

FRA Opinion 5/2016
[Hotspots]

Vienna, 29 November 2016

Opinion of
the European Union Agency for Fundamental Rights
on
fundamental rights in the 'hotspots' set up in
Greece and Italy

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THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA *“to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”*,

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of FRA to *“formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”*,

Having regard to previous opinions of FRA on related issues; in particular the FRA opinion concerning an EU common list of safe countries of origin,¹ and the FRA opinion concerning the proposal for a revised Dublin Regulation,²

Having regard to the request of the European Parliament of 22 September 2016 to FRA for an opinion on the fundamental rights situation in the hotspots that underlined the different functions of the hotspots such as registration, identification, fingerprinting, returns, processing of asylum applications under the border procedure, and relevant fundamental rights in this respect including human dignity, respect for private and family life, data protection, right to asylum and protection against collective expulsions, rights of the child, right to effective remedy, non-discrimination and protection of health, and requested FRA to provide an opinion on *“how best to ensure that such fundamental rights risks are effectively prevented or, in case they materialise, any possible violations may be best addressed.”*

SUBMITS THE FOLLOWING OPINION:

¹ FRA (2016), *Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin*, FRA Opinion 1-2016 [SCO], Vienna, FRA.

² FRA (2016), *Opinion of the European Union Agency for Fundamental Rights concerning the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD)*, FRA Opinion 4-2016 [Dublin], Vienna, FRA.

Opinions

The European Union's 'hotspot' approach is a building block of its response to asylum seekers and migrants arriving at its territory by sea, often traumatised or in distress. It enables the European Union (EU) to assist in a more targeted manner frontline Member States in handling the arising challenges. If well implemented, the hotspots offer the opportunity to concentrate procedures and EU support in specific locations, namely to: register new arrivals; better address basic needs and fundamental rights; detect potential vulnerabilities; and offer those in need of international protection the opportunity to claim asylum or suspected victims of human trafficking the necessary assistance and support required by EU law. With some adjustments, the concerted action by national, European and humanitarian actors that takes place in the hotspots could constitute a model for managing new arrivals in a fundamental rights compliant manner, which could also be used in other parts of the EU.

However, despite a number of important initiatives the EU and national bodies undertake serious fundamental rights gaps persist, affecting the work of all actors in the hotspots, including EU bodies. While some of these can be addressed at the level of individual hotspots, others are directly linked to the overall mode of operation of the hotspots. Many of the protection challenges experienced in the Greek hotspots, which this opinion outlines, are the consequence of new arrivals' prolonged stay there. The possibility of swift onward movement of new arrivals to other locations avoids overcrowding and is an essential pre-condition for their dignified treatment in line with the requirements of the Charter of Fundamental Rights of the European Union (Charter). Other challenges with a similarly profound impact encountered in both Greece and Italy relate to unaccompanied children, including the operation of national guardianship systems. The hotspot approach is deemed to fail in respecting the Charter rights if these systemic issues are not addressed through concerted legislative, policy and operational response at both the EU and national level.

Access to international protection

Delays in processing applications for international protection are a key bottleneck. This is especially the case in Greece, where, contrary to Italy, asylum claims are examined in the hotspots. Such delays have particular fundamental rights implications for unaccompanied children. The availability of lawyers who can provide support during first instance asylum proceedings is limited in the hotspots. Furthermore, information on asylum may not be readily available both upon arrival and during the subsequent stay in the hotspots. EASO is deploying experts to provide information. In several hotspots, specific joint information points are organised.

FRA Opinion 1

Effective access to asylum procedures is a prerequisite to comply with the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the European Union (Charter). The speedy registration and prompt examination of an asylum claim is an important safeguard against protracted stay in a situation of uncertainty and legal limbo. The Asylum Procedures Directive (2013/32/EU) requires Member States to ensure that an asylum application can be lodged as soon as possible after an intention to apply for asylum is expressed. In the hotspots in Greece, the registration and processing of asylum applications from some countries is prioritised, whereas

persons from other countries have been waiting for several months to have their asylum applications formally registered.

Although a certain degree of prioritisation of asylum applications by nationality can be justified if it is based on objective considerations, this must not result in denying, or unduly delaying, access to asylum to others. Prioritisation by nationality should not lead to discriminatory effects on other rights or undermine the right to family reunification.

FRA Opinion 2

Given the specific vulnerability of unaccompanied children and their protection needs, which cannot adequately be met in the hotspots, their asylum claims should be treated as a matter of priority, regardless of their nationality. In practice, significant delays often occur in registering and/or examining asylum claims by unaccompanied children.

To give primary consideration to the best interests of the child as required by Article 24 (the rights of the child) of the Charter, the examination of applications for international protection of unaccompanied children must be ensured as early as possible. The same applies to their access to family tracing and reunification procedures in line with Article 7 (respect for private and family life) of the Charter and applicable secondary EU law.

FRA Opinion 3

Adequate information on the right to apply for international protection and the procedure to follow is a prerequisite for accessing the right to asylum, as stipulated in Article 18 of the Charter and the 1951 Geneva Convention relating to the Status of Refugees. Significant efforts have been made in the hotspots to integrate written materials with oral information by involving the United Nations High Commissioner for Human Rights (UNHCR), and other humanitarian organisations as well as EASO. The capacity, however, is still not sufficient to cover all new arrivals, particularly in light of people's language diversity.

Regular reviews to assess the effectiveness of the provision of information should be carried out involving all actors. Building on current initiatives, more focus should be given to providing child-specific information ensuring that it is delivered in a child-friendly manner.

FRA Opinion 4

Asylum seekers and migrants in an irregular situation apprehended in connection with their irregular entry have a duty to provide fingerprints for Eurodac. As FRA pointed out in its 2015 focus paper, compliance with this obligation should primarily be secured through effective information and counselling. This can either be provided individually and/or through outreach actions targeting migrant communities, such as focus group discussions, information sessions and similar initiatives.

To comply with the provisions of the Charter on the right to dignity (Article 1) and integrity of a person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the right to liberty and security (Article 6), the use of physical or psychological force to obtain fingerprints for Eurodac should be avoided because it entails a high risk of violating fundamental rights. Children, suspected victims of torture, sexual or gender-based violence, victims of other serious crimes, as well as traumatised people should not be detained or coerced into giving fingerprints, nor should any other people usually considered vulnerable.

FRA Opinion 5

Availability of legal support is a prerequisite for full access to the right to asylum. As required by Article 20 of the Asylum Procedures Directive and stemming from Article 47 (the right to an effective remedy and to fair trial) of the Charter, free legal assistance and representation must be available for appeal proceedings. Providing legal support before, namely during the first stage of the asylum procedure, could significantly alleviate the pressure on the appeals system and reduce the number of decisions overturned on appeal.

Notwithstanding the practical challenges involved, efforts should be made to extend the availability of legal support to the remainder of the asylum proceedings in light of its complexity. Priority should be given to unaccompanied children and other applicants in need of special procedural safeguards.

Rights of the child

Systems of temporary guardianship for unaccompanied children in both Greece and Italy are under considerable strain and cannot guarantee the best interests of the child. Children's general well-being is not adequately safeguarded. In the absence of sufficient specialised accommodation capacity, unaccompanied children face *de facto* detention in some hotspots. Access to education and age-appropriate activities poses a challenge, as does the sufficient presence of qualified staff with child protection and social work expertise. Furthermore, the screening of all personnel in the hotspot facilities who comes into direct contact with children also remains a challenge.

FRA Opinion 6

For unaccompanied children, an effective guardianship system is a pre-condition to ensure the child's best interests and general well-being, as required by the United Nations (UN) Convention on the Rights of the Child and Article 24 (the rights of the child) of the Charter. In Greece and Italy, temporary guardianship for large numbers of unaccompanied children arriving at the hotspots is assigned to local public officials without specialised child protection expertise.

The temporary guardianship arrangements in both countries should be reviewed to ensure that qualified and skilled personnel exercise this role, having sufficient financial resources and capacity to fulfil this role. At the same time, temporary guardians should be replaced as soon as possible by more permanent and sustainable guardians.

FRA Opinion 7

Separated children – meaning children who are not travelling together with their parents or legal guardians but are accompanied by other adults – may be exposed to heightened risk of abuse or neglect. They must be identified and registered to ensure that they are provided the protection and care necessary for a child's well-being, as required by Article 24 of the Charter.

As a matter of priority, an individual risk assessment should be carried out with each separated child to determine whether or not there are risks related to placing the child with the accompanying adult and, if so, to determine the necessary protection measures, monitoring and follow-up measures. Such assessment should be undertaken based on standardised procedures, and it requires qualified psychosocial staff with child protection expertise, who is not yet available in all hotspots. The risk assessment requires sufficient time and constant monitoring of the family situation.

FRA Opinion 8

Under Articles 7 (respect for private and family life) and 24 of the Charter, detention of children, including unaccompanied and separated children, is rarely justified. In its case law, the European Court of Human Rights (ECtHR) also made it clear that the detention of children is not allowed in facilities that are inappropriate – as is the case for the hotspots. Children in hotspots should not be deprived of liberty, particularly once they have already been registered. The need for separate accommodation and protection of children who remain in the hotspots because of chronic lack of dedicated accommodation capacity and delays in processing their asylum claims should not be resolved at the expense of children’s rights.

Member States must ensure that sufficient capacity is available to meet the requirements under EU and national law for adequate accommodation of unaccompanied children seeking asylum. The European Union should continue to support national measures aimed at addressing the chronic lack of child-appropriate reception capacity in Greece and Italy.

FRA Opinion 9

EU law places specific requirements on the material conditions, education, healthcare and child-specific activities needed to ensure the child’s well-being and to meet children’s special needs. Even where these rights are guaranteed in national law, lack of arrangements on the ground may lead to unavailability of core services in practice.

There should be a qualified person responsible for child protection issues in each hotspot. This person should identify the needs of the children and, together with the responsible national authorities and other actors, address the gaps in children’s rights to healthcare, education, age-appropriate leisure activities and overall adequate living conditions. In this context, formal education should be provided to all children not later than three months after their arrival.

FRA Opinion 10

EU law requires that persons exercising activities involving direct and regular contact with children are subject to proper screening. Such measures are also necessary to comply with the provisions of Article 24 of the Charter to safeguard the best interests of the child and promote the child’s safety and well-being. Although checks of criminal records are part of the recruitment procedures of public authorities in both Greece and Italy, this might not be the case for subcontracted staff or volunteers working in the hotspots.

Clear obligations should be in place for systematic vetting and screening of all personnel in the hotspot facilities who comes into direct contact with children, including appropriate measures to ensure effective implementation and monitoring. Vetting procedures should include as a minimum checks of criminal records against convictions, as described in Article 10 of the Directive on child sexual abuse and exploitation of children (2011/92/EU). Such procedures should apply to all staff national authorities and their implementing partners recruit, regardless of the type of contract. In addition, all international and civil society organisations should introduce a child safeguarding policy and vetting requirements for all their staff and volunteers, and for the staff of their partner organisations who access the hotspots.

Identification of vulnerabilities

Many persons arriving at the hotspots belong to vulnerable groups, for example children or persons who suffer trauma because they escaped an armed conflict or lost family members at sea. Identifying vulnerabilities beyond those that are visible *prima facie* or self-declared poses a challenge in most hotspots, notably as regards victims of trafficking in human beings. In the Greek hotspots, the absence of standard operating procedures contributes to an overall fragmentation of responsibilities for identification and referral. The important role of female staff is not always fully reflected. The involvement of the European Asylum Support Office (EASO) and Frontex in the hotspot procedures provides an opportunity to further mainstream the identification of vulnerabilities into these procedures.

FRA Opinion 11

Identification and referral of vulnerable people as required by the Reception Conditions Directive (2013/33/EU) is a shared responsibility of all actors operating in the hotspots. As such, it should be outlined in standard operating procedures as an integral part of first reception and identification procedures, and remain a constant priority.

First reception and identification procedures should be set up in a way that allow medical, social and psychosocial staff to work in tandem with the authorities interviewing new arrivals. Screening forms should facilitate recording of vulnerabilities and the effectiveness of identification systems should be regularly reviewed at hotspot coordination meetings. Psychosocial and medical staff should be located in places that are easily accessible to people hosted in the hotspots. They should also regularly visit the reception areas to facilitate the detection of vulnerabilities, with due regard to the right to privacy.

FRA Opinion 12

In line with the Anti-Trafficking Directive (2011/36/EU), staff in the hotspots likely to come into contact with victims of trafficking in human beings should be adequately trained to identify and deal with the victims. The availability of specialised expertise and awareness of existing guidance is limited in some of the hotspots.

Efforts should be made in Greece to step up the identification of possible victims, building on the promising practice in Italy, where the Ministry of Interior involved the International Organisation for Migration (IOM) to speak to people at risk upon arrival with the objective of identifying and referring victims to support services. Use of the existing identification tools could be further promoted and extended, including, for example, the adaptation of the Frontex VEGA Handbook on children at airports to sea borders.

FRA Opinion 13

Sufficient presence of female staff and interpreters contributes to safeguarding the dignity of women undergoing procedures in the hotspots and helps to ensure respect for their right to private life enshrined in Article 7 of the Charter. Besides meeting the requirement under Article 15 of the Asylum Procedures Directive to ensure that same sex staff is available on request of the applicant, it also plays an important role in facilitating the reporting of sexual and gender-based violence or when carrying out procedures that involve physical contact.

The availability of female staff and interpreters should be ensured in the day-to-day operation of the hotspot (such as when establishing work shifts); Member States should also take this into account when deploying experts to the hotspots.

Safety of all persons in the hotspots

In the Greek hotspots, several factors lead to tensions putting at risk the safety of people hosted in the camps as well as the staff working there, such as limited community outreach activities about the persons staying in the hotspots, combined with overcrowding, lack of information (in spite of considerable efforts to improve the situation involving also EU actors) and protracted stay. Instances of violence, riots and demonstrations reported from the hotspots in Greece almost on a weekly basis signal frustration, communication gaps and a high level of distrust by asylum seekers. Many of them have stayed in a situation of legal limbo for too long with uncertainty on whether they would be given asylum or returned to Turkey. The infrastructure, operation and staffing of the hotspots is not adapted to the need to guarantee the safety of persons facing heightened risks, particularly women and children.

FRA Opinion 14

The right to good administration under Article 41 of the Charter implies the right of the persons in the hotspots to be informed of procedures applicable to them. At present, the inconsistent provision of information on procedures and rights contributes to tensions among migrants and asylum seekers in the hotspots and possible displays of violence.

