



**Extending the time limit of examination procedures under Article 31(3)(b) of the Asylum  
Procedures Directive**

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Migration Law Clinic  
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## 1. Introduction

### 1.1 Asylum Procedures Directive (2013/32/EU)

Directive 2013/32/EU (further: the Asylum Procedures Directive) establishes common procedures for granting and withdrawing international protection.<sup>1</sup> Article 31(3)(b) of the Asylum Procedures Directives establishes conditions under which Member States of the European Union (EU) may extend the decision period for processing asylum applications. It states that Member States may extend the standard six-month decision period by up to nine months when there is a 'large number of third-country nationals or stateless persons simultaneously seeking international protection, making it practically difficult to complete the asylum procedure within the original six-month timeframe.'

This expert opinion focuses on the interpretation of Article 31(3)(b) of the Asylum Procedures Directive, which reads as follows:

*'3. Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.*

(...)

*Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:*

(...)

*(b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time limit;'*

### 1.2 Background of the proceedings

In August 2022, due to an 'unforeseen mass influx of refugees', the Dutch government decided to extend the lawful examination period for asylum applications from six months to fifteen months.<sup>2</sup> This extension meant that all applications submitted after the decision was taken, would undergo a fifteen-month examination period. Originally, this extension was intended for applications submitted until

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<sup>1</sup> European Parliament and the Council Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) [2013] OJ L 180/60.

<sup>2</sup> Besluit van de Staatssecretaris van Justitie en Veiligheid van 21 september 2022, WBV 2022/22, houdende wijziging van de Vreemdelingencirculaire 2000, (Stcrt 2022, 25775).

January 1st, 2023,<sup>3</sup> but on the 3rd of February 2023, it was prolonged until January 1st, 2024.<sup>4</sup> Subsequently, on January 4<sup>th</sup> 2024, it was further extended to January 1st, 2025.<sup>5</sup>

On January 6<sup>th</sup> 2023, the District Court of the Hague ruled that the extension was unlawful, considering that the influx of applications for international protection was not simultaneous but rather gradual.<sup>6</sup> The *Staatssecretaris van Justitie en Veiligheid* appealed this decision. On the 9<sup>th</sup> of November 2023, the Administrative Jurisdiction Division of the Council of State submitted three questions for preliminary ruling to the Court of Justice of the EU (further: CJEU).

The questions referred to the CJEU are:<sup>7</sup>

- 1a. Can the decision-making authority make use of its power to extend the decision period from six to 15 months, as provided for in Article 31(3)(b) of the Asylum Procedures Directive, when there is a large number of requests for international protection submitted simultaneously, if the increase in the number of requests for international protection occurs gradually over a certain period, making it practically very difficult to complete the procedure within the six-month timeframe as a result? How should ‘simultaneously’ be interpreted in this context?
- 1b. Which criteria should be used to assess whether there is a ‘large number’ of requests for international protection, as referred to in Article 31(3)(b) of the Asylum Procedures Directive?
2. Does a limitation in time apply to the period during which an increase in the number of requests for international protection must occur in order to still fall within the scope of Article 31(3)(b) of the Asylum Procedures Directive? And, if so, how long can this period last?
3. Can circumstances that cannot be traced back to the increase in the number of applications for international protection, e.g. the fact the determining authority faces a backlog that existed before the increase of applications or a lack of personnel capacity, be taken into account in determining if the examination procedure can be done within six months?

### 1.3 Outline of the expert opinion

This Opinion deals with the interpretation of Article 31(3)(b) of the Asylum Procedures Directive. The Opinion contains four main chapters in which each of the questions is addressed. Essentially, the referred questions are answered by applying the literal, contextual and teleological interpretation methods.

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<sup>3</sup> Immigratie- en Naturalisatiedienst, ‘*Maximale Beslistermijn Asielaanvraag van 6 Naar 15 Maanden*’ (2022) <[www.ind.nl/nl/nieuws/maximale-beslistermijn-asielaanvraag-van-6-naar-15-maanden](http://www.ind.nl/nl/nieuws/maximale-beslistermijn-asielaanvraag-van-6-naar-15-maanden)> accessed 8 January 2024.

<sup>4</sup> Besluit van de Staatssecretaris van Justitie en Veiligheid van 26 januari 2023, WBV 2023/3, houdende wijziging van de Vreemdelingencirculaire 2000, (*Stcrt* 2023, 3235).

<sup>5</sup> Besluit van de Staatssecretaris van Justitie en Veiligheid van 27 december 2023, nummer WBV 2023/26, houdende wijziging van de Vreemdelingencirculaire 2000, (*Stcrt* 2023, 473).

<sup>6</sup> District Court of The Hague 6 January 2023, ECLI:NL:RBDHA:2023:136.

<sup>7</sup> Council of State 8 November 2023, ECLI:NL:RVS:2023:4125.

Chapter 3 discusses the first question, with two sub questions, concerning the interpretation of the terms 'simultaneously' and 'large number' used in Article 31(3)(b) of the Asylum Procedures Directive. This chapter indicates that 'simultaneously' should be interpreted narrowly.

Chapter 4 examines the second question concerning the interpretation of the phrase 'large number' used in Article 31(3)(b) of the Asylum Procedures Directive. The chapter aims to determine what constitutes a 'large number' of requests for international protection by analysing various definitions and its application within the context of the Directive. The analysis shows that a 'large number' entails both the absolute number of asylum requests and the operational capacity of the national asylum system. What constitutes a large number can thus differ for each Member State, while the criteria to determine so are uniform.

Chapter 5 addresses the second question concerning the time frame of the increase in requests for international protection as specified in Article 31(3)(b) of the Asylum Procedures Directive. The chapter explores whether a time limitation applies to the period during which an increase in asylum requests takes place to still fall under the scope of Article 31(3)(b) and, if so, the duration of this period. This chapter demonstrates that the term 'simultaneously' implies a limited time frame, supporting a narrow interpretation of this provision. This analysis reveals that a stringent time limit is crucial to meet the aim and purpose of the Directive, namely a timely and efficient asylum procedure that safeguards legal certainty for both Member States and applicants.

Chapter 6 delves into the third question, which inquires whether external circumstances, unrelated to an increase in the number of applications for international protection, can be considered when determining the feasibility of completing the examination process within six months, as stipulated in Article 31(3)(b) of the Asylum Procedures Directive. The chapter demonstrates that the aim of the Directive is to address delays explicitly caused by a sudden increase in applications.

## **1.4 Methodology**

In order to answer each question referred for preliminary ruling, an in-depth analysis of three classic methods of interpretation (literal interpretation, contextual interpretation, and teleological interpretation) is conducted. The nature of these interpretation methods and how they are applied by the CJEU will be explained further in chapter 2.

