



The Greens | EFA
in the European Parliament

BEYOND DUBLIN

A Discussion Paper for the Greens/EFA in the European Parliament

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1 INTRODUCTION

The Dublin system¹ is the legal base for deciding the EU Member State that is responsible for determining an asylum claim. It has been widely criticised in its various incarnations and is coming under increasing pressure. Various ideas for reform have been put forward by a range of actors. Article 26 of the Regulation requires a review by 21 July 2016 which should propose ‘necessary amendments’ to the Regulation, while a more thorough ‘fitness check’ of the Dublin system, planned for 2014, is overdue². The EU’s Commissioner on Migration and Home Affairs has announced a review of the Dublin system for 2015, indicating that it would not be a major overhaul, as it would be premature for such a new instrument, but the review is likely to further spur the debate on reforms and alternatives.

As the 20th anniversary of the Dublin Convention coming into force approaches in 2017, members of the Green Group³ believe it is time to develop a vision of an alternative to the current system. This paper will review ideas that have been put forward for reform of the Dublin system and make recommendations. While the Dublin system is linked to many of the flaws in the Common European Asylum System, as well as wider issues, such as the economic disparities between Member States, this paper will seek to remain focussed on reform of the Dublin system itself and not address questions, such as the problem of access to protection in the EU or the question of returning asylum seekers found not to be in need of protection, or the movements of irregular migrants who do claim asylum.

2 THE CURRENT DUBLIN SYSTEM AND ITS PROBLEMS

2.1 THE COMMON EUROPEAN ASYLUM SYSTEM

15 years after the Tampere Council, when Member States agreed to develop a Common European Asylum System (CEAS), we are far from the desired situation where a person seeking protection will be treated in the same way wherever lodges his/her application within the EU. The second phase legal instruments set common standards for asylum procedures, reception conditions and qualification for protection, but fall short of establishing the “common procedure”, “uniform status of asylum, valid through the Union” and “uniform status of subsidiary protection” foreseen in the Treaties⁴.

¹ The Dublin System is made up of four legal instruments: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 stateless person (recast) (Dublin III Regulation) [2013] OJ L180/31; Regulation (EU) No 603/2013 of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the recast Dublin Regulation (recast) (EURODAC Regulation) [2013] OJ L180/1 and Regulation (EU) No. 118/2014 which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation.

² From the European Commission (2011) Communication on enhanced intra-EU solidarity in the field of asylum. Brussels 2.12.2011 COM(2011) 835 final: “A comprehensive ‘fitness check’ should be made by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights”.

³ Bodil Ceballos, Ska Keller, Jean Lambert, Judith Sargentini, Josep-Maria Terricabras

⁴ Treaty of the Functioning of the European Union, Article 78

Member States' asylum procedures remain complex, and the recast Asylum Procedures Directive still leaves wide scope for the application of accelerated procedures, with their reduced safeguards. While some progress has been made, recognition rates continue to vary widely between Member States, from as low as 4% for Greece and 8% for Hungary in 2013 to 87% for Bulgaria and 84% for Malta. Different caseloads might account for some these differences, but rates vary considerably even for the same nationalities: 97% of Somalis were granted protection in Italy at first instance in 2013 and just 17% in France, 41% of Russian nationals were successful in their claims in the UK, 2% in Germany.⁵

Standards of reception conditions have improved in some Member States, but fall well short in a number of countries. ECRE has recently reported that asylum seekers' access to accommodation and support to meet their basic needs, the grounds and conditions of detention and access to quality free legal assistance to properly protect their rights remain problematic in a number of EU Member States⁶. The most egregious example remains Greece, where in 2011 conditions were found by both the European Court of Human Rights in *MSS*⁷, and by the Court of Justice of the EU in *NS*⁸, to violate the right to be free from inhuman and degrading treatment. Despite substantial funding and other support from the EU and Member States, Greece is still not suitable for returns, four years after the *MSS* decision. Far more money has been spent on detention centres, fences and immigration control in Greece than on reception of asylum seekers and asylum procedures.

Serious concerns have been documented about the shortage of reception places, overcrowding and poor quality accommodation in Bulgaria. In January 2014 UNHCR called for Dublin returns to be suspended because asylum seekers routinely lacked access to basic services, such as food and healthcare, faced lengthy delays in registration which subsequently deprived them of their basic rights, were at risk of arbitrary detention, while asylum procedures were neither fair nor effective (it lifted the call the following April)⁹. A shortage of places has long been a problem in Cyprus, Greece and France, while Italy lacked capacity to handle a sharp rise in arrivals in 2013 and a substantial increase in the number of asylum seekers led to some overcrowding of reception centres in Germany¹⁰.

Recent allegations that the mafia had diverted funds from reception centres in Rome have raised questions about whether Member States have used European funding effectively in order to improve the standard of reception conditions¹¹. In the area of integration, the Court of Auditors concluded in 2012 that it was impossible to assess whether the European Integration

⁵ http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf

⁶ ECRE (2014) Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the European asylum System. Annual report 2013/2014, European Asylum Information Database (AIDA), Brussels. September 2014. <http://www.asylumineurope.org/annual-report-20132014>

⁷ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>

⁸ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=211472>

⁹ UNHCR Bulgaria: UNHCR says asylum conditions improved, warns against transfer of vulnerable people 15 April 2014 <http://www.unhcr.org/534cfae69.html>

¹⁰ ECRE (2014) Mind The Gap: An NGO Perspective On Challenges To Accessing Protection In The Common European Asylum System, AIDA Annual Report 2013|2014. Available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf

¹¹ Nielsen, N. 'Immigration centres are new cash cow for Italian mafia' *EU Observer*, 4 December 2014 <https://euobserver.com/justice/126787>

Fund had benefited refugees¹². Critics ask whether the European Commission has used as effectively as it might the two levers it has at its disposal to raise standards: monitoring Member States and acting as the guardian of the Treaties by bringing infringement proceedings; and judicious use of Community funds.

Downward pressure on standards of reception and procedures is likely to be exerted by the continued perception by Member States that asylum seekers choose their destination country. A recent study by the European Asylum Support Office on asylum applicants from the Western Balkans reported that Member States had addressed 'pull factors' by using accelerated procedures (which have reduced safeguards) or reducing the length of the normal procedure and reducing cash benefits provided during the procedure¹³.

Nevertheless, in June 2014 the European Council declared that the full transposition and effective implementation of the Common European Asylum System was an "absolute priority" and should result in "a level playing field where asylum seekers are given the same procedural guarantees and protection throughout the Union".¹⁴ In the absence of such a level playing field, claiming asylum in the EU remains a risky protection lottery.

2.2 THE MEDITERRANEAN CRISIS

Discussions about the Dublin system take place in the shadow of the crisis in the Mediterranean. Some States' responses have been influenced by an apparent reluctance to take responsibility for asylum seekers rescued at sea. The UK, for example, declined to take part in Frontex' Operation Triton in 2014, on the grounds that more migrants and asylum seekers would make the journey if they were confident they would be rescued. By November 2014 over 200,000 refugees and migrants had arrived by sea in the Mediterranean, compared to 60,000 in 2013. 160,000 were received by Italy, 40,000 by Greece¹⁵.

2.3 PURPOSE OF THE DUBLIN SYSTEM

The Dublin III Regulation, which entered into force in July 2013, has its origins in the 1990 Dublin Convention, which had the necessary aim of guaranteeing that an asylum seeker's claim would be examined by one of the EU's Member States and preventing him/her from being left 'in orbit', victim of two or more States refusing to take responsibility. It provided a hierarchy of criteria to identify the Member State that should determine the asylum claim

The first criteria under Dublin III concern unaccompanied minors (Art 8), who must be reunited with family members legally present in the EU, if it is in the child's best interests. At the time of the negotiations of Dublin III, the situation where an unaccompanied minor had no relatives present in any Member State remained unclear, pending the outcome of the case of *MA and*

¹² European Court of Auditors, [Do the European Integration Fund and the European Refugee Fund contribute effectively to the integration of third-country nationals? Together with the Commission's replies](#), Special Report No 22/2012, November 2012

¹³ European Asylum Support Office (EASO), 'Asylum applicants from the Western Balkans: Comparative analysis of trends, push-pull factors and responses, 2013. <http://easo.europa.eu/latest-news/press-release-easo-published-report-on-asylum-flows-from-the-western-balkans/>

¹⁴ Council of the European Union (2014) European Council 26-27 June 2014 Conclusions, EUCO 79/14, 27 June 2014 Brussels. Available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf

¹⁵ UNHCR (2014) Central Mediterranean Initiative: So Close, Yet So Far from Safety. Available from <http://www.unhcr.org/542c07e39.html>

*Others*¹⁶ in the Court of Justice. The Court found that if the child had lodged asylum applications in more than one Member State, the Member State in which the child was present should be responsible. A revision to the Regulation is under negotiation.