Ensuring the provision of consistent information in a manner that is accessible to all persons in the hotspots would help mitigate the tensions. In addition to information provided upon arrival, up-to-date and sufficiently detailed information on various procedures needs to be available to all persons throughout their stay in the hotspots.

FRA Opinion 15

In line with Article 18 (4) of the Reception Conditions Directive, measures to reduce the risk of exposure to sexual and gender-based violence should be a key priority for all actors. Women and girls face specific risks when staying in the hotspots which are not always sufficiently taken into account in the design and management of these camps.

The risks need to be reflected, for example, in planning and adjusting the physical infrastructure of the facilities, in the organisation of police patrols particularly at night, the design of referral pathways for alleged victims, or in the allocation of a place to sleep. Preventive measures should be planned in consultation with women and girls, taking into account their fears and experiences.

FRA Opinion 16

Due to their vulnerability, children face an aggravated risk of violence and abuse, and are potentially also more affected by experiences of violence. Under the United Nations (UN) Convention on the Rights of the Child, states have the responsibility to ensure the children's safety from violence, sexual exploitation and abuse, as well as trafficking in human beings. In the hotspots, these risks are particularly high.

All actors should cooperate to mitigate the risks faced by children in the hotspots. Physical security measures, such as separate accommodation of families and

unaccompanied children and the creation of safe areas for children, need to be accompanied by adequate security arrangements and the systematic presence of qualified staff specialised in child protection matters.

FRA Opinion 17

Community outreach through regular meetings with asylum seekers and migrants hosted in the hotspots, as well as other forms of participation of these communities in the hotspots, can help map and address issues perceived by them as most pressing, thus reducing potential tensions and incidents.

Dissemination of promising practices from individual hotspots coupled with the deployment of specialised staff and promoting alternative means of reducing tensions would be beneficial.

Readmissions

The role of the hotspots in supporting effective returns has become particularly prominent in Greece as a result of the EU-Turkey statement. Return decisions issued to new arrivals are systematically, without an individual assessment, accompanied by a detention decision, which allows to impose pre-removal detention also on persons who have agreed to return to Turkey. Although the readmissions take place under national law, challenges in respecting fundamental rights safeguards by the national authorities have implications for Frontex which provides escort staff for these operations.

FRA Opinion 18

Escorts provided by Frontex to support readmission operations are drawn from among officers deployed by Member States who do not necessarily have sufficient experience in this field.

Escorts conducting these operations should be adequately trained to ensure that the rights of removed persons are respected during the removal. When requested by Frontex to deploy escort staff, Member States should consider deploying officers with prior escort experience and/or appropriate training.

FRA Opinion 19

A comprehensive system for return monitoring, including for readmission operations, is an important safeguard to help prevent fundamental rights violations and ensure humane treatment.

Where return or readmission operations are carried out from the hotspots, this should be accompanied by effective monitoring by domestic authorities designated to conduct forced return monitoring under the Return Directive (2008/115/EC). Where these bodies hold a broader mandate, they could also play a more comprehensive role concerning the conditions and procedures in the hotspots in general.

FRA Opinion 20

Under Article 6 of the Charter and Article 5 of the European Convention on Human Rights (ECHR) both enshrining the right to liberty and security, detention is a limited exception to the right to liberty and as such needs to be based on a prior individual assessment. Pre-removal detention applied without assessing the risk of absconding, particularly in relation to persons who have expressed their intention to leave the EU voluntarily may fall short of this standard and become arbitrary.

Unless it is determined based on an individual assessment of the specific case that there are overriding reasons to impose detention, persons having agreed to be readmitted should not be unduly restricted in their liberty.

FRA Opinion 21

In accordance with the provisions of the Return Directive, all returnees should be informed of their rights and obligations while detained pending removal, as well as during the removal operation.

Interpretation arrangements need to be in place for the entire duration of the operation to ensure that each returnee can communicate effectively with the escorts, to be able to respond to security, medical and other emergencies, and to safeguard the rights of the returnees.

Introduction

'Hotspots' are facilities set up at the EU external border in Greece and Italy for the initial reception, identification and registration of asylum seekers and other migrants coming to the EU by sea. They also serve to channel newly arrived people into international protection, return or other procedures. The Figure below shows the location of the existing hotspots and their reception capacity.

Figure: Map of hotspots in Greece (5) and Italy (4) and their reception capacity (No. of persons)



Source: FRA (2016)

The European Commission envisaged the 'hotspot approach' in the *European Agenda on Migration* in April 2015 in response to the increased migratory pressure. The intention was to provide an environment "where the European Asylum Support Office (EASO), Frontex and Europol would work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants."³ When implementing the hotspot approach, Member States act within the scope of EU law and therefore have to comply with the rights and principles set forth in the Charter of Fundamental Rights of the EU (Charter), which is also binding for EU institutions and agencies on the ground.

Scope of the legal opinion

This opinion does not comprehensively look at *all* fundamental rights risks arising from the operation of the hotspots. It touches in particular on the following Charter rights:

- the right to human dignity (Article 1)
- prohibition of torture and inhuman or degrading treatment or punishment (Article 4)
- the right to liberty and security (Article 6)

³ European Commission (2015), *Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda on Migration*, COM(2015) 240 final, 13 May 2015, p. 6.

- respect for private and family life (Article 7)
- the right to asylum and protection in the event of removal, expulsion and extradition (Articles 18 and 19)
- the rights of the child (Article 24)
- the rights of the elderly and persons with disabilities (Articles 25 and 26)
- the right to good administration (Article 41)
- the right to an effective remedy and to a fair trial (Article 47)

Other rights potentially affected include the right to protection of personal data, the right to education or healthcare. Material conditions in individual hotspots are not discussed as a separate issue but references are made to these where they are relevant in light of individual fundamental rights risks, such as those arising in respect of specific vulnerable groups. Notably, the issue of capacity of the hotspots is referred to throughout the opinion as one of the factors contributing to fundamental rights risks, both in terms of the overall accommodation space available and the ability to respond to new arrivals. The Greek hotspots, for example, have a capacity of 5,450 persons (see Figure for details).⁴ Together with other facilities on the five islands including those run by the United Nations High Commissioner for Human Rights (UNHCR), the accommodation capacity is about 8,000 persons. In comparison, the estimated number of migrants on the Greek islands (including outside the hotspots) in November 2016 was 14,985.⁵

Without being exhaustive, this opinion discusses selected topics in light of the aforementioned fundamental rights at stake, identifying the challenges and describing measures that could be taken to mitigate the risk of actions, which are not compliant with the Charter. It does not focus exclusively on risks arising in direct relation to the involvement of EU actors on the ground, but also takes into account that the hotspot approach entails a certain share of responsibility of the EU for the situation in the hotspots overall.

This opinion does not examine potential fundamental rights challenges arising in relation to the relocation of applicants for international protection from Greece and Italy to another EU Member State – a measure that complements the hotspot approach – as relocation procedures essentially take place outside the hotspots. However, as relocation can only be triggered after an asylum application is formally lodged, the delays in registering asylum claims examined in this opinion have also an impact on relocation.

This opinion does not look at the role played in the hotspots by Europol, given the specific focus of its presence in supporting the national police with real-time verification of suspected profiles. Similarly, it does not cover relations with the local communities on the islands hosting a hotspot; FRA describes the fundamental rights implications of this issue in its regular monthly updates on the migration situation in the EU.⁶

Given that the majority of practical experience with the operation of the hotspots was collected during FRA's field presence in Greece, this opinion is based to a great extent on FRA observations. These are complemented by desk research and findings from FRA missions to Italy. The advice provided therein is conceived in a manner as to be valid

⁴ European Commission, Hotspot state of play, 11 November 2016, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf (all hyperlinks accessed on 21 November 2016).

⁵ UNHCR, Europe Refugee Emergency, <http://data.unhcr.org/mediterranean/download.php?id=2173>.

⁶ See in particular FRA (2016), *Monthly data collection on the current migration situation in the EU July 2016 monthly report; Thematic focus: Impact of the asylum crisis on local communities* (online), Vienna.

for the hotspots in both countries, or indeed for any potential similar operation elsewhere in Europe in the future.

Hotspots and role of the EU

The explanatory note from the European Commission on the hotspot approach⁷ identified the field in which EU agencies can provide support. Activities include

- registration and screening (Frontex);
- debriefing of migrants (Frontex, and provision of relevant information to Europol);
- stepping up investigations, information and intelligence exchange on facilitation of irregular entry and stay (Europol, Eurojust);
- registration of asylum seekers and subsequent preparation of case files, and support with the implementation of relocation of asylum seekers (EASO);
- coordination of return of irregular migrants (Frontex);
- interpretation (relevant EU agencies as appropriate).

An EU Regional Task Force, which brings together the relevant EU actors, ensures the operational coordination of the hotspots. In Greece, the European Commission's Structural Reform Support Service (SRSS) ensures coordination between national authorities, EU actors and international organisations on the implementation of the EU-Turkey statement of 18 March 2016. The hotspot approach is conceived as a system for EU bodies to provide support to national authorities by temporarily bolstering their capacity to deal with increased migratory influx. As of 11 November 2016, there were 122 EASO and 474 Frontex deployed staff present in the five Greek hotspots (Chios, Lesbos, Leros, Kos and Samos) and 19 EASO and 89 Frontex deployed staff in the four Italian hotspots (Lampedusa, Pozzallo, Taranto and Trapani).⁸ These numbers illustrate that the hotspots, while run by EU Member States, operate with an unprecedented level of operational EU support. Particularly in Greece, EASO and Frontex are significantly involved in the day-to-day operation of the hotspots. For some of the core actions taken there (for example, vulnerability assessment, asylum admissibility and eligibility interviews or removal operations), the EU agencies play a key role.

At the same time, the primary responsibilities remain with the Member States operating the hotspots. As a result, during their operation EU bodies in the hotspots encounter fundamental rights challenges that may not directly result from their own activities but which still significantly affect their work. Examples may include systematic lack of capacity of certain services at the national level, such as guardianship for unaccompanied children or the availability of sufficient adequate facilities for swift onward movement of unaccompanied children out of the hotspots. If not adequately addressed, such fundamental rights gaps may affect the work of all actors in the hotspots, including EU bodies, with negative implications for the legitimacy of the EU operational support as a whole.

Impact of hotspot experience on future EU policies

This is particularly relevant as the role of EU bodies in the hotspots becomes more structured and increasingly anchored in EU law. Initially, the EU agencies operated in the hotspots on the basis of the general provisions of their founding regulations and operational plans agreed with the national authorities. The new mandate for Frontex

⁷ European Commission (2015), [Explanatory note on the "Hotspot" approach](#).

⁸ European Commission, Hotspot state of play, 11 November 2016, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_hotspots_en.pdf.

and the planned new mandate for EASO, transforming them respectively into the European Border and Coast Guard and the European Union Agency for Asylum, are more specific. They envisage the participation of both agencies in “migration management support teams” operating in “hotspot areas” where Member States, the European Commission and relevant EU agencies cooperate on managing existing or potential disproportionate migratory challenges.⁹ According to Recital 27 of the new Frontex Regulation, the European “Commission, in cooperation with other relevant agencies should ensure the compliance of activities in the hotspot areas with the relevant [EU law], including the [European asylum rules] and fundamental rights”.¹⁰

This shows that the experience with the operation of the hotspots may have an impact on future EU asylum and migration policies. A clear understanding of the fundamental rights challenges encountered in Greece and Italy – as well as measures to be taken to mitigate these challenges – will allow the EU to take measures to avoid creating fundamental rights gaps in future, should the hotspot approach or aspects thereof be applied elsewhere in the EU. In light of the possible impact of the experiences collected in the hotspots in Greece and Italy on future EU policies, a more systematic and regular collection of data and evidence on the fundamental rights situation in Greek and Italian hotspots would contribute to an accurate assessment of the challenges and ways to address them.

FRA support to closing the protection gaps in the hotspots

The explanatory note of the European Commission on the hotspot approach mentions that EU agencies can use FRA for input on how to address fundamental rights challenges in the hotspot approach. Indeed, FRA has been providing fundamental rights expertise to the European Commission, EASO and Frontex on diverse aspects of the operations in Greece and Italy, since the inception of the hotspot approach in mid-2015. In October 2015, for example, responding to challenges in achieving systematic registration of new arrivals, FRA has published a Checklist to act in compliance with fundamental rights when obtaining fingerprints for Eurodac.¹¹

To further enhance the provision of meaningful support to the EU actors on the ground, FRA staff was present in the Greek hotspots from April to September 2016. The SRSS facilitated FRA’s temporary field presence, which focused on issues related to child protection, the situation of other vulnerable groups and procedural safeguards linked to removal. FRA also conducted fact-finding missions to the Italian hotspots to familiarise itself with the fundamental rights challenges arising there.

Changing nature of the fundamental rights challenges

The factual and legal setting in which the hotspots operate in Greece and Italy differ. This affects the type of fundamental rights risks arising at the hotspots. In Italy, the hotspots operate based on commonly agreed standard operating procedures issued at the central level and applicable to all hotspots.¹² The day-to-day management of the

⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, Article 2(10).

¹⁰ *Ibid*, Recital 27.

¹¹ FRA (2015), *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, FRA Focus 05/2015, Luxembourg, Publications Office.

¹² See www.libertaciviliimmigrazione.dlci.interno.gov.it/it/hotspot.

hotspot facilities is mostly outsourced to non-governmental organisations (NGOs) with a different degree of municipality involvement.

The purpose of the hotspots in Greece, on the other hand, changed with the implementation of the EU-Turkey statement of 18 March 2016 which aims to substitute irregular and dangerous migrant crossings from Turkey to the Greek islands with a legal channel of resettlement from Turkey to the EU.¹³ Under the statement, persons arriving in Greece from Turkey irregularly after 20 March 2016 are to be returned to Turkey. For every Syrian returned in this manner, another Syrian should be resettled from Turkey to the EU. Resettlement of other nationalities is not envisaged under the statement. While the assessment of this arrangement is not the subject of this opinion,¹⁴ it has had significant impact on the overall situation in the hotspots from where the returns to Turkey of persons having arrived after the EU-Turkey statement are implemented.

