

5.3. Assessment framework

The EUAA's guidance expands on the different modes of participation, noting that when conducting an assessment of the individual responsibility of the applicant for the excludable act, the assessment must be based on both the nature and extent of the applicant's involvement, as well as their state of mind. The applicant's state of mind refers to their knowledge and intent in relation to the excludable acts. It highlights that conduct may include both actions and omissions, for example the failure to act, and emphasises that individual responsibility may extend even when an applicant only attempts the excludable acts. As seen above, in certain cases, the attempt itself may constitute a crime, fulfilling the material element of the assessment, such as in the case of attempted murder.

The modes of participation set out in the guidance are closely aligned with Article 25 of the Rome Statute and include:

- **Direct commission;**
- **Inducing commission** of an excludable act by others, including through planning, instigating or ordering;
- **Aiding and abetting**, i.e. a substantial contribution to the commission of an excludable act by others (for example by providing physical, logistical or financial support, encouraging the commission of the excludable acts by others, or the provision of moral support);
- **Joint criminal enterprise** involving a substantial contribution to a common criminal purpose of a group to carry out a commonly intended crime;
- **Command responsibility** in the context of a superior-subordinate relationship between persons, in which the individual with a superior role was aware or should have been aware of crimes committed by their subordinates.

Similarly, the EUAA Judicial Analysis on Exclusion: Articles 12 and 17 Qualification Directive (February 2020) identified the following modes of individual responsibility: direct commission of excludable crimes/acts, incitement, aiding and abetting, joint criminal enterprise/common purpose liability, command/superior responsibility and membership of an organisation responsible for excludable crimes or acts, including organisations or groups designated as 'terrorist'.

While in the case of a direct commission of an excludable act and the incitement of an act it may be more straightforward to establish individual responsibility due to the closer causal link between the applicant's action and the crime, aiding and abetting and joint criminal enterprise may be more complex as the applicant's activities may be more remote from the crime. In order

to assess cases of aiding and abetting and joint criminal enterprise, a substantial contribution to the crime is required. The EUAA's guidance defines 'substantial contribution' in terms of a 'substantial effect' to the perpetration of the act. UNHCR's Information Note on the Application of Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' defines the same varied modes of participation in order to establish individual responsibility, also highlighting that responsibility is not only attributed to the applicant when they have directly committed a crime, but can also be attributed when they have made a 'substantial contribution' to its commission.

Additionally, to establish individual responsibility, it must be examined whether the applicant acted with knowledge and intent to participate in the excludable acts. As highlighted above, in international criminal law, this requirement is enshrined in Article 30 of the Rome Statute. In asylum law, the CJEU has provided limited clarification by referring in *Lounani* to the relevance of the applicant's knowledge of the activities of the group to which the excludable acts were linked, indicating that this subjective element forms a part of the assessment.

The EUAA's guidance broadly aligns with this approach, defining knowledge as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". As regards intent, it notes that two aspects need to be taken into account, including whether the applicant intended to engage in the conduct and whether the applicant intended to cause the consequences (or was aware they will occur in the normal course of events). However, it notes that the requirement of knowledge and intent varies depending on the mode of participation.

In cases of incitement, the EUAA's guidance requires that the applicant either intended to provoke the commission of the act or was aware of the substantial likelihood that the crime would occur as a consequence of their actions. On the other hand, in cases of aiding and abetting, a lower threshold is applied. The guidance notes that the applicant must have been aware that their conduct would assist or facilitate the commission of the crime, although precise knowledge of the specific act is not required. Unlike incitement or joint criminal enterprise, the guidance notes that aiding and abetting does not require the applicant to share the intent of the principal perpetrator. It is sufficient that the applicant intentionally engaged in the assisting conduct, while knowing that such assistance would facilitate the commission of an excludable act. Finally, with regard to command responsibility, the knowledge requirement is interpreted more broadly as depending on the applicant's position; it may be considered that the applicant knew or should have known about the acts committed by their subordinates, without the need to establish the applicant's intent for the specific crimes.

The EUAA's guidance emphasises that an applicant's link to a group or regime involved in excludable acts does not automatically establish individual responsibility. Case officers must still determine the applicant's personal responsibility by identifying the relevant mode of liability and assessing both conduct and state of mind. While factors like voluntary association, rank and influence may allow intent and contribution to be inferred depending on the circumstances, mere association is insufficient.

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