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Nationality Status Determination in Asylum Procedures under the CEAS and the Potential Impact of the ‘New Pact on Migration and Asylum’

Cecilia Manzotti*

ABSTRACT

The determination of asylum seekers’ nationality, or lack thereof, is a key component of assessments of applications for international protection, and can prove difficult when asylum seekers do not submit any valid identity or travel documents, or are stateless or at risk of statelessness. This article investigates how nationality status determination is relevant and how it is regulated in the Common European Asylum System (CEAS) and in the ‘New Pact on Migration and Asylum’ (the Pact), that is currently under negotiation in the European Union (EU). Under the CEAS, the determination of nationality is not only critical to assessing whether the applicant qualifies for international protection, but can also determine the type of procedure through which their application is examined, and accordingly the level of procedural guarantees to which they are entitled. Under the Pact, with the introduction of a pre-entry screening and the obligation to process asylum applications lodged by individuals from countries with low recognition rates through border procedures, the determination of the applicant’s nationality becomes even more critical. In fact, the Pact institutionalizes the channelling of asylum seekers into substandard procedures based on their nationality, a practice that has been widely used in ‘hotspots’ in Greece and Italy. This is even more problematic considering that the Pact, like the current CEAS, provides only very general rules relevant to establishing a claimant’s nationality status. This article sheds light on an overlooked aspect of asylum procedures, and calls for the development of specific guidance on nationality status determination in asylum procedures at the EU level.

1. INTRODUCTION

In recent years, European Union (EU) Member States have witnessed an increase in the number of asylum seekers who do not provide any identity or travel documents but simply declare their

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identities, or produce false documents or genuine documents that belong to someone else or were obtained based on counterfeit information. This poses considerable challenges for the determination of the claimant’s nationality. The task may be further compounded if the applicant has lived in several countries before arriving in Europe or was born to parents of one nationality but grew up and lived their own life in another country. Establishing an applicant’s nationality status may also be particularly complex when the person is stateless, or at risk of statelessness. Over the past decade, Europe has been increasingly confronted with the arrival of stateless asylum seekers. Syria, in particular, which between 2013 and 2021 was the main country of origin of asylum seekers in the EU, has long hosted one of the largest stateless populations in the world, including Syrian Kurds and Palestinians, and new cases of statelessness have also emerged during the conflict.

Statistics on asylum in the EU show that a small but noteworthy number of asylum seekers are recorded as being of ‘unknown nationality’, and their nationality often remains undetermined throughout the entire protection status determination process, which in some Member States leads to a negative decision. Sometimes, asylum seekers are registered with a wrong nationality or their nationality status is incorrectly determined during the asylum procedure. Indeed, determining the nationality of asylum seekers can sometimes prove difficult. Not only does it involve a number of procedural and evidentiary issues, but it also entails theoretical questions relating to the notion of nationality, its content, and the rules for the recognition of nationality at the international level.

Ascertaining the applicant’s nationality status and identifying their country of origin is the first step in the assessment of asylum applications, and is critical to the determination of

2 EMN (2017) (n 1) 4, 17.
3 In line with the traditional perspective of international law, the term ‘nationality’ is used in this article to denote the individual’s relationship with a State for the purposes of international law, as distinguished from ‘citizenship’, which instead refers to the individual’s membership of a State which operates at domestic level. Although instances in which ‘nationality’ and ‘citizenship’ do not correspond are extremely rare, it is useful to maintain the distinction since this article is primarily concerned with the outward-looking dimension of the individual–State relationship. See Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff 1979) 4–5.
4 The term ‘nationality status’ refers to both a person’s possession of one or more nationalities and the lack of any nationality, i.e. statelessness. Accordingly, ‘nationality status determination’ refers to the process of determining whether a person possesses any nationality and, if so, which one(s), or is stateless. Although the term ‘nationality status determination’ may sound cumbersome, it is used in preference to ‘nationality determination’ as it better reflects the fact that statelessness may also be a possible outcome of the determination.
6 McGee and Albarazi (n 5) 40–41.
7 Between 2016 and 2020, 43,820 asylum seekers (amounting to 1.2% of the total) were recorded as being of ‘unknown nationality’ in the European Union (EU). In the same period, 53,310 individuals recorded as being of ‘unknown nationality’ received a first instance decision and almost 16,000 asylum seekers of ‘unknown nationality’ received a final decision regarding their application for international protection. See <https://ec.europa.eu/eurostat/web/migration-asylum/asylum/database> accessed 6 April 2023. The EMN reports that, in some Member States, failure to establish identity leads to a negative asylum decision. EMN (2017) (n 1) 36.
9 The term ‘country of origin’ is used hereafter to refer to the applicant’s country or countries of nationality or, for stateless persons, of former habitual residence, as defined in art 2(n) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 2011 OJ L337/9 (recast Qualification Directive).
international protection under both international and EU refugee law. Furthermore, the determination of the nationality, or lack thereof, of asylum seekers has consequences that stretch far beyond the asylum procedure: stateless asylum seekers who do not qualify for international protection may be entitled to other forms of protection on the grounds of their statelessness, and the claimant’s prospects of family reunification, resettlement, naturalization, or return often depend on their nationality status and/or their ability to prove it. Despite the relevance of nationality status determination in asylum procedures, refugee law texts, the scholarly literature, and jurisprudence provide little analysis or guidance on the matter; empirical research on the topic is also scant. \(^\text{10}\)

Against this backdrop, this article focuses on the issue of nationality status determination in the Common European Asylum System (CEAS), and assesses the potential impact of the changes proposed in the ‘New Pact on Migration and Asylum’ (the Pact), that the European Commission presented in September 2020. \(^\text{11}\) More specifically, it investigates how nationality status determination is relevant in the context of asylum procedures, and how it is regulated in the current CEAS and in the legislative proposals that the Commission has put forward together with the Pact. Although negotiations relating to the Pact have stalled, and the fate of the Pact is uncertain, the Commission’s proposals remain the starting point for discussion. Ultimately, this article aims to shed light on an overlooked aspect of asylum procedures and highlight its complexity and far-reaching consequences for the persons concerned.