According to the European Commission, as a result of the EU-Turkey statement, the hotspots on the islands in Greece needed “to be adapted – with the current focus on registration and screening before swift transfer to the mainland replaced by the objective of implementing returns to Turkey”.¹⁵ The Greek Parliament subsequently adopted legislation that transposes into national law the provisions of the Asylum Procedures Directive (2013/32/EU).¹⁶ The new law introduces the concepts of first country of asylum and safe third country, as well as procedures for fast-track examination of applications for international protection at the border. The law also provides a framework for the operation of the hotspots including specifying the role of EU agencies and international organisations and their interaction with the Greek authorities.¹⁷

In practical terms, this change of focus under the EU-Turkey statement meant initially transforming the hotspots into closed facilities. This change led NGOs and UNHCR, which until then played a central role in the hotspots particularly in providing services to new arrivals, to terminate or significantly restrict their activities in opposition to what was perceived as a move towards ‘mandatory detention’.¹⁸ Although in practice the focus on detention has been gradually replaced by a geographical restriction of movement to the particular island (see Section 5) and most of the humanitarian organisations have subsequently reinstated their presence, the Greek hotspots remain a core pillar of the implementation of the essentially return-oriented EU-Turkey statement, which clearly distinguishes them from the Italian hotspots. At the time of the preparation of this opinion, a case was pending before the European Court of Human Rights (ECtHR) in which three applicants claimed that their rights had been breached by the detention in the Vial hotspot in Chios after the EU-Turkey statement.¹⁹

¹³ European Council, EU-Turkey statement, 18 March 2016.

¹⁴ At the time of drafting this opinion, the legality of the statement was being considered by the General Court of the EU, Cases T-192/16, T-193/16 and T-257/16, *NF v. European Council*, notified on 31 May 2016 and 2 June 2016.

¹⁵ European Commission, Next operational steps in EU-Turkey cooperation in the field of migration, COM(2016) 166, 16 March 2016.

¹⁶ Directive 2013/32/EU on common procedures for granting and withdrawing the status of international protection (recast).

¹⁷ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC.

¹⁸ See, for example, UNHCR, “UNHCR redefines role in Greece as EU-Turkey deal comes into effect”, 22 March 2016, www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html.

¹⁹ See ECtHR, *Raoufi and Others v. Greece*, No. 22696/16, communicated on 26 May 2016.

1. Access to international protection

One of the functions of the hotspots is to facilitate access to asylum procedures to those in need of international protection by identifying whether newly arrived people wish to apply for international protection. Effective access to asylum guaranteed under Article 18 of the Charter is a prerequisite of the right to international protection. It also forms the basis for the protection from *refoulement* and collective expulsion, which are reflected in Article 19 of the Charter as well as Article 78 of the Treaty on the Functioning of the European Union and Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR).

The formal registration and examination of asylum claims is a matter for the competent national authorities. In Greece, applications for international protection are registered in the hotspots, whereas in Italy initial registration takes place in the hotspots and the formal lodging of the application happens after the people concerned have been transferred to other facilities. Relocation of asylum seekers to another EU Member State requires that their application for international protection is formally lodged first in Italy or Greece.

The different nature of EU involvement in supporting the national asylum authorities in the Greek and Italian hotspots reflects this difference. EASO is present in the hotspots of both countries, but its support differs: in Italy, EASO teams focus on providing information on relocation, pre-identification of persons eligible for relocation, and prioritisation of vulnerable persons (while supporting the registration of asylum applicants in registration hubs outside of the hotspots); in Greece, EASO teams also provide hands-on support to the Greek authorities in registering and interviewing asylum applicants. Testing ground for enhanced European cooperation, EU bodies are, for the first time, entrusted with core parts of national asylum procedures, while the responsible national asylum authority keeps the overall responsibility for decisions.

More concretely, within the framework of the EU-Turkey statement implementation, teams of experts trained and deployed by EASO assist the Greek Asylum Service with the formal registration of applications for international protection. They also carry out the personal asylum interviews and draft recommendations for a decision to be taken by the Greek authorities. Initially, the registration and interviews concerned applicants from Syria to determine whether their applications should be rejected as inadmissible as they would find effective protection if returned to Turkey under the framework of the EU-Turkey statement. Subsequently, it also included eligibility interviews where the substance of the asylum claim is examined. Such personal interviews are carried out in English with the support of EASO-financed interpreters. Although in all these activities, EASO is working side-by-side with colleagues from the Greek Asylum Service, EASO-deployed experts carry out the bulk of the fact-finding work for the determination of the asylum claim, thereby supporting first instance decision, which the Greek Asylum Service ultimately takes.

1.1 Addressing delays in processing applications for international protection

According to Article 6 (1) of the Asylum Procedures Directive, applications for international protection must be registered within three working days, or 10 working days in case of large numbers of simultaneous applications (Article 6 (5)). Member States also have the obligation under Article 6 (2) of the directive to ensure that individuals who have expressed their wish to apply for asylum ('made' an application for international protection) have an effective

opportunity to lodge their application as soon as possible. The proposed regulation replacing the Asylum Procedures Directive includes an obligation of the Member States to give applicants an effective opportunity to lodge the application within 10 working days of the registration, or within one month in case of a disproportionate number of applicants.²⁰

The respect of registration deadlines is an important safeguard to prevent protracted situations of a legal limbo and allows the persons to enjoy benefits attached to the official status of an asylum seeker. It derives also from the right to good administration, which is enshrined in Article 41 of the Charter and considered by the CJEU as a general principle of EU law.²¹ In Greece, systemic delays to register asylum applications led UNHCR and EASO to support a pre-registration process on the mainland earlier this year.²²

Greek legislation adopted in the wake of the EU-Turkey statement gives the authorities the possibility to conduct only a 'simple' registration within the three days prescribed by the Asylum Procedures Directive, and carry out a full registration – which is then seen as the date of lodging the application – as soon as possible and based on priority.²³

Although EASO supported the Greek authorities with asylum experts, delays in registering applications continued to persist affecting certain nationalities in particular. Asylum claims were prioritised based on nationality, by registering and interviewing Syrian nationals first to assess whether their claims are admissible or whether they could be returned to Turkey, followed by applicants from countries with a relatively low recognition rate, such as Algeria or Pakistan to assess their claims on the merits. This resulted in applicants of nationalities that were not prioritised, including Afghans, Congolese, Iranians and Iraqis, having to wait in the hotspots for up to six months until their claims started to be formally registered. Many of them are still waiting for an eligibility interview.

While prioritisation of certain groups of applicants can be a legitimate tool to decongest the procedure, it should not result in discrimination, notably in conduct that factually results in different treatment of people or groups of people who are in an identical situation, in this case applicants for international protection.²⁴ The impact of such a selective access to asylum procedures needs to be viewed in light of the overall situation at the hotspots, including that people are required to stay in overcrowded facilities, which often do not meet basic humanitarian standards. Protracted stay without an opportunity to pursue or even initiate the asylum procedure, therefore, negatively affects a wide array of individuals' rights, and persons should not be subject to these effects for longer, simply due to their nationality. It may also effectively prevent persons with family members already in the EU, but not belonging to prioritised nationalities, from enjoying the right to family reunification since they are not able to initiate the procedure under the relevant provisions of the

²⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Article 28 (1), (2) and (3).

²¹ See also the Court of Justice of the European Union (CJEU) judgment of 31 March 1992 in Case C-255/90 *P Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and Others* [1999] ECR II-2403.

²² EASO, European Commission, Greek Asylum Office, UNHCR, *Joint Press Release: The pre-registration of asylum seekers in the Greek mainland is starting today*, 9 June 2016, www.easo.europa.eu/news-events/joint-press-release-pre-registration-asylum-seekers-greek-mainland-starting-today.

²³ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 36 (1).

²⁴ FRA and ECtHR (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, p. 22.

Dublin Regulation.²⁵ Finally, it may partly undermine the rationale of the hotspots as some of the de-prioritised nationalities may be eligible for relocation under the temporary and exceptional relocation mechanism established by the Council Conclusions of 20 July 2015.²⁶

FRA Opinion 1

Effective access to asylum procedures is a prerequisite to comply with the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the European Union (Charter). The speedy registration and prompt examination of an asylum claim is an important safeguard against protracted stay in a situation of uncertainty and legal limbo. The Asylum Procedures Directive (2013/32/EU) requires Member States to ensure that an asylum application can be lodged as soon as possible after an intention to apply for asylum is expressed. In the hotspots in Greece, the registration and processing of asylum applications from some countries is prioritised, whereas persons from other countries have been waiting for several months to have their asylum applications formally registered.

Although a certain degree of prioritisation of asylum applications by nationality can be justified if it is based on objective considerations, this must not result in denying, or unduly delaying, access to asylum to others. Prioritisation by nationality should not lead to discriminatory effects on other rights or undermine the right to family reunification.

1.2 Ensuring access to asylum for unaccompanied children

Fundamental rights risks related specifically to children are discussed in more detail in Section 2, including the ineffective guardianship and legal representation systems, which also affect the access to international protection. For the procedure of seeking international protection, according to Article 25 (6) of the Asylum Procedures Directive, the best interests of the child must be a primary consideration.

Delays in the processing of asylum applications, including their actual registration, can have particularly serious effects for unaccompanied children. The UN Committee on the Rights of the Child has underlined that delays or prolonged decision making have particularly adverse effects on children; the committee recommends that procedures or processes concerning children be completed in the shortest time possible.²⁷ Besides heightened protection risks and increased need for durable solutions resulting from their age and lack of family environment, unaccompanied children are in many hotspots subject to additional restrictions compared with other persons, such as the placement in closed facilities or longer waiting times to be transferred to specialised accommodation (see Section 2). Another issue lies in the 'aging-out' of persons who arrive at the hotspots as children but reach the age of majority during their protracted stay and are therefore no longer able to benefit from the special safeguards for children.

²⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. See in this context also FRA (2016), *Opinion of the European Union Agency for Fundamental Rights concerning the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD)*.

²⁶ Justice and Home Affairs Council Conclusions, 20 July 2015.

²⁷ UN, Committee on the Rights of the Child (2013), General Comment No. 14, 29 May 2013, CRC/C/GC/14, para. 93.

Lack of effective access to the asylum procedure therefore aggravates the negative impact on children's rights. It also complicates their access to family reunification, which should be the preferred solution and priority concern in light of the obligation under Article 24 of the Charter to give a primary consideration to the best interests of the child.

FRA Opinion 2

Given the specific vulnerability of unaccompanied children and their protection needs, which cannot adequately be met in the hotspots, their asylum claims should be treated as a matter of priority, regardless of their nationality. In practice, significant delays often occur in registering and/or examining asylum claims by unaccompanied children.

To give primary consideration to the best interests of the child as required by Article 24 (the rights of the child) of the Charter, the examination of applications for international protection of unaccompanied children must be ensured as early as possible. The same applies to their access to family tracing and reunification procedures in line with Article 7 (respect for private and family life) of the Charter and applicable secondary EU law.

1.3 Enhancing provision of information on asylum

Access to sufficient information is an important element to ensure that new arrivals are aware of the possibility to claim asylum, know the asylum procedure and the related rights and obligations. By facilitating access to international protection, it helps minimise the risk of *refoulement*. For this reason, the Asylum Procedures Directive stipulates in Article 8 (1) the obligation of Member States to provide information on the possibility to apply for international protection at the border, and to provide the necessary interpretation arrangements, if needed.

Overall, during its fact-finding missions to the hotspots FRA noted significant improvements in ensuring access to international protection by new arrivals, after difficulties reported particularly in Italy at the end of 2015 and early 2016. The reported difficulties included allegations of superficial screening of protection needs, particularly among nationalities presumed to be predominantly 'economic migrants'.²⁸ Towards the end of the year, UNHCR and civil society organisations reported that many nationals of sub-Saharan African countries, particularly from West Africa, did not get a real opportunity to register their asylum claims.²⁹ This, in combination with the automatic issuance of expulsion orders to new arrivals instructing them to leave the country within seven days raised concerns about a possible risk of *refoulement*.³⁰ To address the matter, the Italian Ministry of the Interior issued internal instructions on 8 January 2016, reminding all first line officials to provide information about access to international protection procedures to newly arriving persons.

During its presence in Greece, the agency did not encounter systemic difficulties for newly arrived persons to claim asylum, although individual incidents did occur. In October 2016,

²⁸ See FRA (2016), *Monthly data collection on the current migration situation in the EU*, January 2016 monthly report, 1-31 January 2016, p. 58, <http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/january-2016>. See also a footage from a hearing on the matter in the Chamber of Deputies Parliamentary Commission of Inquiry on the Centres for Migrants, <http://webtv.camera.it/archivio?id=8844&position=0>.

²⁹ UNHCR (2015), *Europe's refugee emergency response: Update #17*, 1-7 January 2016, p. 6; ECRE (2016), *AIDA update Italy: New rules on asylum procedures and reception and concerns over 'hotspots'*, 8 January 2016.

³⁰ See FRA (2016), *Monthly data collection on the current migration situation in the EU*, December 2015 monthly report, 23 November-1 December 2015, p. 52, <http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/december-2015>.

UNHCR was not given access to a group of Syrians readmitted to Turkey from Kos,³¹ and persons readmitted in April 2016 from Chios included 13 individuals who had previously expressed the wish to apply for asylum to UNHCR.³²

The decision of whether to request asylum or not depends significantly on the information on asylum persons receive. Newly arrived asylum seekers, who FRA interviewed for one of its studies in 2011, pointed out that they often rely on information received from facilitators or fellow travellers.³³ This is of particular importance as persons may arrive in Europe with pre-set assumptions on the availability and conditions of asylum in different Member States. Proactive efforts to provide objective and reliable information are needed to avoid that they base their action on often distorted information they received from informal sources. Provision of both written **and** oral information is likely to be more successful.³⁴

The different actors have made efforts to improve the overall availability of information in the hotspots. In the summer of 2016, the European Commission, with the support of other international, European and national actors, initiated an information campaign in the Greek hotspots on asylum-related matters, relocation as well as the availability of support for voluntary returns. As a more sustainable measure, the campaign is to be followed up by establishing information desks in each of the five hotspots, although by mid November only one of them has been set up by the Reception and Identification Service and is fully functioning in Vial (Chios). In Italy, the Ministry of Interior has contracts with several organisations to provide information and support on arrival, including UNHCR (information on international protection in general), the International Organisation for Migration (general information on migration, including information on assisted voluntary returns, counselling to victims of trafficking in human beings, as well as assistance in their identification) and Save the Children (information to unaccompanied children). The involvement of Save the Children facilitates the provision of child-specific information, provided in a child-friendly manner – an issue that nevertheless continues to remain challenging, also in Greece where little child specific and child-friendly information is available.

The provision of information can be particularly challenging in case of large numbers of arrivals. In this regard, it is positive that authorities cooperate with other bodies that have specific experience in this field, particularly with UNHCR which is usually the first provider of such information, either during or shortly after disembarkation. However, not in all situations have these organisations the capacity to adequately inform all new arrivals, as disembarkations may take place in various parts of the country and several landings may occur at once. Interpretation, an issue that poses a challenge regarding all procedures of the hotspots, might not be available at all times given the variety of languages spoken and the limited staff.³⁵ As a result, information relevant for safeguarding the right to asylum may not always be provided in a language that the person understands.

