

5.4. Divergences and challenges in national practices

The above framework sets out the general principles to establish individual responsibility. In practice, national courts have diverged in their application of these principles. As a preliminary observation, the EUAA Practical Guide on Exclusion from International Protection (September 2026) recommends that case officers identify the relevant mode of individual responsibility and examine the facts in light of the respective criteria, this approach has not generally been adopted by courts. The majority of case law that was analysed did not use this system of classification to identify the mode of participation undertaken by the applicant, which presents a challenge when analysing trends across case law. Even when the court does classify the mode of participation, the boundary between the different modes of participation is not always clearly drawn in national jurisprudence, and the choice of which mode to apply to a given set of facts appears to be frequently a decision made by the court rather than one that follows necessarily from the circumstances of the case. That choice may have consequences as different assessment criteria apply depending on the mode of participation.

Aside from the direct commission of a crime, the most commonly identified mode of participation by national courts was aiding and abetting. In contrast, case law identifying a joint criminal enterprise was sparse. When considering such cases, countries generally follow the assessment framework set out above by assessing whether the applicant made a substantial contribution to the crime with the requisite knowledge and intent. However, despite this broad assessment framework being followed, wide divergence in outcomes was observed. In this regard, the divergence across case law when establishing individual responsibility generally does not stem from the type of activity itself. Thus, no commonly identified activities emerge from the jurisprudence which can be considered as substantial contributions.

The principle point of divergence hinges on the varying interpretations and evidentiary thresholds applied to examine whether the ‘substantial contribution’ and the ‘knowledge and intent’ requirements are satisfied. This has led to different outcomes, even for the same type of activity carried out within the same group or regime. Thus, no commonly identified activities emerge from the jurisprudence which can be considered as substantial contributions.

Sections 5.4.1-5.4.5 examine the principle unresolved questions which emerge from national case law and which contribute to the non-uniform application of the exclusion clauses. In particular, the assessment of whether an applicant made a substantial contribution to an excludable act raises three related but distinct questions: i) how direct the causal connection between the applicant's conduct and the crime must be; ii) whether and in what circumstances a

failure to act can amount to individual responsibility or constitute a substantial contribution; and iii) to what extent causal impact can be inferred from COI and other contextual factors rather than established through specific evidence.

The assessment of knowledge and intent in exclusion cases also raises questions. The following sections address two points in particular. The first is whether aiding and abetting requires purpose-based intent (acting with the aim of bringing about the crime) or whether knowledge that one's conduct would facilitate the crime is sufficient. The second is whether knowledge can be inferred objectively from the systemic context established by COI, and how specific must COI be in relation to the applicant’s role and circumstances for inference to be possible.

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