

LEIDEN UNIVERISY

Immigration detention in the European Union

Analysing the Europeanization of national laws

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INTRODUCTION

Immigration is a highly debated topic, especially since the number of migrants arriving to Europe and asking for asylum in the European Union (EU) has increased in the last years. However, even before 2015, which is the year when the number of arrivals reached their maximum, Member States (MSs) implemented immigration detention of third-country nationals (TCNs) subject to a return decision and asylum seekers. In the period between 2009 and 2013 a total of 92,575 TCNs were detained in the EU.¹ Due to the delicate balance between respect of fundamental rights and possibility of the state to restrict them, the use of this instrument should be carefully regulated by law. In the EU context, common standards that MSs must respect have been developed. For this reason, this thesis will answer the following research question:

How have national legislations concerning immigration detention in different MSs been modified due to the influence of EU law and policies?

The underlying assumption behind the question is that the EU matters, thus, this research will try to understand “how it matters”.² In other words, this analysis will take for granted that adaptation to EU norms has taken place, and it will explore the impact of such modifications. In order to do so, the theory of Europeanization will be applied to immigration detention.

Two hypotheses will be assumed and verified in this thesis. First, due to the effect of implementing EU policies and legislation, the domestic legal systems have undergone modifications with a more or less substantial character. Hence, the process of Europeanization that has taken place will be analysed to determine to what extent national laws have been modified. Second, MSs that had applied more restrictive policies of immigration detention before the entering into force of EU legislation regulating this practice have been required to moderate their terms in order for them to be in compliance with the requirements of EU law. At the same time, MSs with less restrictive measures have made their provisions more stringent since EU law allows for it. Taking into account the degree of discretion that is left to MSs in the implementation of secondary EU legislation and how it has been used is necessary to acknowledge whether there is a trend in the adoption of more restrictive measures when EU law allows for it.

¹ European Migration Network, 2014, “Synthesis Report – The Use of Detention and Alternatives to Detention in the Context of Immigration Policies”, European Commission, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf (accessed 3/07/19), p.5

² C. Radaelli “The Europeanization of Public Policy” in (eds.) K. Featherstone and C. Radaelli, *The politics of Europeanization* (New York: Oxford University Press Inc., 2003), pp.34-35

Despite focusing on a limited number of cases, the outcomes of this thesis will be relevant for different reasons. To begin with, a new area of study will be considered and explored with a different approach to the study of the practice of immigration detention. In fact, a good amount of works have used other methodologies such as discourse analysis or field work, whereas this thesis will use a combined approach by examining the three cases through a legal analysis and then it will apply some of the elements of the theory of Europeanization. Therefore, it is expected that it will also provide new insights into the issue of Europeanization applied to immigration policies. Moreover, the case studies will provide an in-depth analysis of the practice of immigration detention in three specific countries. Thus, it is expected that evidence, which could better illustrate the relations between the EU policies and MSs with regard to the practice of immigration detention, will be found. Finally, the chapter containing the legal framework will constitute a comprehensive examination of the provisions that regulate immigration detention in the EU and that are valid for any MS.

LITERATURE REVIEW

IMMIGRATION DETENTION

The topic of immigration detention has been researched by a large body of academic literature that has described the massive diffusion of this phenomenon all over the world. Some of the authors focused on comparative analysis,³ or on specific European countries, such as Italy,⁴ Greece,⁵ Malta,⁶ Spain,⁷ Sweden,⁸ and the UK.⁹ Two main approaches have been used to study immigration detention.

Firstly, some studies researched the symbolic purposes of immigration detention. In particular, these works build upon the conception that territorial sovereignty of the State seems challenged by migratory fluxes,¹⁰ thus, they explain how countries use immigration detention to reaffirm and display state power.¹¹ At the same time, migrations are also portrayed as “crises” requiring exceptional solutions.¹² As Bloch and Schuster demonstrated, immigration detention has developed from being an emergency measure to becoming normalised.¹³ Moreover, the use of immigration detention as instrument for punishment¹⁴ and as deterrence¹⁵ has also been explored by the

³ L. Schuster, “Common Sense Or Racism? The Treatment Of Asylum-Seekers In Europe”, *Patterns Of Prejudice* 37(3) (2003), 233-256; M. Welch and L. Schuster. “Detention Of Asylum Seekers In The US, UK, France, Germany, And Italy”, *Criminal Justice* 5(4) (2005), 331-355; M. Bosworth and M. Vannier, “Comparing Immigration Detention In Britain And France: A Matter Of Time?”. *European Journal Of Migration And Law* 18(2) (2016), 157-176

⁴ R. Andrijasevic, “From Exception to Excess: Detention and Deportations across the Mediterranean Space”. (eds) N. de Genova and N. Peutz, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham, NC: Duke University Press, 2010), 147-165

⁵ L. K. Cheliotis, “Behind The Veil Of Philoxenia: The Politics Of Immigration Detention In Greece”, *European Journal Of Criminology* 10(6) (2013), 725-745

⁶ C. Mainwaring, “Constructing A Crisis: The Role Of Immigration Detention In Malta”, *Population, Space And Place* 18(6) (2012), 687-700

⁷ X. Ferrer-Gallardo and A. M. Abel, “EU-Limboscapes: Ceuta And The Proliferation Of Migrant Detention Spaces Across The European Union”, *European Urban And Regional Studies* 23(3) (2013), 527-530;

⁸ S. Khosravi, “Sweden: Detention And Deportation Of Asylum Seekers”, *Race & Class* 50(4) (2009), 38-56

⁹ A. Bloch and L. Schuster, “At the extremes of exclusion: deportation, detention and dispersal”, *Ethnic and Racial Studies* 28(3) (2005), 491-512

¹⁰ V. Mitsilegas, “Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State”, *Indiana Journal of Global Legal Studies* 19(1) (2012), 3-60, p.5; G. Cornelisse, “Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?” in M. Guia, R. Koulis and V. Mitsilegas, *Immigration Detention, Risk and Human Rights* (Switzerland: Springer International Publishing, 2016), p.77

¹¹ G. Cornelisse, *Immigration detention and human rights* (Leiden: Martinus Nijhoff Publishers, 2010), p.247; C. Mainwaring and S. J. Silverman, “Detention-as-Spectacle”, *International Political Sociology* 11 (2017), 21-38, p.22

¹² Andrijasevic “From exception”, p.13; Bloch and Shuster, “Extremes of exclusion”, p.508; Mainwaring, “Constructing a crisis”, p.687; Mainwaring and Silverman, “Detention-as-Spectacle”, p.22

¹³ Bloch and Shuster, “Extremes of exclusion”

¹⁴ Khosravi “Sweden”, p.40; E. Guild “Understanding Immigration Detention in the UK and Europe” in (eds.) M. Guia, R. Koulis and V. Mitsilegas, *Immigration Detention, Risk and Human Rights* (Switzerland: Springer International Publishing, 2016), p.150; M. Bosworth, “Immigration Detention, Punishment and the Transformation of Justice”, *Social & Legal Studies* 28(1) (2019), 81-99

literature. Lastly, some authors pointed out how the use of immigration detention results also in creating division and exclusion of TCNs.¹⁶

Secondly, various scholars approached the topic from a legal perspective.¹⁷ To begin with it must be noted that, as Cornelisse puts it, human rights law does recognize the right of the state to use immigration detention, however it aims also at guaranteeing detainees' rights.¹⁸ Despite these mechanisms of protection, Koulisch demonstrated that in the US system there is a bias towards sovereignty, meaning that the government can strongly influence immigration detention with its political power.¹⁹ This idea has been applied to the European context analysing the *Saadi* case, and it has been acknowledged that also the European Court of Human Rights (ECtHR) allows for a certain level of discretion when a state aims to protect its national sovereignty.²⁰ Furthermore, certain legislative approaches blur the lines between criminal and immigration law.²¹ For instance, Mitsilegas has demonstrated how that applies to some features of the Return Directive.²² Nevertheless, in the EU framework, certain safeguards are guaranteed by primary law, case law of the Court of Justice of the EU (CJEU) and the Return Directive, thus they restrict the possibilities for MSs to adopt immigration detention for symbolic purposes²³ and they aim at ensuring both effectiveness of return procedures and respect for fundamental rights.²⁴

FRAMING EUROPEANIZATION

Faist and Ette define Europeanization as the “impact of the EU on its MS”.²⁵ It corresponds to the third conception of Europeanization theorized by Olsen, namely the one that “focuses on change in core domestic institutions of governance and politics, understood as a consequence of the

¹⁵ A. Leerkes and M. Kox “Pressured into a Preference to Leave? A Study on the “Specific” Deterrent Effects and Perceived Legitimacy of Immigration Detention”, *Law & Society Review* 51(4), 895-929; Cornelisse, *Immigration detention*, p.2

¹⁶ Schuster, “Common sense”; Bloch and Schuster, “Extremes of exclusion”; Cornelisse, *Immigration detention*, pp.328-330; H. S. Bhui, “The place of race in understanding immigration control and the detention of foreign nationals”, *Criminology & Criminal Justice* 16(3) (2016), 267-285; Bosworth (2019)

¹⁷ (eds.) Guia et al., *Immigration detention, risk*; E. Guild, S. Grant and C. Groenendijk, *Human rights of migrants in the 21st century* (New York: Routledge, 2018)

¹⁸ Cornelisse, *Immigration detention*, pp.273-274

¹⁹ R. Koulisch, “Sovereign Bias, Crimmigration, and Risk” in (eds.) Guia et al.

²⁰ C. Costello, “Human Rights and the Elusive Universal Subject: International Human Rights and EU Law”, *Indiana Journal of Global Legal Studies* 19(1) (2012), 257-303, p.301; Cornelisse (2016), p.87; M. L. Basilien-Gainche, “Immigration Detention under the Return Directive: the CJEU Shadowed Lights”, *European Journal of Migration and Law* 17 (2015), 104-126, p.107

²¹ Bosworth, “Immigration ;etention, punishment”, p.82; I. Majcher, “Crimmigration in the European Union Through the Lens of Immigration Detention”, *Global Detention Project Working Paper* 6 (2013)

²² V. Mistilegas, “Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive” in (eds.) Guia et al., p.29

²³ Cornelisse, “Immigration detention, an instrument”, p.87

²⁴ Mistilegas, “Immigration Control”, p.44

²⁵ T. Faist and A. Ette, *The Europeanization of national policies and politics of immigration* (Basingstoke: Palgrave Macmillan, 2008), p.3

development of European-level institutions, identities and policies”.²⁶ It is possible to distinguish two types of Europeanization, namely “vertical” and “horizontal” Europeanization. Vertical Europeanization is based on the definition of policies at the EU level, which must then be implemented domestically.²⁷ This mechanism is governed directly by “hard” legislative instruments adopted by the EU (or case law of the CJEU) requiring the compliance of MSs, or indirectly by other measures such as guidelines that do not entail the notion of coercion.²⁸ This idea corresponds to what is defined as a “positive” mechanism of Europeanization, that describes specific arrangements that MSs have to take to change their policies²⁹. Instead, horizontal Europeanization is not determined by binding provisions, but from modifications caused by socialization processes³⁰. This is described as a “crossloading” mechanism that enables exchanges between MSs, which can be facilitated by the EU.³¹ This thesis will examine exclusively vertical Europeanization.

