

Report

# Challenges to a comprehensive EU migration and asylum policy

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Cover photo: A man gazes towards Kawergosk refugee camp, Erbil governorate, Kurdistan region of Iraq. Photo credit: EU/ECHO/Caroline Gluck

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## Key Messages

- The EU has been criticised for a lack of leadership and coherent and coordinated policy-making in the face of the refugee crisis and for poorly designed response mechanisms, all of which have severely constrained timely solutions and effective implementation. Short-term approaches have failed to address the long-term nature of the migration and refugee problem.
- There are three fundamental structural reasons for the failure to deliver a comprehensive and effective EU approach to the refugee crisis: the system of parallel competences that allows Member States to pursue their own policies alongside EU policy; the co-existence of too many actors who want their say in policies and who come from very different policy areas with varying if not conflicting interests; and fragmented, and in some cases, overlapping funding instruments.
- There are a number of incremental steps the EU could take to overcome these constraints, including by appointing a senior political advisor to build bridges between the external and internal dimension of migration and asylum policies across the EU system and between the EU institutions and the Member States.
- To be effective, the proposed measures would require far greater political recognition of the fact that a joint response is in the interests of EU Member States and the EU as a whole.

## Acknowledgements

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# List of acronyms

<b>CEAS</b>	Common European Asylum System
<b>CFSP</b>	Common Foreign and Security Policy
<b>CSDP</b>	Common Security and Defense Policy
<b>COM</b>	European Commission
<b>DCI</b>	Development Cooperation Instrument
<b>DG DEVCO</b>	Directorate General for International Cooperation and Development
<b>DG HOME</b>	Directorate General for Migration and Home Affairs
<b>DG EMPL</b>	Directorate General for Employment, Social Affairs and Inclusion
<b>DG NEAR</b>	Directorate General for Neighbourhood and Enlargement
<b>ECDPM</b>	European Centre for Development Policy Management
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EEAS</b>	European External Action Service
<b>EDF</b>	European Development Fund
<b>EASO</b>	European Asylum Support Office
<b>DG ECHO</b>	Directorate General for Humanitarian Aid and Civil Protection
<b>ENI</b>	European Neighbourhood Instrument
<b>EU</b>	European Union
<b>EUDs</b>	European Union Delegations
<b>EUSR</b>	EU Special Representative
<b>FRONTEX</b>	European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union
<b>FPI</b>	Foreign Policy Instrument
<b>GAMM</b>	Global Approach to Migration and Mobility
<b>GPGC</b>	Global Public Goods and Challenges
<b>HAI</b>	Humanitarian Aid Instrument
<b>HMG</b>	Her Majesty's Government – United Kingdom
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>IOM</b>	International Organization for Migration
<b>IPA</b>	Instrument for Pre-Accession
<b>ISF</b>	Internal Security Fund
<b>ODI</b>	Overseas Development Institute
<b>PI</b>	Partnership Instrument
<b>REC</b>	Regional Economic Community
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNHCR</b>	United Nations High Commissioner for Refugees

# Introduction

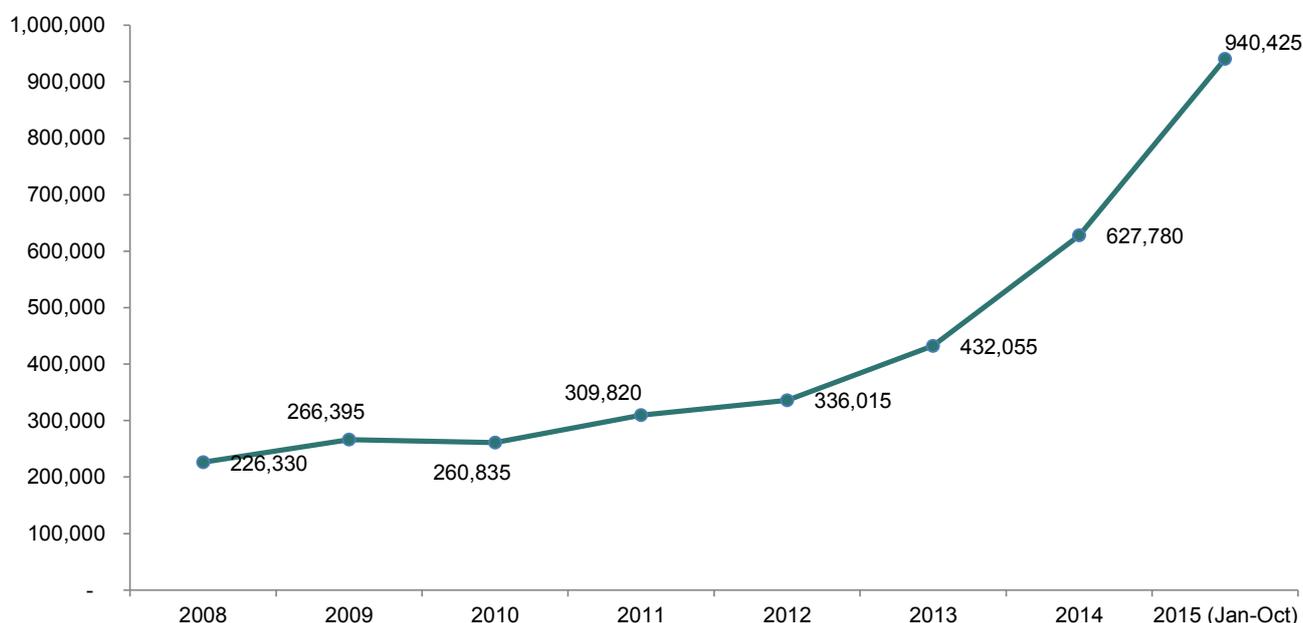
Labelled as Europe's biggest challenge, the Syrian refugee crisis has revealed the severe gaps in Europe's response to collective problems, as Member States struggle to cope with the influx and differ on how best to resettle hundreds of thousands of uprooted people. There is a growing realisation that the issue has to be dealt with collectively at the European level and there are high expectations that the European Union (EU) will help resolve the migration challenges faced by its Member States, particularly on curbing irregular immigration and managing local pressures on borders and asylum processes.

There has been a staggering increase in first-time asylum applicants in recent months (Figure 1), with an 85% increase in applications between the second quarter of 2014 and the second quarter of 2015 (soaring from 115,100 applications to 213,200).<sup>1</sup> Figures show that while a total of 626,710 asylum applications were received

across EU Member States in 2014, there were 417,430 such applications received in just the first six months of 2015. Meanwhile, Germany has reported that it may well have one million new applications in 2015. To date, Germany, Greece and Hungary have recorded the largest share of asylum seekers (Figure 2).

