

Excuse Me, What's the Fastest Way Out of Dublin?

Civil Society and the Future of Refugee Responsibility Sharing in the European Union

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A cornerstone of the Common European Asylum System, the Dublin Regulation is collapsing. A reform of the law is now under way. What are the challenges for civil society actors who seek to influence the reform process? What should be their strategic agenda in light of the EU Commission's latest reform proposal? That proposal hardly addresses civil society views on the political and structural reasons for failure, focusing instead on the Dublin system's technical flaws. This paper argues that civil society actors should identify innovations that can, if proven to work, function as stepping stones for longer-term change. In particular, this should include a system of preference matching and other positive incentives for the planned fairness-mechanism, which has to be attractive to governments too.

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Deutsche Zusammenfassung - German Summary

Im Zuge der „Flüchtlingskrise“ bröckelt die politische Unterstützung für die geltende Dublin-Verordnung, einen Grundpfeiler des gemeinsamen europäischen Asylsystems. Im Mai 2016 legte die EU-Kommission einen Neuentwurf der Dublin-Verordnung vor, damit erreichte der Reformprozess des EU-Gesetzes eine neue Stufe. Dieser Aufsatz fragt nach der Ausgangsposition zivilgesellschaftlicher Akteure im Reformprozess. Auf welche ihrer Kritikpunkte geht der Gesetzentwurf ein? Mit welcher strategischen Agenda sollten sie den Reformprozess und die Zukunft des europäischen Asylsystems beeinflussen?

Seit im Jahr 2003 die erste Fassung der Dublin-Verordnung in Kraft trat, wurde sie dafür kritisiert, Asylsuchende ungleichmäßig auf die Mitgliedsstaaten zu verteilen, nur wenige Asylsuchende in die eigentlich zuständigen Länder zu überstellen, und dabei Individualrechte und -interessen nicht ausreichend zu berücksichtigen. Seitdem hat sich an den grundlegenden Regeln der Dublin-Verordnung nichts geändert. Die gravierendsten Probleme, darunter die ungleichmäßige Belastung der Mitgliedsstaaten, haben politische Gründe. Hinzu kommt, dass Regierungen und Asylsuchende das System relativ einfach unterwandern können, wenn sie es ablehnen.

Zivilgesellschaftliche Akteure forderten bislang vor allem eine gerechtere Verantwortungsteilung und die Berücksichtigung individueller Präferenzen von Asylsuchenden, zum Beispiel von Sprachkenntnissen. Die zivilgesellschaftlichen Akteure waren sich allerdings uneinig, ob diese Ziele innerhalb des Dublin-Systems umgesetzt werden können oder ob dafür ein gänzlich neues System geschaffen werden müsste. Die Diskussion um die Grundsatzentscheidung für oder gegen das Dublin-System nahm unter zivilgesellschaftlichen Akteuren viel Raum ein, obwohl den konkreten Alternativen für ein vollständig neues System stets realistische politische Mehrheiten fehlten.

Im April 2016 machte die Kommission zwei mittelfristige Vorschläge für eine Reform des Dublin-Systems: Der ambitioniertere Vorschlag sah vor, die geltenden Kriterien der Dublin-Verordnung vollständig durch ein Quotensystem zu ersetzen. In einem weniger ambitionierten Vorschlag wollte die EU-Kommission die Verordnung um eine Quote für Notfälle ergänzen. Am Ende siegte Vorsicht über Risiko – offenbar auch aus Sorge, die Mitgliedsstaaten zu verprellen und damit auch der eigenen Akzeptanz bei den Mitgliedstaaten zu schaden.

Der Gesetzentwurf der Kommission geht vor allem auf einen Kritikpunkt ein: Statt durch Positivanreize versucht er, Vollzugsdefizite der Verordnung durch Sanktionen abzubauen. Politische und strukturelle Schwachstellen bleiben dabei weitgehend unberührt. Ein dauerhafter Mechanismus zur Umverteilung von Asylsuchenden („Fairness-Mechanismus“) soll zwar eine bessere Verantwortungsteilung erreichen.

Doch die Hürden für die Aktivierung des des Fairness-Mechanismus' sind hoch und zivilgesellschaftliche Forderungen, die Präferenzen der Asylbewerber zu berücksichtigen, bleiben in dem Fairness-Mechanismus weitgehend unberücksichtigt.

Für zivilgesellschaftliche Akteure wird es kompliziert, auf den laufenden Reformprozess Einfluss zu nehmen. Sie haben weniger Zugänge zu politischen Entscheidungsträgern als vor der „Flüchtlingskrise“, da Entscheidungen in Asyl-Dossiers nicht länger auf Arbeitsebene getroffen werden. Auch macht es das hohe Tempo der politischen und rechtlichen Entwicklungen auf Ebene der EU und ihrer Mitgliedsstaaten schwieriger, Ressourcen auf ein einzelnes EU-Themendossier zu konzentrieren. Vertreter der Zivilgesellschaft, die an einem wirklich europäischen Asylsystem mit hohem Individualrechtsschutz interessiert sind, brauchen eine strategische Agenda für ein best-case-Szenario unter den aktuellen Rahmenbedingungen. Ihnen darf es nicht nur darum gehen, bestehende Individualrechte zu „halten“. Sie müssen auch politisch realisierbare Zwischenschritte für ein langfristiges Asylsystem entwickeln, das Asylsuchende gleichmäßiger auf Mitgliedsstaaten verteilt, dabei individuelle Präferenzen Asylsuchender berücksichtigt und andere Positivanreize setzt. Vertreter der Zivilgesellschaft sollten ihre Anstrengungen daher darauf konzentrieren, dass der Fairness-Mechanismus Präferenzen von Asylsuchenden zur Wahl des Aufnahmelandes mitberücksichtigt oder andere Positivanreize für Asylsuchende wie für Staaten setzt. Wenn ein System zum Abgleich von Präferenzen und wenn Positivanreize an einer begrenzten Zahl von Asylbewerbern pilotiert und die Wirkung empirisch belegt wurde, werden solche Neuerungen auch für Regierungen attraktiv.

Executive Summary

The Dublin Regulation, which is the cornerstone of the Common European Asylum System, is crumbling. The law, directly applicable in all European Union states, seeks to achieve a system in which asylum seekers submit only *one application for asylum in one member state*. In May 2016, the EU Commission presented a proposal for the “Dublin IV” regulation, which moved an ongoing reform process of the law into a new phase. This paper seeks to assess the position of civil society actors – non-governmental organizations, think tanks and foundations – in the wake of the reform process. Does the commission’s draft address civil society perspectives on why the current system failed? What should be the strategic agenda of civil society actors seeking to influence the reform process and the future of the European asylum system?

