



# DUBLIN II REGULATION

## *Lives on hold*

European Comparative Report





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**February 2013**

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Enriched by the first Dublin transnational project “Transnational advisory and assistance network for asylum seekers under a Dublin procedure” in 2011 Forum Réfugiés – Cosi launched a new project with partners entitled “*European network for the technical cooperation on the application of the Dublin II Regulation*”. This comparative report forms part of the main activities of the project aimed at strengthening knowledge on the application of the Dublin II Regulation in Europe. This project was financed by the European Commission through the European Refugee Fund (July 2011 – February 2013).

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## Abbreviations

**Art:** Article

**AsylGH:** Asylgerichtshof (Asylum Court, Austria)

**BAMF:** German Federal Office of Migration and Refugees (Germany)

**Bundesasylamt:** Federal Asylum Office (Austria)

**CEAS:** Common European Asylum System

**CFR:** Charter of Fundamental Rights

**CJEU:** Court of Justice of the European Union

**CRC:** Convention on the Rights of the Child

**D,T&V:** The Service for Repatriation and Departure (the Netherlands)

**EASO:** European Asylum Support Office

**ECHR:** European Convention on Human Rights

**ECtHR:** European Court of Human Rights

**ECRE:** European Council on Refugees and Exiles

**EU:** European Union

**FRA:** Fundamental Rights Agency

**FOM:** Federal Office for Migration (Switzerland)

**IND:** Immigration and Naturalization Service (the Netherlands)

**NGO:** Non-governmental Organization

**OAR:** Spanish Office for Asylum and Refuge (Spain)

**OIN:** Office of Immigration and Nationality (Hungary)

**SAR:** State Agency for Refugees (Bulgaria)

**SPRAR:** System for the protection of asylum seekers and refugees (Italy)

**TAR:** Administrative Tribunal (Italy)

**VfGH:** Verfassungsgerichtshof (Constitutional Court, Austria)

# Executive Summary

*The objective of the Dublin Transnational Network project is to enhance knowledge of the implementation of the Dublin Regulation and investigate and analyse Member State practice surrounding the technical application of this Regulation.<sup>1</sup> This report provides a comparative analysis of Member State practice in applying the Dublin Regulation in Austria, Bulgaria, France, Germany, Greece, Hungary, Italy, Slovakia, Spain, Switzerland and the Netherlands. It serves as a synthesis of the findings of national reports produced by project partners and also draws upon the jurisprudence in these Member States.<sup>2</sup>*

Over 15 years have passed since the first Dublin Convention entered into force and yet inconsistencies and problems remain in the operation of this system.<sup>3</sup> This is due both to the intrinsically flawed premise that the Dublin system rests upon i.e. a level playing field across Europe with harmonized standards of protection as well as to deficiencies within the Regulation itself. This report aims at contributing to a better understanding of the Dublin system and its impact on the fundamental rights of those subject to it, particularly in light of a future ‘fitness check’ of the system.<sup>4</sup> Good practice by Member States is highlighted where appropriate. This report also endeavours to assist the Commission and Member States in identifying specific areas that require monitoring in the implementation phase of the forthcoming recast Dublin ‘III’ Regulation in addition to determining areas for further improvement in the Implementing Regulation.<sup>5</sup> The report makes recommendations for immediate action to address the shortcomings identified in current practice within the Dublin system except for deficiencies that will be addressed by a correct implementation of the recast of the Dublin Regulation. Such interim reforms will improve the application of the Dublin Regulation in the short term. Nevertheless, it is clear that these interim reforms fail to address the fundamental flaws in the Dublin system. ECRE and partner organisations believe that ultimately the underlying principles of the Dublin Regulation need to be fundamentally revised to take into account asylum seekers’ connections with particular Member States.<sup>6</sup>

## Main Findings

There are vast divergences in the way Member States apply the Dublin Regulation. As a result, asylum seekers subject to the Dublin Regulation are not always guaranteed a fair and efficient examination of their asylum claim. Having sought protection in Europe, such asylum seekers are often left in a prolonged state of anxiety and uncertainty with their lives effectively ‘on hold’.

<sup>1</sup> Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1 (‘Dublin Regulation’). A full overview of the activities of the Dublin transnational network project is provided in Annex III.

<sup>2</sup> To access national reports see [www.dublin-project.eu](http://www.dublin-project.eu). A report on national practice in Romania concerning the technical application of the Dublin Regulation is also available there.

<sup>3</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01) (‘Dublin Convention’).

<sup>4</sup> Commission (EC) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, an EU agenda for better responsibility-sharing and more mutual trust*, COM (2011) 835 final, 2.12.2011, p.7.

<sup>5</sup> Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3 (‘Implementing Regulation’).

<sup>6</sup> See ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008 (‘Dublin Reconsidered’).

## Statistical data and the cost of the Dublin system

The efficacy of the Dublin Regulation is questionable. Only a limited number of outgoing requests result in implemented transfers. The fact that certain Member States frequently exchange equivalent numbers of asylum seekers between themselves highlights the illogical nature of the Dublin system. There continues to be a paucity of information on the financial cost of this system. In order to enable a complete appraisal of the effectiveness of the Dublin system it is imperative that there is a thorough cost-benefit analysis of applying this Regulation.

### Fact:

On average across Europe in 2009 and 2010, approximately only 25.75% of all outgoing requests resulted in actual transfers of asylum seekers under the Dublin Regulation. Approximately 34.86% of accepted requests resulted in actual transfers during that same time period. (Source: Analysis of Eurostat data).

## The application of the Dublin Regulation criteria

A consistent approach to the application of criteria is central for the smooth functioning of the Dublin system. This report finds that there are vast disparities in the way that Member States interpret and apply the Dublin criteria.

- Sometimes the presence of family members in the territory of Member States is not taken into account and Member State responsibility is assigned on the basis of another ground contrary to the hierarchy of criteria.
- Even if the family provisions are considered Art. 7, 8 and 14 and/or the humanitarian clause are frequently applied in a restrictive manner leading to many instances of families being separated under the Dublin Regulation in a manner inconsistent with Member States obligations enshrined in Art 8 European Convention on Human Rights (ECHR) and Art 7 Charter of Fundamental Rights (CFR).
- Determining Member State responsibility for the examination of asylum claims for unaccompanied children resembles a 'lottery'. The experience of unaccompanied children within the Dublin procedure varies considerably amongst the Member States with respect to *inter alia* assignment of a guardian, family tracing, assessment of their best interests and age as well as with regard to the interpretation of the Art. 6 criterion.
- Art. 10 on the basis of Eurodac data and irregular entry is the most utilized criterion for assigning Member State responsibility for the examination of an asylum claim despite its relatively low position in the hierarchy of criteria.

### National Fact:

In 2011, in Bulgaria there was only one outgoing transfer implemented on the ground of family reasons. This transfer was to Germany and was one out of nine requests sent under these provisions to Germany (six), France (one), Italy (one) and Austria (one) respectively (Source: Bulgarian State Agency for Refugees statistics)

## The use of discretionary provisions

Due to the fact that the sovereignty clause and humanitarian clause are both discretionary provisions there is a degree of flexibility in how Member States apply them. In practice, both these provisions are rarely applied.

- The majority of Member States only apply the sovereignty clause on limited grounds related to particularly vulnerable individuals depending on the circumstances of the case or in the context of Dublin transfers to Greece due to the humanitarian situation there.
- There are procedural restrictions in place for applying the sovereignty clause in a number of Member States, for example, Bulgarian jurisprudence has held that national Courts are prevented from reviewing the use of this clause on the basis that it is a non-binding provision.



- The consent of the asylum seeker is not required to apply the sovereignty clause in Austria, Germany and Switzerland.
- A restrictive interpretation of the humanitarian clause and/or the definition of family members included in its scope means that the humanitarian clause is hardly ever invoked by administrative authorities.

### National Fact:

In 2011, Germany accepted 2,169 incoming requests for transfers from other Member States. Only 25 of these requests were on the basis of the humanitarian clause.

### Procedural safeguards

Procedural safeguards need to be in place to guarantee the legal and administrative rights of those subject to the Dublin Regulation. However, this report finds that frequently inadequate procedural safeguards are in place to guarantee asylum seekers' rights across the Member States surveyed.

- The majority of Member States provide some form of information to asylum seekers on the Dublin Regulation either by way of an information leaflet and/or admissibility interview. Despite this, the amount and quality of the information delivered varies extensively. Obstacles to effective provision of information include the language employed, technical terminology used in leaflets and/or guidance notes as well as the quality of interpretation and translation of these documents.
- Good practice is identified in Germany, Slovakia and the Netherlands whereby asylum seekers are granted access to their Dublin case files held by national administrations. Nevertheless, practice shows that lengthy delays occur in gaining access to case files held by the German administrative authorities and sometimes important information regarding the identification of the responsible Member State is omitted from these files.
- Not all persons subject to transfer are correctly informed of the decision, contrary to Member States obligations under Art. 19(1-2) and Art. 20(1)(e) of the Dublin Regulation. Failure to be properly notified of a transfer decision also has ramifications for access to an effective legal remedy.
- All Member States provide some form of an appeal to a transfer decision under the Dublin Regulation. However, there is divergent practice as to the effectiveness of these legal remedies for a number of reasons including with respect to requesting suspensive effect of appeal. Obstacles to accessing an effective legal remedy include the use of detention, restricted access to legal aid and to a lawyer and the fact that, in some Member States, a transfer decision is only delivered shortly before removal. This report found that access to an effective legal remedy is particularly restricted for third country nationals who did not claim asylum in the requesting Member State.
- Contrary to the objective of the Dublin Regulation, this report found that access to an asylum procedure is not always guaranteed both with respect to taking back and taking charge of cases. This is due to a number of factors, *inter alia* asylum claims being deemed to have been implicitly withdrawn, the strict requirements of subsequent asylum applications and arbitrary procedures for admission to the asylum procedure. A number of Member States severely restrict access to an asylum procedure in "repeat" cases, where the Dublin Regulation is applied more than once.

### Vulnerable persons subject to the Dublin procedure

In the majority of Member States researched, there is no definition of vulnerable persons nor formal identification procedure in place for identifying persons with special needs. Member State practice is inconsistent as to whether asylum seekers in the Dublin procedure are subject to medical examinations. Vulnerability *per se* will commonly not lead to a transfer decision being cancelled but may result in the transfer being postponed to a later stage. The research also demonstrates that continuity of care within the Dublin procedure is not always guaranteed due to the failure of some Member States to effectively inform the receiving State of any medical conditions or illnesses the person may have in advance of transfer. Apart from persons with specific health needs there was a paucity of information on the experience of applicants with other special needs for example trafficking victims subject to the Dublin Regulation.

## Reception Conditions and Detention

The operation of the Dublin system depicts a Europe with varying standards of reception facilities and social conditions where asylum seekers in the Dublin procedure are frequently treated as a secondary category of people with fewer entitlements. NGOs and charities often play an invaluable role in meeting this protection gap and assisting destitute asylum seekers.

- Asylum seekers in the Dublin procedure are often granted fewer rights in terms of access to reception conditions both pending and subsequent to a Dublin transfer.
- Applicants in the Dublin procedure in some Member States are assigned to different accommodation facilities and/or the provision of accommodation is limited to a specific period of time or until notification of a transfer decision.
- Access to accommodation in a small number of Member States is unpredictable due to insufficient capacity. This has led to some asylum seekers having to resort to measures varying from recourse to the Courts to the organization of makeshift settlements by asylum seekers themselves.
- Reception standards and accommodation facilities vary dramatically amongst and within Member States. Insufficient reception capacities and shortage of accommodation facilities are reported in a number of Member States such as Greece, Italy, France and Switzerland with asylum seekers in the Dublin procedure often being the first affected.
- Some Member States penalize asylum seekers sent back under the Dublin Regulation who previously claimed asylum there either by way of providing less monetary allowance or placing them in reception centres with more limited support services.
- Nine out of the eleven Member States researched frequently use detention as part of the Dublin procedure. The average length of detention varies significantly ranging from 24 hours prior to travel to the whole duration of the Dublin procedure which may take six months or longer.
- Detention is almost systematically used immediately prior to transfer in the majority of Member States surveyed.

## Practical aspects of the Dublin Regulation

The approach to transfers, circumstantial evidence and adherence to the time limits under the Dublin Regulation is extremely varied in all the Member States included in this study.

- Transfers by force are predominantly used to execute removals pursuant to the Dublin Regulation in the majority of Member States. However, voluntary transfers are the main method of removal in Bulgaria, Spain and Greece. Some Member States have special measures in place for the transfer of unaccompanied children, for example, in Slovakia and the Netherlands. Problematic practice exists in Germany whereby the enforcement of a Dublin transfer sometimes results in the application of a re-entry ban.
- In general, the time limits set out in the Dublin Regulation are respected. However, sometimes Member States fail to assume responsibility for the examination of an asylum seeker's claim if the time limits expire prior to removal. Long delays in the Dublin procedure are reported in Austria and Germany.
- Some Member States interpret the term 'absconds' under Art. 19(4) and Art. 20(2) relatively broadly which in turn leads to the extension of the time limit for transfers up to a maximum of 18 months.
- As regards circumstantial evidence, the evidentiary requirements in a number of Member States for proving family links can be quite stringent, with an increasing resort to DNA tests in disputed cases.
- Most Member States rarely accept responsibility under Art. 16(3) on the basis that an asylum seeker has shown that they have left the territory of the Member States for at least three months. Evidentiary requirements are generally applied in accordance with Annex II of the Implementing Regulation.<sup>7</sup>

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<sup>7</sup> Annex II of the Implementing Regulation includes List A (means of proof) and List B (Circumstantial evidence).

### Member State cooperation

Communication and administrative cooperation between Member States in applying the Dublin Regulation is generally good though there have been some reported instances of incorrect and/or insufficient information being transmitted for identification purposes. Bilateral agreements and the exchange of Dublin liaison officers are common practical cooperation measures used by Member States in the Dublin system. Austria, Bulgaria, Germany, Hungary, France, Romania, Slovakia and Switzerland all engage in bilateral agreements in accordance with Art. 23. These administrative agreements commonly result in shorter timeframes for sending and responding to requests and include provisions on practical measures regarding actual transfers. Bilateral readmission agreements outside the context of the Dublin Regulation also occur in Bulgaria, Italy and Greece. The research shows that there are a number of concerns surrounding the implementation of these readmission agreements and their compliance with Member States legal obligations, most notably, the guaranteed right of asylum under Art. 18 of the Charter of Fundamental Rights.

### The implementation of European jurisprudence

Member States implementation of key European jurisprudence is inconsistent and varied. A minority of Member States still have not formally stopped all transfers to Greece despite landmark rulings from both the European Court of Human Rights and the Court of Justice of the European Union prohibiting removal there due to systemic deficiencies in the asylum procedure and reception conditions there. Divergent practice also exists in relation to the interpretation of key findings in the Court of Justice of the European Union (CJEU) joint cases of C-411/10 and C-493/10.<sup>8</sup>

\*\*\*

The implementation of the new recast Dublin Regulation will introduce significant humanitarian reforms in the operation of the Dublin system. A number of practical recommendations are provided below in response to deficiencies in Member State practices which the recast Dublin Regulation will not address. It should be noted that some of these recommendations reflect long-standing positions that ECRE has taken which are necessary to reiterate in light of Member States continued failure to address these issues.<sup>9</sup> Proposals for further research are also advanced for priority areas of concern that require additional study.

<sup>8</sup> CJEU, Joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.

<sup>9</sup> See for example, ECRE/ELENA *Report on the Application of the Dublin II Regulation in Europe*, March 2006; ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008; ECRE, *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System* (COM [2007] 301), AD5/9/2007/Ext/RW.

# Recommendations

## European Commission:

1. With respect to the forthcoming 'fitness check':
  - The European Commission should conduct a comprehensive audit of all costs associated with the Dublin system.
  - More quantitative and qualitative data should be gathered by the European Commission with the support of Member States on the impact of the Dublin system on unaccompanied children.
  - Further study should be conducted on the reasons why limited Member State responsibility is assigned on the basis of family members.
  - Monitoring national practices on the reception and detention of asylum seekers in the Dublin procedure should be prioritised by the European Commission with the support of EASO, taking into account all available sources, including UNHCR and NGOs.
2. When drafting the common information leaflet envisaged under a new implementing regulation, a test phase should be conducted with a sample group of asylum seekers to ensure that the content is sufficiently clear and understandable and presented in a user-friendly format.
3. The European Commission should ensure that the recast Dublin Regulation along with other EU asylum legislation is properly implemented at the national level and take infringement proceedings where appropriate.

## Council of Europe:

1. The Council of Europe Commissioner for Human Rights should continue to monitor the impact of the Dublin system and press Member States to apply the Dublin Regulation in a manner consistent with their ECHR obligations.

## Fundamental Rights Agency (FRA):

1. FRA should undertake research on the impact of the Dublin system on asylum seekers fundamental rights in Europe.

## European Asylum Support Office (EASO):

1. In view of the establishment of a mechanism for early warning, preparedness and crisis management, EASO should:
  - Create expert workshops competent to address problematic national practices related to the application of the Dublin Regulation which will include organizations with specific expertise in this field.
  - Enhance and publish the collection of data on the quality and operation of Member States asylum systems that it obtains.
2. EASO should conduct a thorough review of the implementation of the European Asylum Curriculum module on the Dublin Regulation by Member States.

## Member States:

1. The collection of statistics on the application of the Dublin Regulation should be published and enhanced in compliance with Member State obligations under Regulation (EC) 862/2007.
2. Dublin Regulation statistics should be disaggregated on the basis of sex and age.

### Member States:

3. Comprehensive data on the financial cost of operating the Dublin system should be collected and published by Member States.
4. With respect to unaccompanied children:
  - The principles of the best interests of the child should be the paramount consideration in identifying the responsible Member State;
  - Member States should be more consistent and assiduous in their efforts to trace family members of unaccompanied children in the Dublin procedure living elsewhere in the territory of Member States;
  - The benefit of the doubt should be applied in age-disputed cases given the margin of error and the variety of methods used in age determination procedures.
5. Member States must ensure that the principle of family unity is respected within the Dublin procedure by applying the humanitarian clause in cases where adherence to the binding criteria would result in such families being separated.
6. Member States must respect the duty to apply the sovereignty clause where a transfer would be incompatible with their obligations under international law.
7. The sovereignty and humanitarian clause should be applied in a fair, humane and flexible manner that addresses the complex and varying situations in which many asylum seekers find themselves.
8. Applicants should be regularly provided with information on the progress of their case within the Dublin procedure.
9. Applicants in the Dublin procedure should be informed of a transfer decision within a reasonable period in advance of removal.
10. Pursuant to the right to asylum guaranteed by Art. 18 of the Charter of Fundamental Rights, all persons subject to the Dublin Regulation must be guaranteed access to an asylum procedure and to a full examination of their asylum claim.
11. Immediate steps must be taken to implement the CJEU Court ruling of C-179/11 and ensure equivalent standards of reception conditions for all asylum seekers including in the Dublin procedure.
12. In order to ensure that the objective of swift access to an asylum procedure is achieved in practice, all Member States must strictly adhere to the time limits set out in the Dublin Regulation.
13. Transfers pursuant to the Dublin Regulation should not result in the imposition of re-entry bans.
14. The definition of absconding should be narrowly defined for the purposes of extending the procedural time limits under Art. 19(4) and Art. 20(2).
15. DNA testing should only be used in complex Dublin cases where necessary in the absence of other documentation proving family links. If DNA tests are a requirement for proving family links in the Dublin procedure, Member States should provide them free of charge.
16. Readmission agreements should not be used to circumvent Member States obligations under the Dublin Regulation and international human rights and refugee law.
17. Member States must ensure that Dublin Regulation is applied in a manner consistent with the jurisprudence of the European Court of Human Rights (ECtHR) and CJEU.

### NGOs operating in the field of asylum:

1. Further research should be conducted on the application of the Dublin Regulation with respect to trafficking victims and LGBTI asylum seekers.

*I.*

# *Introduction*



*The report comes at a time when there have been significant developments in the landscape within which the Dublin system operates. In 2011, seminal judgments from both the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) changed the legal framework within which the Dublin system operates. At the same time, the EU institutions have recently reached a political agreement on a recast Dublin ‘III’ Regulation which maintains the underlying principles of the Dublin system and introduces substantive reforms to the Dublin system aiming to increase efficiency whilst respecting the fundamental rights of those subject to it. Comprehensive information on the technical application of the Dublin II Regulation in a large number of Member States has not been gathered since 2006<sup>10</sup> and more recent research focuses on the impact of certain aspects of the Dublin system.<sup>11</sup> This report aims to fill that gap.*

This research provides a comparative analysis of the technical application of the Dublin Regulation in **Austria, Bulgaria, France, Germany, Greece, Hungary, Italy, Slovakia, Spain, Switzerland and the Netherlands**. The report serves to synthesise the findings of the national reports produced by project partners and also draws upon jurisprudence in Member States. The national country reports should be referenced for a more detailed picture of the application of the Dublin Regulation at the national level. Although the focus of the research is on administrative practices, reference is also made to relevant legislation and policies within the Dublin system where appropriate. This report deals primarily with the application of the criteria and Member State co-operation in applying this Regulation. Information was also gathered on the context in which the Dublin Regulation applies at the national level with respect to reception conditions, detention and other Member State obligations.

## 1.1. Legal Framework

### • From Schengen and Beyond

The origins of the Dublin system can be traced back to the safe third country concept introduced to European asylum policy in the 1990s in response to a significant increase in asylum applications. With the introduction of the 1985 Schengen agreement and following the lifting of internal borders between Member States, it became clear that these measures needed to be accompanied by rules concerning Member State competence over asylum seekers. In Europe, the safe third country concept was first codified in the *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, commonly referred to as the Dublin Convention which was signed in June 1990 by the then 12 Member States of the European Community.<sup>12</sup> It entered into force on 1 September 1997 and as well as the 12 original

<sup>10</sup> ECRE/ELENA *Report on the Application of the Dublin II Regulation in Europe*, March 2006; UNHCR *The Dublin II Regulation: A UNHCR Discussion Paper*, April 2006.

<sup>11</sup> For example, CIR *Dubliners Research and exchange of experience and practice on the implementation of the Council Regulation Dublin II establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, April 2010.

<sup>12</sup> Previous to the Dublin Convention the 1985 Schengen Agreement title II Chapter 7 provided that asylum seekers could apply in only one Member State, the criteria for which were listed in Art. 30 of that Chapter.

signatories, it was adopted on 1 October 1997 by Austria and Sweden and on 1 January 1998 by Finland.

