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The Reform of the Dublin III Regulation: How to Build or Not to Build Further Enforcing Mechanisms

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Abstract: The European Commission's proposal for the reform of the Common European Asylum System was presented in 2016 as a package deal. Of all the contentious legal instruments to be reformed, the most complex is the proposal for the Dublin IV Regulation. This article particularly seeks to identify the changes that illustrate the reactions of the European Commission and the Parliament as regards the mechanisms to enforce the Dublin system. On the one hand, some of the measures mark a shift from the human rights concept of refugee protection to an emphasis on security and punitive measures. On the other hand, it contends that some provisions of the Dublin IV proposal provide minimal persuading effects for States and asylum seekers. The robust conditions imposed on the 'beneficiaries' erode whatever the system is supposed to provide, either compliance with human rights standards or its proper implementation.

Keywords: Common European Asylum System - Dublin III Regulation- secondary movements – CEAS reform

(A) INTRODUCTION

The Treaty of Lisbon, which entered into force on 1st December 2009, transformed the measures on asylum from establishing a form of harmonization based on *minimum standards* into creating a harmonization based on a *common system.*[1] This Common European Asylum System (CEAS) includes a similar status of asylum and subsidiary protection in every Member State; criteria and mechanisms for determining which Member State is responsible for considering an application; common procedures for the granting and withdrawal of international protection; standards concerning reception conditions; and a common system of temporary protection.

The principle of solidarity and fair sharing of responsibility, including any financial solidarity between Member States, is also explicitly provided by the Treaty of Lisbon.[2] In addition, the Treaty significantly alters the decision-making procedure on asylum matters by introducing co-decision as the standard procedure. Furthermore, the arrangements for judicial oversight by the Court of Justice of the European Union (CJEU) have been improved significantly. Preliminary rulings may now be sought by any court in a Member State, rather than just national courts of final instance, as was previously the case.

The 'second stage' of the CEAS (2008-2013) was completed based on these grounds. Except for the recast Qualification Directive, which entered into force in January 2012, the other recast legislative acts

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1 European Commission, *Green Paper on the future Common European Asylum System*, 6 June 2007, COM (2007) 301 final.

2 Arts. 25, 27, 31, 37, 78 and 80 TFUE.

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entered into force between July 2013 and January 2014. This meant that the transposition of the asylum Directives in Member States' legislation in mid-July 2015 occurred at the peak of the migration crisis.[3] Coinciding in time, in view of the migratory pressure, the European Commission presented a comprehensive European Agenda on Migration, which proposed several measures to address this pressure[4]. A year later, the Commission tabled seven legislative proposals for the reform of the CEAS in two packages published on 4 May[5] and 13 July 2016[6] respectively.

Of all the contentious legal instruments to be reformed, the most complex is the proposal for Dublin IV Regulation. This article aims in particular to identify the changes that illustrate the reaction of the European Commission and the Parliament as regards the mechanisms to enforce the Dublin system. On the one hand, some of the measures contained in the Dublin IV proposal mark a shift from the human rights concept of refugee protection to an emphasis on security and punitive measures. On the other hand, it contends that some provisions of the Dublin IV proposal provide minimal persuasive effects for States and asylum seekers. The robust conditions imposed on the 'beneficiaries' erode whatever the system is supposed to provide, either compliance with human rights standards or its implementation. Following this introduction, Section B defines the *rationale* of the Dublin IV Regulation, which is in between two apparently colliding extremes. At one extreme, the compliance with human rights standards and becoming a pull factor for the EU on the other extreme. Section C expands upon the analysis of the specific measures envisaged in Dublin IV. Finally, Section D addresses the conclusions that the reform needs a more realistic approach, based on a stronger European Agency on Asylum and less bias towards the interests of States.

(B) EFFECTIVENESS OF THE DUBLIN SYSTEM AS A GENERAL AIM

The reform proposal for the Dublin Regulation III appears to prioritize two objectives: the *enforcement of allocation rules* and the *prevention of secondary movements within the EU*.[7] The rules on allocation of asylum seekers would be accompanied by a *corrective allocation system*. The Member State carrying out the transfer to the Member State of allocation would be entitled to receive a lump sum of 500 € for each person transferred. The European Union Agency for Asylum would be responsible for the establishment

3 Factsheets of the European Union, 2019, http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.2.pdf (accessed 20 November 2019).

4 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, 13 May 2015, COM (2015) 240 final.