Since its adoption in 2003, the Dublin Regulation has come under pressure for failing to achieve an equal distribution of asylum seekers, for transferring low numbers of people to other countries and for failing to safeguard and consider fundamental rights and individual interests. Because the principles underpinning the Dublin system have not changed, the problems related to their application also have not changed. Many of the system’s flaws are political in nature, in particular the disproportionate burden shouldered by frontline states at the external border, as well as differences in the quality of asylum procedures. What the flaws have in common is the notion of “fairness” towards the asylum seeker and fairness among states. Some flaws are technical, such as unclear rules and a design that works only for small numbers of asylum seekers. Ultimately, the Dublin system is depreciated by both states and individuals, and the regulation’s application can be easily undercut.

Civil society recommendations for how to reform the system have primarily addressed the inadequate sharing of responsibility and the disregard of asylum seekers’ individual preferences. Civil society has been divided about whether to advocate for a better Dublin system or to scrap it altogether and allocate responsibility for asylum applications under a new system. Much of the internal debate has focused on making a decision for or against Dublin. However, scrapping the Dublin system has never been politically realistic.

The political reform process of the Dublin Regulation developed traction in 2015, when larger-scale onward movement made many states consider the reintroduction of internal border checks. In spring 2016, the EU Commission presented a communication that laid out two different options for Dublin reform. The more ambitious option was to replace the criteria of the Dublin Regulation with a quota system. The less ambitious option was to complement the Dublin criteria with a quota. Ultimately, caution prevailed: the commission believed that being too ambitious would alienate the member states and undermine its legitimacy, so it proposed the less ambitious option.

Does the EU Commission’s draft address civil society perspectives on why the current system failed? The proposal focuses on technical reasons for why the Dublin Regulation is not applied and seeks to counter these flaws with negative incentives for both states and individuals. Meanwhile, the political and structural flaws of the

regulation are largely left untouched. In respect of responsibility sharing, the proposal represents an attempt to turn past relocation measures into a standing fairness mechanism. Civil society, however, believes that the preferences of asylum seekers should be taken into consideration. These ideas do not play a role in the fairness mechanism proposed by the commission.

For civil society, the ongoing reform process is extremely tricky. Most civil society actors have fewer political access points than they did before the “refugee crisis,” as all asylum-related policy has become extremely politicized. Those seeking a truly European asylum system of high standards will now have to strategize for the best-case scenario in a bad-case scenario. This does not only mean upholding the maximum amount of individual rights safeguards. With Dublin reform likely to be incremental, the longer-term reform perspective regarding the EU asylum system – as it looks in 2030, for example – will remain as relevant as it is today. The challenge is to project a vision of a more harmonized and fairer (from the individual as well as the state perspective) system of protection in the EU states, to foresee the intermediate steps needed for that vision and to prioritize these steps in the reform process. In that context, short-term efforts should be directed at introducing a system of preference matching and other positive incentives for the planned fairness mechanism. Experiences with the concrete impact and challenges of preference matching and other positive incentives need to be collected so as to make such innovations attractive to governments.

Context

Over the past year, the events of the “refugee crisis” have triggered unprecedented political momentum towards an overhaul of the EU asylum system and a push for a new system of sharing responsibility for asylum applications. The current system is based on the Dublin Regulation: the law, directly applicable in the EU member states,¹ determines which state is responsible for deciding the merits of an asylum application submitted by an individual arriving in the EU. The law is guided by the idea that asylum seekers should have *one chance* to lodge an application for asylum in *one member state*, without creating “in orbit” cases for which no one is responsible.

While dwindling political support for the Dublin Regulation among the majority of the EU member states is new, criticism of the regulation is not. Since its adoption in 2003, the regulation has come under fire by civil society actors and countries at the receiving end of asylum applications. These actors have pointed out, among others, that the regulation fails to achieve an equal distribution of asylum seekers among member states, that it contains insufficient individual rights safeguards and that its ambition to have people transferred within the EU is vastly at odds with the reality of low transfer numbers. Some of these criticisms were addressed in a reform of the regulation, adopted in 2013. But the Dublin system has remained largely the same, and criticism has not ebbed away.

In May 2016, the EU Commission tabled a proposal for a new “Dublin IV” regulation, moving the reform process into a new phase. This paper seeks to assess the position of civil society² in the wake of that reform process. Does the commission’s draft address civil society perspectives on why the current system failed? What is the most likely outcome of the reform process? What are the challenges faced by civil society actors as they try to influence the ongoing reform process, and what should be their strategic agenda regarding the future of the Dublin system?

Dublin Failures

The Patients

The Dublin Regulation is not just any law in the Common European Asylum System, the EU's package of asylum laws. The regulation is relevant for every person who lodges an asylum application in an EU country, as well as for every country that receives an application. The regulation's impact is determined not only by the number of individuals moving from one state to another, but also by the number of those who stay.

Whether or not a particular state is responsible for an asylum application has significant implications for the asylum seeker and the state. Across member states, there are considerable differences in reception conditions, waiting time, the use of detention for asylum applicants, the duration of asylum procedures and the chances of an application's success.³ In addition, there are no opportunities for an asylum seeker to move to another EU country immediately after a positive asylum decision, and even among those whose applications are rejected, many remain in the territory of a member state that they are not supposed to be in.⁴

For that reason, the responsibility for deciding an asylum application and the result of a Dublin procedure is important not only for every asylum seeker, but also for every state. EU law requires member states to issue a residence permit to individuals with successful asylum applications. Having responsibility for an asylum application can be tantamount to taking on the practical burdens that follow the positive outcome of that application – for example, welfare benefits pending a job offer.

The Symptoms

Few Transfers

For every asylum application, a member state can assess whether it or another state is responsible for making a decision. If it believes that the responsibility falls on another EU country, it can submit a written request, or “Dublin request,” to that state. More than 65,000 such requests were made in 2014, the last year for which comprehensive data is available from EUROSTAT, the statistics office of the EU. In other words, member states submitted Dublin requests for about 12 out of 100 first-time asylum applications. For the remaining individuals, the responsibility lay with the state to which the applicant lodged an application. From the thousands of transfer requests, few lead to actual transfers of a person from one country to another. There are two main reasons for this. First, not all requests are accepted. For instance, about 60 percent of Germany's requests were accepted in 2014. Second, the chances of an actual transfer are low, even after a state accepts responsibility for an asylum application. The five countries that make the most requests to other states end up transferring on average fewer than a third

of the individuals whose transfers have been accepted. Numbers from Germany show that the percentage of accepted requests that actually led to transfers from Germany to other countries varied between 2 to over 20 percent in the first half of 2015.

