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**When is mobility not a choice?  
Problematizing asylum seekers' secondary  
movements and their criminalisation in the EU**



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Policy Option Brief

# When is mobility not a choice?

## Problematizing asylum seekers' secondary movements and their criminalisation in the EU

By Sergio Carrera, Marco Stefan, Roberto Cortinovis and Ngo Chun Luk

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### 1. INTRODUCTION

Secondary movements inside the EU have featured amongst the top policy priorities in recent European Union (EU) responses to cross-border mobility and asylum. The concept of 'secondary movements' has become a common feature in EU policy documents to refer to the mobility of third country nationals for the purpose of seeking international protection in an EU member state other than the one of first irregular arrival (Radjenovic, 2017).

While high on the EU political agenda in recent years, the objective of limiting and preventing asylum seekers' intra-EU mobility is by no means new. The rationale behind the establishment of the Dublin system since the early-1990s, and its focus on allocating the responsibility for assessing asylum applications to the countries of first irregular entry into the Schengen territory, was to institutionalise already existing 'safe third country policies', by deflecting asylum claims towards member states located at the EU external borders (Van Selm, 2001; Byrne, Noll and Vedsted-Hansen, 2002; Cortinovis, 2018).

'Secondary movements' in the EU context became more politically salient since summer 2015 as a consequence of the increase in the number of asylum seekers entering the EU, and their mobility to other member states. 'Fears of secondary movements of asylum seekers' led a group of EU member states (Austria, Germany, Denmark, Sweden and Norway) to reintroduce and unlawfully prolong systematic internal border checks within the Schengen Area. The decision by their Ministries of Interior to use the 'risk of secondary movements' argument as the main political justification to maintain internal border controls has been found to be illegal (Carrera et al., 2018).

The prioritisation of secondary movements in EU policy contrasts however with the lack of independent evidence on the actual scale and number of people seeking asylum in the EU who then move onward after arriving in the member states of first entry. Available statistical data suffer from a number of shortcomings and limitations (Wagner et al., 2019; Takle and Seeberg, 2015, ch. 4; Guild, 2007).

While references to 'secondary movements' have been widespread in EU policy, the very appropriateness of this term has been subject to much controversy (UNHCR, 2019).<sup>1</sup> The label overlooks the fact that onward mobility may be non-voluntary and not a matter of free choice by asylum seekers. The notion is based on the wrong assumption that intra-EU mobility is by itself illegitimate and that asylum seekers have no good reasons to move to a different EU country, as all EU Member States are assumed to be 'safe'.<sup>2</sup>

The containment logic on which the current EU asylum system is anchored (Carrera and Cortinovis, 2019a) has been widely criticised in light of its ineffectiveness and incompatibility with international refugee and human rights, including the respect of the principle of *non-refoulement*, family and private life and the prohibition of criminalising asylum seekers (Guild et al., 2015; Guild, 2006; Moreno-Lax, 2017). Vedsted-Hansen (2017) has underlined how the EU Dublin System has constituted a source of "protective failure" in a context characterized by dysfunctional asylum systems in several EU member states, a situation that has in turn induced asylum seekers to move to other EU countries in search of safety.

Deterring and preventing asylum seekers' onward movements across the EU has been uncritically incorporated as a key policy goal in several legislative proposals that made up the so-called "asylum package" presented by the Commission in 2016 (European Commission, 2016a, 2016b, 2016c). The overarching logic on which the Commission approach has been based reflects a punitive approach towards asylum seekers' intra-EU mobility, which includes restrictions to asylum seekers' freedom of movement, increased use of detention and a set of sanctions such as the withdrawal of reception conditions for applicants who engage in intra-EU movements.

The criminalisation of asylum seekers' mobility inside the EU is also reflected in recent legislative developments providing for a widened access by law enforcement authorities to asylum seekers' data stored in EU-wide databases. The proposed expansion of the EURODAC database (European Commission, 2016d), coupled with the recently approved Interoperability Regulations (Council of the EU, 2019a), which further enlarge police access to asylum seekers' data, raise crucial issues regarding the violation of the right to privacy of the individuals involved and their criminalisation and discrimination (see section 4.2).

The increasing involvement of EU agencies (such as eu-LISA, Frontex and EASO) in managing, collecting and processing data on asylum seekers' movements contributes to enacting and constructing their mobility as a 'problem' or 'policy issue', which requires the wider mobilisation of EU agencies, their expanded access to EU migration databases, and the allocation to them of increased financial resources. In parallel, non-neutral and politically-led knowledge production through data and statistics on 'secondary movements' is likely to further reinforce practices of (in)securitization in EU border control policies (Bigo, 2014)

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<sup>1</sup> UNHCR prefers using the term 'onward movements' rather than 'secondary movements' "to reflect the fact that such movements may be driven by numerous different factors, and often involve tertiary or multiple stages" (UNHCR, 2019). See Section 2 of this Paper for a conceptual analysis.

<sup>2</sup> Therefore, for the purposes of this Paper, the terms 'onward movements', 'intra-EU mobility', or simply 'mobility' are used interchangeably when referring to the act of moving by asylum seekers to an EU Member State different from the one responsible under the EU Dublin Regulation, which most often corresponds with the country of first irregular entry.

and the drive for an expanded and more pervasive use of personal data in EU databases designed to monitor these movements (Bigo et al., 2012).

The current over-riding focus on the 'symptoms' of asylum seekers' mobility, without an adequate understanding of the actual drivers and protection-related motivations that may lead them to move elsewhere, risks perpetuating and solidifying a policing approach to intra-EU mobility leading to more mistrust and protection failures in the Common European Asylum System (CEAS).

This Paper problematizes and critically reflects on the assumptions behind the EU's framing of intra-EU mobility by asylum seekers as 'secondary movements', and the related policy responses centred on criminalisation and policing. Section 2 starts by analysing the conceptual premises underpinning EU policies, which frame intra-EU onward movements by people seeking international protection as irregular, quasi-criminal and illegitimate.

Section 3 delves into EU policy responses to address onward movements in the context of the 2016 proposed CEAS reform. These proposals concur to the criminalisation of asylum seekers' intra-EU mobility by introducing a set of penalties towards those breaching the obligation to seek asylum in the member state of first entry and moving 'irregularly' elsewhere in search of international protection. A punitive approach, however, is not only fundamentally in tension with international refugee and human rights legal obligations. It is also likely to further increase mistrust by asylum seekers in the system and exacerbate serious side effects, including increasing situations of marginalisation, destitution and irregularity across the EU.

Section 4 expands the analysis of current EU policies by focusing on the consequences of expanded law enforcement or police access to asylum seekers' data in the context of the recently established EU framework on the interoperability of databases. Specific attention is paid to the implications of interoperability in light of the proposed expansion of the scope of the EURODAC database and its use to tackle 'secondary movements' within the EU. The analysis underlines the risks that interoperable EU databases carry for the effective protection of fundamental rights of asylum seekers and refugees.

The Paper concludes by outlining a set of policy options to address identified challenges and gaps in EU policies related to asylum seekers' onward movements. Previous proposals have called for 'choice-based matching models' that take into account asylum seekers and Member States' 'preferences' as part of a new EU-wide relocation system. Past 'preference-matching ideas' have disregarded two central caveats: first, the humanitarian constraints and reasons why asylum seekers try to access international protection and durable solutions somewhere else in the EU; and second, that States are not free when choosing or selecting applicants based on criteria such as nationality, ethnic origin or religion, or even 'recognition rates', 'integration potentials' or 'security grounds', as these clearly amount to prohibited discrimination. The Paper recommends establishing an *individual humanitarian clause mechanism*, providing asylum seekers the right to request an exception to the Dublin Regulation on humanitarian grounds directly to any other EU Member State. It underlines

that the way forward should be one focused on de-securitising intra-EU mobility and upholding the fundamental rights of asylum and privacy to every person in the EU.

## 2. UNDERSTANDING ONWARD MOVEMENTS IN THE EU

### 2.1 Problematising 'secondary movements'

The concept of 'secondary movements' relies upon a model presuming a clear-cut differentiation between 'primary' and 'secondary' movements of asylum seekers inside the Schengen Area. Accordingly, the notion of 'primary movements' relies on the idea of the *involuntariness* of individuals' movements outside their country of origin to seek safety and protection in another country. While the latter might be any country different to the one from which the individual is fleeing, in the EU context this usually corresponds with the country of first irregular entry into the Schengen Area. The first EU country of irregular entry is generally considered to be the one responsible for assessing third country nationals' asylum claims under the current EU Dublin Regulation, except in the case of minor applicants or when the family criteria foreseen in the Regulation apply.<sup>3</sup>

The notion of 'secondary movements', on the other hand, is associated with the alleged *voluntariness* of the decision to move onward, specifically to a country other than the one of first irregular entry. It is thus considered that asylum seekers choose voluntarily, and therefore without solid enough or verified justifications, to move to a Schengen state different from the one declared to be responsible for assessing their asylum claim. The assumed 'voluntariness' of onward movements implies the fact that they are not motivated by a genuine need for protection and thus should be considered as illegitimate.

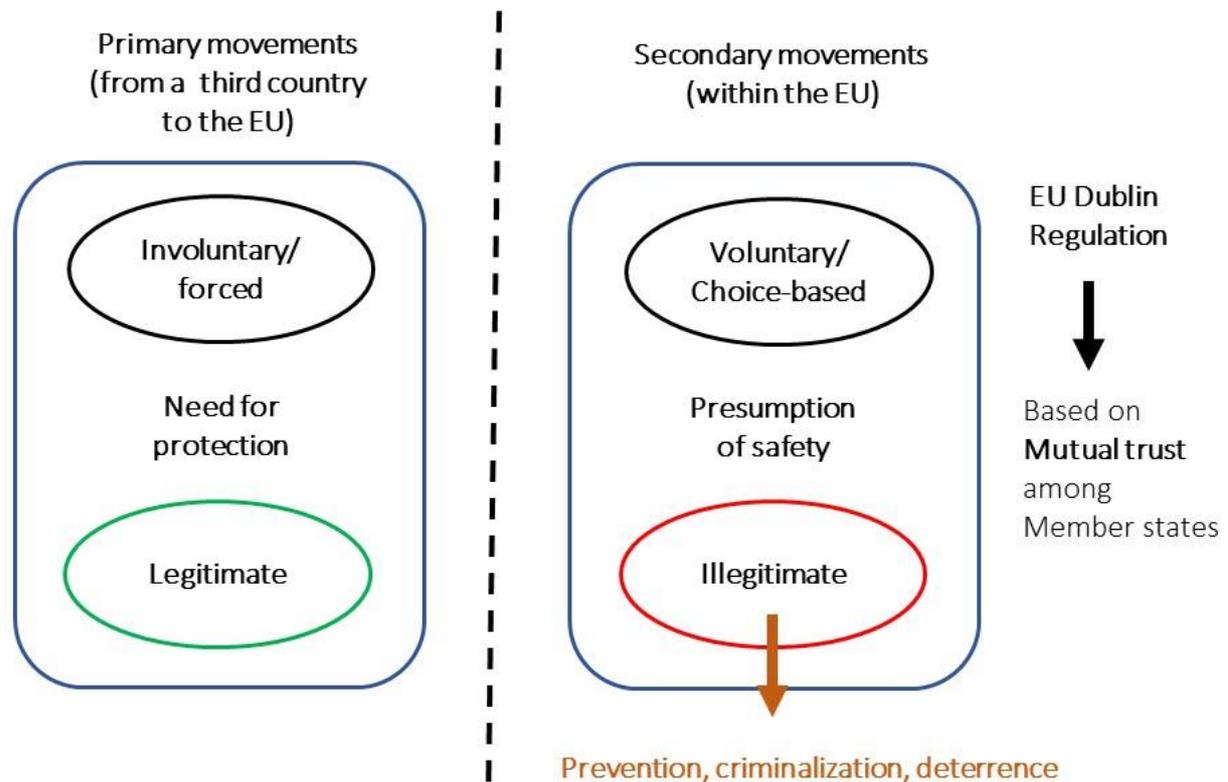
The current EU conceptualisation of secondary movements as voluntary (and therefore illegitimate) relies on the principle of 'mutual trust' among member states, which presumes that EU member states' asylum systems are fit to correctly implement EU asylum law. According to this presumption, all member states that are part of the Dublin system are considered to be a priori 'safe' for asylum seekers. The EU Dublin Regulation thus takes for granted that there are no legitimate reasons why a person would decide to move to another EU country to seek asylum.

