



A Dublin IV recast: A new and improved system?

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According to member states and EU officials, the European Union is now slowly entering a period of ‘post crisis.’ In this fragile period of stability, the European Commission has begun its task of strengthening the EU’s legislative framework on asylum. The focal point of the Commission’s task has been the reform of the Dublin system which, during the ‘asylum crisis,’ had almost collapsed. This policy brief has three aims. Firstly, it examines how the unprecedented movement of over one million persons seeking international protection to the EU in 2015 led to the fragmentation of the Dublin system. Secondly, it examines the main flaws of the Dublin system, namely the disconnect between the unchanged status quo on the Dublin rules and the ever-changing political and economic environment of the EU. Finally, it examines the Commission’s proposal for the recast of the Dublin system, assessing whether the new elements are adequate in resolving the key problems of the system. It is argued that although the reform does address, to a limited extent, the problems of secondary movement and the overburdening of some member state asylum systems, the reform does not sufficiently resolve the key flaws of Dublin in light of potential future migratory challenges.

‘THE DUBLIN PROCESS, IN ITS CURRENT FORM, IS OBSOLETE’¹

On 4 May 2016, the European Commission submitted a proposal for a Regulation of the European Parliament and of the Council ‘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).’ The proposal for the recast of the Dublin Regulation forms part of the legislative package presented by the Commission in its April 2016 Communication, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe.’ Underpinning the Commission’s decision to strengthen the EU’s legal framework on asylum was the need to resolve ‘the weaknesses in the design and implementation’ of the Dublin system, which had been exposed by the unprecedented movement of persons seeking international protection to the EU in 2015.²

The Dublin Regulation is the EU’s system for designating a member state responsible for an asylum application. The principal aim of the system is ‘to guarantee that every third country national seeking asylum in the Dublin area has swift access to status determination, while preventing him from pursuing multiple claims in several member states, with the overarching aim

of speeding up and rationalising the treatment of asylum claims.³ In order to achieve this aim, the Regulation contains a hierarchy of criteria that determines which member state must take responsibility for the asylum application process. The entry of over one million persons during 2015, however, threw the Dublin system and its rules on responsibility into disarray.

Although the Dublin Regulation contains a list of criteria to determine which member state should take responsibility, the rule that is most often automatically applied across the EU is the first irregular entry principle. In times of mass inflows along specific migratory routes, however, this rule places significant pressure on a limited number of member states, namely those at the EU's borders. As a consequence, countries such as Italy and Greece have struggled to effectively process the unprecedented number of arrivals seeking international protection, with their national reception and integration capacities being placed under severe strain. Due to a lack in both administrative and financial capacity, these member states have struggled to fulfil their obligations under the Common European Asylum System such as the fingerprinting of all persons entering their territory and providing swift access to asylum procedures. In addition, the perception that these rules have unfairly unburdened border states has also resulted in instances of non-compliance. Italy and Greece have been criticised for taking a permissive attitude toward instances of onward movement to destinations of preference.

As a result of this secondary movement, countries such as Germany and Sweden have been faced with large increases in applications for asylum while others such as those across the Eastern border have been transformed into countries of transit. The uncontrolled movement of persons has led to a number of member states suspending the Schengen system.

In addition member states have also taken further unilateral measures such as the building of fences and the changing of national asylum laws to dissuade persons from travelling and seeking asylum in these countries. The unprecedented inflows of those seeking international protection has exposed the shortcomings of the EU's Dublin system and placed the functioning of its Common European Asylum System and Schengen in jeopardy.

WHY IS DUBLIN SO PROBLEMATIC?

On the one hand, the Dublin system has been 'lauded as the cornerstone of the EU's Common European Asylum System.'⁴ On the other hand, it has been equally 'vilified as a failure of solidarity and burden sharing among European Union member states.' Some member states see the Dublin system as 'essential to the effective operations of their asylum systems.' For these member states, the Dublin Regulation constitutes a legal framework, which requires each member state to fulfil their obligations of processing an asylum claim. A mechanism, such as the Dublin system, is required to ensure that all member states participate in responsibility allocation and prevent cases of free riding.

Conversely, other member states have argued that the Dublin system contributes to this asymmetrical sharing of responsibility and free riding. The system, with its emphasis on a single member state as responsible, allows for those countries unaffected by refugee inflows to avoid engaging in responsibility sharing arrangements. The Dublin system not only reinforces the idea that asylum applications are a national competence, but that sudden inflows are a problem for other governments to deal with. Member states that consistently receive the most asylum applications and those situated geographically at the main entry points have criticised the lack of solidarity from other countries of EU, especially considering the refusal of

some to participate in the relocation schemes agreed to in 2015.