5 COM (2016) 270 final, 4 May 2016 (Proposal for a Regulation to reform the Dublin system); COM (2016) 272, 4 May 2016 (Proposal for a Regulation to amend Eurodac); COM (2016) 271 final, 4 May 2016 (Proposal for a Regulation to establish an EU Asylum Agency which is to replace the European Asylum Support Office (EASO)).

6 COM (2016) 467 final, 13 July 2016 (Proposal for a new Regulation to replace the Asylum Procedures Directive); COM (2016) 466 final, 13 July 2016 (Proposal for a new Regulation to replace the Qualification Directive) and COM (2016) 495 final, 13 July 2016 (Proposed targeted modifications of the Reception Conditions Directive); and COM (2016) 468 final, 13 July 2016 (Proposal for a Union Resettlement Framework).

7 COM (2016) 270 final, *supra* n.5.

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and technical maintenance of the system for allocation of asylum seekers.[8] The fact that in each case only one contracting state is responsible for processing the asylum application is seen as beneficial for both the Member States and the applicants because it would avoid refugees in orbit and abuses of the system by the so called 'asylum-shoppers'.

However, this may conflict with the systemic deficiencies in the asylum systems of some Member States and with the circumstances that put the person who has been granted international protection in a situation of extreme material poverty, as declared by the European Court of Human Rights and the Court of Justice of the European Union.[9] If some internal systems are considered by the European courts as violating human rights standards, the allocating State could be found in violation of the law as a result of transferring an applicant to a place where the authorities cannot handle his/her application.

The introduction of a Qualification Regulation and an Asylum Procedures Regulation would lead to a set of rules which may achieve further harmonization. The effect of this would be that asylum seekers would be able to rely directly on the Dublin IV Regulation. However, the transformation of the Directives into Regulations entails that some of the EU Member States would be compelled to lower their standards on human rights protection, while harmonization should lie with the correct implementation of EU legislation currently in force. As a result, the enhancement of the quality of international protection, the asylum procedures and the reception conditions in all EU Member States, would be influenced mostly by the views of those Member States which are currently unwilling or unable to meet the agreed standards.[10] Every study, report and assessment on the implementation of the Dublin system highlights that the underlying principles of the Dublin Regulation III need to be *revised in order to grant better protection for refugees.*[11] The proposal for an 'objective assessment of the asylum capacity of each Member State', made by De Bruycker and Tsourdi seems an appropriate way for allowing to distinguish between the 'inability to comply' with obligations and 'unwillingness to comply' with them[12]. Paradoxically however, harmonization would result in a *pull factor* from the Commission's view. In between these two extremes, achieving a standard level of protection or becoming a pull factor, the EU will have to find a middle course.

(C) ENFORCEMENT OF THE DUBLIN IV REGULATION THROUGH THREE SPECIFIC MEASURES

(1) Pre-Dublin procedures for asylum applications by persons from 'safe countries of asylum', 'safe third countries' or 'safe countries of origin'

8 *Ibid.*, at 98.

9 *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011; CJEU, judgement of 6 June 2013, *M.A. and Others v. Secretary of State for the Home Department*, C-648/11, ECLI: EU:C:2013:336 and CJEU, judgement of 19 March 2019, *Jawo v. Germany*, ECLI:EU:C:2019:218.

10 Meijers Committe, 'CM 1805 Note on the proposal for the Procedures Regulation and Dublin Regulation', *Comments*, published on 21st March 2018, accessed 12 October 2019.

11 ECRE and AIDA, *The implementation of the Dublin III Regulation in 2018*, published on March 2019, accessed 4 October 2019.

12 Ph. De Bruycker, and E. Tsourdi, E., 'In search of fairness in responsibility sharing', 51 *Forced Migration Review* (2016), 64-65.

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One of the major issues of the proposal for the Dublin IV Regulation, established in its Article 3, is to introduce a pre-procedure for asylum applications made by persons coming from 'safe countries of asylum', 'safe third countries' or 'safe countries of origin'. Countries of first entry would be required to conduct admissibility and merit-related assessments before applying the Dublin IV Regulation. The Member State where an application is first lodged would have to verify the admissibility of the claim in relation to the 'first country of asylum' and 'safe third country', and would examine in an accelerated procedure application made by applicants coming from a 'safe country of origin' designated on the EU list, as well as applicants presenting security concerns (Article 3)[13].