For adults, reuniting family members is also a top criterion and if they have a close family member who is a refugee in another Member State or an asylum seeker who has not had an initial decision, that Member State will be responsible for their claim (Art 10). The next group of criteria link responsibility to immigration and border control: a Member State is responsible if they have issued the claimant with a residence doc or visa (Art 12), if the claimant has entered their territory or resided there illegally (Art 13), if it has waived the requirement for a visa (Art 14), or if the asylum seeker has applied in an international transit area at an airport (Art 15).

The next criterion (Art 16) requires that pregnant, sick, disabled and other dependents legally present in the EU should “normally” be kept or brought together ‘Provided that family ties existed in the country of origin. Finally, States may opt to take responsibility for a claim lodged with it, even if it is not its responsibility under the criteria, or ask another Member State to take responsibility on humanitarian grounds, for family or cultural reasons (Discretionary clauses, Article 17).

The implicit aim of the Dublin system, particularly with the addition of the Eurodac fingerprint database in 2000, is also to prevent irregular secondary movement between signatory States as well as multiple applications. The Dublin Convention was replaced by the Dublin II Regulation in 2003 and both Dublin II and Eurodac were amended (‘recast’) in 2013. Dublin III applies to all applications for asylum lodged after 1 January 2014.

2.4 IRREGULAR SECONDARY MOVEMENT

The concepts of irregular secondary movement (the movement of asylum seekers and refugees “in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere¹⁷”) and “safe third country” (a country where a person could have found protection) are fundamental to the Dublin system and have been the subject of much debate.

Article 31 of the Refugee Convention protects refugees from being punished for travelling irregularly if they are “coming directly” from a situation where they faced persecution. The idea that the two words, “coming directly” implied a requirement for asylum seekers to seek asylum at the earliest opportunity, was the thin base on which Europe developed the safe third country concept and, later, the Dublin system¹⁸.

Asylum seekers who do not seek asylum at the earliest opportunity, are often described pejoratively as “asylum shopping”. Yet UNHCR’s Executive Committee has recommended that the refugee’s intentions “as regards the country in which he wishes to seek asylum ... should as far as possible be taken into account”¹⁹.

¹⁶ MA & Ors v Secretary of State for the Home Department [2013] EUECJ C-648/11 (21 February 2013)

¹⁷ Conclusion 58 (XL) of the Executive Committee of UNHCR’s Programme, ‘Concerning the problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection’

¹⁸ Costello, C. (2005). The asylum procedures directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection. *European Journal of Migration and Law*, 7(1), 35-69.

¹⁹ UNHCR Executive Committee, Conclusion No. 15 (XXX), Refugees Without an Asylum Country (1979)

Many assumptions are made about asylum seekers' knowledge of Member States' asylum policies, reception conditions, welfare systems etc. and their ability to "asylum shop". A recent study looking at why asylum seekers come to the UK gives a useful overview of whether asylum seekers choose their country of asylum and, if they do, what information informs that choice²⁰. Some research indicates a correlation between recognition rates and the number of asylum seekers in a particular country. Other research shows that economic considerations do influence those asylum seekers who are in a position to choose their country of destination (which usually means they have sufficient funds to pay the agent's fee), but there is little evidence of widespread 'asylum shopping' based on differences in welfare systems. The evidence is that many asylum seekers have little choice over their destination: forced by the absence of legal avenues, they are forced to travel irregularly and the "agent" (smuggler or trafficker) usually chooses. The asylum seeker may have only the vaguest impression of their destination, let alone an understanding of the asylum system. Structural factors, such as colonial links with corresponding familiar language and culture can be a factor, as can a settled community of co-ethnics or co-nationals, although the former colonial power might be deliberately avoided. Family members can be a strong draw. Above all, many asylum seekers will rely on the information and services of paid 'agents'.

2.5 PROBLEMS ASSOCIATED WITH DUBLIN

2.5.1 RISK OF VIOLATION OF FUNDAMENTAL RIGHTS

Critics have argued that the Dublin Convention institutionalised the 'safe third country' practices developed in Europe to 'deflect' asylum seekers to countries they had transited. Criteria associated with border control meant that responsibility for an asylum claim in the Dublin system became 'a burden and a punishment for the Member State which permitted the individual to arrive in the Union'²¹. This risked creating a dangerous 'race to the bottom' as Member States developed policies aimed not at ensuring access to the procedure but at preventing asylum seekers from entering their territory²².

Member States at the EU's external border have indeed been guilty of multiple instances of *refoulement*. In the case of *Hirsi*, for example, 'Italy's push backs' of asylum seekers to Libya were found by the European Court of Human Rights to have represented a real risk of *refoulement*²³, while, more recently, Bulgaria has been summarily expelling Syrians as they cross the border from Turkey²⁴. Shortly after announcing in January 2015 that it expected to

²⁰ Crawley, H. (2011). Chance or choice? Understanding why asylum seekers come to the UK.

²¹ Guild, Elspeth (2006), 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law*, 18 (3-4), 630-51.

²² Thielemann, E., Williams, R. and Boswell, C. (2010) 'What System of Burden Sharing between Member States for the Reception of Asylum Seekers?', European Parliament Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 419.620, 22 January 2010, Brussels.

²³ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: www.refworld.org/docid/4f4507942.html.

²⁴ Human Rights Watch (2014), Bulgaria: Asylum Seekers Summarily Expelled, available at www.hrw.org/news/2014/04/29/bulgaria-asylum-seekers-summarily-expelled

take back 3,600 asylum seekers under Dublin²⁵, the Bulgarian government said it planned to extend the fence along its border with Turkey²⁶.

The Dublin system assumes equivalent human rights and refugee protection standards in Member States. The preamble to Dublin III declares, “Member States, all respecting the principle of non-*refoulement*, are considered as safe countries for third-country nationals”, yet the original Dublin Convention came into force in 1997 some years before the process of harmonisation of Member States’ asylum systems started in 1999. The system’s blindness to Member States’ variations in protection standards turns it into a protection lottery.

Some Member States have treated asylum seekers so poorly that international litigation on Dublin cases has focussed on whether transfer to another Member State would interfere with the applicant’s right to be free from torture, inhuman and degrading treatment.

In January 2011 the European Court of Human Rights (ECtHR) found in *M.S.S. v Belgium & Greece* that the removal of an Afghan asylum seeker from Belgium to Greece was a violation of the prohibition of ill-treatment and the right to an effective remedy on account of poor detention conditions for asylum seekers, failures of the Greek asylum system, and inadequate reception conditions. This was followed by the decision by the Court of Justice of the EU (CJEU) in *NS vs UK*²⁷ that a Member State is prohibited from transferring an asylum-seeker to another Member State “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.” As a result of those “systematic deficiencies”, no asylum seekers could be returned to Greece under Dublin.

Four years on from *M.S.S.*, despite extensive practical and financial support from Member States, the European Commission and UNHCR, Greece still does not have an asylum system to which Dublin returns can safely be made. A group of about 200 Syrians camped out in Athens’ Syntagma square at the end of 2014 for nearly a month, protesting at their lack of accommodation, health care and access to the asylum procedure and asking to be allowed “to leave Greece for other European countries that are implementing the European and International law properly and will protect our Human Rights”²⁸. One described Greece as a “prison”.