One-Sided Application

Broadly speaking, under the Dublin Regulation criteria, an EU state may be responsible for a particular applicant because it enabled that person's entry ("first country" rule) or dealt with that person's application in the past, or because there are humanitarian or family-related reasons at play. When it comes to actual practice under the Dublin Regulation, however, the criteria appear far less diverse. Its humanitarian criteria are rarely applied. Rather, in about half of all transfer requests of 2014, the top-five sending states relied on the provision that requires EU states to take back an asylum seeker if he or she lodged an asylum request in another EU state.⁵ Ironically, the humanitarian dimension of the law is most visible to those for whom it does not apply. People with a refugee or other protection status who decide to move onwards cannot benefit from the regulation's rules regarding family unity or children's best interests.

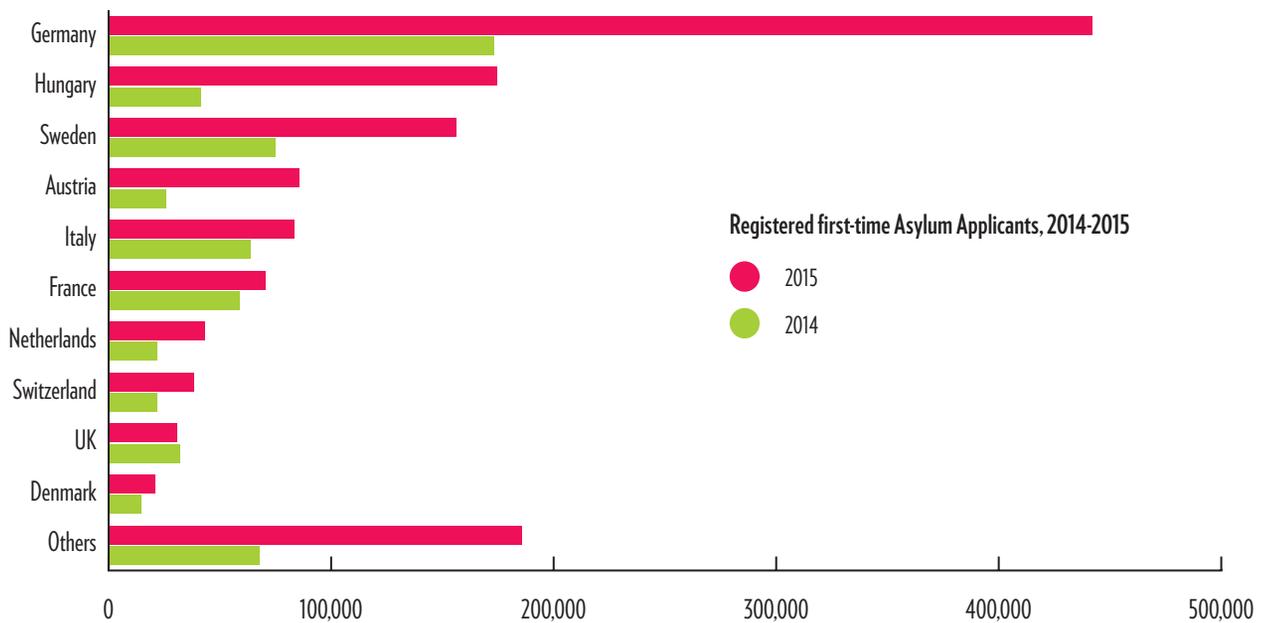
A third of transfer requests are based on the "first entry" criteria of the Dublin Regulation: the issuing of a visa, or irregular entry. Humanitarian and family-related reasons play a marginal role in the regulation's application. In 2014, they accounted for fewer than 2 percent of accepted Dublin requests.

Unequal Distribution

Given the predominance of the "first entry" criterion and the fact that asylum seekers most frequently arrive by boat, states located at the EU's periphery must handle the highest number of arrivals. There are a few legal options for closing external borders to asylum seekers or turning them away and refusing access to asylum procedures. In 2015, there was a turn in the absolute numbers. Germany, Hungary and Sweden together registered more asylum applications than the other 29 states in the Dublin system combined. Germany accounted for a third of all registered asylum applications (see figure on page 12).

The Reasons

The current Dublin Regulation is the result of multiple reform processes having reached a treaty (the Dublin Convention) and then leading to different regulations,⁶ while the basic principles of responsibility sharing remained the same. Now there is widespread consensus among both civil society actors – non-governmental organizations, think tanks and researchers – and policymakers that the current Dublin system has failed, or is at least ineffective. Only some of the reasons for its inefficiency are technical in nature, such as divergences in how to interpret the regulation's criteria. Most of the reasons relate to political failure, and most of them intersect with each other. Many of the reasons concern the issue of "fairness" towards the asylum seeker and among states.



Below are the points identified by civil society and governments (see Annex for a list of publications). Many of these points are shared among civil society and policymakers. Some, such as the argument that asylum seekers “overuse” the possibility of appealing transfers, are made primarily by government actors.

THE EUROPEAN LEVEL

The “unlike Europe” argument

The EU is composed of states with divergent development opportunities, qualities of asylum procedures and treatments of asylum seekers (e.g., use of detention).

The “lacking responsibility sharing” argument

Dublin was not intended to be a burden sharing instrument. Its policy objectives are different: preventing onward movement (“secondary migration”) and having clear rules about the responsibility of the state that allows the entry of an asylum seeker.

The “border closure” argument

Dublin encourages border closures. It sets incentives for border protection by making the states at the external borders responsible for deciding asylum applications. Those seeking to prevent onward movement do so by closing internal borders.

The “fair weather” argument

Dublin is designed only for small numbers of asylum applications. Large numbers make it impossible for authorities to comply with the maximum duration of procedures and lower the quality of transfer requests.

THE MEMBER STATE LEVEL

The “deliberately undercut” argument

Member states have purposely failed to register asylum seekers or driven down standards in order to be less attractive to asylum seekers, encourage onward movement and reduce returns back to their territory.

The “overburdened frontline states” argument

Frontline member states fail to register and comply with minimum standards because they are overburdened.

The “cost-benefit” argument

Low transfer rates and almost equal amounts of incoming and outgoing transfers make member states reluctant to apply the regulation. The coercive nature of the system makes it largely ineffective.

The “technocrat” argument

States disagree about the regulation’s provisions because they are not sufficiently clear. The criteria regarding “first entry” are straightforward, whereas the other criteria are not. For example, evidence on family members is not as clear-cut as a fingerprint in a database.

THE INDIVIDUAL LEVEL

The “asylum seeker preferences” argument

The criteria take insufficient account of the individual interests of asylum seekers (e.g., language, social ties, job prospects).

The “human rights” argument

The conditions in many member states are, objectively speaking, so poor that they amount to a human rights violation, forcing asylum seekers to move onwards.

The “deliberately undercut” argument

Asylum seekers overuse the possibility of appealing Dublin decisions, frustrating the workability of the system. Applicants abscond for 18 months or more, thereby annulling the transfer and the result of the Dublin procedure.