According to the latest Eurobarometer poll (Eurobarometer, 2015), immigration and terrorism are the fastest-growing concerns among EU citizens. On average, 66% of respondents said that more decisions on migration should be taken at EU level, rather than by national governments alone. However, the survey found marked national differences, with those in favour of more EU decision-making accounting for 79% to 81% of respondents from Cyprus, Germany, Luxembourg, Spain and the Netherlands, but only 40% from Estonia, Poland and the Slovak Republic. EU citizens were similarly

**Figure 1: Asylum and new asylum applicants in the 28 countries of the European Union (annual aggregated data)**



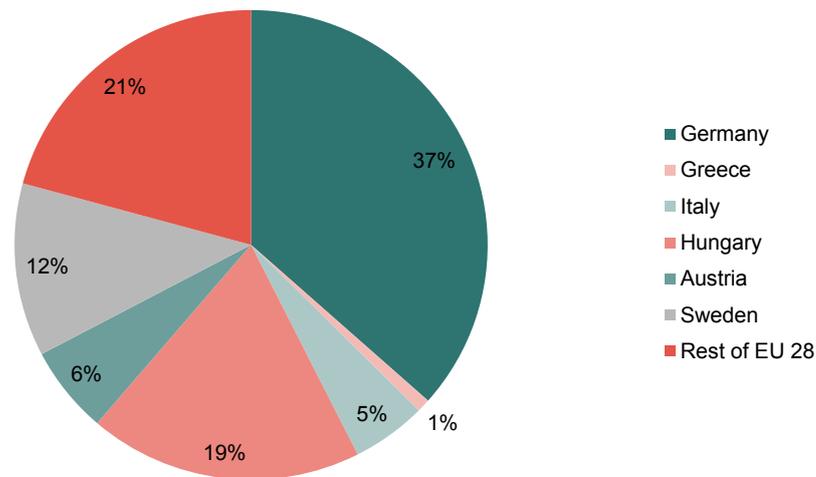
Source: Eurostat, 2015.

Note: An asylum applicant is a person who has submitted an application for international protection or has been included in such an application as a family member during the reference period. A new asylum applicant is a person who has submitted an application for international protection for the first time.

Data from January-October 2015 are not complete for all Member States, so the actual numbers are likely to be higher.

1 Eurostat (2015).

**Figure 2: Asylum pressures on selected European Union countries in 2015\***



Source: Eurostat, 2015.

\*Based on available data for the period January-October 2015. Not all countries have complete data for that period (e.g. Greece).

divided on the issue of receiving asylum-seekers, with 78% of respondents, on average, saying that asylum-seekers should be shared out across the EU countries. Those most in favour of such sharing were the Germans, at 97%, contrasting with those least in favour: the Slovaks and the Czechs at 31%. Of the 78% who favoured the distribution of asylum-seekers across EU countries, 75% were also in favour of doing so according to binding quotas set by the EU. The EU, however, has been criticised for a lack of leadership and coherent and coordinated policy-making in the face of the refugee crisis, and for poorly designed response mechanisms, all of which have severely constrained timely solutions and effective implementation (Collett, 2015). Short-term approaches have failed to address the long-term nature of the migration and refugee problem. As a result, the EU has found itself in a vicious circle: policies to stop third-country nationals coming to the EU lead asylum seekers and migrants to look for alternative ways to get into Europe and, once they arrive, to stay illegally.

This paper sets out three fundamental structural reasons for the failure to deliver a comprehensive and effective EU approach to the refugee crisis. First, EU migration and asylum policy is a ‘shared competence’ (or ‘shared power’). This permits the EU to undertake activities and conduct common policy, but does not stop Member States exercising their own competence in these areas, which has severely limited the EU’s consolidation and coordination roles and has led to fragmentation. As things stand, the

core business of migration policy – in other words, the numbers of people to be allowed in – is not a matter for EU decision-making, but for each member state alone.

Second, a multitude of different actors have varying – or even conflicting – interests and aim to influence policies. This has impaired coherent and timely solutions, and has encouraged a short-term approach to a long-term geopolitical problem. There is no doubt that this will have a significant and long-lasting impact that will undermine the EU’s current concept of ‘Integrated Border Management’, which aims to balance the protection of migrants, ensuring open yet secured and controlled borders.

Third, the EU’s long-standing and more recently created financial instruments that are being used to respond to Europe’s refugee crisis and further afield are scattered, in institutional terms, across the European Commission. They have very different objectives and the way in which they can intervene varies enormously.

This paper attempts to unpack complex and multidimensional decision-making on EU migration and asylum policy to highlight the barriers to a comprehensive approach. It traces the evolution of EU migration and asylum policy, the complex system of competences that underpin decision-making, conflicting interests and approaches, and today’s financial arrangements, to set out where the constraints lie. It finds that short-term approaches have failed to address the long-term nature of the problem and concludes with recommendations to overcome some of the key constraints.

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# The evolution of EU migration and asylum policy

EU migration and asylum policy has evolved over time. There has been considerable progress on cooperation on asylum policies within the EU since 1999, but the underlying foundations for cooperation remain unclear. There is a fair amount of scepticism about the EU's ability to transform migration governance and its limited role on this issue, given the continued centrality of the state as the driver of contemporary migration governance. Without states, of course, there would be no such thing as international migration: it is states and their borders that make international migration visible as a distinct social and political process (Zolberg, 1989).

Attempts to give more authority to EU institutions on migration and asylum matters have always been subject to controversy and resistance by EU Member States (Eisele, 2014). The development of a common set of migration and asylum policies at European level has, therefore, been a long and slow process. Despite achieving some milestones along the way, the challenges posed by the current refugee crisis have underlined the fundamentally dysfunctional nature of the EU system when it comes to asylum and migration issues, the implementation of that system by EU Member States, and European cooperation in the face of such a situation. Despite an EU commitment to create a Common European Asylum System (CEAS), standards differ among Member States and the chances of an asylum-seeker being granted protection are so varied that it has been compared to a lottery (ECRE, 2009).