As Figure 1 below illustrates, this assumption implies that onward movements are by default considered as 'irregular' and, increasingly, quasi-criminal. This in turn justifies restrictive migration and asylum management approaches focused on the criminalisation and policing of asylum seekers' onward mobility inside the EU.

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<sup>3</sup> 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 (recast), L180/31 29.6.2013, Art. 7-13.

Figure 1 - asylum seeker' mobility to and within the EU: primary vs secondary movements



Source: Authors' own elaboration.

The distinction between 'primary' (legitimate) and 'secondary' (illegitimate) movements, however, needs to be revisited in light of the specific conditions faced by asylum seekers and refugees across EU countries. The migration management driven notion of 'safety' that underpins the functioning of EU asylum policy is flawed as it does not allow to capture the whole range of insecurities and risks that individual asylum seekers may face in several EU member states. Even if formally labelled as 'safe', several EU countries have proved to be *de facto* 'unsafe' for asylum seekers. In these circumstances, the decision of individuals to 'move elsewhere' is not the result of a 'free choice'; it is rather the consequence of their legitimate search for adequate standards of international protection, safety and security of residence.

A notion of *safety* grounded in international human rights law should encompass additional criteria than those provided in the 1951 Refugee Convention.<sup>4</sup> These include, first, the absence of degrading reception and living conditions leading to destitution (lack of decent

<sup>4</sup> Article 1A (2) of the Geneva Convention defines a refugee as someone who "and owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

housing), but also protection against exclusion from social assistance or cases of extreme material poverty, which constitute violations of the absolute prohibition of inhuman and degrading treatment (FRA, 2017). Insecure residency status, the lack of life opportunities and long-term (permanent) solutions, including the existence of family and private links can furthermore justify equally sound onward mobility (Zimmermann, 2009). Safety also depends on protection against systemic and institutionalised discrimination and xenophobia against asylum seekers and foreigners (FRA, 2017).

For EU law purposes, 'safety' additionally needs to be viewed in light of the right to seek asylum enshrined in Article 18 EU Charter of Fundamental Rights. This EU right is wider in scope than the one foreseen in the 1951 Geneva Convention, as it includes additional protection standards developed by Court of Justice of the European Union (CJEU)<sup>5</sup> and the European Court of Human Rights (ECtHR) case law,<sup>6</sup> as well as those laid down in secondary EU asylum legislation, including measures related to subsidiarity and complementary protection (EASO, 2018).

Cooperation under the CEAS has been progressively interpreted as being upheld by a form of trust that, while being mutual (i.e. based on the reciprocal assumption that each participating member state respects the EU asylum *acquis*), cannot be 'blind'. The CJEU has confirmed in several asylum-related judgements that the automatic presumption of safety among EU countries is rebuttable. Several instances have indeed shown that, in practice, member states may experience major operational and structural deficiencies (systematic or not) in the functioning of their domestic asylum system, and leaving the individual in an intolerable state of unsafety.

Therefore, and similar to other areas of European cooperation governed by EU law, trust "must be earned" (Mitsilegas et al., 2019). This means *inter alia* that transfers carried out in application of the EU Dublin Regulation ('take back' or 'take charge' requests) can be successfully challenged by individuals on wider fundamental rights grounds.<sup>7</sup> This possibility opposes the idea that onward movements are 'voluntary' and by default illegitimate.

## 2.2. Existing evidence on the 'causes' of onward movements

A preliminary observation to make when discussing the 'drivers' or underlying reasons impacting asylum seekers' decisions to seek protection in a specific country is that people fleeing a situation of persecution, human rights violations or conflict often have only a very limited choice about the intermediary stages of their journey as well as their final destination. In spite of the restrictions and constraints characterising the situation of people who are

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<sup>5</sup> See, for example, Court of Justice of the European Union Press release No 33/19, Judgments in Case C-163/17 Jawo and in Joined Cases C-297/17, C-318/17 Ibrahim, C-319/17 Sharqawi and Others and C-438/17 Magamadov

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190033en.pdf>

<sup>6</sup> See ECtHR, Factsheet – "Dublin" cases, June 2016, [https://www.echr.coe.int/Documents/FS\\_Dublin\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf)

<sup>7</sup> CJEU - Judgment Case C-578/16 PPU C.K. and Others v. Supreme Court of Republic Slovenia; CJEU - C-411-10 and C-493-10, Joined cases of N.S. v United Kingdom and M.E. v Ireland.

forced to leave their country of origin or stay, asylum seekers are nonetheless able to exercise a degree of agency regarding their country of destination (Crawley and Hagen-Zanker, 2018).

EU discussions about the factors shaping asylum seekers' motivations for seeking protection in a specific member state have often focused on the disparities in asylum standards across Europe, which would lead to some countries being 'preferred' over others. In line with this approach, the then European Commissioner for Migration and Home Affairs Dimitris Avramopoulos stated that one of the key aims of the 2016 reform of the CEAS was to prevent 'asylum shopping', that is the situation "when refugees move among EU countries in search of the best conditions to apply for asylum"<sup>8</sup>. In its Communication 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', the Commission underlined how the CEAS is currently characterised by differing treatments of asylum seekers, including in terms of the length of asylum procedures and reception conditions across member states.

These divergences result in part from the often discretionary or 'optional' provisions contained in the EU Asylum Directives, such as the Directive on reception conditions (European Commission, 2016c). 'Optional' provisions in CEAS legal instruments, such as those limiting social assistance and family reunification for beneficiaries of subsidiary protection in the Qualification Directive, have led to varying practices across EU Member States on substantive and procedural matters, which in turn have contributed to onward movements (Vedsted-Hansen, 2017).

The Commission further recognised that, while the Qualification Directive sets out the standards for recognition and protection to be offered at EU level, recognition rates vary between member states in practice. Also, available data points to a lack of adequate convergence as regards the decision to grant either refugee status or subsidiary protection status to applicants coming from the same country of origin. The communication concluded that such divergences should be considered as important factors leading asylum seekers to undertake free movement.

However, lack of harmonisation of EU asylum standards across member states, including reception conditions and criteria for granting international protection, is just one of the facts contributing to shaping the dynamics of intra-EU mobility by people seeking international protection. The previous section of this Paper has highlighted how the quality of international protection in a specific country (and thus the possibility of the latter to be considered 'safe' for an individual asylum seeker) may be influenced by a broader set of social, institutional and economic conditions, which go beyond the existence of adequate asylum procedures and reception standards.

This same conclusion is supported by an expanding body of academic literature focusing on the decisions made by refugees at various stages of their mobility trajectories, and the underlying factors influencing those decisions. This body of literature examines the relation-

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<sup>8</sup> "EU aims to stop 'asylum shopping' Commission proposes reforms for dealing with refugees", Politico, 4 September 2016, <https://www.politico.eu/article/eu-aims-to-stop-asylum-shopping-refugee-crisis/>

ship between policies and destination preferences, underlying the importance of 'non-policy' related drivers of onward movements. A review of research since 1997 looking at the factors determining asylum seekers destination choices underlines that factors that influence asylum seekers' choices about their destination countries are less often related to public policies than to other factors such as the presence of social networks and histories of colonialism (James and Mayblin, 2016).

Along the same line, Takle and Seeberg (2015) conclude their review by pointing out that the dynamics of onward movements within the EU are better explained by the interplay of a range of individual, transnational and national factors, including the location of the existence of family and private links, knowledge of and familiarity with different European languages, and the prospect for sustainable and durable life opportunities. Moreover, Collyer (2004) showed how mobility may be motivated by other additional factors related to "historical complexities...[and] to similar nationally specific or post-colonial relationships with particular Member States", and highlighted that in any case "a first consideration in any analysis of the choice asylum seekers make must be the absence of choice".

Empirical evidence on the 'drivers' of asylum seekers' movements reviewed above therefore shows how the containment logic upon which the EU Dublin system is based is flawed, bringing into question the effectiveness of policies aimed at deterring asylum seekers' mobility and disregarding an individual's personal circumstances, needs and reasons for seeking protection in a specific country.

This same conclusion was reflected in a 2015 evaluation of the Dublin Regulation commissioned by the European Commission, which underlined how the lack of adequate consideration for the interests/needs of applicants in the current Dublin criteria for allocating responsibility should be listed among the causes of secondary movements and the lodging of multiple applications within the EU. The evaluation further underlined how family criteria have been seldom used in practice in the implementation of Dublin and the identification of the responsible state has been almost exclusively based on the first country of irregular entry criteria, which however is an irrelevant factor in relation to applicants' needs and personal circumstances (Maas et al., 2015).

### 3. CRIMINALISING ASYLUM SEEKERS' MOBILITY: PUNITIVE APPROACHES IN THE CEAS REFORM

The Commission identified the tackling of 'secondary movements' as a stand-alone policy priority to be pursued in order not to disrupt the 'first country of irregular entry' logic of the Dublin system and prevent 'asylum shopping'<sup>9</sup> (European Commission, 2016a). In line with this objective, provisions to prevent onward movements have been included by the Commission in several of the legislative proposals that made up the so-called 2016 "asylum package", in particular in the recast Dublin Regulation, and the recast of the Reception Conditions Directive.

The proposal for reforming the Dublin Regulation presented on May 2016 (European Commission, 2016b) includes a new obligation for international protection seekers to apply in the member state of first irregular entry (Art. 4 of the proposal). According to the Commission, the aim of this provision is to clarify that an asylum applicant neither has the right to choose the member state of application nor the member state responsible for examining the application. The proposal lays down a number of procedural and material sanctions in case of non-compliance. These include the mandatory use of the accelerated procedure by the responsible member state, as well as the withdrawal of reception conditions (with the exception of emergency health care) in any member state other than the one responsible (Art. 5).