## 2. Interpretation and application of Union law by the CJEU

In accordance with Article 19 of the Treaty on European Union (TEU), the CJEU shall ensure that in the interpretation and application of the Treaties the law is being observed. This treaty provision implies that all acts of the EU must be interpreted in a manner that ensures the fundamental principle of 'the rule of law, on which the European Union is based'.<sup>8</sup>

In the absence of a special provision laying down the binding method of interpretation of EU law, the CJEU has the freedom to choose the method it deems appropriate.<sup>9</sup> This means that the Court can employ classical methods: literal interpretation, contextual interpretation, and teleological interpretation. These methods are acknowledged in both national legal systems and international law, most importantly in the Vienna Convention on the Law of Treaties (VCLT)<sup>10</sup>. The VCLT provides rules for interpretation and its principles attained the status of international customary law.<sup>11</sup>

The CJEU has addressed the subject of interpretation several times. In *CILFIT*, the Court gave directions to national courts on how to interpret and apply Union law. Even though this case concerns the context of national courts, it does illustrate the manner in which EU law must be interpreted according to the CJEU.<sup>12</sup>

At the outset, the Court states that 'an interpretation of a provision of community law involves a comparison of the different language versions'.<sup>13</sup> Secondly, 'It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it'.<sup>14</sup> By that, the Court explains that 'legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States'.<sup>15</sup> There needs to be regard for EU-specific terms and their autonomous meaning in the national systems.<sup>16</sup>

Further, the CJEU held that 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being given to the objectives thereof and its state of evolution at the date on which the provision in question is to be applied'.<sup>17</sup> The CJEU emphasises the teleological and contextual interpretation methods here.

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<sup>8</sup> Koen Lenaerts and Jose A Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice* (European University Institute Academy of European Law, 2013) p 3.

<sup>9</sup> *Ibid.*

<sup>10</sup> Vienna Convention on the Law of Treaties (1969).

<sup>11</sup> Steven R Ratner, 'International Law Rules on Treaty Interpretation', *University of Michigan Law School Repository* (2022).

<sup>12</sup> Jan Komárek, 'Legal reasoning in EU Law' in Damian Chalmers and Anthony Arnall (eds) *The Oxford Handbook of EU Law*, Oxford University Press (2015), p 49.

<sup>13</sup> CJEU Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982].

<sup>14</sup> *Ibid.*, para 7.

<sup>15</sup> *Ibid.*

<sup>16</sup> Sorina Doroga and Alexandra Mercuscu, A call to impossibility : the methodology of interpretation at the European Court of Justice and the PSPP ruling, *European Journal of Legal Studies*, Vol. 13 No. 2 (2021) 99.

<sup>17</sup> Case *CILFIT* (n 12) para 7.



Nevertheless, the CJEU may prescribe a specific normative significance to a particular method, due to the autonomy of the EU legal system.<sup>18</sup>

## 2.2. Literal interpretation

The literal interpretation, being the most straightforward method, will be firstly examined in every chapter. Literal or textual interpretation is the explanation of a normative act by looking at the ordinary meaning of the words included therein to determine the law.<sup>19</sup> The common critique of this method is that it's only useful, when the meaning is established.<sup>20</sup> However, the literal interpretation can still be considered a starting point to interpret a term. When the meaning of a word is clear and precise, the contextual and teleological interpretation will not call the literal interpretation into question.<sup>21</sup> Additionally, the literal interpretation can be conducted in conjunction with other methods, as the ordinary meaning can vary depending on the context.<sup>22</sup>

## 2.3. Contextual interpretation

Contextual interpretation encompasses two contrasted, yet interrelated perspectives. The first one centres internally on understanding the normative context of the examined provision.<sup>23</sup> To achieve this, the relationship between the provision and the entire system within which it is situated is assessed. In the case of the Asylum Procedures Directive, its provisions are part of a broader regulatory framework established by the Common European Asylum System (CEAS). Moreover, interpreting a provision in isolation may lead to violations of other legal norms stemming from the same legal system.

The second (external) perspective of the contextual method examines the decision-making process leading up to the adoption of the provision<sup>24</sup>. Article 31 VCLT<sup>25</sup> requires the contextual interpretation of treaties in light of their object and purpose. Pursuant to Article 32<sup>26</sup>, the context regarding the establishment of a treaty, the *travaux préparatoires*, constitutes supplementary means of interpretation. The CJEU often draws on international principles of interpretation, including those found in the VCLT, while consistently highlighting the autonomous and unique character of the EU legal system.

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<sup>18</sup> J.M. de Wilmars, *Réflexions sur les méthodes d'interprétation de la Cour de justice des Communautés européennes* (1986), 9-10.

<sup>19</sup> K. Lenaerts and J.A. Gutierrez-Fons (n 8) p 7.

<sup>20</sup> O. Ammann, 'The Interpretative Methods of International Law: What Are They, and Why Use Them?', *Domestic Courts and the Interpretation of International Law*, Chapter 6 (2020) p 198.

<sup>21</sup> K. Lenaerts and J.A. Gutierrez-Fons (n 8) p 7.

<sup>22</sup> O. Ammann (n 20) p 199.

<sup>23</sup> K. Lenaerts and J.A. Gutierrez-Fons (n 8) p 13.

<sup>24</sup> *Ibid.*

<sup>25</sup> Article 31(1) VCLT: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

<sup>26</sup> Article 32 VCLT: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

#### **2.4. Teleological interpretation**

The teleological interpretation entails examining the object and purpose of the law. Teleological interpretation seeks to achieve the objectives set by the Treaties, specifically uniformity of Union law and European integration. The CJEU does so by not only considering the teleological interpretation of a single provision, but rather the EU legal order in its entirety. This interpretative method is also laid down in Article 31 VCLT. Examination of the purpose of legislation is crucial for identifying ambiguities, thereby allowing it to employ supplementary means of interpretation as outlined in Article 32 of the VCLT.

### 3. Interpretation of ‘simultaneously’

In this Chapter the following question will be discussed: ‘Can the decision-making authority make use of its power to extend the decision period from six to 15 months, as provided for in Article 31(3)(b) of the Asylum Procedures Directive, when there is a large number of requests for international protection submitted simultaneously, if the increase in the number of requests for international protection occurs gradually over a certain period, making it practically very difficult to complete the procedure within the six-month timeframe as a result? How should ‘simultaneously’ be interpreted in this context?’

This preliminary question prompts the CJEU to clarify the term ‘simultaneously’ as laid down in Article 31(3)(b) of the Asylum Procedures Directive. The referring Court inquires whether there is a specific time frame within which a large number of applications must be lodged in order to make use of Article 31(3)(b).

#### 3.1 Literal interpretation

The Cambridge and Merriam-Webster dictionaries define ‘simultaneously’ as: ‘happening or being done at exactly the same time’ and ‘existing or occurring at the same time; exactly coincident’<sup>27</sup>

Based on the above, ‘simultaneously’ refers to events happening or being done at the same time, or existing or occurring at the exact moment, coinciding with one another. This interpretation suggests that ‘a gradual increase’ in the number of requests for international protection ‘over a certain period’ is not consistent with Article 31(3)(b) Asylum Procedures Directive. Conversely, ‘simultaneously’ could be understood as referring to a large number of applications lodged in a notably short and distinct timeframe. The submissions would have to be concurrent or closely successive in this regard. The literal interpretation does however not conclusively answer the question of how to interpret the term ‘simultaneously’ if the increase in the number of requests for international protection occurs ‘gradually over a certain period’, making it practically very difficult to complete the procedure within the six-month timeframe as a result. Therefore, the contextual and teleological interpretation methods will be explored in the next sections.