## European Union competences and legal foundations

European cooperation on migration can be traced back to the signing of the **Schengen Convention in 1985**.<sup>2</sup> The abolition of internal frontiers and the creation of a common external border among signing parties required cross-Europe cooperation on short-term visa policy, as well as on external border management.<sup>3</sup> After the collapse of the Berlin Wall in 1989, and amid fears of growing pressures from refugees on the EU's external borders, Germany proposed to give the European Community more responsibility for migration and asylum policies. The **Maastricht Treaty of 1992** formalised cooperation in this area, replacing existing but informal intergovernmental cooperation with a '*third intergovernmental pillar*' dealing with Justice and Home Affairs (Peers, 2011).

The **Treaty of Amsterdam of 1999** represents a turning point in migration policy at European level, moving the competence for immigration, asylum and civil law from Member States to the EU and integrating the Schengen Agreement into the EU Treaties. However, the extent of those competences remained limited in scope, and Member States remained at the centre of much of the decision-making.<sup>4</sup> What's more, after significant lobbying, Denmark, Ireland and the United Kingdom (UK) were given the right to opt in or out of specific proposals.

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2 The Schengen Convention was originally signed by Belgium, France, Germany and the Netherlands. The Convention came into full force in 1995.

3 A Schengen visa is a short term visa granting stays of up to three months. Cooperation is regulated by the Community Visa Code.

4 Under the Amsterdam Treaty, competences at EU level in migration and asylum were governed by specific institutional rules laid down in Title IV of the Treaty: The Commission and Member States shared competence in introducing legal proposals, the European Parliament only enjoyed consultation rights and voting in the Council was to take place unanimously. See Peers, 2011.

### Box 1: European Union competences

The Treaty on European Union clarifies the division of competences (e.g. powers) between the EU and Member States. It introduces a precise classification to distinguish three main types of competence: exclusive competences, shared competences and supporting competences.

- **Exclusive competence** where only the EU can act.
- **Competences that are shared or parallel** between the EU and its Member States where the Member States can act only if the EU has chosen not to. This article of the Treaty also lists certain competences that were previously regarded as parallel: research, technological development, space, development cooperation and humanitarian aid. However, the principle of pre-emption does not apply in these areas, in that Member States may continue to exercise their competences in parallel with the EU, even if the EU has exercised its own competences in these areas.
- The EU has competence to **support, coordinate or supplement** the actions of the Member States where the EU may not adopt legally binding acts that require those states to harmonise their laws and regulations.

The Treaty also gives the EU the power to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

Sources: *Lisbon Treaty (European Union, 2007)*; HMG (2013); <http://ec.europa.eu/citizens-initiative/public/competences/faq#q1>

	Common commercial policy	Justice and home affairs (migration and asylum policy)	Development cooperation and humanitarian aid	Foreign and security policy
Competence	Exclusive	Shared	Parallel	Supporting
Governance model	Supervised delegation to the European Commission	Mix of supervised delegation to the EU Presidency or Commission and coordination	Mix of supervised delegation to the EU Presidency or Commission and coordination	Coordination
External representation	Commission (based on Council authorisation)	Commission, rotating Presidency and Member States	Commission, rotating Presidency and Member States	Member States (with the High Representative and the President of the European Council)

The 2010 Treaty of Lisbon transformed decision-making on migration and asylum and clarified some basic principles for the development of common asylum and migration policies, such as solidarity and respect for human rights.<sup>5</sup> The previous requirement for a unanimous vote on migration and asylum in the Council of Ministers was eased to a requirement for qualified majority voting (achieved when 55% of Member States vote in favour of a proposal, which amounts to 16 of the 28 States, and when the proposal is backed by Member States that represent 65% of the total EU population).<sup>6</sup> This shift

was only made possible by the Treaty's establishment of a clear distinction between EU and national competences. According to Article 79 of the Treaty on the Functioning of the European Union (TFEU): '[measures on migration taken at the European level] do not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.<sup>7</sup>

5 See Article 67, TFEU.

6 Unanimity is still required for issues relating to passports, family law and operational police cooperation. This change had the effect that some legislation that was once difficult to agree on became easier to adopt (such as the extension of long-term residence status to refugees). For some proposals this also led to more liberal policy results (such as the single permit for migrant workers) after the entry into force of the Lisbon Treaty. See Peers (2011).

7 The Lisbon Treaty extended the opt-outs previously granted to the Denmark, Ireland and the UK to the whole of the Justice and Home Affairs field and stipulated that these countries can opt out of provisions to which they have already opted in, in the event that these are amended.

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## Progress on harmonisation

There has been greater progress in harmonising legislative and operational action at European level in relation to the security-related aspects of migration policy such as border management, the fight against irregular migration and short-term visa policy, as well as aspects of return policies (Papagianni, 2014; Henry and Pastore, 2014). These aspects ‘were traditionally seen as the main “flanking measures” for the abolition of internal border controls’ (Papagianni, 2014: 380), and the creation of a single external European border. The main developments have included the harmonisation of laws and standards through a number of directives on short-term visas, irregular migration and return, as well as the creation of the EU external border agency, the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (FRONTEX) in 2004, which has expanded its roles and operational capabilities.<sup>8</sup>

A Europe without internal borders also required the clarification of responsibilities and harmonisation of law on the provision of asylum to third-country nationals through the development of the **Common European Asylum System (CEAS)**:<sup>9</sup> an attempt to achieve more harmonised conditions applying to asylum seekers across the EU Member States. To give effect to the principle of solidarity between EU Member States, a common fund – the EU External Border Fund (2007-2013) – was set up to provide financial assistance for EU states to manage external borders and visa policy. It has been succeeded by the Internal Security Fund (ISF) - Borders and Visa, with a total of €3.8 billion under the Home Affairs budget covering the 2014 to 2020 timeframe. In addition, the Asylum, Migration and Integration Fund provides support to EU states to help them manage the return of non-EU nationals, integrate third-country nationals according to EU standards and apply the EU legislation of the CEAS.

The Fund has an overall budget of €3.137 billion for the years 2014 to 2020.

Despite this progress, the EU has struggled to adopt comprehensive measures on legal migration from third countries (such as entry, residence and fair treatment of third-country nationals) because of ‘persistent opposition and scepticism from the capitals of the Member States’, according to Henry and Pastore (2014: 179). At EU level, progress on legal migration has lagged behind that seen on aspects of borders/visas, asylum and irregular migration (Peers, 2014), despite clear attempts by the European Commission to initiate stronger coordination on legal migration more generally. The EU has followed a sectoral policy approach that includes EU Directives to harmonise admission procedures and conditions for different categories of migrants to the European labour market – an approach that is, today, less ambitious than originally foreseen by the Commission. The current system has been described as a ‘hierarchical, differentiated and obscure European legal regime on labour immigration, which accords different rights, standards and conditions for entry and stay to different groups and countries of origin’ (Carrera et al., 2011).