When the Dublin Convention was established, it was thought by some commentators to have had the potential to remedy the situation of “*asylum seekers in orbit*” in which no Member State would take responsibility for the determination of their asylum claim. However, within two years of its establishment there was widespread agreement that it was not functioning as well as had been hoped.<sup>13</sup> At a special Council meeting in Tampere in October 1999 the European Council called for establishment of a Common European Asylum System (CEAS) including the development of an instrument to identify the responsible Member State for the examination of an asylum claim.<sup>14</sup> With the adoption of the Amsterdam Treaty it was necessary that a Community instrument replaced the Dublin Convention. Therefore the Commission took the opportunity at that time to review the legal framework for the Dublin system. As a result of that, in 2003 Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national was adopted (hereafter the Dublin Regulation).<sup>15</sup>

### • The Dublin Regulation

The Dublin Regulation is aimed at determining Member State responsibility for the examination of an asylum application. As a regulation, it has direct effect and is binding on all EU Member States as well as the following Schengen Associated States Iceland, Switzerland, Norway and Liechtenstein. A fundamental characteristic of the system is that a single Member State is responsible for the examination of an asylum claim. The Dublin Regulation is supported by a number of other regulatory instruments, which together comprise the ‘Dublin system’. The Eurodac Regulation provides for the comparison of fingerprints of asylum applicants for the purposes of applying the Dublin Regulation whilst the Implementing Regulation lays down detailed rules for the application of various aspects of the Dublin Regulation.<sup>16</sup>

The aim of the Dublin Regulation is multifold: a) ensure that one Member State is responsible for the examination of an asylum claim and therefore avoid “*asylum seekers in orbit*” scenarios; b) prevent abuse of asylum procedures in the form of multiple asylum applications; c) to determine as quickly as possible the responsible Member State and to guarantee effective access to an asylum procedure in the responsible Member State. It is sometimes referred to as a responsibility sharing mechanism but the Dublin system was not intended to be a mechanism for equitably sharing responsibilities with regard to the examination of asylum claims.

The Regulation comprises of a set of criteria for allocating responsibility set out in a hierarchical manner. Member States must apply this criteria in the order of importance in which they appear in the Regulation. By order of priority, the criteria set out how responsibility is attributed to Member States as follows: a) a State in which the applicant has a family member (as defined in Article 2(i)

<sup>13</sup> European Commission, *Commission Staff Working Paper: Revisiting the Dublin Convention: Developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, SEC (2000) 522.

<sup>14</sup> Tampere Conclusion No. 14 stated: *This system should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR and other international organisations.*

<sup>15</sup> The legal basis for the Dublin Regulation was under Art. 63(1)(a) of the Amsterdam Treaty. Art. 63(1)(a) required that the European Council adopt “*criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a third country national in one of the Member States*”. The legal basis for the Dublin Regulation is now Art. 78(2)(e) Treaty on the Functioning of the European Union (‘TFEU’).

<sup>16</sup> The Implementing Regulation and Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of “EURODAC” for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316, (‘Eurodac Regulation’) and Council Regulation (EC) 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) 2725/2000 concerning the establishment of “EURODAC” for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 62/1.



of the Regulation) who has refugee status or whose application for asylum is being examined; b) a State which has provided the applicant with a residence permit or a visa or the border of which has been crossed illegally by the applicant; c) in case when the circumstances specified above do not take place, if the applicant enters the territory of a Member State in which the need for him/her to have a visa is waived, that State is responsible for examination of the application<sup>17</sup>. If none of these criteria are applicable, the first Member State in which the asylum application is lodged becomes responsible for examining it (Art. 13).

Over the years, sharp criticism has been levelled at the Dublin system due to its inherent limitations and its harsh impact on asylum seekers subject to it. Indeed, a Dublin transfer has often meant that an asylum seeker never receives an examination of his/her claim by any Member State, families are separated and asylum seekers are frequently detained.<sup>18</sup> Within the context of the Common European Asylum System (CEAS), vastly differing recognition rates create an ‘asylum lottery’ for individuals fleeing persecution and reception conditions available for asylum seekers vary widely across Member States.<sup>19</sup> Any system for allocating Member State responsibility is contingent upon harmonized protection standards within those Member States, which is far from a reality within today’s Europe.

The detrimental impact of the Dublin Regulation on asylum seekers has been highlighted not only by civil society but also by the Council of Europe, in particular the Commissioner for Human Rights.<sup>20</sup> For example, recently, in the context of mounting tensions in the Eastern Mediterranean in relation to migration and asylum, the Parliamentary Assembly of the Council of Europe invited the European Union to “*revise and implement the Dublin Regulation in a way that provides a fairer response to the challenges that the European Union is facing in terms of mixed migration flows*”.<sup>21</sup>

The very foundation of the Dublin Regulation counteracts true solidarity in Europe as it shifts responsibility for the examination of asylum claims to those Member States at the borders of Europe. In the 2007 Green Paper, the Commission itself acknowledged that the “*Dublin system may de facto result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location*”.<sup>22</sup> The system creates additional burdens for these countries and the feeling of a solidarity gap within Europe. This is particularly problematic, in that in ‘overburdened’ situations it is most likely that this will also have detrimental effects for asylum seekers present there, as demonstrated for example, in the poor reception conditions for asylum seekers in Greece.

Given that the application of the Dublin Regulation undermines refugee rights, ECRE along with other organizations have advocated and continue to advocate for a fundamental revision of the Dublin system, replacing it with a responsibility determination procedure, which focuses on existing connections between asylum seekers and Member States and asylum seeker’s own preferences. Such an approach would likely reduce irregular movement prior to the refugee status determination procedure as well as facilitate the integration of refugees.<sup>23</sup>

Despite increasing evidence of its flawed nature, Member States continue to be strongly committed to the Dublin system as reaffirmed in the Stockholm Programme, which states that “*the Dublin system remains a cornerstone in building the CEAS*”.<sup>24</sup>

<sup>17</sup> Article 12 also provides that where the application for asylum is made in an international transit area of an airport of a Member State by a third-country national, that Member State shall be responsible for examining the application.

<sup>18</sup> See for example, ECRE *The Dublin Regulation: Twenty Voices – Twenty Reasons for Change*, March 2007.

<sup>19</sup> An ‘asylum lottery’ continues to exist in Europe as evidenced by recognition rates in 2011, which are extremely variable. For example, in 2011 the recognition rate at first instance in Finland was 66.7% whilst the rate in Ireland was 4.2% [Source: UNHCR Global Trends for 2011].

<sup>20</sup> European Parliament Evaluation of the Dublin System (Own Initiative Report), INI (2008) 2262, 2 July 2008; Council of Europe (‘CoE’) Parliamentary Assembly press release, ‘*Dublin Regulation: unfair, expensive and ineffective*’ says new Chair of PACE Migration Committee, 8 December 2010; CoE Commissioner for Human Rights, *The ‘Dublin Regulation’ undermines refugee rights*, Press Release 683(2010).

<sup>21</sup> CoE Parliamentary Resolution *Migration and asylum: mounting tensions in the Eastern Mediterranean*, 1918 (2013).

<sup>22</sup> Commission *Green Paper on the future of the Common European Asylum System*, COM(2007) 301 final, 6.6.2007 p.10.

<sup>23</sup> ECRE *Dublin reconsidered paper*.

<sup>24</sup> European Council *The Stockholm Programme – an open and secure Europe serving and protecting citizens*, (2010/C 115/01), Chapter 6.2. This does not exclude the possibility of a fundamental replacement of the Dublin system in the future though, as the Council in the Stockholm Programme invites the Commission to “*consider, if necessary, in order to achieve the CEAS, proposing new legislative instruments on the basis of an evaluation*”. However, in the short term, Member States favour maintaining the founding principles of the Dublin Regulation with interim reform envisaged in the recast of the Dublin Regulation.

## • European Jurisprudence: Cracks in the Dublin System

Given this lack of willingness by Member States to revisit the foundational principles of the Dublin system in the face of mounting evidence of its deficiencies, the Courts, both at the national and European level, have increasingly been required to intervene to protect the fundamental rights of those subject to it. Over the past few years, there has been an increase in litigation at both the national and European level with regard to the application of the Dublin system, particularly in relation to challenges to transfers to Greece.

As of October 2012, there are approximately 90 cases currently pending before the ECtHR concerning the application of the Dublin Regulation.<sup>25</sup> This additional pressure on the Court is compounded by a large amount of Rule 39 requests. Since 2007 alone, there have been more than 910 Rule 39 interim measures granted by the ECtHR in proceedings related to the Dublin Regulation on the basis of a *prima facie* risk of a violation of an asylum seekers rights under the ECHR.<sup>26</sup> Additionally, up until November 2012, the CJEU has ruled upon five preliminary references and there are a further four pending preliminary reference questions on the interpretation of the Dublin Regulation.<sup>27</sup>

The delivery of two landmark judgments in 2011 from the ECtHR Grand Chamber in the *M.S.S. v Belgium and Greece* case<sup>28</sup> and the CJEU Grand Chamber in the joined cases of C-411/10 and C-493/10 fundamentally changed the automatic operation of the Dublin system.<sup>29</sup> In *M.S.S. v Belgium and Greece* the ECtHR Grand Chamber ruled, amongst other findings, that Belgium had violated Art. 3 and Art. 13 ECHR by sending asylum seekers back to Greece under the Dublin Regulation. Belgium was held to be in violation of Art. 3 for exposing the asylum applicant to the detention and living conditions in Greece. With regard to the national appeal procedure in Belgium, the Court held that it was in violation of Art. 13 in conjunction with Art. 3 because of the lack of an effective remedy against the Dublin decision. The judgment underscores that Member States in applying the Dublin Regulation cannot ignore the rights of asylum seekers to reception conditions that respect their human dignity and to effective remedies, including procedures to protect against *refoulement* and other arguable claims of human rights violations.<sup>30</sup> In the current application of the Dublin Regulation, the *M.S.S. v Belgium and Greece* judgment clearly holds that when making a decision whether to transfer, the transferring Member State cannot disregard the factual situation in the responsible Member State. When there are substantial grounds for believing that upon transfer the asylum seeker would face a real risk of a violation of his/her fundamental rights, then the transfer must not be carried out and the sovereignty clause Article 3(2) should be used.

Similarly, in December 2011, the CJEU in the joined cases of C-411/10 and C-493/10 ruled that Member States have an obligation not to transfer asylum seekers to States where such a transfer would result in inhuman or degrading treatment in violation of Art. 4 of the Charter of Fundamental Rights (CFR).<sup>31</sup> Both these Court rulings clearly show that the Dublin system cannot work on the basis of a conclusive presumption that asylum seekers' fundamental rights in each Member State will be observed.<sup>32</sup> The operation of mutual trust under the Dublin Regulation cannot be absolute.<sup>33</sup>

<sup>25</sup> CoE ECtHR Press Unit, Fact Sheet – 'Dublin Cases', October 2012; Also note that from 2009-2010 there were no less than 700 cases submitted to the ECtHR concerning asylum seekers requesting that their transfers under the Dublin Regulation were suspended – see CoE Commissioner for Human Rights, *The 'Dublin Regulation' undermines refugee rights*, Press Release 683(2010).

<sup>26</sup> ECRE/ELENA *Research on ECHR Rule 39 interim measures*, April 2012, Annex B(4) p. 100. That information was up-to-date as of April 2012 so the number of Rule 39 requests on the basis of the Dublin Regulation may now be significantly higher.

<sup>27</sup> The CJEU has issued rulings in the following Dublin Regulation cases: C-19/08, C-411/10 and C-493/10, C-620/10, C-179/11, C-245/11. The following Dublin Regulation cases are still pending: C-4/11, C-528/11, C-648/11 and C-394/12.

<sup>28</sup> ECHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011.

<sup>29</sup> CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.

<sup>30</sup> See also ECHR *TI v UK*, Application no. 43844/98, 7 March 2000.

<sup>31</sup> Art. 4 Charter of Fundamental Rights ('CFR'): No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

<sup>32</sup> This principle of conclusive presumption has also been denounced outside the context of the Dublin II Regulation in relation to the 1951 Refugee Convention and 1967 Protocol and Australia's agreement with Malaysia, which was held to be invalid by the Australian High Court. See High Court of Australia, *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32 [31 August 2011].

<sup>33</sup> See for example *M.S.S. v Belgium and Greece*, para. 342 "...When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention."

Member States will have to ensure that they apply the Dublin Regulation in a manner which respects the fundamental rights of refugees.

### • Recasting the Dublin Regulation

In 2008, in the context of recasting the Dublin Regulation, the Commission proposed to uphold the underlying principles in the Dublin Regulation, in the absence of political will for a fundamentally different approach to allocating Member State responsibility.<sup>34</sup> The main aim of the recast proposal was to increase the system's efficiency whilst ensuring higher standards of protection for those within a Dublin procedure. The proposal also envisaged a temporary suspension mechanism to better address situations of particular pressure on Member States' reception facilities and asylum systems. However, during the political negotiations, this proposal was replaced by a mechanism for early warning, preparedness and crisis management.<sup>35</sup>

The Dublin recast compromise text contains some significant areas of improvement including *inter alia* the provision of an individual right to information and a right to a personal interview, and the explicit inclusion of the best interests of the child principle as a primary consideration when applying the Dublin Regulation to all children. Moreover, recast Art. 18 of the compromise text now explicitly obliges Member States to complete the examination of an asylum claim when a person is transferred to the responsible Member State.<sup>36</sup> In addition, the early warning, preparedness and crisis management mechanism has the potential to be built into a permanent 'health check' of the CEAS to address serious deficiencies in Member States reception facilities and asylum systems if fully resourced and implemented correctly.<sup>37</sup> Respect for the fundamental rights of asylum seekers subject to the Dublin procedure should always be the primary concern when operating such a mechanism, rather than the smooth functioning of the Dublin Regulation itself.

Political agreement on the recast Dublin Regulation was reached in late 2012.<sup>38</sup> However, at the time of writing, formal adoption of the recast is still pending. The Dublin 'III' Regulation will replace the Dublin II Regulation six months after its formal adoption and will also be applicable in Croatia in 2013.<sup>39</sup>

The key challenge in this next phase of the Dublin system is to ensure that it is applied effectively and in a protection-sensitive manner. As long as there is limited convergence and harmonization in asylum policies and practice across Europe, however, problems within the Dublin system will remain. Therefore, the Commission's commitment to conduct a comprehensive 'fitness-check' of the Dublin system, covering its legal, social and economic effects as well as its effects on fundamental rights, is welcomed. Such a 'fitness check' should also review the efficacy of the Dublin system as 'other components of the CEAS and EU solidarity tools are built up'.<sup>40</sup>

<sup>34</sup> Commission (EC) 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), SEC(2008)2962, 2008/0243 (COD), 3.12.2008 ('Commission recast proposal').

<sup>35</sup> For further information see Art. 33 of the Dublin recast compromise text.

<sup>36</sup> Council of the European Union, *Position of the Council at first reading with a view to the adoption of 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)*, ASILE 129, CODEC 2520, OC 601, Interinstitutional File: 2008/0243 (COD), Brussels, 14 December 2012, accessed at: <http://register.consilium.europa.eu/pdf/en/12/st15/st15605.en12.pdf>

<sup>37</sup> On this issue see ECRE, *Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, January 2013.

<sup>38</sup> Cyprus Presidency of the Council of the European Union *Political Agreement on the Dublin Regulation*, Press Release, 6.12.2012

<sup>39</sup> Art. 49 recast Dublin compromise text "This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply to applications for international protection lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back applicants, irrespective of the date on which the application was made. The Member State responsible for the examination of an application for international protection submitted before that date shall be determined in accordance with the criteria set out in Regulation (EC) No. 343/2003".

<sup>40</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum *An EU agenda for better responsibility-sharing and more mutual trust*, COM 2011 (835), 2.11.2011 p.7.

# *II.*

# *Methodology*



*The information in this report synthesizes the information gathered by national experts. Over the period of time from November 2011 to October 2012 national experts gathered information on administrative practices concerning the Regulation by way of desk-based research, an analysis of asylum seekers' individual cases which they came across in the course of their work and also through country-specific questionnaires sent to and meetings held with national Dublin units and other relevant stakeholders. Furthermore, approximately 190 judgments concerning or linked to the Dublin Regulation were gathered as part of this project. Where appropriate, these cases summaries are quoted to illustrate national practices and judicial interpretation of the Regulation.<sup>41</sup>*

The information in this report is up to date as of October 2012. Some difficulties were encountered during the research such as delays in meeting the relevant staff in Dublin units and challenges surrounding receiving detailed responses to questionnaires. This comparative report focuses mainly on information revealing cross-cutting trends in the application of the Dublin Regulation. Information on some Dublin Regulation provisions (for example Art. 11 and 12) was omitted from this report due to a paucity of information concerning them at the national level. A national report was also published on behalf of Romania by the Romanian JRS but unfortunately this was submitted too late to be referenced and included in the comparative report despite the original intentions of the partners.<sup>42</sup> Some stakeholders in Spain were also unable to provide sufficient information on national practice and therefore only limited references to Spain are made in this report where applicable. The report makes recommendations for immediate action to address the shortcomings identified in current practice within the Dublin system except for deficiencies that will be addressed by a correct implementation of the recast of the Dublin Regulation. It is significant to note that a number of these recommendations reflect long standing positions that ECRE has taken which are necessary to reiterate in light of Member States continued failure to address these issues.

Throughout this report references are made to the compromise text of the recast Dublin Regulation as set out in the 14 December 2012 Council document version and referenced as the 'Dublin recast compromise text'.<sup>43</sup> This text includes the main amendments in the recast Regulation but there may have been further minor changes after an assessment by lawyer-linguists since that time. Therefore, the numbering of specific recast Regulation articles may not reflect the final official journal version of the recast Dublin Regulation which is still pending at the time of writing this report. In this report the reference to Member States includes all countries bound by the Dublin Regulation included within the scope of this research, both with respect to EU Member States and Schengen Associated States applying the Dublin Regulation. Annex I of this report provides further clarification on legal terminology used in the context of this study.

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<sup>41</sup> All of the case summaries are available in the jurisprudence database at [www.dublin-project.eu](http://www.dublin-project.eu).

<sup>42</sup> The national report for Romania will be available at [www.dublin-project.eu](http://www.dublin-project.eu) in February 2013.

<sup>43</sup> Council of the European Union, *Position of the Council at first reading with a view to the adoption of 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)*, ASILE 129, CODEC 2520, OC 601, Interinstitutional File: 2008/0243 (COD), Brussels, 14 December 2012, ('Dublin recast compromise text') accessible at: <http://register.consilium.europa.eu/pdf/en/12/st15/st15605.en12.pdf>.

*III.*

*& Statistics*  
*the Cost of the Dublin System*



## 3.1. Dublin Regulation Statistics

Many national authorities do not make statistics available at the national level despite being obliged to provide this information to Eurostat. Therefore, this information is on the basis of data gathered by Eurostat.<sup>44</sup> Further national statistical information is available in annexes in a number of the national reports.<sup>45</sup> Nevertheless, from the start the methodological difficulties in conducting a statistical analysis must be emphasized as even within Eurostat not every Member State has provided detailed data to use for comparison.<sup>46</sup>

### National Fact

In 2011, Italy received 13,715 incoming requests under the Dublin Regulation from other Member States. During that year, Italy sent 1,275 outgoing requests to other Member States.

As regards implemented transfers, 4,645 asylum seekers were transferred to Italy in 2011. In contrast to this, Italy only implemented 14 transfers to other Member States (Source: Dublin Unit, Italian Ministry of Interior).

Depending on the Dublin caseload the percentage of actual transfers is relatively low. On average, across all EU Member States for 2009 and 2010, only 34.86% of accepted requests actually resulted in transfers.<sup>47</sup> This shows that across the European Union and the Schengen Associate States approximately a third of accepted requests for responsibility result in transfers of asylum seekers to the responsible Member State. This low rate of transfers raises serious questions as to the efficiency of the Dublin system.

The statistical data shows that certain Member States frequently exchanged equivalent numbers of Dublin requests between themselves, for example, between **Switzerland** and **Germany** and **Norway** and **Sweden**. On the basis of the average number of requests for 2010 Germany sent 306 outgoing requests to Switzerland and also received in the same period 350 requests from Switzerland. Similarly, for the same period Norway sent 458 requests to Sweden and received 482 requests back on average from Sweden. This equivalent number of exchanges of Dublin cases indicates that despite the considerable cost and administrative effort to implement Dublin procedures, some Member States end up with more or less the same overall number of asylum applications to examine.

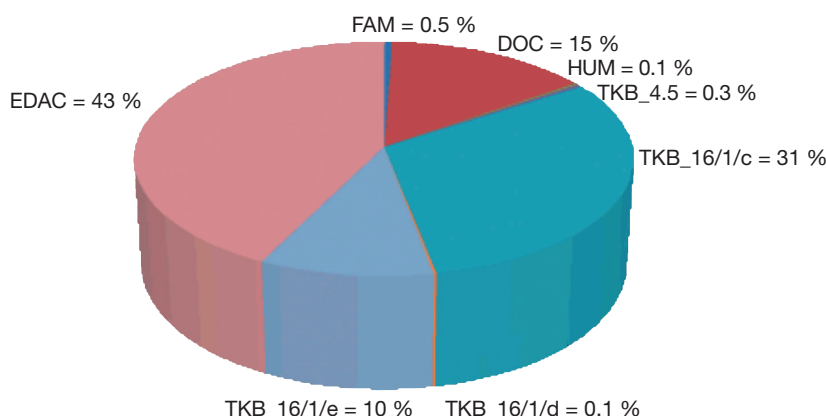
<sup>44</sup> Further information on the use of Eurodac is available at: Commission, report from the Commission to the European Parliament and the Council, *Annual Report to the European Parliament and the Council on the activities of the EURODAC Central Unit in 2011*, COM(2012) 533 final, 21.9.2012.

<sup>45</sup> For example, statistical information on the application of the Dublin Regulation is available in the annexes of the Hungary and Italy national reports.

<sup>46</sup> Even if sufficient statistical data is available, the data is not collected and evaluated in a uniform manner due to methodological difficulties. As part of this research it was noted that there appear to be significant differences in the figures submitted by Member States to Eurostat and those statistics available at the national level. This requires further consideration particularly in light of the need for accurate statistical information for the forthcoming 'Early Warning, Preparedness and Crisis Management Mechanism' envisaged under the recast Dublin Regulation.

<sup>47</sup> In addition on average for 2009 and 2010 only 25.75% of all requests actually resulted in successful transfers to the responsible Member State. During the same time period, 73.91% of outgoing requests were accepted by the receiving Member State.

• Chart on the main legal grounds for outgoing requests in 2010 - See corrigendum in Annex 5



<b>FAM</b>	Family (Art 6, 7, 8, 14) = 0.5 %
<b>DOC</b>	Documentation and entry reasons (Art 9, 10, 11, 12) = 15 %
<b>HUM</b>	Humanitarian reasons (Art 15) = 0.1 %
<b>TKB_4.5</b>	Taking back requests: Withdrawal of application during Dublin procedure (Art.4.5) = 0.3 %
<b>TKB_16/1/c</b>	Taking back requests: Under examination - no permission to stay = 31 %
<b>TKB_16/1/d</b>	Taking back requests: Withdrawal - new application = 0.1 %
<b>TKB_16/1/e</b>	Taking back requests: Rejection - no permission to stay = 10 %
<b>EDAC</b>	Total requests based on EURODAC = 43 %

The pie chart<sup>48</sup> above depicts the percentage of the average number of outgoing requests for the year 2010 on the relevant grounds of the Dublin criteria for all Member States. For example, in 2010 only 0.5% of outgoing requests to another Member State under the Dublin Regulation were on the basis of family reasons. Even fewer outgoing requests were sent to other Member States for humanitarian reasons under Art. 15 i.e. 0.1% of requests in 2010 were on this basis. The legal grounds predominantly used for outgoing requests relate to Eurodac data and take back requests under the Dublin Regulation.

The pie chart highlights the fact that the Dublin Regulation criteria has not been fully utilized in the best interests of the asylum seeker with the main basis for outgoing requests being linked to irregular movement in the context of take back requests and Eurodac data. Familial and humanitarian reasons only consist of a small proportion of cases for sending outgoing requests to other Member State.