The “enabling smuggling” argument

The desire of asylum seekers to bypass the system drives the use of irregular means of transportation.

The Cure: The Recommendations of Civil Society

Civil society reform recommendations have mainly addressed two aspects of the failing Dublin system: the lack of responsibility sharing and the disregard of asylum seekers' individual preferences regarding their country of refuge.

In essence, suggestions for reform either propose a completely different operating principle of responsibility sharing for asylum applications, or propose changes that are complementary to the Dublin Regulation's "first country" rule. The question of advocating for a "better, alternative Dublin" or for "no Dublin" became a critical matter among some NGOs, to some extent pushing aside the discussion on concrete improvements of the Dublin system. A broad consortium of non-governmental organizations opted for the latter, suggesting free choice of the asylum country.⁷ The "free choice" suggestion could have boosted the Dublin system's efficiency and efficacy by working with, rather than against, asylum seekers. But it was never politically realistic, especially given that the number of asylum seekers that would move to each country is both impossible to predict and to control under such a system.

The recommendations are listed below. Those with a high change factor relative to the status quo are not compatible with the current principles of the Dublin Regulation.

| Recommendation | Addressing which flaw? | Status quo change factor |
|---|---|--------------------------|
| Cap and trade: EU states can trade admission quotas. | Responsibility sharing | High |
| Full quota system: Dublin is replaced with a system based on objective criteria, e.g., GDP, population size. | Responsibility sharing | High |
| Free choice: Asylum seekers get to choose their country of refuge, even before the asylum procedure begins. | Asylum seeker preferences; “border closure” argument | High |
| Dublin compensation fund: States that bear smaller burdens should compensate the others. | Responsibility sharing | Modest |
| Introduce a permanent relocation mechanism: Non-frontline states take in asylum seekers from frontline states. | Responsibility sharing | Modest |
| Incentives for refugee admission below the central government level: Municipalities compete for refugee admission in exchange for funds. | Responsibility sharing | Modest |
| Mutual recognition of positive asylum decisions: After a positive decision of an asylum application, individual can either immediately or after a certain waiting time move to a country of his/her choice. | Asylum seeker preferences | Modest |
| Compensate uneven distribution with resettlement: To introduce a responsibility sharing element, states that take in a relatively small share of asylum seekers resettle refugees from outside the EU. | Responsibility sharing | Low |
| Dublin with carrots: Introduce a system matching the preferences of asylum seekers. | Asylum seeker preferences | Low |
| Human rights-oriented implementation of Dublin: Improve right to information, interviews, criteria and remedies. | “deliberately undercut” argument; “technocrat” argument | Low |

Dublin Futures

Inside EU Institutions: A Twisting Roadmap

The Dublin Regulation has a built-in provision of monitoring and evaluation. It assumes that the EU Commission will report on the law's application and, if necessary, propose amendments. According to the original timeline, this report was to be presented to the European Parliament and the European Council by July 21, 2016.⁸ In May 2015, when larger-scale onward movement prompted many states to consider reintroducing internal border checks, it became apparent that the original timeline for a report by the EU Commission was politically untenable, and that the commission would have to suggest more than incremental changes, and quickly. In its Agenda for Migration, the commission suggested that it may be necessary to revise the Dublin system's legal parameters beyond incremental amendments.

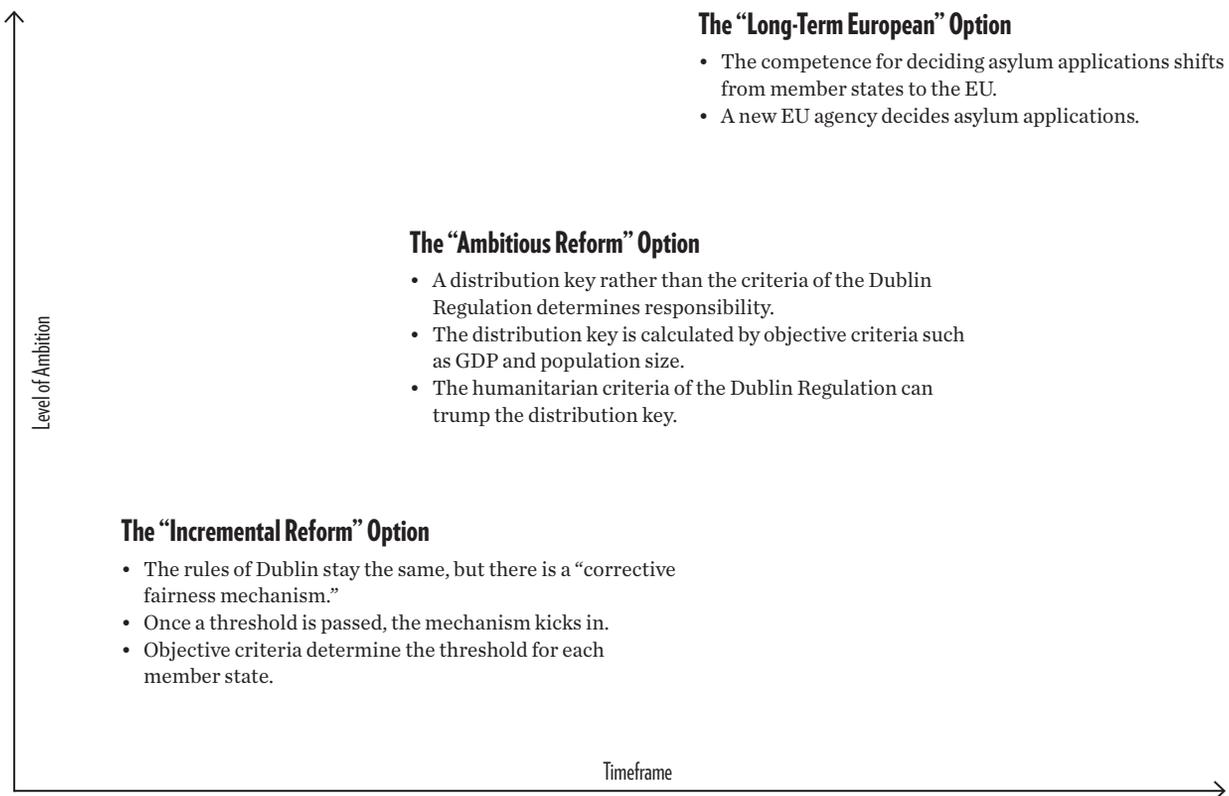
In summer 2015, the EU Commission ordered an evaluation of the law to elaborate on issues such as relevance, effectiveness and efficiency, based on consultations with legal and policy advisors in 19 member states. There had been a similar evaluation in 2007, which compiled statistics on transfer requests and actual transfers made, exploring the reasons for the gap between the two figures and listing interpretative differences of the regulation's key provisions.⁹ In late 2015, few of the regulation's problems had changed; as a result, the evaluation lost some of its original appeal as a vehicle for reform.

