilst Operation Irini had no explicit mandate for safety of life at sea and SAR activities, the mission direction is that any

²⁸ European Commission, 'Search and Rescue', available [here](#), last accessed 12 December 2023.

²⁹ Ibid.

³⁰ Peter Murtagh, 'EU ends migrant rescue mission in Mediterranean' (*Irish Times*, 27 March 2019) available [here](#), last accessed 14 December 2023.

³¹ Dáil Éireann Debate, 'Deployment of a Naval Service Vessel to Participate in Operation Irini: Motion' (25 April 2023) available [here](#), last accessed 14 December 2023.

“migrants rescued by the ship should be taken to and disembarked to a European coastguard ship as soon as possible”.

The EU’s Response to the Increase in Asylum Seekers and Migrants

“The analysis of EU cooperation with Turkey, Libya, and Niger as case studies reveal an overwhelming focus on the fight against irregular migration, paying limited attention to the rights of TCNs [Third Country Nationals]”.

[A Study on the ‘The EU Approach to Migration in the Mediterranean’ commissioned by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (2021), p. 15, available [here](#)]

Some of the emergency measures undertaken by the EU to address irregular migration in the Mediterranean are discussed below. As noted by [IOM](#), the fact that individuals “migrate irregularly does not relieve States from the obligation to protect their rights”.

Relocation Initiatives

In order to ease the burden on Italy and Greece, in September 2015 the EU launched an emergency relocation [programme](#). It resulted in 34,700 asylum seekers being relocated from Italy and Greece to other EU Member States as well as Norway and Switzerland.³² It closed in 2017.

On 23 September 2019, the interior ministers of Italy, Malta, France and Germany adopted a joint declaration of intent to establish a temporary solidarity mechanism, which would operate on a voluntary basis and allow for the swift relocation of asylum seekers rescued at sea (sometimes referred to as the “Valetta Declaration”). An official mechanism does not appear to have been established; however, approximately 3,000 individuals have been voluntarily relocated from Italy and Malta to other EU Member States since 2018.³³

In April 2020, a voluntary EU scheme was initiated for relocating vulnerable asylum seekers, unaccompanied children and refugees from Greece to thirteen participating EU Member States as well as Switzerland, Norway and Iceland.³⁴ By October 2022, over 5,000 relocations had been completed under this scheme.³⁵

The EU’s Voluntary Solidarity Mechanism

In June 2022, 21 EU Member States, including Ireland, signed a [Declaration on Solidarity](#), which provided for the establishment of a Voluntary Solidarity Mechanism. Signatory States may either accept asylum seekers relocated from another EU Member State, normally being the asylum

³² European Commission, ‘Relocation: EU Solidarity in Practice’ see [here](#), last accessed 7 December 2023.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

seeker's first State of entry, or they can make financial contributions. The Mechanism set a target of relocating 8,000 asylum seekers per year. However, it was reported in an article published on 'InfoMigrants'³⁶ on 16 June 2023 that since June 2022, only 1,457 relocations (32 transfers) had taken place under the scheme from Cyprus, Spain, Greece, Italy and Malta, to Germany, France, Luxembourg, Bulgaria, Romania, Finland, Portugal and Croatia.³⁷

On 8 June 2023, due in part to difficulties in securing accommodation for Ukrainian refugees and existing applicants for international protection, the Irish Government agreed to make a financial contribution of €1.5 million to the Solidarity Mechanism instead of accepting 350 relocated asylum seekers.³⁸

Eastern Mediterranean Route: the EU-Turkey Agreement 2016

The [Eastern Mediterranean route](#) often involves a sea crossing from Turkey to Greece and, to a lesser degree, Cyprus and Bulgaria. It is widely used by people from the Middle East and South Asia fleeing conflict and instability, most notably, Syrians, Iraqis and Afghans.³⁹ According to IOM, "[i]t was the main maritime route used for irregular entry to Europe in 2015, when nearly one million migrants attempted to cross the Mediterranean into Europe through this route".⁴⁰

The EU and Turkey reached an Agreement on 18 March 2016 in an attempt to reduce migration to Europe via the Eastern Mediterranean route. It was agreed that:

- all new irregular migrants arriving on the Greek islands from Turkey will be returned to Turkey as a temporary and extraordinary measure if they do not apply for asylum or if their claim is deemed to be unfounded or inadmissible;
- for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey in the EU with priority being afforded to migrants who have not previously entered or tried to enter the EU irregularly; and
- Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU.⁴¹

As part of the EU-Turkey Agreement, the EU established the Facility for Refugees under which it undertook to provide €6 billion in assistance for refugees and host communities in Turkey.⁴²

³⁶ InfoMigrants is a collaboration led by three large European media sources: France Médias Monde, the German public broadcaster Deutsche Welle, and the Italian press agency ANSA. It is co-financed by the EU. See: 'About InfoMigrants', available [here](#), last accessed 8 December 2023.

³⁷ Romain Philips, 'Few asylum seekers transferred under Europe's solidarity mechanism' (*InfoMigrants*, 16 June 2023), available [here](#), last accessed 8 December 2023.

³⁸ Paul Cunningham, 'Cabinet agrees €1.5m EU payment over asylum seekers' (*RTÉ*, 8 June 2023) available [here](#), last accessed 7 December 2023.

³⁹ IOM, 'Missing Migrants Project: Migration within the Mediterranean', available [here](#), last accessed 8 December 2023.

⁴⁰ Ibid.