In order to analyse the interaction between EU policies and their impact at the domestic level, various theoretical frameworks and definitions have been introduced by different scholars. For instance, Borzel and Risse define three different levels of change, namely absorption if policies are substantially left the same; accommodation if ideas developed at the EU level are integrated domestically without drastic changes; and transformation if the core features of domestic policies are changed.³² Radaelli adds to this framework inertia to describe a situation that does not provoke any change due to the resistance of MSs, and retrenchment, meaning that national policies distance themselves to European ones.³³

EUROPEANIZATION OF IMMIGRATION POLICIES

The academic debate concerning the impact of the EU immigration policies in the domestic realm has grown in importance and attention.³⁴ It is demonstrated by the fact that different scholars have addressed the issue of Europeanization of migration policies.³⁵ In some cases, legal studies have

²⁶ J. P. Olsen, “The many faces of Europeanization”, *Journal of Common Market Studies* 40(4) (2002), 921-952, p.932

²⁷ C. Radaelli, “The Domestic Impact Of European Union Public Policy: Notes On Concepts, Methods, And The Challenge Of Empirical Research”, *Politique Européenne* 5(1) (2002), 105-136, p.120

²⁸ Idem., pp. 121-123

²⁹ C. Knill, and D. Lehmkuhl, “How Europe Matters. Different Mechanisms Of Europeanization”, *SSRN Electronic Journal* 3(7) (1999), 1-22, p.4

³⁰ Radaelli, “Europeanization public policy”, pp.41-42

³¹ N. T. T. Hang, “Europeanization: simply a top-down process?”, *Marmara Journal of European Studies* 19(1) (2011), 135-151, p. 137

³² T. A. Borzel and T. Risse, “Conceptualizing the Domestic Impact of Europe” in (eds.) Featherstone and Radaelli , pp. 69-70

³³ Radaelli, “Europeanization public policy”, pp.37-38

³⁴ Faist and Ette, *Europeanization national policies*, p.10

³⁵ V. Giraudon, “European Integration and Migration Policy: Vertical Policy-making as Venue Shopping”, *Journal Of Common Market Studies* 38(2) (2000), 251-271; S. Lavenex, “The Europeanization Of Refugee Policies: Normative Challenges And Institutional Legacies”, *Journal Of Common Market Studies* 39 (5) (2011), 851-874; C. Kaunert and S.

focussed on the way EU directives have been transposed into national legislations of MSs.³⁶ One relevant example for our thesis is the book edited by Zwaan, which analyses the implementation of the Return Directive in various MSs.³⁷ However, this kind of works have been criticised for being too descriptive.³⁸

The principal debate that is relevant for the purposes of this thesis arose around the following question: what has been the effect of Europeanization on domestic policies of migration? In order to answer this question, various elements of migration policies have been studied using different approaches. Some authors have looked at the decision-making process. As explained by Roos, countries can be locked-in and forced to adapt to the EU decision-making or use “venue shopping” at the EU level to bring about modifications in national legislation.³⁹ He noted that the general tendency was to safeguard states’ sovereignty and maintain national legislation, thus pushing for the expansion of their own policies at EU level.⁴⁰ On the one hand, Guiraudon analysed the case of migration control policy in the framework of “venue shopping” between 1970 and 1999 in France, Germany and the Netherlands.⁴¹ She deems that EU cooperation in this field builds upon security concerns and consequently it results in restrictive policies.⁴² On the other hand, Kaunert and Léonard responded to Guiraudon’s article demonstrating that this has not been the case since asylum policies have actually become less restrictive, pushing for higher legal standards.⁴³ Contrasting conclusions were also drawn by Roos, that analysed the process of adoption of multiple directives between 1999 and 2009 with a special regard to the interests of MSs. He found that venue shopping did not result in more restrictive measures in all the policy areas considered.⁴⁴ Other scholars looked at the impact of European integration on national policies. The tendency to provide for less protection for human rights when economies are integrated and policies pursued at the

Léonard, “The European Union asylum policy after the Treaty of Lisbon and the Stockholm Programme: towards supranational governance in a common area of protection?”, *Refugee Survey Quarterly* 31(4) (2012), 1-20; S. Bonjour and M. Vink, “When Europeanization Backfires: The Normalization Of European Migration Politics”, *Acta Politica* 48(4) (2013), 389-407; A. Caviedes, “European Integration and the Governance of Migration”, *Journal of Contemporary European Research* 12(1) (2016), 552-565; A. Ripoll Servent and F. Trauner, “Do supranational EU institutions make a difference? EU asylum law before and after communitarization”, *Journal of European Public Policy* 21(8) (2014), 1142-1162

³⁶ L. Cerna, “Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative”, *Policy Studies* 34(2) (2013), 180-200; J. Chaloff, “The Impact of EU Directives on the labour migration framework in EU countries”, *OECD Social, Employment and Migration Working Papers* 180 (2016)

³⁷ K. Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2011)

³⁸ Faist and Ette, *Europeanization national policies*, p.10

³⁹ C. Roos, *The EU and immigration policies*. (New York: Palgrave Macmillan, 2013), p. 40

⁴⁰ Idem, p.193

⁴¹ Guiraudon, “European integration”, p.252

⁴² Idem, p. 256

⁴³ Kaunert and Leonard (2012), p.9

⁴⁴ Ibid.

intergovernmental level as in the EU had already be signalled by Hathaway.⁴⁵ Instead, Toshkov and de Haan tried to demonstrate the possibility of a “race to the bottom” that could take place when policies are “Europeanized” by focusing on national policies aimed at discouraging asylum applications, however they concluded that their study has not confirmed the hypothesis.⁴⁶

RESEARCH GAP

The existing literature on the topic of immigration detention is not scarce, however it is possible to acknowledge a research gap. Some studies explored the underlying purposes of immigration detention, whereas other works approached the topic from a legal perspective, but they mainly researched the limits to national decision-making power considering both international and EU law. However, none of them focuses in particular on the impact that EU law and policies have on MSs’ practices related to immigration detention. In the field of EU studies, this connection can be assessed through the process of Europeanization. Various scholars have already researched this relation in the broader area of migration policies, but nobody has ever focused on immigration detention specifically. Moreover, the diverging conclusions demonstrate that there is no agreement among scholars to support the idea that Europeanization led to degradation of fundamental rights’ protection. As a result, this thesis will follow a similar approach of the legal studies that explored the implementation process of EU directives mentioned before. In order to avoid an overly descriptive nature, it will explore the results of such transposition and it will engage in the broader discussion about the impact of EU law on the national legislative framework.

⁴⁵ J. C. Hathaway, “Harmonizing for Whom: The Devaluation of Refugee Protection in the Era of European Economic Integration”, *Cornell International Law Journal* 26(3) (1993), 719-735, pp.734-735

⁴⁶ D. Toshkov and L. de Haan, “The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates”, *Journal of European Public Policy* 20(5) (2013), 661-683, p.662

RESEARCH DESIGN

METHODOLOGY

In order to answer the research question, a comparative legal research will be carried out. IN addition, this work will use some contributions of the theory of Europeanization to analyse the impact of EU supranational decisions on MSs. This multidisciplinary method is necessary to understand immigration detention from a broader and more complete perspective and to situate this thesis in the field of EU studies.

This study is inspired by the work of Radaelli, who suggests to take into account the object of Europeanization (*what is Europeanized*) and the direction of the transformation (*to what extent*).⁴⁷ In this thesis, the object of study will correspond to the legal structure represented by national legislation, which is one of the domestic political structures he identified.⁴⁸ This choice allows us to work with material that is a form of codified policy. Through successive amendments, domestic laws show how national provisions have been modified to be compatible with EU law, thus it will be possible to focus on causal connections between EU law and modifications of national legislation and policy. Finally, analysing how MSs used the discretion left by EU legal instruments enables to verify our second hypothesis, namely that MSs restrict their legislations when it is possible according to EU law.

This scope of this thesis will be limited in three ways. First, without dismissing its importance, the impact of horizontal Europeanization will not be analysed since it would require a different methodological approach. Second, only legal provisions will be examined, thus no insights about the actual implementation of immigration detention will be provided, except those relevant for our analysis. Third, it will not discuss whether national legislation is actually compatible with EU law and whether MSs have failed to comply with the transposition of the directive.

In order to measure the “direction” of transformation, the literature review provided some mechanisms that allow to analyse vertical Europeanization. All these processes have in common the fact that they aim at measuring the degree of modification of national policies. To avoid the confusion created by different definitions provided by the literature, the core aspects of these transformation will be assessed by using the following terminology: no modification; medium modification, meaning that some clarification has been introduced but no major changes took place;

⁴⁷ Radaelli, “Europeanization public policy”, pp.34-35

⁴⁸ Ibid.

and substantial modification, which implies the fundamental transformation of policies especially with the introduction, abolishment or drastic change of particular features.

The sources that will be used for the first part of the thesis will be primary and secondary legislative sources of EU law, case law of the CJEU and ECtHR, with small references to international conventions and the European Charter of Human Rights (ECHR). The study of the three cases will be based on national legislation, communications to national authorities and jurisprudence. Previous literature on the topic, reports, studies and other available material produced by international organizations and NGOs that have collected specific information and figures about regulation and practices related to immigration detention in the MSs will constitute our secondary sources. Finally, the conceptual aspects of Europeanization theory have been provided by the academic literature.

CASE SELECTION

The body of cases will be composed of three countries, namely Italy, France and Sweden. Since 2008, they have been among the ones where the highest number of asylum seekers have arrived in Europe per year.⁴⁹ Nonetheless, they differ to a certain extent. Italy is situated at the southern border of the EU and it is often the first European country where asylum seekers, especially those taking the so-called central Mediterranean route, arrive.⁵⁰ France is both a final destination and a state where asylum seekers and refugees transit for a period of time in order to reach other countries, such as the UK.⁵¹ Finally, Sweden is elected as the final destination by many asylum seekers and refugees. Despite being considered as one of the most welcoming states of Europe, its stances became more restrictive when the number of refugees and asylum seekers grew bigger in Europe.⁵² Moreover, the number of asylum seekers' arrivals increased differently in the three countries, as Figure 1 illustrates. Different policies have been developed to tackle the problem, which have also been influenced by the application of EU policies, such as the implementation of the Schengen system and the hotspot approach. Also, the Dublin Regulation produced different effects in the MSs considered, as it will be demonstrated through the comparison between outgoing and incoming

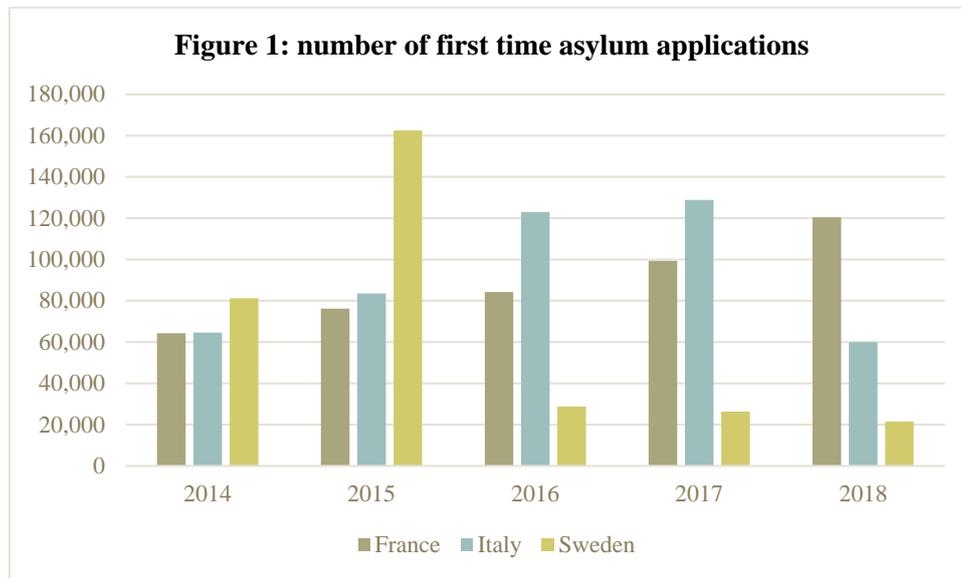
⁴⁹ Eurostat, 2019a, "Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data", European Commission, https://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_ASYAPPCTZA (accessed 3/07/19)

⁵⁰ Frontex, 2019. "Migratory Routes", *Frontex.Europa.Eu*, <https://frontex.europa.eu/along-eu-borders/migratory-routes/central-mediterranean-route/> (accessed 3/07/19)

⁵¹ A. Mohdin, 2018, "Channel Migrant Crossings: Who Is Coming And Why?", *The Guardian*, <https://www.theguardian.com/world/2018/dec/28/channel-migrant-crossings-who-is-coming-and-why> (accessed 3/07/19)

⁵² B. Couturier, 2018, "Suède: le coût d'une politique migratoire exceptionnellement généreuse", *France Culture*, <https://www.franceculture.fr/emissions/le-tour-du-monde-des-idees/le-tour-du-monde-des-idees-du-vendredi-07-septembre-2018> (accessed 3/07/19)

requests. Hence, the choice of these MSs contributes to assess whether, despite these differences, national laws were modified in a similar way that enables us to draw some generalizable conclusions. However, through the methodology used it will not be possible to understand to what extent these differences had an impact on the specific legislative amendments that took place in the three MSs.