However, the 2015 evaluation revealed two new insights. First, it demonstrated the strain that increased numbers put on the Dublin system: higher numbers exacerbate known problems related to intra- and inter-government coordination, and to insufficient quality of transfer requests. Second, the evaluation was the first to deliver an estimation of the costs of the whole system: costs related to administration, procedures and transfers amounted to about 1 billion euros.

Meanwhile, focus had already shifted to an alternative system that the commission would eventually propose, and political pressure made the leadership of the dossier move from the level of the commission's Directorate General for Migration and Home Affairs to First Vice-President Frans Timmermans and his cabinet.

In March 2016, the EU heads of states came to an agreement with Turkey, wherein the latter would return all irregular migrants crossing to the Greek islands from Turkey and resettle outside of Turkey one Syrian for every Syrian returned. The agreement also put into place a voluntary humanitarian admission scheme. Turkey would be supported in the admission of asylum seekers and refugees with an additional 3 billion euros.

In April 2016, the EU Commission issued a communication¹⁰ that laid out two options for Dublin reform: one more and the other less ambitious in terms of political feasibility, and one more and the other less European in its problem-solving approach. The more ambitious option would scrap the Dublin system entirely and replace it with a quota system. The less ambitious option would merely integrate a quota into



EU Commission’s Reform Options, April 2016

the existing Dublin system. The commission also presented its long-term vision of a more European system, which would require the creation of an EU agency that decides applications for asylum.

Alongside the different reform proposals, there were two different strands of opinions among EU commissioners. Despite skepticism regarding the political feasibility of the ambitious option, a majority of commissioners and First Vice-President Timmermans, favored the ambitious option because it would go beyond a quick fix. A minority favored the less ambitious option because it was deemed a more realistic approach to removing pressure from frontline states, and politically more feasible. Ultimately, despite initial sympathy for an ambitious European option, caution prevailed. The EU Commission’s legitimacy among some member states had already been weakened, given that it is perceived as a proponent of more balanced and higher admission of asylum seekers. In this respect, there was a clear political risk in going beyond what member states might be willing to accept.

Reform Proposals: What the Commission Wants

The EU Commission tabled its proposal for a new Dublin Regulation on May 4, 2016. The proposal leaves Dublin intact, but seeks to complement it with a “fairness mechanism.”

The key elements of that mechanism are as follows:

- A formula taking into account population size and GDP determines a baseline number of asylum seekers for every country.
- Once the number of asylum applications that a member state is responsible for under the Dublin criteria, or has resettled from other countries, is higher than 150 percent of the baseline, the mechanism kicks in. Other member states have to accept the relocation of that surplus, but not of individuals whose asylum applications are inadmissible.
- Member states that do not wish to participate in the relocation process have to pay 250,000 euros per asylum seeker to the state accommodating that person.
- The numbers are recorded in real time by a new registration system.

The fairness mechanism is complemented by a sort of extension of Dublin beyond EU territory. Before the Dublin procedure even starts, it is obligatory to test whether an asylum application is admissible. In particular, states have to assess whether the applicant comes from a “safe country of origin,” or whether another state outside the EU could in the future or has in the past provided international protection to an asylum seeker – along the lines of the deal in place between the EU, Greece and Turkey. If so, responsibility for the application will lie with the state that made the admissibility check.

Other suggestions aim at making sure that the existing rules are applied and that application is more effective. These include the following:

- Asylum seekers are obligated to make an application for asylum in the first country of entry. If he or she does not comply, he or she will be subject to a fast track procedure and lose all benefits except for emergency health care.
- The onus of providing proof of relevant information to determine responsibility (such as states transitted and presence of family members) is shared between the asylum applicant and the state.
- Deadlines that have expired no longer shift responsibility to another state from the one originally responsible.
- There are shorter time limits for the procedure.
- States are obligated to take back an asylum seeker for whose application they are responsible.
- Who counts as a family member of an asylum applicant is extended to include siblings and family relations formed in transit countries.

Does the Proposal Address the Reasons for Why the Dublin System Failed?

THE EUROPEAN LEVEL

The “unlike Europe” argument

The EU is composed of states with divergent development opportunities, qualities of asylum procedures and treatments of asylum seekers (e.g., use of detention).

- Not addressed. The quality of the asylum procedures will be addressed by a new law on asylum procedures. Full harmonization is left to the long term.

The “lacking responsibility sharing” argument

Dublin was not intended to be a burden sharing instrument. Its policy objectives are different: preventing onward movement (“secondary migration”) and having clear rules about the responsibility of the state that allows the entry of an asylum seeker.

- Addressed by a fairness mechanism that triggers relocation. However, this mechanism is only for individuals whose asylum applications are not inadmissible (e.g., asylum seekers returned under the EU-Turkey deal), thwarting the effects of the mechanism.

The “border closure” argument

Dublin encourages border closures. It sets incentives for border protection by making the states at the external borders responsible for deciding asylum applications. Those seeking to prevent onward movement do so by closing internal borders.

- Deliberately left unchanged for external borders. The “first country” rule is retained, and loopholes are filled. States are encouraged to cooperate with third countries to take back individuals whose asylum applications are inadmissible because these people do not fall under the relocation scheme of the fairness mechanism.
- To prevent internal border closures, the proposal seeks to apply the “first country” rule more rigorously by introducing restrictions against asylum seekers who move onwards.

The “fair weather” argument

Dublin is designed only for small numbers of asylum applications. Large numbers make it impossible for authorities to comply with the maximum duration of procedures and lower the quality of transfer requests.

- See “lacking responsibility sharing.” Administrative support units (“Dublin support units”) of a new asylum agency are supposed to help states that lack capacity. New rules on the quality of Dublin requests are introduced.

THE MEMBER STATE LEVEL

The “deliberately undercut” argument

Member states have purposely failed to register asylum seekers or driven down standards in order to be less attractive to asylum seekers, encourage onward movement and reduce returns back to their territory.

- States that fail to register will be unable to benefit from relocation. The issue of low standards is not addressed. States that want to avoid the fine can participate in relocation, but still not comply with the common minimum standards.

The “overburdened frontline states” argument

Frontline member states fail to register and comply with minimum standards because they are overburdened.

- See “lacking responsibility sharing” and “fair weather.”

The “cost-benefit” argument

Low transfer rates and almost equal amounts of incoming and outgoing transfers make member states reluctant to apply the regulation. The coercive nature of the system makes it largely ineffective.

- Restrictive measures against asylum seekers are intended to increase transfer rates, changing the cost-benefit ratio of states wishing to transfer individuals.