⁴¹ EU-Turkey Statement (18 March 2016), see [here](#), last accessed 8 December 2023.

⁴² European Commission, 'The EU Facility for Refugees in Turkey', available [here](#), last accessed 8 December 2023.

The EU-Turkey Agreement has been criticised by [human rights organisations](#) including Human Rights Watch and Amnesty International, who argue that Turkey is not a safe country to which to return Syrian refugees.⁴³ ECRE accused the EU of “outsourcing” obligations owed to refugees.⁴⁴

Image entitled,
“[Syrians and Iraq
refugees arrive at
Skala Sykamas
Lesvos Greece 2](#)”

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On 8 April 2016, the [Irish Human Rights and Equality Commission stated](#) that:

“... Preventing refugees from seeking asylum in Europe through returns to Turkey – a country already host to approximately 3 million refugees – risks placing the European Union in direct violation of the principle of *non-refoulement* (the prohibition against returning asylum seekers to a country where they risk persecution). It also ignores the humanitarian and human rights imperative for solidarity and a fair sharing of responsibility to provide protection to those fleeing persecution.

...Ireland’s support for the EU-Turkey agreement, in the face of a continuing lack of solidarity, and urgent questions as to the adequacy of protection against *refoulement*, is a matter of serious concern.”⁴⁵

⁴³ ECRE, ‘EU-Turkey deal: trading in people and outsourcing the EU’s responsibilities (8 March 2016) available [here](#), last accessed 8 December 2023; and ECRE, ‘Greece: HRW Finds Türkiye Increasingly Unsafe for Refugees and Calls for EU Pressure to Repeal JMD, Pushbacks and Abuse Continue and Recognised Refugees are Left in Destitution’ (28 October 2022), available [here](#), last accessed 8 December 2023.

⁴⁴ ECRE, ‘EU-Turkey deal: trading in people and outsourcing the EU’s responsibilities (8 March 2016) available [here](#), last accessed 8 December 2023.

⁴⁵ IHREC, ‘Statement on the refugee crisis and the EU-Turkey agreement’ (8 April 2016), available [here](#), last accessed 8 December 2023.

Commenting on the EU-Turkey Agreement in a written answer to a parliamentary question on 14 June 2016, [Minister for Foreign Affairs and Trade, Charlie Flanagan, T.D., stated](#) that:

“The need for the agreement to comply with EU and international law was a key concern for very many EU Member States, including Ireland. The legal advice of the EU institutions and the Attorney General’s Office was that the terms of the Agreement were not in breach of EU or International law....

... Turkey has provided formal guarantees as part of the EU-Turkey Agreement that Syrian refugees returned to Turkey will be granted temporary protection upon return...

... I am aware of reports by Human Rights Watch and Amnesty International, including testimony from migrants and witnesses that some Turkish border guards have used violence against Syrians. These reports are very worrying and will require a full investigation by the Turkish authorities. While Turkey has a right to secure its border with Syria, all actions on the part of Turkey must be in line with international law.”

In multiple reports, Human Rights Watch and Amnesty International have reiterated that Turkey is not a safe country for Syrian refugees, including because they are at risk of being involuntarily returned from Turkey to Syria contrary to the *non-refoulement* rule.⁴⁶ During a [Dáil debate](#) on 15 September 2021, Minister for Foreign Affairs, Simon Coveney, T.D., commented on reported incidents of non-voluntary returns of Syrian refugees to Syria:

“I have taken careful note of the Amnesty International Report entitled ‘You are going to your Death; violations against Syrian refugees returning to Syria’. The report contains some deeply concerning accounts of the explicit targeting of refugees returning to Syria.

Ireland believes, and has stated publicly on many occasions, that all returns to Syria must be safe, voluntary and dignified. Addressing the United Nations Security Council on 20 January, Ireland’s Permanent Representative to the UN stated that ‘millions of Syrians remain as refugees, and the conditions necessary for them to return, in a safe, voluntary and dignified manner are far from being achieved’. This clearly remains the position.”

In terms of implementation, the [website of the Turkish Ministry of Interior](#) indicates that 39,576 Syrian refugees had left Turkey for the EU under the One-to-One policy, as of 30 November 2023.⁴⁷ International Rescue Committee, an NGO, reported in March 2023 that approximately 32,472 Syrian refugees had been resettled from Turkey to EU Member States under the EU-Turkey agreement.⁴⁸ It also reported in March 2023 that only 2,140 individuals had been returned from Greece to Turkey under the Agreement due in part to an acknowledgment by

⁴⁶ See e.g., ECRE, ‘Greece: HRW Finds Türkiye Increasingly Unsafe for Refugees and Calls for EU Pressure to Repeal JMD’ (28 October 2022) available [here](#), last accessed 8 December 2023.

⁴⁷ Turkish Ministry of the Interior, ‘Temporary Protection’, see [here](#), last accessed 8 December 2023.

⁴⁸ International Rescue Committee, ‘What is the EU-Turkey Deal’ (updated 16 March 2023), see [here](#), last accessed 8 December 2023.

Greek courts that Turkey is not a safe country to which to return Syrian refugees.⁴⁹ It should also be noted that Turkey has been refusing to accept returns of Syrian refugees from Greece under the EU-Turkey Agreement since March 2020.⁵⁰

Asylum seekers who arrive on the Greek islands are detained in reception and identification centres and, more recently, EU-funded Closed Controlled Access Centres of Islands. Human rights organisations have expressed concerns that conditions in these centres do not adhere to fundamental human rights standards.⁵¹

The EU-Turkey Agreement may have deterred some individuals from undertaking dangerous sea-crossings from Turkey to Greece. The European Council reported that arrivals of “irregular migrants” via the Eastern Mediterranean route were 98 per cent lower in 2020 as compared with 2015; however, arrivals began to increase again in 2021 and 2022.⁵²

Other factors may have also contributed to the overall reduction in arrivals via this route, including alleged pushbacks of asylum seekers and migrants. This is discussed in more detail later in the Note.

