

RIGHTS AT RISK: IMPLICATIONS OF A CLOSER NEXUS BETWEEN ASYLUM AND RETURN PROCEDURES

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APRIL 2019



INTRODUCTION

The EU Hotspot Approach was launched as part of the EU Agenda on Migration to assist Member States facing disproportionate migratory pressure at the EU's external borders. Located at key arrival points, hotspots are designed to provide operational support by the EU agencies to Member States, with a focus on assisting in the identification, registration, fingerprinting and processing of asylum seekers. While the EU Hotspots were intended as temporary emergency structures, they have grown into longer-term structures, and the approach is perceived as a test model for a potential permanent EU registration and identification mechanism at the key points of arrival with the purpose of swift and effective processing and selection between those in need of international protection, and those to be returned.

To improve the effectiveness and efficiency of the migration management system, a main objective of current efforts by the EU is to establish a closer link between the asylum and return procedure and to reduce gaps between the procedures. This is at the core of the EU Agenda on Migration¹ and is reflected in the reform of the different regulations and directives under the Common European Asylum System² of May and July 2016 and as well as in the recast Return Directive³ of September 2018. It is also encouraged by the Best Practices for the Implementation of the EU Hotspot Approach⁴ released by the Commission in late 2017.

The push for a closer link between the asylum and the return procedure is politically motivated. Low return rates are perceived to compromise the credibility of the asylum and migration management system, and to increase incentives for irregular migration and onward movements. Control of onward movements through containment at the EU's external borders or similar transit zones as well as an increase in returns, are considered preconditions to EU-wide arrangements for solidarity and responsibility sharing for those disembarked at the EU's external borders. Hence, in its latest opinion on the hotspots, the Fundamental Rights Agency (FRA) reports to have observed *"an emerging trend towards processing applications for international protection while applicants remain confined at the external land or sea border"*.⁵ This assessment is based on developments in the EU such as the European Commission support for the hotspot approach⁶ and the notion of "controlled centres"⁷ initially launched at the European Council meeting in June 2018.

Over the months of August-October 2018 DRC conducted a desk study and qualitative research based on secondary data review and individual interviews on the current implementation of the EU hotspot approach, with a focus on measures to reduce the gap between the asylum and return procedure. The research included field visits to Greece and Italy and explored evolving filtering mechanisms for swift distinction between refugees and migrants and detention practices generated in Greece and Italy to accommodate a closer nexus between the asylum and return procedure. Based on an analysis of the practices this policy brief assesses protection implications, including barriers for newly arrived third country nationals to access the asylum procedure and the risk of refoulement.

The findings of the research demonstrate that a closer nexus between the asylum and return procedure raises multiple concerns from a protection perspective, including potential impediments regarding effective access to the asylum procedure, due to an automatic use of detention and a lack of access to legal assistance and effective remedies.

1 EU Commission, [Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe](#), 6 April 2016.

2 The Commission presented two packages for the reform on the Common European Asylum System (CEAS): The first package of 4 May 2016 included proposals for regulations to reform the Dublin system, to amend Eurodac and to establish an EU Asylum Agency which is to replace the European Asylum Support Office (EASO). The second package of 13 July 2016 included proposals for new regulations to replace the Asylum Procedures Directive and the Qualification Directive as well as proposed changes to the Reception Conditions Directive.

3 Return Directive, Directive No. 2008/115/EC.

4 Commission Staff Working Document (2017): [Best Practices for the implementation of the EU Hotspot Approach](#)

5 FRA, [Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, February 2019](#), FRA Opinion 3/2019 [Hotspots Update], 4 April 2019, page 18.

6 FRA: According to the European Commission the hotspot approach in Greece has shown "the added value of initiating the asylum and return procedures and, when appropriate, finalizing them, in the hotspots." European Commission, Commission Staff Working Document, [Best practices on the implementation of the hotspot approach](#), Accompanying the document Report from the Commission to the European Parliament, the European Council and the Council, Progress report on the European Agenda on Migration, SWD(2017) 372 final, Brussels, 15 November 2017.

7 [European Council, European Council conclusions](#), 28 June 2018

Hotspots in Greece and Italy and their reception capacity (No. of persons)



In 2019, there is a total of nine reception facilities in Greece and Italy, where the hotspot approach is being applied. The hotspot in Taranto did not host new arrivals.

Source: FRA, [Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, February 2019](#), FRA Opinion 3/2019 [Hotspots Update], 4 April 2019

IMPACT OF CURRENT PRACTICES ON ACCESS TO THE ASYLUM PROCEDURE

It is a fundamental right to apply for asylum⁸ and to be protected against *refoulement* and collective expulsion.⁹ A core function of the EU hotspots is to identify whether persons, who arrive at the hotspots, intent to apply for asylum and direct them to the right procedure.

For a person to be able to access the asylum procedure, it is essential that the person is adequately informed about the right to apply for international protection and the asylum procedure.¹⁰ Under EU law, newly arrived persons in a hotspots should be informed about the applicable procedures.¹¹

To facilitate the return of an illegally staying third-country nationals, the Member States can make readmission agreements with other EU Member States or third countries. Removal procedures are regulated by EU law, especially the Return Directive¹² and the Schengen Borders Code¹³. The Member States can decide not to apply the Return Directive in specific situations,¹⁴ which the authorities in Greece and Italy have chosen to do with regard to persons, who e.g. have been refused entry or have been apprehended while irregularly entering the country by sea without having obtained a right to stay.¹⁵ The authorities can also detain a persons to prevent unauthorized entry or to prepare removal, if the decision to detain complies with the principles of necessity and proportionality.¹⁶ In all situations, the basic principles and safeguards of the Return Directive, such as providing information to detained migrants, as well as the principle of non-refoulement applies.¹⁷

⁸ 1948 Universal Declaration of Human Rights Article 14 and Article 18 of.

⁹ 1951 Geneva Convention relating to the Status of Refugees Article 1(A)(2) and the EU Charter of Fundamental Rights Article 19 and the Treaty on the Functioning of the European Union Article 78 and Protocol No. 4 to the European Convention on Human Rights (ECHR) Article 4.

¹⁰ 1951 Geneva Convention relating to the Status of Refugees, the Charter for Fundamental Rights Article 18 (right to asylum) and the Asylum Procedures Directive.