In November 2014, the ECtHR ruled in *Tarakhel v Switzerland*²⁹ not that Italy had such systematic deficiencies in its asylum system comparable to Greece’s in *M.S.S.* that would prohibit all Dublin returns, but that an Afghan family would risk torture or inhuman or degrading treatment (Article 3, ECHR) if returned there, because of the overall situation in which “a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions” as

²⁵ ‘Thousands of asylum seekers to be returned to Bulgaria,’ 6 January 2015, *Euractiv* www.euractiv.com/sections/justice-home-affairs/thousands-asylum-seekers-be-returned-bulgaria-311050, accessed 03/03/2015

²⁶ Agence France-Presse (2014), ‘Bulgaria to extend border fence against migrant influx’, 14 January 2015 *Hurriyet Daily News*, www.hurriyetaidailynews.com/bulgaria-to-extend-border-fence-against-migrant-influx.aspx?pageID=238&nID=76960&NewsCatID=351, accessed 03/03/2015.

²⁷ C-411/10

²⁸ Greek Council for Refugees, ‘Syrians in Syntagma’, *newsletter*, November 2014, available at www.refugees.gr/images/newsletter/November.pdf

²⁹ *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148070>

well as their specific situation. As regards their individual situation, the Court considered the specific needs and “extreme vulnerability” of children meant that there would have been a violation of Article 3, had they been returned without “specific guarantees” that they would be treated in an appropriate way and the family kept together.

2.5.2 INEFFECTIVE

The Dublin system appears to be highly ineffective. It fails to prevent so-called ‘asylum shopping’ and multiple applications³⁰. It may even encourage them. If the criterion of illegal entry is the main one used, it is in asylum seekers’ interests to attempt to evade detection in their country of first entry: A JRS’ study found that most asylum seekers in the Dublin procedure had travelled irregularly within the EU³¹. Given that an asylum seeker knows that they will have to stay in a country for more than 5 years before they are legally allowed to move to another Member State under the Long Term Residents Directive and relatively few are actually transferred it makes sense to move to a preferred country even after having lodged an application.

The numbers of asylum seekers actually transferred from one Member State to another under the Dublin Regulation amounted to only 3% of asylum claims made in the EU in 2013³². The net effect on Member States is even smaller, as the transfers from country to A to country B are often cancelled out, in numerical terms, by transfers from B to A. For example, in 2013 Germany made 281 transfers to Sweden, while Sweden transferred 289 asylum seekers to Germany³³. The overall result was that 570 asylum seekers were transferred against their will, probably after considerable delays, at great expense, away from the Member State where they were likely to have the family, community or other links that would have enabled them to integrate most rapidly, if their claim was successful.

Given Member States’ concerns about ‘pull factors’ and the evidence that the Dublin system does little to reduce the numbers of asylum seekers in the countries receiving most applications, it is likely to maintain downward pressure on the standards of reception and asylum procedures.

The Dublin system causes significant delays in the processing of applications, sometimes longer than the asylum procedure itself³⁴. As Dublin procedures lengthen, to the extent that they frequently take longer than the substantive decision, Member States are increasingly exercising their prerogative to abandon or ignore the Dublin procedure, finding it quicker and simpler, particularly if the case looks straightforward and likely to be refused, to decide the case on its substance and return the applicant to their country of origin.

³⁰ See ECRE (2013) Dublin II Regulation: Lives on Hold, February 2013, Brussels. Available from www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html;

³¹ Jesuit Refugee Service (2013) Protection Interrupted: The Dublin Regulation’s Impact on Asylum Seekers’ Protection, June 2013, Brussels. Available from www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf

³² EASO (2014), Annual Report: Situation of Asylum in Europe 2013, July 2014, Valetta. Available at <http://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>

³³ EUROSTAT (2014) Dublin statistics on countries responsible for asylum application, March 2014 Luxembourg Available from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application#

³⁴ A German lawyer interviewed said he regularly had clients who had been in the Dublin system for three years or more.

The system is likely to become more unwieldy for Member States. In *Abdullahi*³⁵, the CJEU had ruled that asylum seekers could only challenge a Dublin transfer if they could show systemic deficiencies in the destination country, but in its *Tarakhel* judgment, the ECtHR underlines the need for “a thorough and individualised assessment” of the asylum seeker’s particular situation, ruling out automatic transfers. Some see this as a “game changer”³⁶, leading to the full range of rights having to be considered before transfer.

2.5.3 COSTLY - FINANCIALLY

ECRE has described the challenges of ascertaining the financial costs of the Dublin system³⁷. The Commission’s 2007 evaluation report of Dublin noted despairingly³⁸, “Owing to the lack of precise data, it was not possible to evaluate one important element of the Dublin system, namely its cost”. Nevertheless, it can be assumed to be expensive, simply on the grounds that it represents an additional layer of bureaucracy on top of the normal asylum procedure and involves a good deal of coercion, including extensive use of detention.³⁹ Costs would include office equipment, personnel of Dublin units and the EURODAC infrastructure for taking and storing fingerprints, but the biggest cost, according to the Commission evaluation, is transfer to other Member States, particularly when transfers are supervised or escorted. Inquiries have been made, including a number of parliamentary enquiries, but officials are generally unable to disentangle Dublin costs from other expenditure.

2.5.4 COSTLY - IN HUMAN TERMS

The considerable human cost of Dublin has been well documented in reports by ECRE⁴⁰, JRS⁴¹ and others, with asylum seekers often left in a prolonged state of anxiety, frequently separated from relatives (e.g. because the relationship was formed since leaving their country) and friends, sometimes living in worse conditions than other asylum seekers and frequently detained at some point prior to transfer.

While the purpose of the Dublin system is ostensibly to allocate responsibility for deciding the asylum claim, it effectively determines where the asylum seeker has to settle. If they feel they are in the wrong country, separated, for example, from relatives and community, it will take up to five years⁴² after they have been granted international protection for them to be eligible for

³⁵ *Shamso Abdullahi v. Bundesasylamt*, C-394/12, European Union: Court of Justice of the European Union, 10 December 2013, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-394/12>

³⁶ Costello, Cathryn and Mouzourakis, Minos (2014), ‘Reflections on reading Tarakhel: Is ‘How Bad is Bad Enough’ Good Enough? Good Enough?’, *Asiel&Migrantenrecht*, (10), 404-11.

³⁷ ECRE (2013) Dublin II Regulation: Lives on Hold, February 2013, Brussels. Available from www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html;

³⁸ Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system - Annex to the communication on the evaluation of the Dublin system, 5 June 2007, COM(2007)299 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007SC0742>

³⁹ See Guild, E. et al. (2014) New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection. European Parliament. http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29509989

⁴⁰ See ECRE (2013) Dublin II Regulation: Lives on Hold, February 2013, Brussels. Available from www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html;

⁴¹ Jesuit Refugee Service (2013) Protection Interrupted: The Dublin Regulation’s Impact on Asylum Seekers’ Protection, June 2013, Brussels. www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf

⁴² half the time they have been in the asylum procedure is deducted from the five year qualifying period

Long Term Resident's status, which would allow them to move and reside in another Member State, providing they have means of support and/or employment. If they do not meet these conditions, they must remain where they are.

Dublin not only fails to prevent irregular secondary movement, but actively encourages asylum seekers to remain irregular and 'invisible' to authorities; some have taken extreme measures, such as burning their fingerprints so as to avoid detection by EURODAC and being returned to the Member State where they entered irregularly.

Although the Dublin II Regulation had the potential to bring families together and gave Member States the power to take responsibility for a claim on humanitarian grounds, in practice the relevant clauses were rarely used: ECRE found that the family reunion ground accounted for just 1% of 'take charge' requests, despite being top of the hierarchy of criteria, while 'humanitarian clause' requests make up less than 0.5% of all requests.⁴³ This may be due to a lack of awareness amongst asylum case officers of the Dublin criteria, or the significance of family connections, or to delays in the communication of information⁴⁴.

2.5.5 UNDERMINES SOLIDARITY BETWEEN MEMBER STATES

The irregular entry or stay criterion is the most commonly used ground for Dublin 'take back' requests. Although a tiny proportion of all asylum seekers are actually transferred, the underlying logic of the system is that, if it were effective, it would shift responsibility for asylum claims to Member States near the EU's external border.