##### 3.2.1 Other language versions

In Regulation No 1/58<sup>28</sup>, the Council laid down the principle of ‘linguistic equality’ of all the official languages of the Member States. The regulation also implemented full multilingualism of EU legal documents.

As was presented above, the CJEU stated in *CILFIT*, the CJEU required national courts to engage in a comparative study of the different language versions of the EU provision in the matter. While

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<sup>27</sup> Cambridge Dictionary, *Simultaneously*, (n.d.)

<[www.dictionary.cambridge.org/dictionary/english/simultaneous](http://www.dictionary.cambridge.org/dictionary/english/simultaneous)> accessed 31 March 2024; Merriam-Webster, *Simultaneously Definition and Meaning*, (n.d.) <[www.merriam-webster.com/dictionary/simultaneous](http://www.merriam-webster.com/dictionary/simultaneous)> accessed 31 March 2024.

<sup>28</sup> Council Regulation No 1 determining the languages to be used by the European Economic Community, [1958] OJ 17.

examining the notion of ‘simultaneously’ mentioned in Article 31 (3)(b) Asylum Procedures Directive. it becomes evident that the terminologies employed in other language versions closely align with the expressions articulated in the English version of the Asylum Procedures Directive.

Examples:

- 1) ‘gleichzeitig’ - German version;
- 2) ‘tegelijk’ - Dutch version;
- 3) ‘jednocześnie’ - Polish version;
- 4) ‘simultanément’ - French version.

None of the language versions indicate that a gradual increase in asylum applications can be considered to fall within the scope of Article 31 (3)(b) APD. In fact, it contradicts the ordinary meaning of the provision regardless of the language version.

### 3.3 Contextual interpretation

As recognised under the EU Charter of Fundamental Rights<sup>29</sup>, the right to asylum is a fundamental right.<sup>30</sup> In the EU, the CEAS<sup>31</sup> establishes uniform standards and collaboration to ensure equitable treatment of asylum seekers within an open and impartial system, regardless of where they submit their application.<sup>32</sup> The system includes a number of legislative instruments addressing various points of asylum law. Therefore, looking at other Directives within the CEAS with similar provisions and objectives is crucial for the interpretation of Article 31(3)(b) of the Asylum Procedures Directive.

#### 3.3.1. The Asylum Procedures Directive

The Asylum Procedures Directive creates a harmonised system, setting out procedural rules on how to process requests for international protection efficiently and fairly.<sup>33</sup> The Asylum Procedures Directive aims to establish procedural guarantees safeguarding applicants' right to have their claims examined.

In the recast Directive, the European Commission emphasised that maintaining the six month time limit laid down in Article 31(3) of the Asylum Procedures Directive is essential and a key objective.<sup>34</sup> The time limit is meant to streamline asylum procedures, making the process more effective and minimising the reception costs for asylum seekers.<sup>35</sup> The context of the provision also suggests that applications from ‘a large number of third-country nationals or stateless persons’ should occur within a time frame that is so tight it practically becomes very difficult to adhere to the time limit. The

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<sup>29</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326, Article 18.

<sup>30</sup> European Parliament, *Guaranteeing the right to asylum*. (n.d.). <[www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum](http://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum)> accessed 26 April 2024.

<sup>31</sup> Commission of European Communities, ‘Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection’ COM (2009) 0554, p. 5.

<sup>32</sup> Ibid.

<sup>33</sup> Preamble, Recital 8 of the Asylum Procedures Directive.

<sup>34</sup> Commission of European Communities (n 31) p. 7.

<sup>35</sup> Ibid.

emphasis laid on the importance of adhering to this six-month time limit by the legislator favours a narrow interpretation of the term 'simultaneously.'

For this analysis, the external perspective of the contextual method will not be explored in depth, as the legislative history did not result in any new insights. The analysis of the *travaux préparatoires* of the recast of the Asylum Procedures Directive indicates that Article 31 underwent an amendment. In the recast version of the Asylum Procedures Directive, subparagraph 3 was added to Article 31 (Article 23 in the initial version of Asylum Procedures Directive). However, the legislative history does not provide explicit reasons why those specific circumstances, such as complex issues of act and/or law (a) or simultaneously increasing number of asylum applications (b) are included in the extension clause.

### 3.3.2 The Dublin Regulation

Relevant context is Article 11 of Regulation No 604/2013<sup>36</sup> (Dublin Regulation). The Dublin Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Article 11 of the Dublin Regulation addresses the scenario where multiple family members or minor unmarried siblings submit asylum applications 'simultaneously' or 'within a closely overlapping time frame'. In such cases, the provision ensures that their applications are processed together to prevent family separation during the asylum procedure. The responsible Member State is determined based on the criteria outlined in Article 11 of the Dublin Regulation, which underscores the importance of cohesive treatment of family units seeking international protection collectively. As this provision contains wording similar to Article 31(3)(b) of the Asylum Procedures Directive, it indicates the manner in which the latter should be interpreted. Article 11 of the Dublin Regulation reads as follows:

#### **'Family procedure**

*Where several family members and/or minor unmarried siblings submit applications for international protection in the same Member State **simultaneously, or on dates close enough** for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to their being separated, the Member State responsible shall be determined on the basis of the following provisions:*

(a)

*responsibility for examining the applications for international protection of all the family members and/or minor unmarried siblings shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of them;*

(b)

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<sup>36</sup> European Parliament and the Council Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin Regulation) [2013] OJ L 180/31.

*failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.'*

While the Dublin Regulation and the Asylum Procedures Directive have diverging objectives, a comparison is apt. Essentially, both provisions are concerned with procedural safeguards of asylum applications that were lodged simultaneously.

It is important to note that Article 11 contains a logical disjunction: either 'simultaneously' or 'on dates close enough.' This disjunction indicates that these two concepts do not carry identical meaning. The general interpretation of 'on dates close enough' implies that 'simultaneously' should be understood narrowly. By explicitly including applications submitted 'on dates close enough' for the procedures to be conducted together, the meaning of 'simultaneously' cannot be more than a single day. In other words, Article 11 suggests that 'simultaneously' must be interpreted consistently with its literal meaning.

The phrase 'dates close enough for the procedures for determining the Member State responsible to be conducted together' suggests excluding scenarios of a 'gradual increase' in asylum applications over a more extended period. To speak of a gradual increase would require the amount of asylum applications to, at the least, grow over a period of months or even longer. It would be inconsistent to include such an extended period within the scope of 'dates close enough' for collective processing.

Building on the above, if a gradual increase is incompatible with 'days close enough', it certainly cannot be understood as 'simultaneously' filed applications used in both the Dublin Regulation and Article 31(3)(b) of the Asylum Procedures Directive. Besides, if the EU legislator intended to broaden the time limit for an increase in applications, it could have included 'dates close enough' in the Asylum Procedures Directive as well.

### **3.4 Teleological interpretation**

Typically, preambles offer valuable insight into the objectives and purpose of the law. The primary aim of the Asylum Procedures Directive is to ensure 'access to legally safe and efficient asylum procedures.'<sup>37</sup> Additionally, recital 19 instructs Member States to shorten the overall duration of asylum proceedings while maintaining flexibility and adhering to time limits. Lastly, recital 60 emphasises that the Directive must be interpreted and implemented in light of the Charter and the right to asylum therein.