Central Mediterranean Route

As noted previously, the Central Mediterranean route typically involves journeys from North Africa and Turkey via the Mediterranean Sea to reach Italy and, to a much lesser extent, Malta. The EU has negotiated agreements with Libya and Tunisia to address irregular migration via this route.

The Malta Declaration

The vast majority of asylum seekers and migrants who take the Central Mediterranean route transit through Libya.⁵³ In February 2017, European Council members agreed under [the Malta Declaration](#) to increase cooperation with the Libyan authorities and the Libyan National Coast Guard with a view to tackling people smuggling activities on this route. Amongst other areas, they agreed to prioritise the provision of training, equipment and support to the Libyan National Coast Guard, and the ensuring of adequate reception capacities and conditions in Libya for migrants. In a written answer to a parliamentary question on 11 July 2017, [Minister for Foreign Affairs, Simon Coveney, T.D.](#), discussed the EU’s commitment to assist Libya as set out in the February 2017 Malta Declaration.

The 2022 Annual Report of the Fundamental Rights Officer of Frontex stipulates:

“The Fundamental Rights Officer, taking into consideration numerous reports, findings and recommendations by international organisations,

⁴⁹ Ibid.

⁵⁰ ECRE, ‘Greece: Ongoing Violations in the Aegean and Evros’ (12 May 2023) available [here](#), last accessed 8 December 2023.

⁵¹ ECRE, ‘Greece: EU-Funded Refugee Camps in the Aegean Built on a Regime of Incarceration’ (5 May 2023), available [here](#), last accessed 8 December 2023.

⁵² European Council, ‘Migration flows in the Eastern Mediterranean route’, available [here](#), last accessed 8 December 2023.

⁵³ Ibid.

reiterated that Libya cannot be considered a port of safety for migrants and potential asylum seekers who are rescued at sea”.⁵⁴

In a March 2023 Report, an Independent Fact-Finding Mission on Libya established by the UN Human Rights Council and comprised of independent experts found that:

“crimes against humanity were committed against migrants in places of detention under the actual or nominal control of Libya’s Directorate for Combating Illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus. These entities received technical, logistical and monetary support from the European Union and its member States for, inter alia, the interception and return of migrants.

... Based on the substantial evidence and reports before it, the Mission has grounds to believe that the European Union and its member States, directly or indirectly, provided monetary and technical support and equipment, such as boats, to the Libyan Coast Guard and the Directorate for Combating Illegal Migration that was used in the context of interception and detention of migrants.

... Immigration control by Libya and European States must be exercised consistent with their international law obligations, especially the principle of non-refoulement, and in accordance with the Global Compact for Safe, Orderly and Regular Migration.”⁵⁵

During an interactive dialogue with the Independent Fact-Finding Mission on Libya on 3 April 2023, the [EU Delegation to the UN, Geneva](#) stated:

“The findings of the FFM [Fact-Finding Mission] report are of serious concern. Migration management always needs to adhere to internationally recognized human rights standards and principles. However, we take issues with certain elements of the FFM report regarding EU and MS assistance to Libyan authorities in this area. Libya is a key third country along the Central Mediterranean route and the EU is committed to its cooperation and dialogue with the Libyan authorities on strengthening migration management and respect for human rights. The EU continually assesses its own methods to improve them and we will continue constructive engagement with all relevant international actors on how we can best contribute to the common objective of ensuring protection of human rights, including in the context of migration management.”

⁵⁴ Frontex, ‘The Fundamental Rights Officer Annual Report 2022’ (2023) p. 10, available [here](#), last accessed 12 December 2023.

⁵⁵ The Mission applied the “reasonable grounds to believe” evidentiary standard when making factual and legal determinations. This is the standard typically used by UN fact finding missions and commissions of inquiry. See: UN Human Rights Council, ‘Independent Fact-Finding Mission on Libya’ (3 March 2023) UN Doc A/HRC/2/83, available [here](#), paras 4, 15 and 46-47, last accessed 14 December 2023.

During the same interactive dialogue, the Representative of Ireland to the UN, Geneva indicated that Ireland aligned itself with the statement made on behalf of the EU.⁵⁶

The EU-Tunisia Memorandum of Understanding and the Ten Point Plan for Lampedusa

On 16 July 2023, the EU entered into a [Memorandum of Understanding](#) (MoU) with Tunisia to implement a comprehensive partnership agreement encompassing five pillars, including migration and mobility. The EU agreed to make available over €105 million in funding under the MoU “for training and technical support for Tunisian border management, for combatting anti-smuggling operations, and for reinforcing control of borders”.⁵⁷

The MoU has attracted criticism from human rights NGOs, including [Human Rights Watch](#), [Amnesty International](#) and [International Rescue Committee](#), for failing to incorporate safeguards aimed at ensuring the human rights of asylum seekers and migrants. On 18 July 2023, the UN Committee on the Elimination of Racial Discrimination together with several human rights experts appointed by the UN Human Rights Council “raised concern about Tunisia’s allegedly discriminatory treatment of sub-Saharan migrants, and urged the authorities to take urgent measures to stop collective expulsions and protect the human rights of all migrants”.⁵⁸