¹¹ The right to good administration, Article 41 of the EU Charter of Fundamental Rights, and Article 5 of the Reception Conditions Directive, Directive No. 2013/33/EU.

¹² Return Directive, Directive No. 2008/115/EC.

¹³ Schengen Borders Code, Regulation (EU) No. 2016/399.

¹⁴ Return Directive Article 2(2)(a).

¹⁵ FRA, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, February 2019, FRA Opinion 3/2019 [Hotspots Update], 4 April 2019, p. 56

¹⁶ Article 5 of the European Convention on Human Rights, Article 6 and 52(1) of the EU Charter of Fundamental Rights, and Article 15 of the Return Directive.

¹⁷ Return Directive Article 4(4).

The elements and measures that are being encouraged within the framework of the implementation of the hotspot approach to support a closer link between the asylum and return procedure generally include: swift distinction between refugees and migrants upon arrival and a subsequent channelling into different procedures coupled with restrictions in freedom of movement and a focus on speedy enforcement of return decisions for persons not expected to be in need of international protection. While the EU agencies support the work of the national authorities in the hotspots, and EU law and national law regulate activities, Member States decide how activities are implemented, which e.g. is illustrated by the different standard operating procedures (SOPs) developed in Italy¹⁸ and Greece¹⁹ respectively.

The policy measures thus translate into different practices depending on national contexts, available resources and capacities as well as political imperatives and arrangements – such as the EU-Turkey Statement – and have different implications for procedural safeguards and for access to the asylum procedure, as reflected in the below:

- When refugees and migrants arrive to the Eastern Aegean islands by boat, they are transported to hotspot facilities, which are legally defined as Reception and Identification Centres (RIC),²⁰ and managed by the Greek authorities in the Reception and Identification Service (RIS).²¹ The Hellenic police, Frontex, the Greek Asylum Service and EASO as well as KEELPNO²² are also present in the hotspots.
- Unlike the establishment of physical hotspot facilities in Greece, the hotspots in Italy relies on pre-existing structures and are instead defined as a method of teamwork between the Italian authorities such as the police and health personnel, working together with personnel from Frontex, Europol and EASO as well as UNHCR, IOM and Save the Children.²³ However, there are indications that the Italian legal framework is moving towards the Greek model.²⁴
- In both countries, the initial step in the hotspot procedures is based on the identification and registration of new arrivals by the police with the assistance of Frontex.
- In both countries, new arrivals are detained for purposes of identification and registration as well as with the aim to return irregular migrants or asylum seekers, whose application for asylum has been found inadmissible.
- In Greece, the authorities at the RIC register all new arrivals, who ask for asylum, with the Greek Asylum Service. In Italy, the authorities do not transfer all new arrivals for registration with the asylum authorities. Consequently, the initial registration by the Italian policy, which takes place in the form of a short “pre-identification interview” functions as a filter that either facilitates or hinders the person’s access to the asylum procedure.
- Asylum seekers on the Eastern Aegean islands can be subjected to a geographical restriction during their asylum procedure. Asylum seekers from certain nationality groups with recognition rates below 25% are placed in detention in pre-removal centers under the so-called “low-profile scheme”, and an admissibility procedure is applied to asylum seekers of nationalities with recognition rates above 25% such as Syrian nationals²⁵.
- In Italy, newly arrived persons, who have been registered as asylum seekers directly upon arrival, can have their asylum applications processed without being detained or having their movement restricted. However, in case a person, who has not initially been registered as an asylum seeker and instead has received an expulsion decision by the Italian authorities, at a later stage decides to apply for asylum, the person can risk being detained during the whole asylum procedure.

18 The Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and Department of Public Security, [Standard Operating Procedures \(SOPs\) applicable to Italian hotspots](#), adopted February 2016.

19 Greece, Reception and Identification Service, General Secretariat for Reception, Ministry of Migration Policy, Manual of Standard Operating Procedures applicable to the Reception and Identification Centres (R.I.Cs), 1 December 2017.

20 There are Reception and Identification Centres (RIC) on the islands of Lesbos, Chios, Samos, Leros and Kos, which are under the Greek Ministry of Migration Policy.

21 Reception and Identification Service (RIS) is an independent body under the General Secretariat of Reception of the Ministry of Migration Policy. Law 4375/2016, Article 8(2), Government Gazette 51/A/03.04.2016

22 The Centre for Disease Control and Prevention (Εθνικό Κέντρο Πρόληψης Επιδεικνύμενων Παθήσεων, KEELPNO) is a private law entity under the Ministry of Health and Social Solidarity that is responsible for medical and psychosocial services, according to Law 4375/2016, Article 36(11), inserted by Law 4540/2018, Article 28(7).

23 The Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and Department of Public Security, [Standard Operating Procedures \(SOPs\) applicable to Italian hotspots](#), adopted February 2016, and AIDA (2019), Country report Italy (Update 2018), p. 28.

24 “Legislative reforms adopted in 2018 will make it possible to confine migrants for 30 days in special facilities (appositi locali) within the hotspots as the authorities carry out accelerated asylum procedures.” Note: Italy, Law Decree No. 113 of 4 October 2018, converted into Law No. 132 of 1 December 2018 [decreto-legge 4 ottobre 2018, n. 113, coordinato con la legge di conversione 1° dicembre 2018, No.132], Official Gazette [GazzettaUfficiale] No.281, 3 December 2018, Article3(1) (a) on the 30 days deadline and Article9 (1-ter) and (1-quarter) on border procedure as well as on the five territorial commissions. FRA p. 23.

25 Law 4375/2016, Article 54, and AIDA (2019): Country report, Greece Update 2018, p. 26.

In both countries practice is largely based on nationality and general recognition rates rather than an individual assessment of the person's claim:

- In the Greek hotspots, the authorities focus on channeling new arrivals into different asylum procedures depending on the recognition rates of their respective nationality groups. In addition, persons from certain nationality groups must file their potential asylum applications, while detained in a pre-removal centre.
- In the Italian hotspot procedures, the authorities focus on immediate channeling of newly arrived persons into either asylum or return procedures. In addition, persons from some countries with low recognition rates and well-functioning readmission agreements with Italy are kept in detention and deported directly from the hotspots or pre-removal detention centers.