Article 31 of the Asylum Procedures Directive aims to ensure that procedures are thoroughly examined within a reasonable timeframe.<sup>38</sup> A timely and diligent examination of the asylum applications are the primary objectives of this provision and the Directive as a whole, as stated in recital 18.<sup>39</sup> However, the legislator recognised the need for exceptions in certain circumstances where deviation from the legal decision period is inevitable. A teleological interpretation entails that Member States should view

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<sup>37</sup> Recital 8 of the Asylum Procedures Directive.

<sup>38</sup> Article 31 (2) of the Asylum Procedures Directive.

<sup>39</sup> Recital 18 of the Asylum Procedures Directive.

the exception as a departure from the primary aim of prioritising efficiency and promptness. Moreover, interpreting exceptions restrictively is settled case-law and a general principle of Union law. In *Commission v UK*, the CJEU ruled the following: ‘...exceptions are to be interpreted strictly so that general rules are not negated’.<sup>40</sup> In other words: Member States should only resort to exceptions under extraordinary circumstances, such as an unforeseen and significant increase in asylum applications.

### 3.5 Conclusion

Summarising this chapter, all discussed methods of interpretation suggest that ‘simultaneously’ should be understood in its ordinary meaning. While it is practically unthinkable that asylum requests are filed at the exact same time, a gradual increase over a period of time certainly cannot fall within the scope of Article 31(3)(b) of the Asylum Procedures Directive. Firstly, no other language version of the Directive supports such an interpretation. Second, the context of the Directive confirms that the legislator deliberately refrained from extending the scope of this provision beyond ‘simultaneously’ filed applications as it did in the Dublin Regulation. A teleological interpretation suggests that the primary objective of the Directive is the swift yet thorough examination of asylum claims. Any departure from the main objective should logically be considered as an exception to the rule. From a teleological perspective, ‘simultaneously’ should therefore be interpreted narrowly. Settled case law of the CJEU indeed establishes that both a teleological and systematic interpretation imply that exceptions must be interpreted strictly to ensure that general rules remain intact and unaffected.

Article 31(3)(b) of the Asylum Procedures Directive thus precludes decision-making authorities from making use of its power to extend the decision period from six to 15 months when there is a large number of requests for international protection submitted simultaneously, if the increase in the number of requests for international protection occurs gradually over a certain period, making it practically very difficult to complete the procedure within the six-month timeframe as a result.

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<sup>40</sup> CJEU Case C-346/08 *Commission v United Kingdom* [2010] para 39 and CJEU Case C-476/01 *Kapper* [2004] para 72.

## 4. Interpretation of ‘large number’

In this chapter the following referred question will be discussed: ‘Which criteria should be used to assess whether there is a ‘large number’ of requests for international protection, as referred to in Article 31(3)(b) of the Asylum Procedures Directive?’

By this question, the CJEU is asked to provide criteria that can be used to define what can be considered a ‘large number’. Typically, the CJEU does not provide specific numbers in response to questions referred for preliminary ruling. Instead, it might draw parallels with other EU legal instruments or offer an interpretation of Article 31(3)(b) to shed light on how ‘a large number of requests’ can be established by Member States.

### 4.1 Literal interpretation

As in the previous chapter, the first method that will be discussed is the literal interpretation of a ‘large number’. For the word ‘number’ the definition by different dictionaries is superfluous. The provision itself explains the number; namely the number of third-country nationals or stateless persons that make it difficult to conclude the procedure within six months. According to the Cambridge and Merriam-Webster dictionaries, ‘large’ has the following definitions: ‘big in size or amount’<sup>41</sup> or ‘exceeding most other things of like kind especially in quantity or size’.<sup>42</sup>

The definition of ‘large’ on its own does not supply any other criteria than the actual number of applications, which could be used to assess whether there is a ‘large number’ of requests for international protection. It does however offer guidance on the most obvious criterion: the actual amount of asylum applications. Turning to the Merriam-Webster definition, the actual number of applications has to be exceeding most other moments to qualify as large. In other words: the average number of requests for international protection could qualify as one of the criteria to assess whether there is ‘a large number’ of such requests.

Furthermore, the phrase ‘making it difficult in practice to conclude the procedure within the six-month time limit’ offers another useful criterion to ascertain whether there is a large number of requests. It affirms that a ‘large’ number must be seen as relative to the capacities of the immigration service.

#### 4.1.1 Other language versions

Other language versions of ‘large number’ in the Asylum Procedures Directive:

1. ‘**Große Anzahl**’ - German
2. ‘**Groot aantal**’ - Dutch
3. ‘**Grand nombre**’ - French
4. ‘**Duża liczba**’ - Polish

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<sup>41</sup> Cambridge Dictionary, *Large*, (n.d.) <[www.dictionary.cambridge.org/dictionary/english/large](http://www.dictionary.cambridge.org/dictionary/english/large)> accessed 2 April 2024.

<sup>42</sup> Merriam-Webster, *Large Definition and Meaning*, (n.d.) <[www.merriam-webster.com/dictionary/large](http://www.merriam-webster.com/dictionary/large)> accessed 2 April 2024.



All the selected language versions imply an identical meaning. Therefore, the different language versions do not give a better understanding of the notion 'large number'.

## 4.2 Contextual interpretation: application

This section will first discuss the meaning of 'large number' within the context of the Asylum Procedures Directive. After that, other relevant directives within the CEAS containing similar provisions will be examined: the Temporary Protection Directive, the Returns Directive, and the Reception Conditions Directive.

### 4.2.1 The Asylum Procedures Directive

As highlighted in section 2.3.1, the Asylum Procedures Directive aims to establish procedural safeguards that ensure a thorough and prompt examination of asylum claims. An essential aspect for contextual analysis regarding the term 'large number' is its correlation with the consequence it could prompt. Namely, whether or not the number of requests makes it very difficult to conclude the procedure within six months. The number of requests should therefore be of such a degree that it significantly hampers the practical conclusion of the procedure within the prescribed time frame, for example when the number surpasses what is typically encountered by the immigration authorities. Accordingly, an extension of the decision period under Article 31(3)(b) concerns an unusual, exceptional situation, and should be invoked reluctantly.

The phrase 'large number' is adopted in a few other instances in the Asylum Procedures Directive. Firstly, it is used in article 6 of the Asylum Procedures Directive. Article 6 states that the registration of an application can take up to three days if an asylum application is made at the responsible authority and up to six days if the application is made to other authorities that are likely to receive such an application. According to paragraph five '*where simultaneous applications for international protection by a **large number** of third-country nationals or stateless persons make it very difficult in practice to respect the time limit [...] Member States may provide for that the time limit to be extended to 10 working days.*'<sup>43</sup>

Secondly, Article 43 of the Asylum Procedures Directive also contains similar wording to Article 31(3)(b). According to Article 43(1) of the Asylum Procedures Directive, in border procedures a decision on the application has to be made within a reasonable time. If the decision is not made within four weeks, the applicant can enter the territory. Article 43(3) of the Asylum Procedures Directive reads as follows: '*In the event of arrivals involving a **large number** of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practise to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.*'<sup>44</sup>

In both provisions not only the absolute number is taken into account. What principally legitimises the extension is the number of requests in relation to the difficulty in practise to respect the time limit.