The [European Ombudsman](#), Emily O'Reilly,⁵⁹ has opened an own-initiative inquiry into the MoU. She requested the European Commission President, Ursula von der Leyen, to confirm by 13 December 2023 whether a human rights impact assessment was conducted prior to the signing of the agreement and to clarify what measures are being undertaken to monitor the human rights impact of the MoU on an ongoing basis and to mitigate the risk of human rights violations.⁶⁰

On 14 September 2023, Italy declared an emergency after approximately 7,000 migrants and asylum seekers arrived within a 48-hour period on Lampedusa, an island with a pre-existing population of 6,000 people.⁶¹ In response, the European Commission announced a [10-point Plan for Lampedusa](#), which reinforced the EU’s support for the MoU and the Tunisian Coast Guard. It also included a commitment to provide Italy with additional support in managing and registering new arrivals via the EU Asylum Agency and Frontex. Furthermore, it provided for a ‘step up’ in border surveillance, the exploration of options to expand naval missions in the Mediterranean, a ‘step-up’ in the return of irregular migrants to their countries of origin, and the establishment of

⁵⁶ The interactive dialogue, including Ireland’s statement, is available to watch on [UN Web TV](#), last accessed 14 December 2023.

⁵⁷ European Ombudsman, ‘Ombudsman asks Commission about respect for fundamental rights in EU agreement with Tunisia’ (14 September 2023) available [here](#), last accessed 13 December 2023.

⁵⁸ OHCHR, ‘UN experts urge Tunisia to act swiftly to uphold migrants’ rights’ (18 July 2023) available [here](#), last accessed 13 December 2023.

⁵⁹ The European Ombudsman is an independent and impartial body that holds the EU’s institutions and agencies to account.

⁶⁰ European Ombudsman, ‘Ombudsman asks Commission about respect for fundamental rights in EU agreement with Tunisia’ (14 September 2023) available [here](#), last accessed 13 December 2023.

⁶¹ Naomi O’Leary, ‘Italian island Lampedusa declares emergency as 7,000 migrants arrive in 48 hours’ (*Irish Times*, 14 September 2023) available [here](#), last accessed 13 December 2023.

operational partnerships on anti-smuggling with countries of origin and transit. The Plan attracted criticism from [Human Rights Watch](#) and over 80 additional NGOs in a [joint statement](#).

Pushbacks and Collective Expulsion of Asylum Seekers

“Pushback” is not a legal term but is commonly used to refer to the practice of ***“intercepting third country migrants as they cross the land borders of a state or enter the territorial waters, and pushing them back into another jurisdiction”***.

[European Anti-Fraud Office, ‘Final Report: Case No. OC/2021/0451/A1’ (2022), at 1.5.4, available [here](#), last accessed 8 December 2023].

Various actors, including [human rights NGOs](#), [media organisations](#), [the Council of Europe’s Committee for the Prevention of Torture](#), and UNHCR have voiced concerns regarding alleged pushbacks, collective expulsions and ill-treatment of refugees from the sea and land borders of certain EU Member States. On 21 February 2022, [the UN High Commissioner for Refugees, Filippo Grandi, stated](#):

“Violence, ill-treatment and pushbacks continue to be regularly reported at multiple entry points at land and sea borders, within and beyond the European Union (EU), despite repeated calls by UN agencies, including UNHCR, intergovernmental organizations and NGOs to end such practices.

We are alarmed by recurrent and consistent reports coming from Greece’s land and sea borders with Turkey, where UNHCR has recorded almost 540 reported incidents of informal returns by Greece since the beginning of 2020. Disturbing incidents are also reported in Central and South-eastern Europe at the borders with EU Member States.”

UNHCR’s Representative for EU Affairs, Mr. Gonzalo Vargas Llosa, [addressed the Select Committee on EU Affairs](#) on 8 February 2022. Commenting on pushbacks of refugees at EU borders, [Mr. Vargas Llosa stated](#): “[p]rogress on ending pushbacks, the establishment of independent national monitoring mechanisms to investigate them and measures to enhance search and rescue and ensure predictable disembarkation of those rescued at sea are urgently needed”.

As noted previously, Article 80 (1) of the [Frontex Regulation](#) requires Frontex to guarantee the protection of fundamental rights, including the principle of *non-refoulement*, when discharging its obligations. In November 2020, the European Anti-Fraud Office (OLAF) commenced an investigation into potential misconduct and/or irregularities related to Frontex, including possible “involvement in and/or cover up of illegal pushbacks” in Greece. A partially redacted version of OLAF’s report was published by several media organisations in October 2022.⁶² It highlighted serious shortcomings in the actions undertaken by Frontex in response to credible alleged violations of fundamental human rights.⁶³ Following the Report’s publication, Frontex Executive

⁶² European Anti-Fraud Office, ‘Final Report: Case No. OC/2021/0451/A1’ (2022), at 1.5.4, available to download at: Katy Fallon, ‘EU border agency accused of serious rights violations in leaked report’ (*The Guardian*, 14 October 2022), available [here](#), last accessed 14 December 2023.

⁶³ See generally *ibid*.