Part 2 introduces the topic of nationality status determination in asylum procedures by examining its relevance in international refugee law. This part shows how, under the 1951 Convention relating to the Status of Refugees (Refugee Convention), \(^\text{12}\) the determination of asylum seekers’ nationality, or lack thereof, is critical to assessing their qualification for refugee status. Part 3 turns to the current and proposed CEAS instruments and examines the role they accord to nationality status determination. It is argued that nationality status determination in the CEAS is relevant in two respects: first, it is crucial in assessing the claimant’s qualification for international protection, as under international refugee law (3.1); secondly, it can determine the type of procedure through which the asylum application is examined, and accordingly the level of safeguards and rights to which the claimant is entitled (3.2). This article contends that under the Pact nationality status determination becomes even more relevant since the Pact’s legislative proposals reinforce the use of simplified and accelerated procedures based on the applicant’s country of origin. Part 4 examines the small number of evidentiary and procedural rules relevant to nationality status determination that can be found in the current CEAS (4.1) and in the Pact’s proposals (4.2), showing that, despite the relevance of nationality status determination, the current and proposed CEAS instruments provide virtually no guidance on how to establish

\(^{10}\) With regard to Europe, in 2013 and 2017, EMN conducted two studies that focused, respectively, on the issue of establishing identity in the context of asylum and other migration procedures. Although the studies focus more broadly on identity determination, they provide extremely useful information about Member States’ practices and challenges regarding the determination of asylum seekers’ nationality status and country of origin. EMN (2013) (n 1); EMN (2017) (n 1).

\(^{11}\) European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum’ COM(2020) 609 final (the Pact). The Pact sets out the Commission’s comprehensive approach in the areas of migration, asylum, integration, and border management. The Commission’s Communication was accompanied by five legislative proposals: a Proposal for a Regulation introducing a screening of third country nationals at the external borders (Proposal for a Pre-Entry Screening Regulation) (n 117 below); an Amended Proposal for a Regulation establishing a common procedure for international protection in the Union (Amended Proposal for an Asylum Procedures Regulation) (n 50 below); a Proposal for a Regulation on asylum and migration management; an Amended Proposal for a Regulation on the establishment of ‘Eurodac’; and a Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum. These instruments build on previous proposals to reform the CEAS, which are still under negotiation.

applicants’ nationality status. Part 5 concludes with a call for greater guidance on the determination of nationality status in asylum procedures at the EU level.

2. NATIONALITY STATUS DETERMINATION UNDER INTERNATIONAL REFUGEE LAW

The Refugee Convention requires the applicant’s fear of persecution to be evaluated against their country of nationality, if they have one, or their country of former habitual residence, if they are stateless. This stems from article 1A(2), which defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.13

Article 1A(2) further specifies that, if the person has more than one nationality, their risk upon return and the availability of protection must be assessed in all the countries of which they are nationals.

Scholars, the United Nations High Commissioner for Refugees (UNHCR), and judicial sources unanimously understand the term ‘nationality’ in the phrase ‘country of his nationality’ in article 1A(2) of the Refugee Convention as a politico-legal term meaning ‘membership of a State’ and the applicant’s country of nationality as the State of which the person holds citizenship.14 The fact that the Refugee Convention requires the applicant’s claim to be assessed by reference to conditions in their country of nationality stems from the intention of the drafters of the Convention to provide surrogate national protection to those at risk in their countries of nationality.15

While it is undisputed that the term ‘country of his nationality’ in article 1A(2) refers to the claimant’s State of nationality, the identification of a person’s country of nationality implies a number of theoretical questions related to the notions of State and nationality. For example, depending whether international recognition is deemed a requirement for an entity to be regarded as a State – an issue which international lawyers have long debated – a person may be considered either a citizen of a certain State or stateless, as illustrated by the case of Palestinians, whose nationality status is determined very differently across Europe, depending whether the host country recognizes Palestine as a State or not.16 Different interpretations of the term ‘nationality’ may also result in diverging determinations regarding a person’s nationality status.

13 Emphasis added.
14 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/1P/4/ENG/REV4 (1979, reissued 2019) (Handbook) para 87; James C Hathaway and Michelle Foster, The Law of Refugee Status (2nd edn, Cambridge University Press 2014) 49–50; Guy S Goodwin-Gill and Jane McAdam (with Emma Dunlop), The Refugee in International Law (4th edn, Oxford University Press 2021) 86; Eric Fripp, Nationality and Statelessness in the International Law of Refugee Status (Hart Publishing 2016) ch 5, s B1, paras 5.9–5.23. In the same article of the Refugee Convention, nationality is also one of the five grounds for persecution. As a reason for persecution, however, the term has a broader meaning, referring not only to citizenship, but also to membership of an ethnic or linguistic group. UNHCR Handbook at para 74.
15 Hathaway and Foster (n 14) 49–51.
16 On the treatment of Palestinians in Europe in terms of nationality status determination, see eg EMN, ‘Ad-Hoc Query on the Palestinian’s Characterization as “Stateless”’ (2015); ISI, ASKV Refugee Support, and European Network on Statelessness (ENS), ‘From Syria to Europe: Experiences of Stateless Kurds and Palestinian Refugees from Syria Seeking Protection in Europe’ (2019). As the EMN survey shows, the disparate treatment of Palestinians in the EU also depends on Member States’ different interpretations of art 1(2)(i) of the 1954 Statelessness Convention (n 18 below), which excludes from the benefits of the convention those who receive protection and assistance from United Nations organs or agencies other than UNHCR.
In particular, decision makers involved in asylum or statelessness determination have sometimes extended the concept of ‘country of nationality’ to include countries of which the applicant could possibly obtain the nationality, contrary to the prevailing view among refugee law scholars. While a close examination of these questions is beyond the scope of this contribution, this brief mention of some of the theoretical debates that have developed relating to the notion of ‘country of nationality’ highlights the complexity of nationality status determination.

Article 1A(2) also foresees the possibility of a stateless person being a refugee. Indeed, the phrase ‘not having a nationality’ in article 1A(2) is commonly understood as a synonym of ‘stateless person’, as defined in article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention). Both the scholarship and the jurisprudence reflect the view that stateless persons, like applicants who have a nationality, must establish a well-founded fear of persecution to qualify for refugee status. At the same time, while statelessness per se does not make a person a refugee, arbitrary and discriminatory denial and withdrawal of nationality may, under certain circumstances, constitute persecution for the purposes of refugee status determination. Similarly, the denial of civil, political, and socio-economic rights that stateless persons often suffer in their country of habitual residence may also amount to persecution for one or more of the reasons listed in the article 1A(2) refugee definition.