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<sup>43</sup> Article 6 of the Asylum Procedures Directive.

<sup>44</sup> Article 43 of the Asylum Procedures Directive.

Hence, another criterion to assess whether there is a 'large number' of requests for international protection is the strain on the asylum system. The question that then arises is, how extensive must this strain be in order to legitimise the activation of article 31(3)(b)?

Registration of an asylum application does not take very long. Consequently, there has to be an exceptional situation for the strain on the system to be decisive in the question whether or not there is a 'large number' under Article 6 of the Asylum Procedures Directive. In Article 43 of the Asylum Procedures Directive the exception can be activated if there is physically not enough space in the border- or transit facility.<sup>45</sup> This also requires exceptional circumstances. The discussed provisions in this section thus imply that the strain on the system might be a criterion in assessing whether there is a large number of applicants for international protection. In order for that factor to be decisive, the strain would have to be the consequence of exceptional circumstances.

#### 4.2.2 *The Temporary Protection Directive*

EU legislation that mentions a 'large number' and is the most similar to Article 31(3)(b) of the Asylum Procedures Directive is Article 2(d) of the Temporary Protection Directive.<sup>46</sup> Under the Temporary Protection Directive displaced persons can, in the event of a mass influx of displaced persons, get temporary protection in the Member States.<sup>47</sup> In the case of the Temporary Protection Directive, requests for protection are not individual but rather a Union-wide activation is implemented.<sup>48</sup> When the Temporary Protection Directive is activated, anyone who falls under the personal scope can get temporary protection in a Member State. The existence of a mass influx needs to be established by a Council decision adopted by a qualified majority on a proposal from the Commission. A mass influx is defined in Article 2(d) of the Temporary Protection Directive: '*... arrival in the Community of a **large number** of displaced persons, [...].*' This provision is quite similar to Article 31(3)(b): '*a **large number** of third-country nationals or stateless persons apply for international protection [...].*'

Article 31(3)(b) of the Asylum Procedures Directive and Article 2(d) of the Temporary Protection Directive share similar aims: both aim to unburden the immigration authorities of Member States in a situation of a large number of displaced persons requesting protection. One of the aims of the recent activation of the Temporary Protection Directive is to reduce pressure on national asylum systems by creating a protection status with reduced formalities.<sup>49</sup> Article 31(3)(b) Asylum Procedures Directive creates the possibility of an extended decision-making period to accommodate the strain on the asylum system. Hence, the criteria to assess whether there is a 'large number' under the Temporary Protection Directive can be used analogously in matters concerning the Asylum Procedures Directive.

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<sup>45</sup> Article 43(3) of the Asylum Procedures Directive.

<sup>46</sup> Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) [2001] OJ L 212/12.

<sup>47</sup> Article 2(a) of the Temporary Protection Directive.

<sup>48</sup> Article 5(1) of the Temporary Protection Directive.

<sup>49</sup> Commission Press Release IP/22/1469 p. 1, Recital 23 of the Temporary Protection Directive.

According to the legislative history of the Temporary Protection Directive, it is impossible to quantify in advance precisely what constitutes a mass influx.<sup>50</sup> We can, however, look at the previous activation of the Temporary Protection Directive to get a general idea of what a 'large number' could be in a certain situation. The Temporary Protection Directive has been activated once since it was adopted in 2001. This happened on the 4th of March 2022, which was the eighth day after Russia invaded Ukraine. The proposal for the activation of the Temporary Protection Directive was made by the European Commission on the 2nd of March; six days after the invasion. The Commission proposal, however, does not provide a further explanation of the criteria used for the notion 'large number'.

The only explanation that is given is the amount of people that fled Ukraine, which is 650.000 people.<sup>51</sup> Thus in this specific situation a 'large number' consists of 650.000 people entering the EU within little over a week according to the proposal by the European Commission. In the Council decision not the current number of Ukrainians is mentioned, but the UNHCR prediction at the time. UNHCR predicted that between 1,2 million and 3,2 million people would be seeking international protection.<sup>52</sup> These figures showed that the Union would face a situation of mass influx of displaced persons.<sup>53</sup> Moreover, the main consideration for activation of the Temporary Protection Directive was whether asylum systems would be able to process potential asylum claims 'without adverse effects on their efficient operation'<sup>54</sup> and if not will the activation 'limit the risk of overwhelming asylum systems'.<sup>55</sup> Therefore, in this particular context the notion of 'large number' entailed the absolute number of people fleeing, prediction of that number entering the Union in the near future and whether the asylum systems would be able to process potential asylum claims.

#### 4.2.3 The Returns Directive

Article 18(1) of the Returns Directive 2008/115<sup>56</sup> includes provision for '*situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff.*'

The Returns Directive refers to 'situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden' on resources. This is another confirmation that 'a large number' is not merely a statistically significant figure but one that is relative to straining resources beyond typical operational capacities. It specifically refers to a volume that exceeds what is normally manageable within existing systems and processes. This indicates a

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<sup>50</sup> Commission, 'Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof' COM (2000) 303 final 2000/0127 p 14.

<sup>51</sup> Commission Press Release (n 51) p 1.

<sup>52</sup> Council Implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection (Activation Decision) [2022] OJ L 71/1, para 6.

<sup>53</sup> Para 7 of the Activation Decision.

<sup>54</sup> Recital 7 of the Activation Decision.

<sup>55</sup> Recital 16 of the Activation Decision.

<sup>56</sup> European Parliament and the Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive) [2008] OJ L 348/98.

threshold that, when crossed, disrupts standard operational procedures, and requires temporary extraordinary responses for a reasonable period of time.

#### 4.2.4 The Reception Conditions Directive

Article 18(9) of Directive 2013/33<sup>57</sup> (further: Reception Conditions Directive) permits a limited exception when capacities for detention accommodation in reception centres are exceeded. Article 18(9) reads as follows:

*'9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:*

*(...)*

*(b) housing capacities normally available are temporarily exhausted'*

The Reception Conditions Directive acknowledges situations that strain normally available resources. In such cases, a 'large number' refers to a volume of asylum seekers that surpasses what reception centres can normally accommodate.

#### 4.2.5 Conclusion on the context

The most similar use of the notion 'large number' is mentioned in the Temporary Protection Directive. The notion 'large number' in both the Temporary Protection Directive and the Asylum Procedures Directive share characteristics. A 'large number' is in both Directives used to define an exceptional situation that could cause or causes a heavy strain on the asylum systems of the Member States. Because of these similarities the criteria that are used to define 'large number' in the Temporary Protection Directive could be an indication for the criteria to define 'large number' in the Asylum Procedures Directive. Because the Temporary Protection Directive has been invoked only once, there is little information about what criteria can be applied to define a 'large number'. What is clear, however, is that the Commission mentioned the actual number of people already within the Union and the Council referred to the predicted amount of displaced persons by UNHCR. This indicates that the criteria that can be used to define a 'large number' is mainly the actual and predicted amount of people that applied or possibly will seek international protection, heavily burdening the Member States' asylum systems. Consequently, for the purpose of the Article 31(3)(b) of the Asylum Procedures Directive, the criterion to assess whether a number qualifies as large could be understood as the potential risk of overwhelming the asylum system to the point where it negatively impacts the operational efficiency and interests of asylum seekers.