Yet if we assess the original aim of the system, the Regulation was not ‘designed to equalise or share the asylum burden.’ The central purpose underpinning the creation of the Dublin Convention in 1990 was to develop ‘a mechanism that swiftly assigns responsibility for processing an individual asylum application to a single member state.’ At the time of the agreement, the rules on responsibility perhaps had a certain logic to them. The criticism that the system is inherently flawed is therefore not completely accurate. Rather, the problem also stems from the tension between the decision by member states to maintain the status quo on the Dublin rules and the dramatically changing context in which the system operates.

Since the original agreement in 1990, the European Union has expanded from twelve member states to twenty-eight, radically changing the geographical shape of the EU’s borders and neighbourhood. In addition, with the Arab uprisings and the outbreak of violent conflict in Syria since 2011, the nature of migratory flows to the European Union has changed, with increasing numbers arriving since as early as 2013. The central problem is that by maintaining a status quo on its original form, the Dublin system is no longer responsive to the kind of migratory challenges faced by EU member states.

EXPLAINING THE PRE-CRISIS STATUS QUO

The status quo on Dublin has been maintained largely because the majority of EU member states are reluctant to engage in a reform that may require them to take on additional responsibilities. In fact, the system can be conceptualised as competitive game in which member states seek to minimise their ‘burden’ of asylum applications. This defensive behaviour

has at times had drastic outcomes on the asylum systems of other member states. A prime example is the ‘well documented practice of piling requests on patently failed national asylum systems, disregarding the rights of applicants and the functioning of the CEAS as a whole.’⁵

Some measures have been taken in an attempt to demonstrate solidarity but also to ensure a compromise is achieved on the existing rules of the Dublin system. This includes measures such as the Early Warning and Preparedness Mechanism, which was created by the 2013 recast of the Dublin system. The measure aimed to support member states whose asylum systems were under strain from sudden and high inflows. However, not only was the system never implemented, it also placed additional responsibilities on border states. The mechanism was never activated because ‘some member states argued that the conditions for triggering the mechanism were never fulfilled.’⁶ Others have argued that ‘it is difficult to reach a political agreement on triggering the mechanism in the absence of clear criteria and indicators to measure the pressure.’ In addition, the mechanism places an obligation on member states under pressure to invest resources in producing crisis management action plans with often little support from other EU member states. Overall, both the Dublin system and its solidarity mechanisms have reinforced the perception that the management of sudden and large inflows is a national issue.

The status quo on this perception may have been maintained easily enough during periods of relatively low inflows. The movement of over one million persons to the EU seeking international protection, however, forced the EU and member states to recognise that the Dublin system required a reassessment. The Commission acknowledged that even ‘with a more efficient and stricter enforcement by all Member States of the existing rules... there is a high likelihood that the current system would

remain unsustainable in the face of continuing migratory pressure.’ The following section examines the new elements introduced by Dublin IV, and whether the reform can resolve the key problems of the Dublin system.

WHAT’S NEW ABOUT DUBLIN IV?

Among a number of technical reforms, the Dublin IV recast seeks to address two key phenomena that were witnessed in 2015, namely the uncontrolled secondary movement of persons and the critical pressure placed on border states as a result of the Dublin responsibility rules. The Commission seeks to respond to these two challenges through three steps. The first is to sanction applicants for secondary movement by placing their claims through accelerated procedures. In the proposal for the recast, the Commission states that a new obligation will be introduced that ‘foresees that an applicant must apply in the member state either of first irregular entry or, in the case of legal stay, in that member state.’ In the case of ‘non-compliance...by the applicant, the Member State must examine the application in accelerated procedures.’ This new element is aimed at ensuring ‘an orderly management of flows, to facilitate the determination of the Member State responsible, and to prevent secondary movement.’

The second step adopted by the Commission is to stabilise the allocation of responsibility. The new recast ‘introduces a rule that once a member state has examined the application as member state responsible, it remains responsible for examining future representations and applications of the given applicant.’ The aim is to strengthen the rule that ‘only one member state is and shall remain responsible for examining an application and that the criteria of responsibility shall be applied only once.’ This new provision is intended to remove any incentives ‘applicants may have to abscond in order to forestall a transfer’ as the ‘expiry of

deadlines will no longer result in a shift of responsibilities between member states.’ In doing so, the new recast resolves the ambiguity surrounding the deadline of previous transfer charges.