In the case of stateless persons, article 1A(2) requires that the risk analysis be conducted by reference to the conditions in their country of former habitual residence. UNHCR also recommends that, when the applicant’s nationality cannot be established, their country of former habitual residence be considered. The Ad Hoc Committee on Statelessness and Related Problems, which drafted the Refugee Convention, defined a person’s ‘country of former habitual residence’ as ‘the country in which he [or she] had resided and where he [or she] had suffered or fears he [or she] would suffer persecution if he [or she] returned’. Although the concept of ‘country of former habitual residence’ has been interpreted in a flexible manner depending on the context and purpose, it generally implies that the person has lived in the country – which does not need to be a State – for a significant period of time and has made it the centre of their interests. Commentators and decision makers tend to agree that residence does not need to be lawful, and the applicant does not need to establish that they have the right to return to the country for it to be considered a country of former habitual residence. If the applicant has more than one country of former habitual residence, UNHCR recommends that all of them be considered as countries of reference, and that refugee status be granted if a risk

17 On this issue, see eg Hathaway and Foster (n 14) 57–64; Michelle Foster and Hélène Lambert, International Refugee Law and the Protection of Stateless Persons (Oxford University Press 2019) 127–31; Goodwin-Gill and McAdam (n 14) 87–91.
18 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention); UNHCR, Handbook (n 14) para 101; Foster and Lambert (n 17) 106–07. There seems to be no reason to argue, as Fripp does, that the category of individuals ‘not having a nationality’ may in some cases be more limited than the group of those who are stateless as defined in art 1(1) of the 1954 Convention. See Fripp (n 14) ch S, s C, para S.150.
19 Foster and Lambert (n 17) 92–98; Goodwin-Gill and McAdam (n 14) 92.
21 Foster and Lambert (n 17) 173–88; Hélène Lambert, ‘Stateless Refugees’ in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), The Oxford Handbook of International Refugee Law (Oxford University Press 2021) 808.
22 Refugee Convention (n 12) art 1A(2).
23 UNHCR, Handbook (n 14) para 89.
26 Foster and Lambert (n 17) 138.
27 Hathaway and Foster (n 14) 69–70; ibid.
of persecution exists in at least one of them.\textsuperscript{28} On this point, however, scholars and decision makers have adopted different approaches.\textsuperscript{29}

Refugee status determination and statelessness determination can be conducted through either a combined procedure or two separate procedures.\textsuperscript{30} In either case, it is important to consider the specific protection needs that arise from each of the two conditions and devise appropriate procedural arrangements and standards. Notably, on the one hand, inquiries with the authorities of the person's possible countries of nationality, which are often necessary for the purpose of statelessness determination, may endanger asylum seekers, and therefore can only be conducted when it has been concluded beyond doubt that the person is not at risk of persecution or serious harm in their country of origin.\textsuperscript{31} On the other hand, asylum procedures should be sensitive to the particular situation of stateless persons who often face great difficulties establishing their nationality status. While formal determination of statelessness may not be carried out in the context of asylum procedures, it is paramount that the person's statelessness, or risk of statelessness, be promptly identified during the evaluation of their application for international protection, as it has both a procedural and a substantive impact on the assessment of their asylum claim and is critical to the prevention of new cases of statelessness.

Despite the relevance of nationality status determination in determining refugee claims, the Refugee Convention does not provide any indications as to how to determine whether an asylum seeker is a national of one or more countries, or is stateless. Regrettably, UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status (Handbook), which offers the most authoritative interpretation of the international legal definition of a refugee, also fails to address the evidentiary and procedural questions that may arise when determining asylum seekers’ nationality status,\textsuperscript{32} and does not examine the theoretical complexity of the notion of nationality.\textsuperscript{33} Similarly, the Handbook is completely silent regarding the identification of stateless refugees, and does not even refer to the rules and standards for statelessness determination set out in the UNHCR Handbook on Protection of Stateless Persons.\textsuperscript{34}

3. THE ROLE AND RELEVANCE OF NATIONALITY STATUS DETERMINATION IN THE CEAS AND THE POTENTIAL IMPACT OF THE NEW PROCEDURES PROPOSED UNDER THE PACT

Having clarified the relevance of nationality status determination for the evaluation of asylum claims under the Refugee Convention, the article now turns to examine the role of nationality status determination in EU refugee law. More specifically, section 3.1 considers nationality status determination as part of the inclusion assessment, highlighting possible frictions with the international norms discussed in part 2. Since the new proposals do not introduce any major change in this regard, the article looks at both the recast Qualification Directive and the Proposal for a Qualification Regulation, on which the European Parliament reached a provisional agreement.

\begin{thebibliography}{99}
\bibitem{28} UNHCR, Handbook (n 14) para 104.
\bibitem{29} Hathaway and Foster (n 14) 72–74.
\bibitem{31} ibid para 79.
\bibitem{32} The UNHCR Handbook (n14) para 93 states only that the possession of a passport creates a \textit{prima facie} presumption of nationality, which can either be supported or rebutted by the applicant's statements and other evidence. It does not provide any guidance as to whether or what other documents may be relevant for determining an applicant's nationality status, the probatory weight of the documents, or what other methods could be used to determine nationality in the absence of (credible and reliable) evidence.
\bibitem{33} ibid paras 87–93.
\bibitem{34} UNHCR, Handbook on Protection of Stateless Persons (n 30).
\end{thebibliography}
in 2018 and which would not be affected by the Pact. Section 3.2 examines the procedural impact of nationality status determination, first under the recast Asylum Procedures Directive (3.2.1), and then under the Pact’s proposals (3.2.2). It shows how, under the current CEAS, nationality status determination can potentially impact the substantive and procedural rights that applicants enjoy throughout the asylum procedure, and how it becomes increasingly relevant under the Pact.

3.1 Nationality status determination as part of the inclusion assessment

Similarly to the Refugee Convention, the EU recast Qualification Directive requires the claimant’s fear of persecution to be evaluated by reference to the situation in their country of nationality, or their country of former habitual residence if they are stateless. Article 2(d) of the recast Qualification Directive, which largely corresponds to article 1A(2) of the Refugee Convention, defines a refugee as follows:

>a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it …

Likewise, the applicant’s country of nationality, or country of former habitual residence if the person is stateless, is the country of reference for the evaluation of subsidiary protection, as provided for by article 2(f), which defines ‘a person eligible for subsidiary protection’. The definitions of a ‘refugee’ and a ‘person eligible for subsidiary protection’ remain unchanged in the Proposal for a Qualification Regulation.

The applicant’s nationality status is also relevant to assessing whether a recognized refugee continues to qualify for international protection under EU law. Indeed, under article 11 of the EU recast Qualification Directive and the corresponding article of the Proposal for a Qualification Regulation, which largely echo the Refugee Convention’s cessation clauses, refugee status comes to an end when the person has voluntarily re-availed themselves of the protection of their country of nationality, re-acquired their nationality, acquired a new nationality, or can safely return to their country of former habitual residence if they are stateless. Importantly, the Proposal for a Qualification Regulation introduces compulsory regular reviews of refugee and subsidiary protection statuses to assess whether the applicant’s protection needs have ceased.