Art. 47 of the recast Dublin compromise text provides that statistics concerning its operation and that of the Implementing Regulation shall be communicated to the Commission in accordance with Art. 4(4) of Regulation (EC) No. 862/2007.<sup>49</sup> However, the statistics Member States are obliged to share under the Dublin Regulation with the Commission under Regulation (EC) No. 862/2007 are not disaggregated by age or sex.<sup>50</sup> Therefore, without this data it was not possible to assess whether the application of the Dublin Regulation places asylum seekers of one sex at a particular disadvantage or monitor the amount of unaccompanied children subject to Dublin transfers.

<sup>48</sup> The data for this pie chart was produced on the basis of calculating the average number of outgoing requests from each Member State and the according legal basis for that request as provided in Eurostat data. The legend of the pie chart is on the basis of terminology used by Eurostat.

Please see Annex 5 Corrigendum

<sup>49</sup> Council Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation No. 311/76 on the compilation of statistics on foreign workers, L199/23 OJ 31.7.2007 [‘Regulation on Statistics’].

<sup>50</sup> It is noted that the sex of the applicant will be collected in relation to Eurodac data.



## 3.2. Operational cost of the Dublin system

In the 2007 Commission evaluation report on the Dublin system it was noted, “Owing to the lack of precise data, it was not possible to evaluate one important element of the Dublin system, namely its cost”.<sup>51</sup> Therefore as part of this research, national experts were requested to ascertain further data on the costs related to the application of the Dublin Regulation. Costs related to the administrative operation of Dublin units include costs such as office equipment, personnel, EURODAC infrastructure support including the taking and storing of fingerprint data as well as the cost of conducting transfers to other Member States. However, it has proven difficult to measure these costs, as often the national Dublin authorities are part of a broader, more general administrative structure that deals with migration, asylum and border control. In none of the Member States requested was information available on the operational costs of applying the Dublin Regulation (**Austria**,<sup>52</sup> **Bulgaria**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Slovakia**, **Spain**, **Switzerland** and **the Netherlands**).

In response to requests for information a number of national authorities indicated that it was difficult to calculate the financial costs due to the fact that several different national administration units and/or branches are involved in the Dublin procedure, encompassing both the administrative aspects linked to ascertaining the Member State responsible as well as conducting actual transfers to the responsible Member State. As an example, in **Switzerland** the Federal Office for Migration (FOM) registers asylum applications and determines Member State responsibility under the Dublin Regulation whilst regional cantons are responsible for conducting Dublin transfers. The FOM has no information on the costs incurred at the regional level by the cantonal authorities. Similarly, in **the Netherlands** the following national authorities are involved in different aspects of applying the Dublin II Regulation: the Immigration and Naturalization Service (IND), the Immigration Police, the Central Agency for the Reception of Asylum Seekers and the Service for Repatriation and Departure (DT&V). According to Dutch governmental officials, as there is no centralized administration for operating the Dublin system and due to the fact that each of these authorities stores their own statistics separately it is difficult to ascertain comprehensively the costs related to the Dublin Regulation.<sup>53</sup>

The issue of the financial cost of the Dublin system has been the subject of parliamentary enquiries in **Austria**,<sup>54</sup> **Germany**<sup>55</sup> and **Switzerland**<sup>56</sup> but the response thus far has been that the cost of operating the Dublin system cannot be accounted for in detail. On the issue of staffing levels in Dublin units alone it is evident that there would be huge disparities in cost amongst Member States. For example, the German Dublin unit hosts approximately 40 staff whilst **Greece** employs six staff in their national Dublin unit.

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Evaluating the effectiveness of the Dublin system requires reliable empirical data and statistical information on trends concerning asylum seekers’ movements and Member States examination of asylum claims. Since the introduction of Regulation (EC) No. 862/2007 there has been a significant improvement on the availability and comparability of asylum related data. Nevertheless, the requirements for sharing specific data on the operation of the Dublin system are relatively limited. Understanding the impact of the Dublin system could be improved by further disaggregating the statistics on the basis of age, sex and citizenship of the person concerned. Equally, the additional

51 Commission (EC) Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, SEC (2007) 742, COM(2007) 299 final, 6.6.2007 (‘Commission 2007 Evaluation Report’). According to the Austrian Ministry of the Interior no statistical data concerning the cost of the Dublin system in Austria is publicly available.

52 According to the Austrian Ministry of the Interior no statistical data concerning the cost of the Dublin system in Austria is publicly available.

53 National expert interview with IND officials, the Netherlands, 18 June 2012.

54 Austrian parliamentary question XXIV.GP-NR 10892/AB, 16 May 2012.

55 Deutscher Bundestag, Bundestags-Drucksache 17/2655 26, October 2010, p. 6, accessible at: <http://dipbt.bundestag.de/dip21/btd/17/026/1702655.pdf>,

56 Federal Department of Justice and Police, reply to enquiry No. 10.3561, 17 September 2010, <http://www.parlament.ch/f/dokumentation/curia-vista/vorstoesse-tabellen-grafiken/Documents/cv-10-3561-f.pdf>, annexed tables with costs: [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20103561](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20103561). Further Parliamentary enquiries of relevance: [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20093817](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20093817); [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20081112](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20081112); [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20094276](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20094276)

information for disaggregation provided in Art. 8 of Regulation (EC) No. 862/2007 should always be used by Member States to enable data to be gathered on the number of persons concerned by a Dublin request, decision and/or transfer.<sup>57</sup>

Since the time of the Dublin Convention questions have been raised concerning the cost of operating this system of assigning Member State responsibility.<sup>58</sup> Nevertheless, up until now there has still not been a comprehensive study on the costs associated with the Dublin system. In the 2007 Commission evaluation report it was noted that the lack of precise data meant that the cost could not be evaluated but then stated that despite this “*Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial implications*”.<sup>59</sup> 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 system.<sup>60</sup> In a time of austerity within Europe, knowing the cost of the Dublin system is critical to evaluating it.<sup>61</sup>

In order to enable a complete appraisal of the effectiveness of the Dublin system it is essential that there is a serious cost/benefit analysis of applying the Regulation. A cost-accounting system needs to be established at the national level to distinguish the costs of applying the Dublin Regulation from other migration and asylum activities. In view of the Commission’s future launch of a ‘fitness check’ of the Dublin system which will also include an assessment of its economic impact, Member States with the support of the Commission should explore ways to collect reliable and comprehensive data on the cost of applying the Dublin Regulation.

## Recommendations

### Member States

- **The collection of statistics on the application of the Dublin Regulation should be published and enhanced in compliance with Member State obligations under Regulation (EC) 862/2007.**
- **Dublin statistics should be disaggregated on the basis of sex and age.**
- **Comprehensive data on the financial cost of operating the Dublin system should be collected and published by Member States.**

### European Commission

- **The European Commission should conduct a comprehensive audit of all costs associated with the Dublin system.**

<sup>57</sup> Art. 8(1)b) Regulation on Statistics, provides for further disaggregation for the Dublin Regulation on the basis of number of persons concerned by the request, decision and transfer.

<sup>58</sup> In the 2001 Commission staff working paper evaluating the Dublin Convention it was noted that the “*Application of the Convention generates a substantial workload and costs for the authorities in the Member States. It is desirable to form an accurate picture of these, so that they can be compared with the results obtained, since cost-effectiveness considerations are an essential part of the assessment of public policies.*” SEC(2001) 756, 13.06.2001 p.18.

<sup>59</sup> Commission 2007 Evaluation Report, p. 13.

<sup>60</sup> European Parliament, *European Parliament resolution on the evaluation of the Dublin system*, 2 September 2008, P6\_TA(2008)0385, accessible at: <http://www.unhcr.org/refworld/docid/48ca663ca.html>

<sup>61</sup> This issue was also raised in the ECRE *Dublin reconsidered* paper, p.4.

*IV.*

# *Report Findings*



## IV. The Application Of The Dublin Regulation Criteria

### 4.1. The Hierarchy of Criteria

Art. 5 of the Dublin Regulation states that the criteria for determining the Member State responsible shall be applied in the order in which they are set out in Chapter III of the Regulation. This principle has been maintained in the Dublin recast compromise text.<sup>62</sup>

It is difficult to ascertain whether the hierarchy of criteria is respected in general by Member States as this would require having sufficient knowledge of the particular circumstances of each case to ensure that the criteria was correctly applied on an individual basis. However, it is interesting to note that for over half of the Member States researched the most used criterion is Art. 10 concerning irregular border crossing into a Member State. In general, **Austria** respects the hierarchy of criteria, however, there have been reported instances of Art. 14 being applied instead of the more appropriate provision of Art. 8 with regards to family unity cases with resultant ramifications for determining the responsible Member State.

The correct application of the hierarchy of criteria in **Germany** is dependent on case officers in the BAMF having the requisite knowledge of the hierarchy of criteria and therefore forwarding all the relevant information for the correct assignment of responsibility to the German Dublin unit. However, practice has shown there has been a number of instances where the staff in BAMF ignored the presence of a close family member in another Member State and instead applied Art. 10(1) or Art. 13 of the Dublin Regulation on the basis of a Eurodac hit or previous asylum application respectively.

In **Slovakia**, based on the information provided during the interview at the Dublin Unit the hierarchy of criteria is observed in practice. Nevertheless, sometimes all of the relevant facts are unknown to the Dublin Unit at the time of commencement of the Dublin procedure. If these facts are revealed as part of the Dublin procedure, indicating a different ground for responsibility, then the applicable criteria can be amended to ensure respect for the hierarchy. This can occur at any stage up to the time of issuing the transfer decision on the responsibility of another Member State.

According to the Hungarian Dublin unit a previous asylum application in another Member State has priority over take charge-based requests for transfer in **Hungary**, unless the family unity provisions, the humanitarian or the sovereignty clause applies in the individual case concerned. It is unclear how this translates in practice but it may lead to an incorrect interpretation of the hierarchy of criteria, as provisions linked to the possession of a residence permit or valid visa in Art. 9 come before Art. 13 on the basis of an asylum application.



**Dutch Case Study:** *The Netherlands requested Spain to take back an ‘unaccompanied child’ on the basis of Art. 13 Dublin Regulation, whilst his mother resided in the Netherlands where she was naturalized. The Dutch authorities did not notify the Spanish authorities that her mother was residing legally in the Netherlands. Upon appeal the regional Court of Zwolle ruled that the Netherlands should examine the asylum application of the child and ordered that he should not be transferred to Spain.*<sup>63</sup> It is

clear that this is an example of a case where the hierarchy of criteria under the Dublin Regulation was not respected as Art. 6 takes precedence over Art. 13 and accordingly **the Netherlands** should have been the responsible Member State due to the presence of the asylum seeker’s mother there.

<sup>62</sup> However the situation pertaining to a certain point in time for determining the responsible Member State has been qualified for the presence of family members with respect to Art. 8, 10 and 11 under the Dublin recast compromise text. Recast Art. 7(3) states “*In view of the application of the criteria referred to in Art. 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the asylum seeker have not yet been subject of a first decision regarding the substance*”.

<sup>63</sup> Regional Court Zwolle (Case of Rechtbank Zwolle) Case No. 04/51294, 27 January 2005.

## 4.2. Unaccompanied Children (Art. 6)

Article 6 states that if an unaccompanied child applies for asylum then the responsible Member State is that where a member of his or her family is legally present, provided that this is in the best interest of the child. If there are no family members present in Europe, then the Member State where the child lodged his/her asylum application is responsible. The Dublin recast compromise text (Recast Art. 8) extends family members to incorporate siblings under this provision and also includes within its scope married children who are present in the territories of Member States without their spouse. It also broadens the possibility to reunite with relatives who can take care of the minor, depending on the best interests of the child. According to recast Art. 8(4) in the absence of family, then the Member State where the child lodged his/her asylum application is responsible provided that this is in his/her best interests.

### 4.2.1. Interpretation of Art. 6

The second paragraph of Art. 6<sup>64</sup> (hereafter referred to as Art. 6(2)) is interpreted in divergent ways across the Member States, either as the State where the asylum seeker has currently lodged an asylum application or the first Member State where he/she submitted an asylum application. In **France** and **Italy** Art 6 is applied in such a way that if no family members are located in the territories of the Member States, then responsibility is assigned on the basis of the *present* Member State where the child has lodged an asylum application. Therefore, such unaccompanied children are not subject to a transfer to another Member State. In contrast to this, in the absence of family, unaccompanied children in **Austria, Switzerland, Slovakia** and **the Netherlands** are usually sent back to the first Member State where they lodged an asylum application. Given the varying interpretations of this provision a preliminary reference request was sent by the Court of Appeal (England and Wales Civil Division) to the CJEU in C-648/11 requesting clarification on which Member State Art. 6(2) designates responsibility to in cases where children have lodged asylum claims in more than one Member State. As this reference is still pending, an addendum to the Dublin recast compromise text provides a joint declaration by the European Council and European Parliament inviting the Commission to potentially revise the text of recast Art. 8(4) subsequent to the CJEU's ruling in this case.<sup>65</sup>

## Jurisprudence

### Procedural safeguards for unaccompanied children

Two unaccompanied siblings and their adult brother arrived in Switzerland via Greece and Italy. The older brother had requested asylum in Italy and was subject to a Eurodac category 1 hit.<sup>66</sup> However, his two younger brothers were not registered in Italy and claimed to have not sought asylum there. The FOM ordered the transfer of all three siblings to Italy. Their legal representative claimed that their rights as unaccompanied children seeking asylum were violated in the Dublin procedure as the authorities had not interviewed them in the presence of a guardian. Upon appeal, the Federal Administrative Court noted that every unaccompanied child should be interviewed in the presence of a guardian according to Swiss practice. In this case, the Eurodac hit of the oldest brother and information given by him was not sufficient to determine Italy's responsibility for the two children.

<sup>64</sup> Art 6 (second sentence - para 2) Dublin Regulation states "in the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

<sup>65</sup> An addendum to the Dublin recast compromise text states "The Council and the European Parliament invite the Commission to consider, without prejudice to its right of initiative, a revision of Article 8(4) of the Recast of the Dublin Regulation once the Court of Justice rules on case C-648/11 MA and Others vs. Secretary of State for the Home Department and at the latest by the time limits set in Article 46 of the Dublin Regulation. The European Parliament and the Council will then both exercise their legislative competences, taking into account the best interests of the child. The Commission, in a spirit of compromise and in order to ensure the immediate adoption of the proposal, accepts to consider this invitation, which it understands as being limited to these specific circumstances and not creating a precedent." This is accessible at: <http://register.consilium.europa.eu/pdf/en/12/st17/st17712-ad02.en12.pdf>

<sup>66</sup> A EURODAC Category 1 hit is when a person has been registered as an asylum applicant in another Member State on the basis of fingerprint data stored in the EURODAC database.

Also, the decision of the FOM was held to contravene Art. 6 Dublin Regulation as the children had not requested asylum in Italy. Therefore the Court held that the FOM needed to clarify the facts further in order to determine the responsible Member State and in case of doubt, it should apply the sovereignty clause. In addition, the Court ruled that, in case of a transfer decision, further enquiries need to be made regarding available institutions for unaccompanied children in the receiving State i.e. Italy (Federal Administrative Court, E-8648/2010 21 September 2011). This is a leading case in Switzerland as it sets out a number of important procedural safeguards for unaccompanied children subject to the Dublin procedure.

#### 4.2.2. The application of the best interests of the child principle

Art. 6 refers to the best interest of the child when deeming a Member State responsible on the basis of family members being legally present there. Under the recast Dublin compromise text there are further references to the best interests of the child included in recast Art. 6 on guarantees for all children, which sets out that this principle, shall be a primary consideration for Member States with respect to all Dublin procedures.

In **Austria**, neither the Austrian Asylum law nor the Foreigners Police legislation refers directly to the necessity of examining the best interests of the child when applying the Dublin Regulation. A best interest determination is considered to be part of the role of the legal guardian in **Bulgaria**. However, no explicit criteria or procedure exists as to what this means in practice. In **Germany**, in response to requests by NGOs and legal representatives to apply this principle the administrative authorities responded that this concept is not found in German legislation and *“if it were, another authority would be responsible for implementing it”*. The German administrative authorities do not view the principle of the best interests of the child as an integral element when applying the Dublin Regulation.



**Good Practice:** In the Netherlands, according to the Aliens Circular,<sup>67</sup> the determination of the best interests of the child when applying Art. 6 should include the following considerations:

- a) a core family connection needs to have been established; it is not in the best interests of the minor to be placed with someone who is not confirmed to be the father, mother or guardian of the minor;
- b) there is no presumption of mistreatment (physically, mentally or sexually) of the minor by this family member;
- c) the family member is able to provide the minor with sufficient care (informal translation).

There are no Dutch policy rules on what constitutes sufficient care for the purposes of Art. 6. In addition, practice in **the Netherlands** demonstrates that it does not always ensure that the best interests of the child are taken into consideration as shown in the jurisprudence below.

<sup>67</sup> Par C3/2.3.5 subtitle 'Article 6: niet-begeleide minderjarige asielzoeker'.

## Jurisprudence

### Article 6 and the presence of family members in Europe

In September 2010 a Somali unaccompanied child requested asylum in the Netherlands but the Dutch authorities considered Malta to be responsible under the Dublin Regulation. The boy had a sister present in the Netherlands and a mother and grandmother in Somalia. The Secretary of State in an appeal stated that it was not in the best interest of the child to be reunited with his sister in the Netherlands as his mother and grandmother were still living in Somalia and he could stay with them upon return to Somalia. This was in accordance with the text of C3/2.3.6.3 Aliens Circular. The Dutch Council of State ruled that this proposal by the Secretary of State could not be upheld. To the contrary, it ruled that it would be in the best interest of the child if he could be united with his sister in the Netherlands during the examination of his asylum application rather than being in Malta. The appeal of the Secretary of State was dismissed and as a result it was held that the asylum application should be examined by the Dutch authorities (Dutch Council of State, Administrative Law Section, No 201000393/1/V3 15 September 2010).

### 4.2.3. Family Tracing

There is no provision related to family tracing in the current Dublin Regulation. The Dublin recast compromise text includes in recast Art. 6(4) an obligation for Member States to *“take appropriate action to identify the family members, siblings or the relatives of the unaccompanied minor in the territory of the Member States, whilst protecting the minor’s best interests.”* It also provides that Member States may call upon the assistance of international or other relevant organizations, including through facilitating the child’s access to the tracing services of such organizations.

There is varied practice concerning the tracing of family members of unaccompanied children across the Member States researched but overall it appears that the child concerned will have to provide some relevant information as to identify if a family member is present in the territory of the Member States. In **the Netherlands** the IND will try to trace family members of children on the basis of concrete information on identity and location. The Dutch Refugee Council may also assist in the tracing of family members. In **Switzerland** and **the Netherlands** if an unaccompanied child claims to have family members in another Member State then information may be requested to that State in accordance with Art. 21 Dublin Regulation.<sup>68</sup> If family members are located, a take charge procedure is then initiated on the basis of that information under Art. 6 or Art. 15 Dublin Regulation.

Similarly, in **Austria** the Federal Asylum Office will initiate a Dublin transfer according to Art. 6 if there are known family members located in another Member State. In practice there can be lengthy delays in unifying the family within the Dublin procedure in **Austria**. According to the Bulgarian authorities, staff find family tracing quite difficult as they are *“not accustomed to this type of research and do not have the necessary human resources”*.

In **Slovakia** the Migration Office pays particular attention to unaccompanied children that are willing to reunify with family members in other Member States. The relationship of the unaccompanied child with his/her parents and/or siblings needs to be confirmed by way of lawful evidence including DNA testing if appropriate.<sup>69</sup>

<sup>68</sup> Article 21 of the Dublin Regulation includes a number of provisions on administrative cooperation and the exchange of information between Member States.

<sup>69</sup> Further information on the evidentiary requirements for establishing family links is available in Chapter IX, 9.3.1.

**X Bad Practice:** In Italy a family tracing procedure does not exist in practice with respect to the Dublin procedure<sup>70</sup> and therefore Art. 6(1) is rarely applied to ensure that unaccompanied children have their asylum application examined in a Member State where their family members are present.

**X Bad Practice:** According to the Hungarian Helsinki Committee's experience the Office of Immigration and Nationality (hereafter OIN) in Hungary often fails to retrieve information on family members residing in other Member States. In particular if a person does not claim asylum in Hungary and the Dublin Regulation is applicable only due to a previous asylum application, the Hungarian Police do not try to trace his/her family members living in other Member States.<sup>71</sup>



**Hungarian Case Study:** A 14-year-old Afghan child was apprehended at the Hungarian border and stated that he wanted to reach his brothers in Switzerland due to problems at home. Neither the Border Police nor the guardian appointed to his case asked any further questions regarding his situation, family members or the reasons he fled his country. He was expelled from Hungary to Serbia under the re-admission agreement as the Hungarian authorities deemed that there was no issue of refoulement.

#### 4.2.4. Appointment of a guardian during the Dublin procedure

The Dublin Regulation is silent on the issue of a guardian being assigned to unaccompanied children during the procedure.<sup>72</sup> Under the Dublin recast compromise text Art. 6(2) obliges Member States to ensure that a representative represents and/or assists the unaccompanied child with respect to the Dublin Regulation. Currently a guardian is appointed to assist unaccompanied children in **Bulgaria, Hungary, Italy, Slovakia, Switzerland** and **the Netherlands** during the Dublin procedure. Similarly, according to national legislation guardians should be appointed to assist children in **Greece**. However, in **Greece** the local prosecutor often does not truly act as a guardian for these minors or in their best interests.<sup>73</sup>

Concerns have been raised concerning the expertise and training of guardians in **Hungary**. Without the necessary training and expertise it is questionable whether a legal guardian can assist in protecting a child's best interests. Legal guardians are also assigned to unaccompanied children apprehended at the border but according to the Hungarian Helsinki Committee's experience these guardians merely pay attention to the formalities of the alien policing procedure and do not examine if the conditions to remove a child are met. The Hungarian Helsinki Committee has yet to witness cases where guardians have appealed against a decision to remove unaccompanied children at the borders.

Depending on the Member State guardians play different roles in the Dublin procedure for unaccompanied children. As an example in **Bulgaria** the role of the guardian is in principle limited to being present during the asylum interviews and at the serving of the Dublin transfer decision whilst in **Switzerland** the guardian's role is to assist the child in all matters including with regard to schooling and accommodation. According to Swiss practice if the case is too complicated for the guardian's own legal knowledge they should contact a legal advisor for assistance on behalf of the

<sup>70</sup> However, tracing outside the Dublin procedure and in the context of the return of children does occur by the Committee of Foreign Minors and IOM in Italy.

<sup>71</sup> It is unclear whether this issue will be resolved by the Dublin recast compromise text as recast Art. 6(4) only requires the Member States in which the application for international protection was lodged to take appropriate action to identify family members.

<sup>72</sup> As regards the family definition under Art. 2(1)(iii) a guardian is considered to be a family member of an unaccompanied child when the applicant or refugee is a minor and unmarried and the guardianship already existed in the country of origin.

<sup>73</sup> Greek Council for Refugees, *Unaccompanied minors in the Greek-Turkish Borders: Evros Region*, March 2011-March 2012, June 2012, accessible at: <http://www.gcr.gr/sites/default/files/evros.pdf>



child. However the experience and quality of work of these guardians vary widely, as each canton organizes this differently. Therefore children are not always guaranteed access to a legal advisor when required. Additionally in Swiss practice a guardian is often responsible for many children and it is unclear whether they always have sufficient capacity or if they are sufficiently independent to represent the best interests of the child.<sup>74</sup>



**Good Practice:** In the Netherlands unaccompanied children are assigned a guardian from the expert guardianship organisation Nidos.<sup>75</sup> Nidos is an independent guardianship and family supervision agency which appoints by law guardians for unaccompanied children. These independent guardians play a supervisory role in ensuring the best interests of the child and are responsible for their care and education.