Source: Eurostat, “Asylum and first time asylum applicants”

THESIS OUTLINE

The thesis will be structured as follows. The first part will provide an overview of the legal framework regulating immigration detention in the EU, focussing on the principal directives and regulations, and on the relevant CJEU and ECtHR rulings on the topic. In the following chapter, it will be examined how EU law had an impact on the modification of national legislation, jurisprudence and regulatory communications to enforcement authorities concerning immigration detention of the three MSs. After a general overview about how the country has been dealing with the current migratory flows, each case will examine the legal provisions regulating immigration detention, with a particular focus on: reasons for detention and categories of TCNs that can be detained, alternative measures, detention of minors and conditions of detention (maximum length and places). The last part will be dedicated to the comparative analysis itself, applying the theoretical framework of Europeanization introduced in the literature review to the three cases. The conclusive discussion will answer the research question.

LEGAL FRAMEWORK REGULATING IMMIGRATION DETENTION IN THE EU

This chapter will provide a legal overview of the principal instruments that regulate immigration detention at the EU level, highlighting what the fundamental rights obligations of MSs are, and examining more in detail the relevant secondary sources of EU law and the connected case law. In order to provide a detailed overview of the provisions that will be discussed in the case studies, this chapter focusses mainly on the following elements of the EU legislative instruments: reasons for detention, categories of TCNs that can be detained, alternatives to detention, detention of minors, length and place of detention. The questions that will be examined in detail are: *what are the legal provisions that allow for the detention of irregular TCNs and asylum seekers according to EU law? What are the detention conditions that MSs are required to apply?*

In the EU context, immigration detention is regulated through primary and secondary law. On top of that, MSs are also bound by the 1951 Geneva Convention relating to the Status of Refugees and to the European Convention of Human Rights (ECHR), respectively signed in the frameworks of the United Nations and the Council of Europe.

The Geneva Convention does not allow signatory countries to limit the movement of asylum seekers until their status is regularized unless such restrictions are necessary.⁵³ The concept of “necessity” must be proved for each individual case by considering alternative measures and by demonstrating that they cannot achieve the same objective of detention.⁵⁴ Also the ECHR recalls the right to liberty and security, but it provides more specific grounds that can constitute an exception to this right. For the purpose of our study, it is relevant to mention that it allows the restriction of movement to prevent a TCN from entering the country without authorization, or if he/she has to be deported or extradited.⁵⁵ The article establishes also that the TCN must be informed of the reasons for his/her arrest in an understood language,⁵⁶ he/she is also entitled to a fair trial in a reasonable time⁵⁷ and to compensation in case of detention contravening such provisions.⁵⁸ In addition, protocol n.4 addresses the freedom of movement of people that are lawfully into the country.⁵⁹ Such right can though be restricted on grounds of national security, public safety, public

⁵³ 1951 Convention Relating to the Status of Refugees, art. 31(2)

⁵⁴ C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees* (Geneva: United Nations High Commissioner for Refugees, 2017), p.47

⁵⁵ The European Convention on Human Rights (ECHR), art.5(f)

⁵⁶ *Idem*, art. (2)

⁵⁷ *Idem*, artt. (2) and 5(3)

⁵⁸ *Idem*, art. (5)

⁵⁹ *Idem*, art. (1)

order and prevention of crime.⁶⁰ Instead, with regard to the expulsion of aliens, protocol n.7 establishes the right to being provided with reasons, have his/her case reviews, and to be represented before the authority.⁶¹

The relevant EU primary law in this regard is constituted by the EU Charter of Fundamental Rights. It recalls the right of liberty and security of the person,⁶² the right to asylum,⁶³ some form of protection against removal, expulsion or extradition,⁶⁴ and the notion of right of the child and their best interest,⁶⁵ which has an impact on the issue of minors' detention.

In order to better address the issue of immigration detention, EU secondary law has been adopted. The most important pieces of legislation that will be examined in this thesis are the Return Directive (Directive 2008/115/EC)⁶⁶, the Reception Conditions Directive (Directive 2013/33/EU, henceforth RCD), the Asylum Procedures Directive (Directive 2013/32/EU, henceforth APD)⁶⁷, and the Dublin III Regulation (Regulation (EU) No 604/2013). The first instrument applies to TCNs that are illegally staying in the territory of a MS, whereas the other three concern asylum seekers.

THE RETURN DIRECTIVE

The Return Directive establishes that it is admissible to detain TCNs that are illegally staying in the country and are subject to a return decision, especially if there is risk of absconding or if the person obstructs the procedures.⁶⁸ The risk of absconding is determined for each individual case if reasons based on “objective criteria defined by law” suggesting that the TCN who is subject of return procedure may abscond are present.⁶⁹ MSs remain free to decide such elements, but the European Commission provided a list of aspects that should be considered in order to define the risk of absconding at the national level. They are: lack of documentation, stable address or financial resources, failure to report to the authorities, explicit refusal to comply with return provisions and non-compliance with return decision, conviction for a criminal offence or ongoing investigation and

⁶⁰ ECHR, art. 2(3)

⁶¹ Protocol 7 to the ECHR, art. 1(1)

⁶² Charter of Fundamental Rights of the European Union, art.6

⁶³ *Idem*, art.18

⁶⁴ *Idem*, art.19

⁶⁵ *Idem*, art.24

⁶⁶ In 2018, the European Commission proposed to recast the Return Directive, but for the purpose of this paper this will not be taken into consideration since it does not binding for MSs so far.

⁶⁷ Since 2016 discussions about proposal to recast the Asylum Procedure Directive are ongoing, but it has not been approved yet, therefore it will not be included in this thesis.

⁶⁸ Directive 2008/115/EC, art.15(1)

⁶⁹ *Idem*, art.3(7)

trials, previous episodes of escaping, being charged with a return decision in another MS, refusal to move to another MS offering right to stay, and illegal entry into the Schengen area.⁷⁰

Various rulings established that MSs are allowed to use measures such as police custody while assessing whether a person is illegally staying in the country in case it demonstrates necessary and if due diligence is applied; but, once it has been established that the stay is illegal, a return decision must be adopted.⁷¹ When an irregularly staying TCN has not been removed without justified reasons, MSs are entitled to adopt provisions, including those with a criminal character.⁷² However, these sanctions are regulated outside the scope of the Directive. On the contrary, reasons that do not allow for detention on the basis of the Return Directive are concerns about public order and public safety,⁷³ and the sole fact that a TCN is illegally staying in the territory of the country if detention might delay the enforcement of the return decision and jeopardize the achievement of the objective of the Directive.⁷⁴

Some dispositions are in place to grant certain legal safeguards to irregular TCNs. In particular, MSs must prove that alternative measures with a less coercive character are ineffective in the particular case at stake.⁷⁵ Moreover, they have to provide reasons to justify detention and the TCN is granted the right to a judicial review.⁷⁶

The Directive establishes particular provisions for families and minors that allow for detention only when it is a measure of last resort and for a period as short as possible.⁷⁷ The same article also guarantees that they are hosted respectively in separate accommodations for families⁷⁸ or in accommodations suited for unaccompanied minors,⁷⁹ with the possibility to engage in leisure activities and, to a certain extent, in education.⁸⁰

Detention must be maintained only for the shortest time possible and if the procedures for the removal are effectively ongoing.⁸¹ In other words, detention is justified only as long as there is a “reasonable prospect of removal”.⁸² However, it must not exceed six months and it can only be

⁷⁰ Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks, OJ 2017 L 339/83, pp.10-11

⁷¹ CJEU, C-329/11, *Achughbajian*, 6 december 2011, para.30-31

⁷² *Idem*, para.48

⁷³ CJEU, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, para.70

⁷⁴ CJEU, C-61/11 PPU, *El Dridi*, 28 april 2011, para.58-59

⁷⁵ Directive 2008/115/EC, art.15(1)

⁷⁶ *Idem*, art.15(2)

⁷⁷ *Idem*, art.17(1)

⁷⁸ *Idem*, art.17(2)

⁷⁹ *Idem*, art.17(4)

⁸⁰ *Idem*, art.17(3)

⁸¹ *Idem*, art.15(1)

⁸² CJEU, C-357/09 PPU, *Kadzoev*, para.63

prolonged for twelve more months if the detainee is not cooperating or if the procedure necessary to obtain the necessary documents is delayed.⁸³ In case the period of detention started before the applicability of the rules established in the Directive, this has to be taken into account.⁸⁴ Moreover, the legality of detention must be reviewed at reasonable intervals.⁸⁵ Among the conditions of detention, it is also stated that *ad hoc* facilities should be used for immigration detention purposes, however when prisons are used for this scope the TCNs must be separated from other detainees.⁸⁶ Resorting to prison accommodations has to be considered as an exception to the norm that must therefore be interpreted narrowly.⁸⁷

THE RECEPTION CONDITIONS DIRECTIVE AND THE ASYLUM PROCEDURES DIRECTIVE

As already mentioned, the RCD and the APD regulate the detention of asylum seekers. This section will examine the measures that are stated in the first instrument since they are elaborated more in detail. On the contrary, the second directive reiterates MSs obligations deriving from the RCD when applying immigration detention.⁸⁸

Asylum seekers are defined in the RCD as “applicants”, namely TCNs or stateless persons that have applied for international protection but are still waiting for a final decision.⁸⁹ The Directive defines detention as the “confinement of an applicant by a MS within a particular place, where the applicant is deprived of his or her freedom of movement”.⁹⁰ A list of the limited circumstances that allow for the detention of an asylum seeker if included in national law is provided. They are: (a) verifying his/her nationality; (b) determine elements of the application that would not be possible to obtain without detention, especially if there is a risk of absconding; (c) decide upon his/her right to enter the country; (d) prepare the removal process in case MSs have substantial evidence that he/she could have already accessed the procedure or if the application has the sole purpose of delaying the return; (e) for ground of national security and public order; and (f) in accordance to the provisions of the Dublin Regulation.⁹¹ The Directive also emphasizes that less coercive measures should be defined in national law,⁹² and that detention is admissible only when they are not applicable.⁹³

⁸³ Directive 2008/115/EC, artt. 15(5) and (6)

⁸⁴ CJEU, C-357/09 PPU, *Kadzoev*, para.39

⁸⁵ Directive 2008/115/EC, art.15(3)

⁸⁶ *Idem*, art.16(1)

⁸⁷ CJEU, Joint Cases C-473 /13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*, 17 July 2014, para.25

⁸⁸ Directive 2013/32/EU, art.26

⁸⁹ Directive 2013/33/EU, art.2(b)

⁹⁰ *Idem*, art.2(h)

⁹¹ *Idem*, art.8(3)

⁹² *Idem*, art.8(4)

Safeguards for detainees' rights such as having the reasons of detention stated in writing, possibility of judicial review and to be informed and receive legal assistance are provided.⁹⁴ The length of detention is not fixed by the Directive, but article 9 states that it should be "as short a period as possible" and, as long as the motivations mentioned previously apply.⁹⁵ Also, specialised detention facilities should be set up for detained asylum seekers, however if that is not possible MSs are allowed to use prisons provided that applicants are separated from other prisoners and preferably also from other categories of TCNs.⁹⁶ Minors are considered among the most vulnerable persons, therefore their detention is limited to a measure of last resort.⁹⁷ Unaccompanied minors cannot be detained in prison accommodations and under the same conditions that apply in the Return Directive.⁹⁸ This holds true also for detained families with children.⁹⁹

THE DUBLIN REGULATION

The Dublin Regulation aims at defining the procedures to decide which MS is in charge of the examination of an application for international protection¹⁰⁰. In this framework, the detention of the asylum seeker is only admissible in order to carry out a transfer procedure, if there is a significant risk of absconding, if detention is proportional, and if less coercive measures are not effective.¹⁰¹ In order for article 28(2) to be applicable, the criteria upon which the examination of the risk of absconding is carried out must be defined in a legislative instrument.¹⁰² The detention period should also be limited in these occurrences. Considering the length of the necessary phases of the procedure, detention is allowed for a maximum three months.¹⁰³ Conditions and guarantees that apply to the detained person must follow the indications laid down in articles 9, 10 and 11 of the RCD.