The exceptions from the Returns Directive, the Reception Conditions Directive and the Asylum Procedures Directive are focused on situations where there are exceptional circumstances. In the

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<sup>57</sup> European Parliament and the Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive), [2013] OJ L 180/96.

Reception Conditions Directive and the Returns Directive it is about the exhaustion of capacities and the Asylum Procedures Directive is about a large number of asylum applications. The Reception Conditions Directive and the Return Directive thus offer useful context for interpreting the term 'large number' under Article 31(3)(b) of the Asylum Procedures Directive. Requirements of an 'unforeseen heavy burden' and 'exceeding normal available capacities' are recurring elements. Having regard to Article 18(9) of the Reception Conditions Directive and Article 18(1) of the Returns Directive, a 'large number' in Article 31(3)(b) of the Asylum Procedures Directive can be interpreted as a volume of applications that, albeit temporarily, overwhelms the usual processing capabilities of the asylum system. This interpretation would be consistent with the Reception Conditions Directive and the Returns Directive, which allow exceptional measures when unforeseen capacity shortages arise.

### **4.3 Teleological interpretation**

According to the preamble of the Asylum Procedures Directive, the CEAS should include common standards for fair and efficient asylum procedures in the Member States.<sup>58</sup> The goal of the Asylum Procedures Directive is to further develop the standards for procedures for granting and withdrawing international protection.<sup>59</sup> Combining these recitals, the goal of the directive is to develop standards for fair and efficient asylum procedures based on the principle of solidarity and fair sharing of responsibility.<sup>60</sup> Recital 18 of the Asylum Procedures Directive further explains 'fair and efficient'. It states that it is in the interest of both Member States and applicants for international protection that a decision is made as soon as possible, without giving in on an adequate and complete examination.<sup>61</sup> Thus, what has to be kept in mind when applying the Asylum Procedures Directive is the junction between a timely and diligent decision.

On the one hand, the decision-making on asylum applications must be timely. So this indicates a high threshold for the invocation of Article 31(3)(b) as the Article directly delays the decision-making process. On the other hand, the aim and purpose of the Asylum Procedures Directive also requires Member States to make a diligent decision. Therefore, there has to be a balance between the 'timely' and the 'diligent'. It must be noted that a longer processing period does not necessarily make a decision more diligent. Moreover, extending the decision-making period does also not necessarily result in examining an application for a longer period of time when the procedure is merely delayed.

Since the Asylum Procedures Directive aims to both ensure a timely as well as a diligent decision, there is no explicit emphasis on either element. However, an extension of the examination period does not necessarily influence the degree of diligence. In other words, an extension might result in an examination that was conducted as diligently, but at a later stage. A correlation between the diligence of an examination and the extension of the time limit therefore remains unestablished.

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<sup>58</sup> Recital 5 of the Procedures Directive.

<sup>59</sup> Recital 12 of the Procedures Directive.

<sup>60</sup> Recital 8 of the Procedures Directive.

<sup>61</sup> Recital 18 of the Procedures Directive.

#### 4.4 Conclusion

The inquiry into the criteria for determining what constitutes a 'large number' of asylum applications under Article 31(3)(b) of the Asylum Procedures Directive has been addressed by exploring literal, contextual, and teleological interpretation methods. The analysis demonstrates that the criteria for assessing what qualifies as a 'large number' goes beyond an absolute number of requests. Instead, the practical impact on asylum processing capacities is central.

The literal interpretation defines 'large' simply in terms of size or amount, leading to an understanding that a 'large number' primarily refers to a volume of applications that significantly exceeds usual numbers, which impedes the processing within the standard six-month period.

The contextual interpretation with provisions in the Temporary Protection, Returns, and Reception Conditions Directives, enriches our understanding. These directives associate a 'large number' with situations that place exceptional strain on resources, leading to operational challenges.

The teleological interpretation brings us the following: the directive emphasises the need for a balanced approach that does not compromise the thoroughness of the asylum procedure for the sake of expediency. The use of the term 'large number' in Article 31(3)(b) inherently seeks to balance the directive's objectives against practical capacities, suggesting that the term should be interpreted in a way that allows for flexibility in response to situational demands without undermining the integrity of the asylum process.

The integration of these interpretations points to a nuanced definition of 'large number.' It is not solely about a threshold that, once crossed, automatically justifies extending processing times. Rather, it is about understanding the capacity of the system to handle influxes relative to its normal operations and the impact on the quality and timeliness of decision-making. The criteria for determining what is a large number must be the same throughout the Union, while what specifically must be regarded as a large number could differ for each Member State. Therefore, the criteria for a 'large number' should include both quantitative and qualitative dimensions: the absolute number of applications and the relative capacity of the asylum system to process these applications efficiently without sacrificing procedural fairness. This approach ensures that extensions of the processing timeline under Article 31(3)(b) are invoked restrictively, preserving the Directive's intent and the integrity of the asylum process across Member States.

The answer to the question is as follows: the criteria that should be assessed in order to determine whether there is a 'large number' of requests for international protection, as referred to in Article 31(3)(b) of the Asylum Procedures Directive, are the absolute number of applications for international protection and the ability of such a number to impose unforeseen burdens and strains on the usual operations of the decision making body and exceed its normal capabilities.

## 5. Limitation to the time period of increase

In this chapter the second preliminary question will be discussed. The question reads as follows: ‘Does a limitation in time apply to the period during which an increase in the number of requests for international protection must occur in order to still fall within the scope of Article 31(3)(b) of the Asylum Procedures Directive? And, if so, how long can this period last?’

This question is virtually an extension of question 1a. In the first chapter, we concluded that Article 31(3) (b) of the Asylum Procedures Directive precludes decision-making authorities from making use of their power to extend the decision period from six to 15 months when there is a large number of requests for international protection submitted simultaneously, if the increase in the number of requests for international protection occurs gradually over a certain period. The answer to question 1a implies that there must be a limit to the time period in which an increase in application for international protection must take place in order to fall within the scope of Article 31(3)(b) of the Asylum Procedures Directive. In this chapter we will elaborate further on this suggestion and try to establish how long this period can be.

### 5.1 Literal interpretation

The text of Article 31(3)(b) does not mention a certain time period during which the increase in applications must occur. However, the word ‘simultaneously’ implies that there is a limit. Otherwise the term would have been left out. The only element of this provision that indicates how long the ‘certain period’ can be is ‘simultaneously’. The literal interpretation of the word is already discussed in section 2.2. The same goes for other language versions, these are discussed in sections 2.2.1 and 3.1.1. It was established that there are no major differences between language versions.

### 5.2 Contextual interpretation

It follows from the general understanding of the term ‘simultaneously’, used in Article 31(3)(b) of the Asylum Procedures Directive, that there needs to be a time limit to the period in which applications have to be in order to fall within the scope of the Article. The term could never reasonably mean that the timeframe for applications to be lodged is indefinite. This section will elaborate on this and discuss the possible length of the time limit. It will do so by discussing article 31(3)(b) of the Asylum Procedures Directive within its context and the context of the Reception Conditions Directive.