The establishment of an EU common list of safe countries of origin was originally dealt with in a Commission proposal presented in September 2015.[14] However, after the trialogue started, in January 2017, the Maltese Presidency together with the European Parliament decided to freeze the process and continue discussions within the framework of the proposal for an Asylum Procedure Regulation[15]. The designation of 'safe countries' has significant political and legal implications as well as crucial effects on the rights and guaranties available to asylum seekers[16]. All of these consequences are transferred to the Member States of first entry according to the Dublin IV proposal.

The automatic application of the concepts of *first country of asylum*, *safe third country*, and *safe country of origin* and the non-defined legal concept of 'security concern' may lead to discriminatory situations based on nationality and on the routes taken by the asylum seekers. In the case of the *safe country of origin* and applicants constituting security concerns, procedural safeguards could be undermined due to the brevity of the time scale, or they could be transformed into non-individual processes of these applications for international protection, prohibited by Directive 2013/32 on common procedures for granting and withdrawing international protection.[17]

The European Parliament, based on the Wikström Report, suggested some amendments to Article 3 of the Dublin IV Regulation and presented a different text on accelerated procedures restricted to two situations: 'if the applicant is for serious reasons considered to be a danger to the national security or public order of the Member State, or if the applicant has previously been forcibly expelled under national law either from the determining Member State or from another Member State, for serious reasons of public security of public order'[18].

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13 COM (2016) 270 final, *supra* n. 5, Recital 17, Art. 3 (3) and at 15.

14 COM (2015) 452.

15 COM (2016) 467 final.

16 AIDA, '"Safe countries of origin" a safe concept?', *Legal Briefing No. 3*, September 2015.

17 CEAR, *Hacia dónde va el nuevo sistema europeo común de asilo: retos, amenazas y propuestas* (CEAR, Madrid, 2017) at 8.

18 European Parliament, *A Report on the 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 a stateless person (recast)*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Cecilia Wikström, A8-0345/2017, 6 November 2017 (hereinafter Wikström Report), Article 3 (a), at 151.

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The application of Article 3 may lead to two different interpretations: that a Member State, when it has indications that an applicant for asylum has travelled through another Member State, is conducting an admissibility procedure; or that the pre-Dublin procedure implies, in view of the parallel introduction of the obligation to apply for asylum in the Member State of first arrival, an additional administrative burden for Member States at the external borders.

In fact, the Dublin process itself is already a pre-procedure to an asylum procedure. Dublin IV adds another layer and extends rather than shortens the asylum procedures. The Member States having the largest numbers of first applications would solely be responsible for such pre-procedures. They will not only be responsible for the assessment of the application, but also for the risk of sending persons into life or freedom threatening conditions after examining their route rather than their protection claim is too high.[19] Consequently, it is dubious that the pre-Dublin procedure would be applied by Member States as they would be much more interested in evading the responsibility in any additional procedures; and determining within a two-month deadline if they are responsible for the assessment of the applications imposed in Dublin IV.

(2) Sanctions against secondary movements

Secondary movements occur when refugees or asylum-seekers move from the country in which they first arrived to another one to seek protection or for permanent resettlement. Different factors influence such movements and the decision to settle in a particular country. As the European Commission declared:

> 'The Common European Asylum System is also characterized by differing treatment of asylum seekers, including in terms of the length of asylum procedures or reception conditions across Member States, a situation which in turn encourages secondary movements.'[20]

Not only the human rights situation in specific States, but also the choices of integration for the asylum seeker determine the tendency of secondary movements. In 2007 the Commission stated that 'ensuring a high level of harmonization with regard to reception conditions of asylum seekers is crucial if secondary movements are to be avoided'.[21] As long as there is not further approximation of national asylum procedures, legal standards, and reception conditions, asylum seekers will seek protection in the most favorable state. The case of Greece is the clearest example of the difficulties of harmonizing standards. The Commission recognized that 'a very difficult humanitarian situation [...] is [...] developing on the ground'.[22] Furthermore, it addressed a recommendation to the Hellenic Republic on the urgent measures to be taken

19 Caritas Europa et al., *Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member States 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), COM (2016) 270 final*, (October 2016) at 5.

20 European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final, 6 April 2016.

21 European Commission, *Green Paper, supra* n.1 at 4 and 11.

22 European Commission, *First report on relocation and resettlement*, COM (2016) 165 final, 16 March 2016, at 2.

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by Greece in view of the resumption of transfers under the Dublin regulation.[23] The issue underlying these contrasting messages was the urgent need to harmonize standards.

Entry and transit requirements in the countries concerned; material resources; family or other social networks; economic prospects; the presence of migrant communities; or even the human smugglers who facilitate travel and impose concrete destinations are some of the several circumstances which determine asylum-seekers' decision to 'choose' their destination.[24] In this context, if the asylum seeker were given an opportunity to justify the reasons for applying for at one particular destination or other, it would make the system more comprehensible and efficient.