Management issued a public statement outlining the remedial measures it has undertaken to address the shortcomings identified in the Report, which it indicated reflect “practices of the past”.⁶⁴

The 2022 Annual Report of the Fundamental Rights Officer of Frontex advised that the Fundamental Rights Office continued to receive information and allegations in 2022 concerning collective expulsions and pushbacks from several borders where Frontex is operating.⁶⁵ In this regard, the Report:

“raised particular concerns about the situation in Albania (borders with Greece), Bulgaria (borders with Türkiye), Greece (borders with Türkiye), Latvia (borders with Belarus) and Lithuania (borders with Belarus, where Frontex provided support with border surveillance activities until July 2022).”⁶⁶

The Report further noted that:

“Collective expulsions and so called ‘pushbacks’,⁸ may amount to a violation of the principle of non-refoulement and of the right to asylum. Ill-treatment of migrants is against the obligation to respect human dignity in all circumstances and core fundamental rights such the right not to be tortured and not to be treated in an inhuman and degrading manner, and the right to integrity of the person”.⁶⁷

Article 46 (4) of the [Frontex Regulation](#) requires the Executive Director of Frontex, having consulted with the Fundamental Rights Officer of Frontex and informed the Member State concerned, to withdraw financing for, or suspend or terminate, any Frontex activity, either in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.

A *New York Times* article, published on 27 June 2023, reported that the current Fundamental Rights Officer, Jonas Grimheden, recommended that Frontex suspend operations in Greece in response to “‘credible reports’ of the Greek authorities expelling migrants at land and sea, separating children from parents and treating migrants in a ‘degrading’ way”.⁶⁸ The article was published after a ship carrying asylum seekers and migrants, the *Adriana*, sank off the coast of Greece on 14 June 2023, resulting in the deaths of up to 650 people. An article published by [The Guardian on 10 July 2023](#) reported that prior to the sinking, Frontex offered support to the Greek authorities; however, received no reply.

⁶⁴ Frontex, ‘Statement of Frontex Executive Management following publication of OLAF report’ (14 October 2023) available [here](#), last accessed 14 December 2023.

⁶⁵ Frontex, ‘The Fundamental Rights Officer Annual Report 2022’ (2023) p. 11, available [here](#), last accessed 12 December 2023.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Monika Pronczuk, ‘EU Border Agency considers pulling out of Greece over Migrant Abuses’ (*New York Times*, 27 June 2023), available [here](#), last accessed 12 December 2023.

Following the tragedy, the European Ombudsman, Emily O'Reilly, opened an [own-initiative inquiry](#) with a view to clarifying Frontex's role in SAR operations in the Mediterranean sea. As part of the inquiry, the Ombudsman asked to inspect several documents, including the serious incident report regarding how events unfolded with the *Adriana*.⁶⁹ She also requested answers to several questions, including whether Frontex reports on fundamental human rights violations related to interactions between Member State authorities and NGO vessels that rescue people at sea.⁷⁰ She is coordinating her inquiry with the Greek Ombudsman, Andreas Pottakis, who is empowered to investigate how the Greek authorities dealt with the *Adriana* boat.⁷¹

“A tragedy of this magnitude requires all those involved to reflect on their responsibilities and to be clear to the public who is accountable for these deaths. My Office will focus on the role of Frontex as we try to piece together the events that led to the capsizing of the boat and the deaths of at least 500 people.”

“Migration to Europe will continue and it is up to the EU to ensure that it acts in a way that maintains fundamental rights and does not lose sight of the human suffering that compels people to seek a better life beyond their home countries.”

[[European Ombudsman, Emily O'Reilly](#), commenting on her inquiry concerning Frontex' role in SAR operations in the Mediterranean sea and the sinking of the *Adriana* on 14 June 2023]

In July 2022, in the case of [Safi and Others v. Greece](#)⁷² the European Court of Human Rights found that Greece had violated the right to life and the right to freedom from inhuman or degrading treatment, as protected under articles 2 and 3 of the European Convention on Human Rights respectively, in their response to the sinking of a fishing boat transporting 27 foreign nationals in the Aegean Sea, which resulted in the death of 11 individuals. The Court found that the Greek authorities had failed to do everything that they could reasonably have been expected to do to protect the lives of those on board. The Court also identified a procedural violation of article 2 in that the Greek authorities failed to conduct a thorough and effective investigation into the incident. Finally, the Court found a violation of article 3 in respect of 12 survivors of the sinking who were subjected to body searches, which were not duly warranted by a compelling security need or a need to prevent disorder or crime.

⁶⁹ European Ombudsman, 'Ombudsman asks Frontex about role in rescue operations after Greek boat tragedy' (25 July 2023), available [here](#), last accessed 14 December 2023.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Application no. 5418/15, information note available [here](#), last accessed 14 December 2023.

Criminalisation of Humanitarian Search and Rescue (SAR) Efforts

The **criminalisation of the provision of humanitarian assistance to “irregular migrants”** has been defined as ***“the policing, intimidation and establishment of administrative sanctions or criminal proceedings against citizens, migrants, and volunteers or employees of NGOs and private sector actors who have assisted migrants and asylum seekers for humanitarian motives”***.

[Moreno-Lax et. al., (2021), p.94; available [here](#), last accessed 7 December 2023].