³¹ UNHCR, *UNHCR concerns over the return of 10 Syrian asylum-seekers from Greece*, 21 October 2016, <http://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-return-10-syrian-asylum-seekers-greece.html>.

³² UNHCR Regional Bureau Europe, Daily Report, 5 April 2016, <https://data.unhcr.org/mediterranean/download.php?id=1000>.

³³ FRA (2011), *The duty to inform applicants about asylum procedures: The asylum-seeker perspective*, Luxembourg, Publications Office, p. 14.

³⁴ *Ibid.*, p. 9.

³⁵ As of 30 September 2016, UNHCR's team in southern Italy responsible for these activities comprised two field coordinators, seven legal officers and 12 interpreters. Amnesty International (2016), *Hotspot Italy: How EU's flagship approach leads to violations of refugee and migrant rights*, 3 November 2016, p. 38, www.amnesty.org/en/documents/eur30/5004/2016/en/.

Notwithstanding the importance of initial information provision after arrival, reliable and up-to-date information on asylum also needs to be available during further stay in the hotspot as part of a coordinated chain that responds to the changing legal framework and dynamic policy priorities (see also Section 4 on preventing tensions and promoting safety). Despite coordination measures, in some hotspots information still tends to be provided in a fragmented manner by a number of actors, who focus on specific issues rather than on providing information in a coordinated way. In some cases, only very basic information may be provided, for example by distributing information sheets that risk to become quickly outdated. Furthermore, written information material does not fully meet its purpose if it is unavailable in the relevant languages. The 'Information on the asylum procedure in Greece for those who arrived to Turkey after March 20, 2016', for example, which the national authorities issued with the EU's financial support, was not available in Urdu, one of the most common languages spoken by the persons in the Greek hotspots.³⁶

FRA Opinion 3

Adequate information on the right to apply for international protection and the procedure to follow is a prerequisite for accessing the right to asylum, as stipulated in Article 18 of the Charter and the 1951 Geneva Convention relating to the Status of Refugees. Significant efforts have been made in the hotspots to integrate written materials with oral information by involving the United Nations High Commissioner for Human Rights (UNHCR), and other humanitarian organisations as well as EASO. The capacity, however, is still not sufficient to cover all new arrivals, particularly in light of people's language diversity.

Regular reviews to assess the effectiveness of the provision of information should be carried out involving all actors. Building on current initiatives, more focus should be given to providing child-specific information ensuring that it is delivered in a child-friendly manner.

1.4 Complying with the Charter when taking fingerprints

Systematic registration of new arrivals including children is one important achievement of the hotspots. Registration is a fundamental component of international refugee protection. It helps protect refugees against *refoulement*, arbitrary arrest and detention, is necessary to give access to services, and enables the identification of vulnerable people.³⁷ The absence of systematic registration at the point of entry makes it easier for those who have the means to reach their preferred country of destination, but it also exposes those who are more vulnerable to protection risks. Systematic registration also helps address the host society's security concerns.

The European Agenda for Migration stresses the importance of fully implementing the rules on taking fingerprints at the borders.³⁸ The European Commission issued a guidance paper on how to implement the duty to take fingerprints, which also envisages

³⁶ Greece, Asylum Service, *Information on the asylum procedure for those who came from Turkey before March 20th, 2016 and are in open reception centres*, <http://goo.gl/bafNmk>.

³⁷ UNHCR (2003), *UNHCR Handbook for Registration*, September 2003, pp. 6-7.

³⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda for Migration*, COM(2015) 240 final, 13 May 2015.

as a last resort the use of coercive measures.³⁹ This led to a discussion about the feasibility and appropriateness of using restrictive measures to force third-country nationals or stateless persons to give their fingerprints, to which FRA contributed with a legal analysis and a checklist.⁴⁰ The checklist was produced in response to instances of alleged excessive use of force brought to FRA's attention from Italy in the course of 2015. FRA continued to receive such information until early 2016.⁴¹ Excessive use of force to take fingerprints has also been subject of an Amnesty International report published in November 2016, which is not limited to hotspots.⁴²

FRA Opinion 4

Asylum seekers and migrants in an irregular situation apprehended in connection with their irregular entry have a duty to provide fingerprints for Eurodac. As FRA pointed out in its 2015 focus paper, compliance with this obligation should primarily be secured through effective information and counselling. This can either be provided individually and/or through outreach actions targeting migrant communities, such as focus group discussions, information sessions and similar initiatives.

To comply with the provisions of the Charter on the right to dignity (Article 1) and integrity of a person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the right to liberty and security (Article 6), the use of physical or psychological force to obtain fingerprints for Eurodac should be avoided because it entails a high risk of violating fundamental rights. Children, suspected victims of torture, sexual or gender-based violence, victims of other serious crimes, as well as traumatised people should not be detained or coerced into giving fingerprints, nor should any other people usually considered vulnerable.

1.5 Increasing availability of legal support and legal aid

Given the complexity of the asylum procedures as well as language barriers, the availability of legal support is a precondition for meeting the standards required by Article 47 of the Charter for effective access to a remedy in case of a negative asylum decision. Asylum seekers should be informed about their right to a lawyer at all stages of the procedures and have access to free legal assistance and representation at second instance. In cases involving international protection, availability of legal support becomes a key safeguard against *refoulement*, as highlighted by ECtHR jurisprudence,⁴³ as also acknowledged in Article 20 of the Asylum Procedures Directive. As a general principle of the right to access to justice, access to a lawyer should be as unimpeded as possible and ensure confidentiality.⁴⁴

As no asylum procedures take place in the hotspots in Italy, this part only covers the hotspots in Greece. For appeal proceedings, Greek national law grants access to free

³⁹ European Commission, *Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, Commission Staff Working Document, SWD(2015) 150 final, 27 May 2015.

⁴⁰ FRA (2015), *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, Luxembourg, Publications Office.

⁴¹ See FRA (2016), *Monthly data collection on the current migration situation in the EU*, February 2016 monthly report, 1-29 February 2016, p. 70, http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-monthly-compilation-com-update-3_en.pdf.

⁴² Amnesty International (2016), *Hotspot Italy: How EU's flagship approach leads to violations of refugee and migrant rights*, 3 November 2016, p. 38, www.amnesty.org/en/documents/eur30/5004/2016/en/.

⁴³ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 185-186.

⁴⁴ ECtHR, *Kopp v. Switzerland*, No. 23224/94, 25 March 1998, para. 74, and ECtHR, *S. v. Switzerland*, No. 12629/87 and 13965/88, 28 November 1991, para. 48.

legal assistance and representation.⁴⁵ While a functioning national legal aid scheme is still in the making, free legal aid is currently provided through a temporary project, which the European Commission funds, and UNHCR and its local partners implement.⁴⁶ Within this project, some 26 lawyers work on the five islands hosting a hotspot, mainly dealing with appeals cases. Few other lawyers, including pro bono lawyers, provide on a short-term basis legal counselling; the Council of Bars and Law Societies of Europe, for example, is one of the organisations which deploys lawyers from other countries to the hotspots.⁴⁷ Lawyers only infrequently accompany asylum seekers during the first instance interview.

The limited availability of lawyers to provide support during first instance asylum proceedings represents a specific challenge in the case of unaccompanied children in the hotspots. According to Greek law,⁴⁸ children aged 15 years and over can submit an application for international protection on their own, and as a result may not have a practical opportunity to be assisted by a lawyer during the asylum interview (or in fact other administrative procedures). There were some attempts to close this gap in individual hotspots, such as the joint initiative by the Reception and Identification Service and non-governmental actors in Moria (Lesvos) to support all unaccompanied children throughout the procedures in particular regarding family reunification claims. Such isolated efforts, however, cannot replace a systematic solution at national level.

FRA Opinion 5

Availability of legal support is a prerequisite for full access to the right to asylum. As required by Article 20 of the Asylum Procedures Directive and stemming from Article 47 (the right to an effective remedy and to fair trial) of the Charter, free legal assistance and representation must be available for appeal proceedings. Providing legal support before, namely during the first stage of the asylum procedure, could significantly alleviate the pressure on the appeals system and reduce the number of decisions overturned on appeal.

Notwithstanding the practical challenges involved, efforts should be made to extend the availability of legal support to the remainder of the asylum proceedings in light of its complexity. Priority should be given to unaccompanied children and other applicants in need of special procedural safeguards.

⁴⁵ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 44 (3).

⁴⁶ UNHCR, *Refugees/Migrants Emergency Response – Mediterranean*, Greece Web Data Portal, Europe's Refugee Emergency Response Update #29, 19 July–8 August, <http://data2.unhcr.org/en/documents/details/51145>, p. 1.

⁴⁷ See Council of Bars and Law Societies in Europe, *CCBEInfo*, Special Edition – Migration, p. 4, www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO_special_edition_2_016/EN_newsletter_special_edition.pdf.

⁴⁸ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 36 (8) and (9).

2. Rights of the child

Children represent the largest vulnerable group in the hotspots. On the Greek islands, for example, children represent an estimated 37 % of all arrivals in 2016.⁴⁹ A significant proportion of them are unaccompanied, others may be separated from their parents but accompanied by another adult.⁵⁰ In Italy, 19,001 unaccompanied and separated children arrived in the first nine months of 2016.⁵¹

The ECtHR repeatedly stated that the special protection granted to asylum seekers is particularly important in case of children, in view of their specific needs and their extreme vulnerability, whether unaccompanied or accompanied by parents.⁵² Article 24 of the Charter emphasises the best interests of the child as a key principle of all actions taken in relation to children by public authorities and private actors. In this regard, Member States must provide to the child such protection and care as is necessary for his or her well-being and development. According to Article 3 of the Convention on the Rights of the Child, they should also ensure that institutions, services and facilities responsible for the care or protection of children promote and safeguard the child's best interests and wellbeing and are subject to effective supervision and monitoring. The principle of the best interests as a primary consideration is reiterated in EU secondary law (in particular Articles 7 and 25 of the Asylum Procedures Directive, Articles 23 and 24 of the Reception Conditions Directive⁵³ and Articles 10 and 17 of the Return Directive⁵⁴) which provides specific safeguards for children in asylum and return procedures.

The best interests of the child depend on the extent to which the child can enjoy the rights set forth in the United Nations (UN) Convention on the Rights of the Child. This includes, but is not limited to, the right to family life (Article 9), safety from various forms of violence and exploitation (stipulated in Articles 19, 34, 35 and 36, and discussed in Section 4), health (Article 24), adequate standard of living (Article 27) and education (Articles 28 and 29). In a similar manner, Article 24 of the Charter needs to be interpreted in conjunction with the relevant Charter rights including the right to family life (Article 7), education (Article 14) and healthcare (Article 35). Other provisions of the Convention on the Rights of the Child address the protection of children who are temporarily or permanently deprived of parental care and family environment (Article 20), the protection of refugee and asylum-seeking children, both accompanied and unaccompanied (Article 22) and prohibition of unlawful or arbitrary deprivation of

⁴⁹ UNHCR, Refugee/Migrants Emergency Response – Mediterranean, updated 20 November 2016, <http://data.unhcr.org/mediterranean/country.php?id=83>

⁵⁰ A 'separated child' is a child who has been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. UN Committee on the Rights of the Child General Comment No. 6 CRC/GC/2005/6 and the UN Guidelines for the Alternative Care of Children (UN Alternative care guidelines) A/HRC/11/L.13), para. 8.

⁵¹ UNHCR, Italy Unaccompanied and Separated Children (UASC) Dashboard, January-September 2016, <http://data.unhcr.org/mediterranean/download.php?id=2152>.

⁵² See ECtHR, *Tarakhel v. Switzerland*, No. 29217/12, 4 November 2014, para. 99. ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 91. ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 July 2011, para. 87.

⁵³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

⁵⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

liberty (Article 37). The best interests of the child must be assessed giving due weight to the views of the child in accordance with their age and maturity.

2.1 Ensuring a functioning system of guardianship for unaccompanied children

Unaccompanied children represent a specific category due to their increased vulnerability that requires special attention from the authorities. In the absence of their parents they need a guardian that supports them during their stay. Safeguarding their best interests depends therefore on the effectiveness of the national guardianship system. The role of guardians is critical in terms of ensuring the child's access to services, information and other support.

Guardians are generally responsible for safeguarding the child's best interests and general well-being and to this effect complement the limited legal capacity of the child.⁵⁵ Where this system is not capable, in terms of structure, capacity or responsiveness, of handling the increased pressure, this can lead to serious gaps. This includes, for example, delayed family reunification, lack of effective access of the child to the asylum procedure (in Greece, children younger than 15 years cannot submit an asylum application without a legal representative,⁵⁶ whereas in Italy there is no such limitation⁵⁷) or relocation, or assistance on other key procedural issues where the child cannot act alone. This has also implications for the work of EU bodies on the ground, particularly on EASO.

In case of both Greece and Italy, unaccompanied children staying in the hotspots are assigned a temporary guardian who acts as an interim legal representative until the competent judicial authority appoints a permanent guardian, when available. This usually happens weeks or months later when the children have been transferred out of the hotspot. Such temporary guardianship is assigned automatically to public officials. In Greece, a local prosecutor for juveniles or First Instance Public Prosecutor would assume this role.⁵⁸ In Italy, where guardianship falls within the competence of the municipalities, the practice varies depending on the locality. The shortage of qualified guardians (who according to Italian law may be volunteers), nevertheless, commonly leads to the need to appoint a temporary guardian, such as a local mayor or another person responsible for the hotspot (such as the municipal police commander in Taranto).⁵⁹ They carry out this task in addition to their everyday functions. Most of them have not received any training on the specific situation of asylum seeking or migrant

⁵⁵ FRA (2015), *Guardianship systems for children deprived of parental care in the European Union - With a particular focus on their role in responding to child trafficking*, Luxembourg, Publications Office, p. 14.

⁵⁶ Greece, Presidential Decree No. 113 on the establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (L 326/13.12.2005) and other provisions, Article 4 (3).

⁵⁷ Italy, Legislative Decree No. 25 of 28 January 2008, as amended.

⁵⁸ Greece, Presidential Decree No. 220 of 2007 on the transposition into the Greek legislation of Council Directive 2003/9/EC from January 27, 2003 laying down minimum standards for the reception of asylum seekers, and Presidential Decree No. 141, G.G. A' 226, of 2013, on the transposition into the Greek legislation of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (L 337) on minimum standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast). Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC.

⁵⁹ Italy, Civil Code [*Codice civile*], Articles 343-359.

children and guardianship functions and become only involved when formally required to complement the limited legal capacity of the child.