In 2012 two Member States at the EU's external border did indeed receive the most transfer requests: Italy received by far the most, 12,358, followed by Poland with 4,725⁴⁵, but only 4,894 asylum seekers were actually transferred to Italy (still the biggest recipient amongst EU Member States) and 1,012 to Poland⁴⁶ (overtaken slightly by Germany with 1,096). Nevertheless the total asylum applications lodged in Italy and Poland (15,715 and 10,750 respectively) were far outweighed by the largest recipients: Germany (77,540), France (60,460) and Sweden (43,865).

The myopic national debates about immigration in Member States are such that many citizens feel that their country is the top destination for asylum seekers. When Southern EU States, such as Spain, Malta, Greece and, most recently, Italy, ask for help with dealing with their migration crisis their northern neighbours are quick to criticise (e.g. the poor reception conditions), but slow to offer practical help. When in 2014 Italy requested support with Mare Nostrum, its rescue-at-sea programme that was costing 9m Euros a month, other Member States asked whether rescuing people encouraged more irregular migrants to risk the journey. They questioned the extent to which Italy's asylum system was truly under pressure, given that those rescued stayed for such a short time in reception centres. They indicated that Italy might have

⁴³ ECRE (2013) Dublin I Regulation: Lives on Hold, February 2013, Brussels. Available from

www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html

⁴⁴ Fratzke, Susan (2015) *Not Adding Up: the Fading Promise of Europe's Dublin System*. Brussels. Migration Policy Institute Europe. www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system

⁴⁵ EUROSTAT (2014) Asylum applicants and first instance decisions on asylum applications: third quarter 2014 Available from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application#

⁴⁶ EUROSTAT Outgoing transfers by receiving country and type of 'Dublin' request [migr_dubto] Own calculations.

been disingenuous in claiming that it could not force those rescued to have their fingerprints taken, as this meant that if any moved on they could be returned⁴⁷.

2.5.6 MERELY SYMBOLIC

In light of the serious flaws in the Dublin system from the beginning, together with the human and financial costs, the question has been asked, whether it has a further purpose, beyond that stated. It may well be “less about rational ends and more about symbolic ones for the Union⁴⁸”. The Commission’s 2007 evaluation stated, “Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial implications”⁴⁹. In response, the European Parliament in a 2008 resolution expressed its concern at the lack of a cost assessment and called on the Commission to remedy that as an important aspect of evaluating the system⁵⁰.

In other words, Member States may be prepared to tolerate a costly, ineffective, inefficient and inhumane system in order to be able to signal to the public their control over asylum seekers and the asylum system. The immigration debate is so toxic in many Member States governments may be willing to invest a great deal in this political theatre. In these times of austerity the electorate urgently needs to know just how much States are investing in what may amount to little more than window dressing.

2.6 IMPLEMENTATION AND REVIEW OF DUBLIN III

When the Dublin II Regulation was ‘recast’ as Dublin III, a number of the main criticisms were addressed and changes made in order take into account developments in jurisprudence. It contains improved procedural safeguards such as the right to information, personal interview, and access to remedies. It also provides for an “early warning system” that would place national asylum systems under observation and ensure rapid intervention when needed, an idea the Council put forward when it rejected the Commission’s proposal for a temporary suspension of returns to relieve the burden on a Member State’s whose asylum system was not coping.

A further amendment to the Regulation is currently being negotiated in order to bring the Directive into line with the CJEU’s ruling in *MA*, that “as a rule, unaccompanied minors should not be transferred to another Member State”.⁵¹

The impact of these changes has yet to be assessed. The Commission is expected to conduct a review of Dublin in 2015, but it is not clear whether it will be as extensive as the ‘fitness check’ that it once planned for 2014⁵². At the same time, the Parliamentary Assembly of the Council of

⁴⁷ The Italian Refugee Council reported that only 36,000 of the 106,000 people who had arrived by boat in the first half of 2014 had filed asylum claims http://www.asylumineurope.org/sites/default/files/resources/one-pager_it_0.pdf

⁴⁸ Mouzourakis, M. (2015) ‘We Need to Talk about Dublin’ Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union. *Working Paper Series. No. 105.* www.rsc.ox.ac.uk/publications/we-need-to-talk-about-dublin

⁴⁹ European Commission (2007) Report on the evaluation of the Dublin system Brussels, 6.6.2007 COM(2007) 299 final

⁵⁰ European Parliament, European Parliament resolution on the evaluation of the Dublin system, 2 September 2008, P6_TA(2008)0385, available at: <http://www.unhcr.org/refworld/docid/48ca663ca.html>

⁵¹ Case C-648/11 *MA v Secretary of State for the Home Department* [2013] ECRI-0000, 6 June 2013.

⁵² From the European Commission (2011) Communication on enhanced intra-EU solidarity in the field of asylum. Brussels 2.12.2011 COM(2011) 835 final: “A comprehensive ‘fitness check’ should be made by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system,

Europe, which has repeatedly criticised the Dublin system, notably in its recent Resolution 2000 (2014), is preparing a report with a view to making recommendations on “how to improve its fundamental principles and its concrete implementation”.⁵³

3 MITIGATING THE PROBLEMS ASSOCIATED WITH DUBLIN

It is already five years since the Council of Europe’s Commissioner for Human Rights said, “Europe should do better in terms of refugee protection. A fair and efficient system that would fully guarantee the human rights of asylum seekers in Europe is still wanting. The Dublin Regulation should be revised as soon as possible in order to put an end to this situation⁵⁴”.

3.1 CREATING A LEVEL PLAYING FIELD

Applying for asylum in Europe remains a lottery, because the chances of being granted protection vary so greatly from Member State to Member State. That the Dublin system pays too little regard to the interests and wishes of the applicant merely adds insult to injury by offering no opportunity, within the system, to make the perfectly reasonable decision (providing s/he is sufficiently well informed) to go to the country where s/he is most likely to be granted protection. In the absence of a mechanism within the system, there is a clear incentive for irregular secondary movement.

If an asylum seeker were guaranteed a similar reasonable standard of reception conditions and the same high quality, consistent decision throughout the EU – the ‘common procedure’ and ‘uniform status’ envisaged in the Treaty – the ‘protection lottery’ objection to Dublin would instantly fall away, as would a significant inducement for irregular secondary movement. It has to be acknowledged, however, that significant disparities would inevitably persist between Member States, such as overall economic performance, the strength of the job market and the level of welfare benefits.

A possible model for achieving consistent decision making was mooted in the Commission’s 2013 study on joint processing⁵⁵: Option D imagined an EU decision-making system for some or all asylum claims, with legal power to take decisions and distribute them to Member States according to an agreed key. Leaving aside the distribution question, establishing a “**European Asylum Service**” along these lines operating in all Member States could, potentially, leapfrog the slow process of harmonisation.

The European Asylum Support Office ran a series of pilot projects in 2014 testing aspects of joint processing. These are reported to have met with some success, enabling Member States to share expertise and good practice and to understand better other States’ situations and challenges⁵⁶. Member States are understandably nervous that relinquishing control to an EU

including its effects on fundamental rights”.

⁵³ Motion for a resolution | Doc. 13592 | 11 September 2014

⁵⁴ Council of Europe, (2010) The ‘Dublin Regulation’ undermines refugee rights. Press release - 683(2010) Available from: <https://wcd.coe.int/ViewDoc.jsp?id=1671357&Site=DC>

⁵⁵ Urth et al. (2013) ‘Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for the Joint Processing of Asylum Applications on the Territory of the EU’, European Commission, Directorate-General Home Affairs, HOME/2011/ERFX/FW/04, 13 February 2013, Brussels.

⁵⁶ Guild, E. et al. (2014) New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection. European Parliament.

body to grant the rights to enter and remain on their territory might be giving away sovereignty. On the other hand, it could also have political attractions: having asylum decisions made by a body independent of national government, could make decision making less vulnerable to political pressures. It would also be separated from immigration enforcement authorities, whose mind-set can contaminate decision making.