There are ample evidence and reports that describe and analyse the broader rights implications of the implementation of the EU hotspot approach in Greece and Italy²⁶. The following will from a narrower perspective explore evolving practices at the EU's external borders in Greece and Italy respectively that relates specifically to measures aimed at establishing a closer link between the asylum and return procedure and demonstrate implications of these practices for access to the asylum procedure, to an effective remedy and to the risk of refoulement.

A fair and effective asylum system is a prerequisite for lawful return of a third country national. Accelerated procedures for reasons of effectiveness can be acceptable, but must ensure access to legal assistance, built on effective safeguards, and guarantee individual assessments of all cases independently of nationality.

²⁶ E.g. FRA (2019): Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy; ECRE (2016) The implementation of the hotspots in Italy and Greece; DRC (2017): Fundamental Rights and the EU Hotspot Approach";

BARRIERS TO THE ASYLUM PROCEDURE IN THE GREEK HOTSPOTS

Key concerns in the Greek hotspots related to the asylum-return nexus are the immediate channelling of certain nationality groups into different procedures and the impact of this practice combined with detention policies on the access to legal assistance, to the asylum procedure and to effective remedy and procedural safeguards.

Nationality-based approaches and detention practices impede access to legal assistance and to the asylum procedure

Systematic detention based on nationality under the low-profile scheme: Administrative detention has been on the rise in Greece in the past years following the launch of the EU-Turkey Statement, making it one of the highest in Europe²⁷. In accordance with Greek law, detention decisions must be taken on an individual basis and must be an exceptional measure.²⁸ Under the framework of the so-called low-profile scheme however, the police systematically base its detention decisions and the Greek Asylum Service its recommendations for detention on the respective recognition rates of nationality groups irrespective of the individual's potential intention to lodge an asylum claim²⁹.

In practice, pre-removal centers in Greece are used equally for newly arrived asylum seekers as for asylum seekers, who have had their application rejected. Hence, at the end of 2018, 1.619 out of a total of 2.098 detainees in pre-removal centers were asylum seekers³⁰.

Barriers to legal assistance and to the asylum procedure: As a result of the low-profile scheme single men from Pakistan, Bangladesh, Sri Lanka, Tunisia, Algeria, Egypt, Morocco, Gambia, Guinea, Cameroon, Mali, Senegal, Sierra Leone, Togo, Mauritius and Nigeria who have an asylum motive and would like to apply for asylum, are required to do so from within detention.

Asylum seekers have the right to legal assistance, while they are in detention.³¹ However, it is generally more difficult to access the asylum procedure from detention for those detained immediately upon arrival under the framework of the low-profile scheme, as access to legal information and assistance is limited in the detention centres. UNHCR refers cases to legal aid actors, who have limited capacity to respond to the numerous referrals³². Legal assistance to detained asylum seekers requires additional time commitment from legal aid organisations, as lawyers must travel to the pre-removal centre to consult their clients. .

In addition to the low-profile scheme, rejected asylum seekers are detained upon notification of a negative second instance decision under the fast track border procedure³³. Access to legal assistance and the ability to challenge the second instance negative decision is impeded by detention. Tight deadlines for interviews and appeal in accelerated procedures constitute additional access barriers to international protection when implemented in a context of detention. The fast-track border procedure was introduced as a temporary measure following the launch of the EU-Turkey Statement but was applied to more than 40% of the asylum seekers in Greece in 2018.³⁴

27 According to a new [report](#) by Greek Council for refugees the number of administratively detained persons at the end of 2017 was increased by 60% as compared to 2016. The same trend continued in 2018; 32,718 decisions ordering administrative detention in 2018 as compared to 25,810 in 2017. For comparison see statistics of detention of asylum seekers in selected EU countries in ECRE (2018) AIDA report: "Boundaries of liberty Asylum and de facto detention in Europe".

28 Greek domestic law 4375/16, Article 46.

29 AIDA (2019): Country report, Greece Update 2018, p. 147-148 and 153

30 AIDA (2019), Country report Greece (Update 2018), p. 145; DRC Greece has observed indications of a shift towards less detainees in the pre-removal center on Lesbos in recent months, which can be a result of various factors, such as effective advocacy (complaints before the Greek Ombudsman, CPT visit in April 2018 and consequent report of February 2019, exercise of legal remedies by legal aid actors), less population on site and country of origin of new arrivals (4700 vs 6539 April 2018, 76% of population on site from Afghanistan).

31 Law 4375/2016, Article 38.

32 Interview legal aid providers, August 2018

33 AIDA (2019), Country report Greece (Update 2018), p. 148

34 "In 2018 the total number of applications lodged before the RAO of Lesbos, Samos, Chios, Leros and Rhodes and the AAU of Kos was 30,943. This represented 42.9% of the total number of applications lodged in Greece that year." AIDA Update 2018, p. 74.

There is no evidence to suggest that the expanded use of detention on the islands has had a positive effect on the return rates.³⁵

Insufficient vulnerability assessment procedures channels asylum seekers into wrong procedures

Difficult and slow access to vulnerability assessment from within detention: Individuals channelled into detention immediately upon arrival are not screened fully for vulnerability prior to their detention. While NGOs and other actors have pointed to gaps in vulnerability assessments in the Greek hotspots throughout the years,³⁶ asylum seekers face yet greater hurdles in trying to access vulnerability assessments from within detention.

Access to a full vulnerability assessment from within detention is time-consuming for both lawyers and police authorities. Referral for a vulnerability assessment could at the time of the research take up to two months in part due to lack of qualified staff, including translators, doctors and psychiatrists³⁷, leading to long periods of detention of vulnerable asylum seekers.

Vulnerable asylum seekers in the fast-track border procedure: As a result of these barriers to the full vulnerability assessment, detained asylum seekers are also channelled into the wrong procedures, notably the fast track border procedure, rather than regular procedure, depriving them of the special procedural guarantees for vulnerable applicants. Barriers to vulnerability assessments in the pre-removal center are particularly problematic for Syrians. The EU-Turkey Statement exempts vulnerable Syrians from the fast track border procedure and foresees their asylum application to be assessed on merits in the regular procedure, rather than through the admissibility procedure. The identification and assessment of vulnerability of the individual asylum seeker is thus determining for which procedure the asylum seekers' application is being processed in.³⁸

In the Greek hotspots, apart from complaints to the Ombudsman, there is currently no effective complaint mechanism against cases of defective administrative acts, including for rectifications to wrongful identification and registration upon arrival³⁹.