At the same time, the proposal promotes the 'stabilisation' of responsibility for asylum claims by deleting the 12-month time-limit for the applicability of the illegal entry criterion (Article 15 of the proposal). In addition, it foresees the abolition of the conditions for "cessation of responsibility" contained in Article 19 of the current Dublin Regulation, including in the case of an applicant who has left the territory of the EU for a period exceeding 3 months (former Art. 19). According to the Commission, these revisions would represent a significant tool for streamlining responsibility criteria and preventing secondary movements (European Commission, 2016b). However, during negotiations of the file, a group of southern member states heavily criticised the introduction of permanent or prolonged responsibility for asylum claims for the state of first entry, arguing that this provision would substantially increase the number of claims under their responsibility (ECRE, 2018).

A number of provisions to reduce "reception-related incentives for secondary movements within the EU" are also included in the proposal for a recast reception conditions directive presented in July 2016 (European Commission, 2016c). These include restrictions on asylum seekers' free movement by requiring member states to assign a specific place of residence to applicants, to impose reporting obligations and to make the provision of material reception conditions subject to the actual residence by the applicant in a specific place, if this is considered necessary for the swift processing of the Dublin procedure, or in order to effectively prevent the applicant from absconding (Art. 7.2).

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<sup>9</sup> In the EU context, 'asylum shopping' refers to the phenomenon where a third country national applies for asylum in more than one EU member state with or without having already received international protection in one of those EU member states (European Commission, 2008).

An additional ground for detention of asylum seekers has also been added to tackle secondary movements and absconding of applicants. If an applicant has been assigned a specific place of residence, but has not complied with this obligation, and where there is a risk of absconding, the applicant must be detained in order to ensure the fulfilment of the obligation to reside in a specific place (Art.8.3(c)).

Stakeholders have raised concerns as to the restrictive and punitive character of measures aimed at addressing onward movements advanced included in the Commission's proposals. Restrictions to the fundamental right of free movement and liberty of asylum seekers, in particular, create tension with international law, including the principle of non-penalisation of refugees and asylum seekers included in Article 31 of the 1951 Geneva Convention, as well as fundamental rights standards included in the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights (EU CFR).

The European Council on Refugees and Exiles (ECRE) has underlined how the exclusion of applicants who engage in secondary movements from an entitlement to reception conditions in a member state other than the one responsible under the proposed Dublin reform contradicts the principle of entitlement to reception conditions as a corollary of asylum seeker status elaborated by the CJEU (ECRE, 2016). In *Cimade and Gisti*<sup>10</sup>, the CJEU found that the rights to dignity and asylum under Articles 1 and 18 of the CFR implies that the Directive should be applicable (in its entirety) to all asylum seekers who have a right to remain on the territory of the member states. As a consequence, it appears that introducing limitations on the applicability of the Directive on the sole basis of the non-compliance with provisions of the Dublin Regulation undermines compliance with basic fundamental rights standards.

Doubts also arise with regard to the legality of provisions to restrict asylum seekers' fundamental right to freedom of movement (which is guaranteed under both the EU CFR and the ECHR) on the basis of administrative reasons, and namely the effective monitoring of the asylum procedure or the Dublin procedure. Also, grounds for detention included in the Commission proposal are in tension with the right to liberty under Art. 6 of the EU CFR, as they are not connected to the fulfilment of a concrete obligation incumbent on the applicant or are punitive in nature (ECRE, 2016).

In its reports on the recast Dublin Regulation and recast reception conditions directive, the LIBE Committee of the European Parliament put forward a number of amendments that delete or limit several of the punitive measures described above. The EP stressed how the objective of reducing secondary movements should be achieved through an approach based on positive incentives rather than punitive measures, first of all by promoting high quality reception conditions at the same level throughout the EU (European Parliament, 2017a). Furthermore, in its Report on the Recast Dublin Regulation, the EP has put forward a number of proposals to ensure voluntary compliance of applicants with the rules. These include the possibility to provide applicants with a limited choice in the identification of the member state of destination in the framework of the envisaged collective allocation system.

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<sup>10</sup> CJEU, Case C-179-11 *Cimade and Gisti v Ministre de l'Intérieur*, Judgment of 27 September 2012.

According to the EP report, this provision would give applicants 'some say' in the procedure and reduce the risk of secondary movements (European Parliament, 2017b).

None of the proposals for the reform of the CEAS presented by the Commission in 2016 could be finalised before the expiry of the 2014-2019 parliamentary term due to the choice of member states to stick to a logic of consensus and to discuss the asylum reform as a 'package' (Carrera and Cortinovis, 2019). While the fate of the CEAS reform as a whole as well as that of single legislative files is still unclear (Pollet, 2019) it may be expected that the issue of onwards movements of asylum seekers within the EU will continue to be prominent in future initiatives to reform EU asylum rules.<sup>11</sup>

## 4. POLICING ASYLUM SEEKERS' DATA

### 4.1 EURODAC as a policing tool

EURODAC offers a clear example of how data-based technology has progressively become a key component for the functioning not only of the Dublin system, but also of the so-called 'Integrated Border Management Strategy (IBM)'<sup>12</sup> and, more broadly, of the EU Agenda on Security (Commission, 2019).

Since its creation, EURODAC has allowed collection and collation of biometric data (i.e. fingerprints) of asylum seekers and individuals apprehended in connection with irregular border-crossings, or in a situation of irregular stay. Looking at the rationale and dynamics behind EURODAC's inception, some authors noted how this biometric identification system has been specifically designed to serve the purpose of preventing third country nationals from 'deliberately concealing their identity' (Aus, 2006).

The analysis of inter-institutional discussions that led to the establishment of EURODAC back in 2000 revealed how the envisaged system represented from the very outset an EU-level response to political concerns raised by the interior ministers of some member state over "irregular international migratory movements which seemed to undermine the effective application of the Dublin Convention" (Aus, 2006). Fears of onward movements of asylum seekers from first EU countries of entry (e.g. Italy and Greece) to other member states (e.g. Germany, Sweden) led EU policymakers to introduce compulsory rules subjecting migrants and asylum seekers to compulsory biometric identification processes.

People whose data can be inserted in the EURODAC system are currently classified in three distinct categories. The first category is represented by applicants for international protection. The second category consists of third country nationals or stateless persons apprehended while irregularly crossing an EU external border. The third category comprises third

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<sup>11</sup> See Ursula von der Leyen, President-elect of the European Commission. Mission letter to Ylva Johansson, Commissioner-designate for Home Affairs, Brussels, 10 September 2019.

<sup>12</sup> Art. 4 of Regulation (EU) 2016/1624 (European Border and Coast Guard Regulation) describes the main components of the IBM, which include at point (i) the "use of state-of-the-art technology including large-scale information systems".

country nationals or stateless persons found “illegally staying” in the territory of a member state.<sup>13</sup>

The current EURODAC Regulation prescribes different retention periods, which vary depending on the categories of persons whose data is collected, transmitted and/or compared via this database. While data of individuals seeking asylum (category one) are kept in the database's central system for 10 years, data of subjects apprehended by competent authorities in connection with irregularly crossing of the EU external border (category two) are only retained for 18 months. Fingerprints of irregularly staying third country nationals (category three) are instead not retained. Member states may only transmit to EURODAC fingerprints of this last category of data subjects to check if the person found in a situation of irregularity within their territory has previously lodged an application for international protection or irregularly crossed the EU external border.

As the Commission clarified: “the current EURODAC Regulation is not concerned with storing information on irregular migrants for longer than what is necessary to establish the first country of irregular entry under the Dublin Regulation if an asylum application has been lodged in a second Member State” (European Commission, 2016d). This remark confirms that the primary objective of EURODAC was, and allegedly remains, that of enabling member state asylum authorities as well as national and EU and border management actors to compare the fingerprints of asylum seekers and irregular migrants in order to facilitate the issuing and execution of ‘take charge’ and ‘take back’ requests. EURODAC is thus intrinsically instrumental to the enforcement of the Dublin rules through the storing and comparison of asylum seekers and migrants’ data.

Previous scholarly research has shown how the logic of mobility control underlying EURODAC has witnessed a process of progressive strengthening and transformation (Bigo et al., 2012). From a database originally intended exclusively to assist asylum authorities in the determination of the EU country responsible for taking charge or taking back asylum seekers, it became a fully-fledged law enforcement tool which responds to police and internal security logics and objectives. Since 2013, member state law enforcement authorities and Europol – the EU law enforcement agency facilitating the exchange of criminal intelligence between police, customs and security services – can in fact access this database ‘to help them fight terrorism and serious crime’ (European Parliament, 2013).

The incorporation of these new security functions into EURODAC has been deplored by EU bodies and representatives of civil society alike. The European Data Protection Supervisor

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<sup>13</sup> Regardless of the category, fingerprint sets can only be collected and transmitted via EURODAC if the third country national or stateless person concerned is at least 14 years old. See Regulation (EU) No 603/2013 of the European Council and of the Parliament of 26 June 2013 on the establishment of EURODAC for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by member state law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L180/1.

(EDPS) questioned the very justification and necessity of the decision to enable law enforcement access to EURODAC, given that police authorities already had the possibility to make use of biometric data (through SIS) to perform their functions (EDPS, 2010).

International immigration, refugee and criminal law experts decried the changes introduced in the 2013 revision of EURODAC Regulation as a violation of 'fundamental rights of asylum seekers, including the right to privacy and data protection, the right to asylum and protection against torture and inhuman treatment' that are enshrined in EU and international human rights law (Meijers Committee, 2009). Further analysis has been developed to show how the 2013 amendments to the EURODAC legislation expose asylum seekers – a group of vulnerable individuals *per se* – to risks of stigmatisation, in stark contradiction with the principle of non-discrimination (Meijers Committee, 2012).

Such concerns have, however, not prevented EURODAC from being remodelled into a system subjecting asylum seekers to law enforcement and preventive policing logics (Bhatia, 2015), most notably on the basis of the assumed inauthenticity of identities and for controlling movement and behaviour, 'in a way analogous to controlling the bodies of criminals' (Griffiths, 2012). Similar logics, unfortunately, also appear to inspire the most recent Commission proposal for a reform of EURODAC (European Commission, 2016d). Quite telling, for instance, is the possibility envisaged by the proposal to provide law enforcement authorities with access to EURODAC information in a way that ensures that all three categories of data stored in the EURODAC Central System can be compared.<sup>14</sup>

The new proposal, which has been tabled as part of the EU legislative package for reforming the CEAS (see section 3 above), would *inter alia* lower the age limit for data collection (from 14 to 6 years old), and add new categories to the data stored in the system, including facial images. According to the proposal, EURODAC "will prime the system for searches to be made with facial recognition software in the future" (European Commission, 2016d). New and extended retention periods (5 years) are furthermore proposed for data pertaining to irregular border crossers (category 2 data) and irregular stayers (category 3 data).<sup>15</sup> According to the explanatory memorandum to the proposal, the storage of new types of personal data for longer periods is intended to allow immigration and asylum authorities to "easily identify an individual, without the need to request this information directly from another Member State".

Besides supporting the Dublin Regulation, Art. 1(1)(b) of the proposal addresses an additional objective, namely "to assist with the control of illegal immigration to and secondary movements within the Union" and the "identification of illegally staying third country nationals" for the purposes of removal and repatriation. The table below shows how, in addition to foreseeing the collection of new categories of biometric and alphanumeric data,<sup>16</sup> and expanding the scope of application of the EURODAC legislation *ratione personae*, the

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<sup>14</sup> Art. 20(3) of the EURODAC proposal.