3.2 MOBILITY FOLLOWING A GRANT OF INTERNATIONAL PROTECTION

Another way of mitigating the impact on an asylum seeker of a Dublin system that takes insufficient account of their needs and wishes would be to enable them to **move within the EU sooner following a positive outcome of their asylum claim**. Refugees are currently 'stuck' in countries, such as Malta, and have to wait up to five years after being granted protection until they qualify for Long Term Resident's status and are able to move (providing they are able to work or otherwise support themselves and their family). In addition to being in the interests of refugees, UNHCR points out in its recommendations to the Latvian Presidency, that if they could move sooner, it could "alleviate the particular pressures felt by some MS as a result of granting protection to significant numbers of applicants, by providing beneficiaries of international protection with opportunities to move between MS, and to legally take up residence in other MS subject to the fulfilment of relevant conditions".⁵⁷ It was for similar reasons that Malta had pushed for beneficiaries of international protection to be allowed to move after just one year, during negotiations on the Long Term Residence Directive in 2008.⁵⁸

Currently, if a person's asylum claim is refused in one Member State, under the Return Directive it is considered to be refused by all countries in the Union, but the grant of a protection status by one State is not automatically recognised by others. In March 2014, the European Commission proposed the development of new rules on **mutual recognition of asylum decisions** across the Member States a framework for transfer of protection in line with the Treaty objective of creating a uniform status valid throughout the EU⁵⁹. The joint Italian, Latvian and Luxembourg Presidencies indicated that this would be a priority area for the Council in 2014-2015, but no proposal has been published to date⁶⁰, nor does it feature in the Latvian Presidency's work plan for Jan – June 2015⁶¹.

In a recent discussion paper, ECRE explains how this would work and advocates two new instruments: one to enshrine mutual recognition of asylum decisions, the other to govern the transfer of protection, if a refugee moved one from one Member State to another⁶². ECRE argues that the 1951 Refugee Convention requires that refugees should be treated as 'most favoured

⁵⁷ UNHCR Recommendations to Latvia for the EU Presidency January - June 2015, Jan 2015
<http://www.unhcr.org/54b3d24d9.html>

⁵⁸ Mainwaring, C. (2012) 'Resisting Distalization? Malta and Cyprus' influence on EU Migration and Asylum Policies', *Refugee Survey Quarterly* 31 (4): 38-66

⁵⁹ European Commission (2014) An Open and Secure Europe: Making it Happen, COM (2014) 154, 11 March 2014, Brussels.

⁶⁰ European Council (2014) 18 month programme of the Council (1 July 2014 - 31 December 2015), 10948/1/14 REV 1, 17 June 2014, Brussels

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010948%202014%20REV%201>

⁶¹ Latvian Presidency of the European Union (2015) The programme of the Latvian Presidency of the Council of the European Union, 1 January – 30 June 2015, https://eu2015.lv/images/PRES_prog_2015_EN-final.pdf

⁶² ECRE (2014) Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU: Discussion Paper. Brussels <http://ecre.org/component/downloads/downloads/953.html>

foreigners' for certain rights, particularly with respect to employment⁶³; in the EU, the most favoured foreigners are citizens of other Member States. If nationals of one EU Member State can benefit from free movement under the Free Movement Directive and can access employment in another Member State, then so should beneficiaries of international protection. But they should have to meet the same criteria as those citizens⁶⁴ i.e. it is not an unfettered right.

If beneficiaries of international protection were able to move immediately, or relatively soon after a positive decision on their asylum claim, there would be less pressure to move on irregularly when they first arrived in the EU. States at the periphery of the EU may be concerned that this may act as a pull factor and result in them being responsible for the reception and determination of the claims of a disproportionately large number of asylum seekers.

4 OPTIONS FOR REFORM AND ALTERNATIVES

4.1 FAIRER TO MEMBER STATES

4.1.1 FAIR DISTRIBUTION AND RESPONSIBILITY SHARING

Asylum seekers arriving in the EU are undeniably distributed unequally between Member States: just five countries (Germany, Sweden, Italy, France and the United Kingdom) received 70% of all EU asylum claims in third quarter of 2014⁶⁵. A fairer way of looking at the numbers of asylum seekers, however, would be to compare them to the national population. By that measure, Denmark enters the top 5 with 1,300 per million, behind Sweden 2,900 per million, compared to Slovakia and Portugal at the other end, 5 and 15 per million respectively⁶⁶.

EU AND NON-EU COUNTRIES' RELATIVE SHARE OF RESPONSIBILITY FOR PROTECTION

At this point it is salutary to make a comparison with countries beyond the EU's borders. The countries hosting the largest refugee populations, as a proportion of their own populations, are Chad, with 34,000 per million, Jordan, 88,000 per million and Lebanon, 178,000 per million⁶⁷ - orders of magnitude greater than the EU Member States under greatest pressure. Of the 3.8 million people who have fled Syria the vast majority are hosted by Turkey, Lebanon, Jordan and Egypt. Just 6% have claimed asylum in Europe.⁶⁸ When considering the Dublin system from the perspective of responsibility-sharing, it is important to reflect on how Europe might better

⁶³ Article 17, para 1 of the Refugee Convention: on Wage Earning Employment, "The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment".

⁶⁴ As per Article 7 of the Free Movement of EU Citizens Directive, after three months, beneficiaries of international protection would have to meet the same conditions as a citizen of another Member State would i.e. be working, self-employed or studying or have sufficient resources not to be a burden on the social assistance system.

⁶⁵ EUROSTAT (2014) Asylum applicants and first instance decisions on asylum applications: third quarter 2014 http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report

⁶⁶ *ibid*

⁶⁷ UNHCR (2014) Statistical Yearbook 2013, Geneva. Available at <http://www.unhcr.org/54cf99b69.html>

⁶⁸ 203,028 Syrian asylum applications in Europe, Apr 2011 – Dec 2014 <http://data.unhcr.org/syrianrefugees/asylum.php>

share the global responsibility for protecting refugees with countries in refugees' regions of origin whose capacities are so much more stretched.

RESPONSIBILITY-SHARING WITHIN THE EU

Over the years, much of the discussion about reform of the Dublin system has taken the Member States' perspective in the form of proposals to share the 'burden', or costs, of providing protection more equitably and what kind of formula would be fairest. A comprehensive 2010 study on 'burden-sharing' (this was the phrase used in the title of the study, but the term will be avoided wherever possible in this report, in favour of the more neutral 'responsibility-sharing') for the European Parliament, started by gathering data on the total Member State expenditure on asylum and, from that, the overall cost of the EU's asylum system. From one perspective, this was modest, in that it amounted to less than UK citizens' expenditure on pets and pet food⁶⁹.

The cost of providing protection, however, is not fixed. As recent research for the European Parliament⁷⁰ has made clear, choices made by Member States can lead to higher costs, such as preventing asylum seekers from working, maintaining long and complex asylum procedures or the use of detention. The greater the use of coercion, the greater the costs⁷¹. The Dublin system itself, with its additional layer of bureaucracy and involuntary transfer of asylum seekers between Member States must account for significant costs, but adequate data are not available.

SOLIDARITY, A GUIDING PRINCIPLE OF THE EU

Responsibility sharing can be understood to fall within the meaning of the fundamental EU value of 'solidarity' between Member States, which was given much greater emphasis in this area by the Lisbon Treaty. Prior to 2009, the legislative bodies were required to adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees'. This was replaced in the Lisbon treaty by Article 80⁷², which elevated 'solidarity and fair sharing of responsibility, including its financial implications' to a guiding principle of the Common European Asylum System.

Responsibility sharing can take a variety of forms: people (asylum seekers, refugees) can be distributed between Member States, as in various proposals discussed below. This is sometimes called '**physical burden sharing**'. Alternatively, resources can be shared, either through '**financial burden sharing**', (e.g. European Refugee Fund, or its successor) or by **pooling administrative resources** (e.g. joint processing, joint removals).