To sum up, all the legislative instruments emphasize the exceptionality of immigration detention. This is evident in EU legislation since the principles of proportionality and necessity are recalled and the legislative instruments aim at avoiding arbitrary detention. Also, they underline MSs' human rights obligations. TCNs subject to a return decision and asylum seekers, including those that have to be transferred to another MS under the provisions of the Dublin Regulation, can be

⁹³ Directive 2013/33/EU, art.8(2)

⁹⁴ *Idem*, art.9

⁹⁵ *Idem*, art.9(1)

⁹⁶ *Idem*, art.10(1)

⁹⁷ *Idem*, art.11(2)

⁹⁸ *Idem*, art.11(3).

⁹⁹ *Idem*, art.11(4)

¹⁰⁰ Regulation (EU) No. 604/2013, art.1

¹⁰¹ *Idem*, art.28(2)

¹⁰² CJEU, C-528/15, *Al Chodor*, 15 March 2017, para.42

¹⁰³ Regulation (EU) No. 604/2013, art.28(3)

detained according to EU law under limited circumstances and protected by certain guarantees. Four elements that emerged are the most relevant for the purpose of this thesis. First, MSs must state in domestic law explicit reasons for detention and how the risk of absconding has to be assessed. Second, alternative measures should be preferred and demonstrated insufficient and in case of detention of asylum seekers explicitly stated by law. Third, detention must be in compliance with certain time restriction and adequate facilities must be used for immigration detention purposes, thus prisons can be used only as exceptional cases. Fourth, families with minors and unaccompanied minors are entitled to further guarantees to ensure that the best interest of the child is respected.

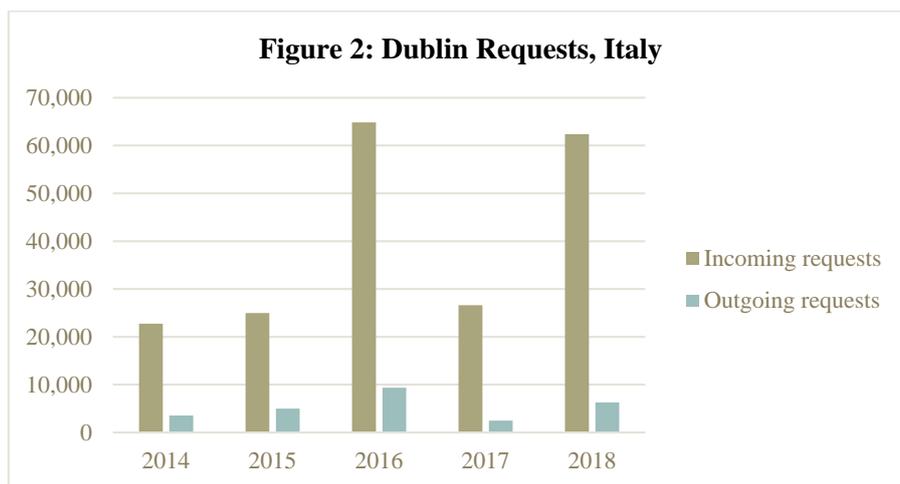
CASE STUDIES

The following case studies will examine the immigration situation of the three MSs at stake and the policies they implemented in the field of immigration detention. The following question will be explored. *How have national laws regulating immigration detention been amended in order to comply with the legal obligations deriving from the adoption of EU legislation?*

ITALY

GENERAL BACKGROUND AND LEGISLATIVE FRAMEWORK

Since 2008, the economic crisis contributed to the reduction of influx of foreign workers to Italy, that were substituted by an increasing number of asylum seekers. As a consequence the focus of national policies shifted.¹⁰⁴ The country did not demonstrate to be sufficiently equipped to deal with such incoming fluxes and the measures taken had mainly emergency features.¹⁰⁵ In order to tackle this issue, in Italy and also in Greece, the EU established the so-called “hotspots”, that are centres where EU agencies cooperate with national authorities for the purpose of managing the arrival procedures.¹⁰⁶ Following the adoption of the EU Agenda for Migration, in 2017 the notion of “hotspot” (*punti di crisi*) has been introduced in the Italian legislation.¹⁰⁷ At the unilateral level, Italy signed a Memorandum of Understanding with the Libyan government in 2017 aimed at cooperating in the management of migratory flows.¹⁰⁸ In fact, the number of asylum seekers arriving in Italy has decrease in 2018 as Figure 1 showed.



Source: Eurostat, “Dublin requests”

¹⁰⁴ n/a, 2015, “20 anni di migrazioni di Italia”, *Ismu.org*, http://www.ismu.org/wp-content/uploads/2015/06/Guida_20-anni-di-immigrazione-in-Italia_.pdf (accessed 3/07/19), p.26

¹⁰⁵ *Idem*, p.27

¹⁰⁶ COM(2015) 240 Final, *A European Agenda on Migration*, p.6

¹⁰⁷ Law Decree 286/1998, art.10-ter

¹⁰⁸ A. de Guttry, F. Capone and E. Sommaro, "Dealing With Migrants In The Central Mediterranean Route: A Legal Analysis Of Recent Bilateral Agreements Between Italy And Libya", *International Migration* 56 (3) (2017), 44-60, p.52

As illustrated by Figure 2, the impact of the Dublin system on Italy has been quite constant over the years. The country has been primary subject to transfers from other MSs, whereas it has been possible to transfer only a small minority of asylum seekers from Italy to other MSs.

The principal act that is used in Italian legislation to regulate immigration and the particular aspect of immigration detention is the Consolidated Immigration Act (*Testo unico sull'immigrazione*), adopted in 1998 and amended multiple times afterwards. In particular, in 2011, Law Decree 89/2011 was approved to implement the Return Directive,¹⁰⁹ whereas in 2015, new amendments, approved through the so-called Reception Decree (*Decreto Accoglienza*), were necessary to transpose the RCD and the APD.¹¹⁰ In the following years, other two Law Decrees gave particular importance to return procedures and have brought important modification to the Immigration Act. They are the 2017 Minniti Decree (*Decreto Minniti*) and the 2018 Security Decree (*Decreto Sicurezza*).

Italy allows for immigration detention in the so-called Return Detention Centres (*Centri di Permanenza per i Rimpatri*, henceforth CPRs) and in some cases in the hotspot, even if their function is linked to the possibility to repatriate irregular migrants, they also work as reception centre that TCNs can leave.¹¹¹ The number of irregular TCNs and asylum seekers detained in Italy in the CPRs is presented by Figure 3, however these data do not take into account the numbers of those detained for a short term in the hotspots (13.777 TCNs detained in 2018 for an average of 3,8 days).¹¹²

Figure 3: TCNs detained in Italy¹¹³

2014	2015	2016	2017	2018
4.986	5.242	2.984	Not available	4.092

REASONS FOR DETENTION AND CATEGORY OF TCNS THAT CAN BE DETAINED

¹⁰⁹ n/a, “Recepimento Della Direttiva Rimpatri”, *Camera dei Deputati*, <http://leg16.camera.it/522?tema=443&Recepimento+della+direttiva+rimpatri> (accessed 3/07/19)

¹¹⁰ Studi Camera – Istituzioni, 2018, “Il decreto legislativo n. 142 del 2015 (cd. Decreto accoglienza)”, *Camera dei Deputati: Documentazione parlamentare*, https://temi.camera.it/leg18/post/il_decreto_legislativo_n_142_del_2015_cd_decreto_accoglienza_.html (accessed 3/07/19)

¹¹¹ Global Detention Project, *Italy Immigration Detention Profile* (Geneva: GDP, 2018a). Available at <https://www.globaldetentionproject.org/countries/europe/italy> (accessed 3/07/19), pp.18-19

¹¹² C. Bove, *Country Report: Italy* (Asylum Information Database, 2018). Available at <https://www.asylumineurope.org/reports/country/italy> (accessed 3/07/19), p. 115

¹¹³ Commissione straordinaria per la tutela e la promozione dei diritti umani, 2017, “Rapporto sui centri di identificazione ed espulsione in Italia”, *asylumineurope.org*, http://www.asylumineurope.org/sites/default/files/resources/cie_rapporto_aggiornato_2_gennaio_2017.pdf (accessed 3/07/19), p.13; C. Bove, *Country Report: Italy* (Asylum Information Database, 2017). Available at <https://www.asylumineurope.org/reports/country/italy> (accessed 3/07/19), p.103; Guarantor for the rights of detained persons in Bove, *Report Italy 2018*, p.115

Immigration detention is admissible according to article 12 of the Immigration Act when it is necessary to verify the identity of the TCN and to carry out the procedure to implement a return decision.¹¹⁴ In 2011, the same article has been modified, establishing that the possibility to detain TCNs is limited to certain circumstances, and if the risk of absconding can be assessed.¹¹⁵ The grounds on which this evaluation, that must be carried out case by case, are stated at article 13(4-bis).¹¹⁶ All the parameters established in the EU Return Handbook are taken into consideration when assessing the risk of absconding, except for the lack of financial resources and the unauthorized secondary movement to another MS.¹¹⁷ The conviction for a criminal offence is not stated among the elements that contribute to the examination of the risk of absconding, but it is considered as an autonomous reason that can justify the detention of an asylum seeker.¹¹⁸ On the contrary to what was the case until 2009, following the *El Dridi* case, the possibility to detain a TCN whose return order has not been enforced without valid ground has been abolished and substituted by a financial penalty.¹¹⁹

In 2015, clearer parameters were approved in order to regulate the detention of asylum seekers only during the examination of their application through the implementation of the APD and the RCD.¹²⁰ This practice had been in place since 2002,¹²¹ but the 2015 Law Decree has limited the detention of asylums seekers only in case they represent a threat for public security and the risk of absconding exists.¹²² In addition, the new piece of legislation modified what was previously stated in the 2002 Law Decree concerning detention of TCNs that applied for asylum while already in detention. The previous law always required the continuation of detention in this case.¹²³ Instead, since 2015, the TCN must remain in detention only if there are serious grounds to suspect that the application is submitted with the sole aim of delaying or hinder the return decision.¹²⁴

Moreover, the Law Decree approved in 2017, has established that all the TCNs irregularly found on the territory or during rescue operations at sea must be fingerprinted according to the provisions of

¹¹⁴ Law Decree 286/1998, art.14(1)

¹¹⁵ Law Decree 129/2011, art.3(1)(4)

¹¹⁶ *Idem*, art.3(1)(c)

¹¹⁷ European Migration Network, *The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report* (Brussels: EMN, 2017). Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_return_study_synthesis_report_final_en.pdf (accessed 3/07/19), pp.28-29

¹¹⁸ Law Decree 142/2015 art 6(2)(c)

¹¹⁹ Law Decree 89/2011, art.3(d)(5)

¹²⁰ Law Decree 142/2015, art.6(1)

¹²¹ Law 189/2002, art.32(1)(b)

¹²² Law Decree 142/2015, art.6(1)and(2)

¹²³ Law Decree 189/2002, art.32(2)(b)

¹²⁴ Law Decree 142/2015, art.6(3)

the Dublin Regulation¹²⁵. Consequently, the repeated refusal to undergo such identification procedures is considered as risk of absconding and it results in the detention of the TCN, even if he/she is applying for international protection.¹²⁶ This decision can appear suggested by a Communication that the Commission made at the end of 2015 concerning the implementation of the hotspot approach in Italy, which required Italian authorities to allow for long-term detention for TCNs that refuse to undergo fingerprinting.¹²⁷

As seen, both irregular TCNs and asylum seekers can be detained in Italy. On the contrary, the situation of asylum seekers that are part of the Dublin procedure is more blurred. According to Italian law they are not detained,¹²⁸ but it has been reported that in some instances they are kept in the CPRs before a transfer.¹²⁹ However, no amendments of the Italian legislation that aim at establishing specific provisions for this category have been encountered.