## The external dimension of migration and asylum policy

The incorporation of an external dimension into the EU’s migration and asylum policies began to emerge in the 1990s – yet in a rather ad-hoc and unsystematic way. Initially, the EU’s interest in cooperating with third countries was driven, in part, by a realisation of the limits of internal migration control measures. As a result, policies focused on combatting irregular migration, agreeing on readmission rules, as well as addressing ‘root causes’ of migration, which translated into a simple ‘more development for less migration’ logic (see Collyer, 2011).<sup>10</sup>

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8 The EU follows a concept of ‘Integrated Border Management’ that aims to balance the protection of migrants while ensuring open yet secured and controlled borders. See <https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/05-IOM-IBM-FACT-SHEET-Integrated-Border-Management.pdf>

9 The CEAS is made up of five legal instruments: Qualification Directive (Directive 2011/95/EU), the Dublin III Regulation (Regulation (EU) No 604/2013), the Reception Conditions Directive (Directive 2013/33/EU), the Asylum Procedure Directive (Directive 2013/32/EU) and the Eurodac Regulation (Regulation (EU) No 603/2013). These were most recently in 2013 and the majority had to be transposed into Member States’ national legislation and implemented as of July 2015 ([http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf)). These CEAS legal instruments frame the conditions around asylum application procedures and the living conditions asylum seekers should have while they wait for the examination of their claim; specify the grounds for granting international protection; determine which Member State is responsible for examining a claim; and establish an EU asylum fingerprint database to prevent an individual from making multiple asylum claims in various EU Member States. ([http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf)). An agency was created to help Member States implement the CEAS: the European Asylum Support Office (EASO). EASO aims to enhance practical cooperation on asylum matters and help Member States fulfil their European and international obligations and assist those States whose systems are under particular pressure (<https://easo.europa.eu/wp-content/uploads/BZ0213822ENC.pdf>).

10 A Commission Communication from 1991 confirms this thinking calling for the use of external cooperation instruments to determine ‘how, in each of the countries concerned, potential migrant populations can be kept in their areas of origin’. ([http://aei.pitt.edu/1260/1/immigration\\_policy\\_SEC\\_91\\_1855.pdf](http://aei.pitt.edu/1260/1/immigration_policy_SEC_91_1855.pdf)). Yet, the soundness of this underlying logic has been challenged extensively in the literature. See Clemens (2014).

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This link between the EU's internal and external policies and the strengthening of partnerships with third countries have been pursued still further,<sup>11</sup> and now includes 'supporting third countries in managing migration flows, enhancing border control and documenting security, promoting refugee protection, fostering legal migration and preventing irregular migration' (Eisele, 2014: 83). A more balanced and strategic approach to the integration of migration into the EU's external policies was adopted with the 2005 Global Approach to Migration. This was extended in 2011 to the **Global Approach to Migration Mobility (GAMM)**, which is the overarching framework that defines the EU's external migration and asylum policy.<sup>12</sup> While security aspects such as the fight against irregular migration and measures to enhance border management still feature prominently, these are embedded in a more comprehensive framework based on such pillars as how to make migration work for development, establish legal opportunities and ensure the protection of fundamental rights of migrants and asylum seekers.<sup>13</sup> The EU has a wide range of instruments, including migration dialogues, legal agreements, visa facilitation, and mobility partnerships, as well as various funding arrangements to implement the external dimension of migration and asylum.

In the context of the current crisis, however, the EU's response has not been framed by the overarching GAMM. The **European Agenda on Migration**, adopted in 2015, provides a renewed approach to migration that also covers relations with countries outside the EU and shows the new involvement of the European External Action Service with a broader scope of tools.<sup>14</sup> Yet, the EU Agenda on Migration makes little reference to the GAMM and has been criticised as being driven by a security rationale.

Taken together, how comprehensive and cohesive have all of these migration policies and actions been across the EU to date? A study for the EU Parliament points out that 'the diverse nature and the multiplicity of the instruments employed to develop the EU external action on migration has evident implications for their impact and effectiveness'. The EU distribution of competences in this area (with shared competences between the EU and the

Member States being the rule – see Box 1) and the variety of actors involved (Box 2) also affects the possibilities of a comprehensive and coherent external approach as well as the efficiency and efficacy of the external dimension of EU migration policy (Andrade et al., 2015). As explored in Sections 2 and 3, the implementation of the GAMM has been focused more strongly on security, readmission and border control and has not reached its potential in terms of using migration tools to achieve development objectives. The use of national foreign policy channels for migration-policy interests by EU Member States without taking into account the implications for other EU countries has also compromised coherent and joint action. For example, Hungary's erection of a border fence has increased pressure points on other European entry points and it could be argued that the Italian-Libyan cooperation agreement on readmission has re-interpreted international standards of protection and neglected the non-refoulement principle (the principle in international law that forbids the rendering of a true victim of persecution to his or her persecutor).<sup>15</sup>

It seems, therefore, that a system of interlocking, yet not fully integrated, policies has evolved, both at the level of the EU and its Member States. This includes flexibilities in the form of opt-outs, opt-ins and derogations for some EU Member States, which have undermined the system's fundamental founding principle of solidarity in a context of diverging priorities. What has become evident is that the CEAS has become dysfunctional in the face of the self-interest of EU Member States, their lack of capacity to implement some of the agreed harmonised standards and dispersed competences (Collett, 2015).

The following sections of this report look at three inter-related aspects that have severely constrained the ability of the EU's system to deal effectively with migration and asylum challenges:

- the layers of different competences across the EU and between the EU and its Member States
- the conflicting objectives of the many different actors involved, which has led to the adoption of short-term approaches
- a fragmented system of financial instruments to fund activities.

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11 The EU Tampere Council Conclusions for example called for 'a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit'. Council of the EU, Tampere European Council Presidency Conclusions, 15-16.10.1999.

12 The Commission noted that 'the GAMM should be firmly embedded in the EU's external foreign policy, and be implemented by the Commission, the EEAS and the Member States. The need for 'balance' and 'genuine partnership' have been emphasised by the EU Commission to guide its Global Approach.

13 The main pillars of the GAMM relate to legal migration and mobility, the fight against irregular migration and trafficking in human beings, promoting international protection and maximising the development impact of migration. The preparation for this more comprehensive approach aimed to reflect the state-of-the-art literature on the migration and development nexus and coincided with the more systematic incorporation of migration within the EU's development cooperation.