The third step proposed by the Commission is the creation of a corrective allocation mechanism to support member states facing significant pressure from sudden and high inflows of persons seeking asylum. The aim of the mechanism is to ‘ensure a fair sharing of responsibility between member states and a swift access for applicants to status determination procedures when a member state is confronted with a disproportionate number of applicants.’ The system would function in a similar way to the relocation schemes, in which an applicant will be transferred from an overburdened state so their application can be examined by another member state. The mechanism is automatically triggered when a member state receives 150% of its fair share of asylum applications. At this point, applicants will be relocated elsewhere in the EU.

CONCLUSION: SHORTSIGHTED SOLUTION TO LONG TERM CHALLENGES

Although the recast introduces new elements to tackle the issues of secondary movement and the lack of solidarity among member states, the proposal remains insufficient. Firstly, the added provision allowing member states to sanction asylum seekers reveals a more coercive trend in EU asylum policy and does not necessarily address the reasons why asylum seekers choose to move. Secondly, this rule is only effective if the asylum seeker has been registered. It does not resolve the main contributing factor of secondary movement, the avoidance of registration in first entry countries.

The proposal for the stabilisation of responsibilities will help with preventing member states from circumventing the deadlines for accepting responsibility and reducing the incentives for asylum seekers to abscond. However, this provision can only be effective in an environment of mutual trust and solidarity. Incentives to circumvent rules exist because some member states perceive the responsibility rules as unfair. In order to develop trust, the system needs to move beyond a competitive game of responsibility avoidance. The Commission's proposal for a corrective allocation mechanism is a step in the right direction. However, the challenge with the new solidarity mechanism is that it does not necessarily provide the right solution to the actual challenges faced by border states.

Firstly, the measure stipulates that the benefitting member states, the state of first application and the one carrying out the allocation process, would be required to undertake additional responsibilities prior to the application of the mechanism. These responsibilities include identifying applications, registering claims, carrying out admissibility screenings and taking responsibility for inadmissible applications and unfounded claims. As such, these 'benefitting' member states would in fact be dealing with a 'sizeable share of the returns of rejected asylum seekers', an aspect of EU asylum policy that remains a substantial challenge to implement. This has led to a number of criticisms that Dublin IV would in fact 'aggravate current imbalances in responsibility among member states' by designating 'gatekeeper' responsibilities to irregular entry states, which in practice would be the already overburdened states of Italy and Greece.

Secondly, member states of allocation would be eligible to refuse the transfer on two grounds: firstly, on the ground of national and public security concerns, and secondly, through the

'pay to not play' exemption. Each year member states can declare themselves unavailable as member states of allocation for the duration of 12 months. During this time, the member state would be required to make a 'solidarity contribution' of 250,000 euros for each application, which would have been allocated to them. There has been some concern that such exemptions will simply reinforce the incentives of member states to not participate in responsibility sharing.

Thirdly, the mechanism is conceived as a measure to be applied during instances of high inflows. Framed in this way, the system presumes that such high inflows are temporary, and that once numbers return below the threshold of 150% the mechanism can be suspended. The mechanism does not consider the long term structural changes to migratory flows, in which the regional conflicts will continue to produce high numbers of refugees.

Ultimately, the Commission concluded that 'the current criteria in the Dublin system should be preserved,' leading to criticisms that the Dublin system, in its operation, 'will remain unchanged.' Despite this criticism, it is important to take into consideration the feasibility of a foundational reform in this political climate where there is little political will and appetite for further integration.

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ENDNOTE

¹ Statement by Angela Merkel on the 7 October 2015 in response to the problems of uncontrolled movement across member state borders.

² European Commission (2016) *Communication from the Commission to the European Parliament and the Council, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe'* COM(2016) 197 final, Brussels.

³ Regulation 2013/604, Recitals 4 and 5

⁴ Fratzke, S (2015), 'Not Adding Up: The Fading Promise of Europe's Dublin System' *Migration Policy Institute Europe*, March, p. 15.

⁵ Maiani, F (2016), 'The Reform of the Dublin III Regulation' *Study by the Directorate General for Internal Policies, Policy Department C for the Committee for Civil Liberties, Justice and Home Affairs*, p. 23

⁶ European Commission (2016), *Proposal for a Regulation of the European Parliament and the Council, 'establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodge in one of the Member States by a third-country national or stateless person (recast)'* 2016/0133(COD), Brussels, p. 11.



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