ALTERNATIVES TO DETENTION

Among other measures adopted in 2011, in the process of transposition of the Return Directive, the possibility to opt for less restrictive measures was introduced, namely the surrender of identity documents to the authorities, obligation to reside in a pre-determined place, obligation to notify to the authorities according to an established plan.¹³⁰

MINORS IN DETENTION

In 2015, the detention of unaccompanied minors has been explicitly prohibited by law when transposing the APD and RCD.¹³¹ It must be noted that they were not detained, at least since 2008, when previous Council Directives were implemented,¹³² but, for the first time, the 2015 Law Decree included this provision in the Consolidated Immigration Act. At the same time, the Law Decree has established that unaccompanied minors can be housed in adequate reception centres for identification purposes and for age determination.¹³³ In 2017, the Immigration Act was amended and it was specified that the reception centres have to be specifically designed for minors and the period that can be spent there was decreased from 60 days, as approved in 2015, to 30 days.¹³⁴ After

¹²⁵ Law Decree 13/2017, art.17(1)(2)

¹²⁶ *Idem*, art.17(3)

¹²⁷ COM(2015) 679 final, *Progress Report on the Implementation of the hotspots in Italy*, p.4

¹²⁸ Bove, *Report Italy 2018*, p.117

¹²⁹ *Idem*, p.52

¹³⁰ Law Decree 189/2011, art.3(5.2)

¹³¹ Law Decree 142/2015, art.19(4)

¹³² Law Decree 25/2008, art.26

¹³³ Law Decree 142/2015, art.19(1)

¹³⁴ Law 47/2017, art.4

this period, they must be integrated in the Protection System for Asylum Seekers and Refugees.¹³⁵ On the contrary, it is possible to detain accompanied children with their families if it is requested and if it is allowed by the Juvenile Court.¹³⁶

LENGTH AND PLACE OF DETENTION

Detention periods are different according to the category to which the TCN belongs. Indeed, asylum seekers can be issued a decision authorising detention for a duration of sixty days, but it can be extended for a maximum period of one year, thus prolonging the provision that was in place before the entering into force of EU legislation that authorised for a maximum of three months of detention in total.¹³⁷ However, detention in hotspot facilities is only allowed for a period of thirty days and, in case the asylum seeker is then transferred in a CPR, the total time limit would be one hundred and eighty days.¹³⁸

Instead, the maximum length period for the detention of TCNs subject to a return decision has changed over time. In 2011, when the RCD was implemented, the Italian legislator established that detention was possible for a period of maximum 18 months with a series of regular reviews.¹³⁹ Thus, this extended the maximum period of one hundred and eighty days that was in place before the adoption of EU legislation.¹⁴⁰ The period was then shortened in 2014,¹⁴¹ but then re-extended in 2018 to the maximum that is allowed under EU law.¹⁴²

As already mentioned, in Italy, immigration detention is allowed in the so-called CPRs,¹⁴³ that were previously called Identification and Expulsion Centres (*Centri di Identificazione ed Espulsione*). Prisons are not used for immigration detention purposes.¹⁴⁴ Nevertheless, in 2018, the possibility to detain asylum seekers also in the “hotspots” has been introduced when it is necessary for identification and verification procedures for maximum thirty days, after which the detainee can be moved to the CPRs.¹⁴⁵ In fact, in 2015 the Commission had already urged Italy to maximize the capacity of the hotspots and to take into consideration the possibility to reform regulations

¹³⁵ n/a, 2018, “Minori Stranieri Non Accompagnati”, *Camera dei Deputati*, <https://www.camera.it/temiap/documentazione/temi/pdf/1104665.pdf> (accessed 3/07/19) p.4

¹³⁶ Bove, *Report Italy 2018*, p.121

¹³⁷ Law Decree 142/2015, art.6(8)

¹³⁸ Law Decree 113/2018, art. 3(1)(a)

¹³⁹ Law Decree 189/2011, art.3(3)

¹⁴⁰ Law 94/2009, art.1(22)

¹⁴¹ Law Decree 161/2014, art.3(1)(e)

¹⁴² Law Decree 113/2018, art.2(2)

¹⁴³ Law Decree 286/1998, art. 14

¹⁴⁴ Bove, *Report Italy 2018*, p.123

¹⁴⁵ Law Decree 113/2018, art.3(1)(a)

regarding detention.¹⁴⁶ In 2018, 7 CPRs and 4 hotspots were in place¹⁴⁷, but some works have started in 2017 and are currently ongoing to increase the capacity of immigration detention centres.¹⁴⁸

FRANCE¹⁴⁹

GENERAL BACKGROUND AND LEGISLATIVE FRAMEWORK

In the first part of 2000s, France aimed at developing the concept of “chosen migration”, meaning that only migrants that were considered necessary for the national economy were allowed to enter.¹⁵⁰ Despite in 2012 this approach softened,¹⁵¹ concerns about security arose, especially following the 2015 the terrorist attack in Paris. As a reaction, in 2014 and 2015 the border with Italy was closed.¹⁵² However, contrary to what happened in the rest of Europe, the numbers of asylum seekers arriving in France has not diminished in the last years.

In 2018, almost 40% of the asylum seekers that arrived in France had already passed through another MS.¹⁵³ This trend is also shown by Figure 4. In fact, after 2014, the number of outgoing requests has increased dramatically, thus enlarging the divide with the number of incoming requests, which augmented far less. The shortcomings of the Dublin system, in particular the failure to carry out readmissions, create administrative burdens in France since it has to re-examine certain applications that were denied in other MSs and to take care of those presented by asylum seekers that have been fingerprinted elsewhere but did not apply for asylum.¹⁵⁴

¹⁴⁶ COM(2015) 679 final, p.2

¹⁴⁷ Bove, *Report Italy 2018*, p.115

¹⁴⁸ Studi Camera – Istituzioni, 2019, “I Centri Di Permanenza Per I Rimpatri”, *Camera dei deputati: Documentazione Parlamentare*, <https://temi.camera.it/leg18/post/cpr.html> (accessed 3/07/19)

¹⁴⁹ In order to compare the French system on an equal level as other MSs, special legal provisions applying in the French Overseas Territories and figures related to immigration detention practices carried out there will not be considered.

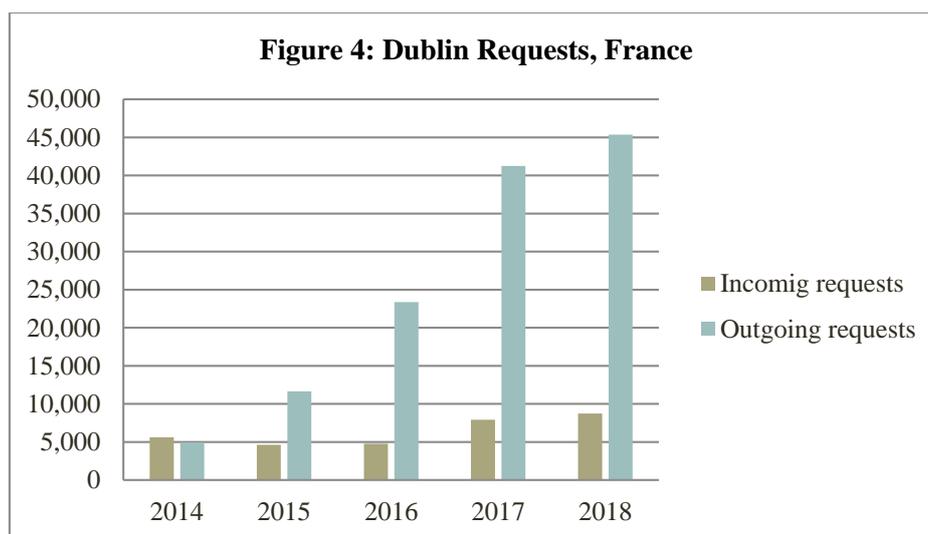
¹⁵⁰ A. Geddes and P. Scholen, *The politics of Immigration and Migration in Europe*. (London: SAGE Publications Ltd., 2016), p.57

¹⁵¹ *Idem*, p.58

¹⁵² *Idem*, p.59

¹⁵³ D. Leschi, 2018, "Migrations: La France singulière", *Fondation pour l'innovation politique*, http://www.fondapol.org/wp-content/uploads/2018/11/133-FRANCE-IMMIGRATION_2018-10-10_w2.pdf (accessed 3/07/19), p.18

¹⁵⁴ Brice in J. N. Escudié, 2019, "Pour Pascal Brice, Directeur De L'ofpra, Les "Insuffisances" Et Les "Failles" De Dublin "Posent De Sérieux Problèmes", *Banque Des Territoires*, <https://www.banquedesterritoires.fr/pour-pascal-brice-directeur-de-lofpra-les-insuffisances-et-les-failles-de-dublin-posent-de-serieux> (accessed 3/07/19)



Source: Eurostat, "Dublin requests"

The principal instrument used in French legislation to regulate the treatment of TCNs is the Code of Entry and Residence of Foreigners and of the Right to Asylum (*Code d'entrée et du séjour des étrangers et du droit d'asile*, henceforth CESEDA) that entered into force in 2005. Various amendments took place over the years. In particular, in 2011, the text was modified in order to make it compatible with the Return Directive.¹⁵⁵ Whereas, the 2015 modifications enabled the transposition of the APD and the RCD.¹⁵⁶ Various 2016 amendments have also contributed to modify the CESEDA, introducing provisions that resemble the ones agreed at the EU level. Finally, in 2018 a new Law was proposed and eventually adopted with the aim to better manage immigration and the asylum system according to European standards.¹⁵⁷

TCNs subject to immigration detention are kept in the Centres of Administrative Retention (*Centres de Retention Administrative*, henceforth CRAs) or, in case their capacity is not sufficient, in the Administrative Retention Facilities (*Locaux de Retention Administrative*, henceforth LRAs) spread across the country.¹⁵⁸ As the Figure 5 shows, the number of TCNs detained in France is way higher than in the two other MSs considered.