Two observations can be made regarding the way in which the notion of ‘country of nationality’ as the country of reference for the purposes of refugee status determination is understood in the current CEAS and the proposed Qualification Regulation. First, both the definition of

37 COM(2016) 466 final (n 35) arts 2(3), (5).
38 Refugee Convention (n 12) art 1C(1)–(4), (5).
39 Recast Qualification Directive (n 9) art 11(1)(a)–(c); COM(2016) 466 final (n 35) art 11(1)(a)–(c).
40 Recast Qualification Directive (n 9) art 11(1)(f); COM(2016) 466 final (n 35) art 11(1)(f).
41 COM(2016) 466 final (n 35) arts 15, 21.
a ‘refugee’ and the definition of a ‘person eligible for subsidiary protection’ refer only to third-country nationals and stateless persons, thereby excluding nationals of EU Member States from the personal scope of both the recast Qualification Directive and the Qualification Regulation. Indeed, asylum for nationals of EU Member States is regulated by Protocol 24 to the Treaty on the Functioning of the European Union (TFEU), which provides that EU Member States must regard each other as safe countries of origin for the purposes of asylum, and asylum applications from nationals of a Member State should only be accepted under exceptional circumstances or based on a Member State’s unilateral decision and, if considered, treated as manifestly unfounded. As pointed out by UNHCR and several commentators, this is at odds with the universal right to seek asylum under international law, which is not limited by nationality; the definition of a refugee contained in the Refugee Convention; and article 3 of the same treaty, which prohibits States parties from discriminating between refugees based on their country of origin.

Although Member States’ pre-existing treaty law obligations have precedence over EU law, and therefore ‘the international law requirement to accord refugees an identical status necessarily renders the Qualification Directive’s exclusion of EU nationals ineffective’, most EU Member States apply Protocol 24, either by excluding EU nationals from the asylum procedure or by treating their applications as manifestly unfounded, and accordingly processing them through accelerated procedures, which severely limits the chances of a proper individual assessment. While the number of EU nationals applying for asylum in another EU Member State remains very low and virtually none of them are granted international protection, the general presumption of the safety of EU Member States appears difficult to justify, especially when it comes to specific groups such as Roma people. This is further supported by the fact that asylum seekers from EU Member States such as Hungary, Romania, and Slovakia have been granted international protection in non-EU countries, such as Canada.

A second element of concern is that article 4(3)(e) of the recast Qualification Directive provides that, when assessing applications for international protection, Member States must also consider ‘whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship’. While this provision has been removed in the Proposal for a Qualification Regulation, the Amended Proposal

46 Zwaan (n 43) 308–10.
47 McAdam (n 44) 271; Stern (n 45) 68–71. Importantly, the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) have challenged the presumption of safety of EU Member States in a small number of decisions regarding the transfer of asylum applicants from one EU Member State to another Member State, based on the Dublin Regulation. See Stern (n 45) 75–81.
49 Emphasis added.

Neither the recast Qualification Directive nor the Amended Proposal for an Asylum Procedures Regulation clarifies what ‘being able to assert citizenship’ means in practice, and some commentators have held that this does not necessarily refer to an applicant’s potential citizenship.\footnote{Fripp (n 14) ch 2, s C3, para 2.40.}

Nevertheless, several elements suggest that ‘being able to assert citizenship’ not only includes cases of confirmation or activation of an existing citizenship, but also applications for a new citizenship, thereby extending the notion of ‘country of nationality’ for the purposes of refugee status determination to include an applicant’s possible future countries of nationality. First, the fact that the Directive diverges here from article 1A(2) of the Refugee Convention – which it otherwise echoes – by introducing this particular expression instead of mirroring the Refugee Convention’s clause on holders of multiple nationality, cannot be overlooked. Secondly, the verb ‘to assert’ focuses on the applicant’s claim, and no reference is made to the State’s response.\footnote{Lambert (n 21) 128.}

Finally, the use of ‘could’ further suggests that article 4(3)(e) refers to a person’s potential nationalities.

This broad interpretation of the notion of ‘country of nationality’ for the purposes of refugee status determination clashes with a considerable body of opinion and jurisprudence supporting the view that ‘country of nationality’ refers only to those countries whose nationality the person already possesses.\footnote{See also UNHCR’s criticism of art 4(e) of the 2004 Qualification Directive, which has remained unchanged in the 2011 recast Directive. UNHCR, ‘Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’ (2005) 14–15.}

Regrettably, however, neither the Directive nor the Qualification Regulation clarifies what ‘having a nationality’ or ‘being stateless’ means for the purposes of article 2(d) and (f), while they elaborate on other key aspects of the definitions of a ‘refugee’ and a ‘person eligible for subsidiary protection’, such as ‘persecution’, the ‘reasons for persecution’, and ‘protection’. Without any specification, there is the risk that Member States, and different authorities within the same State, may interpret the notion of nationality differently, which ultimately may result in diverging conclusions regarding an applicant’s nationality status.

With regard to stateless refugees, EU law is in line with international refugee law, in that the definition of a refugee also applies to stateless persons (as does the definition of a beneficiary of subsidiary protection). However, although the recast Qualification Directive and the Qualification Regulation acknowledge that stateless persons can qualify for international protection, neither the current CEAS nor the Pact’s proposals take into consideration the specific situation of stateless asylum seekers, as the next sections show, with regard to examination procedures.

### 3.2 The procedural impact of nationality status determination

#### 3.2.1 The current CEAS

Under the CEAS, the applicant’s nationality is not only relevant to the substantial assessment of their asylum application, but can also determine the type of procedure through which the application is examined. The relevant provision here is article 31(8) of the recast Asylum Procedures Directive, which includes an exhaustive list of grounds for the optional application
of accelerated and border procedures. Three of these grounds are related to nationality status determination, pertaining essentially to two scenarios.

First, Member States can examine asylum applications through accelerated and/or border procedures when the claimant is a national or, being stateless, a former habitual resident of a ‘safe country of origin’, as defined in annex I to the Directive. From its introduction into EU refugee law in the 1990s, the concept of ‘safe country of origin’ has been justified by the need to assist in establishing a harmonized approach to applications from countries which give rise to a high proportion of clearly unfounded applications and to reduce pressure on asylum determination systems. The very concept of ‘safe country of origin’, which is now used by most EU Member States, is questionable for several reasons, which this article does not discuss.

Secondly, article 31(8) provides that accelerated and border procedures can be used when the claimant does not cooperate in identification procedures, including procedures for establishing nationality status. More specifically, accelerated and border procedures can be applied in the following two cases:

(c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or
(d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

These provisions raise a number of problems. First, the language used in paragraphs (c) and (d) is vague, leaving Member States considerable space for discretion. In particular, it is not clear whether the mere provision of any false documents or information can justify the use of border procedures or whether the latter can only be applied when the false documents or information produced by the applicant specifically concern their identity or nationality, are relevant to their asylum claim and could have had an impact on the decision, as is specified in the case of concealment of information and documents. Even more problematically, under paragraph (d), the mere likelihood that the applicant destroyed or disposed of their identity or travel documents in bad faith – an assessment left to the discretion of the national authorities – is sufficient to justify the activation of accelerated or border procedures.