<sup>15</sup> Recital 33 of the EURODAC proposal.

<sup>16</sup> Art. 1(1) of the EURODAC proposal in particular envisages storing fingerprints and other alphanumeric data (e.g. biographical data) pertaining to third country nationals or stateless persons found illegally staying in a member state for a period of five years.

Commission's proposal also envisages the extension of EURODAC to return and deportation-related functionalities and purposes.

Table 1 -2016 EURODAC reform proposal: new envisaged functionalities, related purposes and potential beneficiaries

| <b>Functionalities</b>  | <b>Corresponding purpose(s)</b>   | <b>Stakeholders/Users</b>   |
|---|---|---|
| <b>Store &amp; search data</b> of irregularly staying migrants (Cat. 3) to compare them with other categories of EURODAC data (cat. 1-3). | <ul style="list-style-type: none"> <li>• Transmit and compare data on illegally staying third country nationals "who do not claim asylum and who may move around the EU undetected"</li> <li>• Accelerate procedures for identification of "illegally staying third county nationals apprehended and fingerprinted in another MS"</li> <li>• Assist MS to re-document a third country national for return purposes</li> <li>• Reduce length of return and readmission procedures</li> <li>• Carry out individual assessment of the situation of irregular migrants (e.g. risk that they may abscond)</li> </ul> | <ul style="list-style-type: none"> <li>• MS migration &amp; border authorities</li> <li>• EBCG Teams</li> <li>• Frontex return teams</li> <li>• MS asylum experts deployed at EU external borders under the auspices of EASO</li> </ul> |
| <b>Marking data</b> of irregularly staying TCNs after they obtain a residence permit  | <ul style="list-style-type: none"> <li>• Allow the authorities of member state where a TCN is found in situation of irregularity to ascertain that he/she has been given a residence permit by another EU member state</li> <li>• Assist member states that issued residence permit to re-document a third country national for return purposes</li> <li>• 'Pass back' the individual to the member state that issued the residence permit</li> </ul>   | <ul style="list-style-type: none"> <li>• MS police authorities conducting checks within Schengen Area</li> <li>• MS migration authorities &amp; border guards</li> </ul>  |

**Transfers of data  
 to third countries**

- Allow identifying third countries of transit, “where the illegally staying third country national may be readmitted”
- Share information on irregular third country nationals with their country of origin “when a travel document needs to be secured”
- Facilitate readmission and return procedures
- MS migration & border authorities
- EBCG Teams
- Frontex return teams

According to the Commission, the suggested changes in functionality would allow “the competent immigration authorities of a member state to transmit and compare data on those illegally staying third country nationals who do not claim asylum and who may move around the European Union undetected”. The information obtained should facilitate competent member state authorities (including authorities different from those responsible for migration and asylum) in the task of identifying irregularly staying third country nationals on their territory for return purposes, in particular by providing “precious elements of evidence for re-documentation and readmission purposes”.<sup>17</sup>

The possibility foreseen in Art. 38 of the proposal to transfer data to third countries is one of the most concerning implications of the proposed EUODAC reform. Giving member state authorities the possibility to transfer data to a third country for the purpose of facilitating readmission and return procedures means that the data of individuals escaping from persecution could (directly, or through onward data transfers) reach the country of origin from which they are fleeing. Such a scenario appears to be clearly in tension with EU and member state obligations to protect asylum seekers in light of Article 18 of the EU Charter. Such a possibility might also further fuel mistrust of asylum seekers vis-à-vis EUODAC and increase their reluctance to have their data recorded and stored in the system.

The possibilities to transfer data to third countries envisaged in the proposal also threaten asylum seekers' rights to privacy, data protection, and their possibility to access effective remedies under EU primary and secondary law. It is in fact not clear how affected individuals could effectively exercise their data protection rights (e.g. the rights of access, correction and erasure) once the data have been transferred to third countries' authorities. This new form of data processing would furthermore seriously reduce the possibility for competent oversight actors (and most notably national data protection authorities) to monitor compliance of data processing with relevant EU data protection legislation.

Under EU law, transfer of data to a third country is only allowed when specific data protection principles and requirements are met. While the first chiefly concern the legality, necessity and proportionality of the transfer, the second are detailed respectively in Art. 61 of the

<sup>17</sup> Explanatory memorandum to the EUODAC proposal, p. 12.

General Data Protection Regulation (GDPR)<sup>18</sup> and Article 50 of Directive 2016/680 on protecting personal data processed for the purpose of criminal law enforcement.<sup>19</sup> The powers of the Commission and the standards to be respected when exchanging personal data with third countries as part of an activity falling within the scope of EU law have been progressively clarified by the CJEU. Above all, data can be transferred to a third country only when the latter ensures an adequate level of protection of fundamental rights, as protected by EU secondary law, read in light of the Charter.<sup>20</sup> This might also explain why sharing information with a third country, international organisation or private entity is strictly prohibited under the current EURODAC Regulation.<sup>21</sup>

#### 4.2 Interoperability: ‘breaking the silos’ to policing asylum?

The proposed changes to the EURODAC legislation cannot be seen in isolation from the wider EU initiative concerning the so-called interoperability framework.

On 11 June 2019, after expeditious inter-institutional negotiations, the EU adopted two Regulations on Interoperability between EU borders and security information systems.<sup>22</sup> The establishment of the new data collection and information sharing framework has been mainly justified by the need to improve security in the EU. The interoperability framework is admittedly intended to break operational and technical silos by allowing different databases to “talk to each other” for the sake of “more efficient checks at external borders”. Interoperability is in particular deemed to “improve detection of multiple identities and help prevent and combat illegal migration” (Council of the EU, 2019a, 2019b).

The databases falling under the scope of the Interoperability Regulations currently include: the Entry/Exit System (EES); the European Travel Information and Authorisation System (ETIAS); the European Criminal Records Information System for Third Country Nationals (ECRIS-TCN); the Schengen Information Systems (SIS); the Visa Information System (VIS); and EURODAC.

A general feature of the interoperability initiative is the creation of links between data sets that until now had to be stored and used for sector-specific goals (Curtin, 2017). The main objective underlying these regulations is to allow for the interconnection between several existing EU databases for security, border and migration (Alegre et al., 2017). The operationalisation of interoperability will entail a ‘de-compartmentalisation’ of existing EU information

<sup>18</sup> General Data Protection Regulation (GDPR), OJ L 119/1, 4.5.2016.

<sup>19</sup> Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ L 119/89, 4.5.2016.

<sup>19</sup> General Data Protection Regulation (GDPR), OJ L 119/1, 4.5.2016.

<sup>20</sup> Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015.

<sup>21</sup> The standing legislation also strictly forbids access to EURODAC by a third country which is not a party to the Dublin Regulation, nor are member states allowed to check data on behalf of a third country.

<sup>22</sup> Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

systems originally created for different purposes and serving specific policy objectives (Vavoula, 2019).

On the other hand, a key risk raised by such an initiative is the definitive blurring of boundaries between different policy areas, in particular between the fields of migration, asylum, internal security, police cooperation and criminal justice. Scholars have noted that this blurring of boundaries between various databases has significant consequences for fundamental rights, in particular in light of the possibility it gives to create profiles of individuals pre-identified as 'dangerous', based on constantly ongoing risk assessments conducted in line with the so-called preventive justice model (Mitsilegas, 2017). The inclusion of EURODAC in the framework of interoperability, in particular, implies that a database initially conceived to store asylum seekers' biometrics for the purpose of assisting in the determination of the state responsible for processing an asylum application under the Dublin system, will become interconnected with other large-scale information systems, such as SIS, serving exclusively law enforcement functions.

It is often claimed that the new Interoperability Regulations do not formally modify already granted access rights as set out in the legal basis relevant for each database included in the system (Council, 2019a). However, changes introduced by the new rules should not be underestimated, since they will drastically modify the ways in which data pertaining to asylum seekers, refugees as well as migrants and people on the move will be used for a wide range of policy goals and corresponding operational activities. Interoperability will in fact expand the use currently made of such information, in particular by introducing new possibilities to process third country nationals' data and attaching to the latter new purposes and meanings.

It will do so through the creation of new information management and exchange tools enabling "multiple horizontal interactions between authorities in different Member States", as well as "vertical interactions between national authorities and EU agencies" (Galli, 2019). These interactions will rely on a number of new instruments devised to enable the aggregated use of data inputted in the already existing databases. In particular, interoperability is designed to enable checks on whether data on an individual is stored in one of the six EU databases.

First, the European Search Portal (ESP) will make it possible to query the databases simultaneously and obtain combined results. The ESP will indicate to the authorities performing the query in which of the different interconnected databases the information is held. Authorities having access to at least one of the interconnected databases will be able to perform searches through the ESP. For instance, asylum and border authorities will be able to query the ESP and see if data related to an asylum seeker being identified are stored in other EU databases, such as SIS.

Second, the Common Identity Repository (CIR) will store an individual file for each person registered in the systems. The CIR will contain both biometric and biographical data as well as a reference indicating the system from which the data were retrieved. CIR will aggregate biographical and identity information (e.g. names, dates of birth, passport numbers) and biometrics (fingerprints and facial scans) taken from different databases (i.e. ECRIS-TCN,

EES, EURODAC, ETIAS and VIS) and make such data available to border and migration authorities as well as to law enforcement actors. It has been estimated that CIR will hold the biometric and biographic data of up to 300 million non-EU nationals (Jones, 2019).

Third, the Biometric Matching Service (BMS) will generate and store templates from all biometric data collected in existing databases (all, except ETIAS, currently contain these type of data), and thus replace separate searches in the other databases. Finally, the Multiple Identity Detector (MID) will use the alphanumeric data stored in the CIR and the SIS II to detect multiple identities. The MID will thus create links between identical data to indicate whether the individual is lawfully registered in more than one system or whether identity fraud is suspected (Vavoula, 2019).

The interoperability framework is scheduled to become operational by 2023. However, member states have already raised doubts concerning the possibility of implementing the project within the intended timeline. Germany's Federal Ministry of the Interior has for instance flagged that "resource bottlenecks", risk "overloading of the authorities involved", and that "problems in recruiting specialist staff" are likely to challenge the possibility of putting interoperability into practice.<sup>23</sup> The Commission recently reported that "procurement and resources present challenges" in several EU countries. As of October 2019, it was found that some member states had not yet a secured budget allocation and sometimes not even an identification of funding needs for some components of the future interoperability (Council of the EU, 2019c).

The Commission repeatedly restated the "utmost priority not to lose any time in the design, development and implementation of the new systems and interoperability". And yet, "coordinating and cooperating across all the different national authorities involved in projects, such as those dealing with EES/VIS/ETIAS at operational level" allegedly "presents a challenge". In such a context, the risk exists that interoperability will face similar, if not worse, implementation difficulties and deficiencies previously encountered in the context of similar projects (and in particular the SIS II), which were seriously affected by operational delays, escalating budget, political crises and criticisms of the potential impact on fundamental rights (Parkin, 2011).