The problematic character of secondary movements is justified principally in two ways: on the one hand, they generate refugees in orbit or `asylum shoppers`, meaning that they shift from one country to another without having their asylum claim assessed; on the other hand, they put pressure on host countries, including their reception capacities, asylum systems, and the perception of security in different societies. They can even create law enforcement concerns. When countries have more difficulties in managing their asylum systems, the response by restrictive and deterrent measures is accentuated, such as by erecting fences, increased border controls, visa requirements, prolonged detention and deportation.

Due to the above-mentioned reasons, the main objective Dublin IV Regulation's is to prevent secondary movements.[25] It obliges States to follow accelerated procedures in these cases. That is to say, it presumes a connection between secondary movements and an asylum seeker's claim.[26]. However, a secondary movement is not related to the applicant's well-founded fear of persecution or real risk of serious harm in his or her country of origin or habitual residence. As a consequence, secondary movements should under no circumstances impact on the assessment of a person's international protection needs nor the type of procedural safeguards provided.[27]

As is generally known, the CEAS is designed in a way that an asylum-seeker's application is to be examined in only one State of the whole Dublin territory (the 32 States subject to the Dublin rules). The responsibility should only be undertaken by one State (one chance only) for each application. On these grounds, the Dublin Regulation III reinforces the presumption that Member States are equal. Its preamble establishes in its third consideration that 'Member States, all respecting the principle of non-

[23] European Commission, *Recommendation of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) 604/2013*, C (2016) 871 final, OJ 2016 L38/9. For a critique see ECRE, *Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece C (2016) 871*, published February 2016, accessed 10 November 2019.

[24] European Parliamentary Research Service, 'Secondary movements of asylum-seekers in the EU asylum system', *Briefing*, October 2017 and Meijers Committee, *CM 1614 Comments on the proposals for a Qualification Regulation (COM (2016) 466 final, Procedures Regulation (COM (2016) 467 final), and a revised Reception Conditions Directive (COM (2016) 465 final*, 2016.

[25] COM (2016) 270 final, *supra* n. 5, at 3-4.

[26] According to the text proposed by the Commission: 'If an applicant does not comply with the obligation set out in Article 4 (1), the Member State responsible in accordance with this Regulation shall examine the application in an accelerated procedure, in accordance with Article 31 (8) of Directive 2013/32/EU', in COM (2016) 270 *supra* n 5, at Art. 5 (1). The European Parliament proposed to delete this text, in European Parliament, Wikström Report, *supra* n. 16.

[27] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation COM (2016) 270*, October 2016, at 22.

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refoulement, are considered as safe countries for third country nationals'. If the way the asylum seeker was treated and the resolution of his/her application was coherent among Member States, then the results of the processes would be more or less comparable regardless of the Member State in which the application was lodged. However, after twenty years, and in the third stage of the CEAS, the differences among the recognition rates are still remarkable.[28]

Furthermore, the interest of the Dublin IV Proposal in discouraging secondary movements is reflected in measures which include far-reaching *sanctions* for secondary movements. The difference between the Commission's and the Parliament's focus as regards the ruling of secondary movements is that the Commission is reactive in the sense of penalizing the movement already realized and the Parliament appears to be proactive in dissuading asylum seekers not to move to a second Member State. Evidence of the punitive procedural consequences can be found in the following Commission's proposals:

(a) It introduces the aim of sanctions against asylum seekers and refugees who engage in irregular secondary movements;[29]

(b) It requires a mandatory examination on an open asylum application under an accelerated procedure if an applicant does not comply with the obligation to make the application in the Member State of first entry;[30]

(c) It announces the treatment of further representations following a discontinued application as a subsequent application;[31]

(d) It excludes the applicant's right to appeal the negative first instance decision taken by the responsible Member State.[32]

The punitive approach to secondary movements of asylum seekers was also envisaged by the European Commission on the Recast Reception Conditions Directive.[33] The secondary movements would imply the exclusion from general material reception conditions. According to the Commission's proposal, the exclusion would be imposed as of the moment of notification of the transit decision. The Parliament proposed the deletion of this provision.