Non-visible vulnerabilities: Risk of wrongful detention & treatment in wrong procedure

A 19-year-old Syrian asylum seeker arrived in February 2018 on Lesbos, together with his adult sister, her husband and baby. Upon arrival, he was separated from his family members and detained. The young man had physical scars from the torture he had suffered in Syria but was not screened for vulnerability prior to his detention. The young man was vulnerable, because he has been imprisoned in Syria for two months, and the detention in the pre-removal center had a negative impact on his health. Despite the efforts of the young man's lawyer to get him identified as vulnerable and be channeled into an eligibility procedure, the young man did not undergo a vulnerability assessment prior to his first asylum interview for admissibility. The interview took place after two weeks of detention, and EASO identified the young man as being vulnerable and thus exempted him from the fast-track border procedure. In practice, however, the young man was detained for additional two weeks before the authorities had issued the formal decision so that he could be released from detention.⁴⁰

35 AIDA (2019), Country report Greece (Update 2018).

36 MSF, (October 2017), Confronting the mental health emergency on Samos and Lesbos available at <https://www.msf.org/sites/msf.org/files/2018-06/confronting-the-mental-health-emergency-on-samos-and-lesvos.pdf>; The Greek Ombudsman, (April 2017), Migration Flows and Refugee Protection: Administrative Challenges and Human Rights Issues, p. 20-23.

37 According to the AIDA (2019), Country report Greece (Update 2018), there was no doctor present in Lesbos and no psychiatrist in any of the pre-removal detention centers at the end of 2018.

38 Greek domestic law 4375/2016, Article. 50, par. 2.

39 DRC Protection reports.

40 Interview Legal aid provider, August 2018

Lack of effective remedy and procedural safeguards can lead to *refoulement*

Procedural safeguards as well as effective access to appeal a negative asylum decision are paramount to prevent violations of the principle of *non-refoulement*. This requires effectiveness of appeals at the judicial level.

Twisted procedural safeguards and short deadlines in the fast track procedure: The Greek Asylum Service makes the final decision on admissibility, although the interviews and opinions on the case are usually conducted by EASO. During the fast track border procedure, EASO is conducting a so-called “merged” interview, i.e. admissibility and eligibility interview at the same time. The Greek Asylum Service often follows the opinion of EASO.⁴¹ Case-workers from EASO are not able to read interventions by lawyers, which are written in Greek. Thereby, important legal evidence is often not considered in EASO’s assessment and recommendation to the Greek Asylum Service.⁴²

The deadlines of the fast track border procedure are very short.⁴³ If an asylum seeker is rejected in the first instance, he or she has only five days to submit an appeal with suspensive effect.⁴⁴ If the rejected asylum seekers do not appeal within the deadline, the Greek Asylum Service considers their asylum applications withdrawn.⁴⁵ Submission of additional evidence once the appeal is lodged is also required within a few days only. The short deadlines also in principle apply to the examination of the appeal but is - according to the newly released AIDA update on Greece – in practice only applied to the applicant⁴⁶.

Limited effectiveness of appeals: Asylum seekers, who have received a second instance negative decision, can within 60 days file an application for annulment to the Administrative Court of Appeals with regard to the asylum case⁴⁷ and to the first instance administrative courts regarding the return decision.⁴⁸

However, most rejected asylum seekers will be detained after they have been rejected in the second instance. The onward appeal must be submitted by a lawyer, but the access to legal aid is impeded for detained asylum seekers due to lack of a free legal aid system and limited capacity of the few NGOs that offer free legal assistance.⁴⁹

As noted by the Greek Ombudsman, detained asylum seekers are not provided with information about the return procedure and they do not have access to interpreters, which further limits their possibilities to challenge the negative decisions.⁵⁰

The design of the hotspots in itself is a barrier for rejected asylum seekers’ access to the appeals procedure, e.g. because the hotspots are placed on islands without courts and there is no system for free legal aid that can ensure access the appeal procedure.⁵¹

41 ECCHR, Case Report: EASO’s involvement in Greek Hotspots exceeds the agency’s competence and disregards fundamental rights, November 2018, and Greens/EFA, The EU-Turkey Statement and the Greek Hotspots: A failed European pilot project in refugee policy, June 2018, p. 17-18.

42 Phone interview legal aid providers, December 2018.

43 Interview legal aid providers, August 2018; AIDA (2019) Greece Report Update 2018.

44 Law 4375/2016, Article 61(1)(d).

45 Law 4375/2016, Article 47.

46 AIDA (2019) Greece Country report Update 2018.

47 Presidential Decree 114/2010, Article 29, and Law 4375/2016, Article 64, citing Law 3068/2002, Article 15.

48 The Greens/EFA in the European Parliament, (June 2018), The EU-Turkey Statement and the Greek Hotspots: A failed European pilot project in refugee policy, p. 24.

49 AIDA (2019) Greece Country Report, Update 2018, p. 82 and 173.

50 Ombudsman (2018), Return of third-country nationals - Special Report 2017.

51 The Greens/EFA in the European Parliament, (June 2018), The EU-Turkey Statement and the Greek Hotspots: A failed European pilot project in refugee policy, p. 24.

ACCESS BARRIERS TO THE ASYLUM PROCEDURE IN THE ITALIAN HOTSPOTS AND PORTS

The major concern related to measures to close the gap between the asylum and return procedures in the Italian context is the practice of channelling certain nationalities directly into the return procedure. The risks of this practice are aggravated by a lack of legal information and access to legal assistance as well as insufficient procedural safeguards and remedies.