#### **4.2.1 Overexpansion of law enforcement access to asylum seekers and migrants' data**

Before the entry into force of the Interoperability Regulations, police authorities' possibility to access and make use of data contained in EU databases (i.e. VIS, EURODAC, ETIAS, EES) was allowed, but only following authorisation by the competent authorities, and linked to the performance of a limited set of law enforcement activities,<sup>24</sup> and most notably: the prevention, detection and investigation of terrorist offences and other serious criminal offences (see Figure 2 below).

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<sup>23</sup> See 'Europäisches IT-Großprojekt verzögert sich', Presse Augsburg, 4 October 2019, <https://presse-augsburg.de/europaeisches-it-grossprojekt-verzoegert-sich/496818/>

<sup>24</sup> Different from the performance of border control-related activities, which allowed access to EU systems for identification purposes. Activities performed in the context of border controls and migration management (including cases where the person to be identified is present) justified access to most systems, with no specific restrictions.

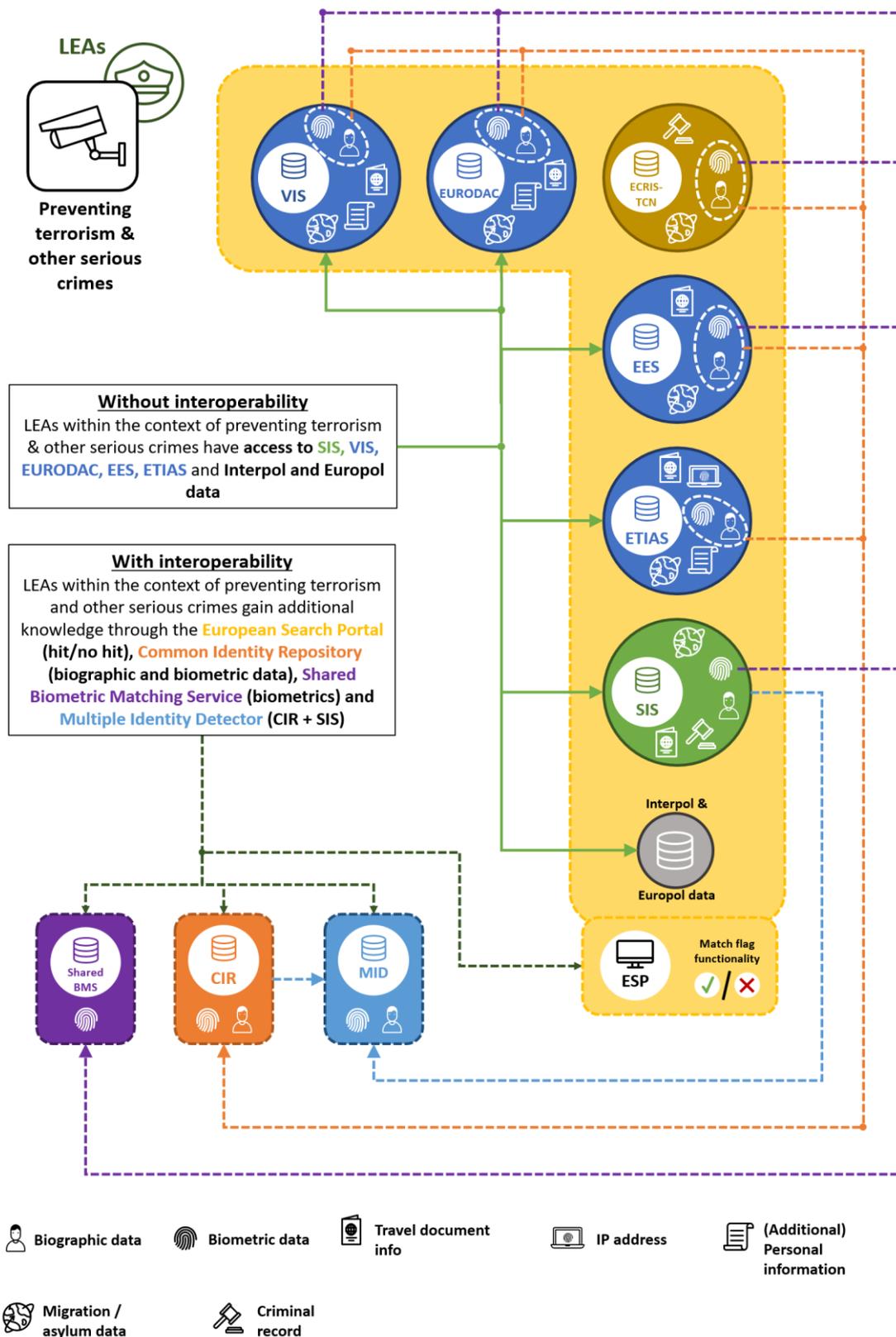
With the entry into force of the interoperability framework, law enforcement authorities' ability to make use of refugees', asylum seekers', and migrants' data will be significantly enhanced. As illustrated in Figure 2 below, Europol and member state authorities competent for the performance of such functions will in fact be given the possibility to simultaneously check through the European Search Portal (ESP) whether data on an individual is stored in any of the six EU databases mentioned above.

Furthermore, Article 22 of the Interoperability Regulations provides that "where there are reasonable grounds to believe that consultation of EU information systems will contribute to the prevention, detection or investigation of terrorist offences or other serious criminal offences" the designated authorities and Europol may consult the Common Identity Repository (CIR).<sup>25</sup> Biometric and biographic information of asylum seekers will also be made available to authorities responsible for investigating, detecting and/or prosecuting serious crime or terrorism through the Common identify repository (CIR), and the Multiple Identity Detector (MID).

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<sup>25</sup> The CIR shall provide to designated authorities and Europol a reply in the form of a reference as referred to in Article 18(2) indicating which of those EU information systems contains matching data, and a reference to the EU information systems to which the data belong. The reply shall be used for the purpose of submitting a request for full access to the underlying databases (in accordance with the procedures of those systems).

Figure 2- Law enforcement authorities (LEAs) access to EURODAC and migration data-bases for the “fight against serious crime and terrorism” without and with interoperability



Source: Authors' own elaboration.

The Interoperability Regulations also foresee an expansion of the *factual circumstances* justifying police authorities' access to specific categories of data (biometric and alphanumeric) contained in the above-mentioned databases, and accessible through the common identity repository (CIR) for identification-related purposes. Prior to the entry into force of the interoperability framework, law enforcement authorities' access to migration and asylum databases (EURODAC, VIS, EES, ETIAS) was not allowed for the performance of police checks directed at identification or verification of identity of individuals within the Schengen territory for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Only searches of (alphanumeric and biometric) data contained in the SIS were allowed to perform such activities (Figure 3 below).

With interoperability, law enforcement authorities are instead likely to regain functions – most notably those related to immigration control and the policing of mobility of migrants and asylum seekers – that they had lost since the implementation of the Schengen system. In fact, Article 20 of the Regulation introduces the possibility for member states' designated police authority to carry out queries of the CIR “solely for the purpose of identifying a person” in the following circumstances:

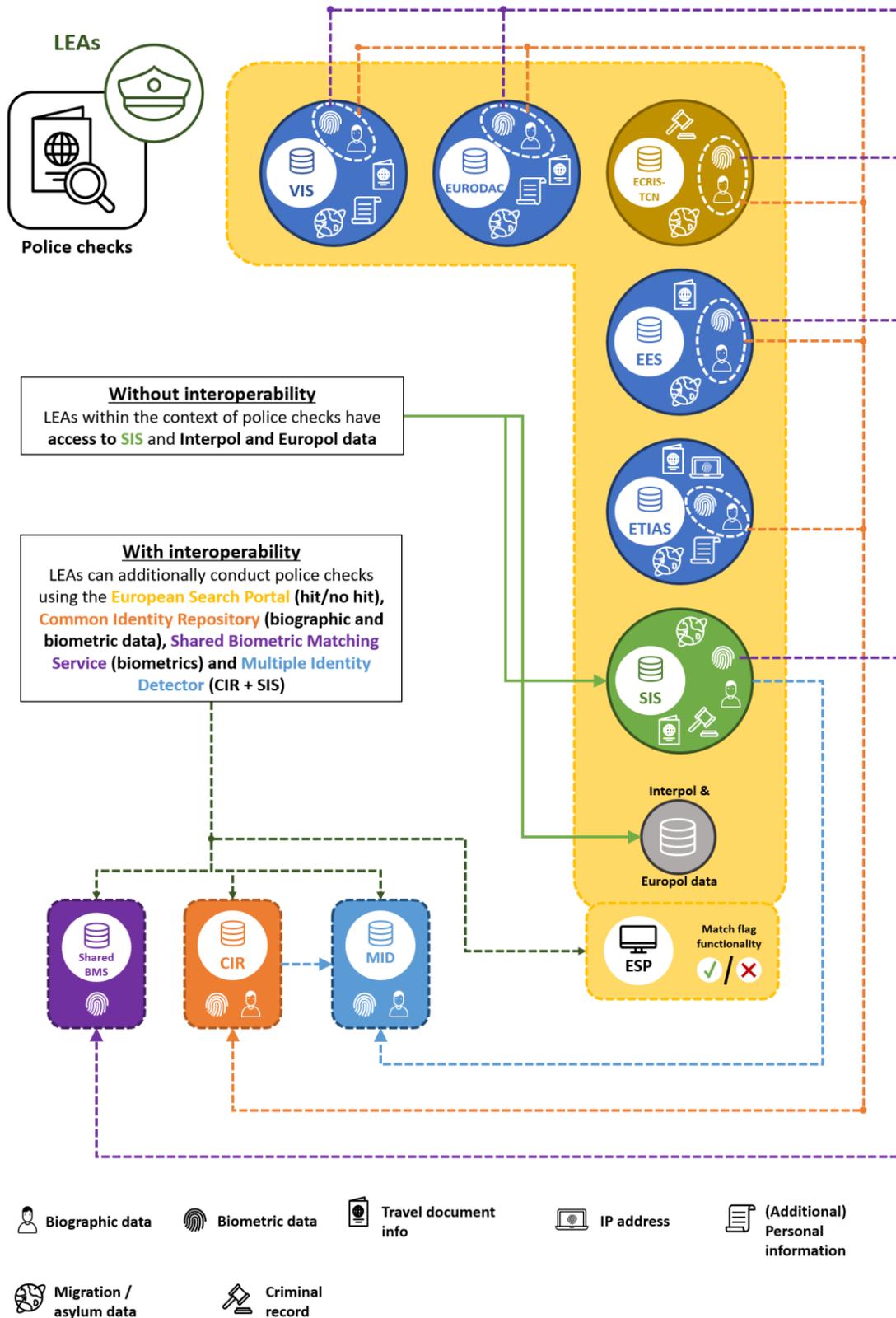
- a) where a police authority is unable to identify a person due to the lack of a travel document or another credible document proving that person's identity;
- b) where there are doubts about the identity data provided by a person;
- c) where there are doubts as to the authenticity of the travel document or another credible document provided by a person;
- d) where there are doubts as to the identity of the holder of a travel document or of another credible document; or
- e) where a person is unable or refuses to cooperate.<sup>26</sup>

Where the query indicates that data on that person are stored in the CIR, the police authority shall have access to consult the data referred to in Article 18(1) of the Interoperability Regulations (Figure 3 below).