14 Genetzke (2015).

15 This has triggered criticism by UNHCR and the European Parliament, see Kaunert et al. (2012) p. 138.

## Box 2. European Union actors on migration and asylum policy

At the EU level, the main institutions and services playing an active role are the European Commission, the European External Action Service (EEAS) and the European Council.

The **European Commission** proposes legislation (such as the EU Return Directive), sets policy guidelines (such as the Global Approach to Migration Mobility (GAMM) and the EU Agenda on migration), and negotiates political agreements on behalf of Member States (e.g. readmission agreements). The Juncker Commission has taken a much more prominent and propositional role than previous Commissions. This appears to be both a reflection of the style of the new Commission and the growing need for a concerted EU response to the current refugee situation. Within the Commission, the Directorate General for Migration and Home Affairs (DG HOME) takes the lead on most of the day-to-day work on migration and asylum policy.

The mandate of the **European External Action Service (EEAS)** is to ensure coherence across the different external relations policies of the EU and to support the rollout of the EU's Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). The EEAS is involved in making decisions on the use of the EU's external-relations financial instruments, yet it does not administer or disburse funds directly to implement common strategies. Its focus on migration and asylum has increased during the current crisis, as shown by the increase in the number of staff working on the foreign-policy dimension of asylum and migration issues within their respective geographic units. Nevertheless, the EEAS has yet to fulfil its mandate to provide guidance on the external dimension of the current refugee crisis and global migration issues and has failed to provide an overall coordinating role other than in relation to targeting smugglers through the CSDP and in its involvement in dialogue with partner countries.

**EU Delegations (EUDs)**, made up of EEAS and Commission staff, represent the EU abroad. EUDs have had little involvement in migration policy and decision-making, despite their role in the implementation of EU cooperation with third countries (Andrade et al., 2015) and their engagement in political dialogue with partner countries.

The **Council** is the forum in which Member States gather to vet the work of the European Commission and give it a mandate to negotiate agreements with third countries on their behalf. On migration, this usually takes place in the justice and home affairs policy area at the working level (working groups) and the ministerial level. However, given the urgency of the migration crisis, there have been several extraordinary European Council meetings that have brought together heads of states and government to address blockages and attempt agreement on joint solutions. In theory, the Council should also be a space where information is exchanged on what is happening at the Member State level and for the coordination of actions. However, this does not appear to happen in practice (Andrade et al., 2015).

The complex constellation of Member State working groups, dialogues and contact groups that have grown in the Council has become increasingly difficult to navigate. Some of the working groups that prepare and support the work and decisions of the Council, such as the High-Level Working Group on Immigration and Asylum (which brings interior and foreign ministry officials together), have a broad remit, requiring the presence of several national ministries. Others require specific technical expertise and knowledge. Furthermore, the geographically focused working groups in the Foreign Affairs Council are de-linked from the priorities of the Justice and Home Affairs Council (Collett, 2015).

Two **EU agencies**, in particular, are in charge of implementing EU migration and asylum policy: the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (FRONTEX) and the European Asylum Support Office. Their mandate and budgets have seen an increase over recent months to enhance their capacity to respond to the crisis. FRONTEX is in charge of controlling EU borders and can also carry out missions such as search and rescue operations at sea or the return of third-country nationals to their countries of origin if they have arrived via irregular means. EASO is an agency that provides expertise and technical support to Member States to help them implement the Common European Asylum System (CEAS).

The **European Parliament** plays a minor role in this policy field, which is limited to approving legislation and giving its consent before the conclusion of agreements with third countries. Recent evolution in asylum policy has, very largely, taken the form of political and operational instruments, which do not give the Parliament space to engage formally (Andrade et al., 2015).

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# Layers of competences

The European response to the current refugee situation is being undermined by a complex system of competences that shape the decision-making on migration and asylum and its external dimension. There are varying layers of competences (powers) across the EU and its Member States. These are either competences that are shared between the Commission and the Member States, with the Member States pursuing their own policies in parallel to a common EU policy, or exclusive competences of the Member States, with the Commission playing a coordinating role. Competences that are shared competences by the EU and its Member States become problematic when there are diverging interests and objectives.

The failure of the provisions and implementation of the CEAS is a prime example. The ‘first-port’ entry principle of the Dublin Regulation (see Box 3) puts pressure on frontline states and does not have any fair responsibility-sharing concept. At the same time, the requirement to send people back to the place where they first entered the EU has, for the most part, been disregarded by Member States. Given this situation, the Commission’s proposal for relocation within the EU (27 May 2015) was an attempt to restore some of the core principles of fairness in sharing responsibility that underpin the EU’s migration and asylum policies (Box 3).

## Box 3: Relocation and resettlement

**Relocation** is the transfer of persons who need (or already benefit from) a form of international protection in one EU Member State to another EU Member State where they would be granted similar protection.

**Resettlement** is the transfer of non-EU national or stateless persons who have been identified as in need of international protection to an EU state where they are admitted either on humanitarian grounds or with the status of refugee.

*Source: European Commission Fact Sheet.*

The Commission does not, however, have the power to enforce a mandatory relocation system without the consent of EU Member States and the European Parliament. It also lacks effective enforcement mechanisms to ensure compliance with the CEAS standards and directives. This is unlikely to change, as some Member States are unwilling to cede authority to the Commission and do not believe it is in their interest to do so, while other Member States see this as the future of a functioning system in this greater ‘Europeanisation’ of decision-making on relocation, resettlement and border management. The result so far has been a decision by some EU Member States to participate in a voluntary and temporary relocation scheme of 160,000 refugees, but not a permanent and mandatory crisis-relocation system as proposed by the Commission, which would require an amendment to the Dublin Regulation (Box 4).<sup>16</sup>

The competence for the achievement of fair responsibility-sharing mechanisms in the form of resettlement from those countries hosting a large amount of refugees also rests with individual states as it concerns admission numbers. The same applies to the provision of humanitarian visas or mobility schemes that could alleviate pressures on those countries outside Europe that host large refugee populations.