[Directive 2002/90/EC](#) (the “EU Facilitation Directive”) and [Framework Decision 2002/946/JHA](#), collectively referred to as the “Facilitators’ Package”, require EU Member States to introduce measures criminalising the intentional facilitation of irregular entry into, transit across, or residence in the territory of an EU Member State in breach of the law of the State concerned. Under EU law, it is not necessary that the facilitator profits from the facilitation of irregular entry or transit in order to be liable for criminal punishment. In contrast, [article 3 of the UN Protocol Against the Smuggling of Migrants](#) defines the “smuggling of migrants” as “the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

Article 1 (2) of [Directive 2002/90/EC](#) affords EU Member States the option to decide not to impose criminal sanctions in cases where the aim of the facilitating behaviour is to provide humanitarian assistance. When transposing the Directive into national law, a limited number of EU Member States expressly incorporated this humanitarian exemption.⁷³

[Section 9\(1\) of the Criminal Justice \(Smuggling of Persons\) Act 2021](#), which transposes the EU Facilitation Directive into Irish law, provides for a defence in criminal proceedings where the impugned conduct was engaged in “for the purpose of providing humanitarian assistance, otherwise than for the purpose of obtaining, directly or indirectly, a financial or material benefit”. Even where States have incorporated the humanitarian exception into domestic law, there are significant differences between States in the scope of its application.⁷⁴ Some States have failed to extend/apply the humanitarian exemption to NGOs involved in SAR activities.⁷⁵

The European Parliament adopted a [Resolution](#) to end the criminalisation of humanitarian assistance in July 2018, which underlined that in accordance with the UN Protocol Against the Smuggling of Migrants, acts of humanitarian assistance should not be criminalised. The [Resolution](#) also called upon EU Member States to implement the humanitarian exemption provided for in [Directive 2002/90/EC](#) and urged the European Commission to adopt guidelines for Member States specifying which forms of facilitation should not be criminalised.

⁷³ Violeta Moreno-Lax et. al., ‘The EU Approach to Migration in the Mediterranean’ (2021), p. 97, available [here](#), last accessed 7 December 2023.

⁷⁴ Ibid.

⁷⁵ Ibid.

In September 2020, the European Commission published [Guidance on the EU Facilitation Directive](#), which stipulates that:

“In view of the general spirit and objective of the Facilitation Directive, it is clear that it cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised, such as search and rescue operations at sea, regardless how the Facilitation Directive is applied under national law.”

However, according to a 2021 Study prepared at the request of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, this new Guidance fails to adequately address the risk of over-criminalisation thereby “leaving the Facilitators’ Package still ‘unfit for purpose’”.⁷⁶

The prosecution of humanitarian actors for their involvement in SAR activities at sea by certain EU Member States has been [criticised by the UN Special Rapporteur on the Situation of Human Rights Defenders](#), Mary Lawlor. Furthermore, in a Joint Statement, over 100 human rights NGOs called upon EU Member States to stop the criminalisation of humanitarians for demonstrating solidarity with migrants and refugees.⁷⁷ The Statement also calls for the revision of the EU Facilitation Directive to redefine migrant smuggling in line with [the UN Protocol Against the Smuggling of Migrants](#).⁷⁸

The Trial of Seán Binder and Sarah Mardini

In 2018, Seán Binder, a German national who has lived in Ireland for most of his life, and Sarah Mardini, a Syrian refugee, were arrested on the Greek island of Lesbos. Binder and Mardini had been participating in SAR activities as volunteers with Emergency Response Centre International, a since closed Greek humanitarian NGO. Misdemeanour (minor) charges were lodged against Binder and Mardini, including espionage and forgery.

In January 2023, the Court of Appeal of Mytilene, Greece, annulled the misdemeanour charges due to procedural shortcomings, including a failure to translate the charges into a language that the two accused understood contrary to their fair trial rights. A prosecutor submitted an appeal against the judgment, which the Supreme Court began hearing on 16 May 2023. In an article published on 16 May 2023, [the Irish Examiner reported](#) that a judgment is not expected for some time. The statute of limitations for the misdemeanour charges had been due to expire in February

⁷⁶ Violeta Moreno-Lax et. al., ‘The EU Approach to Migration in the Mediterranean’ (2021) p.99, see [here](#), last accessed 13 December 2023. See also Malcolm Wu, ‘The EC’s Guidance on the Facilitation Directive – Ending the Criminalisation of NGO-led SAR Operations?’ (*Opinio Juris*, 30 October 2020), available [here](#), last accessed 13 December 2023.

⁷⁷ ‘Joint Statement: The EU must stop the criminalisation of solidarity with migrants and refugees’ (Brussels, 26 July 2019), available [here](#), last accessed 14 December 2023.

⁷⁸ *Ibid*.

2023. However, if the appeal is successful, the statute of limitations will be extended by three years and a new trial will take place concerning the misdemeanour charges.⁷⁹

The prosecution has also initiated an investigation into potential felony (more serious) charges against Binder and Mardini, including facilitation of irregular entry, membership of a criminal organisation and fraud.⁸⁰ Several human rights NGOs, including [Amnesty International](#) and [Human Rights Watch](#), argue that the charges and allegations against Binder and Mardini are baseless and constitute an example of the criminalisation of humanitarianism. During a [Dáil debate on 24 May 2023](#), the Minister of State at the Department of Housing, Local Government and Heritage, Kieran O'Donnell, T.D., committed to raise the matter of follow through in respect of Mr. Binder and his family with the Tánaiste and his office.

Reform Process: the New Pact on Migration and Asylum

The flaws in the existing Common European Asylum System prompted a reform process, which has been ongoing since 2016. The European Commission announced a [New Pact on Migration and Asylum](#) (the “Pact”) on 23 September 2020, accompanied by various legislative proposals, including:

- an Asylum and Migration Management Regulation;
- a new Asylum Procedures Regulation;
- a new Screening Regulation to provide for a screening procedure at the external borders for individuals who do not fulfil the conditions for entry, including asylum seekers;
- a revised EURODAC Regulation, including provision for the collection of biometric data such as facial images;
- a recommendation on an EU mechanism for preparedness and management of crises related to migration;
- a regulation to address situations of *force majeure*;
- a recommendation on cooperation on search and rescue; and
- guidance on the non-criminalisation of search and rescue.