DISTRIBUTING ASYLUM SEEKERS

A number of proposals for distributing asylum seekers in a more equitable way have been put forward over the years, starting in the EU in the early 1990s, when the EU, in particular Germany, was receiving large numbers of asylum seekers from the Balkans. In 1992, when Germany's asylum applications peaked at 460,000, the German Presidency presented a Draft Council Resolution on Burden Sharing⁷³ with Germany's proposal of distribution using a "key" modelled on its *Königsteiner Schlüssel* system for distributing asylum seekers domestically to its

⁶⁹ Thielmann et al.

⁷⁰ Guild, E. et al. (2014) New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection. European Parliament. pp 18-19
www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29509989

⁷¹ Guild, E. et al. (2014) New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection. European Parliament. pp 18-19
www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29509989

⁷² Consolidated Version of the Treaty on the Functioning of the European Union art. [80], 2008 O.J. C 115/47

⁷³ Council Document 7773/94 ASIM 124

Länder.⁷⁴ The key comprised three criteria, each given equal weight: population size, size of Member State territory and GDP. The UK had received very few asylum seekers and strongly opposed it. According to Thielemann, other Member States saw distribution without the individuals' consent as a potential violation of their human rights.

The next attempt to introduce a distribution mechanism at the EU level, following the Kosovan Humanitarian Evacuation Programme, the Temporary Protection Directive, had at its core the principle of "double voluntariness". Beneficiaries of temporary protection would have to give their consent to go to the Member State and the Member State had to "indicate – in figures or in general terms – their capacity to receive such persons" and then ensure that eligible person, "who have not yet arrived in the Community have expressed their will to be received onto their territory".

4.1.2 ALLOCATION OF RESPONSIBILITY FOR PEOPLE GRANTED INTERNATIONAL PROTECTION - INTRA EU RELOCATION MECHANISM

In 2012 the European Parliament returned to the idea of a "European distribution key" inspired by Germany's *Königsteiner Schlüssel*. Although first proposed as a mechanism for distributing asylum seekers, it ended up in a European Parliament resolution as a mechanism for distributing people already granted international protection:

"Calls on the Commission to take into consideration, in its legislative proposal for a permanent and effective intra-EU Relocation Mechanism, the use of an EU Distribution Key for the relocation of beneficiaries of international protection, based on appropriate indicators relating to Member States' reception and integration capacities, such as Member States' GDP, population and surface area and beneficiaries' best interest and integration prospects; this EU Distribution Key could be taken into account for Member States which are facing specific and disproportionate pressures on their national asylum systems or during emergency situations; underlines that relocation will always depend on the consent of beneficiaries of international protection."⁷⁵

The proposal for an **intra-EU Relocation Mechanism** to which the resolution referred was put forward by the Commission following two projects, EUREMA I and 2 (**European Union Relocation from Malta**) in 2011-2012. They involved relocating people who had been recognised in Malta to other Member States, based on the same principle of "double voluntariness" as the Temporary Protection Directive. They represented the Council's response to Malta's pleas for solidarity in response to the 'particular pressures' it was facing because of increased boat arrivals. 500 people were transferred to other Member States – outweighed, in terms of responsibility-sharing, by the 560 Dublin returns Malta received in 2010.

A number of people refused the offer of places and six asked to return to Malta after being relocated to a new Member State. Some Member States are reported to have seen this as ingratitude⁷⁶ or as an indication of the challenges presented by distribution schemes dependant on applicants' choice/consent and the Council did not back the Commission's proposal for an EU-wide relocation scheme. A fact-finding report notes, however, that there were failures to provide the support that had been promised, a breakdown of trust and concerns about reuniting

⁷⁴ Thielemann, E. (2003) Between Interests and Norms: Explaining Burden-Sharing in the European Union . Available at <http://personal.lse.ac.uk/thielema/Papers-PDF/JRS-16-3-BS-Interests-Norms.pdf>
Journal of Refugee Studies 16 (3): 253-273

⁷⁵ European Parliament resolution of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI))

⁷⁶ New Approaches study

with families⁷⁷. The importance of accurate information about the destination country is a crucial lesson for any future relocation or distribution mechanisms that offer applicants a choice and the list of reasons why candidates for relocation declined places is instructive:

- “lack of a community of the same origin (hence a perceived lack of social safety net)
- perception that living conditions in the proposed relocating country are difficult and prospects for regular work limited;
- poor social welfare systems (in some cases no guaranteed support after initial phase)
- less favourable integration prospects;
- language barriers;
- the perception that there are other options (US), onward movement in Europe, settlement in Malta)”.

Notwithstanding the limited success of the EUREMA projects, UNHCR has recently proposed a one year pilot project for the relocation of recognised Syrian refugees from countries like Malta and Greece to northern Europe.

4.1.3 “MULTI FACTOR MODEL FOR ALLOCATION OF RESPONSIBILITY FOR ASYLUM SEEKERS

In November 2013 the German Institute for International and Security Affairs (known as SWP) published a policy brief, “Pathways to Fairer Burden-Sharing”, proposing a “multi-factor model” for determining “fair reception quotas” in response to the “highly uneven” distribution of the Dublin system⁷⁸. This model derives a key from the combination of two more heavily weighted factors, GDP and population, objective criteria already supplied annually by UNHCR, with two less weighted factors, territory and unemployment rate.

The fair reception quotas would be used either to

- a) Organise the **physical distribution** of claimants or
- b) To calculate Member States’ contribution to a “**Dublin compensation fund**” to cover the costs of accommodating asylum-seekers and processing their applications.

The physical distribution mechanism, it is suggested, would enable some individuals to go to their country of choice, for example, to join a family member, presumably providing that the quota remained unfilled and they were accepted by the Member State. Under the financial compensation option, the Dublin system for distributing asylum seekers would remain unchanged. The proposal suggests looking at the new Asylum and Migration Fund’s compensation mechanism for resettlement as a possible model.

In September 2014 Austria proposed to use this same distribution mechanism, but for **resettlement of refugees** (from outside the EU).

The advantage of models that use a distribution key is that they take into account Member States’ capacities, which are ignored by the Dublin System. As a rule, however, they take insufficient account of asylum seekers’ preferences.

⁷⁷ European Union: European Asylum Support Office (EASO), EASO fact finding report on intra-EU relocation activities from Malta , July 2012, available at: <http://www.refworld.org/docid/52aef8094.htm>

⁷⁸ Steffen Angenendt, Marcus Engler, Jan Schneider, European Refugee Policy, Pathways to Fairer Burden-Sharing, SWP Comments 2013/C 36, November 2013, http://www.swp-berlin.org/en/publications/swp-comments-en/swp-aktuelle-details/article/european_refugee_policy.html

ADVANTAGES OF THE SWP MODEL:

- Flexibility: two options, physical distribution or financial compensation;
- The possibility of letting some applicants have their choice of country in option a)⁷⁹;
- Ease of transition in option b) (Dublin distribution continues unchanged);
- Enables Member States to plan services according to predictable numbers;
- May reduce the incentive for States to drive down their standards (or not raise them) in order to deter asylum seekers.

DISADVANTAGES OF THE SWP MODEL:

- Challenge to get those Member States to agree for whom it means a net increase in asylum numbers (little incentive)
- Lack of clarity about how asylum seekers would be distributed in option a)
- Likely to need to use coercion in option All the problems associated with Dublin in option b) (i.e. coercion, detention, protection lottery, secondary movement etc.)
- All the financial and human costs of coercion, where asylum seekers have to be forced to go to a country not of their choosing, including those in option a) whose preferences could not be met;
- The cost of a fund to cover all reception and procedural costs is likely to be considerable;
- People might try to game the system, by making sure they arrive before their preferred Member State fills its quota.

4.1.4 ICMPD ANALYSIS OF DISTRIBUTION-KEY BASED MODELS

The International Centre for Migration Policy Development (ICMPD) has compared different models for the distribution of asylum seekers⁸⁰, at both EU and national level. These include models not mentioned here, such as range of distribution keys tested by the consultancy Ramboll and what they describe as the “considerably different approach” taken by the only existing responsibility-sharing mechanism in place at the EU level – the European Refugee Fund.