Public officials appointed as temporary guardians may not be equipped with sufficient child protection expertise and skills, and typically have a large number of children they are responsible for, which affects the effectiveness of the support they may be able to provide to the children. As an illustration, based on information provided by the local authorities, the First Instance Prosecutor in Lesvos on 13 of October 2016 was the temporary guardian for more than 200 unaccompanied children held in the hotspot or placed in the transit shelters on the island. In Italy, on 23 August 2016, the Mayor of Pozzallo was in charge of 193 unaccompanied children.

The high number of children per individual guardian makes it virtually impossible to extend the role of the guardian beyond completing formal requirements. Moreover, when the legal guardian is also formally the manager of the hotspot or the reception facility this creates a potential conflict of interest. For this purpose, the joint handbook on guardianship published by the European Commission together with FRA suggests to avoid appointing managers of reception facilities as guardians.⁶⁰

In practice, *ad hoc* arrangements are often used to deal with the high number of cases requiring guardianship. In Greece, the legislation provides the possibility to the prosecutor to assign the legal representation tasks (but not full guardianship) to a non-profit organisation.⁶¹ In such cases, organisations running shelters where these unaccompanied children are placed assume legal representation tasks and assign a lawyer to represent the child in the proceedings. For unaccompanied children held in the hotspots, some prosecutors have also assigned specific tasks to individual non-profit organisations or lawyers, for example legal representation of children aged under 15 years in the proceedings.

The Greek government is working on a legislative proposal that aims to reform the guardianship system for unaccompanied children to allow for the prompt appointment of individual guardians to all unaccompanied children to safeguard the best interests of the child and ensure effective protection. It will provide for a national registry of independent and qualified guardians that could be locally appointed by prosecutors. Italy is also in the process of introducing changes to the legislation protecting unaccompanied children, which touches on issues relating to guardianship.⁶²

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For unaccompanied children, an effective guardianship system is a pre-condition to ensure the child's best interests and general well-being, as required by the United Nations (UN) Convention on the Rights of the Child and Article 24 (the rights of the child) of the Charter. In Greece and Italy, temporary guardianship for large numbers of unaccompanied children arriving at the hotspots is assigned to local public officials without specialised child protection expertise.

⁶⁰ FRA (2014), *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office, p. 36.

⁶¹ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 34 (l).

⁶² Italy, Chamber of Deputies, legislative proposal ZAMPA and others, Modifiche al testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, e altre disposizioni concernenti misure di protezione dei minori stranieri non accompagnati (1658), www.camera.it/leq17/126?tab=1&leq=17&idDocumento=1658&sede=&tipo=.

The temporary guardianship arrangements in both countries should be reviewed to ensure that qualified and skilled personnel exercise this role, having sufficient financial resources and capacity to fulfil this role. At the same time, temporary guardians should be replaced as soon as possible by more permanent and sustainable guardians.

2.2 Standardising procedures for separated children

Migrant children who are not travelling together with their parents or legal guardians but are accompanied by other adults are referred to as separated children. As they do not benefit from their parents' protection, they should have the same entitlements as unaccompanied children, including guardianship. Different approaches have, however, been observed in individual hotspots when dealing with these children, particularly when they travel with adult relatives. According to the Committee on the Rights of the Child, in such cases guardianship should be assigned to the accompanying adult family member unless there is an indication that this would not be in the best interest of the child.⁶³

In Greece, in the absence of standardised approaches, temporary care and protection arrangements for separated children have been handled differently, without necessarily assessing if the child is at risk of abuse or neglect by the accompanying adult and without appointing a guardian for the child. A risk assessment is not undertaken systematically by the authorities.

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Separated children – meaning children who are not travelling together with their parents or legal guardians but are accompanied by other adults – may be exposed to heightened risk of abuse or neglect. They must be identified and registered to ensure that they are provided the protection and care necessary for a child's well-being, as required by Article 24 of the Charter.

As a matter of priority, an individual risk assessment should be carried out with each separated child to determine whether or not there are risks related to placing the child with the accompanying adult and, if so, to determine the necessary protection measures, monitoring and follow-up measures. Such assessment should be undertaken based on standardised procedures, and it requires qualified psychosocial staff with child protection expertise, who is not yet available in all hotspots. The risk assessment requires sufficient time and constant monitoring of the family situation.

2.3 Ensuring protection of unaccompanied children without resorting to detention

In Greece as well as in Italy, new arrivals including children are confined to the hotspots until they are registered and fingerprinted. In Italy, deprivation of liberty by the police can last for up to a maximum 96 hours, after which it can only be continued if confirmed by a judge.⁶⁴ In Greece, deprivation of liberty is possible for a three-day period that can be extended up to 25 days, before allowing the persons to leave the hotspot as long as

⁶³ UN, Committee on the Rights of the Child (2005) *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, para. 34.

⁶⁴ Italy, Immigration code (*Testo unico sull'immigrazione*), legislative decree No. 286, 25 July 1998 (as amended), Article 14 (3) and 14 (4); Constitution of the Italian Republic, Article 13.

they remain on the island on which the hotspot is located.⁶⁵ In addition, unaccompanied children are deprived of their liberty in some hotspots as a discretionary protective measure imposed by the temporary guardian or the Reception and Identification Service to prevent exploitation and avoid children going missing. Finally, in Greece, unaccompanied children involved in disturbances were moved to migration detention facilities for public order reasons.

In the last case, children suspected of involvement in riots in the hotspots have been transferred to pre-removal detention facilities in Amygdaleza and Petrou Ralli in Athens, both of which have been the subject of long-standing criticism for the poor standards of detention conditions.⁶⁶ In such cases, it is questionable whether the use of immigration detention facilities is appropriate and whether such situations should not be treated under the national juvenile justice system rather than dealt with by immigration detention, although in this case due regard should be taken of similarly serious criticism voiced in relation to the conditions in Greek juvenile detention facilities.⁶⁷

The use of 'protective custody' in relation to unaccompanied children raises further questions.

Article 6 of the Charter and Article 5 of the ECHR stipulate the right to liberty, with the latter listing a set of permissible grounds for detention. Among these are also the prevention of unauthorised entry and detention for the purpose of removal (Article 5 (1) (f)) and educational supervision (Article 5 (1) (d)). Regardless of the ground for detention, when interpreting Article 5 of the ECHR, the ECtHR held that the detention of children is arbitrary in facilities that are inadequate to cater for their specific needs.⁶⁸

According to Article 37 of the UN Convention on the Rights of the Child, children may be deprived of liberty "only as a measure of last resort and for the shortest appropriate period of time". The Committee on the Rights of the Child clarified specifically in relation to unaccompanied or separated children that they "should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack

⁶⁵ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 14 (2).

⁶⁶ In 2013, the UN Special Rapporteur on the human rights of migrants described the detention conditions at Petrou Ralli as "totally unacceptable". The outdoor area of the Amygdaleza detention facility for children is described as a "small cage". UN Human Rights Council (2013), *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Addendum, Mission to Greece*, A/HRC/23/46/Add.4, 18 April 2013, p. 13, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/46/Add.4.

⁶⁷ See for example European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2016), Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015, CPT/Inf (2016) 4, pp. 60-61.

⁶⁸ ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, paras. 118-120; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 74-75; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, paras. 100-102.

thereof.⁶⁹ Overall, at the global level, it is increasingly considered that children should never be detained for immigration related reasons alone.⁷⁰

Article 24 (2) of the Reception Conditions Directive requires that unaccompanied children who have made an application for international protection must be placed either with adult relatives, a foster family, in accommodation centres with special provisions or other suitable accommodation. Detention of unaccompanied children can only be applied in case of “exceptional circumstances” and all efforts are to be made for release to take place as soon as possible, in line with Article 11 (3) of the directive.

Under Greek and Italian law, unaccompanied children should be accommodated in special facilities designated for that purpose.⁷¹ In Italy, unaccompanied children seeking asylum cannot be detained.⁷² In Greece, unaccompanied children who have applied for asylum while in detention may only remain in detention in “very exceptional cases” and “as a last resort” for the time required to refer them safely to appropriate accommodation facilities. Such detention cannot exceed 25 days. It can, nevertheless, be prolonged by additional 20 days when, due to “exceptional circumstances” and “despite reasonable efforts by competent authorities”, it is not possible to provide for their safe referral to appropriate accommodation facilities.⁷³

The overall capacity of these facilities does not meet the current needs. According to official statistics of the National Centre for Social Solidarity (EKKA), as of 13 October 2016, there were 1,100 such accommodation spaces available across Greece, but a further 1,627 children remained on the waiting list, some 343 of them staying on the five islands where the hotspots are located.⁷⁴ Similarly, accommodation facilities are also insufficient in Italy leading to the establishment of a new form of temporary facilities for unaccompanied children at Prefecture level.⁷⁵ In the absence of sufficient capacity in dedicated specialised facilities, these children remain in the hotspots pending further transfer. Although in Italy and Greece additional facilities have

⁶⁹ UN, Committee on the Rights of the Child (2005), General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, para. 61.

⁷⁰ See, for example: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2009), 20 years of combating torture. 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, Council of Europe, para. 97. Inter-American Court of Human Rights, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, para. 160; Council of Europe, Parliamentary Assembly, Resolution 2020 (2014) on the alternatives to immigration detention of children, para. 9 (1) and Recommendation 2056 (2014) on the alternatives to immigration detention of children, para. 2.

⁷¹ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EU, Article 14 (8); Italy, Decreto legislativo No. 142/2015, Art. 19 and Ministerial decree of 1 September 2016, *Istituzione di centri governativi di prima accoglienza dedicati ai minori stranieri non accompagnati*, No. 16A06605, Official Gazette No. 210, 8 September 2016.

⁷² Detention of a child with his/her parents is possible under the General Directive of the Ministry of Interior on Detention Centres and assistance pursuant to Article 22, paragraph 1 of Decree of the President of the Republic No. 394 of 31 August 1999.

⁷³ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EU, Article 46 (10) (b).

⁷⁴ Greece, National Centre for Social Solidarity (EKKA), *Situation Update: Unaccompanied Children in Greece*, 13 October 2016, p. 1.

⁷⁵ Italy, Ministry of Interior, Decree of 1 September 2016, *Istituzione di centri governativi di prima accoglienza dedicati ai minori stranieri non accompagnati*. (16A06605), Official Gazette No. 210 of 8 September 2016.

been or are being established near the hotspots to serve as temporary (transit) shelters, their capacity is also insufficient.

For their protection and to avoid children going missing, in some hotspots in Greece and at least in one hotspot in Italy unaccompanied children would not be allowed to leave the hotspot, sometimes being confined to a dedicated section only. The material conditions and availability of meaningful age-appropriate activities in such sections for unaccompanied children are generally of even lower standards than in the entire hotspot.

Variants of this *de facto* detention have been applied in different hotspots. In some cases, this has contributed to situations where unaccompanied children would declare themselves as adults to be able to leave the hotspot or not to be separated from other asylum seekers or migrants, thus losing their entitlement to be treated according to their age. Detention that in practice can last for months, particularly in Greece, has additional adverse effects and may contribute to the occurrences of violence or suicide attempts registered among unaccompanied children in the hotspots.

Given that the *de facto* detention of the children in these hotspots after their registration is not motivated by reasons of preventing entry or facilitating removal, it should be examined whether it can be considered a measure of educational supervision under Article 5 (1) (d) of the ECHR. The ECtHR has clarified that such supervision must be understood broadly, embracing many aspects of the exercise, by the authority, of parental rights for the benefit and protection of the child.⁷⁶ It stated that a holding facility does not constitute “educational supervision” if no educational activities are provided, and that the state is obliged to put in place appropriate institutional facilities which meet the security and educational demands of that system in order to satisfy the requirements of under Article 5 (1) (d).⁷⁷ In light of this case law, the prolonged confinement of unaccompanied children in hotspots is not justifiable under Article 5 (1) (d).

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Under Articles 7 (respect for private and family life) and 24 of the Charter, detention of children, including unaccompanied and separated children, is rarely justified. In its case law, the European Court of Human Rights (ECtHR) also made it clear that the detention of children is not allowed in facilities that are inappropriate – as is the case for the hotspots. Children in hotspots should not be deprived of liberty, particularly once they have already been registered. The need for separate accommodation and protection of children who remain in the hotspots because of chronic lack of dedicated accommodation capacity and delays in processing their asylum claims should not be resolved at the expense of children’s rights.

Member States must ensure that sufficient capacity is available to meet the requirements under EU and national law for adequate accommodation of unaccompanied children seeking asylum. The European Union should continue to support national measures aimed at addressing the chronic lack of child-appropriate reception capacity in Greece and Italy.

⁷⁶ ECtHR, *P. and S. v. Poland*, No. 57375/08, 30 January 2013, para. 147.

⁷⁷ ECtHR, *Ichin and Others v. Ukraine*. Nos. 28189/04 and 28192/04, 21 March 2011, para. 39; ECtHR, *A. and Others v. Bulgaria*, No. 511776/08, 29 February 2012, para. 69; ECtHR, *D.G. v. Ireland*, No.39474/98, 16 August 2002, para. 79.

2.4 Providing adequate conditions and access to services for children

Under Article 24 of the Charter, children are entitled to protection and care as is necessary for their well-being. This applies to all children, regardless of their nationality and legal status, or whether they are unaccompanied or with their families. Article 23 of the Reception Conditions Directive requires that children are ensured a standard of living adequate for their physical, mental, spiritual, moral and social development, as well as access to leisure activities, including age-appropriate play and recreational activities and to open-air activities. Articles 14 and 19 of the directive guarantee the right to education and healthcare.

Adequate response to the needs of children in the hotspots requires the presence of qualified staff, both women and men, with child protection and social work expertise. Social professionals and specialised care workers should be part of the staff but also specialists who are experienced in dealing with traumatised children or nutrition experts. Regarding healthcare, except for volunteers, typically no paediatricians visit the hotspots in both countries, which raises concerns given the proportion of children among the population in the hotspots.

As regards education, children have special entitlements stemming from the Reception Conditions Directive as well as the Return Directive (which in its Article 14 covers access to education for irregular migrants awaiting removal among safeguards pending return). According to Article 14 (2) of the Reception Conditions Directive, access to education may not be postponed for longer than three months from the moment an asylum application has been lodged. In legal terms, in both Member States children are granted access to education regardless of their migration or residence status. In practice, however, provision of educational activities for children staying in the hotspots has been challenging. School activities organised in the hotspots are mostly *ad hoc* and access to external schools has been limited to a few projects in Greece. Notable initiatives include an NGO-run education scheme catering for children from the hotspot and open camps in Chios.⁷⁸

Mostly NGOs and local volunteer organisations provide leisure activities for children in the hotspots; only in some cases, the camp management supports them. In some Greek hotspots, for example, these include sports activities or trips outside the hotspot. Child-friendly areas for play are not available in all hotspots since establishing such facilities depends on the financial and human resources of the organisations involved, the localities of the camps and the support of the management of the hotspots.