Nationality-based assessment: hindering access to the asylum procedure

Registration based on nationality: In principle all persons, who arrive in Italy, have the right to apply for asylum at any time during or after the registration procedure.⁵² Nationality assessments however, play an important role in the channelling of newly arrived persons into either the asylum or the return procedure upon disembarkation. In practice, the Italian police carries out the pre-identification process of new arrivals based on assumptions as to whether certain nationality groups are eligible for asylum or not, as well as whether a forced return is likely to be enforced. Patterns of how the Italian police is channelling newly arrived persons from different nationality groups into different processes have varied between disembarkation points and over time.⁵³

As a result of the practice, persons from certain countries such as Tunisia, which the Italian authorities considers to be safe, do not get access to the asylum procedure, but are instead deported to their country of origin without an assessment of their asylum claim and whether such as return would violate the principle of non-*refoulement*.⁵⁴ At the same time, Tunisians were the main nationality to enter the hotspots in 2018 with 5,638 persons, followed by Eritreans with 2,472 persons and Sudanese with 759 persons.⁵⁵ Protection concerns are exacerbated by the fact that the Italian police registers assumed and not declared nationalities for new arrivals.

Registration of newly arrived persons based on nationality

To register newly arrived persons, the Italian police – supported by Frontex – conduct a “pre-identification interview” on which basis they fill out an information sheet (*“foglio notizie”*). The information sheet includes personal data such as name, date and place of birth and nationality as well as the person’s reasons for coming to Italy. Based on how the information sheet has been filled out, newly arrived persons are channelled into either asylum or return procedures.⁵⁶

The information sheet contains five options: work, reuniting with family, fleeing poverty, seeking asylum and “other reasons”. These options are mutually exclusive, so the Italian police only mark one of the boxes. Usually, the Italian police decides which box to mark based on the persons’ nationality. Persons from countries, which the Italian authorities considers to be safe such as Tunisia, are registered as “economic migrants” and thus do not get access to the asylum procedure.⁵⁷

⁵² Presidential Decree 21/2015 Article 3(2).

⁵³ AIDA (2018), Country Report: Italy 2017 Update, p. 25

⁵⁴ AIDA (2019), Country report Italy (Update 2018), p. 33.

⁵⁵ AIDA (2019), Country report Italy (Update 2018), p. 27.

⁵⁶ Italian Ministry of the Interior, (June 2016), Standard Operating Procedures (SOPs) applicable to Italian Hotspots, available at http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_english_version.pdf

⁵⁷ AIDA (2019), Country report Italy (Update 2018), p. 28.

Expanded grounds for the use of detention: The Italian police usually channel new arrivals, who they do not register as asylum seekers, into immediate rejection procedures with the aim of refusing the persons entry into Italy, although they are already in the country. The Italian authorities issue irregular migrants with a decision to reject the persons' entry ("*ordine di respingimento*").⁵⁸ If the police cannot immediately expel the persons, which is usually not possible for persons arriving to Italy by boat, the police instead can issue a "deferred rejection decision" ("*ordine di respingimento differito*") or an "expulsion decisions" ("*ordine di espulsione*") that can be enforced at a later stage.⁵⁹

The Italian police can detain a person to whom they have issued a deferred rejection based on the grounds that the person does not have legal stay in Italy. Whether the police decide to detain a person depends on the available detention capacity, the places of arrival and the profile of the arrivals.⁶⁰

With the latest changes to the Italian immigration law, by the so-called "Salvini Decree"⁶¹, the practice for judicial review of migration detention has changed and a judge must now determine the legality of the detention within 48 hours.⁶² However, a main objective of the Decree is to increase return rates for third-country nationals, who are in an irregular situation in Italy.⁶³ To achieve this, the Decree extends the maximum duration of detention in the pre-removal centre from 90 to 180 days.⁶⁴ In case the capacity of the pre-removal centres is exhausted, newly arrived persons can also be held in other 'appropriate facilities' such as police offices, before the detention has authorized by a judge.⁶⁵

The Italian police can also detain persons for up to 30 days to ascertain their nationality.⁶⁶ If the Italian police cannot verify the identity of the person, he or she can be transferred to a pre-removal centre and detained for up to 180 days. The Decree hereby expands the grounds for detention in the hotspots and thus modifies the implementation of the Reception Conditions Directive and the Procedures Directive (Decree-Law 18 August 2015, n. 142).⁶⁷ It is however, in line with the proposed Recast Return Directive that includes lack of documentation in the expanded criteria for risk of absconding⁶⁸. Additionally, the authorities continue to de facto detain newly arrived persons at the hotspots without detention order.⁶⁹ In practice, children are also being detained in the hotspots and in 2018, a total number of 2,700 children were detained in the hotspots.⁷⁰

58 Consolidated Act on Immigration, 286/1998, Article 10, co. 2.

59 EP, Policy Department for Citizens' Rights and Constitutional Affairs, Background Information for the LIBE Delegation on Migration and Asylum in Italy, April 2017, p. 13.

60 Interviews with Italian police, September 2018.

61 [Decree-Law on Immigration and Security, no. 113/2018, of 24 September 2018](#) (the so-called "Salvini Decree") amending the provisions of the Consolidated Act on Immigration (Legislative Decree no. 286/98) and came into force on 5 October 2018.

62 According to AIDA (2018), Country report Italy (Update 2017), p. 108, newly arrived persons in the hotspots used to be detained for much longer periods than Article 13 Italian Constitution allows.

63 The Decree allows for expanded use of detention to ensure returns of irregular migrants, and re-allocates funds, which were supposed to be used for [assisted voluntary return and reintegration, to facilitate 'return measures'](#) (Article 6). EU Migration Law Blog, <http://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/>.

64 Decree-Law on Immigration and Security, no. 113/2018, Article 2.

65 Decree-Law on Immigration and Security, no. 113/2018, Article 4.

66 Decree-Law on Immigration and Security, no. 113/2018, Article 3.

67 EU Migration Law Blog, <http://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/>.

68 [COM\(2018\) 634 final, Proposal for a Directive of the European Parliament and of the council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#)

69 AIDA (2019), Country report Italy (Update 2018), p. 28 and 118.

70 The total number of 2,700 detained children includes 2,002 unaccompanied children and 698 accompanied children. AIDA (2019), Country report Italy (Update 2018), p. 120.