The different levels of competences may have also limited the comprehensiveness and cohesion of policies and actions directed at the external dimension of the EU’s migration policies, i.e. instances where the EU works with non-EU countries to manage migration and asylum and related challenges (Andrade et al., 2015). The problem is that the European Commission alone cannot implement a balanced approach that makes good use of all the pillars of the GAMM: this requires the cooperation of EU Member States. As a result, the concrete implementation of the GAMM has been tilted towards a focus on security, readmission and border control, rather than making use of the full potential of migration tools for development. So far, external action in the area of migration and asylum has focused on areas where the EU has competence (e.g. mainstreaming migration into EU institutions’ development cooperation/short-term visa policy) and where the interests of Member States are aligned (e.g. the mandate for the EU

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16 The temporary and voluntary relocation system is based on Article 76(3) of the TFEU, which allows the Council, on a proposal from the Commission, to adopt provisional measures in the event of an emergency situation characterised by a sudden inflow of third-country nationals. However, a permanent mandatory scheme would need to amend the Dublin III Regulation (Regulation EU No 604/2013) to establish mandatory quotas for relocation and the assignment of responsibilities.

#### Box 4: The Dublin Regulation and the Dublin System

European Union regulations are legal acts of the EU that become immediately enforceable as law in all Member States simultaneously. The **Dublin Regulation** is one example: it establishes a hierarchy of criteria for identifying the Member State responsible for the examination of an asylum claim in Europe. This examination is carried out predominantly on the basis of family links (subject to a number of requirements). Then responsibility is assigned based on the State through which the asylum seeker first entered – the State responsible for their entry into the territory of the EU Member States (or Iceland, Liechtenstein, Norway and Switzerland, who voluntarily subjected themselves to the Dublin Regulation). However, Denmark, Ireland and the UK have opted out of many of the elements of the Common European Asylum System (CEAS); they are not bound, therefore, by all the elements of these legal acts. The Regulation aims to make Member States responsible for the examination of an asylum application, to deter multiple asylum claims and to determine the responsible Member State as quickly as possible to ensure effective access to an asylum procedure.

The Dublin Regulation is part of the ‘**Dublin System**’ of legal instruments, such as the regulation establishing Eurodac, a database for comparing fingerprints of asylum seekers and some categories of illegal immigrants to determine the EU country responsible for asylum-application examination and send the individuals concerned back to that country.

*Source: European Council on Refugees and Exiles (ECRE), available at: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html>*

to help facilitate the negotiation of readmission agreements). Progress has been limited in areas where the Commission plays a mere coordinating role, such as legal migration.

The confusion around competences is compounded by the fact that *‘policies of Member States often follow their own interest and logic, which at times run counter to EU community level aspirations’* (Piperno, 2014:

5). Negotiations overlap, for example, on readmission

agreements, where activities are shared between the EU and the Member States. While the Commission is tasked with negotiating Community Readmission agreements, bilateral talks between third countries and individual Member States take place in parallel. This often impairs the EU’s mandate and role and results in the deferral of EU negotiations (Andrade et al., 2015).

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# Conflicting objectives and a short-term approach

According to Collett (2015), there are two main reasons for the failure of mechanisms to develop, agree upon and implement EU policy on migration:

- the coexistence of too many actors who want a say in policies and who come from very different policy areas with varying, if not conflicting, interests
- the lack of a joined-up approach across the Commission and the EEAS, which leads to uncoordinated responses.

Migration and asylum policy is led, for the most part, by officials with a home affairs portfolio – whether in the Commission or in the Council/Member States – with a focus on the internal security aspects of migration and asylum. Carrera et al. (2013) have suggested that the European Commission Directorate General for Migration and Home Affairs’ (DG HOME) move into the external dimension of migration policy was motivated by the limited scope it had to get involved in the internal dimension, such as harmonising policies and standards, as it faced growing resistance from EU Member States. Instead, it has succeeded in taking a lead role in the internal preparation and negotiations of dialogues with third countries, such as Mobility Partnerships<sup>17</sup> without involving the part of the institutions dealing with external relations i.e. the EEAS or the Foreign Affairs Council.

This move has posed challenges as DG HOME transposes its concern for EU internal security to the external dimension of migration and asylum policy. As such, DG HOME’s outlook on migration tends to be short-term and focused on security threats inside the EU. This means that its actions aim, primarily, to restrict human mobility and stem irregular immigration (Carrera et al., 2013). The Commission’s Directorate-General for Employment (DG EMPL) has not been strongly involved in the discussion, even though it could bring a different and valuable angle to the issue of irregular migration and smuggling centred around labour market structures and informal work.

This short-term approach has failed to address the long-term nature of the problem. As a result, the EU has found itself in a vicious circle, with the reinforcement of policies preventing third-country nationals from entering the EU leading asylum seekers and migrants to look for alternative ways into the EU, or encouraging them to stay irregularly (Flahaux, 2014; de Haas, 2015).

With migration and asylum policy extending beyond the remit of the home affairs portfolio, this approach has clashed with that of the external-relations directorates of the European Commission, and in particular the Directorate-General for International Cooperation and Development (DG DEVCO). The result, in some cases, has been conflicting policy goals. For example, return and reintegration policies have diverted attention from the process of wider economic and political reform and obstructed development objectives in partner countries. In addition, the insertion of readmission clauses in certain agreements has complicated negotiations with third countries (Carrera et al., 2013). Nevertheless, despite all of the diverging interests, regular communication between DG HOME and DG DEVCO has facilitated coordinated action and the joint elaboration of overarching Commission policies as formulated in its communications.<sup>18</sup>

To date, the role of the EEAS has been restricted to taking the lead in components of the EU response, such as CSDP missions as part of a comprehensive approach, without necessarily succeeding in injecting a longer-term strategic vision into the EU’s overall response. This is in spite of the Juncker Commission’s new cluster structure, which gives the High Representative of the European Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (HR/VP) responsibility to coordinate the Commissioners in charge of external relations portfolios. Within the EEAS itself, the number of staff working on migration issues has increased in relation to their respective regional portfolios. Yet, it does not always seem to be clear ‘who does what’ on migration and

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17 Mobility Partnerships provide a comprehensive framework to ensure that movements of persons between the EU and a third country are well-governed. They bring together measures to ensure that migration and mobility are mutually beneficial for the EU and its partners, including opportunities for greater labour mobility. The Mobility Partnership is tailor-made to the shared interests and concerns of the partner country and EU participants (COM, 2011).

18 Some examples: COM (2011) The Global Approach to Migration and Mobility; COM (2013) Maximising the Development Impact of Migration; COM (2015) A European Agenda on Migration.

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asylum. Interviews with officials from the Commission revealed that there is little knowledge of what the EEAS does on migration other than coordinating missions to target and destroy smugglers' vessels. In general, effective coordination with all actors remains a challenge most of the time, even though the EEAS's involvement is valued, given the clear foreign policy dimension of the asylum crisis. The establishment of new Deputy Secretary General positions within the EEAS, and especially the one tasked with Economic and Global issues, may be an opportunity to establish stronger coordination with relevant Commission Services on the issue of migration.