¹⁵⁵ Decision 2011-631 DC, 9 June 2011, para.41

¹⁵⁶ Law Decree 2015-1166, 21 September 2015, preface

¹⁵⁷ M. Rescan, 2018, "La Loi Asile Et Immigration Définitivement Adoptée À L'Assemblée", *Le Monde*, https://www.lemonde.fr/politique/article/2018/08/01/la-loi-asile-et-immigration-definitivement-adoptee-a-l-assemblee_5338430_823448.html (accessed 3/07/19)

¹⁵⁸ Welch and Schuster, "Detention Asylum-seekers", p.340

Figure 5: TCNs detained in France¹⁵⁹

	2014	2015	2016	2017	2018
Total number of TCNs detained	26.371	27.947	24.090	26.474	26.614
Number of detainees in the Dublin procedure	Not available	834	2.208	3.723	3.857

REASONS FOR DETENTION AND CATEGORIES OF TCNS THAT CAN BE DETAINED

According to title 5 of the CESEDA, which regulates immigration detention in the French legislative system, it is possible to detain a TCN when he/she must leave the territory of the country after an individual evaluation of the case and only if there is a considerable (*non négligeable*) risk that he/she will escape and if detention is proportionate and necessary.¹⁶⁰ The second section of the chapter is aimed at defining a series of grounds that can determine the presence of a risk of absconding. This final formulation of the article and the introduction of these grounds is the result of the 2018 Law aiming at making French law compatible with EU standards. Almost all of the elements proposed in the EU Return Handbook are taken into account, except for the lack of financial resources and the conviction for a criminal offence, despite the nature and the date of the latter one are considered when the presence of the risk of absconding is assessed¹⁶¹. On top of that, other elements that can be linked to the Dublin procedure are considered in order to evaluate the risk of absconding, e.g. if the TCN did not comply with the procedures necessary to apply for asylum in another MS or with a transfer decision in the past, if he/she hindered a transfer decision from France, and if the TCN does not participate to the necessary interviews to determine the responsible MS in the Dublin framework.¹⁶² Two rulings of the French Court of Cassation, both referring to the *Al Chodor* case, were relevant to trigger these amendments. In the first one, the French Court of Cassation ruled against the detention of asylum seekers in the Dublin procedure since the national law did not provided for objective and generally applicable criteria to determine the risk of absconding¹⁶³. The second one reiterated this decision and added that, according to the law present at that time, detention was not possible before the issuance of a transfer decision.¹⁶⁴ As a consequence of these legislative modifications, the option to issue an house arrest (*residence à*

¹⁵⁹ La Cimade, 2018, “Centres et locaux de rétention administrative”, *La Cimade*, https://www.lacimade.org/wp-content/uploads/2018/07/La_Cimade_Rapport_Retention_2017.pdf, (accessed 3/07/19), pp.11-12 ; La Cimade, 2019, “Centres et locaux de rétention administrative”, *La Cimade*, https://www.lacimade.org/wp-content/uploads/2019/06/La_Cimade_Rapport_Retention_2018.pdf (accessed 3/07/19), pp.11,13

¹⁶⁰ CESEDA, L551-1, ch.1(I)(II)

¹⁶¹ European Migration Network, *Effectiveness return*, pp.29-30

¹⁶² CESEDA, L551-1, ch.1(II)

¹⁶³ Decision 2017-1130, 27 September 2017 - Cour de cassation - Première Chambre Civile

¹⁶⁴ Decision 2017-149, 7 February 2017 – Cour de Cassation - Première Chambre Civile, p.149

l'égard) against asylum seekers in the Dublin procedure, which was already in place,¹⁶⁵ has been combined with the possibility to detain them according to the grounds provided in Article L551-1.¹⁶⁶

It can also be noticed that the cases *El Dridi* and *Achughbabian* had a relevant impact on French immigration policy, since the frequent practice of detaining TCNs in police custody was defined illegal by the French Court of Cassation due to the fact that suspicion of staying illegally in the country was the only reason for being held in custody.¹⁶⁷ Indeed, in 2012 the CESEDA was amended.¹⁶⁸ The possibility for the authorities to detain, not in a systematic manner, for a limited period of time TCNs with the purpose of determining their identity and the legality of their staying in France¹⁶⁹ and a new offence of illegal stay have been introduced.¹⁷⁰ This crime applies in case a TCNs has not left the country following a return order without legit reason and it is punishable with three years of imprisonment.¹⁷¹

Despite the established tradition that only irregularly staying TCNs can be detained,¹⁷² in 2015, a chapter concerning TCNs applying for asylum in administrative detention has been added to the CESEDA.¹⁷³ Consequently, he/she can be kept in detention during the examination of the request only if there are objective grounds to suppose that the application has the sole objective of hindering the return decision.¹⁷⁴ Since 2018 the provisions of Title V of CESEDA have become applicable also to asylum seekers in cases measures to protect public order and national security are needed after an individual assessment and if less restrictive measures are not effective.¹⁷⁵

ALTERNATIVES TO DETENTION

Other less restrictive measures are envisaged under French legislation, in particular house arrest (*assignation à résidence*) that is applicable for six months with the possibility to be renewed once

¹⁶⁵ CESEDA, L561-2

¹⁶⁶ Law 2018-187. 20 March 2018, art. 1

¹⁶⁷ A. Beduschi, "Detention of Undocumented Immigrants and the Judicial Impact of the CJEU's Decisions in France", *International Journal of Refugee Law* 26(3) (2014), 333-349, pp.334-335

¹⁶⁸ Law 2012-1560. 31 Decembre 2012

¹⁶⁹ CESEDA, L611-1

¹⁷⁰ *Idem*, L624-1

¹⁷¹ CESEDA, L624-1

¹⁷² Global Detention Project, *Country report. Immigration detention in France: longer, more widespread, and harder to contest*, (Geneva: GDP, 2018b). Available at <https://www.globaldetentionproject.org/countries/europe/france>, (accessed 3/07/19), p.13

¹⁷³ Law 2015-925. 29 July 2015, art.16

¹⁷⁴ CESEDA, L556-1

¹⁷⁵ *Idem*, L571-4

more for the same time period.¹⁷⁶ This measure has been introduced in 2011 with the implementation of the Return Directive.¹⁷⁷

MINORS IN DETENTION

When a TCN is detained accompanied by a minor, the grounds justifying detention are slightly limited and detention can last only for the shortest period possible. Indeed, only three elements apply, namely the failure to respect the measures imposed for a precedent place of residence, a past attempt to escape in order to avoid deportation, and if detention does not violate the best interest of the child.¹⁷⁸ French law also guarantees that they are accommodated in appropriate facilities with isolated rooms.¹⁷⁹ The introduction of these particular grounds took place in 2016.¹⁸⁰ However, this practice created various concerns with regard to the respect of fundamental rights, as shown by different cases submitted to the ECtHR in 2016.¹⁸¹ One particular case, *Popov v France*, has been recalled in these occurrences. The Court ruled that less restrictive measures were not examined sufficiently by national authorities and that children could not rely on any legal remedy since they were “accompanying” their parents but not formally ordered detention.¹⁸² After six months from the *Popov* case, the French minister of home affairs called local authorities to use house arrest as a generalised measure instead of detention in cases of family accompanied by children, making reference to the best interest of the child, to the possibility to use less restrictive measures and to the Return Directive.¹⁸³

On the contrary, although the fact that unaccompanied minors cannot be detained has been stated by law only in 2018,¹⁸⁴ it has been reported that this practice was not in place even before.¹⁸⁵ However they can be kept in waiting zones (*zones d’attente*) for the necessary period of time in order to examine if their asylum request is inadmissible or unfounded, in exceptional circumstances and in certain cases.¹⁸⁶ These conditions are the fact that he/she comes from a safe third country, he/she provided false information and he/she threatens national security.¹⁸⁷ These measures have been

¹⁷⁶ CESEDA, L561-1

¹⁷⁷ Law 2011-672. 16 June 2011, art. 47

¹⁷⁸ CESEDA., L551-1, ch.1(III bis.)

¹⁷⁹ *Idem*, L551-1(III bis)

¹⁸⁰ Law 2016-274. 7 March 2016, art.35

¹⁸¹ See for instance *A.B. and Others v France*, *A.M. and Others v France*, *R.C. and V.C. v France*, *R.K. v France*, *R.M. and Others v France*

¹⁸² ECtHR, *Popov v France*, n. 39472/07 and 39474/07. 19 January 2018, para.124, 146

¹⁸³ Circular n. NOR INTK1207283C

¹⁸⁴ CESEDA, L551-1 (III bis), as amended by Law 2018-778. 10 September 2018, art.28

¹⁸⁵ C. Salignat, *Country Report : France* (Asylum Information Database, 2016). Available at <https://www.asylumineurope.org/reports/country/france>, p.98

¹⁸⁶ CESEDA, L221-1

¹⁸⁷ *Idem*, L723-2

introduced in 2015¹⁸⁸, since no specific measures taking into account children's condition were in place before that date. However, the provision establishing that they can be detained for a maximum period of four days like adults remained in place.¹⁸⁹

LENGTH AND TIME OF DETENTION

In principle, detention is only allowed for a period of 48 hours, however after twenty-eight days, it can be prolonged for additional thirty days under particular circumstances, such as absolute urgency, threat to public order, impossibility to carry out the removal due to voluntary obstruction or failure to obtain the necessary documents or transportation means. After this period, if the return decision has not been enforced, an additional extension is allowed. Nevertheless, detention cannot be prolonged more than twice, for a maximum total of ninety days.¹⁹⁰ This measure has been approved in March 2018 within the framework of the law aiming at regulating migration and apply an effective asylum law which has doubled the length that was previously admissible.¹⁹¹

According to French legislation, immigration detention can take place only in facilities that are not managed by penitentiary administration.¹⁹² Therefore it does not allow the use of prisons for the purpose of immigration detention.¹⁹³ Article R553 of CESEDA deals with the CRAs. On top of that, due to temporary circumstances the LRAs can also be used for immigration detention for 48 hours.¹⁹⁴ In 2017, 21 CRAs have been counted,¹⁹⁵ whereas it is not possible to establish the exact number of LRAs since they are set up according to the necessities of the moment.

SWEDEN

GENERAL BACKGROUND AND LEGISLATIVE FRAMEWORK

Over the years, migration in Sweden developed from been driven by the necessity of working force, to be determined by family reunifications.¹⁹⁶ The welcoming approach of the country was demonstrated for instance in 2012, when it granted automatically the refugee status to those people fleeing Syria.¹⁹⁷ It also established a system of "quota refugees" with the United Nations High Commissioner for Refugees that allows the resettlement of a certain amount of refugees every

¹⁸⁸ Law 2015-925. 29 July 2015, art.13

¹⁸⁹ CEDESA, L221-3

¹⁹⁰ Idem, L552-7

¹⁹¹ Immigration and asylum law (n° 714), amendment n°CL821, art. 16

¹⁹² CESEDA, L551-1(I)

¹⁹³ L. Delbos and C. Tripier, *Country Report: France* (Asylum Information Database, 2018). Available at https://www.asylumineurope.org/sites/default/files/report-download/aida_fr_2018update.pdf (accessed 3/07/19), p.101