Fast-track return of Tunisian nationals

Although, it is possible for Tunisians to be granted asylum in Italy,⁷¹ the Italian police usually do not grant Tunisians access to the asylum procedure during the registration process. Instead, the Italian police process Tunisians in a fast-track procedure in accordance with provisions in the Schengen Borders Code and not the Return Directive, and they are usually detained until they can be returned to Tunisia. In 2018, Tunisians were the largest group of detainees in the pre-removal centres with 1,422 persons.⁷² Tunisians are on occasion separated from other nationalities already prior to disembarkation and are subject to de facto detention in the hotspots with the view to immediate deportation.⁷³ On occasion, it has been necessary for UNHCR to intervene for Tunisians (or persons from other countries with low recognition rate) to be able to declare their intention to apply for asylum⁷⁴.

In 2017, the majority of the forced returns carried out from Italy were to Tunisia with 2,237 persons.⁷⁵

Insufficient access to legal information upon disembarkation poses a barrier to the asylum procedure

Ineffective information provision: In accordance with the Standard Operating Procedures⁷⁶ in the Italian hotspots, UNHCR and IOM are tasked with providing legal information about the asylum procedure to newly arrived persons,⁷⁷ which is done by distribution of an information leaflet.⁷⁸ This leaflet contains information about the possibility to declare special needs and vulnerabilities, family ties and the need for international protection, but does not describe the procedure on applying for asylum. UNHCR and IOM can only occasionally provide information in group sessions. For some groups illiteracy also poses an obstacle to accessing the information in the leaflet prior to the filtering interview. In practice, a notable number of people are left with an incomplete understanding of the consequences of the procedure.⁷⁹

In its recent opinion, FRA found that “*not everyone seemed to understand the implications of requesting or not requesting asylum*” because “[t]he physical and psychological state of the people rescued at sea, the timing of delivering information, the complexity of the procedures and the fact that not all relevant languages are covered, continue to be important obstacles to effective information provision”.⁸⁰

Differentiated access to legal information based on nationality: Access to new arrivals is based on the discretion of the police at disembarkation points.⁸¹ On occasion, the police has blocked UNHCR from distributing flyers at a port of entry, and sometimes for specific nationality groups.⁸² While, the order of disembarkation from the boats is in principle organized according to levels of vulnerabilities,⁸³ the Italian police has also been reported to separate Tunisians from other Arabic speaking individuals on the boat.⁸⁴ Nationality-based disembarkation practices can lead to differentiated access to meaningful legal information.⁸⁵

71 Statistics from the National Asylum Commission illustrate that several Tunisians have been given refugee status in Italy, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/quaderno_statistico_per_gli_anni_1990-2018.pdf

72 Among other detained nationalities in 2018 were Moroccans with 549 persons, Nigerians with 490 persons and Albanians with 201 persons. AIDA (2019), Country Report: Italy 2018 Update, p. 115.

73 AIDA (2019), Country Report: Italy, 2018 Update, p. 78.

74 Interviews UNHCR, September 2018.

75 The other nationalities with high return rates are: Albania (1,334), Morocco (858), Egypt (442) and Nigeria (314). Garante nazionale dei diritti delle persone detenute o private della libertà personale, (2018), Relazione al Parlamento, graph 4.6, p. 115.

76 The Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and Department of Public Security, [Standard Operating Procedures \(SOPs\) applicable to Italian hotspots](#), adopted February 2016.

77 The Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and Department of Public Security, [Standard Operating Procedures \(SOPs\) applicable to Italian hotspots](#), adopted February 2016, p. 6 and 11.

78 The leaflet, “Information for migrants and refugees arriving in Italy by sea”, is produced by UNHCR, IOM, EU authorities and the Italian Ministry of Interior and translated into several languages (English, French, Tigrinya and Arabic), SOPs p. 11-12.

79 AIDA (2019), Country report Italy (Update 2018), p. 29.

80 FRA, [Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy, February 2019](#), FRA Opinion 3/2019 [Hotspots Update], 4 April 2019, page 36.

81 Access for UNHCR or other organisations can be blocked, e.g. due to security reasons. Procedure Decree, Article 10-bis(2).

82 Information from three separate sources, interviews Sicily September 2018.

83 Interviews UNHCR, September 2018.

84 Interview with ASGI researchers and cultural mediator who has been involved with search and rescue operations, September 2018.

85 UNHCR staff confirmed that for the last few landings in Catania and Messina, they had been able to provide flyers to the Tunisians. Interview UNHCR, September

Lack of effective remedies and procedural safeguards can be detrimental in fast-track procedures

Insufficient procedural safeguards for rebutting the pre-identification registration in the hotspots:

Newly arrived persons are channelled into either asylum or return procedures depending on how the Italian police registers them on the information sheet. It is thus problematic, if the newly arrived persons do not understand this procedure.

While the SOPs for the Italian hotspots foresee that receipts are to be handed out to individuals who have declared their intention to apply for asylum, the responsible actor is not defined in the document.⁸⁶ The Italian police does not hand out a copy of the information sheet, which makes it difficult for newly arrived persons to know how they are registered and whether they should challenge their registration⁸⁷.

Lack of effective remedies to challenge return directly from hotspots: Persons who are deported directly from hotspots do not have a possibility to legally challenge their return as they only receive the expulsion decision by the police during the return procedure. At no point in the procedure between the arrival and the forced return directly from hotspots is there an individual assessment by a judicial authority of the individual's legal status and the risk that a forced return would pose to the principle of *non-refoulement*. The "Salvini Decree" includes a border procedure that may become applicable in the hotspots.⁸⁸

Insufficient safeguards & risk of refoulement

In August 2017, the Garante Nazionale monitored a return flight from Lampedusa to Nigeria. The 18 Nigerians were handed their deferred rejection/expulsion decision several days after their arrival in Lampedusa and only minutes before the return operation to Nigeria started. The Garante observed that the return flight occurred without the control by the judicial or a means to appeal for the individuals concerned. The individuals returned to Nigeria had been in *de facto* detention for their entire duration on Italian territory⁸⁹.

LESSONS LEARNED FOR A FUTURE EU APPROACH?

This policy brief has analyzed how measures with the view to reduce the gap between the asylum and return procedure have been implemented as part of the EU hotspot approach and especially how the practices of swift distinction between refugees and migrants and the channeling of the respective categories into different procedures have evolved. The findings of the research conducted demonstrate that a closer nexus between the asylum and return procedures raises several concerns from a protection perspective, including impediments regarding effective access to the asylum procedure and consequent risk of *refoulement*, due to accelerated procedures for certain nationality groups, an expanded use of detention and a lack of effective access to meaningful legal information and legal assistance.