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<sup>26</sup> Article 20, paragraph 1 of the Interoperability Regulations.

Figure 3 – Law enforcement authorities' (LEAs) access to databases for police checks with and without interoperability



Source: Authors' own elaboration.

Interoperability, in substance, will allow police authorities to make inferences derived from the information obtained via CIR consultations, and to take decisions based on the reference indicating the underlying database(s) where the data are stored. These new operational powers appear problematic in different respects.

First, the possible overuse of interoperability components such as the CIR for conducting police checks might lead to a *de facto* reintroduction of systematic border controls. While similar issues have already been flagged with regard to the way in which SIS II is currently used by police authorities within the Schengen Area (Guild et al., 2016), interoperability might create further tensions with the Schengen Border Code and EU freedom of movement *acquis*.

Second, the fact that interoperability will by design allow the interconnection of law enforcement databases with migration and asylum ones might lead member state law enforcement authorities to carry out checks on specific groups of people identified on the basis of grounds such as ethnicity and religion, with the consequent risk that the new technologies will be used as tools for discriminatory identity checks. The European Parliament has already expressed concerns with regard to the increasing vulnerability of both adults and children – especially of African descent – who are exposed to “the routine use of racial profiling, discriminatory stop-and-search practices and surveillance in the context of abuse of power in law enforcement, crime prevention, counter-terrorism measures, or immigration control” (European Parliament, 2019).

Third, the range of new data processing operations allowed for by the Interoperability Regulations have led experts to note how their operationalisation will undermine the key data protection principle of purpose limitation,<sup>27</sup> blurring – if not erasing – the lines between datasets designed to serve distinct purposes, such as border control and law enforcement (Silvestri, 2018).

### **4.3 Capturing asylum authorities in the security continuum**

Interoperability will also change the ways in which a wide range of EU and member state first-line authorities responsible for processing asylum applications, border control and migration management tasks perform their functions and carry out their daily work.

First of all, data gathered into EURODAC during identification and registration of international protection seekers and the processing of asylum claims by member state authorities might at all times be used in the context of checks conducted by law enforcement authorities across the EU (see Figure 4 below). Interoperability will also enable another functionality that consists in the possibility for borders, asylum, immigration authorities having access to at least one of the pre-existing databases, to query the European Search Portal (ESP) to ascertain whether the data of an individual being checked (in the context of processing

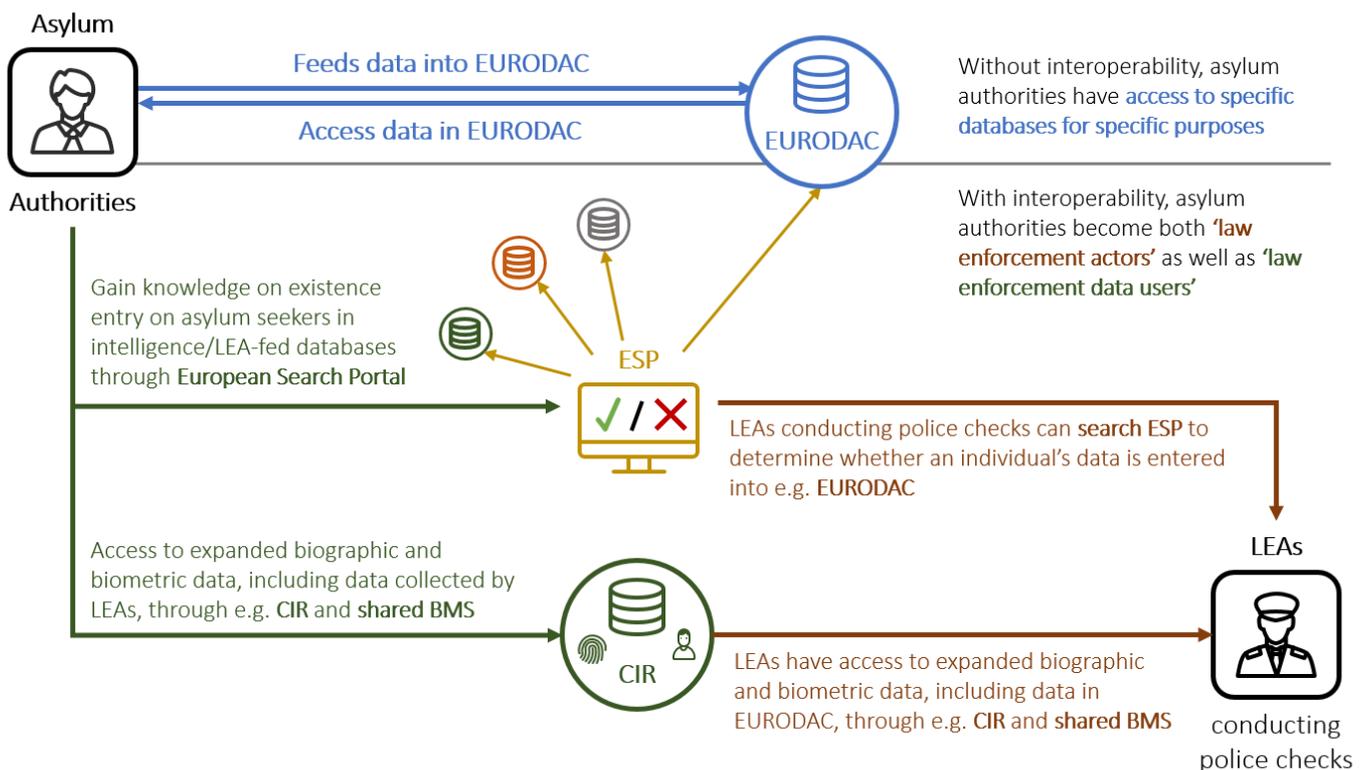
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<sup>27</sup> The purpose limitation principle, as defined in Article 5(1)(b) of the General Data Protection Regulation (GDPR), states that personal data must be “collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes”. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88.

but also law enforcement-related activities) are stored in any of the existing databases (Figure 4 below).

The new large-scale information-gathering and analysis systems introduced by the Interoperability Regulations are thus *de facto* turning EU and national authorities in charge of asylum border and migration management into law enforcement actors. They also become law enforcement data users at the moment when they have access (including indirectly) to information stored by police and other security players across the EU. Interoperability will thus perpetuate and reinforce the long-standing misinterpretation of human mobility as a security problem by the mean of capturing asylum authorities into a law enforcement framework that artificially identifies asylum seekers as potential security threats. This move reflects what Bigo has called the (in)security continuum (Bigo, 2002; Bigo, 1996).

Figure 4- EURODAC and interoperability as policing tools



Source: Authors' own elaboration.

At the same time, the extension of a data-driven police and criminal justice approach to refugees raises the question of interoperability's compliance with international refugee law and specifically, the non-penalisation of irregular entry of bona fide asylum claimants enshrined in Art 31 of the 1951 Refugee convention. Handling and processing of EURODAC data in the context of police activities appears in disconformity with the faithful application of Art 31 of the Convention, as it creates an artificial and dangerous association between asylum seekers and potential criminals, a criminalisation dynamic similar to the one produced by current EU legislation on the facilitation of irregular migration (Carrera et al., 2018b).

Before the entry into force of the Interoperability Regulations, the European Data Protection Supervisor (EDPS, 2018) noted that “facilitating the access by law enforcement authorities to non-law enforcement systems (even to limited information such as a hit/no hit) is far from insignificant from a fundamental rights perspective”. The EDPS also recalled how different “systems have been set up and developed in view of the application of specific policies and not as a law enforcement tool. Routine access would represent a violation of the principle of purpose limitation. It would entail a disproportionate intrusion in the privacy of for instance travellers who agreed to their data being processed in order to obtain a visa, and expect their data to be collected, consulted and transmitted for that purpose”.

#### **4.4 eu-LISA and Frontex: new powers beyond technical management**

EU JHA agencies, notably Frontex and eu-LISA may be considered as the main ‘winners’ of the new interoperability framework. Interoperability reflects a trend towards multi-purpose data and information processing schemes, which is nurtured by ‘an attitude of data-sharing by default’ among the Union’s law enforcement authorities (Bigo et al., 2012). In this context, EU agencies increasingly play the role of ‘knowledge producers’, for example through the production of migration statistics, the elaboration of scenarios on future migration flows, and the visualisation of migration routes used by migrants, as is the case in Frontex Risk Analysis Reports (Horii, 2016).

And yet, previous examinations of EU security and migration data management instruments and policies have shown how information collected and processed by calculation and statistical correlation with the aim of producing risk assessments and risk profiles is highly controversial, most notably because it produces ‘probabilistic knowledge’ (Bigo et al, 2012). Statistics showing that a particular group of individuals has a higher chance of being involved in an unlawful (or even criminal) activity will justify that profilers focus their efforts on that particular group. In the field of law enforcement more specifically, profiling is used ‘to select’ a group of people as a potential ‘risk’ or ‘threat’ – such as ‘high risk travellers’, ‘suspicious traveller’, the visa ‘over-stayer’, etc., which may lead to discriminatory ethnic profiling (FRA, 2010).

The reform of the eu-LISA agency is especially illustrative of the increasing role played by JHA agencies in data processing and knowledge production. On 9 November 2018, the European Council adopted the Commission’s proposal to strengthen eu-LISA’s mandate, with the key aim of ensuring interoperability of EU information systems for migration, security and border management.<sup>28</sup> The revised eu-LISA mandate includes far-reaching operational, research and policy tasks, ranging from personal data processing, ensuring ‘data quality’ control, developing other large-scale IT systems, implementing research projects and testing pilot projects, as well as providing *ad hoc* operational support to member states facing “extraordinary security and migration challenges” in particular areas of their external borders (e.g. hotspots) (Carrera, 2019).

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<sup>28</sup> Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, OJ L 295, 21.11.2018, p. 99–137.

The expanding role played by eu-LISA in data processing raises a number of challenges concerning not only the impact on fundamental rights (and most notably privacy and data protection rights), but also with regard to non-discrimination. Some outstanding issues regarding the expanded mandates of the agency, in particular, should be highlighted. Already in 2017, in its observations on the Commission proposal for the revision of eu-LISA mandate, the EDPS recommended that such a revision should be “accompanied by a detailed impact assessment of the right to privacy and the right to data protection which are enshrined in the Charter of Fundamental Rights of the EU”.<sup>29</sup> This is because the information systems managed by the agency “contain very sensitive information about individuals” (EDPS, 2017).

With regard to the interoperability of information systems, the EDPS recommended that, in the absence of clearly formulated policy objectives and of a comprehensive legal framework, all references to interoperability should be deleted. The EDPS raised additional concerns about the possibility that the agency could develop and host a common centralised solution for large-scale IT systems, which are in principle decentralised, maintaining that such changes require the revision of the appropriate legislative basis, which should be accompanied by adequate impact assessment and feasibility studies. The fundamental issues raised by the EDPS, in particular the implications on data privacy and protection, continue to remain relevant after the entry into force of the revised eu-LISA Regulation.