The guarantees of Article 31 of the 1951 Refugee Convention – to protect refugees from the imposition of criminal penalties – are only contemplated in the Dublin IV proposal as regards to the detention of applicants. Non-penalization of irregular entry of refugees should be explicitly and broadly enshrined in the Dublin IV proposal. Secondary movements are provoked by the failure of certain Member States to respect EU standards and the imbalances derived from this fact. As stated by Maiani, 'if there are to be any priorities in the EU Asylum Policy, precedence should be given to redressing failing standards rather than

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[28] The highest recognition rates were in Switzerland (90%) and Ireland (86%) and the lowest recognition rates were for decisions issued in Czech Republic (11%) and Poland (14%), in EASO, *Annual Report on the Situation of Asylum in the European Union 2018*, (2019) at 37. For an analysis on this, see Guild, E., *Interrogating Europe's Borders: Reflections from an Academic Career*, (Radboud Universiteit, 2019) at 19.

[29] COM (2016) 270 *supra* n. 3, Recital 22.

[30] Arts. 3 (1) and 20 (3).

[31] Art. 20 (4).

[32] Art. 20 (5).

[33] COM (2016) 495 final.

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to repressing secondary movements' and he added that 'this might be a more effective way to attain the latter objective'.[34]

(3) Shortening procedural time limits

The Dublin IV proposal generally aims to streamline the application of the Dublin system through an overall reduction of time-limits for completing the procedure. Firstly, expiry of deadlines will no longer result in a shift of responsibility between Member States, with the exception of the deadline for replying to take charge requests.[35] Precisely, the suggested deadlines are the following: one month instead of three for issuing a 'take charge request',[36] and the request shall be sent within two weeks instead of two months in case of a Eurodac or VIS hit data recorded[37]; two weeks for making a 'take back' notification after receiving the Eurodac hit, which does not require a reply[38]; one week from the acceptance of the 'take charge' request or from the 'take back' notification for taking a transfer decision;[39] and four weeks to carry out a transfer.[40]

The Dublin IV proposal is therefore likely to repeat the perverse effects of its first version, the Dublin Convention of 1990. In its evaluation of the Dublin Convention in 2001, the Commission explained that the absence of consequences attached to deadlines led to several negative situations; eventually transfers not being carried out; and the detriment of asylum seekers' access to protection. In order to avoid leaving asylum seekers uncertain about the outcome of their application for an excessive period of time, deadlines had to be applied.[41] However, an excessive reduction of deadlines as proposed in Dublin IV, might misplace expectations and fail to oblige States to apply the Regulation or encourage asylum seekers to adhere to it.

(D) CONCLUSION: RIGHTS BASED COMPLIANCE

To sum up, the Dublin IV proposal introduces certain grounds of inadmissibility to be assessed by the Member States of first entry as well as the application of accelerated procedures which contradict the spirit contained in the very same Dublin IV proposal. It exacerbates distribution of inequalities as it imposes additional responsibilities upon external border countries for processing asylum applications failing under 'first country of asylum', 'safe third country', 'safe country of origin' and security grounds. Furthermore,

34 F. Maiani, '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 Homme Affairs,* (2016) at 36.

35 COM (2016) 270 final, at 16.

36 Art. 24.

37 Art. 24.

38 Art. 26.

39 Art. 30 (1).

40 Art. 30 (1).

41 European Commission, *Evaluation of the Dublin Convention*, SEC (2001) 756, 13 June 2001, 9-11. For a recent discussion, see C. Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission', *EU Migration Blog*, published on 17 May 2016, accessed 5 November 2019.

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through the proposed accelerated procedure, it would not be possible to take into consideration the asylum seeker's family relations, which are however reinforced in the proposal.[42]

In contrast to the adoption of new, general and strong measures unlikely to be fulfilled, a preferable way of reforming Dublin III Regulation would be to advocate for the enhancement of compliance with the existing overall mechanism on reception conditions. Whatever one's opinion of the Dublin III Regulation is, it is a fact that this instrument is the most human rights centered version in the 'Dublin history'. The consequences of irregular secondary movements for applicants, such as the mandatory use of the accelerated procedure or the withdrawal of reception conditions, risk violating fundamental rights and imposes massive involuntary transfers which could never be executed.

The focus on implementing and enforcing harmonized reception conditions would be more realistic than reforming Dublin III Regulation. The core problem of Dublin III is the national differences among Member States on the one hand, and the State interest-oriented approach on the other. A stronger European Union Asylum Agency, with resources for coordinating and gathering information from the Member States, seems to be a more realistic approach than the one resting on States decisions in the application of Dublin. The reality of the situation merits consideration.

[42] ECRE, *Comments on the Commission Proposal...*, *supra* n 27 at 3.

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