#### 4.2.5. Age Assessment

The current Dublin Regulation does not have any rules regarding how different age determination procedures are undertaken or taken into account by different Member States when applying the Dublin Regulation. However, the determination as to whether an asylum seeker is a child or an adult can have important repercussions both with regard to the applicability of Dublin criteria and in relation to the level of support provided with respect to reception conditions and the asylum procedure itself. Sometimes asylum seekers are transferred as adults and then deemed to be children in the responsible Member State or vice versa all of which impacts upon their rights and entitlements. Under the Dublin recast compromise text, recast Art. 31 obliges the transferring Member State to transmit essential information to safeguard the rights of the person concerned including any information pertaining to an assessment of the age of the applicant.<sup>76</sup> As to the actual national age assessment procedures, that information is beyond the scope of this comparative report, however, where appropriate further information is provided in the national reports.

As to whether Member States recognize one another's age determinations, there is varied practice amongst the Member States within the scope of this study. Though specific age assessments are conducted in **Austria**, there have been cases where the Austrian authorities have taken the registered age of an asylum seeker as declared in another Member State regardless of the method that may have been used to determine it and/or why he/she may have claimed to be a child/adult there. In **Slovakia** and **the Netherlands** the fact that there has been an age assessment in another Member State is taken into consideration by the national authorities.

Specifically in take back cases in **Italy** and **Hungary**, if an applicant was deemed to be an adult in a prior asylum procedure, they will still be considered to be an adult on the basis of this earlier age determination irrespective of the transferring Member States' age assessment. If an unaccompanied child is returned from another Member State to **Hungary** with documentation attesting that he/she is a child, this is reportedly not taken into consideration. Instead the Hungarian authorities conduct a new age assessment procedure and in the majority of age-disputed cases the asylum seeker is commonly found to be an adult. However, contrary to the practice observed by the Hungarian Helsinki Committee, the Dublin unit in **Hungary** stated that if an age assessment procedure in another Member State contradicts the Hungarian age determination and this new evidence is provided to the OIN, then it will be evaluated and accepted if proven to be reliable.

<sup>74</sup> Sometimes the appointed guardian is in fact an official of a canton authority and is therefore not always independent in their actions.

<sup>75</sup> In the Netherlands, every minor is supported by a specialized case worker – see [www.nidos.nl](http://www.nidos.nl) for further information (English pages available).

<sup>76</sup> However recast Art. 31 does not clearly define what the responsible Member State should do with such information on the age of an applicant.

In **Germany**, according to a BAMF internal instruction, an applicant's registered age in another Member State may not take precedence over the age registered by the German Federal State where the applicant resides.<sup>77</sup> BAMF declares itself bound by the age that was registered by the Federal State authorities. The actual age assessment procedure across **Germany** is dependent on the regulations of the different Federal States. For example, in Hessen social workers hold a personal interview with the child to determine age whilst in other States medical assessments may be conducted. Despite the BAMF internal instruction, in practice lawyers have come across cases whereby the authorities have taken the registered age from the other Member State, irrespective of the age assessment method used by that State.

The outcome of an age assessment procedure may also have consequences for child in the asylum procedure, for example in **Bulgaria** if in an age disputed case the person is deemed to be an adult their asylum application may be examined as manifestly unfounded in an accelerated asylum procedure.

## Jurisprudence

### Age assessment

In May 2012 the Regional Court of Den Bosch found that the IND should not assume that the asylum seeker who claimed to be a child was an adult only on the basis that he had presented himself previously as an adult in Austria (Rechtbank Den Bosch (Regional Court Den Bosch), case no. 12/9988, 22 May 2012).

After arriving in France in 2003 an unaccompanied child from the DR Congo was placed under the responsibility of the youth care service of the Department of Moselle for 2 years. At that time he was deemed to be 14 years old on the basis of a submitted birth certificate. In 2005 the renewal of his residence was refused on the basis that he seemed older than 18 years old and that his birth certificate was insufficient to identify his age. The applicant appealed this decision, which was granted in his favour from the Appeal Court of Metz. The Department of Moselle submitted a further appeal at the Court of Cassation. The Court of Cassation confirmed the decision of the Appeal Court of Metz, ruling that the Appeal Court had not committed an error of law and that its decision was legally correct. There was a correct assessment of the probative value of the birth certificate attesting his age, which should be given precedence over x-ray test results, given their margin of error. There was no external reason to question the evidentiary value of the birth certificate. (Court of Cassation, No. 06-13344, 23 January 2008).<sup>78</sup>

<sup>77</sup> BAMF-Dienstanweisung Altersbestimmung bei Minderjährigen, accessible at [www.proasyl.de/fileadmin/fm-dam/i\\_Asylrecht/Dienstanweisungen-Asyl\\_BAMF2010.pdf](http://www.proasyl.de/fileadmin/fm-dam/i_Asylrecht/Dienstanweisungen-Asyl_BAMF2010.pdf) p. 23.

<sup>78</sup> Though this case does not involve the Dublin Regulation it highlights some of the issues around the type of evidence accepted in determining the age of an asylum applicant.

## 4.3. The Family Unity Provisions (Art. 7, 8 & 14)

Art. 7, 8 and 14 are provisions aimed at preserving the principle of family unity as noted in Recital 6 of the Dublin Regulation. It is imperative that Member States apply the Dublin Regulation in a manner compatible with the respect and protection of fundamental rights such as family unity in accordance with Art. 8 ECHR and Art. 7 Charter of Fundamental Rights. Art. 7 of the Dublin Regulation enables asylum seekers to have their asylum claim examined in a Member State where family members who have refugee status are present, whilst Art. 8 allows applicants to be united with family members whose asylum application has not yet been the subject of a first decision regarding substance. Art. 14 aims at identifying Member State responsibility in cases where several family members submit asylum applications simultaneously or in dates close enough for the Dublin procedure to be conducted together in a way which ensures that the Dublin criteria does not lead to them being separated in practice.

Under the Dublin recast compromise text the family provisions extend to family members who have been granted international protection (recast Art. 9) and applicants for international protection who have not yet been subject to a first instance substantive decision (recast Art. 10).<sup>79</sup> Recast Art 11 entitled the ‘family procedure’ incorporates the principles in the current Art. 14 provision thereby prioritising it and moving it further up the hierarchy of Dublin criteria.

### 4.3.1. Family Definition (Art. 2(i))

Art. 2 (i) defines the family insofar as it already existed in the country of origin, as the following persons who are present in the territory of the Member States: the spouse of the asylum seeker or his/her unmarried partner in a stable relationship, where the legislation or practices of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor children of such couples or of the applicant, on the condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under national law; the father, mother or guardian when the applicant or refugee is a minor and unmarried. The Dublin recast compromise text retains the same definition of family but amends guardian in the context of minors to *‘another adult responsible for him/her whether by law or by the national practice of the Member State where the applicant is present’* (recast Art. 2(g)). The recast compromise text also includes a new definition of ‘relative’ for the purposes of the family provisions (recast Art. 2(h)).

According to Member State practice, the definition of family incorporates unmarried partners in stable relationships in **Austria, Bulgaria, Greece, Spain, Switzerland** and **the Netherlands**. In **Bulgaria** there is no definition of a ‘stable long-term relationship’ for the purposes of the family definition and therefore this is determined on the basis of an individual assessment.

Same sex partnerships are also included in the definition of family in **Switzerland** and **the Netherlands**. **Austria** also includes within the scope of the family definition same sex formally recognized marriages or registered partnerships in the country of origin.

Unmarried partners in a stable relationship are not included in the definition of family members in **Hungary** and **Slovakia**. A broader definition of family exists in **Greece** whereby adult children of the asylum seeker who suffer from a mental or physical disability and therefore are dependent upon the applicant concerned are also included.

The definition of family in **France** varies between the Conseil d’Etat’s jurisprudence and the practice of the French Dublin unit. The Conseil d’Etat has ruled that the definition of family member should not be interpreted in the restricted sense of the Dublin Regulation but in a more expansive way,

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<sup>79</sup> This is in accordance with the expansion of the scope of the recast Dublin Regulation to beneficiaries of subsidiary protection.

as long as the intensity of family relations is proven in the individual case.<sup>80</sup> Despite the Court's approach the French Dublin unit maintains a strict definition of the notion of family members on the basis that "*that Dublin Regulation should not become an instrument of family reunification*".<sup>81</sup>

In **Germany** the definition of a guardian for the purpose of Art. 6 is restricted to someone who was previously acting as a guardian for the child concerned in the country of origin. This is strictly in adherence with the definition under Art. 2(i) but may result in families being unfairly separated. In German practice for example, it is not possible for an adult sibling to an unaccompanied child, who lived in the same household together in the country of origin to become that minors' guardian for the purposes of the Dublin procedure even if he/she has the capacity to take care of that child. In such a case the BAMF will try to transfer responsibility to another Member State on the basis that even though there is a sibling relationship, no guardianship existed in the country of origin. The BAMF merely refers to the possibility in the future of launching a visa procedure for family reunification from the responsible Member State. However, the fact that there may be a re-entry ban issued pursuant to a previous Dublin transfer may also have serious implications for the issuing of a visa to reunite such family members. In reality they will most likely not be able to reunite at a later stage.<sup>82</sup>



**Good Practice:** The Hungarian authorities do not require that the family previously existed in the country of origin under Art. 2(i).<sup>83</sup> The family must only have existed prior to their entry into Hungary.

#### 4.3.2. Family Unity and the application of the Dublin Regulation (Art. 7, Art. 8 & Art. 14)

According to Austrian practice, if the asylum seeker can identify the location of a family member in another Member State the authorities will contact that Member State for further information on the family links. However, sometimes the authorities fail to take into account information submitted at a later stage in the Dublin procedure, which indicates the presence of family members in other Member States as evidenced in the case study below. There are also significant delays in **Austria** for bringing family members together under the Dublin Regulation leaving families in a prolonged state of uncertainty, separated from one another over long periods of time.

**The Netherlands**, in accordance with Art. 8, accepts responsibility for an asylum request of a family member of an asylum seeker whose application in the Netherlands has not yet substantively been decided upon by IND. The Dutch Aliens circular confirms that responsibility for a family member under this provision is only accepted in cases where the applicant in **the Netherlands** had already requested asylum before the family member concerned applied for asylum elsewhere in another Member State. This is formally in conformity with Art. 5(2), in that the Member State responsible shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State. However, it can lead to family members being separated in practice. The persons concerned must express their consent in writing for such Dublin transfers.

The German authorities take a strictly formal interpretation of the family provisions, for instance in one case the BAMF sought to remove parents to another Member State whose children had been granted subsidiary protection in **Germany** on the basis that this was the wrong residence ground under which Art. 7 could be applied to assign Member State responsibility.

<sup>80</sup> Conseil d'Etat *M. Tamir A v Ministry of the Interior*, App. No. 281001, 24 March 2003.

<sup>81</sup> Quote from representative of the French Dublin unit, personal interview 17th July 2012.

<sup>82</sup> For further information on the use of re-entry bans pursuant to Dublin transfers see Chapter IX. 9.1.2.

<sup>83</sup> This is in accordance with the recent ECtHR ruling in *Hode and Abdi v UK* where the Court in holding that there was a breach of ECHR Art. 14 read together with Art. 8 ECHR found that there was no justification for treating refugees who married post-flight differently from those who married pre-flight. By analogy this should also apply to marriages conducted in the country of refuge i.e. the Member State. ECtHR *Hode and Abdi v UK*, Application No. 22341/09, 6 November 2012.

In **Greece**, currently the majority of outgoing Dublin transfer requests relate to asylum seekers wishing to unite with family members in other Member States. The Greek Dublin unit attempts to process these cases but firstly asylum seekers need to register their asylum claim in **Greece**, which continues to be extremely difficult in practice.<sup>84</sup> The support of an NGO is necessary to ensure access to the asylum procedure. Even once an asylum claim is registered, the application form verifying the presence of family members is only considered by the Athens Asylum Department at the time of the substantive personal interview which may be many months later. At this stage the three-month deadline for submitting take charge requests under Art.17(1) may have passed, therefore depriving the asylum seeker of the possibility of submitting a take charge request to another Member State. Even if the time limit has not yet expired, asylum seekers themselves often pay the costs of transfers to other Member States due to delays and insufficient resources within the Greek administration.<sup>85</sup>

A procedural problem hinders the application of Art. 7 and 8 in **Germany** whereby asylum seekers are not informed of the progress of their Dublin case by the national authorities. The German authorities do not always notify applicants when a take charge request is made to another Member State and, conversely, if a Member State requests **Germany** to take charge of a family member's asylum application. As a result, the BAMF sometimes rejects take charge requests under these provisions due to the lack of DNA information, which would provide evidence of family links but this is without informing the persons concerned of the requirement to provide such information in the first place.<sup>86</sup>

#### National Fact:

**Bulgaria:** According to the Bulgarian State Agency for Refugees statistics, in 2011 there was only one outgoing transfer implemented on the ground of family reasons. This transfer was to Germany and was one out of nine requests under these provisions sent to Germany (six), France (one), Italy (one) and Austria (one) respectively.



**Good Practice:** In the Netherlands Art. 7 is applied not only to legally residing refugees, but also to persons with an asylum related residence permit on the basis of Art. 29 Aliens Act (subsidiary, humanitarian and categorical protection).

On a technical level, Art. 7 does not permit a broader interpretation, therefore Arts. 3(2) and 15 of the Dublin Regulation are invoked to fill this gap.<sup>87</sup> This interpretation is based on the principle in the Dutch Asylum system whereby there is no distinction between all four asylum based residence permits as far as the rights that they offer to the beneficiary concerned including in the context of family unity within the Dublin procedure.

<sup>84</sup> The campaign for the access to asylum in Attica area, <http://asylum-campaign.blogspot.com/> accessible at: <http://www.statewatch.org/news/2012/oct/gre-asylum-attica-report.pdf>

<sup>85</sup> The Greek authorities currently do not formally oblige asylum seekers to pay for the costs of their Dublin transfers but most asylum seekers resort to paying for such transfers to ensure that they are united with family members as soon as possible.

<sup>86</sup> For further information on evidentiary requirements for family links see Chapter IX, 9.3.1.

<sup>87</sup> In practice when another Member State receives information from the asylum seeker that there is a family member with some form of protection status in the Netherlands, that State should contact the Dutch authorities to investigate if Art. 7 or Art. 15 is applicable based on the presence of a family member. The Dutch authorities will inform the requesting Member State the requesting Member State that a transfer to the Netherlands is possible under Art. 15 if the family member has a protection status for reasons other than the 1951 Refugee Convention and 1967 Protocol. Therefore, though the transfer is under Art. 15, it operates in the same manner as Art. 7.



**Austrian Case Study:** *At the start of the Dublin procedure in Austria, an asylum seeker did not know where his wife and children were located in Europe. On the basis of other Dublin criteria, the authorities initiated a Dublin procedure with Poland. After four months the applicant located his family in Norway. He informed the Austrian Federal Asylum Office but it issued a transfer order to Poland and conducted no procedure with Norway. Eventually, after six months he was admitted to the asylum procedure in Austria to have his asylum application examined due to the expiry of time limits while his wife and three minor children had their asylum applications examined in Norway. During the whole asylum procedure, which altogether took approximately two years, the family had to live separately and conduct their own asylum procedures in different Member States. This case is an example of a situation where, even though the time limit for a take charge request on the basis of Art. 7 or 8 may have expired, the humanitarian or sovereignty clause should have been applied to ensure family unity during the examination of their asylum claims.*



**German Case Study:** *A Syrian couple and their five children ranging in age from two up to eleven years old entered Germany via Italy in September 2010. In Germany, the family was separated and the father was assigned to another Federal State separate from his wife and children. On the basis of a Eurodac hit, the BAMF initiated a Dublin procedure with Italy and tried to remove the family there after having received Italy's acceptance of responsibility. The parents appealed this decision to their local responsible Administrative Courts in their respective Federal States. The Court that was responsible for the mother and the children suspended the Dublin transfer in an urgent interim relief procedure on the basis that there would be an imminent infringement of law in removing them to Italy as a result of the deficiencies in the Italian asylum and reception system. However, the father was not successful in his Court appeal. Although the Federal Office was aware of the fact the removal of the father would cause a separation of the family, in January 2011 a flight was booked and the father only prevented the removal by absconding. Even after the Court that was responsible for the mother suspended the removal to Italy in the principal appeal proceedings, obliging the Federal Office to invoke the sovereignty clause for the rest of the family, the BAMF still continued to pursue the removal of the father to Italy. The Court responsible for the father rejected another urgent interim relief application to suspend his removal, as did the Constitutional Court upon further appeal. The reasoning advanced by the national authorities was that the family would not need to be separated as the rest of the family could also leave Germany and move to Italy. Only an application for interim measures under Rule 39 to the European Court of Human Rights, which was granted in October 2011, stopped the separation of the family (Application. 64208/11). The German authorities subsequently settled the case.*

## Jurisprudence

### Article 7 and presence of a sibling in Europe

An Iranian unaccompanied child applied for asylum in France having previously spent six months in Greece in an irregular manner. His elder brother, an adult sibling, had been granted refugee status in France in 1998 and was subsequently naturalized as a French citizen in 2004. The French authorities ordered the child's transfer to Greece under the Dublin Regulation, which the applicant appealed successfully against in the Administrative Court. However, the Minister of the Interior subsequently lodged an appeal to the Conseil d'Etat. The substantive issue in the case concerned the application of Art. 7. The Conseil d'Etat ruled that the presence of the applicant's brother was irrelevant for invoking Art. 7 as siblings are not included in the definition of family under Art 2. The Court ruled in favour of the Minister of the Interior and the Administrative Court's decision was dismissed (Conseil d'Etat, France No. 302034, 2 March 2007). Though on a technical formal reading of Art. 7 this interpretation by the Conseil d'Etat is correct it results in the separation of family life in France and Article 15 should have been invoked to fill this protection gap in the best interests of the child.<sup>88</sup>

### Family unity and guardian in Europe

The asylum applicant was an orphaned child who entered the EU via Poland. He had an aunt with refugee status in Austria who took over full custody of him. He claimed asylum in Austria but this was found to be inadmissible and a decision was issued to transfer him to Poland under the Dublin Regulation. The Asylum Court agreed with the Austrian authorities decision, therefore the applicant appealed to the Constitutional Court. The Constitutional Court allowed the applicants' appeal stating that there was a serious risk of a violation of Art. 8 ECHR. The child's parents had already died in his country of origin and his aunt was confirmed as his legal guardian by the Austrian social welfare authorities. There was an obligation to examine whether removal to Poland would constitute a violation of the right to family life. The Asylum Court had not provided sufficient reasons for its decision and did not take into account the fact that the aunt was the applicant's legal guardian. The application of the sovereignty clause should have been considered by the Asylum Court. Subsequent to the Constitutional Court decision the applicant was granted access to the asylum procedure in Austria (Constitutional Court, Austria U653/12, 11 June 2012).<sup>89</sup>

### Definition of family

A Mongolian national claimed asylum in France after having previously spent time in Austria and Italy. His mother, sister and brother resided in France having previously applied for asylum there. The Prefecture of Pyrénées Orientales issued a transfer decision to Austria which the asylum seeker appealed. The Administrative Tribunal of Montpellier refused the applicants' initial appeal and then he submitted a further appeal before the Conseil d'Etat. The Conseil d'Etat firstly noted that the applicant did not fall within the definition of family member under Art. 2 of the Dublin Regulation and therefore was not applicable to Art. 7 and Art. 8. However, the Court stated that even though the applicant's situation does not fall within the scope of those provisions the French authorities should have considered whether the discretionary provisions of Art 3(2) or Art 15 were applicable. The Court declared that the definition of a family member should not be interpreted in the restrictive sense of the Dublin Regulation but in a more extended sense, insofar as the intensity of family links is proven. In the direct case the Conseil d'Etat ruled that the applicant had not demonstrated the intensity of links with family members in France and therefore the appeal was rejected (Conseil d'Etat, France No. 281001, 3 June 2005). Despite the fact that the applicant's appeal was refused in this case, the Court's reasoning is important in

<sup>88</sup> It is noteworthy that the Dublin recast compromise text Art. 8(1) provides that "where the applicant is an unaccompanied minor, the Member State responsible for examining the application for international protection shall be that where a member of his or her family within the meaning of Article 2(g) or his/her sibling is legally present, provided that is in the best interests of the minor."

<sup>89</sup> This judgment is accessible at: [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT\\_09879389\\_12U00653\\_2\\_00](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_09879389_12U00653_2_00)

demonstrating the need to have an extended interpretation of family when applying the Dublin Regulation to respect the principle of family unity.

#### Definition of family: Fiancée

A Turkish asylum seeker in the Netherlands requested that the Dutch authorities submit a take charge request to Germany on the basis that his fiancée lived there. Upon appeal the Council of State ruled that in accordance with Art. 7 of the Dublin Regulation, the country where a family member lives and who is allowed to reside as refugee, is responsible for examining the asylum application of the asylum seeker regardless whether the family was already formed in the country of origin. Therefore, the Dutch Minister should have requested Germany to take charge of the asylum application before examining it. Then Germany would have been able to establish whether his fiancée is considered a family member of the asylum seeker for the purposes of the Dublin Regulation. As a result the Dutch authorities had to request Germany to take charge of the asylum application under Art. 7 of the Dublin Regulation (Council of State, No 201012024/1/V2, 2 May 2011).

#### Family Life: Fiancée

A Pakistani asylum seeker applied for asylum in Bulgaria but according to Eurodac data he had submitted two previous asylum applications in Austria and Greece. Bulgarian authorities issued a transfer order to Austria. The asylum seeker appealed the decision on the basis of his forthcoming marriage to a Bulgarian citizen. He claimed that the transfer would result in a violation of his family life. The Court dismissed the appeal and did not engage with the issue of Art. 8 ECHR stating *“The considerations stated in the appeal that, in view of the forthcoming marriage of the foreigner with a Bulgarian citizen, his transfer to Austria would violate the family principle under article 16 of Regulation 343/2003/EC<sup>90</sup> and under article 8 of the European Convention on Human Rights, are not related to the circumstance that Republic of Bulgaria is not a competent country to examine the application of I.H., considering his application for granting a status was made in 2006 in Austria and the acceptance of his transfer to the competent country”* (informal translation)(Sofia City Administrative Court, Bulgaria Decision no 2829 of 2010, Admin case no. 4595 of 2010, 20 August 2010).

#### Guardianship of sibling

An Iraqi unaccompanied child first applied for asylum in Belgium and subsequently in Germany. His older brother lived in Germany on the basis of an unlimited settlement permit. The child's brother had the ability to take care of his younger brother and was accordingly assigned as his legal guardian. Despite this, the German authorities proceeded to try to remove the applicant to Belgium under the Dublin Regulation. Upon appeal the Saarland Administrative Court granted the child interim relief by way of an injunction to prevent his imminent removal to Belgium. The Court ruled that the BAMF failed to exercise its discretionary power to invoke the sovereignty clause and totally disregarded the guardianship of the brother residing in Germany when determining the responsible Member State (Saarland Administrative Court, Germany 2 L 458/11, 3 May 2011).<sup>91</sup>

### 4.3.3. Simultaneous Applications from Family Members (Art. 14)

There was a paucity of information related to the application of this provision with the exception of **Austria**. Some Austrian Asylum Court jurisprudence has interpreted the provision of *“simultaneously, or on dates close enough for the procedures for determining Member State responsible to be conducted together”* as meaning that there is a timeframe of three months within which the Art. 14 provision must be applied. This appears to be linked to the general three-month time limit of

<sup>90</sup> In accordance with Art. 16(1)(c) Dublin Regulation, Bulgaria had requested Austria to take back responsibility for the examination of the asylum seeker's claim.