The Pact is intended to provide:

“a set of regulations and policies to create a fairer, efficient, and more sustainable migration and asylum process for the European Union. ... [It] is designed to manage and normalise migration for the long term, providing certainty, clarity and decent conditions for people arriving in the EU. It also

⁷⁹ ‘Kerry humanitarian Sean Binder urges Greek Supreme Court to dismiss spy trial’ (*Irish Examiner*, 16 May 2023), available [here](#), last accessed 14 December 2023.

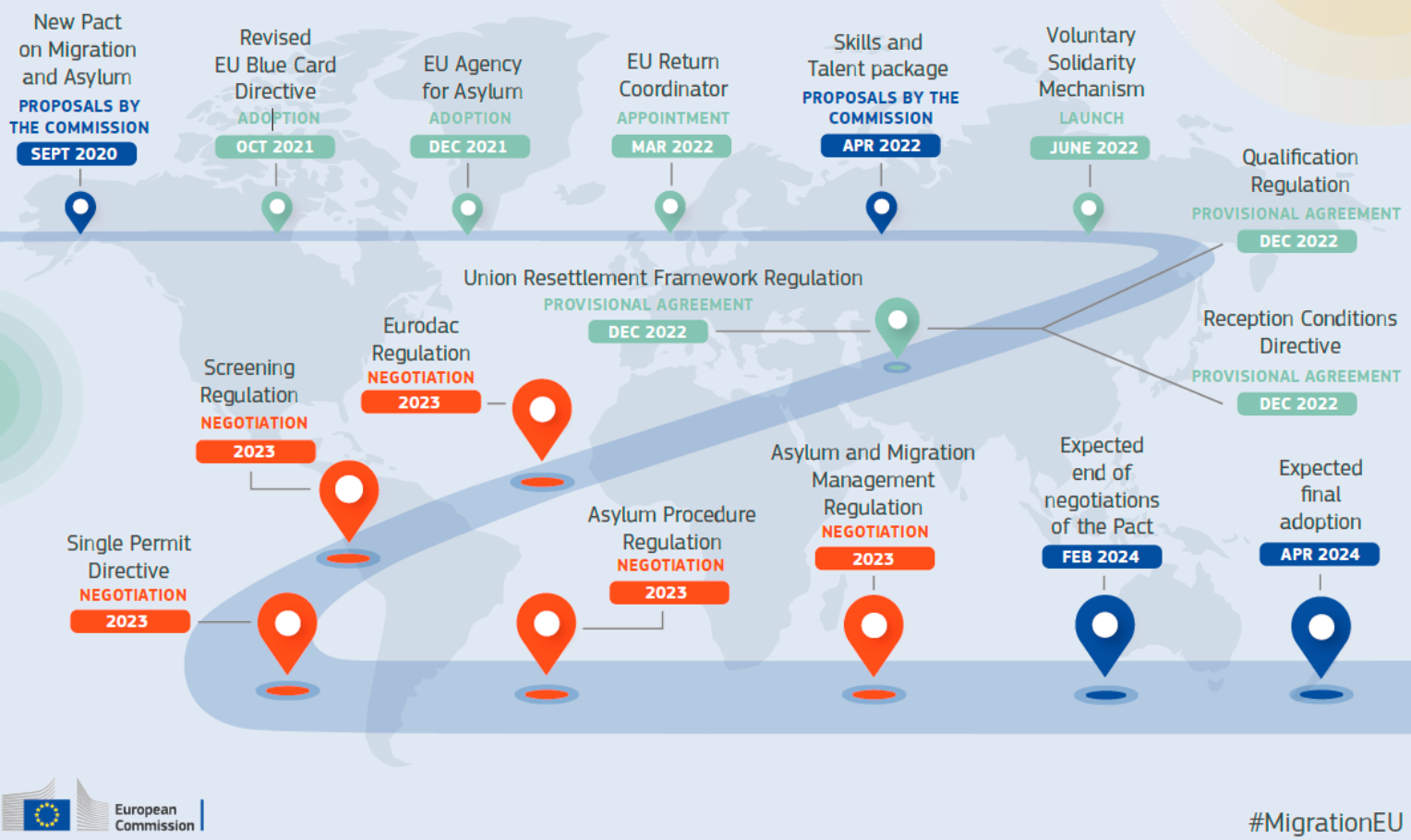
⁸⁰ Amnesty International, ‘Greece: Prosecution appeal prolongs ordeal of rescue workers Seán Binder and Sarah Mardini’ (16 May 2023), available [here](#), last accessed 14 December 2023.

seeks to establish a common approach to migration and asylum that is based on solidarity, responsibility, and respect for human rights”.⁸¹

Commenting on the Pact on 6 October 2020, the [Minister for Justice, Simon Coveney, T.D., stated](#): “[t]he publication of the Migration Pact proposals represents an opportunity to renew and intensify efforts to agree a common approach and put in place more effective and humane arrangements to manage the considerable migratory pressures that Europe continues to face.”

Infographic 1: New Pact on Migration and Asylum of the EU⁸²

NEW PACT ON MIGRATION AND ASYLUM: TIMELINE AND MAIN ACHIEVEMENTS



⁸¹ European Commission, 'What is the New Pact on Migration and Asylum of the EU' see [here](#), last accessed 14 December 2023.