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EU law places specific requirements on the material conditions, education, healthcare and child-specific activities needed to ensure the child's well-being and to meet children's special needs. Even where these rights are guaranteed in national law, lack of arrangements on the ground may lead to unavailability of core services in practice.

⁷⁸ https://www.facebook.com/refugeeeducationchios/about/?ref=page_internal

There should be a qualified person responsible for child protection issues in each hotspot. This person should identify the needs of the children and, together with the responsible national authorities and other actors, address the gaps in children’s rights to healthcare, education, age-appropriate leisure activities and overall adequate living conditions. In this context, formal education should be provided to all children not later than three months after their arrival.

2.5 Vetting of staff who have direct and regular contacts with children

All children and in particular those who are separated or unaccompanied are highly vulnerable to abuse and exploitation. Living conditions that often do not meet basic standards, combined with a lack of measures to prevent violence and promote safety and wellbeing of children and other vulnerable persons living in the hotspots, increase children’s inherent vulnerability and risk of exploitation.

The Reception Conditions Directive requires in Article 23 (d) and Article 18 the Member States to take measures to promote and ensure safety and security of persons residing in all premises and accommodation centres and put in place child protection safeguards to prevent violence, abuse and exploitation of children. Vetting and screening of persons that come in direct contact with children, especially in closed facilities such as the hotspots, along with child safeguarding policies are necessary to prevent abuse.

Article 10 of the Directive on Child Sexual Abuse and Exploitation specifically provides for the disqualification of persons who are convicted for certain offences against children to exercise temporarily or permanently professional activities involving direct and regular contacts with children. It also calls on Member States to take the necessary measures to ensure that employers (including voluntary organisations) conduct proper screening of all staff and volunteers when recruiting a person for professional or organised voluntary activities involving direct and regular contacts with children.⁷⁹ The need to regulate and control access of organisations and individual persons in the hotspot facilities is also important in light of existing security concerns in most of the hotspots (see also Section 4 in relation to the safety in the hotspots).

In both Greece and Italy, convicted persons are disqualified from becoming civil servants; in principle, checks of criminal records of staff are carried out during recruitment and before their formal appointment. In addition to the public authorities, other actors, including international and civil society organisations, provide services and undertake various activities in the hotspots; their staff or volunteers are present in the hotspot facilities and do come into direct contact with children. In most cases, such services are provided in the context of an agreement or subcontract signed between competent national authorities and respective organisations. In Greece, the Reception and Identification Service holds a registry of civil society organisations.⁸⁰

The Greek administrative framework sets out the quality and safety requirements for civil society organisations that could be subcontracted to undertake specific activities in

⁷⁹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

⁸⁰ Invitation to civil society organisations to express interest for registration in the Registry of First Reception Service, Athens, 11 January 2016, Ref. 15-1/233, www.firstreception.gov.gr/PRImages/EditorImages/%CE%A0%CE%A1%CE%9F%CE%A3%CE%9A%CE%9B%CE%97%CE%A3%CE%97%CE%9C%CE%97%CE%A4%CE%A1%CE%A9%CE%9F%CE%9C%CE%9A%CE%9F%2016GRK%20LAT%20PAP.pdf.

the reception facilities run by the Reception and Identification Service. This framework, however, does not include vetting and screening obligations of their personnel who comes into direct and/or regular contact with children, or any other safeguard such as child protection safeguarding policies.⁸¹ Some civil society and international organisations, such as Save the Children, do have a child protection safeguarding policy that requires the vetting of personnel. There is, nevertheless, no evidence that other actors also apply such requirements, or that competent national authorities effectively and systematically monitor the implementation of such requirements.

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EU law requires that persons exercising activities involving direct and regular contact with children are subject to proper screening. Such measures are also necessary to comply with the provisions of Article 24 of the Charter to safeguard the best interests of the child and promote the child's safety and well-being. Although checks of criminal records are part of the recruitment procedures of public authorities in both Greece and Italy, this might not be the case for subcontracted staff or volunteers working in the hotspots.

Clear obligations should be in place for systematic vetting and screening of all personnel in the hotspot facilities who comes into direct contact with children, including appropriate measures to ensure effective implementation and monitoring. Vetting procedures should include as a minimum checks of criminal records against convictions, as described in Article 10 of the Directive on child sexual abuse and exploitation of children (2011/92/EU).

Such procedures should apply to all staff national authorities and their implementing partners recruit, regardless of the type of contract. In addition, all international and civil society organisations should introduce a child safeguarding policy and vetting requirements for all their staff and volunteers, and for the staff of their partner organisations who access the hotspots.

⁸¹ Greece, Common Ministerial Decision No. 11.1/5042 of Ministry of Interior and Administrative Reform, Ministry of Labour Social Security and Social Solidarity and Ministry of Finance, 28 April 2016, www.etqr/idosc-nph/search/pdfViewerForm.html?args=5C7QrtC2zwFHp_31M9ESQXdtvSoCrlL8JGD3SRQTdV4tiDow6HlTEJlnj48_97uHrMts-zFzeyCIBSQOpYnTy36MacmUFCzppFvBej56Mmc8Qdb8ZfRjQZnsAdk8Lv_e6czmhEembNmZCMxLMtSGTxRs1u7KxSYKUqDB33ef7lcAJPBUI3q6X4SNGH9s..

3. Identification of vulnerabilities

According to Article 21 of the Reception Conditions Directive, children, unaccompanied children, persons with a disability, elderly persons, pregnant women, single parents with children, victims of human trafficking, persons with serious illnesses or mental disorders and persons who have been subjected to torture, rape or other serious forms of violence belong among vulnerable groups requiring special safeguards and care.⁸² This list is not exhaustive, as other persons can be considered vulnerable, for example lesbian, gay, bisexual, trans and intersex (LGBTI) persons. In the hotspots framework, specific cases of vulnerability are not infrequent, such as persons suffering trauma due to having escaped an armed conflict or who have lost family members at sea. The definition of vulnerability under Greek law also specifically mentions persons with a post-traumatic stress disorder resulting from such experiences.⁸³ Vulnerable persons are not subject to the fast-track asylum procedure on the Greek islands and EASO conducts a vulnerability assessment to ascertain their status and needs. In Italy, various actors, including UNHCR, IOM and Save the Children as well as EASO, support the prioritisation of cases of vulnerable persons and their referral to services provided by the Italian authorities (see also Section 1).

The Charter refers specifically to the rights of the child (Article 24), the elderly (Article 25) and persons with disabilities (Article 26). In addition, Article 1 of the Charter stipulates the inviolability of human dignity of any person. Any measures taken by EU bodies or Member States when implementing EU legislation have to be construed in such a manner that they take into account the special situation of vulnerable persons and do not lead to violation of their dignity.

3.1 Ensuring identification upon arrival and throughout stay

Identification of vulnerabilities is a crucial step in ensuring that the special needs of vulnerable persons are taken into account and their rights adequately safeguarded. Under Article 22 (1) of the Reception Conditions Directive, Member States have an obligation to assess whether an applicant for international protection has special protection needs. The proposed recast Reception Conditions Directive further enhances this by requiring that the assessment is conducted systematically and initiated as early as possible.⁸⁴ The role of EU agencies in the procedures taking place in the hotspots entails a responsibility to support the national authorities in this regard. In Italy, the responsibility of each actor is defined in the standard operating procedures applicable to all hotspots, whereas in Greece the activities of different actors are not similarly coordinated.

Particularly in case of large numbers of arrivals, identification at an early stage (on the vessel, during disembarkation or first reception) can pose a challenge. Only very obvious or self-

⁸² For the definition of vulnerable groups under Greek law, see Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 14 (8). For the definition under Italian law, see Italy, Legislative Decree No. 140/2005, Article 17.

⁸³ Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Article 14 (8).

⁸⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, 2016/022 (COD), 13 July 2016, Article 21 (1).

declared vulnerabilities are identified at an early stage whereas others (such as victims of trafficking or torture) are often not, unless concerted efforts to achieve this are in place.⁸⁵ In the past, the ECtHR has emphasised that the state has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.⁸⁶ When not identified early, such special protection needs will then not be taken into account in designing a protection-sensitive response (e.g. when allocating a place to sleep or referring the person to special support services).

While the registration of new arrivals requires an individual approach to each case, a certain degree of standardisation of the procedures for the identification of vulnerabilities ensures that vulnerability indicators are consistently looked out for and recorded. The screening procedure carried out largely by Frontex and/or the national police represents a key stage in this regard. In Italy, the police has developed standardised forms for the initial identification interview (*Foglio Notizie*). The same holds true for Greece, although there hotspot-specific forms with a varied degree of comprehensiveness were used in the past.

Identification and reporting of vulnerabilities needs to be possible and supported by all actors during the entire stay in the hotspot, which can be challenging especially at those hotspots where access to psychological services is limited. In some hotspots, for example, medical and psychological services are placed in a restricted area where access is difficult for those who did not have a prior appointment. Others need to justify their visit to the guards, in front of other persons waiting at the gate. Besides reducing the accessibility of medical services, this further diminishes the likelihood that persons who have not yet reported their vulnerability or who have become vulnerable during their stay at the hotspots (such as victims of violence) would report their vulnerability and have it acknowledged and addressed.

FRA Opinion 11

Identification and referral of vulnerable people as required by the Reception Conditions Directive (2013/33/EU) is a shared responsibility of all actors operating in the hotspots. As such, it should be outlined in standard operating procedures as an integral part of first reception and identification procedures, and remain a constant priority.

First reception and identification procedures should be set up in a way that allow medical, social and psychosocial staff to work in tandem with the authorities interviewing new arrivals. Screening forms should facilitate recording of vulnerabilities and the effectiveness of identification systems should be regularly reviewed at hotspot coordination meetings. Psychosocial and medical staff should be located in places that are easily accessible to people hosted in the hotspots. They should also regularly visit the reception areas to facilitate the detection of vulnerabilities, with due regard to the right to privacy.

⁸⁵ See, for example, The Aire Centre and ECRE (2016), *With Greece: Recommendations for Refugee Protection*, <http://www.ecre.org/wp-content/uploads/2016/07/With-Greece.pdf>, p. 19.

⁸⁶ See ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010.

3.2 Providing an adequate response to trafficking in human beings

Victims of trafficking in human beings represent one of the groups at risk who are particularly difficult to identify. At the same time, trafficking is a persistent issue that accompanies also large-scale migration flows. In its 2013 report on the fundamental rights situation at Europe's southern sea borders, FRA reported experiences of several migrant women interviewed in Spain who shared their experience of rape and abuse during the land journey before coming to Europe.⁸⁷ When reviewing the progress made in the fight against trafficking in human beings, the European Commission identified a need for coordination in the hotspots.⁸⁸

According to a survey the IOM carried out in arrival locations in southern Italy between June and September 2016, almost three quarters (71 %) of migrants taking the Central Mediterranean routes connecting North Africa to Europe have experienced exploitation.⁸⁹ In August 2016, in relation to the upsurge of arrivals of women of Nigerian origin, IOM warned that an estimated 80 % of them would have been trafficked to Europe for prostitution (an increase in the number of arriving Nigerian women was also recorded in Greece in summer 2016).⁹⁰ Based on an agreement with the Italian Ministry of Interior, the IOM assists in identification at disembarkation and provides information to vulnerable people focusing on unaccompanied children and victims of trafficking – this can be considered a promising practice.⁹¹ In Greece, the involvement of specialised organisations in identifying and assisting victims of trafficking is currently more limited.

Considerable attention is being paid to the issue of trafficking in human beings at the EU level, and the Anti-Trafficking Directive (2011/36/EU) emphasises the Member States' responsibility for ensuring assistance and support to victims, and providing adequate training for staff likely to come into contact with these victims.⁹² The impact on the situation in the hotspots, however, remains limited with insufficient awareness of, for example, Frontex-developed training and tools to identify victims of trafficking or the EASO Identification of Persons with Special Needs (IPSN) tool.⁹³

Referral of identified victims of trafficking from the hotspots to appropriate services poses another challenge. In some cases, referral may be available in law but not in

⁸⁷ FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office, p. 24.

⁸⁸ European Commission (2016), *Report on the progress made in the fight against trafficking in human beings as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, Brussels, SWD(2016) 159 final, p. 9; and European Commission (2016), *Staff Working Document Accompanying the Report on the progress made in the fight against trafficking in human beings as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, Brussels, (COM(2016) 267 final), para. 3.5.

⁸⁹ International Organisation for Migration (IOM), *Abuse, Exploitation and Trafficking: IOM reveals data on the scale of the danger and risks that migrants face on the Mediterranean routes to Europe*, 18 October 2016, <http://unitedkingdom.iom.int/abuse-exploitation-and-trafficking-iom-reveals-data-scale-danger-and-risks-migrants-face>.

⁹⁰ IOM, *Mediterranean Human Trafficking and Exploitation Prevalence Survey: IOM*, Press release, 12 August 2016, www.iom.int/news/mediterranean-human-trafficking-and-exploitation-prevalence-survey-iom. See also IOM (2015), *Rapporto sulle vittime di tratta nell'ambito dei flussi migratori misti in arrivo via mare, aprile 2014-ottobre 2015*, www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/pubblicazioni/oim-rapporto-sulle-vittime-tratta-nellambito-dei-flussi-migratori-misti.

⁹¹ See www.libertaciviliimmigrazione.dlci.interno.gov.it/it/hotspot.

⁹² Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital 25 and Article 11.

⁹³ See, for example, The Aire Centre and ECRE (2016), *With Greece: Recommendations for Refugee Protection*, <http://www.ecre.org/wp-content/uploads/2016/07/With-Greece.pdf>, p. 17.

practice due to lack of available places in appropriate facilities. As a result, only some victims are able to leave the hotspots while others remain there, where the possibility to protect them effectively remains limited. In other cases, such persons may be released from the hotspot without being allocated a place in an appropriate facility, which can have further adverse effects including their re-victimisation.

FRA Opinion 12

In line with the Anti-Trafficking Directive (2011/36/EU), staff in the hotspots likely to come into contact with victims of trafficking in human beings should be adequately trained to identify and deal with the victims. The availability of specialised expertise and awareness of existing guidance is limited in some of the hotspots.

Efforts should be made in Greece to step up the identification of possible victims, building on the promising practice in Italy, where the Ministry of Interior involved the International Organisation for Migration (IOM) to speak to people at risk upon arrival with the objective of identifying and referring victims to support services. Use of the existing identification tools could be further promoted and extended, including, for example, the adaptation of the Frontex VEGA Handbook on children at airports to sea borders.