54 The recast Asylum Procedures Directive (n 36) recital 20 does not define accelerated procedures and leaves States free to set the timeframe within which the application should be examined. With regard to border procedures (art 43(1)), the Directive instead states that they can be used at the border or in transit zones, to assess both the admissibility and, in accelerated procedures, the substance of applications for international protection.
55 Recast Asylum Procedures Directive (n 36) art 31(8)(b). Recital 42 provides that ‘where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him or her’; moreover, applicants ‘in need of special procedural guarantees’ to whom no ‘adequate support’ can be provided are exempted from border procedures. Recitals 29, 30.
57 In 2021, the European Asylum Support Office (EASO) reported that 22 EU+ countries have adopted safe country of origin lists, for a total of 61 countries: “Safe Country of Origin” Concept in EU+ Countries: Situational Update (EASO 2021) 2.
59 It is also difficult to reconcile this provision with recital 21, which states that ‘[a]s long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to border or accelerated procedures.”
Nationality status determination may therefore have a significant impact on the applicant’s access and enjoyment of procedural and substantive rights throughout the asylum procedure. Indeed, the border examination procedure implies limited procedural guarantees compared with the regular procedure, and its very nature makes the exercise of substantive and procedural rights extremely difficult or even impossible.

First, the legal fiction of non-entry on which border procedures rely may, under certain circumstances, undermine the right to seek asylum, the principle of non-refoulement, and the right to an effective remedy. Although the legal fiction of non-entry does not discharge States from their human rights obligations under international law, as established by the European Court of Human Rights (ECtHR), Member States have sometimes used it to limit the rights of those arriving at their borders, preventing them from applying for international protection and denying the applicability of the procedural safeguards enshrined in the recast Asylum Procedures Directive.

Secondly, although the recast Asylum Procedures Directive provides that border procedures should be subject to the same basic principles and guarantees that apply to the regular procedure, they include fewer procedural safeguards and imply procedural restrictions that may substantially limit the applicant’s rights to asylum and to an effective remedy, and ultimately may lead to a violation of the principle of non-refoulement. In particular, the timeframe for authorities to issue a decision is much shorter (four weeks instead of 6–21 months in regular procedures), appeals submitted in border procedures do not have automatic suspensive effect, and States generally allow only a few days to appeal a first instance or second instance decision issued in the context of border procedures. It is clear that such short timeframes may make it difficult for applicants to substantiate their claim and for the authorities to properly assess it. These deadlines often hamper, or even preclude, access to information, interpretation services, and legal assistance, as has been documented by several organizations. This is further exacerbated by the fact that border facilities are generally difficult for non-governmental organizations, interpreters, and lawyers to access.

A third problematic aspect of border procedures is that in most cases they imply detention, either de jure or de facto. Although the recast Asylum Procedures Directive is silent on the issue, article 8(3)(c) of the recast Reception Conditions Directive foresees the possibility of detaining an asylum seeker in order to decide, in the context of a procedure, on the applicant’s right to

61 ibid art 19.
64 EPRS (n 62) 27–28; ECRE (n 62) 13.
65 These are set out in ch II and include, eg, the applicant’s right to be informed, in a language they understand, about the asylum procedure, their rights and duties, the right to a personal interview, and the right to receive interpretation services and free legal assistance. Recast Asylum Procedures Directive (n 36) art 43(1).
67 Recast Asylum Procedures Directive (n 36) art 31(3), (5).
68 ibid art 46(6), (7).
69 EASO, ‘Border Procedures for Asylum Applications in EU+ Countries’ (2020) 14; EPRS (n 62) 233.
enter the territory’, which in practice means in border procedures. Moreover, several sources document that applicants subject to border procedures are systematically detained, either formally or because their situation factually amounts to deprivation of liberty, without an individual assessment of necessity and proportionality and without considering alternatives to detention. Since Member States often do not acknowledge this situation as deprivation of liberty, ‘asylum seekers detained in such a border procedure do not even have access to basic procedural guarantees, such as a judicial review of their detention.

Due to their limited procedural safeguards and intrinsic shortcomings, border examination procedures are in fact second-rate procedures. This is the case also for accelerated procedures, when the timeframe allowed for examination of the application is so short that it substantially limits the applicant’s ability to assert their claim. While a comprehensive examination of the several human rights problems involved in border and accelerated procedures falls outside the scope of this article, three main observations can be made regarding their use and the issue of nationality status determination.

First, the use of border and accelerated procedures based on the claimant’s country of origin is difficult to justify and raises issues of discrimination. Even acknowledging the legitimacy of the aim pursued, that is, harmonizing decisions across Member States and reducing the pressure on the asylum determination systems, resorting to examination procedures that severely hinder the applicant’s ability to present and defend their claim and the authorities’ opportunities to properly assess it does not appear to be a necessary and proportionate means to achieve this objective.

Furthermore, the use of simplified and faster procedures based on considerations that have nothing to do with the merits of the asylum claim, and notably punish the claimant for not cooperating with the authorities, as provided for by article 31(8)(c) and (d) of the recast Asylum Procedures Directive, is equally problematic. Also in this case, the risk is to betray the essence of the refugee protection regime by denying protection to those at risk of persecution or serious harm in their countries of origin.

Moreover, as noted above, the language of these provisions is extremely vague, making the conditions for their application unclear. Finally, paragraphs (c) and (d) of article 31(8) do not take into consideration the specific situation of stateless asylum seekers, who often do not have any identity or travel documents. Considering the limited knowledge of statelessness among public officials, it is not difficult to imagine that they may suspect stateless applicants of having destroyed or concealed their documents and, based on this belief, refer them to accelerated or border procedures. These concerns remain valid and become even more urgent under the Pact.


72 The ECtHR and, more recently, the CJEU, has defined keeping an asylum seeker at the border or in transit zones as deprivation of liberty. See Amuur v France App No 19776/92 (ECtHR, 25 June 1996); Joined Cases C-924/19 PPU and C-925/19 PPU FMS EU:C:2020:367.

73 EPRS (n 62) 221–22. For details about the implementation of border procedures, including the use of detention, in EU Member States, Norway, and Switzerland, see EASO (n 69) 21–48.