⁸² This infographic is replicated from the European Commission website; see [here](#), last accessed 14 December 2023.

Implementation of the Pact

A number of actions have already been undertaken to give effect to the Pact. In 2020, the European Commission adopted [Recommendation \(EU\)2020/1365](#), which requires EU Member States to cooperate with each other, the European Commission and the [European Contact Group on Search and Rescue](#) in relation to SAR activities carried out by private vessels with a view to reducing deaths at sea and ensuring effective migration in compliance with obligations under relevant international and EU law. The European Commission also issued [Guidance on the EU Facilitation Directive](#) in 2020, as discussed above.

On 22 June 2022, the [Council of the EU](#) agreed positions on the proposed Eurodac and screening regulations to form the basis of negotiations with the European Parliament.

On 8 June 2023, the [Council of the EU](#) agreed a negotiating position on two of the most important legislative measures proposed under the Pact: the asylum procedure regulation and the asylum and migration management regulation. According to the Council's [press release](#), the asylum procedure regulation will:

- establish a common procedure for EU Member States when people seek international protection;
- streamline the procedural arrangements, for example, regarding the length of the process;
- establish common standards concerning the rights of asylum seekers; and
- prevent the abuse of the system by placing obligations on applicants to cooperate with the authorities.

The [Press Release](#) also indicates that the proposed asylum and migration management regulation, once finalised, will update and replace the Dublin III Regulation, including by streamlining the existing rules and shortening the applicable time limits for determining which EU Member State is responsible for examining an application for international protection.

[The Press Release states](#) that in order to “balance the current system whereby a few member states are responsible for the vast majority of asylum applications, a new solidarity mechanism is being proposed”. It [explains](#) that under the proposed mechanism, States can demonstrate solidarity by: (i) accepting an allocation of relocated international protection applicants; (ii) making a financial contribution to a solidarity fund of at least €20,000 per applicant not relocated; and/or undertaking alternative solidarity measures, for example, deploying personnel to States dealing with large numbers of asylum seekers or providing capacity building support to those countries. The [Press Release](#) indicates that EU Member States will enjoy full discretion as regards how they demonstrate solidarity and will not be obliged to carry out relocations.

Poland and Hungary voted against the proposals that comprise the negotiating position, whereas Bulgaria, Malta, Lithuania and Slovakia abstained from the vote.⁸³ The proposals agreed by the [Council of the EU](#) on 8 June 2023 now form the basis for negotiations by the Council presidency with the European Parliament.

⁸³ Laura Fletcher, ‘EU’s ‘historic’ asylum seeker hosting deal explained’ (RTÉ, 9 June 2023) available [here](#), last accessed 14 December 2023.

In statements issued on 9 June 2023, the [Minister for Justice, Helen McEntee T.D.](#), and the Minister of State with Responsibility for Law Reform, [James Browne T.D.](#), welcomed the Council's agreement on these two key measures. [Minister McEntee](#) stated that these measures seek to create "a fairer, more efficient, and more sustainable migration and asylum system across the EU Member States". Commenting on the measures in a written answer to a parliamentary question concerning immigration on 20 June 2023, [Minister McEntee](#) stated:

"My Department will continue to participate in the negotiation of these measures when discussions with the European Parliament begin and will continue to examine the proposals and their impact on Ireland, with a view to making recommendations to Government on whether or not to opt-in to the measures, once they are adopted. As the Deputy will be aware, opt-ins under Protocol 21 are subject to the approval of the Houses of the Oireachtas."

As noted previously, Ireland has an option, provided for in Article 3.1 of [Protocol 21](#) to the TFEU, to opt-in to proposals presented to the Council in the area of freedom, security and justice.

On 4 October 2023, the Council of the EU reached an agreement on the proposed regulation concerning situations of crisis and *force majeure* in the field of migration and asylum.⁸⁴ This position will form the basis for negotiations between the Council Presidency and the European Parliament.⁸⁵

Critique of the New Pact on Migration and Asylum

Whilst welcoming the proposed solidarity mechanism, ECRE (an alliance of 117 NGOs) has been mainly critical of the proposals included in the [New Pact on Migration and Asylum](#) and of the negotiating positions adopted by the Council of the EU in relation to same.⁸⁶ ECRE asserts that the proposed procedural rules do not address the major "dysfunction of the system, the Dublin rules, which escape largely intact".⁸⁷ It also alleges that the proposals will transfer responsibility for refugees to countries outside EU territory without increasing the likelihood that these States will be willing to host people returned from EU Member States.⁸⁸

The 2021 Study of the 'EU Approach on Migration in the Mediterranean', which was prepared at the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, examined the Pact. It concluded that the focus, which the Pact places "on externalisation of protection obligations and containment of refugees and migrants in transit countries will render the EU hostage to the whims of foreign political forces".⁸⁹

⁸⁴ Council of the EU, 'Migration policy: Council agrees mandate on EU law dealing with crisis situations' (4 October 2023) available [here](#), last accessed 13 December 2023.

⁸⁵ Ibid.

⁸⁶ ECRE, 'Editorial: Migration Pact Agreement Point by Point' (9 June 2023) see [here](#), last accessed 13 December 2023.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Violeta Moreno-Lax et. al., 'The EU Approach to Migration in the Mediterranean' (2021) p. 14, see [here](#), last accessed 14 December 2023.

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