3.3 Deploying sufficient female staff to identify women at risk

The large share of persons belonging to vulnerable groups in the hotspots requires a presence of appropriate staff in order to identify their specific needs. Having a sufficient number of female staff and interpreters in first-line services can improve the registration and interviews of certain vulnerable groups, such as single women or victims of gender-based violence. Similar considerations apply to the availability of same-sex staff to receive reports of harassment or sexual violence in the camps and facilitate potential referrals. Availability of sufficient numbers of female staff is equally important in case of procedures that involve physical contact, such as searches or fingerprinting for Eurodac. Procedures involving potential dignity and privacy issues vis-a-vis women should be conducted by female staff.⁹⁴

Female staff are uncommon among national police authorities carrying out first identification interviews. Although EASO and Frontex staff present in the hotspots include women (EASO, for example, has been providing both male and female interpreters and cultural mediators in Greece and Italy), this does not necessarily ensure sufficient presence of women among all relevant profiles including interpreters and during all shifts.

Interpreters play a crucial role due to their increased sensitivity to cultural and social issues, which is of particular importance during asylum interviews given the relevance of gender-based violence in asylum claims.⁹⁵ The right to request that the person

⁹⁴ See, for example, European Parliament (2016), *Report of 10 February 2016 on the situation of women refugees and asylum seekers in the EU*, (2015/2325(INI)), www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0024+0+DOC+XML+Vo//EN; or UN Women (2016), *Gender Assessment of the Refugee and Migration Crisis in Serbia and FYR Macedonia*, www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/country/serbia/gender%20assessment%20of%20the%20refugee%20and%20migration%20crisis%20in%20serbia.pdf?v=1&d=20160112T163308.

⁹⁵ The UNHCR Guidelines on Gender-Related Persecution, for example, state that while female applicants may be subjected to the same forms of harm as male applicants “they may also face forms of persecution specific to their sex, such as sexual violence, dowry-related violence, female genital mutilation, domestic violence, and trafficking,” (see UNHCR (2002), *Guidelines on Gender-Related Persecution*, Geneva).

conducting the interview and the interpreter are the same sex as the applicant is stipulated in Article 15 (3) (b) and (c) of the Asylum Procedures Directive.

FRA Opinion 13

Sufficient presence of female staff and interpreters contributes to safeguarding the dignity of women undergoing procedures in the hotspots and helps to ensure respect for their right to private life enshrined in Article 7 of the Charter. Besides meeting the requirement under Article 15 of the Asylum Procedures Directive to ensure that same sex staff is available on request of the applicant, it also plays an important role in facilitating the reporting of sexual and gender-based violence or when carrying out procedures that involve physical contact.

The availability of female staff and interpreters should be ensured in the day-to-day operation of the hotspot (such as when establishing work shifts); Member States should also take this into account when deploying experts to the hotspots.

4. Safety for all persons in the hotspots

According to Article 18 (4) of the Reception Conditions Directive, Member States must take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment. In the hotspots, serious incidents have been reported, including rape and other violent crimes, as well as suicide attempts and riots. The security situation in the hotspots has been particularly challenging in Greece, due to overcrowding, protracted stay and the implementation of readmissions to Turkey directly from the hotspots. The Table below outlines several significant incidents in the Greek hotspots between April and November 2016.

Table: Examples of incidents in the Greek hotspots, April-November 2016

Date	Incident	Hotspot
24.11.2016	After the death of two persons in an accidental explosion, fire spreads in the hotspot, reportedly started by persons accommodated in the camp. Several people have to be hospitalised.	Lesvos
09.11.2016	Following heavy rainfall damaging their tents and belongings, persons accommodated in the hotspot march through the streets demanding dry clothes and tents.	Samos
26.10.2016	Female asylum seekers protest about delays in examining their asylum claims. Reportedly, a woman attacks EASO staff.	Chios
24.10.2016	Riot, asylum seekers set fire to EASO facilities.	Lesvos
19.10.2016, 20.10.2016	Asylum seekers block hotspot entrance protesting about delays in examining their asylum claims and protracted stay on the island.	Chios
08.10.2016	Rape of a 25-year old Moroccan by three Algerians.	Lesvos
26.09.2016	A young Afghan man attempts to commit suicide after receiving a negative decision.	Chios
25.09.2016	Rape of a 16-year old unaccompanied boy by four other boys.	Lesvos
19.09.2016	Persons accommodated in the hotspot set fire to the camp.	Lesvos
04.09.2016	Violent clashes between children in the hotspot. Five unaccompanied children are transferred to the hospital while others abscond.	Lesvos
07.07.2016	Persons accommodated in the hotspot attack police officers.	Leros
09.07.2016	Riot, persons accommodated in the hotspot protest against their living conditions, attacking the police director and the mayor. Clashes with locals.	Leros
28.06.2016	A Yezidi woman attempt to commit suicide.	Leros
02.06.2016	Clashes and fire.	Samos
01.06.2016	Fire breaks out after clashes between persons of different nationalities. Families have to escape the camp and spend the night outside.	Lesvos
26.05.2016	An Afghan man attempts to commit suicide.	Chios
26.04.2016	Riot, with tensions starting in the unaccompanied children section.	Lesvos
15.04.2016	Rape of a 13-year old boy inside the hotspot.	Chios
06.04.2016	A Pakistani man threatens to commit suicide.	Lesvos

Source: Various media reports (see Annex)

In Greece, safety in the hotspots has therefore been an issue of growing concern for national authorities managing the facilities, as well as EU bodies present on the ground, concerning the safety of both the persons accommodated in the hotspots and the deployed staff. In response to these risks, the EU has been conducting a continuous security review of the hotspots aimed at, among other issues, developing emergency evacuation plans. The number of personnel responsible for ensuring security has also been gradually increased, mainly by deploying additional Hellenic Police staff co-funded by Frontex.

Children are disproportionately affected by possible security gaps in the hotspots and women are at heightened risk of gender-based violence. According to UNHCR, in January 2016 women and children made up 55% of the migrants arriving to Greece, a considerable increase from 27% in June 2015.⁹⁶ Although the arrival patterns vary considerably from one month to another, also in September 2016, women and children represented over 45% of the arrivals.⁹⁷ This section therefore also looks specifically at the risks these groups face and at measures that could be adopted to reduce them.

4.1 Providing information to mitigate tensions

Provision of clear and unambiguous information to persons in the hotspots on their rights and obligations and applicable procedures is an important safeguard for all procedures conducted in the hotspots and not only in relation to the initial information on the right to apply for international protection discussed in Section 1. It is a core aspect of the right to good administration under Article 41 and right to effective remedy under Article 47 of the Charter. Particularly where procedures are constantly evolving and the situation in the hotspots is changing, gaps in the timely provision of adequate information can also lead to the feeling of anxiety and frustration among the people hosted there, and be a contributing factor to eruptions of violence. This is particularly the case in Greece where perceived unfair criteria for prioritisation of asylum claims together with overcrowding and long stays contributed to tensions in most hotspots. In Italy, the swift onward movement of newly arrived people to other reception facilities helps keep the security situation in the hotspots under control.

Provision of information to new arrivals is challenging, as FRA has already documented in its 2013 report on the situation at Europe's southern sea borders. Migrants and asylum seekers may be suspicious of the information they receive from the various actors, particularly if it contradicts what they heard from friends or smugglers. FRA underlined the importance of providing information before the first registration and identification interview carried out by the police but also concluded that the provision of information is most effective when it is given after a newly arrived person had a possibility to rest. It takes newly arrived people days and sometimes weeks to understand their legal situation and the options they have.⁹⁸

In Greece as well as Italy, information in the hotspots is provided by different actors through a collaborative approach with important roles played by the managing authority, UNHCR, IOM, EASO, Frontex, the asylum and police authorities, legal practitioners as well as NGOs contracted or invited to carry out specific activities in the hotspots. Humanitarian organisations – who provide a large share of the services available to the migrants and asylum seekers in the hotspots and often serve as their primary information source – have highlighted that they are not always sufficiently notified by the authorities on new developments and policies.⁹⁹

With many actors providing information to people hosted in the hotspots, ensuring consistency in the messages given to the community can be challenging. Information material provided by various bodies, as well as the information campaign initiated by

⁹⁶ UNHCR, Trends of arrivals to Greece June 2015-January 2016, <http://reporting.unhcr.org/sites/default/files/Trends%20of%20arrivals%20to%20Greece%20JUN15-JUL16.pdf>

⁹⁷ UNHCR, Greece data snapshot – 12 October 2016, <http://data.unhcr.org/mediterranean/download.php?id=2059>.

⁹⁸ FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office, pp. 95-96.

⁹⁹ Norwegian Refugee Council *et al* (2016), *More than Six Months Stranded – What Now? A Joint Policy Brief on the Situation for Displaced Persons in Greece*, www.nrc.no/resources/reports/more-than-six-months-stranded/, p. 11.

the European Commission in the summer of 2016, or deployment of dedicated staff by some bodies focusing on information provision, represent helpful initiatives. Information provision could nevertheless be further streamlined, ensuring that information on various procedures and their relevant developments is consistent, up-to-date and available for all persons in the hotspots, including its availability in the relevant languages. As a follow up to the information session by the European Commission, information desks are planned in the hotspots which are accessible to people hosted in the hotspots. As of mid-November, however, only one, in Vial (Chios), is functional (see also Section 1). Once they are established in all five hotspots in Greece, such information desks can mitigate the information gap and reduce the risk of providing contradictory information.

FRA Opinion 14

The right to good administration under Article 41 of the Charter implies the right of the persons in the hotspots to be informed of procedures applicable to them. At present, the inconsistent provision of information on procedures and rights contributes to tensions among migrants and asylum seekers in the hotspots and possible displays of violence.

Ensuring the provision of consistent information in a manner that is accessible to all persons in the hotspots would help mitigate the tensions. In addition to information provided upon arrival, up-to-date and sufficiently detailed information on various procedures needs to be available to all persons throughout their stay in the hotspots.

4.2 Adapting the infrastructure and operation of the hotspots to reflect gender diversity

The way a camp is designed and managed impacts significantly on the safety of people staying there, contributing also to preventing gender-based violence as required by Article 18 (4) of the Reception Conditions Directive. The risk of sexual and gender-based violence can be reduced substantially through precautions taken, for example when designing sanitary facilities, allocating a place to sleep to new arrivals or controlling access to the hotspot or its sections by people under the effect of alcohol. In addition, creating an environment to enable women to speak about their fears can help camp staff to take effective preventive action. Effective referral pathways should enable victims to report and receive adequate medical, psychosocial and legal support.¹⁰⁰

On the preventive side, several aspects can be highlighted, starting first with the separation of male and female sanitary facilities, including safe ways for women and girls to access such facilities. Whereas in all hotspots in Greece and Italy, toilets and washing facilities are separated by sex, in some cases, the facilities are not adequately placed or properly distinguished, and would be in practice used by both sexes, particularly where overcrowding is an issue. At other instances, the facilities would be missing locks or even doors, as they get broken.

Second, in some hotspots (except for particularly vulnerable people) new arrivals are not allocated a specific place by the camp managers but only an area in which they

¹⁰⁰ For an overview on how to prevent and address, see UNHCR (2003), *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons – Guidelines for Prevention and Response*, www.unhcr.org/protection/women/3f696bcc4/sexual-gender-based-violence-against-refugees-returnees-internally-displaced.html, and Inter-Agency Standing Committee (2015), *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action*, <https://interagencystandingcommittee.org/working-group/documents-public/guidelines-integrating-gender-based-violence-interventions>.

should find a place by themselves. In this way, the camp manager does not have the opportunity to monitor whether the sleeping arrangement may risk exposing some people to harassment or violence. Additional arrangements may be necessary to accommodate the needs of certain groups of women, such as single mothers or pregnant women.

Third, to be effective, preventive measures should build upon the real fears and the suggestions for solutions by the community themselves. In some Greek islands meetings with women have been held by international organisations, serving multiple purposes. They are safe places for women and girls to report about their fears and to discuss possible measures to reduce the risks of sexual and gender-based violence.

Fourth, regular police patrols inside the reception areas of the hotspots, including during the night, would give the message to the community that rules are being enforced. To be effective in preventing gender-based violence such patrols should be carried out jointly by male and female officers. Adequate illumination of the hotspot premises is another important factor contributing to the safety at night.

In addition to these and other preventive measures, systems are needed to assist victims to access medical, legal and psychosocial support. In both Greece and Italy, referral pathways for cases of sexual and gender-based violence have not yet been finalised and agreed upon by the relevant actors in all hotspots.

FRA Opinion 15

In line with Article 18 (4) of the Reception Conditions Directive, measures to reduce the risk of exposure to sexual and gender-based violence should be a key priority for all actors. Women and girls face specific risks when staying in the hotspots which are not always sufficiently taken into account in the design and management of these camps.

The risks need to be reflected, for example, in planning and adjusting the physical infrastructure of the facilities, in the organisation of police patrols particularly at night, the design of referral pathways for alleged victims, or in the allocation of a place to sleep. Preventive measures should be planned in consultation with women and girls, taking into account their fears and experiences.

4.3 Mitigating the risk of violence, abuse and exploitation of children

Although children are by no means the only persons at such risk, they are more vulnerable to some types of violence (such as sexual abuse) and the effect of violence on children, both when they are direct victims and in cases where they witness it, is potentially very damaging. Children are also at a higher risk of abuse and exploitation by criminal networks, and cases of gender-based violence and harassment involving children have been reported from the hotspots, as the Table above shows.

Unaccompanied and separated children are also particularly vulnerable to the risk of becoming victims of trafficking in human beings or, more generally, of going missing. In some hotspots, there have been reports of adults approaching the staff claiming to be relatives of unaccompanied children hosted there and demanding that the child is handed over. This gave rise to concerns over possible trafficking in human beings,

particularly in the overall context of disappearances of migrant children reported from across various Member States during recent years.¹⁰¹

Providing special areas for accommodation of children (with families and unaccompanied) separated from the rest of the camp is a solution adopted in some of the hotspots, but not systematically in all hotspots and in all situations. Particularly in some hotspots in Italy, in case of overcrowding due to limited availability of space, children have to be kept with unrelated adults, at least for a short period.

Furthermore, as mentioned also in relation to the protection of women, this physical element of security is not always accompanied by the necessary staff, both in terms of security controlling access to the separated areas (also at night) and child protection specialists, and by outreach and reporting mechanisms to detect cases of violence and abuse. The presence of child protection staff on a 24/7 basis, important particularly in case of unaccompanied children, has been observed as missing in a number of hotspots, both in terms of sufficient numbers of staff and the necessary qualifications (for example, the overall absence of protection staff at night, or presence of volunteers without a social work background).