75 IM v France App No 9152/09 (ECtHR, 2 February 2012) paras 144, 148.

76 Reneman (n 66) 745.

3.2.2 The Pact’s legislative proposals

Under the Amended Proposal for an Asylum Procedures Regulation, the applicant’s country of nationality, or country of former habitual residence if they are stateless, becomes a ground for the compulsory application of the border procedure, if the proportion of positive asylum decisions for that country is, according to the latest yearly Union-wide average Eurostat data, 20 per cent or lower.78 Border asylum procedures, which are merged with border return procedures,79 are also made compulsory if the applicant does not cooperate in the identification procedures, notably if ‘the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision’.80 Where a claimant originates from a ‘safe country of origin’, the use of the border procedure remains optional.81 In times of crisis, nationality status determination becomes even more critical, since Member States could ‘extend the application of the border procedure to nationals who come from third countries where the EU-wide average recognition rate is above 20% but under 75%’.82 As in the case of the concept of ‘safe country of origin’, the Commission justifies these changes as aiming to address the ‘increased proportion of asylum applicants unlikely to receive international protection in the EU [which] leads to an increased burden not only in relation to the processing of asylum applications in general but also in relation to the return of those migrants not in need of international protection’.83

The introduction of the 20 per cent threshold raises several concerns. First, it is unclear whether the threshold refers only to first instance decisions or includes final decisions, following judicial review. While Eurostat statistics on recognition rates refer to first instance decisions, these are not a reliable indicator of decision making, and even less of protection needs, since a significant number of decisions are overturned on appeal.84 The reliability of Eurostat average recognition rates is also significantly undermined by the fact that an applicant’s chances of obtaining international protection still vary enormously from one country to another.85 Furthermore, there is the risk that low recognition rates may create prejudices against certain nationalities among decision makers and thereby become self-perpetuating.86

Moreover, as discussed in the previous section with regard to the recast Asylum Procedures Directive, border procedures raise a number of fundamental rights issues, which would be reiterated or even exacerbated under the Amended Proposal for an Asylum Procedures Regulation. Procedural guarantees and safeguards in border procedures are significantly curtailed under the Commission's latest proposal, as the duration of the border examination procedure – and

78 COM(2020) 611 final (n 50) art 40(1)(i). The proposal includes an exception for applicants belonging to ‘a specific category of persons for whom the low recognition rate cannot be considered representative of their protection needs due to a specific persecution ground’. However, it is unlikely that such an assessment could be carried out in the context of the pre-entry screening. See recital 39a; Centre for European Policy Studies (CEPS), ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (2021) 77.
79 COM(2020) 609 final (n 11) 8. The relevance of nationality status determination with regard to return procedures is not examined here as this goes beyond the scope of this article, which is concerned only with nationality determination in the context of asylum procedures.
80 COM(2020) 611 final (n 50) arts 41(3), 40(1)(c). The use of border procedures based on the suspicion that the applicant has destroyed or disposed of their identity or travel documents in bad faith is no longer allowed under the amended proposal.
81 ibid recital 40b. The designation of ‘safe countries of origin’ also remains a prerogative of Member States, although in the 2016 Proposal for an Asylum Procedures Regulation the Commission had included a provision introducing a list of safe countries of origin at Union level. COM(2016) 467 final (n 71) art 48.
83 ‘Explanatory Memorandum’ COM(2020) 611 final (n 50) 1–2, 4.
84 ECRE (n 62) 26.
85 ibid 27.
therefore of the applicant’s possible deprivation of liberty – is extended to 12 weeks,\textsuperscript{87} strict time limits for lodging an appeal are introduced,\textsuperscript{88} the second level of appeal is removed,\textsuperscript{89} and it is established that appeals against decisions issued in the context of border procedures do not have automatic suspensive effect.\textsuperscript{90} The proposal also provides that appeals against negative decisions rejecting applications as unfounded or manifestly unfounded based on the notion of ‘safe country of origin’ do not have automatic suspensive effect, regardless of the examination procedure used.\textsuperscript{91} Detention also remains a concern under the Commission’s latest proposal. Although the proposal states that border procedures do not necessarily involve detention,\textsuperscript{92} it is vague about where applicants would be housed during the examination of their asylum application, and it is unlikely that an application for international protection could be assessed at the border, prior to a decision on entry, without depriving the applicant of their liberty. All this severely limits the applicant’s ability to assert their claim, and ultimately reinforces the conclusion that border procedures are substandard procedures. If the Amended Proposal for an Asylum Procedures Regulation is adopted, ‘sizeable categories of people will be confronting strong presumptions against their need for protection that will … become de facto very hard to challenge in the context of border procedures’.\textsuperscript{93}

In fact, the amended proposal normalizes and institutionalizes the practice of screening asylum seekers and channelling them into substandard procedures based on their nationality, a process that has been widely reported in the hotspots in Greece and Italy, and has been severely criticized as undermining the right to seek asylum.\textsuperscript{94} In Italy, there is ample evidence that persons arriving in the hotspots are informal classified as asylum seekers or economic migrants based on their country of origin, and those originating from countries informally considered as safe, such as Tunisia, are prevented from applying for international protection and directly issued with removal decisions.\textsuperscript{95} In Greece, asylum seekers from countries with recognition rates below 25 per cent on Lesvos or 33 per cent on Kos are reportedly detained in pre-removal centres and channelled into fast-track border procedures, under the so-called ‘low profile scheme’.\textsuperscript{96} The EU Fundamental Rights Agency (FRA) has been extremely critical that, as a result of this nationality-based screening, some applicants are denied access to the asylum procedure or kept waiting for several months before their asylum application is eventually registered.\textsuperscript{97} In addition to Italy and Greece, an increasing number of countries, including Germany,
Sweden, and Switzerland, ‘seem to sidestep the legal framework of “safe country of origin” concepts by de facto accelerating the treatment of specific nationalities.’98

In sum, under the Pact, the determination of asylum seekers’ nationality status becomes even more relevant, since accelerated and border procedures are made compulsory for applicants originating from certain countries or not cooperating in identification procedures. At the same time, procedural safeguards, which are already limited in accelerated and border procedures, are further reduced. All this is exacerbated by the fact that the Amended Proposal for an Asylum Procedures Regulation, like the current CEAS, fails to provide clear criteria and standards for establishing nationality status, as the next part shows.

### 4. PROCEDURAL AND EVIDENTIARY RULES FOR ESTABLISHING ASYLUM SEEKERS’ NATIONALITY STATUS

The previous parts have shown that nationality status determination plays a crucial role under current and proposed EU refugee law. This part examines what the CEAS (4.1) and the Pact’s legislative proposals (4.2) say with regard to procedures, methods, and evidence to establish asylum applicants’ nationality status, identifying gaps and areas of concern.

#### 4.1 The current CEAS

In line with the definitions of a ‘refugee’ and a ‘person eligible for subsidiary protection’ discussed earlier, article 4 of the recast Qualification Directive includes nationality(nationalities) and country(countries) of previous residence among the material aspects of an applicant’s asylum claim. However, the Directive does not provide any indications as to how an applicant’s nationality status should be determined, and the recast Asylum Procedures Directive is equally silent on the matter. In the two instruments, nationality determination is touched upon in only a few provisions concerning the assessment of evidence and credibility in the examination of asylum applications.