The “technocrat” argument

States disagree about the regulation’s provisions because they are not sufficiently clear. Criteria regarding “first entry” are straightforward, whereas the other criteria are not. For example, evidence on family members is not as clear-cut as a fingerprint in a database.

- The rules on evidence are changed so as to reduce the number of Dublin transfer requests with insufficient evidence. In part, this is achieved by a new burden on the asylum seekers.

- There is a new remedy for individuals who claim to have a family member in another member state, but are not transferred to that state.

THE INDIVIDUAL LEVEL

The “asylum seeker preferences” argument

The criteria take insufficient account of the individual interests of asylum seekers (e.g., language, social ties, job prospects).

- Siblings are included in the family definition. Otherwise not addressed.

The “human rights” argument

The conditions in many member states are, objectively speaking, so poor that they would amount to a human rights violation, forcing asylum seekers to move onwards.

- The “early warning and preparedness mechanism” of the current regulation, intended to counter deficiencies in the member states, is scrapped in the proposal. In the past, it was never used, largely for political reasons (i.e., to not “shame” a member state) and for lack of clear criteria.

The “deliberately undercut” argument

Asylum seekers overuse the possibility of appealing Dublin decisions, frustrating the workability of the system. Applicants abscond for 18 months or more, thereby annulling the transfer and the result of the Dublin procedure.

- New rules on the time limit to lodge an appeal. Absconding no longer shifts responsibility. Restrictive measures against asylum seekers attempting to bypass the system seek to increase the application of the Dublin system.

The “enabling smuggling” argument

The desire of asylum seekers to bypass the system drives the use of irregular means of transportation.

- Restrictive measures against asylum seekers attempting to bypass the system seek to increase the application of the Dublin system.

Conclusion on the Reform Proposal

The proposal is an attempt to breathe new life into the old Dublin system, with the “first country” rule as the lowest common political denominator. The proposal focuses on technical reasons for why the Dublin Regulation is not applied and seeks to counter these flaws with negative incentives for both states and individuals. Sticks are primarily used to discourage onward movement, and asylum seekers who decide to move onwards will face drastic consequences in the allocation of benefits. Circumstances that lead to a shift in the responsibility for asylum applications, such as missed deadlines, are reduced.

However, there is little in the proposal that addresses the political and structural flaws of the Dublin Regulation. There is no longer a response mechanism to states that decrease standards out of political calculus or for other reasons. In respect of responsibility sharing, the proposal is an attempt to turn past emergency measures into a permanent system. The EU Commission is now trying to establish a system that coerces member states into participating in a permanent relocation scheme. Positive incentives for applying the fairness mechanism are lacking in the proposal. Civil society believes that asylum seekers’ preferences should be taken into consideration. Yet, the only new element that considers asylum seekers’ preferences is the extended definition of “family,” together with a remedy to enforce transfers of those individuals who claim to have a family member in another member state.

Finally, the proposal also lays the groundwork for an asylum system that makes greater use of the “safe third country” and “safe country of origin” concepts. The proposed requirement of determining the safety of a state outside the EU effectively extends the Dublin system to the European neighbor states.

Dublin IV: Likely Outcome and Implications

The jury is still out on Dublin reform. The proposal of the EU Commission needs to be adopted by the EU Parliament and the EU Council of Ministers with a qualified majority. In the upcoming negotiations, the primary political battle will be over the circumstances in which the fairness mechanism is activated, and whether there will be any material compensation or fines for enforcing or not enforcing the mechanism. The negotiations will be crucial for the commission to be able to table further reform suggestions regarding the Common European Asylum System.

Among member state governments, reactions have been mixed. France, Germany and Austria – all countries at the geographic core of the EU, but with fairly different relative reception numbers of asylum seekers – appear supportive. In other member states, in particular the Visegrad states, the idea of fines for refusal to participate in the proposed fairness mechanism has already prompted fierce reactions. Given that the fairness mechanism is the only real novelty in the proposed update of the regulation, the EU Parliament will attempt to “save” any kind of fairness mechanism against total removal. In the parliament, the current proposal has already been criticized, in particular for its lack of ambition.¹¹

As for the timeline, the negotiations on the new Dublin Regulation will not last the five years it took to recast the current Dublin Regulation, given the political pressure

for change. Yet, in light of opposition in parliament and among states, it is unlikely that a Dublin IV Regulation will see the light of day in 2016.

The proposal also has legal issues that need to be resolved.¹² In particular, there are legal issues concerning the relation between family unity and the application of “first country of asylum” and “safe third country” rules. Can the latter trump the former? In addition, the stripping of benefits, should it lead to homelessness or malnutrition, may not hold up to legal scrutiny.

Still, the direction of Dublin reform is now clear. It is likely to be incremental, focused on the short term and characterized by the following elements:

- The Dublin criteria of the first country of arrival will be retained;
- Leeway for individuals wishing to avoid the system and for states to undercut it will be reduced;
- The humanitarian criteria of the regulation will not play a greater role than it did before, but the family criteria will;
- Safe country of origin and first country of asylum provisions will play a greater role than they did before.

This direction also foreshadows trends in the future of both the domestic and external dimensions of EU asylum policy:

- A trade-off between the harmonization of EU asylum law and policy on the one side, and high standards on the other;
- A rollback of previous legislative achievements balancing out state interest and individual rights protection;
- A greater role of the external aspect of EU asylum policy;
- Increased pressure to conclude bilateral return agreements, given that the application of “third country” rules may become mandatory.

Refining the Civil Society Agenda

For civil society, the ongoing reform process is extremely tricky. Most civil society actors undoubtedly have fewer political access points than they did before the “refugee crisis.” Decisions are no longer taken at the working level of the EU Commission, as all asylum-related policy has become extremely politicized. The same is true in most of the member states. Besides, the sheer speed of both domestic and EU-level legal developments have made it increasingly difficult to concentrate resources on a single EU issue. In addition, calls for greater consideration of asylum seekers’ preferences were hardly backed up by evidence of how this or other positive incentives would affect numbers on the ground. The widespread frustration with the Dublin system has led to few suggested alternatives that attempt to balance state interest and asylum seekers’ interests.

Those seeking a truly European asylum system with high standards will now have to strategize for the best-case scenario in a bad-case scenario. Ironically, this does not only mean upholding the maximum amount of individual rights safeguards of the

current Dublin Regulation. Given the political climate of the “refugee crisis,” now may not be the best moment for a new system of responsibility sharing. With Dublin reform likely to be incremental, the longer-term reform perspective regarding the EU asylum system – as it looks in 2030, for example – will remain as relevant as it is today. The challenge is to project a vision of a more harmonized and fairer (from the individual as well as the state perspective) system of protection in the EU states, to foresee the intermediate steps and to prioritize these steps in the reform process. In that context, short-term efforts should be directed at the fairness mechanism:

- Ensure that the mechanism has a real chance of being “activated,” rather than using criteria that are so exigent, they make the application of the mechanism only a theoretic possibility.
- Introduce positive incentives/gratification for states (or governance entities below the state level) that are willing to host asylum seekers as part of and beyond the fairness mechanism.
- Introduce a system of preference matching for the planned fairness mechanism. This could prove that such a system works and enables the collection of experiences that is needed for upscaling a similar system in the future.