FRA Opinion 16

Due to their vulnerability, children face an aggravated risk of violence and abuse, and are potentially also more affected by experiences of violence. Under the United Nations (UN) Convention on the Rights of the Child, states have the responsibility to ensure the children's safety from violence, sexual exploitation and abuse, as well as trafficking in human beings. In the hotspots, these risks are particularly high.

All actors should cooperate to mitigate the risks faced by children in the hotspots. Physical security measures, such as separate accommodation of families and unaccompanied children and the creation of safe areas for children, need to be accompanied by adequate security arrangements and the systematic presence of qualified staff specialised in child protection matters.

4.4 Enhancing outreach to the communities in the hotspots

Reaching out in an appropriate manner to the communities accommodated in the hotspots may help the authorities in preventing tensions and addressing already existing issues. This is particularly important in those hotspots where persons stay for a longer period of time, which currently applies primarily to the Greek hotspots. Such outreach may include regular meetings between the camp management and the communities, promoting community policing or proactive reporting of issues arising in the camps that can be used to assess and adjust the procedures or rules applied in the hotspot. Deploying qualified staff including cultural mediators and community service workers, and raising awareness on alternative means of reducing tensions, communication and de-escalation among the staff, can assist in preventing conflicts.

In some of the hotspots, steps have been taken to promote an increased participation of the persons staying there. In Moria (Lesvos), the Hellenic Police organises weekly meetings with community leaders and other relevant actors, which can be highlighted as a positive practice. Dedicated meetings with women organised on some islands have

¹⁰¹ See, for example, a background note to the FRA speech delivered on missing unaccompanied children in the European Parliament's Civil Liberties, Justice and Home Affairs committee on 21 April 2016, <http://fra.europa.eu/en/news/2016/european-parliament-explores-ways-prevent-unaccompanied-migrant-children-going-missing>.

already been mentioned. UNHCR organises participatory assessments in the hotspots to map the main concerns of the people to be able to offer tailored recommendations to the authorities. Such initiatives could be enhanced, and individual promising practices further shared and applied more consistently in other hotspots. Limited community services work and outreach has also been observed in some Italian hotspots, which has led to difficulties in enforcing camp rules on allocation of accommodation, for example.

FRA Opinion 17

Community outreach through regular meetings with asylum seekers and migrants hosted in the hotspots, as well as other forms of participation of these communities in the hotspots, can help map and address issues perceived by them as most pressing, thus reducing potential tensions and incidents.

Dissemination of promising practices from individual hotspots coupled with the deployment of specialised staff and promoting alternative means of reducing tensions would be beneficial.

5. Readmissions

Under Article 6 of the Return Directive, Member States are under an obligation to issue a return decision to migrants in an irregular situation. Recital 10 and Article 7 of the Return Directive give priority to voluntary return. In general, forced removal should only be used when there are reasons to believe that granting a period for voluntary return would undermine the purpose of the return procedure.

Readmission arrangements concluded by Member States or the EU with third countries facilitate resolving practical issues related to the implementation of voluntary or forced returns of third-country nationals. As far as EU law is concerned, however, removal operations in the framework of readmission fall under the EU return and border *acquis* and need to be accompanied by appropriate safeguards stipulated particularly in the Return Directive and the Schengen Borders Code.

Both Greece and Italy make use of the option under Article 2 (2) (a) not to apply the Return Directive to persons who have been refused entry at the border or have been apprehended or intercepted in connection with irregular entry, and have not subsequently obtained the authorisation to stay. As a result, fast-tracked returns of Tunisian and Egyptian nationals from Italy, for example, are carried out using the refusal of entry provisions of the Schengen Borders Code rather than the Return Directive. These are to be distinguished from the swift implementation of removals for people who are already inside Italian territory, as occurred for example in August 2016 with some 40 Sudanese returned to Sudan based on a new Memorandum of Understanding, which may also give rise to concern given the human rights situation in the country.¹⁰²

In Greece, in addition to various return modalities including forced returns or the opportunity to make use of the IOM Assisted Voluntary Return (AVR) programme, ‘voluntary readmissions’ to Turkey gained prominence after the EU-Turkey statement. In these cases, persons who agree to withdraw their application for international protection are returned directly from the hotspots and accompanied by escorts to Turkey as a country through which they have transited on their journey to Europe (rather than their country of origin).

Even where Member States make use of the option under Article 2 (2) (a) of the Return Directive, basic principles and safeguards of the directive still apply, according to its Article 4 (4). Besides ensuring respect for the principle of non-*refoulement*, the treatment and level of protection granted to returnees may not go below certain standards of the Return Directive on issues such as the limitation on the use of coercive measures during removal or detention conditions. Moreover, the principles stipulated in the Charter continue to apply, including the right to human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4) or the right to an effective remedy (Article 47). The EU-Turkey statement of 18 March 2016, which is used as a basis for the returns from the Greek islands to Turkey, also stipulates that this will “take place in full accordance with EU and international law” and that all migrants will be “protected in accordance with the relevant international standards and the principle of non-*refoulement*”.¹⁰³

¹⁰² Italy, Memorandum d’intesa tra il Dipartimento della Pubblica Sicurezza del Ministero dell’Interno Italiano e la Polizia nazionale del Ministero dell’Interno sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio, Rome, 3 August 2016, http://www.asqi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf.

¹⁰³ European Council, EU-Turkey statement, 18 March 2016.

5.1 Enhancing training and skills of return escorts

To ensure a smooth completion of the removal procedure and safeguard the rights and human dignity of the returnees, escort staff must be adequately trained and possess the necessary skills in handling potentially difficult situations. According to Guideline 18 (2) of the Council of Europe Twenty Guidelines on Forced Return, escorts “should be carefully selected and receive adequate training, including in the proper use of restraint techniques,”¹⁰⁴ a principle which is also reflected in the Frontex Guide for Joint Return Operations by Air.¹⁰⁵

Readmission operations to Turkey from the Greek islands are conducted by boat or air and escorted by officers deployed by Member States to Frontex operations. This includes third-country nationals who have agreed to be readmitted; their returns should therefore be considered voluntary, but are in practice removed with the presence of escorts. Although these operations are formally organised by the Greek authorities and carried out under their command, the presence of Frontex and its *de facto* management of the returns implies its responsibility in ensuring that the staff has the necessary qualifications and training. Not all staff deployed through Frontex have prior escort experience or have undertaken Frontex escort leader training or other similar courses. Training focusing specifically on readmissions from the hotspots, which Frontex currently plans, is therefore an important initiative. It could build on the Guide for Joint Return Operations by Air, as well as the Frontex Code of Conduct for Joint Return Operations.¹⁰⁶

FRA Opinion 18

Escorts provided by Frontex to support readmission operations are drawn from among officers deployed by Member States who do not necessarily have sufficient experience in this field.

Escorts conducting these operations should be adequately trained to ensure that the rights of removed persons are respected during the removal. When requested by Frontex to deploy escort staff, Member States should consider deploying officers with prior escort experience and/or appropriate training.

5.2 Ensuring systematic monitoring of forced returns

Effective monitoring of forced returns by an independent mechanism is an important safeguard against potential ill-treatment, acknowledged also by the Return Directive which in Article 8 (6) specifically requires EU Member States to have such a mechanism in place. National legislation foresees the existence of such mechanisms both in Greece (Office of the Hellenic Ombudsman) and in Italy (National Authority for the rights of persons deprived of liberty). According to Guideline 20 (3) of the Council of Europe Twenty Guidelines on Forced Return, forced return operations should be “fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation.”¹⁰⁷

¹⁰⁴ Council of Europe (2005), Twenty Guidelines on Forced Return, www.coe.int/t/dg3/migration/archives/Source/MalagaReqConf/20_Guidelines_Forced_Return_en.pdf.

¹⁰⁵ Frontex (2016), Guide for Joint Return Operations by Air coordinated by Frontex, General rule 5.2, p. 13, http://frontex.europa.eu/assets/Publications/General/Guide_for_Joint_Return_Operations_by_Air_coordinated_by_Frontex.pdf.

¹⁰⁶ Frontex (2013), Code of Conduct for Joint Return Operations Coordinated by Frontex, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.

¹⁰⁷ Council of Europe (2005), Twenty Guidelines on Forced Return, www.coe.int/t/dg3/migration/archives/Source/MalagaReqConf/20_Guidelines_Forced_Return_en.pdf.

Removal operations conducted in the framework of readmission entail similar risks and face similar challenges as forced returns to the country of origin. Even if Article 8 (6) of the Return Directive does not directly apply in relation to the readmissions from the hotspots as Greece and Italy make use of the optional clause in Article 2 (2) (a) of the directive, it is nevertheless an important mechanism to safeguard the fundamental rights of returnees, such as the right to human dignity, prohibition of inhuman or degrading treatment or punishment and effective remedy. These rights need to be protected regardless of the type of operation. In Greece, the Hellenic Police and Frontex therefore regularly inform the Office of the Hellenic Ombudsman about planned readmission operations, and the Office participates in them to the extent allowed by its limited capacities – a practice which could be considered also for Italian authorities involved in removals to Tunisia and Egypt on the basis of the bilateral readmission agreements. To increase the Office’s capacity, in July 2016 FRA supported the Hellenic Ombudsman by training additional staff to carry out monitoring tasks.

Both national bodies designated as forced return monitoring mechanisms under the Return Directive in Greece and Italy hold the comprehensive mandate of National Preventive Mechanisms under the Optional Protocol to the Convention Against Torture. In line with Article 4 of the Optional Protocol, these bodies can monitor places of deprivation of liberty with a view to strengthening the protection of persons restricted in their liberty against torture and other cruel, inhuman or degrading treatment or punishment. The overall role and presence of these bodies in the hotspots could therefore be further enhanced even beyond the monitoring of forced returns.

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A comprehensive system for return monitoring, including for readmission operations, is an important safeguard to help prevent fundamental rights violations and ensure humane treatment.

Where return or readmission operations are carried out from the hotspots, this should be accompanied by effective monitoring by domestic authorities designated to conduct forced return monitoring under the Return Directive (2008/115/EC). Where these bodies hold a broader mandate, they could also play a more comprehensive role concerning the conditions and procedures in the hotspots in general.

5.3 Conducting an individual assessment before depriving persons subject to readmission of their liberty

Deprivation of the right to liberty stipulated by Article 6 of the Charter and Article 5 of the ECHR is permissible, including as a measure to prevent unauthorised entry or prepare removal. However, detention represents a limited exception to the right of liberty and as such needs to comply with the principles of necessity and proportionality expressed in Article 52 (1). Article 9 of the International Covenant on Civil and Political Rights (ICCPR) highlights the requirements of lawfulness, necessity and proportionality specifically in relation to any deprivation of liberty imposed in an immigration context. Article 15 of the Return Directive likewise states that detention should only be used where there are no other sufficient but less coercive measures available.

To enable a possible removal to Turkey under the EU-Turkey statement, upon arrival all migrants in the Greek islands are systematically issued a return decision indicating that they will be readmitted to Turkey. This decision also contains a detention order based on a presumed risk of absconding, a ground considered as legitimate by national

legislation (as well as by Article 15 of the Return Directive).¹⁰⁸ This risk is, however, assumed automatically and is not supported by any specific arguments.

In practice, the migrants, virtually all of whom apply for asylum, are generally released from the hotspot (with the exception of unaccompanied children, as discussed in Section 2) after a period necessary to complete the first registration procedures and are free to move around the island. The suspended return decision, however, remains valid and the person can be detained at any point. In particular, if a person agrees to be readmitted to Turkey and withdraws the asylum application, a practice that has been observed in some hotspots entails the deprivation of liberty of such persons (for example in a dedicated part of the hotspot) until the removal operation is prepared and executed with significant support of Frontex. This can take days or even weeks. As set out above, such coercive measure may be considered disproportionate given that the original detention decision was not based on an individualised assessment, and that the person actually agreed to return voluntarily which seems to be in contradiction with the notion of risk of absconding. Furthermore, being detained upon withdrawing an asylum application may have negative effects on the willingness of persons with even low prospects of obtaining international protection to return voluntarily.

Persons who choose to make use of the IOM AVR programme are generally not deprived of their liberty in the hotspot but are instead transferred to Athens. There, however, they may also be placed in an immigration detention facility until the necessary arrangements for their departure (e.g. obtaining the relevant documents) are finalised. This can again have impact on the willingness of the persons to opt for a voluntary return.

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Under Article 6 of the Charter and Article 5 of the European Convention on Human Rights (ECHR) both enshrining the right to liberty and security, detention is a limited exception to the right to liberty and as such needs to be based on a prior individual assessment. Pre-removal detention applied without assessing the risk of absconding, particularly in relation to persons who have expressed their intention to leave the EU voluntarily may fall short of this standard and become arbitrary.

Unless it is determined based on an individual assessment of the specific case that there are overriding reasons to impose detention, persons having agreed to be readmitted should not be unduly restricted in their liberty.

5.4 Communicating effectively and providing information during the readmission procedure

Provision of sufficient information and communication with persons in a return or readmission procedure allows both to safeguard the rights of the returnee and facilitate the conduct of the removal operation.

Persons restricted in their liberty are entitled to information on their rights while in detention. In the context of the hotspots, this is relevant both to the initial restriction of liberty for the purpose of conducting the registration and possible further detention for the purpose of removal, where Article 16 (5) of the Return Directive applies independently of the application of Article 2 (2) (a). In case of Greece, it has been observed that while other irregular migrants detained pending removal would receive

¹⁰⁸ Greece, Codification of legislation on the entry, residence and social integration of third country nationals on Greek territory, Law 3386/2005, as amended, Article 76 (3).

an information document outlining their rights, persons waiting to be readmitted from the hotspots would not receive the document due to a lack of clarity on their actual legal status.

Ensuring appropriate interpretation arrangements during the operation itself is also vital to guarantee that the escorts can effectively communicate with the returnees in case of any security, medical or other issues. In some cases it has been observed that Member States place restrictions on the use of the staff they have provided to the EU actors in the hotspots, for example by not allowing interpreters to participate in the entire removal operation.

FRA Opinion 21

In accordance with the provisions of the Return Directive, all returnees should be informed of their rights and obligations while detained pending removal, as well as during the removal operation.

Interpretation arrangements need to be in place for the entire duration of the operation to ensure that each returnee can communicate effectively with the escorts, to be able to respond to security, medical and other emergencies, and to safeguard the rights of the returnees.

Annex

Each of the following media sources covers one of the incidents listed in the Table.

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