<sup>91</sup> This judgment is accessible at: [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18651.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18651.pdf)



submitting a take charge request under Art. 17(1). However, the jurisprudence of the Asylum Court is not consistent on this point.

## Jurisprudence

### Simultaneous applications from family members and the hierarchy of criteria

In December 2007 a Chechen applicant claimed asylum in Austria. Subsequent to consultations regarding the applicability of the Dublin Regulation with Slovakia and France, he was admitted to the substantive asylum procedure in Austria in April 2008. Two weeks later his wife and children arrived in Austria via Poland. The Federal Asylum Office re-opened the admissibility procedure and consulted Poland in relation to the whole family including the father and then issued a transfer decision there. The applicants appealed this decision to the Asylum Court but this was rejected on the basis that the principle of family unity would be respected by sending the whole family back to Poland. Subsequently the family appealed to the Constitutional Court. The Constitutional Court ruled that the Asylum Court did not provide reasoning as to why Art 14 was used instead of Art 8, although the father of the family was already admitted to the procedure in merits when the rest of his family arrived in Austria and he had been present there for almost four months. Due to Art 5 (1) Dublin Regulation, there is a hierarchy of the criteria which has to be respected. Therefore, Art 8 is applicable in this case. Thus the Asylum Court's decision was found to be a violation of Art. 5(1) of Dublin Regulation. Subsequently the whole family's asylum application was examined in Austria. This case shows the incorrect application by the administrative authorities of Art. 14 instead of Art. 8. Art. 14 is only applicable in situations where the application of the other criteria set out in the Dublin Regulation would lead to family members being separated. In this case as the father was in the asylum procedure in Austria and had not yet been subject to a first decision on his asylum claim Art. 8 was applicable and the rest of his family should have had their claims examined in Austria as well on that ground.

## 4.4. Visas and Residence Documents (Art. 9)

Art. 9 sets out rules assigning Member States' responsibility on the basis of issuing a valid residence document and/or visa to the asylum seeker concerned. It also provides modalities for when the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, and when responsibility can be determined on the basis of expired residence permits or visas. It is important to note the fact that if a residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents, does not invalidate Member State responsibility. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa was issued. In the context of residence permits Art. 16(2) may also be applicable whereby the obligations to take charge or take back someone under the Dublin Regulation may be transferred to a Member State, which issues a residence document for the applicant. No substantive changes were made to these provisions in the Dublin recast compromise text.

Limited information on Member State practice was reported under Art. 9. Member States apply it where appropriate in individual cases. In **France** the visa criterion is regularly cited in the Ministerial circulars and Prefectures also check the visa information system in individual cases to determine if the Dublin Regulation is applicable.<sup>92</sup> Furthermore, in the French Dublin information notice given to asylum seekers at the start of the asylum procedure, Art 9 is listed as the second potential ground for applying the Dublin Regulation.

<sup>92</sup> The visa information system (VIS) allows Schengen States to exchange visa data and can also assist with determining which Member State is responsible for the examination of an asylum claim on the basis of an issued visa.

In **Slovakia**, according to the Deputy Head of the Dublin unit of the criteria linked to documentation and entry reasons Art. 9 is invoked most frequently on the basis of visas to request other Member States to take responsibility for the examination of asylum claims. In **Spain** the criteria linked to visas are utilized most often in requesting other Member States to take responsibility for examining an asylum application. Similarly, the residence permit criterion is frequently used in **Spain** for outgoing requests.

In **the Netherlands** for asylum seekers arriving by AC Schipol from a non-Schengen country and entering via airport or seaport, responsibility is often established on the basis of the visa criterion. If those asylum seekers have been granted a visa by a particular Member State it is apparent from the moment of entry that a Dublin procedure can be started. According to Dutch practice the residence permit criterion is not applicable when an asylum seeker is recognized as a refugee with status in another Member State. It is also interesting to note that the postponement of a Dublin transfer due to medical reasons on the basis of Art. 64 Aliens Act is considered as a 'residence permit' in the sense of Art. 16(2) of the Dublin Regulation. As a consequence, **the Netherlands** becomes responsible for the examination of such asylum applications.

Eurostat statistics suggest that **the Netherlands** is rarely assigned responsibility on the basis of visas. This may be due to the fact that **the Netherlands** applies a very strict policy when issuing tourist visas.<sup>93</sup>



**French Case Study:** *A family was present in Spain and subject to a Dublin procedure on the grounds of a number of visas issued on their behalf. The father was in possession of two visas: one from the British authorities and one from the German authorities. His wife and two daughters each had visas issued from the French authorities. Spain therefore requested France to take responsibility on the grounds of Article 9(2) of the Dublin regulation (valid visas of the mother and her two daughters) and on the basis of Article 14 for the father so that all the asylum applications could be examined together. The father never requested asylum in France and he conducted business between the U.K. and Spain, countries in which he regularly resided. His wife and two daughters obtained a Schengen visa from the French authorities during the events of the 'Arab Spring'. However the whole family requested asylum in Spain, and none of them wanted to move to France. This case through the issuance of visas, implicates three countries (France, U.K., Spain) under the Dublin Regulation. The French Dublin unit was of the opinion that this family should have requested family reunification in Spain, where the father seems to be established on a sustainable basis. The French authorities were adamant that the Dublin Regulation should not be used for the purposes of family reunification. Moreover, although France issued the highest number of visas in this case which is of relevance for the determination of Art. 9 criteria, the French authorities declared that they could not participate in the uprooting of this family who came to Europe and Spain because the father had started a life there (accommodation, profession, etc.). The French Dublin Unit therefore refused the take charge request for all these reasons, and asked Spain to take charge of the asylum applications of the whole family on the basis of Article 15 of the Dublin Regulation. Eventually, Spain agreed to take over responsibility for the whole family.<sup>94</sup>*

<sup>93</sup> According to Dutch visa policy, if there is an indication that the applicant may request asylum in Europe then the visa is refused.

<sup>94</sup> This case study highlights the complexity of circumstances for determining Member State responsibility that can occur under the Dublin Regulation. It was shared with the national researcher during an interview with the French Dublin unit, 17 July 2012.

## 4.5. Irregular Border Crossing and Eurodac (Art. 10)

Art. 10 states that where it is established on the basis of proof or circumstantial evidence including Eurodac data that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air, having come from a third country, that Member State shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place. Other factors are also taken into account in assigning responsibility under this provision such as whether at the time of lodging the application for asylum the applicant has previously been living for a continuous period of at least five months in another Member State, then that State is responsible for his/her asylum application. This provision substantively remains the same under the Dublin recast compromise text (recast Art. 13 Entry and/or Stay).

The majority of outgoing requests from **Bulgaria, Italy, France, Slovakia, Hungary and the Netherlands** are on the basis of Eurodac data and Art 10 of the Dublin Regulation.

In **France** there are sometimes difficulties with recording damaged fingerprints of some asylum seekers for the purposes of Eurodac. The Prefectures' general practice is to order such asylum seekers to return frequently to their offices to attempt to record their fingerprints.<sup>95</sup> In a Conseil d'Etat ruling of 2 November 2009<sup>96</sup> the Court declared that if fingerprints still cannot be recorded after repeated attempts, this constitutes conclusive evidence that the asylum seeker is not meeting his/her obligation to co-operate and submit their identity to the Eurodac system and accordingly such applicants have no right to accommodation.

Prior to the informal suspension of transfers to **Greece** on the basis of the *M.S.S. v Belgium and Greece* judgment, the most take back requests received by **Greece** were linked to irregular border entry under Art. 10. According to the FOM in **Switzerland**, Art. 10 is used in 22.5% of Dublin cases involving outgoing requests to other Member States. However it should also be noted that statistics from the FOM indicate that the most frequently used ground for outgoing requests is Art. 16(1)c) which is invoked in 45% of all outgoing Dublin transfers.<sup>97</sup>

There have been two phases in how Art. 10 is interpreted and applied in the context of irregular border crossing in **Austria**. This arises in the context of transfers to **Greece** pursuant to the *M.S.S. v Belgium and Greece* judgment.<sup>98</sup> Prior to the ECHR Court ruling, **Austria** requested to send many asylum seekers to **Greece**, due to the fact that they crossed the border illegally even if there was no fingerprint data found on Eurodac. The Greek authorities commonly did not respond to such requests, but the asylum seekers concerned were transferred to **Greece** regardless as it was deemed that it had accepted responsibility by default (Art. 18(7)).<sup>99</sup> Since the European Court of Human Rights Grand Chamber ruling, the Austrian Federal Asylum Office and Asylum Court no longer assume a theoretical responsibility of **Greece** under the Dublin Regulation in such cases.<sup>100</sup> The next Member State the asylum seekers cross illegally after **Greece** is then considered to be the responsible Member State under Art. 10.<sup>101</sup> Similarly the Hungarian Helsinki Committee has also noted recently that a number of other Member States have found **Hungary** to be the responsible Member State in such cases, despite the fact that the asylum seeker originally entered the EU via **Greece**.

<sup>95</sup> In a French Ministerial Circular of 2 April 2010 Prefectures are ordered in the case of unreadable fingerprints, to recall the asylum seeker after one month to make another attempt to take fingerprints. If this remains impossible after many tries the authorities are required to immediately remove the applicant's permit to remain. Thereby placing the asylum seeker in an accelerated procedure.

<sup>96</sup> Conseil d'Etat, section du contentieux, juge des référés, Case No. 332890 *Minister of Immigration, Integration, National Identity and supportive development v. Mrs Selamawit*, Case No. 332890, 2 November 2009.

<sup>97</sup> Article 16(1)c) obliges the responsible Member State to take back, under the conditions laid down in Article 20, an applicant who application is under examination and who is in the territory of another Member State without permission.

<sup>98</sup> See also Chapter XI on the implementation of European jurisprudence.

<sup>99</sup> The following Austrian Asylum Court cases are examples of this practice: AsylGH 16.12.2010, S8 416.443-1/2010; AsylGH 06.12.2010, S22 416.465-1/2010 and AsylGH 30.11.2010, S22 415.911-1/2010.

<sup>100</sup> For further information see Filzwieser/Sprung: Dublin II Verordnung<sup>3</sup> (2010), 107, K11.

<sup>101</sup> See for example, the following Austrian Asylum Court cases: AsylGH 29.03.2012, S3 422.460-2/2012/7E; AsylGH 07.05.2012, S4 421.164-2/2012; AsylGH 19.04.2012, S5 426.038-1/2012; AsylGH 18.04.2012, S7 425.624-1/2012; and many others

Due to this diverging practice, the Austrian Constitutional Court ordered the Asylum Court to submit a preliminary ruling to the CJEU seeking clarification on the interpretation of Art. 10(1).<sup>102</sup> Subsequently the Asylum Court submitted a preliminary reference in the case of C-394/12, the judgment of which is still pending at the time of writing.<sup>103</sup>

Prior to the suspension of enforced transfers to **Greece**, court practice in **Hungary** was inconsistent regarding the application of Art. 10 (1) of the Dublin Regulation in cases where asylum seekers first entered **Greece**, but then arrived in **Hungary** via a third country (e.g. Serbia). According to the OIN, in such cases **Greece** remained responsible. However the Municipal Court of Budapest sometimes ruled that responsibility for assessing such cases should be assumed by **Hungary**. The Court found that, although the applicants entered the EU through **Greece**, they had then travelled on and had entered **Hungary** via Serbia, a third country not participating in the Dublin system. The Court ruled that under Art. 10 (1), **Hungary** and not **Greece** was responsible for assessing these claims.<sup>104</sup> Sometimes, however, the Court itself did not follow this reasoning and **Greece** was confirmed to be responsible State in certain cases.

## Jurisprudence

### Application of Art. 10

An Afghan asylum seeker M.A. fled Afghanistan with his wife and five children. They first stopped in Greece where his wife and four children remained whilst he travelled on with one of his daughters to France via Italy and claimed asylum there. The Prefecture refused M.A.'s request for asylum on the basis that Eurodac data showed that he had previously been fingerprinted illegally entering Italy and therefore it was responsible under Art. 10. M.A. appealed this decision requesting suspension of the transfer to Italy. The Lille Administrative Tribunal found that M.A. did not arrive in Italy directly from a third State outside the territories of EU Member States. Evidence submitted from the Greek Police indicated that the applicants' wife and four other children were still living in Greece. On this basis the Tribunal concluded that Italy could not be held responsible for processing the asylum application of M.A. within the terms of the Dublin Regulation. The Administrative Tribunal suspended his removal to Italy and ordered the French authorities to take responsibility for the asylum application. The Lille Administrative Tribunal was carefully to denote that this decision was only on the basis of the specific circumstances of this case. The Member State that should have been responsible for M.A.'s asylum application was strictly Greece, however France currently has a policy of not transferring asylum seekers to Greece due to the situation there (Administrative Court of Lille, No. 1105278, 16 September 2011).

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The criteria for identifying the Member State responsible for the examination of an asylum claim under the Dublin Regulation are set out in order of priority with the presence of family members being one of the most important factors. However, the findings above show that most commonly used criterion is Art. 10 linked to irregular entry and border control. As shown in the statistics provided in Chapter III applying the Dublin Regulation on the basis of family provisions only contributes to a small percentage of actual transfers to other Member States. Further study may be required to ascertain the reasons behind such data to ensure that this legal instrument is applied in a manner consistent with the principle of family unity.

<sup>102</sup> See VfGH 27.06.2012, U330/12.

<sup>103</sup> For further information and academic commentary on this case see Statewatch analysis, *Was Hungary the first EU country of arrival? Legal responsibility before human rights: a short story on Dublin*, August 2012, accessible at <http://www.statewatch.org/analyses/no-195-dublinii-austria-hungary.pdf>

<sup>104</sup> For example, Metropolitan Court of Budapest, judgments in *Qurban Hasan, wife and child (Afghan)*, Ref. No. 6. Kpk. 45.500/2010, 28 May 2010; *Shamsullah Ahmadi, wife and three children (Afghan)*, Ref. No. 17.Kpk.45.642/2010/3, 7 June 2010; and *Mohmand Sinwari (Afghan)*, Ref. No. 6.Kpk.45.765/2010/2, 9 July 2010. Source: UNHCR Updated Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece, 31 January 2011, accessible at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d7610d92&page=search>

Unaccompanied children within the Dublin procedure require special protection in line with their specific needs. Their inherent vulnerability necessitates a differential treatment for such children within the Dublin procedure particularly with respect to transfers to Member States where there are problematic reception standards and asylum procedures.<sup>105</sup> Diverging practice exists with respect to the application of the principles of the best interests of the child within the Dublin procedure and to the interpretation of Art. 6. However it is anticipated that the pending CJEU case of C-648/11 will provide further clarity and legal certainty on this matter. Member States have a duty to apply all aspects of asylum policy including the Dublin Regulation in conformity with their international obligations *inter alia* the Convention on the Rights of the Child.

The best interest of the child principle is of paramount importance within the context of the Dublin Regulation as recognized in Art. 24 Charter of Fundamental Rights.<sup>106</sup> Therefore it is particularly concerning to note that in the majority of Member States, little consideration is given to applying this principle with some national authorities declaring it to be '*beyond their area of responsibility*'. The Dublin recast compromise text will go some way to improving this by including a non-exhaustive list of factors to be taken into account in assessing this principle but the national implementation of this principle will be a key challenge.<sup>107</sup> Further guidance on what this principle constitutes should also be obtained from the Committee of the Rights of the Child General Comment no. six on the treatment of unaccompanied children outside their country of origin.<sup>108</sup>

This research found that most Member States only assist with tracing family members for unaccompanied children once concrete information is provided on their location, yet it is the very children who have no contact with their family members who require the most support in finding them. Administrative authorities should take a more proactive approach to tracing and identifying family members for unaccompanied children.<sup>109</sup> National practice also shows that there is no uniformity of practice in relation to the consideration of different Member States' age assessment determinations in the Dublin procedure. Given the lack of precision in all forms of age assessment procedures administrative authorities should take a cautious approach and apply the principle of the benefit of the doubt in age-disputed cases.

This research demonstrates that the binding provisions of Art. 7, 8 and 14 which aim at protecting the principle of family unity have effectively failed to protect this right including with respect to the rights of the child. These provisions are rarely applied and interpreted in a restrictive way leading to many instances of families being separated under the Dublin Regulation in a manner inconsistent with Member States obligations enshrined in Art 8 ECHR and Art 7 Charter of Fundamental Rights. The recent CJEU case of C-245/11 reaffirms the importance of family unity including within the Dublin procedure.

An additional problem is related to the late acknowledgment of the presence of family members in other Member States. Time limits within the Dublin Regulation require that take charge requests

<sup>105</sup> For example parallels could be drawn from Art. 10(2) of the Returns Directive which states "*Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return*" Council Directive (EC) 2008/11/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, L348/98 OJ 24.12.2008.

<sup>106</sup> See also the international legal principle of best interests of the child in Art. 3 Convention on the Rights of the Child "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

<sup>107</sup> Recast Art. 6(3) provides a non-exhaustive list of factors which Member States should take due account of including a) family reunification possibilities; b) the minors' well-being and social development; c) safety and security considerations, in particular where there is a risk of the child being a victim of trafficking; d) the views of the minor in accordance with his/her age and maturity.

<sup>108</sup> UN Committee on the Rights of the Child General Comment No. 6(2005) Treatment of unaccompanied and separated children outside their country of origin, June 2005 accessible at: <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

<sup>109</sup> The Commission as part of its Action Plan on unaccompanied minors has also raised points in relation to supporting Member States efforts in conducting family tracing. For further details see: Commission Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014), COM [2010]213 final, 6.5.2010. accessible at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:EN:PDF>

must be submitted within three months in line with the aim of granting rapid access to an asylum procedure. Speed and calls for efficiency must not be used in a manner which obstructs the preservation of family unity. Member States should take into account the very nature of refugee flight, which often means that people will be separated, and lose contact with one another along the journey. This fact should not deny them the opportunity to be brought together during the examination of their asylum claim and in such situations the humanitarian clause should be applied.

The recast Dublin compromise text will assist with solving this issue by broadening the scope of family provisions to all applicants for international protection. Despite this, the family definition will remain relatively restrictive and accordingly issues concerning the separation of siblings and parents of adult asylum seekers and other family members will remain unresolved.<sup>110</sup> Failure to bring together family members within the Dublin Regulation is not only detrimental to the persons concerned but will also not solve the issue of secondary movement as families will endeavour to come together. Considering these findings the social impact of the Dublin Regulation with respect to families and unaccompanied children should be carefully evaluated in the context of the Commissions forthcoming 'fitness check'.

As regards the other responsibility criteria, Art. 10 with the support of Eurodac data is the main provision used in determining Member State responsibility under the Dublin Regulation. Linking responsibility for asylum applications to irregular entry fails to take into account whether asylum seekers have any meaningful link to such a Member State or just happened to arrive there through the unpredictable circumstances of their flight. Accordingly if the Dublin Regulation was working at its optimal best and all requests would result in actual transfers this would clearly lead to a shifting of responsibility for asylum applications to those Member States at the borders of Europe, an effect which would be inconsistent with the principle of solidarity and fair sharing of responsibility under Art. 80 TFEU.

## Recommendations

### Member States

#### **With respect to unaccompanied children:**

**The principles of the best interests of the child should be the paramount consideration in identifying the responsible Member State.**

**Member States should be more consistent and assiduous in their efforts to trace family members of unaccompanied children in the Dublin procedure living elsewhere in the territory of Member States.**

**The benefit of the doubt should be applied in age-disputed cases given the margin of error and the variety of methods used in age determination procedures.**

### European Commission

**More quantitative and qualitative data should be gathered by the European Commission with the support of Member States on the impact of the Dublin system on unaccompanied children.**

**Further study should be conducted on the reasons why limited Member State responsibility is assigned on the basis of family members.**

<sup>110</sup> This problem is compounded by the fact that Member States rarely apply the sovereignty and humanitarian clauses to preserve family unity. A new definition of relative is included in the Dublin recast compromise text but this is only linked to unaccompanied children within a Dublin procedure outside the context of the discretionary provisions.

## V. The Use Of Discretionary Provisions

Art 3(2) and Art 15 commonly referred to, as the sovereignty and humanitarian clause respectively are discretionary provisions within the Dublin Regulation. The Dublin recast compromise text retains these provisions, bringing them together under a separate chapter of the Regulation (recast Chapter IV) whilst clarifying the circumstances and procedures for applying them.

### 5.1. Sovereignty Clause (Art. 3(2))

Art. 3(2) permits Member States to examine an asylum application and thus take responsibility for substantively assessing it even if the Dublin criteria would otherwise assign this responsibility to another Member State. In its' 2007 Evaluation Report the Commission reported that "*Member States apply the sovereignty clause for different reasons, ranging from humanitarian to purely practical*". The Dublin recast compromise text retains this provision under recast Art. 17. Originally, the Commission had proposed to require the consent of the asylum seeker to use this clause, as in the Dublin Convention, however, regrettably, this proposal was rejected during the negotiations on the Dublin recast compromise text.<sup>111</sup>

In general, initial administrative authorities in the majority of Member States researched are reluctant to apply this provision and use it restrictively, for example only in individual cases based on extreme vulnerability. Member States have also exceptionally applied the sovereignty clause with respect to transfers to States where there would be a risk of a potential violation of asylum seekers' human rights in accordance with European jurisprudence.<sup>112</sup>

Statistical data on the application of the sovereignty clause is not readily available at the national level, however, **Germany** has gathered some data specifically in relation to **Greece** and **Malta**.

#### National Facts:

**Germany:** In 2011 Germany applied the sovereignty clause in 4630 cases where Greece was identified as the responsible Member State (Source: Email correspondence from BAMF to Pro Asyl in March 2012).

**Germany:** In 2011 Germany applied the sovereignty clause in 42 cases where Malta was identified as the responsible Member State (Source: Email correspondence from BAMF to Pro Asyl in March 2012).

**Slovakia:** Slovakia has never applied the sovereignty clause. National practice shows that in cases where Greece may be responsible the Slovak Migration Office does not commence the Dublin procedure and proceeds to directly examine the asylum application. This may be viewed as an indirect application of Art. 3(2).

#### 5.1.1. Procedural aspects of the sovereignty clause

Asylum seekers in **Austria**, **Bulgaria**, **Greece**, and **Slovakia** have the right to legally request the national administrative authorities to apply the sovereignty clause in individual cases. Nevertheless such requests rarely result in the application of this provision as it is used only on a discretionary basis by the administrative authorities depending on the individual circumstances of the case. Similarly in **Hungary**, lawyers may submit motions requesting the use of the sovereignty clause but the administrative authorities are not legally obliged to consider such motions. If such a request is refused in **Austria** and **Slovakia** the authorities have a duty to provide legal reasoning for their

<sup>111</sup> Recast Art. 17 contains no requirement for asylum seekers to consent to the application of the sovereignty clause.

<sup>112</sup> See also Chapter XI 11.1. on Member States implementation of the ECHR *M.S.S. v Belgium and Greece* judgment and the joined CJEU cases *NS & Others C-411/10* and *C-493/10*.

refusal. This is particularly important for the submission of any subsequent appeals. The question of whether an asylum seeker has an enforceable personal right to oblige a Member State to assume responsibility under Art. 3(2) is currently pending before the CJEU in the case of C-4/11.