¹⁹⁴ Decree 2001-236. 19 March 2001, art.9

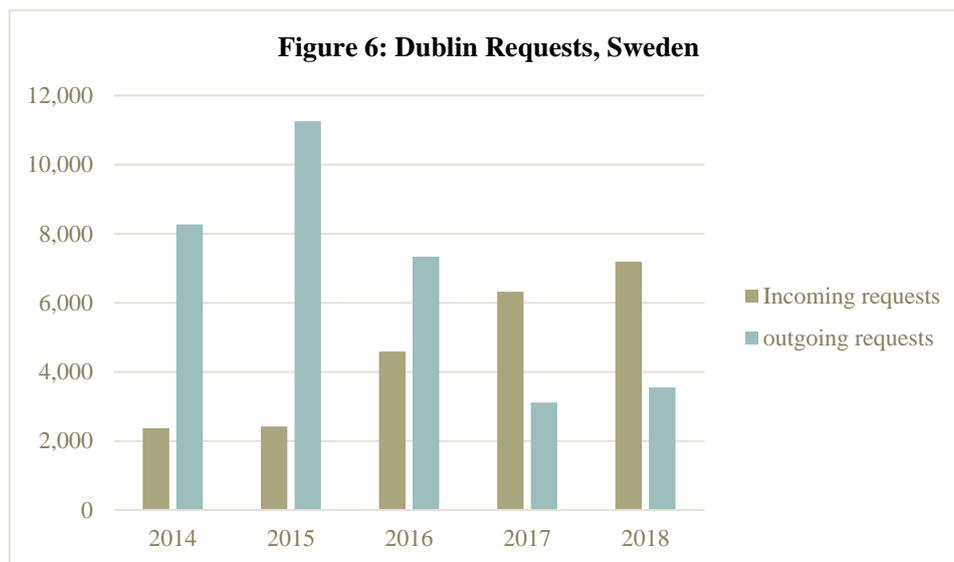
¹⁹⁵ La Cimade, 2018, "Centres et locaux", p.4

¹⁹⁶ Couturier, "Suède"

¹⁹⁷ Geddes and Scholten, *Politics of immigration*, p.133

year.¹⁹⁸ However, the Swedish reception system was especially challenged between 2014 and 2015 when it became the country with the highest number of asylum seekers compared to the rest of the population.¹⁹⁹ This occurrence resulted in a political shift, that started with the reintroduction of border controls with Denmark, thus enabling to drastically reduce the number of arrivals.²⁰⁰ On top of that, legislative changes made migration policies more restrictive.²⁰¹ Hence, expulsion and detention become more prominent practices after 2015.²⁰²

It is often argued that MSs in the South did not respect Dublin Regulation and Northern countries had to take care of the majority of the incoming asylum seekers.²⁰³ Indeed, the Swedish government has been quite vocal in expressing the need to tackle the shortcomings of this system at the EU level.²⁰⁴ However, as Figure 6 shows, this argument reflected the situation only until 2016, when the outgoing requests in Sweden were higher than incoming requests. This trend reversed in 2017 and 2018.



Source: Eurostat, “Dublin requests”

The major legislative instrument that is used in Sweden to regulate immigration is the 2005 Aliens Act (*Utlänningslag*) which was then further amended. In particular, Chapter 10 established all the

¹⁹⁸ *Idem.* p.132

¹⁹⁹ Couturier, “Suède”

²⁰⁰ *Ibid.*

²⁰¹ K. Öberg and M. Sager, “Articulations Of Deportability : Changing Migration Policies In Sweden 2015/2016”, *Refugee Review* 3 (2017), 2-14., p.3

²⁰² A. Skodo, 2018, “Sweden: By Turns Welcoming And Restrictive In Its Immigration Policy”, Migrationpolicy.Org, <https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy> (accessed 3/07/19)

²⁰³ *Ibid.*

²⁰⁴ Öberg and Sager, “Articulations deportability”, p.8

measures that concern immigration detention (*förvar*). Sweden amended the Aliens Act between 2011 and 2012 so that it would comply with the Return Directive.²⁰⁵ The RCD has not been implemented since the legislative system was already in compliance with the EU standards,²⁰⁶ whereas the APD was transposed in 2016.²⁰⁷ The figures about TCNs detained increased slightly over the years as illustrated by Figure 7.

Figure 7: TCNs detained in Sweden²⁰⁸

2014	2015	2016	2017	2018
3.201	3.714	3.714	4.379	4.705

REASONS FOR DETENTION AND CATEGORIES OF TCNS THAT CAN BE DETAINED

Section 1 of Chapter 10 of the Aliens Act defines various ground for immigration detention. They include the fact that the TCN's identity must be confirmed upon arrival or when he/she applies for a residence permit, if it is necessary to assess his/her right to enter and stay in the country, if it is necessary to carry out an investigation to determine if the person has the right to remain in the country. It is also possible to detain the TCN if there is a probability that he/she will be refused entry or will be expelled enforcing a return decision only if there are reasons to presume that the person would otherwise hide, hinder the enforcement or commit criminal acts.²⁰⁹ Before the 2012 modification, this provision encompassed only the fact that the TCN could commit criminal act as reason to apply the two last measures.²¹⁰ The necessary elements that are used to demonstrate whether such a "risk of absconding" exists, as stated in section 15 of Chapter 1, were also introduced in the 2012 amendment of the Aliens Act in order to implement the Return Directive.²¹¹ In Sweden, all the elements mentioned in the Return Handbook to determine whether a risk of absconding exists are taken into account, except for the lack of financial resources.²¹²

Both asylum seekers and rejected TCNs can be detained according to Swedish law. Nevertheless, the detention of asylum seekers in the Dublin procedure proved to be quite controversial in some

²⁰⁵ Prop. 2011/12:60

²⁰⁶ Global Detention Project, *Country Report. Immigration in Sweden: increasing restrictions and deportations, growing civil society resistance*, (Geneva: GDP, 2018c). Available at <https://www.globaldetentionproject.org/countries/europe/sweden>, (accessed 3/07/19), annex 1

²⁰⁷ B. Parusel (ed.), *EMN Annual Report on Migration and Asylum 2016 – Sweden* (Swedish Migration Agency, 2017). Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/27a_sweden_apr2016_part2_final_en.pdf (accessed 3/07/19), p.32

²⁰⁸ Swedish Migration Agency in M. Williams and L. Hallstedt, *Country Report: Sweden* (Asylum Information Database, 2018). Available at <http://www.asylumineurope.org/reports/country/sweden> (accessed 3/07/19), p.71

²⁰⁹ Aliens Act, ch.10(1)

²¹⁰ *Idem* (2009 update), ch.10(1)

²¹¹ MIG 2015:5, para. 2(2)

²¹² European Migration Network, *Effectiveness return*, pp.28-29

rulings of the Swedish Migration Court of Appeal. In fact, in its reasoning in 2015, the Court stated that, due to the supremacy of EU law, it is not possible to apply the Aliens Act to a procedure concerning the Dublin Regulation²¹³. The reasoning of the Court was the following. Despite rules defined in the Regulation, in particular the one set out in Article 28(2) allows for the detention of asylum seekers in case a significant risk of absconding is present, the notion of *significant* risk entails higher requirements than those present in the Aliens Act.²¹⁴ However, in 2017 the same Court took into account these grounds and decided that detention was indeed possible because of a significant risk of absconding.²¹⁵ In practice, asylum seekers are detained sporadically during the Dublin procedure²¹⁶ and asylum applicants that are subject to a transfer procedure under the Dublin Regulation are usually settled in reception centres close to an airport.²¹⁷

ALTERNATIVES TO DETENTION

The less restrictive measure that is established in the Swedish legislative system is supervision, meaning the obligation for the TCN to regularly report to the authority, and it can include the surrendering of identity documents and passport.²¹⁸ This measure has been already in place when the Act was adopted and the entering into force of EU legislation did not modify this provision.

MINORS IN DETENTION

The reasons that justify the detention of children²¹⁹ are: probability that the minor will be refused entry and a refusal-to-entry order with immediate effect is issued; obvious risk of absconding that would impede the enforcement decision; supervision is not sufficient; necessity to enforce a refusal-to-entry or expulsion order; and supervision has previously demonstrated to be not enough to enforce the order.²²⁰ On top of that, children cannot be separated by their custodian through the detention of one of them, whereas an unaccompanied minor can be detained only for exceptional reasons.²²¹ Detention of children is allowed for only 72 hours and it is only possible to double this duration for exceptional grounds.²²² Despite minor amendments of these articles over the years, they do not seem related to the implementation of EU law. Moreover, the characteristics of the facilities where families with children can be detained and unaccompanied minors kept in custody

²¹³ MIG 2015:15, para.3(1)

²¹⁴ *Idem*, para. 3(2)

²¹⁵ MIG 2017:23, para. 3

²¹⁶ Global Detention Project, *Report Sweden*, p.71

²¹⁷ *Idem*, p.32

²¹⁸ Aliens Act, ch.10(8)

²¹⁹ When the word “child” (*barn*) is used on its own in this chapter of the Aliens Act, it is not specified whether it refers to an accompanied or unaccompanied minor.

²²⁰ Aliens Act, ch.10(2)

²²¹ Aliens Act, ch.10(2) and (3)

²²² *Idem*, ch.10(5)

for a limited period of time are not stated by law. However, families are usually provided with separate rooms in detention facilities, whereas unaccompanied minors are separated from adults but they can share common spaces with them if they want to.²²³

LENGTH AND PLACE OF DETENTION

Different detention periods apply according to the ground on which detention is based. Indeed, if the TCN is detained in order to establish whether he/she has the right to remain in Sweden, detention cannot be extended for more than two days.²²⁴

Before the introduction of the 2012 amendment, the section 4 only stated that detention can account for two weeks or be extended for exceptional reasons.²²⁵ In principle, the limit of two weeks should not be exceeded when it comes to asylum seekers.²²⁶ The transposition of the Return Directive introduced two main modifications. First, it specified that if the TCN has received an expulsion order or has been refused to entry, he/she can remain in detention for maximum two months, or more in case of exceptional reasons.²²⁷ Second, it defined this precise time limit.²²⁸ Such an extension is no longer than three months in total, or one year if the enforcement of the return decision is impeded by the TCN's lack of cooperation or failure to acquire the necessary documents.²²⁹ According to a ruling of the CJEU, the same time limits also applies in case of detention of asylum seekers to ensure the transfer under Dublin Regulation rules.²³⁰ Thus, Swedish legislation was deemed to be in compliance with EU law²³¹ and the legislation has not been changed.

Immigration detention is carried out in the five centres that are present in Sweden. They have 357 places in total, however their capacity has been planned to increase between 2018 and 2020.²³² According to Swedish law, it is allowed to detain TCNs in prison if the return decision is based on a criminal offence, for security reasons, if it is necessary for transportation (limited to three days),²³³

²²³ EMN Sweden, *The use of detention and alternatives to detention in the context of immigration policies in Sweden* (Swedish Migration Board, 2014). Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/27a-sweden_detention_study_august2014_en.pdf (accessed 3/07/19), p.19

²²⁴ Aliens Act, ch.10(4)

²²⁵ Ibid.

²²⁶ Global Detention Project, *Report Sweden*, p.74

²²⁷ Aliens Act, ch.10(4)

²²⁸ Prop. 2011/12:60, pp. 10-11

²²⁹ Ibid.

²³⁰ CJEU, C 60/16, *Khira Amayry*, 13 September 2017, para.22

²³¹ *Idem*, para.49

²³² Global Detention Project, *Report Sweden*, p.6

²³³ This provision has been incorporated in 2017 through the Law 2017:906

and for other exceptional justification.²³⁴ The 2012 amendment used to transpose the Return Directive, added that, except for the first ground of detention, in all the other cases, the TCN must be separated to the other prisoners.²³⁵ The same article states that children cannot be placed in prison accommodations,²³⁶ however this provision was not modified by the entering into force on new EU legislation.

²³⁴ Aliens Act, ch.10(20)

²³⁵ Law 2012:129 and Prop 2011/12:60

²³⁶ Aliens Act, ch.10(20)

ANALYSIS

This chapter provides a comparative overview of the three case studies, and it connects the collected evidence to the literature on the topic of Europeanization, applying some of the concepts that have been mentioned in the literature review. This analysis will primarily be based on the following question. *What has been the impact of Europeanization on immigration detention laws?*

For the purpose of this thesis, the effect of Europeanization will be measured on two criteria, namely the degree of modification (no, medium and substantial modification) and the fact that policies have become more or less restrictive for asylum seekers and irregular TCNs. When assessing this last element the practical implications of the amendments introduced will be taken into account.