In particular, article 13(1) of the recast Asylum Procedures Directive provides that applicants are required to cooperate with the competent authorities to establish their identity, which includes their nationality status, as well as other elements of their claim. Under paragraph 2 of the same article, Member States may require asylum seekers to hand over documents in their possession that are relevant to the evaluation of their applications, such as their passport. Similarly, article 4 of the recast Qualification Directive provides that Member States may impose on applicants a requirement to produce as soon as possible all elements, including statements and documents, concerning their identity, nationality, and other material aspects of their asylum claims. In line with this provision, all Member States require applicants to submit all documentation they have or may obtain that is relevant to their application.99

Another relevant provision is article 8(3)(a) of the recast Reception Conditions Directive, which provides that applicants can be detained in order to determine or verify their nationality.100 Based on this provision, all claimants who do not produce any identity documents could potentially be detained. Here again, the specific situation of stateless persons and persons at risk of statelessness is not taken into account. Indeed, stateless persons and persons at risk of statelessness often face considerable challenges establishing their nationality status, and may therefore find themselves subjected to prolonged detention.101

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99 EMN (2013) (n 1) 8.
100 Recast Reception Conditions Directive (n 71) art 8(3)(a).
101 ENS and ISI (n 77) 4.
Essentially, under the recast Asylum Procedures Directive, applicants share the burden of proof of their nationality status with the authorities, and may be required to submit all evidence in their possession that is relevant to establishing or confirming their nationality status. In the absence of more specific provisions, the general procedural rules set out in the recast Qualification and Asylum Procedures directives can be presumed to apply also to nationality status determination. Some of these rules are particularly relevant when it comes to the determination of asylum seekers’ nationality status.

Specifically, article 4(3) of the recast Qualification Directive provides that, when assessing applications for international protection, the authorities must consider ‘all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied’. With regard to nationality status determination, this means that the nationality laws of the countries with which the applicant has relevant links, as well as their actual implementation, should be carefully examined.

Paragraph 5 of the same provision stipulates that the applicant does not need to support all elements of their claim with documentary or other evidence, provided they have submitted all relevant documents in their possession, have made a genuine effort to substantiate their application, and the decision maker is satisfied overall with the credibility of their claims. Accordingly, when it comes to nationality status determination, the absence of ID documents or other evidence attesting to the applicant’s nationality or lack thereof does not per se compromise their claims regarding their nationality status.

Paragraph (d) of article 13(1) of the recast Asylum Procedures Directive is also relevant, as it allows Member States’ competent authorities to search the applicant and the items they are carrying to obtain information that is necessary for the processing of their application. Most Member States have incorporated this provision in national law, and several of them confiscate applicants’ mobile phones and other digital devices and access their content in order to establish or verify the applicants’ identity, including their nationality.

These provisions set out only very general rules, and many of the questions that asylum authorities are confronted with when trying to establish an applicant’s nationality status remain unaddressed. These concern, for instance, the types of evidence, including documents and other evidence, that can be accepted for establishing nationality status; the probatory weight that they should be accorded; and the suitability of other methods that can be used to determine an applicant’s nationality status. In the absence of any regional guidance, Member States deal with these issues very differently.

Indeed, the European Migration Network (EMN) reports that, although most Member States accept documents other than passports and ID cards, such as birth certificates and driving licences, to help establish identity for the purposes of refugee status determination, some Member States accept only official ID and travel documents. When documentary evidence is not available and/or the authorities have doubts about the applicant’s nationality, some countries resort to Language Analysis for the Determination of Origin (LADO), but, here again, the practices among Member States diverge. While some countries have established specialized language analysis units, others resort to employing private companies and

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102 EMN (2013) (n 1) 8.
103 EMN (2017) (n 1) 55.
104 ibid 27–28.
105 ibid 32; EMN (2013) (n 1) 13.
107 This is the case, eg, in Germany, Switzerland, and Belgium. Carla T Elias Nava, ‘LADO and the Need for Uniform Procedures in European Asylum Proceedings’ (2017) 31 Emory International Law Review 307.
108 See, for instance, Austria, Denmark, and Finland. ibid 309.
others still rely, formally or informally and covertly, on the evaluation made by the interpreter who facilitates the refugee status determination interview.\textsuperscript{109} The weight given to LADO in the determination of the applicant’s nationality status also varies from one country to another.\textsuperscript{110} It is clear that all this may result in conflicting and erroneous assessments of an applicant’s nationality status, and may involve the violation of the applicant’s fundamental rights.

Another reason for concern is that the current CEAS does not provide any guidance as to how to identify stateless refugees. This, coupled with the lack of statelessness determination procedures\textsuperscript{111} and public officials’ limited awareness and knowledge of statelessness in most Member States, often leads to the registration of stateless asylum seekers with an imputed nationality, based on their native tongue and country of former habitual residence.\textsuperscript{112} The applicant’s statelessness or risk of statelessness, if not promptly identified, can raise credibility problems later during the procedure, increasing the risk of a negative decision for the applicant.\textsuperscript{113}

Some of these questions have been dealt with by the European Union Asylum Agency (EUAA) (formerly the European Asylum Support Office (EASO)) in its practical guidelines and judicial analyses,\textsuperscript{114} but these are not binding and are far from exhaustive. The jurisprudence of the ECTHR and the European Court of Justice (CJEU) is also of little help here, as the two courts have never substantively elaborated on the criteria for establishing nationality status. As the next section shows, the Pact also fails to address these issues, while reinforcing the channeling of asylum seekers into simplified and faster procedures based on the applicants’ country of origin.

4.2 The Pact’s legislative proposals

In the legislative instruments proposed under the Pact, the general provisions on evidence and credibility assessment discussed in the previous section remain unchanged, with the exception of article 4(1) of the recast Qualification Directive, whose corresponding article in the Qualification Regulation requires applicants to cooperate with the authorities and to submit all the elements available to them to substantiate their asylum application.\textsuperscript{115} However, the Pact introduces a significant change that may potentially impact the determination of the applicant’s nationality status.

Drawing on the workflow implemented in the hotspots in Greece and Italy,\textsuperscript{116} the Proposal for a Pre-Entry Screening Regulation\textsuperscript{117} introduces a pre-entry screening of applicants for international protection, third-country nationals who arrive at an EU border and do not fulfil the entry conditions, those disembarked after a search and rescue operation, as well as those apprehended within the territory of a Member State where there are indications that they eluded


\textsuperscript{110} ibid.

\textsuperscript{111} Few EU Member States have dedicated statelessness determination procedures, although in some Member States statelessness can be determined through other procedures. See ENS Statelessness Index <https://index.statelessness.eu/themes/statelessness-determination-and-status> accessed 21 March 2023.

\textsuperscript{112} ENS and ISI (n 77) 3.

\textsuperscript{113} ibid 3–4.


\textsuperscript{115} COM(2016) 466 final (n 35) art 4(1).