As regards Spanish practice, the Spanish National High Court has ruled that the application of Art. 3(2) is a sovereign decision by the governmental authorities and not an individual asylum seeker's right.<sup>113</sup> In this case the Spanish High Court also declared that the focus in applying the sovereignty clause should be on the individual circumstances of the case and not on the general conditions in a Member State. The sovereignty clause is applied on a case-by-case basis as opposed to a country-specific manner in **Hungary**.

In **Bulgaria**, the jurisprudence of the Bulgarian court prevents it from reviewing the use of the sovereignty clause. As the sovereignty clause is a non-binding provision, the Court has ruled that it cannot oblige the Bulgarian administrative authority to apply it. This calls into question whether Bulgarian Courts can provide an effective legal remedy in situations where transfers may result in violations of the asylum seekers' human rights.

Irrespective of the Member State responsible under the Dublin Regulation, Dublin transfer decisions in Germany frequently contain the following standardized wording: "*Apparently there are no extraordinary humanitarian grounds which hinder a deportation*" (informal translation). This generic wording suggests that the sovereignty clause is considered in each individual case but the depth of such assessment is unclear.

Swiss jurisprudence indicates that the sovereignty clause is not a self-executing provision and therefore asylum seekers can only rely on it in connection with another provision of federal law in **Switzerland**. In **France**, Art. 3(2) is linked to Art. 53(1) of the French Constitution, which empowers the French authorities to take over responsibility for an asylum application even if they are not responsible in accordance with the Dublin criteria.<sup>114</sup> Despite this, there is no systematic reference to this provision by the administrative authorities when using the sovereignty clause.

The consent of the asylum seeker is not required to apply the sovereignty clause in **Austria, Germany** and **Switzerland**. In **Germany** it can be invoked against the wishes of the person concerned on the basis of 'economic or procedural reasons' if removal to the country of origin, after a substantive swift examination of his/her asylum claim, is easier than transferring him/her to another Member State. In contrast to this the consent of the asylum seeker is required in **Hungary**.

No guidance notes or official policies for identifying the relevant circumstances for invoking this provision are available in **France, Hungary** and **Switzerland**. However, national policy instructions on the use of the sovereignty clause are available in **Italy** and **the Netherlands**. **Italy** demonstrates a tendency to apply the discretionary clauses, in particular in cases of vulnerability. In February 2009 the Italian Dublin Unit distributed a ministerial circular to all reception centres, lawyers, municipalities and social services staff working for asylum seekers within the SPRAR, which stated "*the requests of revision of the applicant's transfer to another Member State, according to the Dublin Regulation 343/2003 will be taken into account in order to consider an eventual acceptance of responsibility. The requests must be supported by proper documentation written in Italian or a certified translation of it, containing the reason why the applicant cannot be transferred, or the effective professional integration of him/her in the Italian territory*" (unofficial translation)<sup>115</sup>. Professional integration within Italian society is a relevant factor taken into consideration by the administrative authorities when applying the sovereignty clause.

<sup>113</sup> For further information see Spanish High Court ruling 1570/2011.

<sup>114</sup> Art 53(1) Constitution de la République française "*The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds*" (unofficial translation).

<sup>115</sup> Italian circolare, 23 February 2009.





**Good Practice:** The Hungarian authorities require the consent of the asylum seeker to apply the sovereignty clause.



**Bad Practice:** In Germany the sovereignty clause may be applied against the wishes of the asylum seeker for economic or procedural reasons. The consent of the asylum seeker is not a requirement for applying the sovereignty clause.

## Jurisprudence

### Assessment of the sovereignty clause

In April 2011 the Sofia Administrative Court examined an appeal from an asylum seeker against a Dublin transfer to Greece on the grounds that he would not be able to access an asylum procedure there. The Sofia Administrative Court rejected the appeal on the basis that *'the transfer order was issued by the competent organ (i.e. the Bulgarian administrative authorities) and that the material and procedural rules regarding its issuance were fulfilled'*. In relation to the sovereignty clause the Court stated *"The assessment of this provision lies only with the administrative organ of the Member State, but not with the Court. The lack of such an assessment cannot be sanctioned in judicial way when the criteria for determination of the competent country under article 3(1) of the Dublin II Regulation are fulfilled"* (unofficial translation), Decision no. 1597 of 2011; Admin. Case no. 1938 of 2011; 5 April 2011.<sup>116</sup>

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### 5.1.2. Application of the sovereignty clause in vulnerable cases

Some Member States demonstrate willingness to utilize the sovereignty clause for humanitarian reasons in cases of evident vulnerability including with respect to both physical and mental ill health. Whether or not a Member State will take over responsibility for an asylum application depends on the impact and the severity of the illness on the individual asylum seeker concerned as evidenced by the submission of supporting documentation such as medical reports. Sometimes the fact that an individual is particularly vulnerable combined with certain deficiencies in the reception conditions including medical facilities of the responsible Member State may lead States to use the sovereignty clause to take over responsibility for individual asylum applications or as part of a general policy for vulnerable groups. Since autumn 2009 in **Germany** there has been an unofficial policy of applying the sovereignty clause in cases where particularly vulnerable persons are due to be transferred to **Malta**. Similarly, prior to the European jurisprudence leading to a general suspension of transfers to **Greece, Switzerland** applied the sovereignty clause in relation to vulnerable persons subject to Dublin transfers there.<sup>117</sup>

If an asylum seeker is able to demonstrate that the transfer will be disproportionately harsh for him/her on the basis of his/her individual circumstances, then the Dutch authorities may use their discretion to apply the sovereignty clause in **the Netherlands**. According to Dutch practice, medical aspects alone, for example the availability or lack thereof of medical treatment, is not sufficient to demonstrate 'special individual circumstances'. Based on the principle of mutual trust, it is assumed that medical facilities are comparable in all Member States and that persons subject to Dublin transfers can access such facilities upon transfer. An exception is made if the applicant shows, with substantial evidence, that this principle is not applicable to their case.<sup>118</sup>

<sup>116</sup> The following cases from the Sofia City Admin Court state similar reasoning in relation to the Court's non-engagement with Art. 3(2): Decision 1629 of 2011 and Admin Case 1870 of 2011.

<sup>117</sup> See Chapter VII for further information on vulnerable persons subject to the Dublin procedure. It should be noted that Switzerland on an individual basis still sends some Dublin applicants to Greece. For further information on transfers to Greece see Chapter XI, 11.1.1.

<sup>118</sup> Dutch policy in Aliens Circular C3/2.3.6.4; See also the following Dutch caselaw: No. 201002874/1 (30 August 2010) and No. 11/23402 and 11/23401 (2 November 2011) with regard to transfers to Italy, available in the case law database at [www.dublin-project.eu](http://www.dublin-project.eu).

### 5.1.3. Application of the sovereignty clause for reasons of general conditions in another Member State

The CJEU judgment in joined case C-411/10 and C-493/10 clearly shows that Member States may not transfer an asylum seeker to the responsible 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 Charter of Fundamental Rights. Given the extensive problems in the Greek asylum system this has meant that most Member States in practice use the sovereignty clause to take over responsibility for asylum claims when **Greece** is identified as the responsible Member State under the Dublin Regulation.<sup>119</sup>

There are also increasing concerns regarding the general reception conditions and asylum systems in other Member States whereby administrative authorities and/or national Courts have invoked the sovereignty clause to stop individual transfers to States such as **Hungary, Italy and Malta**. As a result of the *M.S.S. v Belgium & Greece* ECtHR Grand Chamber judgment lawyers in **the Netherlands** have argued that poor reception conditions including the use of unjustified detention for persons transferred to certain Member States under the Dublin Regulation should lead to an application of the sovereignty clause by the Dutch authorities. Currently in **Austria and Switzerland**, the main challenges associated with Dublin transfers relate to the general reception conditions in **Italy**.<sup>120</sup> However, the Austrian and Swiss administrative authorities continue to maintain that **Italy** fulfills its obligations under the Reception Conditions Directive.<sup>121</sup> Though noting that there might be some difficulties in practice, the Austrian authorities rely on the fact that the Commission has not taken any infringement proceedings against **Italy** in the context of that Directive.<sup>122</sup> In **Austria and Switzerland** the only exceptions where the sovereignty clause may be invoked in the context of **Italy** is with regard to particularly vulnerable persons. Similarly, in **the Netherlands** a number of judicial challenges have been made in the context of transfers to **Italy, Malta and Hungary**. Based on the principle of mutual trust, it is assumed by the Dutch authorities that all Member States comply with their obligations under the 1951 Refugee Convention and ECHR, unless there is concrete evidence to the contrary. If this is the case **the Netherlands** may take charge of an asylum application on the basis of Art. 3(2). According to the Dutch Aliens Circular this applies irrespective of whether the case concerned involved a request to take back or take charge of an asylum application.<sup>123</sup>

119 This section should be read in conjunction with Chapter XI, which illustrates Member State's practice in response to the principles in this CJEU judgment.

120 With regard to Austria, there are also many challenges concerning transfers to Hungary.

121 Council Directive (EC) 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers L31/08 [2003] OJ 6.2.2003 ('Reception Conditions Directive').

122 Such an approach may need to be revised in light of the fact that as of October 2012 the Commission has given formal notice to Italy regarding the infringement of the main EU asylum legislation under Art. 258 TFEU. Further information is available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements\\_by\\_policy\\_asylum\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm)

123 Aliens Circular C2/3.6.1.

## 5.2. Humanitarian Clause (Art. 15)

The humanitarian clause is a discretionary provision to be applied in situations where a strict application of the binding criteria would lead to a separation of family members. It provides the possibility of bringing together family members as well as dependant relatives, for humanitarian reasons, in particular on family or cultural grounds.<sup>124</sup> Chapter IV of the Implementing Regulation provides guidance on its' application including with respect to situations of dependency, unaccompanied children, procedural issues and the possibility of recourse to a conciliation procedure.<sup>125</sup> Under the Dublin recast compromise text, the application of this clause has been clarified with the inclusion of a new separate provision aimed at bringing together dependents. Additionally, Art. 15(3) is now incorporated as a legally binding provision under recast Art. 8(2) for unaccompanied children reuniting with relatives.<sup>126</sup>

This clause, like the sovereignty clause, is applied in a restrictive manner with few outgoing requests sent by Member States to their counterparts on this basis. It is noteworthy that the outgoing requests on this ground represent 0.5 % of all outgoing requests in 2010. Although clarity is sometimes required as to the responsible Member State under Art. 15, the conciliation procedure has never been used in **Greece, Hungary, France, Slovakia and the Netherlands**. Furthermore, no information was available on the application of the conciliation procedure in **Austria, Bulgaria, Italy and Spain**. When disputes arise as to the application of the humanitarian clause, Member States appear to prefer to use informal methods of communication to resolve them. It is unclear whether the fact that the formal conciliation procedure is not used diminishes the chances of relatives to be reunited on humanitarian grounds but it remains to be seen whether the inclusion of the conciliation procedure in the Dublin recast compromise text as opposed to the Implementing Regulation will lead to an increase in its' utilization with respect to the application of Art. 15.<sup>127</sup>

In **Austria**, according to judicial doctrine, all siblings and all relatives in descending or ascending line fall under the humanitarian clause. It also applies to more distant relatives such as cousins as long as there is evidence of strong dependency. Despite this policy, practice shows that the humanitarian clause is generally only applied in a few cases relating to extremely serious health problems. Austrian Asylum Court jurisprudence demonstrates that illnesses such as dementia, very severe forms of Hepatitis C or epilepsy,<sup>128</sup> cancer or HIV status result in bringing and/or keeping together dependent family members and relatives under Art. 15. In **France** there is inconsistent practice across the Prefectures. Some Prefectures only consider the criteria within Art. 11 of the Implementing Regulation whilst in other Prefectures there is a wider application of the humanitarian clause.<sup>129</sup>

<sup>124</sup> The objective of Art. 15 seeks to allow Member States to bring together family members where that is necessary on humanitarian grounds as laid down in recital 7 of the Dublin Regulation.

<sup>125</sup> The conciliation procedure under Art. 14 of the Implementing Regulation may be used when Member States cannot resolve a dispute, either on the need to carry out a transfer or to bring relatives together on the basis of Art. 15 of the Dublin Regulation. It consists of a Chairman of a Committee and three Committee members representing three Member States not connected with the matter of the dispute. After receiving arguments from both parties the Committee members propose a solution. Whether it is adopted or rejected by the parties, the solution proposed is final and irrevocable.

<sup>126</sup> Recast Art 8(2) states that "*Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on individual examination, that the relative can take care of him or her; that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.*"

<sup>127</sup> The Commission in the Commission staff working document stated that "*The fact that the conciliation mechanism for the humanitarian clause is not used diminishes the chance of relatives to be reunited on humanitarian grounds, which in some cases....could amount to a breach of the fundamental right to family unity as enshrined in Article 7 of the Charter of Fundamental Rights and in Article 8 of the European Convention on Human Rights*". See Commission staff working document accompanying 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), Impact Assessment, SEC(2008) 2962, 3.12.2008. p.13. ('Impact Assessment Paper'). Under the Dublin recast compromise text (Art. 37) the conciliation procedure may be utilized to resolve a dispute on any matter related to the application of the Dublin Regulation.

<sup>128</sup> This case involved a person with a very severe form of epilepsy where the medication needed was not available in the responsible Member State, Poland.

<sup>129</sup> Article 11 of the Implementing Regulation provides guidance on situations of dependency including a list of factors to be taken in account in assessing the necessity and appropriateness of bringing together the persons concerned under Art. 15(2).

The German language version of the Dublin Regulation formulates Art. 15 in a manner which appears to indicate that family unity on the basis of humanitarian grounds only encompasses members of the nuclear family.<sup>130</sup> The BAMF removed this ambiguity in its internal policy instructions to resemble the English version of the Regulation.<sup>131</sup> Still this provision is rarely applied in **Germany** in practice. According to the Aliens Circular in **the Netherlands**, the humanitarian clause only applies to asylum seekers.<sup>132</sup> Therefore this means that all family members and/or relatives must have claimed asylum to invoke the humanitarian clause.<sup>133</sup> However Dutch authorities interpret Art. 15(3) differently in that the family member of an unaccompanied child is not required to be an asylum seeker as well. A recent Court decision from the Council of State confirms that restricting the application of Art. 15(3) to family members who applied for asylum themselves is prohibited.<sup>134</sup>

**Extract:** The Dutch Aliens Circular (Aliens Circular par. C3/2.3.6.3. subtitle 'Minderjarigen) states the following in relation to the application of Art. 15(3) for unaccompanied children:

*“Member States shall reunite minors, if possible, with relatives in another Member State who are able to care for him/her on the basis of article 15(3) Dublin Regulation, unless this is not in the best interests of the child. It should be noted that, if the unaccompanied minor has a family member and/or relatives in the country of origin, and therefore there is a possibility of care for the minor, the minor is in principle not eligible for reunification on the basis of article 15 Dublin Regulation. After all, if reunification of the child with members of the core family is possible, as meant in article 2(i) of the Dublin Regulation, reunification in the country of origin is preferred.*

*‘If possible’ should, amongst others, be understood to mean:*

- a) *it should be made sufficiently plausible, or demonstrated, that there really is a family tie (the relative not being a member of the core family as defined in article 2(i) Dublin Regulation);*
- b) *depending on the asylum procedure of the relative(s) in the Netherlands, it should be reviewed whether reunification is still possible, also in the light of the interests of the unaccompanied minor.*

*After all, it would be undesirable to process asylum applications of other relatives in the Dutch asylum procedure when it has already been decided that the family member for whose application the Netherlands is indeed responsible, will not be granted asylum and will have to leave the Netherlands” (unofficial translation).*

When applying the humanitarian clause, the Dutch Aliens Circular also requires that there has not as yet been a decision on the substance of the asylum seeker’s application from another Dublin Member State as ‘...this is an application of the basic assumption of the Dublin Regulation, that asylum applications will be processed in one country only.’<sup>135</sup> The statement in the circular extract above, that ‘if the unaccompanied minor has a family member and/or relatives in the country of origin they are in principle not eligible for reunification on the basis of article 15 Dublin Regulation’, has led to ambiguity in practice. For example, the IND requested Malta to examine the asylum application of an unaccompanied boy from Somalia even though his sister resided in **the Netherlands**. As his mother and grandmother were still living in Somalia the IND did not apply Art. 15 and proceeded to transfer him to Malta. Upon appeal the Dutch Council of State rejected this interpretation of the Aliens Circular, and ruled that it was in the best interest of the minor to stay with his sister and therefore **the Netherlands** was responsible for examining his asylum application.<sup>136</sup> Despite this Court ruling, the Aliens Circular continues to prescribe that the humanitarian clause be applied to minors in the manner described above.

<sup>130</sup> In the German Language version of the Dublin Regulation, Art. 2(i) Family Members is translated as Familienangehörige and in Art. 15 relatives is also translated as Familienangehörige so no distinction is made between family members and relatives. The fact that the wording of Art. 15(2) diverges in different languages was noted by the CJEU in C-245/11 which opted for a broader interpretation of family under Art. 15(2) as reflected in the English version of the Regulation.

<sup>131</sup> BAMF-Dienstanweisung Dublinverfahren, available at [http://www.proasyl.de/fileadmin/fm-dam/i\\_Asylnrecht/Dienstanweisungen-Asyl\\_BAMF2010.pdf](http://www.proasyl.de/fileadmin/fm-dam/i_Asylnrecht/Dienstanweisungen-Asyl_BAMF2010.pdf), page 109f.

<sup>132</sup> Par. C3/2.3.6.3 Aliens Circular.

<sup>133</sup> It should be noted that such an interpretation is not consistent with the recent CJEU ruling of C-245/11 in the context of Art. 15(2) whereby it states that “the objective of Article 15(2) of Regulation No 343/2003 is attained both where it is the asylum seeker who is dependent on a member of his family present in a Member State other than the one responsible pursuant to the criteria set out in Chapter III of that regulation and, conversely, where it is that family member who is dependent on the assistance of the applicant.” There is no requirement for the family member and person concerned to both be asylum seekers.

<sup>134</sup> See Council of State decision, No. 201100666/1 30 November 2012.

<sup>135</sup> Aliens Circular C3/2.3.6.3. ‘Minderjarigen’.

<sup>136</sup> ABRvS [Council of State] Case No. 201000393/1/V3 15 September 2010.

**National Facts:**

**Bulgaria:** In 2011 the Bulgarian administrative authorities sent six requests under the humanitarian clause to other Member States. Only one request actually led to the transfer of an asylum seeker to another Member State. As regards incoming requests, Bulgaria only received six requests to use the humanitarian clause from a single Member State, Norway but refused them all. Accordingly in 2011 no incoming transfers were made to Bulgaria on the basis of the humanitarian clause.

**Germany:** In 2011 Germany accepted 2,169 incoming requests for transfers from other Member States. Only 25 of these requests were on the basis of the humanitarian clause.

**Greece:** In 2011 the humanitarian clause was invoked in 25 cases to find other Member States' responsible for the examination of the asylum applications of family members.

**Slovakia:** Despite the fact that they have only received a small number of requests, the Slovak authorities have only accepted one incoming request on the basis of the humanitarian clause since 2010.

**Hungary:** In 2010 the OIN received no incoming requests on the basis of the humanitarian clause. The Hungarian authorities sent outgoing requests based on the humanitarian clause to other Member States in eight cases, four of which were accepted. In 2011 there was one incoming request based on the humanitarian clause, but the asylum seeker's transfer to Hungary was not executed. The Dublin unit sent two outgoing requests to other Member States on the basis of the humanitarian clause in 2011.



**Austrian Case Study:** *In 2010, the Austrian authorities transferred a Chechen father of a newborn child to Poland under the Dublin Regulation. The child had refugee status in Austria. Despite this, the Austrian administrative authorities transferred the father to Poland and stated in the Dublin transfer decision that the father could apply for family reunification from Poland according to Art 15 Dublin Regulation. After he was removed to Poland the request to apply Art. 15 was refused by the Austrian authorities in 2011 and the family was separated. The wife and child have no right to stay in Poland as refugees, and equally the Chechen applicant, husband and father respectively has no right to remain in Austria as a refugee and so they remain separated.*



**French Case Study:** *in August 2006, Mrs A., a Chechen woman, fled Russia to request asylum in France in order to be with her son and daughter-in law who have obtained refugee status there. During her journey, she was arrested in Germany and placed in a detention centre. She applied for asylum and requested a Dublin transfer to France according to the sovereignty clause. Mrs. A is not self-reliant due to her age and health problems. Furthermore, she had to be transferred from the detention centre to a hospital in Germany due to illness. As a refugee who is fully integrated in France, her son is the best person to take care of her. He therefore filed a request to the French Dublin Unit to take responsibility for her with the assistance of France Terre d'Asile. Meanwhile, Germany has filed a request to terminate responsibility, at the request of Mrs A. So far, her requests have not been answered and she has not been transferred to France up until this time.*



**Slovakian Case Study:** A Pakistani asylum seeker requested the Migration Office to initiate the Dublin procedure based on the humanitarian clause to unite him with his brother in Italy. However, the Slovak Migration Office refused to initiate this request to the Italian authorities and claimed in the transfer decision of January 2012 that the definition of ‘family member’ is contained in Article 2 (i) of the Dublin Regulation and “because the asylum seeker does not belong to any of these categories cited by the Dublin Regulation and is not directly dependant on his brother, the requested transfer to Italy has not been possible to realise based on the above stated Regulation” (informal translation). This is based on a flawed interpretation of the humanitarian clause, which provides for a wider definition of family then under Art. 2(i) as confirmed in the CJEU case of C245/11 *K v Bundesasylamt*.

## Jurisprudence

### Family life and Art. 15

In December 2008 Mrs D, a 70 year old women with serious health problems, arrived in France with her second son and his family after transiting Poland. In March 2009 the Prefect did not grant the woman’s family a temporary stay permit, placing them in the Dublin procedure instead. In April the prefect allowed Mrs D to stay for the examination of her asylum claim without providing any reasoning as to the different decision on Member State responsibility. Mrs D’s son took care of her and he was the only family member she had left as the rest had died. The family appealed to the Administrative Court of Dijon to stay in France. In its decision the Administrative Court found that the decision of the Prefect to transfer the son and family to Poland was a ‘*serious and illegal breach of the right to a private life and of Art. 15 of the Dublin Regulation*’. The Court ordered the Prefect to apply Art. 15 and examine the family’s asylum application in France (Administrative Court of Dijon, France No. 0901156, 2 May 2009).

### Definition of family and Art. 15(2)

A Somali woman was registered as having been previously in Italy on the basis of Eurodac data before claiming asylum in Switzerland. Her husband had subsidiary protection in Switzerland. Despite this the FOM transferred her to Italy. She subsequently returned to Switzerland and applied for asylum again. During her time in Italy she claimed she had to live in a train station where she was exposed to sexual harassment. She was pregnant with her husband’s child at that time and claimed that such living conditions were too dangerous for a lone pregnant woman. The FOM requested the Italian authorities to take her back without informing them of her pregnancy or the presence of her husband in Switzerland. The Italian authorities failed to reply and the FOM issued a negative decision. The asylum applicant appealed to the Federal Administrative Court and during her appeal her son was born in Switzerland. The Court examined Art. 15(2) and in particular what the wording “keep or bring together” meant. It held that it was not necessary to await a request from another Member State to apply Art. 15(2) in contrast to Art. 15(1). Therefore according to the Court if the conditions under Art. 15(2) are met i.e. dependency on account of pregnancy etc, the margin of appreciation of the FOM is reduced so that it must apply the humanitarian clause. It further stated that the definition of family member in Art. 15(2) is wider than Art. 2 i), and that there is no fixed boundary but what is decisive is the relationship and a credible dependency. The appeal was granted and the Court ordered the FOM to examine the women’s asylum application (Swiss Federal Administrative Court Switzerland E-1727/2011, 6 September 2011).