The ERF mechanism distributed a fixed minimum of 300,000 Euros to each Member State per year (which could be raised to 500,000 Euros for new EU Member States). The remainder was distributed according to a specific key which considered:

- 1) the proportion of beneficiaries of international protection residing in the Member State admitted in the past three years (weighted with 30%) and
- 2) the proportion of the number of applicants for international protection and persons enjoying temporary protection according to Directive 2001/55/EC registered in the last three years (weighted with 70%).

ICMPD found that the difference in outcomes according to key were relatively modest (see table below, which lists all distribution key models in an overview (the lowest values for each country marked in green, the highest in red). However, use of the keys would make a considerable difference to the number of asylum seekers received by some Member States: Austria, Belgium, France, Germany, Greece, the Netherlands Sweden currently receive more asylum seekers than they would under any of the distribution quotas, while Croatia, the Czech Republic, Estonia,

⁷⁹ It may be suggesting that asylum seekers could have free choice until quota is filled, but it is not clear

⁸⁰ Kraler, A and Wagner, M. An Effective Asylum Responsibility Sharing Mechanism, ICMPD, Oct 2014

http://research.icmpd.org/fileadmin/Research-Website/Lists_of_publications/TP_Responsibility_Sharing_Wagner_Kraler.pdf

Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the UK receive fewer asylum seekers than they would according to any of the distribution keys.

ICMPD recommended that any discussion of responsibility-sharing should focus less on the type of key used and more on the distribution mechanisms and the potential of distribution keys for different policy purposes, such as using resettlement to compensate for uneven distribution.

	SWP model	German proposal 1994	German model (Königsberg)	Austrian model (per population)	% of EU 28 GDP	Asylum applications in % (mean 2009–2013)	ERF distribution quota
Austria	2,45%	1,96%	2,10%	1,66%	2,35%	4,74%	5,65%
Belgium	2,46%	1,92%	2,70%	2,17%	2,90%	8,15%	4,39%
Bulgaria	1,27%	1,41%	0,70%	1,46%	0,30%	0,70%	0,82%
Croatia	0,94%	0,82%	0,50%	0,85%	0,35%	0,22%	
Cyprus	0,55%	0,17%	0,10%	0,17%	0,14%	0,67%	2,01%
Czech Republic	1,94%	1,68%	1,50%	2,08%	1,19%	0,26%	1,24%
Denmark	1,74%	1,32%	1,60%	1,10%	1,90%	1,62%	
Estonia	0,50%	0,47%	0,20%	0,26%	0,13%	0,02%	0,59%
Finland	2,14%	3,37%	1,30%	1,07%	1,47%	1,16%	2,59%
France	13,11%	13,66%	14,70%	12,87%	15,77%	17,72%	11,73%
Germany	15,80%	14,89%	19,10%	16,22%	20,47%	21,08%	11,61%
Greece	2,09%	2,27%	1,70%	2,21%	1,66%	3,31%	4,33%
Hungary	1,60%	1,61%	1,20%	1,98%	0,77%	1,83%	1,22%
Ireland	1,28%	1,25%	1,10%	0,90%	1,29%	0,48%	2,04%
Italy	10,78%	10,29%	12,00%	11,75%	12,38%	6,96%	6,52%
Latvia	0,57%	0,67%	0,20%	0,41%	0,16%	0,05%	0,60%
Lithuania	0,72%	0,77%	0,40%	0,61%	0,24%	0,16%	0,67%
Luxembourg	0,76%	0,16%	0,30%	0,10%	0,33%	0,41%	0,60%
Malta	0,50%	0,05%	0,10%	0,08%	0,05%	0,54%	1,23%
Netherlands	3,98%	2,95%	4,20%	3,30%	4,71%	4,72%	4,57%
Poland	5,19%	5,81%	4,50%	7,60%	2,87%	3,11%	2,82%
Portugal	1,83%	1,83%	1,50%	2,09%	1,34%	0,09%	0,54%
Romania	3,06%	3,45%	2,10%	4,00%	1,03%	0,47%	0,80%
Slovakia	0,98%	0,90%	0,70%	1,07%	0,54%	0,19%	1,25%
Slovenia	0,74%	0,38%	0,30%	0,41%	0,28%	0,09%	0,72%
Spain	8,30%	9,60%	8,30%	9,23%	8,27%	1,01%	1,85%
Sweden	3,22%	4,96%	2,70%	1,86%	2,94%	11,44%	17,64%
United Kingdom	11,54%	10,69%	14,10%	12,48%	14,16%	8,82%	11,96%

4.2 FAIRER TO ASYLUM SEEKERS

4.2.1 "FREE CHOICE"

In March 2013, a consortium of NGOs issued a Memorandum on "Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility"⁸¹. It proposes retaining the Dublin system and most of the criteria contained in it, but removing the "irregular entry" criterion from Dublin III⁸² and replacing it with **free choice** of Member State. Asylum seekers would be registered in the Member State of entry to the EU, given a document recording basic data, such as date and place of entry, with fingerprints, which they would be expected to present to the authorities in the destination country and then they would be allowed to move on. They might be given travel assistance from a central fund. It is assumed that they would have to an incentive to make their way as soon as possible to the country where they have family, community and/or language ties. A "Financial compensation fund" based on "solidarity and fairness" would be used to make up for uneven distribution between Member States. While there is a risk of absconding, the assumption is that people will want to join their families/communities in destination countries.

ADVANTAGES OF 'FREE CHOICE' MODEL

- Takes account interests of refugees - which has a precedent in UNHCR's EXCOM Recommendation 15 (XXX) on "Refugees without an asylum country", that the refugee's intentions "as regards the country in which he wishes to seek asylum ... should as far as possible be taken into account";
- No more bureaucracy – and probably considerably less - than under current Dublin system.
- Financial compensation may encourage Member states to improve procedures and reception conditions;
- Asylum seekers can avoid Member States, such as Greece, where system has collapsed, or countries, such as Bulgaria, where the prospects of employment are minimal and whose own citizens are moving elsewhere in the EU in search of work;
- It is claimed that there would be cost savings because many asylum seekers would be supported by families and networks, saving costs;
- Coercion would only need to be used if applicants rejected in one Member State tried to make a repeat application in another;
- Asylum seekers have an incentive to present to the authorities: regulated movement is better than irregular secondary movement;
- Asylum seekers are likely to choose the Member State where that they will find it easiest to integrate and will integrate, work and pay taxes (e.g. where they have family or other contacts, previous residence, knowledge of the language, prospects of finding work), which is in Member States' interests;
- More rapid integration of beneficiaries of international protection will reduce welfare bill for Member States;

⁸¹ German Bar Association, AWO Workers' Welfare Association, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS (2013) (2013) Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility, March 2013. Available from:

www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Memorandum_Dublin_engl.pdf

⁸² Article 13, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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), 29 June 2013, OJ L. 180/31-180/59

- Legally straightforward, requiring only one amendment to the Dublin III Regulation.
- Equitable, solidarity-based, in that it does not shift responsibility to Member States' at the EU's periphery.

DISADVANTAGES

- Member States are wedded to the idea of linking responsibility for border control to responsibility for asylum claims;
- Member States will fear giving the impression to the public that they are not in control of the system;
- Does not share responsibility equitably in terms of people – relies on financial compensation, which may not satisfy member states who feel they have an unfair share;
- Snowball effect – as individuals join family and friends, communities grow, exacerbating uneven distribution;
- Asylum seekers travelling between Member State of entry/first registration may be vulnerable to harassment owing to their unclear immigration status;
- Member States may try to lower their reception and procedural standards in order to deter asylum seekers, in spite of their obligations to meet EU and international standards;
- Member states may become even more wary about issuing visas, as this criterion is higher in the Dublin hierarchy than illegal entry, so would trump the free choice criterion.