The lack of an overarching long-term vision also seems apparent when examining some of the EU's relations with external partners, the way in which these differ,

and how partners have reacted to the EU's differentiated approaches. For example, the EU-Turkey Joint Action Plan includes Turkey's responsibility to enhance external border controls, increase returns of unwanted migrants, and grant the EU's border agency FRONTEX more powers to expel rejected asylum applicants back to Turkey (Nielsen, 2015). In exchange Turkey receives €3 billion in EU aid, a commitment to 're-energise' the process of its accession to the EU, and the removal of visa restrictions for its citizens. This has not gone unnoticed in Africa, where a Trust Fund that will be shared between a multitude of countries and three regions will receive just €1.8 billion in funding from the EU institutions. This short-term opportunistic rapprochement with Turkey has the potential to harm relationships with other countries in the longer run.

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# Fragmented financial instruments

EU funding to address the external dimension of migration and asylum is spread across a range of diverse financial instruments, each governed by their own legal basis. The system is the *'result of a long process of accumulation [...] of different EU policies (migration and asylum, development cooperation, external relations, neighbourhood policy and humanitarian aid)'* in which migration and asylum play an increasing role. As a consequence, *'the implementation [of actions relevant to a comprehensive approach on migration and asylum] and the funding sources are institutionally scattered among DG DEVCO, DG HOME, DG NEAR (Neighbourhood and Enlargement) in the Commission as well as the EEAS, with very different objectives and intervention formats'* (Andrade et al., 2015). As such, all of these funds have different programming rules. This has resulted in fragmentation.

Most funding for the EU's external development assistance is provided through the geographical development cooperation funds of the European Development Fund (EDF), the Development Cooperation Instrument (DCI), administered by DG DEVCO, the European Neighborhood Instrument (ENI) and the Instrument for Pre-Accession (IPA) administered by DG NEAR. These instruments have been used to fund migration and development, albeit not as a priority area. There is, however, a clear trend toward the greater integration of migration in the EU's geographical development cooperation.<sup>19</sup> The much smaller Partnership Instrument (PI) administered by the Foreign Policy Instrument Service of the Commission, which works in collaboration with the EEAS, also funds migration- and asylum-related activities in strategic partner countries, whether developed or developing.

In addition, as part of the Thematic Programme on Global Public Goods and Challenges (GPGC) under the DCI, the EU has a budget of €344 million from 2014-2020 focused on the management of migratory flows; the maximisation of the development impact, protection and human rights of migrants; and support to people's regional

and global mobility.<sup>20</sup> The Pan-African Programme, again under the DCI, supports migration-related projects as part of the Joint-Africa EU Strategy on migration and mobility.

The Humanitarian Aid Instrument (HAI), administered by DG Humanitarian Aid and Civil Protection (ECHO), contributed more than €854 million or some 71% of its annual humanitarian aid budget in 2014 to projects helping refugees and internally displaced persons in 33 countries. The main partners through which ECHO channels funds include UN agencies such as the UN High Commissioner for Refugees and the International Organization for Migration, and non-governmental organisations such as the Red Cross.

There are also internal funds for migration and asylum, such as the Asylum, Migration and Integration Fund administered by DG HOME (€3.137 billion for the 2014-2020 period). Its main objective is to *'strengthen and develop all aspects of the Common European Asylum System, including its external dimension'*. This allows DG HOME to finance regional protection and readmission in third countries. This is a new provision under the current budgetary period and has emerged from the need to have a budget for financial incentives for third countries to allow cooperation on readmission and border management (ICMPD and ECDPM, 2013). This external dimension of the budget is, however, limited and is meant to complement support to the external aid instruments that remain *'the main funding tool for the external dimension of Home Affairs policies'* (DG HOME, 2015). Nearly 90% of the funds are actually managed by Member States themselves to finance activities such as resettlement, relocation and support to national migration and asylum systems.

In an attempt to institute a more strategic response, the EU has created two multi-donor Trust Funds. First, the Madad fund (European Commission contributions up to €500 million drawn from the ENI, the IPA and DCI), managed by DG NEAR to respond to the Syrian refugee crisis in neighbouring countries. Second, the EU Emergency Trust Fund in Africa (with €1.8 billion from the EDF, DCI,

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19 In 2014, the EU Development Council agreed specifically to incorporate migration more strongly as a topic for the EU's development cooperation. Andrade et al. point out that there is clear growth in funds allocated to migration. In some national programming, such as in Morocco, migration top-up funds and indicators have been added to sectoral budget programmes.

20 [https://ec.europa.eu/europeaid/sites/devco/files/mip-gpgc-2014-2017-annex\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/mip-gpgc-2014-2017-annex_en.pdf) The GPGC focuses on global and multi-regional initiatives as a complement to regional and bilateral funds.

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DG HOME Budget, HAI and ENI), which aims to address the root causes of displacement and irregular migration in African countries and is managed by DG DEVCO. These funds pool money from across the EU budget, the Member States and others.

This multitude of financial instruments has also created fragmentation at the country level. Some partner countries and regions have numerous programmes, each with different terms and conditions. In some cases, the EU institutions have no general oversight of what is taking place on the ground (Andrade et al., 2015). This leads to duplication and fragmentation of funds and programmes and creates complex requirements for recipient countries who have to abide by different sets of rules. This also illustrates the lack of a general strategy to guide these diverse funds towards one coherent approach. A recent study suggests that there are between six and 15 different funds and programmes operating in different regions. *‘As a consequence, there is a multiplicity of projects in each country, with different legal and institutional frameworks, not always aligned and often overlapping with each other. In many countries there is not even a comprehensive list of such EU-funded programmes’* (Andrade et al., 2015). Martín et al. (2015) suggest that, at times, this promotes parallel activities such as training and business creation programmes, rather than reinforcing public schemes that are already working at the national level.