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As shown in Chapter IV the binding family provisions in the Dublin Regulation often cannot cover the multitude of family situations in the Dublin procedure. However, many Member States fail to apply the sovereignty and/or humanitarian clauses to alleviate this problem and preserve family unity. The unwillingness of Member States to apply these provisions to take over responsibility for an asylum claim is most strikingly evident in the statistics regarding the humanitarian clause which indicate only a low number of cases have responsibility assigned on this basis.

The majority of Member States only apply the sovereignty clause in limited grounds related to particularly vulnerable individuals or in the context of Dublin transfers to Greece given the humanitarian situation there. However it has also been applied to the detriment of the individual asylum seekers as shown in Germany whereby the sovereignty clause may be used to expedite the examination of an asylum claim for a swift return to the country of origin. Unfortunately this issue will not be addressed under the Dublin recast compromise text as the requirement to seek the consent of the asylum seeker in applying this provision was removed during recast negotiations.

Similarly the humanitarian clause is applied in a limited manner. A restrictive interpretation of the humanitarian clause and/or family members coming within its scope has led to it rarely being applied in practice. The recent CJEU ruling in the case of C-245/11 provides further clarification on the interpretation of Art. 15(2) by Member States and should be implemented accordingly.

Member States can use these discretionary clauses to mitigate some of the injustice caused by the application of the binding Dublin provisions and may in certain circumstances have an obligation to do so. European jurisprudence shows that Member States have a duty to apply the sovereignty clause/humanitarian clause where a transfer would be incompatible with their obligations under international law.<sup>137</sup> As the new recast Dublin Regulation is implemented the use of the discretionary provisions should be carefully evaluated by the Commission and other relevant stakeholders. Such an evaluation should particularly examine the use of these provisions in situations where it is necessary to derogate from the Dublin criteria on the basis of human rights obligations linked to family unity.

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## Recommendations

### Member States

**Member States must ensure that the principle of family unity is respected within the Dublin procedure by applying the humanitarian clause in cases where adherence to the binding criteria would result in such families being separated.**

**Member States must respect the duty to apply the sovereignty clause where a transfer would be incompatible with their obligations under international law.**

**Member States should apply the sovereignty and humanitarian clause in a fair, humane and flexible manner that addresses the complex and varying situations in which many asylum seekers find themselves.**

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<sup>137</sup> ECHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011.

## VI. Procedural Safeguards

Asylum seekers in the Dublin procedure are particularly vulnerable due to the fact that they are often in a precarious uncertain situation, having fled persecution and sought refuge in a particular Member State. They may have limited understanding as to why a particular Member State has been assigned responsibility for their asylum application. Therefore procedural safeguards are essential in order to respect and protect the fundamental rights of those within the Dublin procedure, in particular Art. 18, 19, 41 and 47 of the Charter of Fundamental Rights.

### 6.1. Access to information

Article 3(4) of the Dublin Regulation requires that asylum seekers shall be informed in writing in a language that they may *'reasonably be expected to understand'* regarding the application of the Dublin Regulation, its time limits and its effects. Art. 18 of the Eurodac Regulation also sets out the rights of asylum seekers to information within the scope of the Eurodac Regulation in relation to their data including the purpose for which the data will be processed within Eurodac.

The Dublin recast compromise text introduces significant improvements on the right to information concerning the application of the Regulation, including providing for a specific personal interview in the Dublin procedure. Recast Art 5 obliges Member States to conduct a personal interview with the applicant in order to facilitate the process of determining the Member State responsible with limited grounds for omitting such an interview. The recast compromise text also envisages the adoption of a common information leaflet for asylum seekers by way of an implementing act adopted by the Commission (recast Art. 4(2)).

#### 6.1.1. Information leaflets

In **Austria, Bulgaria, Hungary, Slovakia** and **Spain**, general information leaflets on the asylum procedure contain specific sections on the potential application of the Dublin Regulation. The accessibility of these information leaflets has been questioned in **Austria** and **Hungary** as they contain formal, complex and legalistic language which is difficult for asylum seekers to fully comprehend. The Hungarian OIN information leaflet also does not clearly list the applicable criteria for responsibility determination or explain the fact that it must be applied in the order in which it is set out in accordance with Art. 5. Similarly, asylum seekers in **France** are not informed of the fact that there is a sequential hierarchy of criteria.

Many obstacles are faced by illiterate asylum seekers who have to rely upon government officials, interpreters and/or legal advisors to explain the content of these information leaflets. In practice, the full content of these leaflets is often not delivered to the applicant to enable them to fully understand the application of this Regulation as reported in **Austria, Bulgaria** and **Germany**.

Asylum seekers in **Bulgaria** are required to acknowledge receipt of these information leaflets and declare that they understand their content, by providing a personal signature in the presence of an interpreter. However, there have been cases where interpreters have failed to fully interpret all of the leaflet's contents thereby depriving the applicant of the necessary information. In **Slovakia**, asylum seekers are also obliged to sign the asylum information leaflet at the Dublin interview thereby declaring that they have received and understood the information on the rights and duties of asylum seekers during the asylum procedure. This document is also signed by the Slovak authority employee who explains the content of the leaflet orally to the asylum seeker with the aid of an interpreter if necessary.



National authorities in **Bulgaria** and **Germany** issue specific information leaflets on the Dublin Regulation. The information leaflet distributed in **Germany** is neither orally translated nor completely explained to the asylum seeker and is often not available in a language he/she understands.

NGOs provide information leaflets on the application of the Dublin Regulation in a user-friendly format in **Switzerland, Hungary, Italy** and **the Netherlands**. In addition, in **the Netherlands**, during a personal interview the Dutch Council for Refugees provides information to all asylum seekers on the Dutch asylum procedure including on the Dublin Regulation. In **Greece**, applicants are only orally informed of the applicability of the Dublin Regulation by the Greek Police though this in itself is dependent on the availability of interpreters.

In **Italy** a manual containing details on the operation of the Dublin Regulation is available on the Ministry of the Interiors' website. Up until recently the Spanish authorities did not provide applicants with any information on the Dublin Regulation, however, currently the national authorities in **Spain** are developing a new leaflet that will include a specific section on the Dublin Regulation. The extract from the information leaflet below highlights some of the issues surrounding the content and delivery of information in these leaflets and the balance to be achieved between providing information on all the technical details of the Regulation whilst making it understandable for asylum seekers. In this example, although the administrative authorities acknowledge the importance of providing information of the presence of family members, it fails to provide any details on what kind of information the authorities require to consider the applicability of the Dublin Regulation on this basis.

#### Extract from the Slovakian Ministry of Interior Information leaflet

entitled "*Advice of the Asylum seeker on the Rights and Duties during the Asylum Proceeding*"

#### **30: Formation of the family that stay in the territory of another member country applying the Dublin Regulation:**

If your family members stay in the territory of another member country applying the Dublin Regulation, please inform immediately the Migration Office employee of this fact.

If your family members agree with it, according to the Dublin Regulation you have the right to family formation with them in one of the member countries applying the Dublin Regulation.

### **6.1.2. Information on the potential application of the Dublin Regulation in an individual case**

In **France**, once it becomes apparent that the Dublin Regulation may be appropriate, the asylum seeker concerned receives a standard one-page information notice on the Dublin Regulation. This information notice contains details on the Dublin Regulations' impact on the asylum application, evidence of the possible responsibility of another Member State, response deadlines for the responsible Member State and the potential extension of time limits for the transfer. According to the Prefectures, this information notice is interpreted orally for the applicant or translated in writing. Despite this in practice, there have been instances where the note was poorly translated and/or intelligible or there was no translation available in the language required. The practice of providing this information notice is varied across all the Prefectures, for example in Lyon no such notice exists even though applicants are subject to the Dublin procedure there.

Persons irregularly present in **Germany**, who have not applied for asylum there but have a previous asylum claim in another Member State, are rarely informed by the German authorities as to whether an investigation has been launched into the applicability of the Dublin Regulation in their case.<sup>138</sup> The BAMF has a duty to inform asylum seekers about the potential application of the Dublin Regulation during a

<sup>138</sup> This practice by the German authorities was subject to a Parliamentary enquiry in 2010. See Bundestags-Drucksache 17/5579, 18 April 2011, available at <http://dipbt.bundestag.de/dip21/btd/17/055/1705579.pdf> p. 6). The Federal government declared that such persons would in future be informed at an early stage about requests to other Member States concerning the Dublin Regulation and any potential removal to the responsible Member State. Despite this, practice demonstrates that a large amount of such persons continue to be uninformed about the initiation of a Dublin procedure and a potential removal to another Member State.

personal interview. However, in reality this does not always occur during the interview or sometimes no personal interview is held at all. In general, those subject to the Dublin procedure in **Germany** are not notified as to what information has resulted in them being subject to the Dublin procedure. Without this information there is no possibility for the asylum seekers to ensure that the German authorities have taken all relevant considerations into account in applying the Dublin Regulation.

In **Hungary**, asylum seekers receive a written decision informing them of the potential application of the Dublin Regulation and the suspension of the admissibility procedure for the examination of the asylum claim pending the result of any investigations. This decision is issued in the Hungarian language but the OIN has an obligation to explain it orally to the applicant in a language that he/she understands. In **Slovakia**, the asylum seeker receives a short written notice from the Dublin unit informing him/her of the commencement of a Dublin procedure. In **Spain** OAR officials inform asylum seekers in interviews of the potential application of the Dublin Regulation in their case. The authorities in **Switzerland** explain either orally or in writing to the asylum seeker which Member State might be responsible for his/her asylum application. The asylum seeker is then given the opportunity to make a statement to the Swiss authorities in response to the allocation of Member State responsibility.

As regards **the Netherlands**, if the applicability of the Dublin Regulation is being considered by the IND, the preliminary meeting with a Dutch Council for Refugees' representative is dedicated to the Dublin procedure. The IND also notifies the asylum seeker if a Dublin procedure has been started including which Member State has been asked to take over responsibility for the asylum claim and on what basis.

#### Example of a Slovakian notice informing a third country national of the application of the Dublin Regulation:

*We would like to inform you about the start of the procedure about your transfer to the country of your first asylum application on the territory of the European Union according to the Council Regulation (EC) No. 343/2003. The result of the procedure will be communicated to you after receiving a final result of the Dublin procedure.*



**Good Practice:** In the Netherlands the asylum seeker receives a letter of intention to issue an admissibility decision rejecting the application for asylum on the basis of the Dublin Regulation. This includes information on the reasons for the intended rejection and its consequences. The asylum seeker and their

legal representative are then given the opportunity to respond to this letter of intention. Subsequent to this, the IND official re-assesses the initial decision, taking into account the response provided by the applicant and his/her legal representative.



**Bad Practice:** If a Dublin procedure is started in Italy in a particular case, the applicant concerned is often not informed of its application. The wording of the Dublin Regulation may be cited on the 'Cedolino' without any explanation provided to the asylum seeker as to what this means for their application for international

protection.



**Bad Practice:** Since Autumn 2010, the Dublin unit in Dortmund, Germany, by way of informing the asylum seeker of the potential applicability of the Dublin Regulation, just posts a German letter to the applicant stating that unit 431 is handling the asylum application i.e. the Dublin unit.<sup>139</sup> No further information is

provided as to which Member State may potentially be responsible or on what grounds the Dublin Regulation is being applied.

<sup>139</sup> Unit 431 in Dortmund, Germany is the larger of two Dublin units in Germany. This unit is responsible for the application of the Dublin Regulation for applicants who have applied for asylum in Germany and there are indications that another Member State may be responsible for the examination of their asylum claim. Sometimes the word 'Dublinreferat' is mentioned in this letter but not in a systematic manner. It depends on the individual caseworker.

## Jurisprudence

### Right to information on the Dublin Regulation

The applicants concerned applied for asylum in France and were issued a transfer order to Poland on the basis of the Dublin Regulation. The applicants challenged the legality of the decision on the grounds that they were not informed in writing in a language that they may reasonably be expected to understand about the application of this Regulation, its time limits and its effects in accordance with the Art. 3.4 of the Dublin Regulation. The Conseil d'Etat ruled that the French authorities failed to respect the procedural safeguards in place and consequently the removal order for Poland was suspended and the French authorities had to re-examine the admissibility of the asylum application in France. Quote: "...having not offered to petitioners procedural safeguards in accordance with Art. 3.4 of the Council regulation (EC) No 343/2003 of 18 February 2003, Prefect of Loire-Atlantique affected seriously and clearly illegally their fundamental right to asylum (CE Refere liberte, No. 313767, 30 July 2008).

## 6.2. A personal interview

The current Dublin Regulation contains no requirement to conduct a personal interview with an asylum seeker. However in order for the national authorities to gather all necessary information to identify the responsible Member State, and if need be, to inform asylum seekers orally of the applicability of the Regulation, an obligation to hold a personal interview was inserted into the Dublin recast compromise text. Such an interview is also necessary to allow asylum seekers to provide the necessary information to enable administrative authorities to make an informed decision on the correct application of the Dublin criteria and in order to fully reflect the principle of the right to be heard.

Applicants receive a personal interview for the purposes of the Dublin Regulation in **Slovakia** and **the Netherlands**. However, in **Slovakia** the employees of the Dublin unit often only use this interview to complete a standardized form given to all asylum seekers with general questions and do not specifically ask questions framed around the Dublin Regulation and the possibility of a Dublin transfer. No interview is held for the purposes of the Dublin Regulation in **Greece**. Information relevant to the applicability of the Dublin Regulation is obtained as part of general preliminary admissibility interviews in **Austria, Hungary, France, Spain** and **Switzerland**. Usually no lawyers or interpreters are present at this preliminary interview in **France**. In **Bulgaria**, once a Dublin procedure is initiated according to the national legislation, a provision (Art. 67(b)(2) LAR) provides that 'where necessary' an interview is taken with the applicant. It is not clear how the 'where necessary' provision is interpreted and applied in practice.

In contrast to the practice of most Member States the potential application of the Dublin Regulation is only considered during the substantive asylum interview in **Germany**.<sup>140</sup> Not all the facts or relevant information as to the applicability of the Dublin Regulation are gathered by the German authorities at the asylum interview. As this is commonly the main asylum interview it always begins with 25 standardized questions concerning name, age, personal documents, family, and journey details and so on and then examines the reasons for seeking asylum. Sometimes the interviewers only ask the 25 questions first when considering the applicability of the Dublin procedure and then only resuming the interview on the substantive reasons for asylum once **Germany** is identified as the responsible Member State. However, usually the whole asylum interview is carried out even if there has been a Eurodac hit indicating the responsibility of another Member State.<sup>141</sup> Moreover if relevant information is gathered, it is not guaranteed that this will be properly taken into consideration in the determination of Member State

<sup>140</sup> This means in practice asylum seekers in the Dublin procedure in Germany may experience lengthy delays. The time period between lodging an asylum application and attending an asylum interview can vary from two days to up to eight months or longer. Some asylum seekers have been in the Dublin procedure in Germany for more than a year. Also the practice concerning the asylum interview varies significantly between the different branches of BAMF.

<sup>141</sup> According to the national expert this delay in examining the applicability of the Dublin Regulation till the stage of the main asylum interview generally does not affect the time limits under the Dublin Regulation as it normally relates to take back cases, which have no time limits in the current Dublin Regulation. Even if time limits have expired for take charge cases, in practice the German authorities may still try to send outgoing requests to other Member States.

responsibility. Often the asylum interview is only held months into the Dublin procedure and the record of this interview is placed on the applicant's file at a later stage within the Dublin unit. Federal Office instructions within the German Ministry indicate that sometimes Dublin procedures are undertaken without any personal interview. If a personal interview is held in **Germany**, no questions are asked in relation to the possibility of applying the humanitarian clause for example no questions are raised as to whether the asylum applicant is dependent on another relative or vice versa. Frequently questions are asked regarding family members and relatives but the personal relationship and dependency to these persons are not considered in the interview and the asylum seeker is not informed as to the importance and consequences of such information on identifying the responsible Member State.

In **Italy** questions of relevance to the Dublin Regulation are asked as part of the preliminary interview but the asylum seeker concerned is not always informed of the reasons why this information is requested and its pertinence to the applicability of the relevant Dublin criteria. Generally speaking, no specific questions are asked by the Italian authorities regarding familial or other relevant links in other Member States and applicants are not fully informed of the rules governing family unity under the Dublin Regulation. In contrast to this, in **the Netherlands** questions are asked about the presence of family members in other Member States in the personal interview.

The interview conducted by the Austrian authorities includes the collection of information on family ties in **Austria**, the physical and mental health of the asylum seeker and his/her reasons for refusing to go to the responsible Member State where applicable.



**Good Practice:** In the Netherlands a specific Dublin interview is held where the IND official provides the opportunity for the applicant to state any reasons why they wish the Netherlands to examine their asylum application. The asylum seeker and their legal representative receive a copy of the interview report directly after the personal interview and following that they may submit corrections to this interview record where necessary.

### 6.3. Access to Dublin case files

It is noteworthy that a number of Member States provide the opportunity for asylum seekers to access their Dublin case files held by national administrations. Such a measure reflects the obligation of the right to good administration under Art. 41 of the Charter of Fundamental Rights.

In **Germany** and **Slovakia** the national authorities are obliged to give applicants or their legal representatives' access to their personal files with the authorities including any relevant administrative information with regards to the application of the Dublin Regulation. In **Germany** requests for access to files can be submitted to the authorities but often it takes weeks or even months before the asylum seeker' receives his/her files. In addition, sometimes the files are incomplete and missing important information such as notifications and requests to the responsible Member State for the extension of time limits. In **the Netherlands**, asylum seekers can receive copies of the official correspondence between **the Netherlands** and the other responsible Member States.



**Good Practice:** The asylum seeker has the right to inspect his/her own asylum file with the national authorities upon request in Slovakia and may receive copies of the documentation contained in his/her file. The Migration Office is obliged to provide interpretation in the language the applicant understands for this purpose.

## 6.4. Notification of the Transfer Decision

Art. 19(1)(2) and Art. 20(1)(e) provide that the transferring Member State must notify the applicant of the forthcoming transfer to the responsible Member State. This decision shall set out the grounds on which the transfer is based and shall contain details concerning the time limit for carrying out a transfer and, if necessary, certain information on the place and date at which the applicant should appear, if she/he is travelling to the Member State responsible by his/her own means. The Dublin recast compromise text in recast Art. 26 strengthens this provision by requiring Member States to include relevant information on the available legal remedies against such a transfer decision.

The notification of the Dublin transfer decision is served in person by way of a written decision in **Austria, Bulgaria, Greece, Hungary, Italy, Slovakia**<sup>142</sup> and **Switzerland**. The transfer decision notice contains information on the right to appeal and timeframes for such an appeal in **Bulgaria, Hungary, Italy, Slovakia** and **Switzerland**. Sometimes in **Italy** the notice does not clearly explain how to submit an appeal if required or provide contact details of NGOs who could assist with such appeals.

In **Bulgaria**, asylum seekers receive the transfer decision in the Bulgarian language, in the presence of an interpreter. The interpreter is required to translate the full text of the decision. In practice, asylum seekers have sometimes claimed that the interpreter only translates the outcome of the decision and not all the necessary information contained within the notice.

The Dublin transfer decision in **France** is delivered by post to the asylum seeker's residence or issued to him/her during an appointment at the relevant Prefecture. The transfer notice issued by post is usually in a language that the applicant understands. If served during the appointment at the Prefecture the notice is in French but may be translated orally by an interpreter or in writing. Asylum seekers in **Bulgaria** and **France** are required to sign the transfer notice issued to them to declare that they understand the contents of the decision. However not all asylum seekers receive a Dublin transfer order in **France**. It is not known why only some applicants receive the transfer order whilst others do not.

In **Greece**, asylum seekers are orally informed when other Member States have taken over responsibility for their asylum application but there is no written notice provided to them in their own language. In **Slovakia**, the transfer decision notice is delivered in person by the authorities if the applicant is detained. In **Slovakia** and **Italy** the transfer notice does not contain information on the proposed itinerary or date for removal to the responsible Member State. According to Slovak practice, a distinction is made between serving third country nationals who have claimed asylum in **Slovakia** a transfer decision and not notifying those who are apprehended in an irregular manner by the Slovak authorities. Third country nationals who have not requested asylum in **Slovakia** but are subject to a Dublin transfer on the basis of a take back request are not issued with any transfer decision. Such persons only receive a short written notice with no possibility to appeal the transfer to the responsible Member State. In **Slovakia**, different procedural guarantees are set in place for these two distinct groups of third country nationals. The example below shows the transfer notice issued to third country nationals who have not claimed asylum in **Slovakia**. No reasons are provided as to why Romania is considered responsible under the Dublin Regulation.

In **Switzerland**, the Dublin transfer decision is notified in writing in one of the official Swiss languages. The transfer decision is not issued in other languages which the asylum seeker may understand nor is there any interpretation provided to translate the decision orally. Usually, a person from the reception centre can help translate the decision but if nobody can be found to translate it this can be problematic for the asylum seeker concerned. As of 1 January 2011 a new law was introduced in **Switzerland**, which permits inadmissibility decisions on the basis of the Dublin Regulation to be notified directly to the asylum seeker even if he/she has a legal representative. This direct notification

<sup>142</sup> Notification of the transfer decision is only applicable in situations whereby an asylum seeker has claimed asylum in Slovakia and their application has been found to be inadmissible due to the fact that another Member State is responsible pursuant to the Dublin II Regulation. If the person concerned has not claimed asylum in Slovakia then they are not properly of the Dublin transfer decision.

to the person concerned could be problematic if he/she is detained and the legal representative is not informed in time or cannot get in contact with him/her to discuss the possibility of submitting an appeal against the decision.

#### Example of a Slovakian Transfer Notice to Third-Country Nationals who have not claimed asylum there:

**Subject: Information about result of procedure according Council Regulation (EC) No. 343/2003**

*We would like to inform you about result of procedure of determining the Member State responsible for examining your asylum application according to Council Regulation (EC) No. 343/2003. On 24.8.2012 we received positive answer from Romania, because of this Romania is the Member State responsible for examining your asylum application.*



**Good Practice:** In the Netherlands and Switzerland, the applicant and/or his/her legal representative receives a copy of his/her own files and other relevant documentation including a copy of the transfer request sent to the other Member State with the Dublin transfer decision notice.



**Bad Practice:** In Germany, general practice shows that the police often only deliver the transfer decision notice on the day of the unannounced removal to another Member State. The asylum seeker is given no prior notification of the transfer. It is common for the legal representative of the asylum seeker only to receive a copy of the decision notice by post the day after removal of his/her client.



**Bad Practice:** Certain Prefectures in France require that the applicant brings their own interpreter to the appointment for delivering the Dublin transfer decision notice to translate the decision. This practice has been condemned by the Conseil d'Etat (Case No 356458, 13 February 2012).