Insights about evolving practices in the Greek and Italian hotspots can serve as the basis for a critical, but constructive reconsideration of how newly arrived third-country nationals at the EU external borders can be received and have their asylum application processed in an effective and rights-based manner. The findings offer some practical lessons learned on the implications of attempts to increase the effectiveness and

⁸⁶ "In any case, within the Hotspot, the intention to apply for international protection, expressed by the person, should be recorded in the information sheet for which a receipt is issued." Italian Ministry of the Interior, (June 2016), Standard Operating Procedures (SOPs) applicable to Italian Hotspots, p. 9.

⁸⁷ AIDA (2019), Country report Italy (Update 2018), p. 29.

⁸⁸ AIDA (2019), Country report Italy (Update 2018), p. 28 and 60.

⁸⁹ Garante nazionale dei diritti delle persone detenute o private della libertà personale, (2017), Rapporto sul monitoraggio dell'operazione per il rimpatrio forzato di cittadini nigeriani organizzato dall'Italia (17-18 maggio 2017), p. 7.

efficiency of the asylum and return procedures at the EU's external borders, which are relevant to the ongoing negotiations of both the Asylum Procedure Regulation and the Recast Return Directive, and in particular the proposed provisions on accelerated border procedures⁹⁰ included in both proposals.

The findings show that the Greek and Italian authorities immediate channelling of certain profiles into procedures in the hotspots, which are aimed at ensuring swift return of third-country nationals, who are not entitled to protection in the EU, poses a threat to these person's access to the asylum procedure. With limited access to legal information upon arrival, there is a risk of incorrect registration that can impact the possibility to access the asylum procedure.

The accelerated border procedures combined with short appeal time limits of 48 hours as proposed in Article 41 of the recast Return Directive and Article 22 of the Asylum Procedure Regulation (albeit still under discussion⁹¹) thus present a real concern as such procedures could entail further risks of access barriers to the asylum procedure and consequent risk of violation of rights in the asylum procedure – including the risk of *refoulement*.

Similarly, experiences from the implementation of the hotspot approach in Greece and Italy demonstrate that the use of detention creates access barriers to the asylum procedure due to limited access to legal assistance and interpreters for detainees, which ultimately can lead to *refoulement*. In general, detention should only be used by the authorities as a last resort and never for children. Detaining certain profiles of people upon arrival as part of efforts to more closely link the asylum and return procedure and ensure that return can take place immediately if the asylum claim is rejected is un-proportional and unnecessary. The expanded use of detention as proposed in Article 18 of the recast Return Directive, including the elaborate criteria to allow detention such as the assessment of the risk of absconding in Article 6, and the new minimum time limits for detention of 3 months are likely to increase the use of detention.

The assessment of the evolving practices in the hotspots in Greece and Italy supports the concern expressed by ECRE related to efforts to close the gap between the asylum and return procedure as reflected in the proposed Asylum Procedures Directive and recast Return Directive: *“By combining the accelerated procedures in the Asylum Procedures Directive with an accelerated return procedure at the border more people may have their applications for international protection summarily examined and, quite probably rejected, at the border, while being detained. They will then have limited opportunities to challenge the decision and be subjected to a fast-track border return procedure with even fewer safeguards”*⁹².

DRC finds that the channeling of newly arrived third country nationals into different asylum procedures can present a gain in efficiency if it is done based on the claim of the applicant and if accompanied by robust procedural safeguards, such as meaningful access to legal information and assistance and effective appeal possibilities at all stages of the procedure. Long waiting times is not in anyone's interest. DRC also recognizes that a functioning asylum and migration management system must include the return of those not in need of international protection. However, the use of accelerated procedures for groups of people, who arrive at a particular destination, as implemented in the hotspots in Greece and Italy, where safeguards are dubious, and where fast-track procedures are combined with an extended use of detention is not acceptable and entails a number of protection concerns as demonstrated in the above. Channelling of new arrivals into different procedures must never create barriers to the asylum procedure.

Lessons learned of the implementation of the hotspot approach must thus be taken into account and critically assessed before further consolidating accelerated procedures in border zones in the EU asylum acquis.

90 COM(2016) 467 Final: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Article 41, and COM(2018) 634 final: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Article 22.

91 EPRS, Briefing - [Recasting the Return Directive](#), April 2019, p. 8.

92 ECRE (2018): ECRE comments on the Commission proposal for a Recast Return Directive, p. 23.

POLICY RECOMMENDATIONS: EFFECTIVE ASYLUM AND RETURN PROCEDURES WITH RESPECT FOR FUNDAMENTAL RIGHTS

On the backdrop of the political push for increasing effectiveness and efficiency of the migration management system in the EU and for ensuring a more direct link between the asylum and return procedure DRC reiterates the need for a thorough and critical assessment of the protection implications and potential adverse effect on fundamental rights.

The implementation of the EU hotspot approach in Greece and Italy provides critical insights and lessons learned for the further development of the EU hotspot approach and any future EU joint models for reception and processing of arrivals to the EU's external borders – as well as to the general efforts to improve the effectiveness and efficiency of the migration management system through reform of the asylum system. It offers a preview of the practical ramifications of efforts towards a closer nexus between the asylum and return procedure. DRC argues that a fair and efficient asylum system must balance the demand for effectiveness and efficiency with the safeguarding of the fundamental rights and the principle of non-refoulement and thus need to reflect the following:

Correct registration and identification

- **Correct registration and identification upon arrival is essential.** How new arrivals are registered and identified upon arrival in Greece and Italy determine which procedure they are channeled into and can influence whether they are detained upon arrival. Practices in Greece and Italy demonstrate that a wrongful registration can prove very difficult for the person to change.
- **Access to legal information and counselling prior to the registration process can ensure correct registration from the beginning.** As registration and identification in the hotspots lead to the immediate channeling by the authorities into different procedures, the consequences of wrongful registration can be detrimental, and even lead to a risk of *refoulement*. Therefore, it is key that newly arrived persons get access to legal information and counselling upon arrival in the language they understand in accordance with their needs for special procedural guarantees.
- **Knowledge of their registration and legal status enables newly arrived persons to understand and challenge decisions of the authorities.** All asylum seekers should be provided with the administrative documents, which are relevant to their application for asylum. The authorities should thus provide newly arrived persons with a copy of their registration, including documents related to the identification and registration procedure by both the national authorities and EU agencies such as Frontex, as well as a document that defines the newly arrived person's legal status, e.g. as asylum seekers or persons without a legal stay on EU territory. Similarly, the authorities should fully inform a newly arrived person in writing, if they issue the person with a detention or removal order.