Concerns also emerge from the analysis of the 2016 proposal for the EURODAC recast and the expanded data processing powers it would entrust to eu-LISA. For instance, Art. 9 of the proposal foresees the possibility for the agency to share statistical data obtained from EURODAC with other relevant Justice and Home Affairs Agencies for analysis and research purposes.<sup>30</sup> Furthermore, new provisions are included in Art. 5(1) that would allow eu-LISA to use “real personal data” when testing the Central System for diagnostics and repair, as well as the use of new technologies and techniques. These new forms of data processing would only be allowed when the data is anonymised, and the information concerned could not be used for individual identification. However, they would also reduce the transparency and foreseeability of the ways in which sensitive data of vulnerable individuals are handled and processed. In such a context, data subjects would *de facto* be deprived of the ownership of their data.

A further major lacuna of the revised eu-LISA Regulation, which has not been taken into consideration by co-legislators, is the lack of any complaint procedure or mechanism before any EU agencies, such as the EDPS or the European Ombudsman, for individuals affected by fundamental rights violations in the context of any of these new responsibilities. This is in spite of the fact that a number of stakeholders, first of all the EU Fundamental Rights Agency (FRA), recommended the establishment of an “EU-wide request handling mechanism” at the eu-LISA agency to manage requests to access, correct and delete data as well as to provide data subjects with the information they need (FRA, 2018a).

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<sup>29</sup> European Data Protection Supervisor, Summary of the Opinion of the European Data Protection Supervisor on the proposal for a Regulation on the eu-LISA, C 386/6.

<sup>30</sup> Statistics produced by eu-LISA for these purposes should not report any names, individual date of births, or any personal data that would individually identify a data subject.

#### 4.5 Risks of arbitrariness, discrimination, and the tension with fundamental rights

The envisaged system of EU interoperable databases and information exchange systems will play an increasingly crucial role in controlling and managing human mobility, including that of refugees and asylum seekers engaging in the onward movements within the Schengen Area. Data collected and collated through existing databases will make it possible to conduct checks on individuals, regardless of their status, along the entirety of their journeys, from the time preceding entry into the Schengen Area to the moment when they cross the EU external border, but also during their stay within the Schengen Area, and until their (voluntary or forced) departure.

For instance, the European Border and Coast Guard Agency (EBCG, also known as Frontex) – which currently has no access rights to the VIS, ECRIS-TCN and EURODAC (Figure 5 below) – has called for aligning access rights of the Agency’s team members with those of national authorities “performing equivalent tasks” in the context of joint operations.<sup>31</sup>

Becoming part of the interoperability framework, Frontex will be given the possibility to use some of the new system’s tools and functionalities to perform its tasks. For instance, Frontex agents will be able to query the European Search Portal (ESP), and consequently see whether the data of an individual is already stored in databases to which they previously had no access (Figure 5 below).

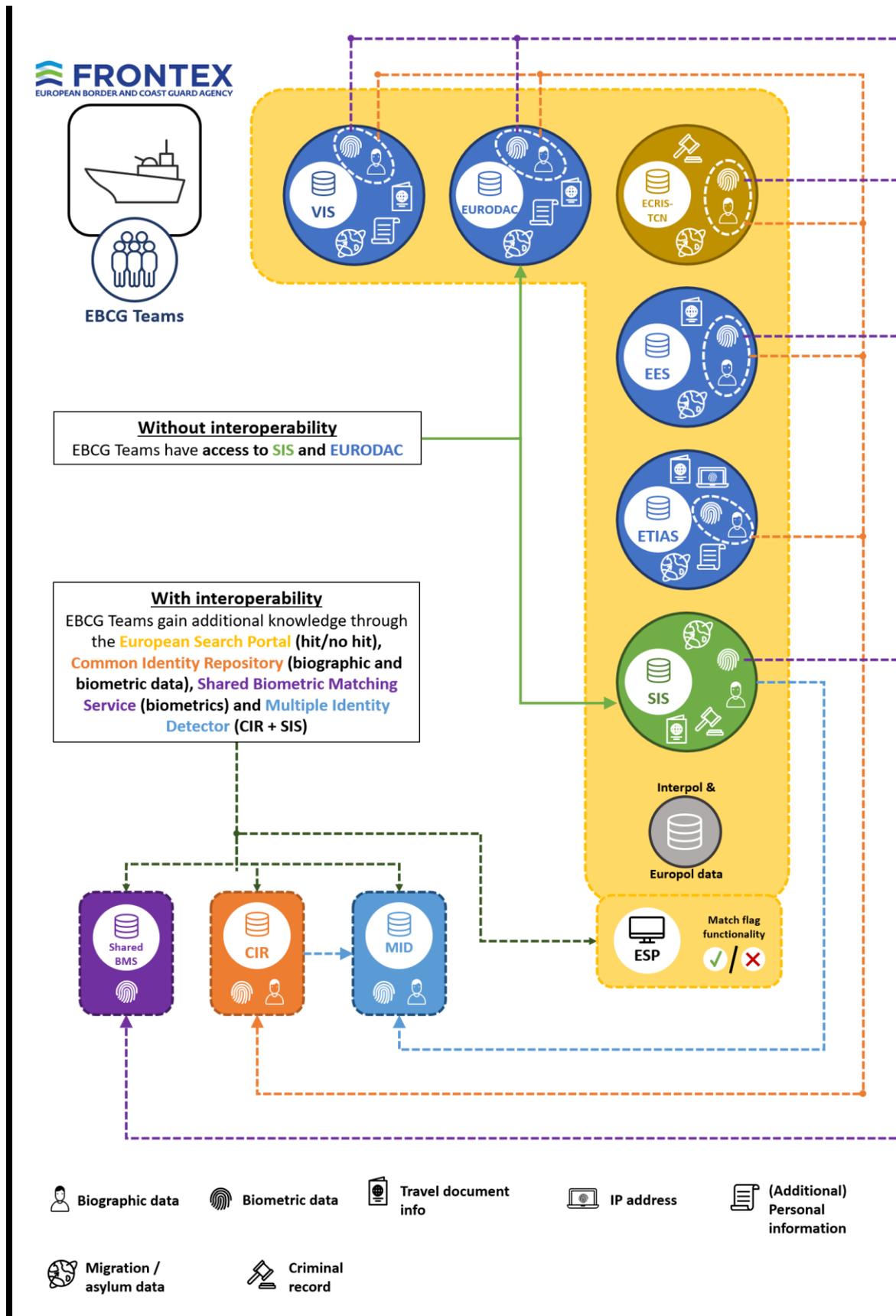
At the same time, in a context where the arena of actors participating in the interoperability framework becomes increasingly populated, greater risks of mistakes, misbehaviour, and malpractice are likely to arise, affecting the rights and status of refugees and asylum seekers in the EU.

Previous research has shown that, already at the stage of fingerprinting of third country nationals whose data will be inserted in the EURODAC system, a large margin of discretion (if not arbitrariness) is left to border guards or law enforcement officers as to the definition of the category under which an individual is classified (Ferraris, 2017). Authorities in charge of fingerprinting decide whether to channel migrants either into the category of asylum seekers or those “irregularly crossing the external border”.

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<sup>31</sup> “Non-paper by Frontex on its access to central EU systems for borders and security”, LIMITE doc no: 15174-17, pdf, available at <http://www.statewatch.org/news/2017/dec/eu-council-frontex-non-paper-access-databases-15174-17.pdf>.

Figure 5- Frontex team members' access to databases without and with interoperability



Source: Authors' own elaboration.

Analysis of EURODAC statistics shows that different 'categorisation approaches' are adopted depending on where fingerprinting of new arrivals from identical migratory routes is conducted. Third country nationals having entered the EU from the so-called Balkan route are more likely to be labelled as irregular migrants in countries such as Hungary or Greece, if compared with other EU member states such as Germany or Sweden (Ferraris, 2017).

However, categorisation in the country of first arrival has a crucial impact on the fate of asylum seekers. Initiatives such as the Migrant Files project have for instance found that "at least ten people a year are wrongly deported due to false system hits in the fingerprint ID scanning devices". The true number may be, however, "far higher".<sup>32</sup> Against this backdrop, the proposal to expand the possibility to store data of irregular migrants into EURODAC (for a period of five years) appears even more problematic. Data inputted wrongly (e.g. mistakenly categorising an asylum seeker as an irregular migrant) would lead to false system hits and potentially even generate 'false identities'. Such results would clearly produce very serious consequences for the individuals concerned.

The FRA already warned against the potential negative effects on the fundamental rights of migrants that may derive from the expanded possibilities given to national and EU agencies authorities to take immigration or law enforcement decisions on the basis of previous determinations regarding irregular entry or stay, specifically in the case of asylum seekers and children (FRA, 2018b). New errors are, however, only likely to arise in a context where EURODAC data become part of the interoperability system, which allows migration and asylum data to be collated with information contained in databases such as ETIAS and VIS (based on risk indicators operationalised into screening rules or algorithms) and used in conjunction with SIS (in the context of crime-fighting and counter-terrorism activities).

Interoperability is likely to magnify the impact of not only flawed administrative decisions, but also spelling mistakes, insufficient information provided by the person, instructions not followed, cultural norms for reporting age, lack of interpretation, and accuracy issues in national databases (if data are taken from these) (Silvestri, 2018). Against such a backdrop, the proposal made in the 2016 proposal for EURODAC reform to inflict sanctions to individuals refusing to hand over their data to EU and member states asylum and immigration authorities appears particularly problematic.

A key question that remains unresolved is whether a generalised use of asylum seekers' and migrants' data for the purpose of combating crime and terrorism complies with the EU data protection principles of necessity and proportionality (Vavolula, 2019). And yet, recent field research conducted in EU 'first arrival countries' such as Italy have already identified normative, technological and bureaucratic bias in the ways in which identity systems such as EURODAC are fed and utilised, including with regard to the classification of vulnerable communities and the inconsistent collection of migrants' identity information (Latonero et al., 2019). The same research confirms that migration management and security technologies that rely on identity and biometric data (rather than on actual past behaviours and criminal records) introduce a new 'socio-technical' layer that may exacerbate existing biases, discrimination, and power imbalances.

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<sup>32</sup> See The migrants' Files website, <http://www.themigrantsfiles.com/>

Against such a background, the proposal to reduce the age threshold (i.e. six years old) above which EURODAC registrations become compulsory appears especially problematic. The FRA has also highlighted problems associated with registration procedures of children for immigration purposes. When looking at practices related to the collection of data during visa applications or for the purpose of the Dublin system, the FRA found that the rights of children were in fact affected in multiple ways, including as a consequence of child-unfriendly treatment, issues related to the quality and reliability of fingerprints, and the risk of re-traumatisation. These challenges might well be further exacerbated by the proposed inclusion of additional categories of personal data (e.g. face images) into EURODAC foreseen by proposal for a reform of EURODAC.

Another crucial privacy issue relates to the possibility for migrants and asylum seekers to access remedies in case of errors or misuse of their data. Lack of information of data subjects about their rights is particularly relevant in the case of asylum seekers. Asylum seekers are often held in detention in border areas, hotspots and closed detention centres (Danish Refugee Council, 2019). In the context of hotspots in Italy and Greece, in particular, data collection is performed by officers from other member states under the supervision or the remit of EASO and Frontex, which themselves are not subject to national supervisory bodies. This circumstance creates a situation where responsibility becomes diffused and any remedy and safeguards are difficult to activate, rendering supervision and data control processes and access to rights materially very complicated.