4.2.2 DUBLIN WITHOUT COERCION

In October 2014 a study commissioned by the Parliament on new approaches to EU asylum makes a persuasive case that the problem at the heart of the Dublin regulation is that it relies heavily on coercion, forcing asylum seekers to be in a Member State that is not of their choosing. Their lack of trust in the system leads to secondary movements. The system could be reconfigured to eliminate or at least greatly reduce its coercive and punitive elements, through, for example, a wider use of the family-related responsibility criteria, in line with *MA* and *K*; making provision such that reception capacity can cope with peak demand, to EU standards; use of the new requirement for a personal interview to take account of an asylum seekers preference to have his/her claim heard in a particular state; ensuring that there is a genuine level playing field in reception and procedural standards; mutual recognition of positive decisions and consideration of other grounds than are covered by the Long Term Resident's Directive to permit movement to another Member State, such as family reunification, study or employment.

ADVANTAGES

- Takes account to a greater extent than most other models (other than "free choice") the interests of asylum seekers;
- Asylum seekers have an incentive to present to the authorities: regulated movement is better than irregular secondary movement;
- Similar cost savings to 'free choice' because many asylum seekers would be supported by families and networks, saving costs;
- Coercion would only need to be used if applicants rejected in one Member State tried to make a repeat application in another;

- Asylum seekers are likely to choose the Member State where they will find it easiest to integrate and will integrate, work and pay taxes etc. (but unclear the extent to which that choice will be accepted);
- More rapid integration of beneficiaries of international protection will reduce welfare bill for Member States;
- Legally sound, requiring application of current law, including case law.

DISADVANTAGES

- No mention of compensation, financial or other, for uneven distribution;
- Not clear the extent to which asylum seekers can avoid Member States with poor standards;
- If still applying illegal entry criterion, unclear how coercion can be avoided.

5 CONCLUSION & RECOMMENDATIONS

Frequent calls have been made over the years for a complete overhaul of the Dublin system and in 2015 it is due to be reviewed again. A successor to the Dublin system is needed that is fair to asylum seekers and fair to Member States. It needs to respect asylum seekers fundamental rights as individuals, and, as far as possible, their wishes, as well as share the responsibility for hosting them and determining their claims as equitably as possible between Member States.

The use of coercion lies at the heart of the well documented failures of the Dublin system, both the human cost to the asylum seeker, the financial cost to States of coercive measures, particularly detention, but also as a root cause of irregular secondary movement, one of the greatest failures of the system.

Member States tend to be concerned with deterring asylum seekers with unfounded claims, but the asylum system ought to be just as interested – if not more so – in those who are ultimately successful and who may stay long term and may eventually become citizens. After all, the latest figures show nearly half of all asylum applicants in the EU receiving a positive initial decision⁸³. From this perspective, it is desirable that asylum seekers are able to start the process of integration as quickly as possible.

The way forward should comprise a comprehensive approach that includes the following core elements.

MITIGATE THE IMPACT ON ASYLUM SEEKERS

There will always be structural differences between Member States but the EU should cease to be a lottery when it comes to standards of reception and asylum decision making. The protection lottery should be addressed either through more robust action by the Commission to monitor and enforce EU standards through infringement proceedings and incremental harmonisation; or by instituting a European Asylum Service that makes consistent, high quality decisions throughout the Union.

⁸³ 48% received positive decision in Q3 2014 according to EUROSTAT. EUROSTAT (2014) Asylum applicants and first instance decisions on asylum applications: third quarter 2014 http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report

At the other end of the process, following a positive outcome of the asylum procedure, beneficiaries of international protection must be given the freedom to move within the EU at an earlier stage, either by amendment of the Long Term Residents' Directive or through mutual recognition of positive asylum decisions, under the same conditions as citizens. Consistent with the fundamental EU principle of free movement of labour, as well as the core objective of refugee protection of providing a "durable solution" to refugees, this would avoid beneficiaries of international protection being 'trapped' in a Member State where the economic conditions are such that many of its own citizens are having to move elsewhere in the EU to find work. It would also relieve pressure on those States.

ENSURE THAT ASYLUM CLAIMS WILL BE HEARD ONCE

The ongoing tensions between Member States over responsibility for asylum claims within the Dublin system indicate the continued need for a mechanism for allocating responsibility. Asylum seekers in the EU must be guaranteed access to the procedure and be assured that their claim for protection is heard in a fair procedure. They should not, however, be free to lodge multiple claims across the EU, simply in order to frustrate the system. These dual objectives point to retaining much some of the architecture of the Dublin system.

UNDERSTAND MEMBER STATES' PROTECTION CAPACITIES

The EU should agree a 'key', based on a number of measures, such as GDP, host population, existing populations of refugees and asylum seekers, which is seen as a fair assessment of Member States' capacity to receive asylum seekers and refugees. A public debate may help to reassure the public in some Member States who are concerned that they are receiving an unfair share. How this key may be used will be discussed below.

UNDERSTAND ASYLUM SEEKERS' NEEDS AND WISHES

When an asylum seeker lodges a claim, comprehensive initial interviews should be conducted to ascertain their needs in relation to vulnerability (e.g. unaccompanied minors), family and dependents, as well as wishes as regards their country of asylum.

MEET ASYLUM SEEKERS' NEEDS AND WISHES

Needs with respect to family, vulnerability and dependents may be met, to a great extent, by the Dublin III regulation, if properly implemented, but the restrictive definitions of family and dependents should be amended to accommodate the realities of people's lives, reduce the incentive to move irregularly and enhance the prospects of integration.

ACCOMMODATING THE WISHES OF ASYLUM SEEKERS

For those asylum seekers whose wishes, as regards their country of asylum, are not met by family, vulnerability and dependents criteria, the Greens could consider two options in lieu of application of the illegal entry criteria:

- a) Allow the applicant to travel to their preferred Member State, criterion in the Dublin Regulation (see "Free Choice" option above); or
- b) Allow them to make a case for travelling to their preferred State, based on objective criteria, such as broader family ties, previous residence, community links, language, employment prospects.

Option b) would require longer interviews and, for asylum seekers to make well-informed decisions, they would need independent advice. It also raises the question of those who are found not to have valid, objective reasons. Any option for this group would require at least

some level of coercion (e.g. as would dealing with claimants who have made multiple and/or fraudulent applications). While coercion does not necessarily lead to human rights violations, it is likely to fuel irregular secondary movement, and incur more financial and human costs, particularly through the use of detention.

Both option a) and b) would result in little change to the current distribution of asylum seekers (given the small number of Dublin transfers currently), would enable asylum seekers to be in the country where they have the best chance of integration, would respect asylum seekers' wishes as far as possible, in line with the conclusions of UNHCR's Executive Committee and would encourage asylum seekers to enter the system, be registered and travel regularly, rather than attempt stay below the authorities' radar.

RESPONSIBILITY SHARING

The distribution key could be used to develop a fairer allocation of funding. Ideally, funding would be tied to Member States developing their protection capacity and raising their reception and procedural standards over time. It could be used to allocate asylum seekers who have no objective reasons for preferring a particular Member State: they might, for example, be offered a choice of two or more Member States that had received fewer than their 'fair share'. But, this would bring with it all the human and financial costs associated with the coercive aspects of the current Dublin system.

More radically, perhaps, the distribution key could be used in connection with resettlement in order to show greater solidarity with countries in refugees' regions of origin, while compensating within the EU for the uneven distribution of asylum seekers.

An EU resettlement quota should be established and the distribution key should be used to determine the number of resettlement places each MS offers. It is likely that those receiving fewer asylum seekers would be required to take a proportionately greater share of the resettlement quota.

Bearing in mind that UNHCR has called for resettlement of 10% of Syria's refugees (approx. 370,000), the EU should establish a resettlement programme of a commensurate scale that shows real solidarity with those countries that bear the greatest responsibility for refugee protection internationally. Member States would have a mandatory resettlement quota: those receiving relatively large numbers of asylum seekers would likely have a small quota or none at all. Within their mandatory quota, Member States would select resettled refugees from those determined eligible for resettlement by UNHCR and those refugees would have the option to whether to accept the resettlement place i.e. it would be done the basis of double voluntariness.

One advantage of responsibility sharing through resettlement is that new communities would start to be formed in Member States currently hosting few refugees. As they became more established, asylum seekers may choose to join them, rather than seek to travel to those Member States currently receiving the largest numbers. In this way, responsibility-sharing through resettlement could help to even out the distribution of asylum seekers across the EU.

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