Annex 1: Civil Society Publications on the Dublin System

Below is a non-exhaustive list of publications on the Dublin system listed in the Forced Migration Current Awareness Blog, the European Commission Library Catalogue, and the think tank list of the European Parliamentary Research Service. Academic articles are not considered.

Think Tanks

| ACTOR | TITLE | YEAR |
|---|--|------|
| Barcelona Centre for International Affairs | Why Dublin “Doesn’t Work” | 2015 |
| Carnegie Europe | How the Refugee Crisis Will Reshape the EU | 2016 |
| Centre for European Economic Research (ZEW) | Why and How There Should Be More Europe in Asylum Policies | 2016 |
| Centre for European Economic Research (ZEW) | Asylum Policy in Europe: ZEW-Study in Favour of European Asylum Agency | 2016 |
| Centre for European Policy Studies (CEPS) | Enhancing the Common European Asylum System and Alternatives to Dublin | 2015 |
| Centre for European Policy Studies (CEPS) | Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU | 2015 |
| Centre for European Policy Studies (CEPS) | Europe’s Double Refugee Crisis | 2015 |
| Centre for European Policy Studies (CEPS) | Treat the root causes of the asylum crisis, not the symptoms | 2015 |

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|---|--|------|
| Centre for European Policy Studies (CEPS) | What priorities for the new European agenda on migration? | 2015 |
| Centre for European Reform (CER) | The Refugee Crisis: Fixing Schengen is not Enough | 2016 |
| Danish Institute for International Studies (DIIS) | Towards “Schengen light” | 2016 |
| EGMONT | The Migration Crisis: A Stress Test for European Values | 2015 |
| European Council on Foreign Relations (ECFR) | How Europe Can Deal with the Asylum Crisis | 2015 |
| European Policy Centre (EPC) | Solidarity and asylum seekers: Member States agreed to disagree | 2015 |
| European Policy Centre (EPC) | EU Asylum Policy in a Securitised World | 2008 |
| Foreign Policy Center | Shelter from the Storm? The Asylum, Refuge and Extradition – Situation Facing Activists from the former Soviet Union in the CIS and Europe | 2014 |
| Foundations for European Progressive Studies (FEPS) | Call to Europe IV Conference: ‘Building Solidarity in Asylum Policy’ | 2015 |
| Friedrich-Ebert Stiftung | The Dublin System – In a Field of Tension of a Human and Solidary Responsibility for Refugees in Europe | 2011 |
| Friends of Europe | Here’s a ‘to do list’ for the Refugee Crisis from Strasbourg’s Human Rights Watchdogs | 2015 |
| German Institute for Economic Research (DIW Berlin) | Distribution of refugees very uneven among EU Member States – even when accounting for economic strength and total population | 2015 |
| German Institute for International and Security Affairs (SWP) | European Asylum Policy – Ways towards a Fairer Distribution of Responsibility | 2013 |
| Heinrich Böll Stiftung | The Humanitarian Crisis in the Mediterranean: How to Fix the EU’s Failed Approach to Irregular Migration? | 2015 |
| Hellenic Foundation for European & Foreign Policy | Migration Policy in Greece | 2009 |
| Insituto Affari Internazionali (IAI) | Migration and Refugee Governance in the Mediterranean: Europe and International Organisations at a Crossroads | 2015 |

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|---|--|------|
| Institute for European Studies | How to Reconcile the EU Border Paradox? The Concurrence of Refugee Reception and Deterrence | 2015 |
| Migration Policy Institute (MPI) | Not Adding Up – The Fading Promise of Europe’s Dublin System | 2015 |
| Migration Policy Institute (MPI) | The Asylum Crisis in Europe: Designed Dysfunction | 2015 |
| Migration Policy Institute (MPI) | EU Dublin Asylum System Faces Uncertain Future after Ruling in Afghan Family’s Case | 2015 |
| Österreichische Gesellschaft für Europapolitik | From Reaction to Action – Europe’s Asylum and Migration Policy at the Crossroad | 2015 |
| Overseas Development Institute (ODI) | Challenges to a Comprehensive EU Migration and Asylum Policy | 2015 |
| Oxford University Press (OUP) Blog | Migrant, refugee, or human? The unsettled issue of human rights in Europe | 2015 |
| Policy Network | Immigration, Work and Welfare | 2013 |
| Right to Remain Blog | Germany’s suspension of the Dublin Protocol: a welcome display of European and global solidarity | 2015 |
| The Expert Council of German Foundations of Integration and Migration (SVR) | Immigration Countries: Germany in an International Comparison | 2015 |

NGOs

| ACTOR | TITLE | YEAR |
|------------------------------|---|------|
| Human Rights Watch | Share Responsibility for Asylum Seekers | 2016 |
| Human Rights Watch | Europe Can Solve Its Refugee Crisis, If It Has the Will | 2015 |
| Hungarian Helsinki Committee | No Countries for Refugees – New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary | 2015 |
| Hungarian Helsinki Committee | Changes to Hungarian asylum law jeopardise access to protection in Hungary | 2015 |

Networks

| ACTOR | TITLE | YEAR |
|---|--|------|
| European Council on Refugees and Exiles (ECRE) | Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary | 2016 |
| European Council on Refugees and Exiles (ECRE) | The Legality of Examining Asylum Claims in Detention from the Perspective of Procedural Rights and their Effectiveness | 2015 |
| European Council on Refugees and Exiles (ECRE) | Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary | 2015 |
| European Council on Refugees and Exiles (ECRE) + European Legal Network on Asylum (ELENA) | Information Note: Dublin transfers post-Tarakhel: Update on European case law and practice | 2015 |
| European Database of Asylum Law (EDAL) | Allocating responsibility for an asylum application through Convention rights: The potential impact of ZAT & Others | 2016 |
| European Database of Asylum Law (EDAL) | The Dublin System and the Right to an Effective Remedy – Observations on the preliminary references in the cases of C-155/15 – George Karim v Migrationsverket and C- 63/15 – Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie | 2015 |
| Odysseus Academic Network | Sharing responsibility: A proposal for a European Asylum System based on solidarity | 2016 |
| Rights in Exile | Migration Flows and the Reintroduction of Internal Border Controls: Assessing Necessity and Proportionality | 2015 |