Interoperability is going to render the effectiveness of available legal and administrative remedies before competent oversight authorities guarantees even more difficult. It will be difficult for instance for a third country national deprived of personal liberty (e.g. in the context of 'hotspots') to be adequately informed about their rights under EU primary and secondary law. Reinforcing and streamlining the data collection process has not gone hand-in-hand with an equal attention to ensure safeguards of people involved, especially when it comes to empowering national control and supervisory data protection authorities so that GDPR and other applicable rules are complied with and accessible in practice.

## 5. CONCLUSION: POLICY OPTIONS

### Option 1: De-securitising asylum seekers' mobility

EU policy responses to address onward movements of asylum seekers inside the EU are increasingly driven by a policing logic, which tends to portray intra-EU mobility as irregular and quasi-criminal. The high policy salience attached to the objective of preventing onward movements, however, contributes to reinforcing a narrow approach to this phenomenon based on deterrence, criminalisation and containment, instead of addressing and upholding its underlying causes.

Onward movements in the EU should be de-securitised, paying due attention to asylum seekers' agency and to the legitimate set of reasons they may have to lodge an application in a member state other than the one of first irregular arrival. The fact that a refugee, a beneficiary of subsidiary protection or an asylum seeker has moved onward (from a country in which she had or could have sought a form of international protection) does not in itself justify her or his being deprived of the set of rights and guarantees associated with their status.

'Trust' in the functioning of the CEAS cannot be taken for granted. Any individual assessment of asylum claims should not automatically presume 'safety' of any EU member state, and therefore automatically reject accessibility to asylum procedures by applicants. There can be no 'blind trust' among EU member states on the fact that any of them should be considered a priori 'safe' for any individual asylum seeker. Applications for asylum in a member state different from the one formally deemed as responsible by EU rules should not be automatically presumed as unfounded. These applications should instead be carefully examined in light of a notion of 'safety' grounded 'in international human rights and refugee law.

The 'human rights test' to be applied in the case of Dublin transfers should be based on a broader notion of 'safety' grounded in both international refugee and human rights law, and current EU asylum law. This understanding of safety should encompass a number of conditions including for instance the absence of degrading reception and living conditions leading to destitution, protection against exclusion from social assistance or conditions leading to extreme material poverty, protection against systemic and institutionalised discrimination and xenophobia against asylum seekers and foreigners.

### Option 2: Asylum seekers' agency: A humanitarian clause mechanism

Previous academic and policy proposals on a possible reform of the Dublin system that incorporate respect of asylum seekers' agency have studied the advantages of establishing a 'free choice' model. It has been argued that a system based on the free and informed choice of the applicant would allow to drastically reduce the use of coercive methods that characterize current Dublin transfers, while also reducing bureaucratic complexity, frequent litigation and implementation challenges typical of the current system (Maiani, 2016).

Other policy contributions have put forward a 'limited choice' model that would allow applicants to select among 'a reasonable range of options' (Guild et al., 2015). The 2017 Eu-

European Parliament proposal for a reform of the Dublin system (the so-called Wikström Report) went into this direction by granting asylum applicants “who do not have genuine links with a particular member state” the option to choose between the four member states which have received the lowest amount of applicants in relation to their ‘fair share’ (calculated on the basis of population and GDP) (European Parliament, 2017b). As a complement to a limited choice system, academic studies have explored the potentials of ‘preference matching’ models, which would allow incorporating asylum seekers’ preferences over the member state of destination, as well as member states’ preferences over potential applicants, into allocation systems based on pre-agreed quotas (Jones and Teytelboym, 2017; Rapoport and Fernández-Huertas Moraga, 2014).<sup>33</sup>

While the advantages of ‘free-choice’ or limited choice models compared to the current EU Dublin system should be recognized, these models risk reinforcing a securitized understanding of asylum seekers’ mobility as something voluntary and unrelated to protection needs. On the contrary, in this Paper we have argued that asylum seekers exercising intra-EU mobility often neither have a ‘free choice’ nor a ‘privileged preference’ when moving to another member state. They are often forced to travel inside the EU for well-founded and legitimate reasons, which may include dysfunctional asylum systems, degrading reception and living conditions, social exclusion, poverty, lack of secure residence, institutionalized discrimination and lack of durable life opportunities.

Another potential drawback associated specifically to ‘preference-matching’ models is that they foresee a ‘choice’ or option for states to ‘rank’ asylum seekers they wish to accept based on a set of pre-defined preferences (to be ‘matched’ with asylum seekers’ preferences about their state of destination). While matching systems do not prescribe which principles states should be allowed to use when ‘ranking’ asylum seekers, their use in the context of EU policies may indirectly lend support to states’ discriminatory and restrictive admission practices.

States’ freedom to select the profiles of asylum seekers they want to receive is limited by their obligations under international refugee and human rights law, and the EU Charter of Fundamental Rights when applying EU asylum law. States cannot select asylum applicants based on their nationality, ethnic origin or religion, or even their ‘recognition rates’, as was the case of the 2015 EU ‘emergency relocation decisions’. Selection based on these grounds would amount to indirect discrimination against individuals, falling directly under the scope of Article 21 EU Charter of Fundamental Rights, and which, as the CJEU has recently confirmed, is illegal under EU law.<sup>34</sup>

An alternative approach to address the current protection gaps of the Dublin system, while not delving into the question of how to structurally reform its allocation model,<sup>35</sup> would be

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<sup>33</sup> A detailed proposal of how a matching system for asylum seekers (or refugee) would work is provided by Jones and Teytelboym (2017). According to the authors, under the proposed system “participating States and refugees would give their preferences – over which refugees they most wish to host or which State they most wish to be protected in – to a centralised clearinghouse that matches them according to those preferences” (p. 8).

<sup>34</sup> See joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, 6 September 2017, par. 304-305.

<sup>35</sup> For a review of alternatives to the Dublin system see Maiani (2016), p. 45.

to explore the possibility to revise the scope and rationale of the so-called 'Humanitarian Clause' envisaged in Art. 17.2 of the Dublin Regulation. In its current form, the humanitarian clause envisages the possibility for a member state responsible for examining an asylum claim to request another Member State to take charge of an applicant on humanitarian grounds, based in particular on family or cultural considerations.<sup>36</sup>

The suggested revision of the 'humanitarian clause' would imply overcoming its current 'state-to state' design and enlarge it by granting an individual asylum seeker the possibility to directly activate the mechanism for requesting any other EU member state to take charge of her or his asylum claim based on humanitarian grounds. In order to make the process swifter and consideration of the evidence impartial, the envisaged European Union Asylum Agency (EEAA) (whose mandate is still under negotiation) could be tasked to manage the process, including the task of taking preliminary decisions on asylum seekers' transfer requests, which should then be validated by the authorities of the requested member state based on simplified and accelerated procedures.<sup>37</sup>

The entire mechanism should be designed and implemented in a way which is fully in line with the right to seek asylum enshrined in Article 18 of the EU Charter of Fundamental Rights. To that aim, the 'mediating role' or mandate played by the EUAA in the process should be linked to protection-related priorities under Article 18 of the Charter and not influenced by migration management objectives. The whole process should be supervised by an adequate monitoring system, entrusted to an actor independent from EASO such as a monitor under the EU Fundamental Rights Agency.

The 'individual humanitarian Clause Mechanism' sketched above would allow asylum seekers to challenge the obligation to remain in a member state where their safety is at risk, while respecting her/his agency regarding the member state of destination. As such, it could effectively contribute in creating the conditions for upholding the right to seek asylum in the EU in accordance with the standards laid down in the EU Treaties and provided by EU asylum legislation. This proposal may be helpful to shift the focus away from the current predominant framing of asylum seekers' mobility in terms of 'voluntary choices' or 'individual preferences', and to pay more attention to the humanitarian protection-driven reasons that asylum seekers may have to pursue onward movements within the EU.

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<sup>36</sup> Studies conducted so far have concluded that divergent interpretation by member states of what constitutes valid humanitarian grounds for transfer have represented an obstacle to the application of the humanitarian clause in practice (Jurado et al., 2016: p. 35). While recognizing that the humanitarian clause has been seldom applied in practice, UNHCR concludes that it represents a key safeguard in a system that duly upholds the principle of family unity and the best interest of the child and recognizes the importance of family and other connections to a State, including as a vehicle for integration (UNHCR, 2017: p. 8).

<sup>37</sup> In light of current divergences among member states on what constitute valid humanitarian grounds for applying the humanitarian clause, the envisaged mechanism should be accompanied by a clear definition of the criteria and conditions to be fulfilled for obtaining transfer based on the humanitarian clause. The mechanism would also require to fundamentally rethink the approach taken by the Commission in its 2016 proposal for reforming the Dublin Regulation, which narrowed the scope of the existing humanitarian clause to family considerations by deleting references to 'humanitarian grounds' (European Commission, 2016b, Art. 19).

### **Option 3: avoiding further expansion of the interoperability framework to limit potential violations of asylum seekers' and migrants' fundamental rights**

The increased data processing and access powers entrusted by the interoperability framework to law enforcement authorities at the national and EU level call for a close scrutiny of accountability and legal protection gaps that are left in the system. Interoperability will lead to an asymmetry in access rights by third country nationals and asylum seekers. There is a real risk that EU databases will be overused by police authorities for identity checks inside the Schengen territory, based on dubious grounds, and which would amount to quasi-systematic border checks contrary to EU borders law. The EU should set up a systematic and permanent monitoring system of EU member states' police checks falling within the scope of the Schengen Borders Code by including in the SIS II a reporting and statistical component (Carrera et al., 2018a).

It would be crucial to identify the availability and effectiveness of complaint mechanisms and administrative and legal remedies available to migrants and asylum seekers whose rights might be directly or indirectly affected by the new regulations. The interoperability framework should be implemented in a way that guarantees interoperable justice, taking the shape of independent and effective complaint mechanisms before competent national authorities and EU agencies such as Frontex and eu-LISA (in relation to for example the quality of data). Despite its role as 'coordinator' and manager, eu-LISA could be co-responsible for fundamental rights violations linked to wrong or false data. The current mandate of the agency is particularly weak as regards legal, democratic and judicial accountability in comparison to other EU agencies and should be revised according to identified needs.

EU data protection law and the EU Charter of Fundamental Rights ensure that ownership of data belongs to individuals – irrespective of their citizenship and migration status, and not to states or national authorities (Bigo, Isin and Ruppert, 2019). With the Interoperability Regulations already adopted, it is also central to invest in initiatives directed at raising migrants and asylum seekers' awareness about their rights as data subjects. Furthermore, the EU should invest in specialised training for legal professionals that provide assistance or information on privacy rights to undocumented migrants, asylum seekers, and refugees.

Without a clear understanding of the exact implications of the new interoperability framework and its exact implementation, there should not be any further expansion of the purposes and functions of other EU databases such as EURODAC. In order to avoid experiences such as those experienced in the operability of the Schengen Information System II (Parkin, 2011), the implementation of the interoperability framework should be subject to close monitoring and democratic scrutiny, paying specific attention to the proportionality, necessity and fundamental rights impacts of any new functionalities and related costs.

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# ReSOMA

RESEARCH SOCIAL  
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## ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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