Access to the asylum procedure

- **Access to fair asylum procedures must be ensured for all, irrespective of nationality.** Channeling of new arrivals into different procedures must never create barriers for the possibility of applying for asylum at a later stage. Individuals, who are channeled directly into a return procedure either due to the fact that they are not applying for asylum or due to wrongful registration, should always have the possibility of applying for asylum at a later stage.
- **Unimpeded access to legal assistance in a fast track procedure.** In a fast track procedure, it is imperative that all persons have access to proper and immediate legal assistance and the right to challenge the decision of the authorities in the form of an appeal or a similar legal safeguard. All detained asylum seekers must have unhindered access to legal advisors and interpreters and the legal aid system must be adequately resourced. Any processing of new arrivals at the EU

border – and particularly so when in a context of detention – needs to include strong procedural safeguards to uphold the principle of non-refoulement.

Screening for vulnerabilities

- **A systematic approach to early identification of vulnerabilities, including non-visible ones, and appropriate follow up on referrals must be ensured.** Special caution must be observed when it comes to vulnerable asylum seekers, such as children, victims of torture, abuse or trafficking and asylum seekers with mental disabilities. Vulnerable asylum seekers must be identified and be provided with access to the asylum procedures in accordance with their special needs as prescribed in the Reception Conditions Directive and Asylum Procedure Directive. Safeguards in the procedure must be in place to prevent detainment of vulnerable asylum seekers.
- **Special protection and safeguards for all children in the asylum and migration procedures must be upheld.** All children have rights in accordance with international human rights standards and the Convention on the Rights of the Child. Unaccompanied children must be swiftly identified, referred to child protection authorities provided with a legal guardian and accommodated in adequate reception facilities.

Detention only as a last resort and never for children.

- **The use of detention should never become automatic and should never be based solely on nationality.** The automatic use of detention in border and fast track and return procedures for specific nationality groups is contrary to fundamental human rights, codified in EU law and the European Convention of Human Rights, and reiterated in the recently adopted UN Global Compact for migration. The harmful effects of detention on children - especially unaccompanied children - are well documented, and detention should therefore never be applied for children.
- **Detention must always be based on individual assessments of the necessity of detention, availability of other less coercive alternatives.** All detainees must be timely informed about the reason for their detention. Detention must be for the shortest possible duration and be subject to speedy judicial review.
- **Access to independent and high-quality free legal assistance and interpreters from within detention is key** to ensure the right to seek asylum for those channeled directly into pre-removal centers, who wishes to lodge an application for asylum.

Solidarity and responsibility sharing

- **The EU must uphold and safeguard the right to seek asylum with the focus on rights and non-refoulement.** Any person arriving at the EU borders has the right to apply for asylum and all asylum applications should be processed individually and in a fair manner. The current trend towards shifting protection responsibilities outside the EU's territory is contrary to the spirit and commitments of the recently adopted UN Global Compact for Refugees. Administrative efficiency and a politically driven agenda of increasing return rates must never take priority over a fair procedure, and each claim for international protection must undergo rigorous scrutiny.
- **The hotspot model must be supplemented with functioning solidarity measures ensuring responsibility sharing among Member States and respect of the rights of asylum seekers.** There is a need for a permanent European responsibility sharing mechanism that can ensure that asylum seekers get access to the asylum procedures in a fair and efficient manner and alleviate the pressure on Member States at the EU's external borders by relocating new arrivals to other Member States based on their meaningful links with the respective country.
- **Urgent interim measures must be put in place to ensure timely disembarkation of persons, who arrive at the EU's external borders.** Pending the reform of the Dublin Regulation, a temporary solution within the framework of the existing EU asylum acquis must be found to the current undignified situation of ad hoc arrangements for disembarkation. Member States, proportionate to their capabilities, must fulfil their obligations for refugee protection by providing relocation places for those seeking international protection, and thereby ensuring a more equitable sharing of responsibility at the European level.

Note on methodology

The consultant carried out 43 open semi-structured interviews with legal aid providers, NGOs, law enforcement agents, translators and practitioners from European and international organizations. The research privileged interviews with professionals directly in contact with new arrivals in hotspots. The analysis triangulated conclusions by interviewees about protection concerns with different sources to check whether the assessments of protection actors seemed plausible.

From 12-21 August 2018, 11 legal aid providers (one from Kos), two UNHRC protection officers, two Frontex officers and three Hellenic police officers were interviewed by the consultant.

From 13-26 September 2018, the consultant interviewed 10 legal aid providers, lawyers and NGOs with legal expertise; five UNHCR protection officers and their respective cultural mediators respectively responsible for Catania, Messina, Pozzallo and Trapani; the heads of the migration office of the Italian police at a port of arrival respectively with and without a hotspot, two Frontex officers, one EASO officer, two IOM officers, the Garante Nazionale, as well as three cultural mediators who had over the last eight years worked for different operators – including for the Italian police and for Frontex.

Acknowledgements

The policy brief was written by Senior Legal Advisor Camilla Wismer Hagen and Policy Advisor Solveig Als based on the research, fieldwork and draft report conducted and prepared by consultant Jill Alpes.

Fieldwork in Italy was carried out with the support of the consultant's research assistant Roberto Calarco. Data collection and analysis in Italy was enriched through collaboration and exchanges with ASGI. In Greece, the fieldwork was supported by DRC Greece. The policy brief is also informed by the internal assessment conducted by Oxfam in Greece in December 2017 on meaningful access to legal assistance in Lesbos.

DRC is grateful to all interviewees as well as internal and external stakeholders for sharing their knowledge and perspectives.