DETENTION OF TCNs SUBJECT TO A RETURN DECISION

As shown by this study, the detention of TCNs subject to a return decision has not been modified in its core aspects since this practice was already in place all three MSs, but standardized parameters that allow for the assessment of the risk of absconding have been introduced, which constitutes an instance of medium modification. In particular, the countries at stake have adopted better definitions of the risk of absconding when implementing the Return Directive based on the model of the EU Return Handbook. In the case of Italy and France these modifications led to less restrictive measures compared to what was the domestic legislation in place before the adoption of EU law. Indeed, these grounds for detention limit the possibilities of MSs to detain irregular TCNs since, the implementation of this measure becomes admissible only when it is demonstrated that there is a founded risk that this person will hide and detention demonstrates necessary. Instead, in Sweden, the presence of a risk of absconding became an additional ground that can justify detention. Thus this amendment has made Swedish legislation more restrictive since it has introduced an additional element that can constitute a reason why an irregular TCN can be detained.

The two cases *El Dridi* and *Achughbabian* had a major impact on the Italian and French legislations resulting in substantial modifications. Indeed, the two countries adopted a new criminal offence, outside the framework of the Return Directive, for TCNs that do not comply with a return decision without legitimate justification. In Italy the introduction of a financial sanction as punishment for this offence resulted in a less restrictive measure. Instead, France adopted a more restrictive measure punishing this offence with longer imprisonment. In addition, France has introduced the possibility to detain TCNs for special controls. This practice was already in place, but this

amendment constitutes a medium modification with a less restrictive nature, since detention is limited in time and the law specifies that it cannot be implemented systematically.

DETENTION OF ASYLUM SEEKERS

In France the RCD and APD had a major impact in terms of reasons for detention and categories of detained immigrants. Indeed, during their transposition, the possibility to detain TCNs that apply for asylum was introduced and, later on, provisions allowing for the detention of asylum seekers if they constitute a public threat have also been added. This produced substantial and more restrictive modifications allowing for the detention of asylum seekers, which was not implemented before. With regard to the possibility to detain asylum seekers in the Dublin procedure, French law did not provide for the necessary grounds to assess the *significant* risk of absconding, even if in practice those applicants were already being detained. Therefore new grounds that can justify detention of these asylum seekers have been introduced to ensure the compliance of national legislation with EU law. This amendment constitutes a medium modification with a less restrictive nature because asylum seekers in the Dublin procedure can now be detained only if there is a demonstrable and significant risk that they will abscond.

The Italian legislative system was already encompassing the possibility to detain asylum seekers, but its terms have been modified to a medium degree through the implementation of EU law in a less restrictive way. In fact, detention of asylum seekers became possible only when it is demonstrated that he/she is a threat for public security. Moreover, when a TCN applies for asylum while in administrative detention and he/she is subject to a return decision, such limitation of movement can be prolonged only if the existence of the risk of absconding is verified. On the contrary, despite not being required through binding instruments, the hotspot approach implemented in Italy as proposed by the Commission has contributed to modify its legislation in a more restrictive manner. Indeed, Italy introduced the fact that an asylum seeker refuses to undergo fingerprinting as a new ground that can contribute to the assessment of the risk of absconding and that can justify his/her detention. This medium modification enabled to detain a higher number of asylum seekers. Finally, Italian legislation has not been modified in order to detain asylum seekers in the Dublin procedure and, contrary to other MSs, the fact that applicant has attempted to move without authorization to another MS is not listed among the elements used to assess the risk of absconding.

The Swedish legal system and its provisions allowing for the detention of asylum seekers were already deemed compatible with EU norms to a large extent, therefore they were not modified.

Nevertheless, the lawfulness of detention of asylum seekers in the Dublin procedure were at the centre of some rulings in the Scandinavian country. In one judgement the Migration Court of Appeal ruled that the criteria stated in Swedish law to acknowledge the presence of the risk of absconding were not sufficient to detain these category of applicants, whereas a second ruling reached an opposite conclusion. Eventually, this situation has not resulted in any modifications of the legislative system but, in practice, the detention of this category of asylum seekers is limited.

ALTERNATIVES TO DETENTION

Through the implementation of the Return Directive, Italy and France introduced some provisions allowing for the use of alternative measure respectively regular reporting to the authorities and house arrest, that can substitute detention and control TCNs' movements with less coercive instruments. Thus, these two cases demonstrate that domestic laws were substantially modified to comply with EU rules. On the contrary, alternatives to detention were already present in the Swedish legal system, therefore it did not encounter any change.

MINORS IN DETENTION

Both in Italy and France, the transposition of the RCD and the APD triggered the inclusion of a special provision prohibiting the detention of unaccompanied minors in the principal legislative acts regulating immigration in those countries. However, this measure was not used before their implementation, thus, no actual modification is acknowledged in this case. Moreover, in both cases, particular measures that allow for short-term detention of minors were introduced. The Italian law established that they can be housed for identification procedures in reception facilities where their freedom is restricted. Two years later, the law was developed further, stating that such reception facilities must be specifically tailored for their needs and the maximum length of detention reduced from sixty to thirty days. Similarly, in France, the provision regulating procedures in waiting zones was amended to specify under which exceptional situations unaccompanied minors can be detained for a maximum period of four days. Those grounds are the more precise of the three MSs considered, since in the other cases the mentioned "exceptions" are not clearly defined by law. This is an instance of medium modification with a less restrictive character since unaccompanied minors' vulnerabilities is taken into account, whereas this practice was previously regulated by the same rules applying to adults. On the contrary, Swedish law has not undergone modifications that are relevant for this study concerning the detention of unaccompanied minors.

This study has no registered particular changes with regard to the Italian and Swedish legislation regulating the detention of accompanied minors. Instead, the French legislation has introduced less

restrictive measures in this area. Firstly, clearer and more limited grounds were introduced to establish whether it is possible to detain a TCN accompanied by a minor. This instance of medium modification does not seem a direct effect of transposition of EU law, but certain elements, especially the consideration for the best interest of the child and the fact that they must be housed in separate accommodations show a similarity with the requirements of the directives considered. Secondly, some rulings of the ECtHR did not result in legislative changes, therefore no modification is registered, but the Minister of Interior urged local authorities to opt for house arrest rather than detention in those cases.

LENGTH AND PLACE OF DETENTION

The length of detention has been extended in all the three MSs considered, thus producing substantial modifications with a more restrictive nature. However, some distinctions must be made. In particular, France has increased the length of detention, but it still remains the shortest of the three cases. Italy has extended the time that both irregular TCNs and asylum seekers can spend in detention, but it has also established a clearer scheme that guarantees the review of the legality of detention over time. This constitutes instead a medium modification with a less restrictive nature offering more legal guarantees to the detainees. Finally, Sweden increased from two weeks to two months the period of detention of irregular TCNs, but it has also defined a more precise maximum time limit under specific circumstances. This last occurrence resulted in a substantial modification with a less restrictive nature protecting detained TCNs.

Despite the Return Directive allows for the use of prisons for immigration detention purposes, only in Sweden this possibility is stated in law. Although this provision was already in place before the adoption of the EU law, it has been amended to ensure that TCNs are separated from other prisoners. Therefore, it can be considered an instance of medium modification that introduced less restrictive measures, whereas no modification has been registered in the two other cases. In Italy, following the implementation of the hotspot approach, it became possible to use also these centres as detention facilities for a limited period of time. This instance constitutes a substantial modification which increases the detention capacity of the country and that has therefore more restrictive characteristics.

CONCLUSIVE DISCUSSION

This thesis aimed at showing how national legislations in Italy, France and Sweden have been modified as an effect of EU policies and law. This conclusive part will collect the main findings, answer the research question, connect this study to the academic literature and point out research areas that might deserve further research.

The comparison of the object of this analysis (i.e. national legislative instruments) demonstrated that the parameter of our methodology, namely the direction of modifications, followed different schemes. In fact, MSs modified their laws to different extents, with a mixture of substantial, moderate and no modification depending on the specific provision at stake. Also, some measures became more restrictive, whereas others were softened. For these reasons, it is impossible to answer the research question uniformly for all the three MSs. However, the hypothesis elaborated in the introduction are verified and it is possible to acknowledge some generalizable trends concerning the Europeanization of this policy area.

To begin with, it seems that MSs generally opted for more restrictive policies when EU law allows for it. Some examples are the extension of the detention period that took place in all the MSs studied, the introduction of the possibility to detain asylum seekers in France and applicants that refuse to be fingerprinted in Italy. Although measures with a restrictive nature are envisaged by EU law and eventually implemented by MSs, it has been proved that they are often followed by certain limitations that restrict national legislative power. This is evident in the analysis of the reasons for detention. On the one hand, EU law allows for the detention of a higher number and various categories of TCNs. On the other hand, in order to prevent arbitrary detention, MSs had to state in their national legislations certain criteria upon which a case-by-case evaluation can be based. A similar argument is also applicable to the length and place of detention. In other words, when MSs have adopted more restrictive measures they were often combined with more defined provisions protecting TCNs. In a few instances legislative modifications resulting in less restrictive measures were required to comply with EU law, e.g. in the case of Italy and France after the CJEU rulings, following the introduction of alternative measures, and concerning minors in detention. Moreover, prisons are not used as detention facilities only in two MSs and only Italy allows for the maximum admissible length of detention. This demonstrates that MSs, despite the discretion left by EU legislative instruments, do not always opt for the most restrictive solution.

The specific methodology used has also highlighted three important aspects concerning the process of harmonization of national legislations regulating immigration detention. Firstly, the fact that in

some instances MSs did not modified their laws, such as in the case of Sweden, can be seen as an instance of Europeanization. In fact, EU legislation restricts the possibility for MSs to implement measures that are not in compliance with it. This results in national legislations that are more similar to each other. Secondly, despite in some cases certain changes are not directly attributable to the transposition of secondary EU law, the similarities between these new provisions and the text of the EU legislative instruments are visible. Similarly, the case of Italy especially demonstrated that non-binding recommendations of the Commission can also trigger legislative modifications. Thirdly, the differences among MSs and the various results of the implementation of EU policies are noticeable to a limited extent in the Europeanization of immigration detention policies. In particular, it can be acknowledged that the hotspot approach allowed for some substantial changes in the Italian legislation which obviously did not take place in the two other MSs. Instead, only in France, which is the country with the highest number of outgoing requests under the Dublin procedure among the MSs considered, criteria to detain this category of asylum seekers have been introduced in domestic law. Although the causal relation between figures and legislative modifications cannot be proved through the methodology used in this thesis, we can conclude that MSs with different situations and facing different challenges underwent a process of legislative modification resulting in the harmonization of immigration detention laws, which demonstrates that Europeanization took place.

Eventually, this thesis has confirmed the presence of conflicting opinions expressed in the literature review concerning the adoption of more or less restrictive measures due to Europeanization. In fact, such contradicting findings about Europeanization of migration policies that have been pointed out might be considered as intrinsically linked to this process itself, which does not produce only one determined outcome. In other words, depending on the variables and on the issue that are considered, one will find contrasting evidence that does not allow to come up with a single answer to the question of whether Europeanization leads to more or less restrictive policies. Instead, by looking at different fields and aspects, it is possible to observe that mixed results are produced through this process.

To conclude, the fact that there are proposals to recast the Return Directive and the APD and an eventual modification of the Dublin Regulation could have the potential to modify the situation in the MSs and this study could be updated with new findings in the future. Also, it would be important to collect more data on immigration detention, both at the national and EU level, so to have a bigger picture of the phenomenon. Moreover, future contributions could use the same framework and methodology of this thesis and extend it using different MSs as case study or apply

it to other elements such as the legal guarantees mentioned in the directives. Finally, another approach that focuses on the decision-making process could be used to analyse the reasons why MSs decided amend their laws in a specific way and to verify the hypothesis of venue shopping presented by other studies about Europeanization .

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