\textsuperscript{116} COM(2020) 609 final (n 35) art 4(1).

border checks on entry. The screening must include a health check and (where relevant) a vulnerability check, identification, registration of biometric data, and security checks through queries in relevant national and EU databases. ‘Identification’ includes the determination of the person’s nationality status. It is therefore at this stage that the person’s nationality is determined and recorded for the first time.

The Pre-Entry Screening Regulation is the only legislative instrument proposed under the Pact that contains new provisions specifically concerning the determination of the applicant’s nationality status. Article 10 sets out the types of evidence to be used to verify or establish a third-country national’s identity. These include identity, travel, or other documents, data, or information provided by or obtained from the third-country national concerned, and biometric data, used in combination with information available in relevant national and European databases. Nevertheless, it is unclear what documents, apart from identity and travel documents, can be accepted as evidence of nationality; whether and how the competent authorities should assess the authenticity and reliability of documents at this stage; and what weight should be accorded to the person’s claim regarding their nationality and other sources of evidence.

The proposal’s silence on the assessment of evidence for establishing the applicant’s identity is particularly problematic considering that the outcome of the screening, against which no possibility of appeal is foreseen, will determine the type of examination procedure to which asylum seekers will be referred. Although the pre-entry screening debriefing form requires only an ‘initial indication’ of ‘nationality/ies’, suggesting that a more accurate evaluation will follow, the assessment made during the pre-entry screening will determine the type of procedure through which the asylum application will be examined. Indeed, article 14(2) provides that, once the pre-entry screening is completed, asylum seekers must be referred to the competent authorities, who, based on the information recorded in the pre-entry screening debriefing form, will decide whether their application for international protection will be assessed through a regular or a border asylum procedure, or will be considered for relocation. It is difficult to imagine that a thorough assessment of the applicant’s nationality status could be carried out within such a short timeframe, and at the border, where it is likely that deprivation of liberty would be imposed. Although the assessment of the applicant’s nationality status conducted during the pre-entry screening could, in principle, be revised and corrected during the examination of the asylum application, evidence shows that amending an incorrect nationality record can prove extremely complex.

Finally, another reason for concern is that the proposal does not foresee that persons arriving at the border or apprehended in the territory of a Member State may be stateless, or at risk of statelessness, and consequently does not provide for the possibility of flagging and recording their condition and referring them to statelessness determination procedures, if available. As already noted with regard to the current CEAS instruments, when statelessness is not promptly identified, applicants are registered with an imputed nationality or as having an ‘unknown

118 ibid art 5.
119 ibid arts 6, 9.
120 ibid arts 6, 12.
123 See ibid 40.
124 Like the border examination procedure, the pre-entry screening is likely to involve detention, as it is unclear how the legal fiction of non-entry could otherwise be applied. CEPS (n 78) S9.
125 ENS and ISI (n 77) 3. The other possible outcomes of the pre-entry screening are: refusal of entry, if the person is apprehended at the external border, does not apply for international protection, and does not fulfill the entry conditions; return, if the person is apprehended within the territory of a Member State, does not apply for international protection, and does not fulfill the entry conditions; and relocation, if the person applies for international protection and fits the criteria for relocation. COM(2020) 612 final (n 117) art 14.
nationality’, which can raise credibility issues later in the procedure and sometimes leads to a negative decision. To prevent this, statelessness should be included in the debriefing form as a possible nationality status and considered as a vulnerability factor. Information about the nationality status of the applicant’s family members should also be collected at this stage to detect a possible risk of statelessness, when this is not raised by the applicant.

5. CONCLUSION

Over the last decade, EU Member States have faced increasing challenges in establishing the nationality status of applicants for international protection, since the number of those who do not provide any valid identity or travel documents has significantly increased. As this article has shown, the determination of the nationality, or lack thereof, of asylum seekers is critical to the substantive assessment of their applications for international protection under EU refugee law, and can determine the type of procedure through which their asylum application is examined. Indeed, the recast Asylum Procedures Directive provides that, if the applicant originates from a ‘safe country’, Member States may decide to examine their application for international protection through accelerated or border procedures. This is the case also for applicants who do not cooperate, or are perceived as uncooperative, in identification procedures, including procedures to determine their nationality status.

This article has argued that, as a result of the new procedures proposed in the Pact, the determination of asylum seekers’ nationality status becomes even more relevant. Indeed, under the Proposal for a Pre-Entry Screening Regulation and the Amended Proposal for an Asylum Procedures Regulation, asylum seekers are screened at the border and channelled into different examination procedures depending on their country of origin. These provisions also apply to stateless asylum seekers, whose particular situation and protection needs are not taken into account in the Commission’s latest proposals, as also happens in the current CEAS. Border procedures imply lower procedural safeguards, which are further curtailed under the Pact. These significantly limit the applicant’s ability to assert their claim, which may ultimately result in the rejection of their asylum application.

This article has contended that the channelling of asylum seekers into simplified and faster procedures based on their country of origin raises discrimination concerns, and is even more problematic considering that neither the current CEAS directives nor the Commission’s latest legislative proposals provide any indications as to how an applicant’s nationality status should be established. Several factors point to the need for guidance on nationality status determination in asylum procedures at the EU level. There is evidence that EU Member States use different methods to establish or verify the nationality status of asylum seekers, including dubious language tests and interviews to check applicants’ knowledge of their alleged country of origin. The weight accorded to each source and type of evidence and the standard of proof required also varies from one country to another. In some instances, the applicant’s nationality status remains undetermined throughout the entire refugee status determination process or is wrongly determined. Moreover, different understandings of the concept of nationality may...

126 ENS (n 121) 12.
127 ibid.
result in conflicting assessments of a person’s nationality status, for example, when the applicant could obtain the nationality of another State and find protection there.

Given the significant impact that nationality status determination has on the examination of asylum applications, and its increasing relevance both in informal practices and in the new procedures proposed in the Pact, this article calls for the development of guidance on nationality status determination in the asylum procedure at the EU level. It would be desirable, in particular, to clarify the meaning and scope of the concept of ‘country of nationality’ for the purposes of refugee status determination and to address the procedural and evidentiary issues involved in the determination of nationality status. In fact, the recast Qualification Directive already clarifies the meaning of other key elements of the definitions of a ‘refugee’ and a ‘person eligible for subsidiary protection’ and provides guidance relating to their actual implementation. The notions of ‘country of nationality’ and ‘stateless person’ could be analogously elaborated in the new directive or regulation, and some – not legally binding, yet authoritative – operational guidance on the procedural and evidentiary aspects of nationality status determination could be developed by the EUAA. While remaining sufficiently broad so as to include relevant differences between countries of origin, for example, with regard to the types of documents attesting to nationality, such guidance would contribute to fairer and more harmonized assessments throughout Member States, which, at least on paper, is one of the objectives of the reform of the CEAS.