Academic Blog Posts

| ACTOR | TITLE | YEAR |
|---------------------------------------|---|------|
| EU Law Analysis | The Dublin Regulation: Is the End Nigh? Where should unaccompanied children apply for asylum? | 2016 |
| EU Law Analysis | Relocation of Asylum-Seekers in the EU: Law and Policy | 2015 |
| EU Law Analysis | The Refugee Crisis: What should the EU do next? | 2015 |
| EU Law Analysis | The new EU Migration Agenda takes shape: analysis of the first new measures | 2015 |
| EU Law Analysis | Can the UK opt-out of mandatory EU refugee quotas? | 2015 |
| European Politics and Policy (EUROPP) | EU migration talks: What EU governments can do to help solve the crisis | 2015 |
| Free Group Blog | Mutual Recognition of Positive Asylum Decisions in the European Union | 2015 |
| Free Movement Blog | Dublin Regulation to be scrapped? | 2016 |
| Free Movement Blog | The creaking Dublin system – Hungary pulls the plug | 2015 |
| Postcards from... | Is a Distribution Key System the Solution to the EU's Refugee Crisis? | 2016 |

Others

| ACTOR | TITLE | YEAR |
|--|--|------|
| Prof. Elspeth Guild, Dr. Cathryn Costello, Ms. Madeline Garlick, Dr. Violeta Moreno-Lax, European Parliament | Enhancing the common European Asylum System and Alternatives to Dublin | 2015 |

Annex 2: Dublin Basics

The Different Faces of Dublin III: The Rationales Guiding the Criteria That Determine the Member State Responsible for Asylum Applications

Border protection rationale, “user pays,” first entry principle

- A state that has issued an applicant with a valid visa or residence document is responsible for the asylum application of that person (Article 12).
- A state that has waived the requirement of a visa is responsible for the asylum application (Article 14).
- Where an applicant has irregularly crossed the border into a state, that state is responsible (Article 13; “first country of arrival” rule).

Administrative efficiency rationale

- The state that has assumed responsibility for an asylum application remains responsible for it even if the asylum seeker travels onwards (Article 18; “one chance only” rule).
- If the circumstances of entry cannot be established and the applicant has been living in an EU state for five months, that state is responsible (Article 13).
- Rules regarding who is responsible if an applicant has multiple valid visas (Article 12)

Humanitarian rationale

- For unaccompanied minors, the EU state in which there is a family member or sibling is responsible. When these individuals are scattered across states or when there are no family members, the child’s best interest is decisive (Article 8).
- If an asylum seeker has family members (nuclear family) in another member state whose asylum applications have already been accepted or are pending, that member state is responsible (Articles 9–10).
- Persons dependent on the assistance of another (due to pregnancy, having a newborn child, serious illness, severe disability or old age) shall be kept or brought together with their child, sibling or parent who is legally resident in one of the member states. The same applies if the person legally resident in one of the member states is dependent on the asylum seeker (Article 16).

No transfers that would result in the risk of inhuman or degrading treatment

- States have to deviate from the normal criteria if “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions” in the EU state that would normally be responsible, resulting in the risk of inhuman or degrading treatment (Article 3).
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Legal Basis for Dublin Transfers in Top-Five Sending States, 2014 (Percentages of All Accepted Requests)

| State | Family reasons | Documentation and legal entry reasons | Irregular entry | Dependent persons; other humanitarian reasons | Asylum request in other member state |
|-------------|----------------|---------------------------------------|-----------------|---|--------------------------------------|
| Germany | 4.5 | 12.2 | 8.7 | 0.1 | 67.8 |
| Switzerland | 0.3 | 41.7 | 0 | 0.3 | 34.6 |
| Sweden | 0.6 | 40.5 | 10.1 | 0.07 | 29.8 |
| Austria | 0.7 | 7.3 | 18.9 | 0.2 | 62.8 |
| France | 1.2 | 9.3 | 7.3 | 0 | 54.9 |

Top-Five Sending States, 2014

| State | Total outgoing transfers | Share of all accepted requests (%) |
|-------------|--------------------------|------------------------------------|
| Germany | 2,887 | 12.56 |
| Switzerland | 2,638 | 46.76 |
| Sweden | 2,059 | 39.86 |
| Austria | 1,076 | 26.2 |
| France | 470 | 14.32 |

Top-Five Receiving States of Dublin Requests From Germany, January to June 2015

| Country | Requests | Acceptance | ...of which led to actual transfers | Percent of accepted requests leading to transfers |
|---------------|----------|------------|-------------------------------------|---|
| Hungary | 6,517 | 4,969 | 103 | 2.07 |
| Italy | 5,567 | 4,578 | 433 | 9.46 |
| Bulgaria | 2,910 | 862 | 21 | 2.44 |
| Poland | 1,633 | 1,466 | 310 | 21.15 |
| France | 1,205 | 1,065 | 224 | 21.03 |
| All countries | 23,971 | 16,922 | 1,905 | 11.25 |

Endnotes

- 1 The Dublin Regulation also applies in the non-EU countries Iceland, Norway and Switzerland. For reasons of simplicity, the text will only discuss EU member states.
- 2 Civil society in the EU includes forces that oppose the reception of asylum seekers altogether. When discussing civil society actors, this paper refers to actors interested in a sustainable asylum system that aligns with international legal minimum standards.
- 3 EUROSTAT, “Distribution of final decisions on (non-EU) asylum applications,” 2015, http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Distribution_of_final_decisions_on_%28non-EU%29_asylum_applications,_2015_%28C2%B9%29_%28%25%29_YB16.png; ECRE, “AIDA Annual Report 2015,” http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf.
- 4 EUROSTAT return statistics, http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation.
- 5 Limitations on statistics, see “AIDA Annual Report 2015,” http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf.
- 6 Council Regulation No 343/2003/EC on establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national, 2003 O.J. L 50/1.
- 7 For instance, in Germany: Deutscher Anwaltverein, Arbeiterwohlfahrt, Der Paritätische, Diakonie, Jesuiten-Flüchtlingsdienst Deutschland, Neue Richtervereinigung, Pro Asyl, Republikanischer Anwältinnen- und Anwälteverein e.V., Rechtsberaterkonferenz.
- 8 Council Regulation No 604/2013/EU on 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, 2013 O.J. L 180/3, Article 46.
- 9 European Commission, COM(2007) 299 final, June 6, 2007, Brussels.
- 10 European Commission, COM(2016) 197 final, June 4, 2016, Brussels.
- 11 European Parliament plenary session, “Decision adopted on the Common European Asylum System reform,” May 11, 2016, <http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1462971857557>.
- 12 Steve Peers, “The Orbanisation of EU asylum law: the latest EU asylum proposals,” EU Law Analysis (May 6, 2016), accessed May 20, 2016, <http://eulawanalysis.blogspot.de/2016/05/the-orbanisation-of-eu-asylum-law.html>.

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