#### 5.2.1 *The Asylum Procedures Directive*

As mentioned in section 2.3.1, the *travaux préparatoires* do not give much information about why some provisions were included in the Asylum Procedures Directive. However, Article 31(3)(b) was not added until the recast in 2013. In addition to this, according to the explanation of the recast as discussed in section 2.3.1 the retention of the six-month term was a vital part of the recast.<sup>62</sup> By doing so, the legislator emphasises the importance of observing the six-month term. This could be an indication that Article 31(3)(b) must be interpreted narrowly. A restrictive interpretation of the

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<sup>62</sup> European Commission ‘Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)’ COM (2011) 0319 final - 2009/0165 (COD) para 3.1.3.

provision further emphasises that there is a limit to the time period in which an increase in the number of applications have to take place in order to fall within its scope.

According to the explanation by the European Commission, the goal of the added exceptions in Article 31 is to provide Member States with more flexibility and effective means to counter abuse.<sup>63</sup> The fact that one of the aims is flexibility, could imply that there is not a fixed period of time in which an increase in applications for international protection has to take place. This however does not mean there is no maximum period at all within which an increase of asylum applications has to occur under any circumstance.

Furthermore, having no limit could cause tension with the principle of legal certainty. According to *Duff e.a.* legal rules should be clear and precise and aim to ensure that situations and legal relationships governed by Community law remain foreseeable.<sup>64</sup> No maximum term in which the increase of asylum applications has to take place would be at odds with this principle.

Article 31(3)(b) is an exception to the rule that decisions on asylum applications have to be made within six months. According to settled case law by the CJEU, exceptions to the rule have to be explained restrictively.<sup>65</sup> Therefore, the exception in Article 31(3)(b) should also be interpreted restrictively. This is another indicator that the period in which there must be an increase in applications for international protection should be limited in order to fall within the scope of Article 31(3)(b).

### 5.2.2 The Reception Conditions Directive

As mentioned in section 3.2.4, Article 18(9) of the Reception Conditions Directive permits a limited exception when capacities for detention accommodation in reception centres are exceeded. This provision specifically mentions the word 'temporary'. The Reception Conditions Directive emphasises that any changes to the reception conditions need to be for the shortest time possible while also being diligent as stated in Recital 16, not taking more time than needed.<sup>66</sup> This provision is useful to interpret Article 31(3)(b) of the Asylum Procedures Directive, as it also deals with the extension of exceptional circumstances as discussed in section 4.2.4. Therefore, Article 18(9) of the Reception Conditions Directive indicates that extensions should not take more time than needed, ensuring the shortest time possible while being diligent.

## 5.3 Teleological interpretation

As discussed in section 3.5 and 4.3, the aim and purpose of the directive is to make timely and diligent decisions in asylum procedures. This is another implication that there must be a limit to the period during which an increase in the number of requests for international protection must occur in order

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<sup>63</sup> Ibid, explanation to Article 31.

<sup>64</sup> CJEU Case C-63/93, *Duff e.a.* [1996] para 20.

<sup>65</sup> CJEU Case C-554/13, *Z.Zh and I.O* [2015] para 42.

<sup>66</sup> Recital 16 of the Reception Conditions Directive: 'With regard to administrative procedures relating to the grounds for detention, the notion of 'due diligence' at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.'



to still fall within the scope of Article 31(3)(b). If there is no limit, this would mean that any (gradual) increase in the influx in asylum seekers, as long as this influx makes it difficult in practice to conclude the procedure within six months, could be a reason to activate Article 31(3)(b). If there is a limit, the threshold for activation of the provision would be higher as the increase has to take place within that certain period.

Furthermore, Article 31(3)(b) states that a large number of people have to apply for protection simultaneously in order for the exception to apply. If this does not include a time-limit, this would essentially render the word 'simultaneously' useless. The fact that 'simultaneously' is included in Article 31(3)(b) indicates that the legislator meant to include a time-limit during which an increase of applications must occur in order to invoke the Article.

#### **5.4 Conclusion**

In conclusion, the interpretation of Article 31(3)(b) of the Asylum Procedures Directive implies the necessity of establishing a time limit for the increase in requests for international protection. While the literal text of the directive does not explicitly mention a timeframe, the term 'simultaneously' does suggest a temporal limitation.

Contextual interpretation within the Asylum Procedures Directive itself in conjunction with the Reception Conditions Directive supports this notion. Retention of the six-month decision period is a vital element of the Asylum Procedures Directive to realise timely decision-making. The Reception Conditions Directive showcases that the shortest possible duration of exceptions aligns with the idea of imposing limits on them due to unusual circumstances.

The teleological interpretation affirms the need for a time limit. Without it, any gradual increase in asylum seekers could trigger the exception, undermining the Directive's objective of ensuring efficient decision-making processes.

The answer to the second preliminary question is thus as follows: in order to maintain legal clarity and predictability for applicants while upholding the Directive's objectives, a defined time limit for the period during which an increase in the number of requests for international protection must occur is necessary. This period should last as long as it continues to be very difficult for the decision-making authority to complete the procedure within the six-month time limit.

## **6. Other circumstances that cannot be traced back to the increase of asylum applications**

In this Chapter the third question will be discussed: 'Can circumstances that cannot be traced back to the increase in the number of applications for international protection, e.g. the fact the determining authority faces a backlog that existed before the increase of applications or a lack of personnel capacity, be taken into account in determining if the examination procedure can be done within six months?'

This will be done by first analysing the literal text of the provision. Secondly, the provision will be interpreted within its context. And thirdly, the provision will be analysed from a teleological perspective.

### **6.2 Literal interpretation**

The literal interpretation of Article 31(3)(b) of the Asylum Procedures Directive already has extensively been discussed in section 3.3, 4.1, and 5.1. Using a literal interpretation regarding the question whether or not other circumstances can be taken into account, the provision clearly outlines a very specific circumstance under which the time limit for processing asylum applications can be extended: a large number of simultaneous applications for international protection. The criterion for extension is tied explicitly to the volume of applications being processed simultaneously, which directly impacts the practicality of concluding these procedures within the established timeframe. In other words: a nexus is required between the practical difficulty of concluding asylum applications within six months and the large number of simultaneously lodged asylum applications. This wording further suggests that the provision is concerned with the sheer volume of applications received concurrently, rather than underlying systemic and/or policy issues such as pre-existing backlogs or personnel shortages. Therefore, the text of the provision does not suggest that other circumstances can be taken into account.

### **6.3 Contextual interpretation: Article 4(1) of the Asylum Procedures Directive**

When applying a contextual interpretation to Article 31(3)(b) of the Asylum Procedures Directive, it is useful to consider how other provisions within the same Directive interact and shape the understanding of permissible delays in the asylum process. One such provision is Article 4(1) of the Asylum Procedures Directive, which relates to the designation of the determining authority and its resourcing.

Article 4(1) of the Asylum Procedures Directive outlines requirements for Member States regarding the designation of a determining authority responsible for processing asylum applications:

*'Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.'*

According to Article 4(1) of the Asylum Procedures Directive, Member States should ensure that decision-making authorities have enough fitting means, including skilled personnel as mentioned in paragraph 3 of the Article, to complete their task in accordance with the Directive. This indicates that the Directive recognizes the importance of providing sufficient resources and personnel to conduct asylum procedures effectively and efficiently. Therefore, the lack of funds or personnel cannot play a role when invoking Article 31(3)(b) Asylum Procedures Directive.