Whether the Trust Funds can help to address this fragmentation remains to be seen. Nevertheless, the speed at which they have been set up and their programmes have been identified, has raised concerns about the lack of strategy and complementarity with development programmes that already exist. In addition, there is debate over the extent to which the governance arrangements of the Trust Funds<sup>21</sup> are compatible with the spirit of ownership and co-management. This is especially true for the Emergency Trust Fund in Africa. DG DEVCO, for example, communicated its decision to shift funds from the EDF into the Trust Fund with little consultation with some Regional Economic Communities (RECs) through which the EDF money would have otherwise been channeled.<sup>22</sup>

The Trust Funds may have the potential to respond more swiftly and in a less fragmented manner than the multitude of financial instruments currently in place, yet the direct management and quick decision-making procedures that allow for this flexibility also pose some risks. Political pressures to commit and disburse funds quickly may ‘create the wrong incentives and lead to programming choices that respond more to EU political priorities than to local realities’.<sup>23</sup> It is vital, therefore, to involve local stakeholders and provide well-informed analysis as well as ensuring that any new projects complement existing programmes.

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21 Hauck et al. (2015).

22 Interview EU Official, Brussels, 19 November, 2015.

23 Hauck et al. (2015: 12)

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# Conclusion

The EU's response to the refugee crisis has been, and continues to be severely undermined by three key factors:

- the system of parallel competences that allows Member States to pursue their own policies alongside EU policy
- the co-existence of too many actors who want their say in policies and who come from very different policy areas with varying – if not conflicting – interests
- fragmented, and in some cases overlapping, funding instruments.

1. In conclusion, we envisage a number of incremental steps to overcome these constraints. To be effective, however, the proposed measures would require far greater political recognition of the fact that a joint response is in the interests of EU Member States and the EU as a whole. This means that bilateral approaches need to be better reconciled with and embedded in one comprehensive EU approach. The current political direction of travel is, however, in the opposite direction, even though the recent Eurobarometer study finds some (if differentiated) recognition among European citizens that a joint approach is desirable.

2. Appoint a senior political advisor to build bridges between the external and internal dimension of migration and asylum policies across the EU system. The position would have a mandate to bridge gaps between EU institutions and EU Member States, complement the work of the Commissioner for Migration, Home Affairs and Citizenship (Collett, 2015) and engage internationally with countries, regional organisations and the UN. The aim would be to inject a longer-term strategic vision into the EU's migration and asylum policies, including its external dimension. The mandate of such a position would need to be clearly delineated, but would include working towards a balanced EU approach to migration, development and security and providing leadership for policy development to support the migration dimension of the EU's Global Strategy. The position could be employed as Special Advisor to Frederica Mogherini, the HR/VP, in her roles as High Representative and Commission Vice-president.<sup>24</sup> It is

important that such a position is able to build bridges between different institutions and services as well as EU Member States. This position could also advise on political dialogue with third countries to ensure that such dialogue is even-handed and respectful – similar to the role assumed by Pierre Vimont in the context of dialogue between European and African countries during the Valletta Summit.

3. Establish an overarching EU strategy for international migration and asylum policy to overcome the disconnect at strategic levels between the internal and external dimensions of the EU's policies on migration as well as security. This could be achieved by having migration aspects reflected more strongly in the EU's new Global Strategy on Foreign and Security Policy led by the HR/VP. The new Global Strategy is an opportunity to set broad policy and operational guidelines that apply across the different parts of the Commission, the EEAS and the Member States, and to bring coherence to the existing set of instruments. The strategy would take a long-term perspective and help to move the discourse away from reactive short-term responses in conjunction with an improved 'toolbox' of instruments.
4. Ensure better information exchange and coordination of national policies at the EU level on both the internal and external dimensions of asylum and migration policy. The Council working groups could play a stronger role in assessing the implications of Member States' policies to ensure coherence of various policies, dialogues and instruments deployed.
5. Strengthen the EU institutions' arbitration role so that they have the authority to ensure that EU rules are interpreted and applied consistently across Member States. The EU should continue to hold Member States accountable for their commitments (e.g. through infringement proceedings) and have tools available to enforce implementation. The European Asylum Support Office could work more closely with EU Member States to ensure harmonious decisions on the recognition of refugees across the EU (Peers, 2015). Naturally, this needs to recognise the different obligations of the Member States, given their specific opt-in or opt-out derogations.
6. Move towards a more permanent relocation system of asylum seekers within the EU over the longer term.

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<sup>24</sup> Another possibility would be to create a EU Special Representative for such a function. While such Representatives have the flexibility to recruit staff, they are a specific function of the EU's Common Security and Defense Policy and, as such, report only to the EEAS and not to the EU Commission. They may not, therefore, be in a good position to bridge the gaps between the different institutions and services.

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This would ensure fairness in responsibility sharing and could include financial compensation options for countries that are unable to take refugees according to jointly agreed criteria. The system also needs to take into account some of the preferences of refugees to reduce their onward movement. This would mean amending the Dublin III Regulation and changing some of its underlying principles. In terms of providing safe and legal ways for refugees to come to the EU, the current visa code could establish an explicit obligation to provide humanitarian visas in exceptional circumstances through the embassies of EU Member States.

7. *Address the fragmentation of the EU's financial instruments through short, medium and long-term approaches.* In the short and medium term, overlaps between funding sources at different thematic or geographic levels should be reduced by strengthening coordination and coherence and by raising awareness of existing funding sources. While the new cluster working method of the Commission is an improvement at political level, it has not yet translated into better coordination mechanisms at the technical level. The mid-term reviews of existing financial instruments are an opportunity to ensure that existing instruments and projects complement each other. They should also be used to ensure that money is not diverted away from comprehensive strategies for development and towards European migration objectives. The European

Parliament and civil society have important roles to play in scrutinising the use of development funds in the context of responding and addressing migration issues externally. There is also a pressing need for discussion on how to address fragmentation in the longer term in the context of setting up new financial instruments for the post-2020 phase.

8. Be clear in communicating the strategy and rationale behind the creation of new financial mechanisms, such as the EU Trust Funds. The way in which they will align with existing strategies in practice should be specified, as well as how short-term and longer-term requirements will be balanced. Many of the strategic and operational issues around the Trust Funds have yet to be resolved.
9. Devolve responsibility for oversight and management of the different in-country programmes and funding streams to EU Delegations (EUDs). This approach would need to be backed up by a serious investment in human resources at country level, ensuring that EUDs have access to the necessary expertise. In a context in which EUDs are increasingly being asked to do 'more with less', high quality aid and impact require adequate support structures and resources. There is also a need to take a much closer look at how EUDs can be involved operationally in supporting the growing number of regional approaches and strategies, as well as cross-border initiatives to deal with international migration issues.

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Cover photo: A man gazes towards Kawergosk refugee camp, Erbil governorate, Kurdistan region of Iraq. Photo credit: EU/ECHO/Caroline Gluck

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