When looking at Article 31(3)(b) from a contextual perspective, considering the requirements of Article 4(1), the possibility of considering other factors than the influx of asylum seekers due to unforeseen circumstances when assessing the six-month time limit in the context of Article 31(3)(b) Asylum Procedures Directive seems unlikely. Since Article 4 of the Asylum Procedures Directive obliges Member States to supply their immigration services with enough funds, it would be contrary to that provision to extend the time limit due to a lack of funds or personnel.

Moreover, allowing other circumstances such as pre-existing backlogs or personnel shortages to be considered for extending the time limit would undermine the effectiveness of the procedure, the importance of which is emphasised in recital 18, of the Directive.

### 6.3.1 The Returns Directive

In the case of *K v Landkreis Gifhorn*<sup>67</sup>, the CJEU provided an interpretation that is pertinent to addressing the current question. The case concerned a Pakistani national who was detained in Hannover prison for the purpose of being removed from Germany. The referred questions primarily focused on Articles 16 and 18 of Directive 2008/115/EC, commonly known as the Returns Directive. Of particular significance for our analysis is the Court's analysis of the concept of an 'emergency situation' as outlined in Article 18.

Article 16 lays down an obligation for the Member States to place individuals under return procedures in specialised detention centres. Article 18(1) of the Returns Directive provides that *'In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).'*' The similarity of this provision with Article 31(3)(b) of the Asylum Procedures Directive is evident and was already observed earlier in this expert opinion.

First of all, in paragraph 71 of this judgement the CJEU noted that Article 18(1), being an exceptional measure to Article 16, should be interpreted restrictively. Secondly, the Court specified that Member States must be prepared for extraordinary situations and be able to adopt sufficient structural measures to alleviate such burdens, such as an unexpectedly large number of returning third country nationals.<sup>68</sup>

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<sup>67</sup> CJEU Case C-519/20, *K v Landkreis Gifhorn* [2022].

<sup>68</sup> *Ibid*, para 80.

Most importantly, the CJEU has noted that Member States cannot rely on emergency clauses, such as Article 18 (1) when *'the heavy burden placed on the capacities of its specialised detention facilities is not the result of an unexpected increase in the number of third-country nationals subject to a detention measure, but is caused solely by the reduction in the number of places available in those specialised detention facilities or by a lack of forward planning on the part of the national authorities'*<sup>69</sup>

Lastly, according to the Court, a Member State must be able to demonstrate that the heavy burden persists throughout the period in which the State relies on the exceptionality clause.<sup>70</sup>

The case of *K v Landkreis Gifhorn* clarified the CJEU's approach to adjudicating exception clauses related to the sudden influx of third-country nationals. As already mentioned, such clauses should be interpreted strictly. Only a large number of arrivals, rather than other circumstances such as backlogs or insufficient personnel capacity, would justify turning to exceptional measures. Hence, when determining whether an examination period can be done within six months, any circumstances other than the increase in the number of asylum applications cannot be taken into account.

#### **6.4 Teleological interpretation**

As discussed in section 3.4, the Common Asylum System (CEAS) is governed by the principle of solidarity and fair sharing of responsibility.<sup>71</sup> In addition to this, the CEAS ensures common standards for fair and efficient asylum procedures in the Member States.<sup>72</sup> The goal of the Asylum Procedures Directive is to further develop the standards for procedures granting and withdrawing international protection.<sup>73</sup> As explained in section 3.4, 4.3 and 5.3, the aim and purpose of the Directive is to make timely and diligent decisions in asylum procedures. Including other factors that cannot be traced back to the increase in the number of applications undermines these principles, as it would allow Member States to unilaterally influence whether or not time limits can be extended.

#### **6.6 Conclusion**

The comprehensive analysis of Article 31(3)(b) of the Asylum Procedures Directive, examined through literal, contextual, and teleological interpretations, underscores a stringent framework for extending the timeframe for processing asylum applications. The wording of the provision is specific: it permits extensions only in circumstances of a significant increase in the number of applications, linking the extension directly to the volume of simultaneous applications and not to systemic deficiencies such as pre-existing backlogs or personnel shortages.

Contextually, other provisions within the Asylum Procedures Directive, particularly Article 4(1), require Member States to equip their determining authorities with sufficient resources, thereby precluding excuses based on resource deficiencies. The contextual interpretation is bolstered by precedents such as the CJEU's judgement in the *K v Landkreis Gifhorn* case, which emphasises that

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<sup>69</sup> Ibid para 81.

<sup>70</sup> Ibid para 82.

<sup>71</sup> Recital 2 of the Asylum Procedures Directive.

<sup>72</sup> Recital 5 of the Asylum Procedures Directive.

<sup>73</sup> Recital 12 of the Asylum Procedures Directive.

emergency provisions should be invoked strictly and only in response to unforeseen burdens directly attributable to new external pressures, not pre-existing conditions.

Teleologically, the directive aims to ensure the swift and efficient processing of asylum claims, integral to the broader goals of the CEAS. This goal is undermined if Member States are permitted to invoke Article 31(3)(b) for delays caused by internal mismanagement rather than genuine, unforeseen increases in asylum applications.

In conclusion, the analysis suggests that Article 31(3)(b) should not be interpreted to allow for extensions based on factors unrelated to increases in asylum applications. Such an interpretation ensures that the provision remains a tool for managing genuine emergencies rather than a loophole through which systemic inefficiencies can be perpetuated. This preserves the effectiveness of the Asylum Procedures Directive and upholds the principle of timely and fair processing of asylum applications across the EU.

## 7. Conclusion

This Opinion addressed the interpretation of Article 31(3)(b) of the Asylum Procedures Directive by answering three questions referred for preliminary ruling by the Administrative Jurisdiction Division of the Council of State.

Question 1a concerns the manner in which ‘simultaneously’ submitted requests for international protection must be interpreted. The Opinion concludes that Article 31(3)(b) of the Asylum Procedures Directive precludes decision-making authority from making use of its power to extend the decision period from six to 15 months when there is a large number of requests for international protection submitted simultaneously, if the increase in the number of requests for international protection occurs gradually over a certain period, making it practically very difficult to complete the procedure within the six-month timeframe as a result.

Question 1b is about the criteria that should be used to assess whether there is a ‘large number’ of requests for international protection. The Opinion concludes that the absolute number of applications for international protection and the ability of such a number to impose an unforeseen burden on the usual operations of the decision making body are relevant criteria to do so.

The second question concerns whether a limitation in time applies to the period during which an increase in the number of requests for international protection must occur in order to still fall within the scope of Article 31(3)(b). The Opinion concludes that to safeguard legal certainty for applicants while upholding the Directive's objectives, a defined time limit for the period during which an increase in the number of requests for international protection must occur is necessary. This period should last as long as it continues to be very difficult for the decision-making authority to complete the procedure within the six-month time limit.

The third question considered whether circumstances that cannot be traced back to the increase in the number of applications for international protection, could be taken into account in determining if the procedure can be done within six months. The Opinion concludes in this regard that in determining if the examination procedure can be done within six months, factors not related to the increase in the number of asylum requests cannot be taken into account.