**French Case Study:** *In Caen, an asylum seeker refused to sign a Dublin transfer decision notice, on the basis that he had not understood the decision due to lack of information and the absence of an official interpreter. However, the Prefecture declared that even if he refused to sign the notice, the information obligation was fulfilled because 'his wife had translated the important information orally'.*

## Jurisprudence

### Delivery of a transfer decision

In a case concerning an age disputed unaccompanied child the German Federal office failed to issue a transfer decision though plans were made for the child's removal to another Member State. The Wiesbaden Administrative Court held that Art. 19(2) of the Dublin Regulation required the Federal Office to issue a transfer decision with specific time limits for removal as well as any information on where the asylum seeker should present himself/herself for transfer if he/she is travelling to the responsible Member State by himself/herself. The delivery practice of the Federal Office was held to prevent the possibility of voluntary return and moreover any possibility of accessing a legal remedy. (Wiesbaden Administrative Court, 5L 147/11 W.I.A, 19 April 2011).<sup>143</sup>

<sup>143</sup> This case is available at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18795.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18795.pdf)

## 6.5. Appeals (Art. 19(2) and 20(1)(e))

Pursuant to Art. 19(2) and Art. 20(1)(e) a Dublin transfer decision may be subject to an appeal or review. However such an appeal or review shall not suspend the implementation of the transfer unless the Courts or competent bodies so decide, on a case-by-case basis whether national legislation allows for this. In order to strengthen legal safeguards for asylum seekers the Dublin recast compromise text provides an explicit provision on remedies which contains a variety of grounds for suspensive effect of appeal, depending on national practice as well as certain obligations in relation to legal assistance for such appeals (recast Art. 27).

**Table 1: Appeals under the Dublin Regulation per Member State**

DUBLIN REGULATION APPEALS							
Member State	Timeframe For submitting an Appeal	Automatic Suspensive Effect	Possibility to request Suspensive Effect	Court ex-officio decides on Suspensive Effect	Specialized Asylum Court <sup>1</sup>	Access to a Higher Court of Appeal	Other Review Mechanisms Available
<b>Austria</b>	7 days	No	Yes	Yes	Yes	Yes	No
<b>Bulgaria</b>	7 days	No	Yes	No	No	No	No
<b>France</b>	2 months	No	No <sup>2</sup>		No <sup>3</sup>	Yes <sup>4</sup>	Yes
<b>Germany</b>	2 weeks	No	Yes <sup>5</sup>	No	No	Yes <sup>6</sup>	No
<b>Greece</b>	15 days	Yes	n/a		No	Yes	No
<b>Hungary</b>	3 days	No	Yes		No		No
<b>Italy</b>	60 days	No	Yes		No	Yes	Yes
<b>Slovakia</b>	20 days <sup>7</sup>	No	Yes		No	Yes	No
<b>Spain</b>	2 months	No	Yes		No		No
<b>Switzerland</b>	5 working days	No	Yes	No	Yes	No	No
<b>The Netherlands</b>	1 week <sup>8</sup>	No	Yes		Yes <sup>9</sup>	Yes	No

1 This section of the Table examines whether the Court examining the application of the Dublin Regulation at the national level is a specialized asylum Court or general administrative Court.

2 In general asylum seekers in the Dublin procedure in France file an appeal for interim measures at the Administrative Court (recours en référé). Although these national interim measures have no power of suspension and are therefore seen as ineffective in the framework of the European Convention on Human Rights, these appeals for interim measures benefit from a very short deadline for examination.

3 Even though France has a specialized Asylum Court for asylum appeals, this Court does not examine appeals under the Dublin Regulation, which are under the remit of Regional Administrative Court

4 The decisions of Regional Administrative Courts can be appealed to the Conseil d'Etat.

5 According to § 34a of the German Asylum Procedure Act there is no formal possibility to request suspensive effect in Germany but in practice, in most cases but not always, the Court may grant suspensive effect. It depends upon the Court in Germany.

6 If the request for suspensive effect is rejected an appeal can be made to the Constitutional Court in Germany and under certain circumstances requests can also be made to the higher Administrative Court if the decision on the merits is negative.

7 This appeal right applies only to those who have lodged an asylum application in Slovakia and are subject to the Dublin Regulation. Third country nationals not applying for asylum in Slovakia receive only a written transfer notice on their Dublin transfer and not a decision and thus have no possibility to appeal.

8 If the Dublin procedure occurs within the extended asylum procedure in the Netherlands then the timeframe for submitting an appeal is 4 weeks. Whether the Dublin procedure is dealt with in the framework of an extended asylum procedure depends on the length of time before a Dublin request is accepted by the responsible Member State. Further information is available in the national report for the Netherlands.

9 In the Netherlands a specialized department of the Court deals with asylum and immigration appeals.

As illustrated in the table above all Member States provide some form of an appeal to a transfer decision under the Dublin Regulation in their national practice. In the majority of Member States appeals are submitted to general administrative Courts or Tribunals as opposed to specialized asylum Courts. Depending on the competence of the Court, appeals may be submitted on the basis of human rights grounds or in relation to procedural issues for example, an incorrect application of the hierarchy of criteria. However, as illustrated in the table above, there is divergent practice as

to the effectiveness of these legal remedies with regard to timeframes and the possibility for the appeal to have suspensive effect.

### 6.5.1. Suspensive effect of appeals

Suspensive effect is only available automatically upon appeal in **Greece**. In **Bulgaria, Germany, Hungary, Italy, Slovakia, Spain, Switzerland** and **the Netherlands** the asylum seeker concerned is required to request suspensive effect from the responsible Court. In **Austria** the Court may *ex officio* rule on suspensive effect of the appeal.

In **France** there are two different types of interim measures available to stop a Dublin transfer prior to a pending appeal: a request for interim measures to prevent a violation of human rights (Le référé liberté) and a request for interim measures to suspend an administrative decision (Le référé suspension). Le référé liberté must be examined within 48 hours by a judge in order to prevent a violation of an applicant's fundamental rights whilst le référé suspension must only be reviewed within approximately 15 days. The judges' powers under le référé suspension are more restricted. Legal representatives more frequently request interim measures under le référé liberté.

According to German law Art. 34a (2) Asylum Procedure Act (Asylverfahrensgesetz) stipulates that removal orders pursuant to the Dublin Regulation must not be suspended on the basis of an interim relief application by the Court. Therefore, appeals on Dublin transfers cannot have suspensive effect by law in **Germany**. Art. 34a(2) of the Asylum Procedure Act is based on the 'safe third country' appeals system and its compatibility with the German Constitution has been examined by the Constitutional Court. The Constitutional Court found that the exclusion of interim relief for removals to safe third countries is compatible with the Constitution as long as a limited number of five exceptions were taken into consideration. These exceptions include grounds such as the third country is itself the persecuting State in the concrete case and /or the asylum seeker may not be able to access an asylum procedure there and is at risk of chain *refoulement*. Since April 2008 a number of German courts of lower instance have ruled that the five exceptional grounds should be extended to a sixth ground which would capture the situation of transfers to **Greece** and that interim relief should be granted in such Dublin cases. In September 2009 the case law of these lower Courts were confirmed by the Constitutional Court as it suspended the removal of an Iraqi asylum seeker to **Greece**.<sup>144</sup> Despite this, Art. 34a (2) Asylum Procedure Act is still in the German legislation and has not been abolished.

In **the Netherlands** although a Dublin applicant may generally await a decision on a request for an interim measure, as long as the Court has not ruled on this request, the IND can still transfer the person concerned if the transfer time-limit of six months is jeopardized.<sup>145</sup> Only the timely issuance of a provisional measure on suspensive effect of appeal can prevent this. It may happen – though in practice this is rare – that the asylum seeker has to approach the Court a second time and request that it decides on the requested provisional measure before the date of the planned transfer ('spoedvovo'), to prevent removal in advance of the Court decision on the suspensive effect of appeal.

The majority of asylum seekers are transferred before the appeal is decided upon in their individual case in **Austria** and **France**. Similarly, the fact that a request for suspensive effect has been submitted does not necessarily prevent the transfer being undertaken prior to a Court examination of this request in **Hungary** and **Germany**. The submission of a request for suspensive effect is not in itself suspensive. Therefore, in **Germany** legal representatives commonly request the Courts to instruct the BAMF not to transfer the person before the Court has ruled on the request for suspensive effect.

<sup>144</sup> There have been at least 12 such interim measures by the Constitutional Court. However, although an oral hearing has taken place in these cases, so far the Constitutional Court in Germany has yet to rule on whether it confirms the view of incorporating a sixth group next to the five exceptional cases.

<sup>145</sup> Aliens Circular C22/5.3.



### 6.5.2. The competence of the Court

The competence of Courts is regulated by national law. The majority of Courts examining Dublin appeals have the power to examine both facts and points of law, including for example in **Hungary** and **the Netherlands**. The decisions of national Courts also led to different actions depending on their respective competences in the Member State concerned. Successful Dublin appeals in **Austria, Bulgaria** and **Slovakia** result in the asylum seeker's claim being re-submitted to the initial administrative authorities for a new examination of the applicability of the Dublin Regulation. In **Hungary** and **Switzerland** the Courts have the power to either issue a new decision or to require the initial administrative authorities to re-examine the applicability of the Dublin Regulation. As an example, in **Switzerland** the case may be remitted back to the FOM either to conduct further investigations or with specific instructions to apply a specific provision in the Dublin Regulation such as the sovereignty clause.

The Dutch Courts considering Dublin appeals also take into consideration facts and circumstances that are raised after the contested IND decision (*ex nunc* assessment), as well as policy changes that entered into force after the IND decision.<sup>146</sup>

The Bulgarian administrative law case law severely impacts the scope of appeal as, thus far, jurisprudence has ruled that the Court cannot order the initial administrative authorities to apply the sovereignty clause. This is based on the distinction between binding and discretionary provisions whereby according to Bulgarian administrative law, the Court only has competence to rule on binding provisions of legislation. Therefore the application of discretionary provisions such as the humanitarian clause is only within the competence of the initial administrative authorities and is not subject to judicial review. However, this jurisprudential approach is questionable in light of the administrative authorities' obligation to exercise discretion within the framework of binding human rights obligations such as the ECHR and the Charter of Fundamental Rights.

### 6.5.3. Access to a Higher Court of Appeal

When an initial appeal is refused there is the possibility to submit a further onward appeal to a higher Court depending on national law in **Austria, Germany, Greece, Italy, Slovakia** and **the Netherlands**. Often, at this higher level, the competency of the Court is limited to points of law. This right to appeal to a higher Court in **Austria** must be on the basis of a potential violation of a constitutionally guaranteed right. The Austrian Constitutional Court will not examine any new facts or circumstances submitted before it but will only focus on information provided to the lower Court.

In **the Netherlands** a further appeal against the Regional Court's ruling is possible with the Council of State. When an appeal at the regional Court level is granted on behalf of the asylum seeker, the Dutch Minister also has the possibility to appeal to the Council of State. Automatic suspensive effect is not available upon appeal to the Council of State. A provisional measure from the president of the Council of State may be necessary to prevent transfer in advance of the Court hearing. During a further appeal by either the IND or the applicant, the Dutch Council of State determines whether the regional court made a correct assessment during the first appeal procedure, while examining both facts and law that existed during that decision (*ex tunc* assessment). If it rules that the regional court made a wrong assessment, it examines the appeal grounds that were raised in the first appeal procedure and rules whether the appeal was (un)founded in the same way as a regional court. The Council of State can rule that government policy is in violation of the law.<sup>147</sup>

<sup>146</sup> Article 83(1) Dutch Aliens Act.

<sup>147</sup> If the government fails to change its policy, or decides not to adhere to the ruling and continues to issue new decisions based on old policy rules, these will be reversed during the appeal procedure with the Regional Court, or the further appeal procedure with the Council of State.

### 6.5.4. Practical obstacles to accessing an effective remedy

Apart from non-suspensive effect of appeal there may also be other obstacles to accessing the Court in advance of a Dublin transfer. In **France** sometimes the notification of a Dublin transfer order and placement in detention occur at the same time. This can then be problematic in terms of access to legal aid and consulting a lawyer for submitting appeals. The fact that the person is in detention can have particular consequences for those asylum seekers who are unrepresented. Even when such persons do meet a lawyer, there is often insufficient time to draft and submit an appeal. Occasionally, NGO staff are obliged to write interim appeals themselves if present in the detention centre. The issue of detention hindering access to a Court appeal was also reported in **Switzerland**. In **Germany**, the fact that most transfer decisions are delivered on the same day as the actual transfer renders it impossible in the majority of cases for asylum seekers to submit an appeal. Usually lawyers only receive the transfer decision after their client has been removed from **Germany**. In response to this practice by the German authorities, legal representatives have started going to Courts prior to a Dublin transfer order being issued to try to access an effective legal remedy. In such cases the Administrative Courts are effectively unable to stop the transfer as the transfer order has not been issued at that time and therefore there is no appealable decision. German courts have stated that the BAMF's practice of issuing Dublin transfer decisions on the day of removal impedes asylum seekers right to appeal and in response have ordered the German authorities to serve Dublin transfer decisions a certain amount of time in advance of removal. The Court's interpretation of ordering the notification of a transfer decision a reasonable amount of time prior to removal is varied. For example, the Meiningen Administrative Court ordered the issuing of a Dublin transfer decision at least two weeks before planned removal, whilst the Hannover Administrative Court obliged the German authorities to not transfer the asylum seeker for at least three working days in advance of issuing the Dublin transfer decision.<sup>148</sup>

The fact that the person within the Dublin procedure has not claimed asylum in the requesting Member State may also impact their right to access an effective legal remedy. NGOs in **Slovakia** have recently monitored cases where persons subject to a Dublin procedure who have not claimed asylum there have been deprived of the right to appeal Dublin transfers. In such situations, the persons concerned have only received written notification of their Dublin transfer and not a transfer decision with the resultant possibility to appeal. The Slovak Dublin unit informed the national experts there that they have a deciding competency only in relation to asylum seekers and not in relation to irregular migrants subject to the Dublin procedure. However, it was specifically the Dublin unit who conducted the whole Dublin procedure and issued the individuals concerned with the notification of their transfer to another Member State.

### 6.5.5. Other review mechanisms

Art 19(2) and Art. 20(1)e) also give Member States the power to conduct a review of the transfer decision. Only in **France** and **Italy** is there any opportunity provided for another form of review. An asylum seeker in **France**, upon receipt of an inadmissibility decision subject to the Dublin Regulation, can submit a written review request to the competent Prefecture on the basis of the use of the discretionary provisions or on other procedural grounds. An alternative recourse to review is available in **Italy** whereby the asylum seeker can lodge an appeal to the President of the Republic within 120 days of notification of the transfer decision. Though not a formal review mechanism In **Germany**, an applicant may submit a petition to the *Bundestag* (Federal Parliament) or to the Parliament of one of the responsible Federal States.<sup>149</sup> On this basis the Committee on Petitions, consisting of members of the German Parliament, may recommend the Federal Government to change its decision. As an example, in 2011, the German Bundestag unanimously recommended the Federal Ministry of the Interior not to implement the removal of a Chechen family to Poland and to invoke the sovereignty clause.

<sup>148</sup> Meiningen Administrative Court, 8 E 20032/11 Me. 14 March 2011 and Hannover Administrative Court 1 B1818/11.

<sup>149</sup> This is in accordance with the basic right of petition under Art. 17 of the Basic Law in Germany.

### 6.5.6. Legal Aid

There are no provisions on legal aid in the current Dublin Regulation.<sup>150</sup> The Dublin recast compromise text under Article 27 obliges Member State to ensure that legal assistance is granted subject to a means and merits test on the basis that there is a ‘tangible prospect of success’ upon appeal. If a decision is made not to grant free legal assistance and representation by an authority which is not a Court or Tribunal then Member States are required to provide the right to an effective remedy before a Court or Tribunal against this decision.

State appointed legal representatives are assigned to asylum seekers in **Austria** upon notification of a transfer decision (ARGE Rechtsberatung or Verein Menschenrechte Osterreich). Asylum seekers may also receive legal assistance from other NGO’s or lawyers outside these organizations. Similarly, in **France** and **Hungary** asylum seekers may benefit from legal assistance by way of a free legal aid scheme subject to a means test based on their financial income. Formally, asylum seekers in **France** are required to request legal aid from the Legal Aid Bureau at the relevant administrative court. Certain lawyers will often refuse to take cases unless there are solid grounds for appeal.<sup>151</sup> In **Hungary** the effectiveness of the legal aid scheme is limited as it does not cover interpretation and translation costs and the fee offered for lawyers working under the scheme is extremely low which in turn affects the quality of legal representation available. Alternative funding is indispensable as is the work by NGOs such as the Hungarian Helsinki Committee for asylum seekers in the Dublin procedure, albeit with problems of capacity and resources. NGOs play a central role in accessing legal assistance in **Italy** and **Slovakia** also. Only lawyers registered on a specific list are able to provide free legal aid In **Italy**. Although this list is public asylum seekers need the assistance of NGOS to help them find a lawyer.

Access to free legal assistance is not guaranteed by law in **Bulgaria**. The State Agency for Refugees does not provide legal aid and it is up to the asylum seeker themselves to find a lawyer during the Dublin procedure. There are NGOs that provide legal aid.<sup>152</sup> Once the case reaches the Bulgarian court, the asylum seeker may ask to be appointed a lawyer free of charge for the court hearing. The judge decides on that request, taking into account the complexity of the case.

In **Germany**, formal access to legal representation is provided for in the Legal Advice Aid Act (*Beratungshilfegesetz*). Despite this, in reality there is limited access to legal representation due to the practice of regional Courts. Such Courts may reject requests on the grounds that what is being challenged is factual issues and not legal questions and therefore these would not require a lawyer. In addition, the financial amount of €84 net, which is paid to lawyers for the provision of legal representation is so low that the majority of lawyers reject such mandates or invest only limited time into the provision of legal representation/advice. In reality, **Germany** lacks any effective state paid legal representation, which is compensated only to a minor extent by access to counselling centres of charities/welfare organizations and other NGOs. However, these organisations also have extremely limited capacities and resources to provide legal aid. Ultimately, in **Germany**, a person in need of legal assistance from a lawyer is required to pay for it privately with his or her own means. As regards legal representation before the Court, the basic principle is that the German authorities have to pay for the costs of the lawyer in case the asylum seeker succeeds before Court. In case the appeal is refused the asylum seeker themselves has to pay for the costs of the lawyer.<sup>153</sup> The only exception to this is with respect to legal aid for unaccompanied children wherein a lawyer

<sup>150</sup> For further information on the availability of legal aid for asylum seekers in the Dublin procedure or other related asylum procedures see ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe, October 2010 accessible at: <http://www.ecre.org/component/content/article/57-policy-papers/247-ecreelena-survey-on-legal-aid-for-asylum-seekers-in-europe.html>

<sup>151</sup> The Law of 1972 establishes the legal aid regime in France. It replaced the previously existing judicial assistance system. The most vulnerable persons have the right to have their legal expenses paid for by the State. Applicants must fill in a form, accompanied with the relevant supporting documentation and address it to the competent legal aid bureau of the relevant Court. The payments to lawyers who accept legal aid cases are very low when compared with regular legal representatives fees. The State covers all expenses for low-income individuals. Since the introduction of a new law of 11 July 1991, legal aid also applies to non-judicial administrative procedures.

<sup>152</sup> The major source of financing for these legal aid services in Bulgaria is the European Refugee Fund operated by the State Agency for Refugees (SAR) at national level.

<sup>153</sup> In practice this means that if the asylum seeker remains in Germany and are not employed they must pay this cost over time. If they have financial means they are required to pay the cost.

(*Ergänzungspfleger*) is paid by the national authorities to represent the minor during the asylum procedure.

An instrument for legal representation was developed in **Germany**, entitled ‘assistance for procedural costs’ (*Prozesskostenhilfe*), which aims at safeguarding the payment of lawyers’ costs for cases which were not successful in the end but did have some good prospects of success during an initial merits test. There have only been a few cases in practice in which assistance for procedural costs has been granted in Dublin appeals. A majority of Courts refuse any requests for receiving assistance for procedural costs by arguing that if an appeal is rejected, the whole case could not have had good prospects for success in the beginning.

Free legal assistance and representation is only granted in the appeal procedure in **Switzerland** in retrospect, and in most cases only if the appeal is successful. This means that the asylum seeker must either advance the costs of a lawyer or rely upon the services of legal advisory offices run by NGOs. Access to free legal aid can be difficult if the applicant is in detention. In this regard it is also problematic that decisions can be notified to the asylum seekers directly even if they have a legal representative. If the appeal is rejected, free legal representation is only granted if it is considered necessary for safeguarding the asylum seekers rights (i.e. a merits test finds that the appeal is not futile). From a review of national practice it is evident that free legal representation is only rarely granted in **Switzerland**.



**Good Practice:** In the Netherlands, asylum seekers’ access free legal aid from the day before the commencement of the asylum application and / or the Dublin procedure.

## 6.6. Access to the Asylum Procedure

One of the main objectives for the Dublin Regulation as outlined in recital 4 is aiming to ‘*make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications*’ (own emphasis added). Pursuant to Art. 16(1)b) the responsible Member State under the Dublin Regulation is obliged to complete the examination of the applicant’s asylum claim. This is in accordance with Recital 15, which stipulates that the Regulation ‘*seeks to ensure full observance of the right to asylum guaranteed by Article 18 Charter of Fundamental Rights.*’ The Dublin recast compromise text under recast Art. 18 strengthens the principle of effective access to an asylum procedure by clarifying the obligation of the Member State responsible to proceed to a full assessment of the protection needs of asylum seekers transferred to it under the Dublin procedure.

Access to the asylum procedure upon a Dublin transfer to the responsible Member State is contingent on whether there was a previous asylum application submitted (i.e. a take back request) or not (i.e. a take charge request on other criteria) in that Member State and if so at what stage of examination the previous asylum claim has reached prior to onward travel to the transferring Member State. Therefore this part of the report is divided into a number of different subsections depending on the various scenarios for asylum seekers transferred under the Dublin procedure.

As regards NGO support and assistance in accessing an asylum procedure subsequent to a transfer to the responsible Member State there is divergent practice both within regions of Member States and across them. For example in **Italy**, depending on capacity and resources, there are NGO services available with interpreters at the main airports for Dublin returnees for example in the transit area of the Rome-Fiumicino airport. However the situation at the sea borders is quite different. In **Italy**, at seaports of arrivals, NGOs have no access to the marine vessels unless expressly authorized

by the Italian Police authorities and therefore they are not always able to assist those who may be in need of international protection. In addition, in **Italy** the transferred asylum seeker is required to go to the office of the Questura competent for his/her asylum claim to continue with his/her asylum procedure. The relevant Questura is based on where he/she may have previously been fingerprinted or photographed, where his/her files are kept or where he/she may have submitted a previous asylum application. Italian legislation does not foresee any support to actually travel to the responsible Questura. Therefore, in practice, NGOs sometimes provide travel tickets to help asylum seekers travel there on the basis of a formal agreement with the local Prefecture. Often, NGO staff receive no further information on whether the asylum seekers reached their destination and were able to find accommodation there.

### **6.6.1. Access to the asylum procedure in a take back situation**

Access to the asylum procedure in a take back situation depends on what stage the asylum seeker's previous asylum application was at in the responsible Member State. If the asylum application is still pending upon return, he/she shall receive a decision on its substance in **Bulgaria**. Similarly, in **Greece**, if the asylum application is still pending, asylum seekers receive a pink card and are requested to report to the Aliens Police Division to continue the examination of their claim.

The asylum procedure in **Bulgaria** is discontinued upon return if the previous asylum application has been refused or if the applicant has been absent for over 3 months and 10 days. Upon transfer in such a scenario, the person concerned will be treated as an irregular migrant and required to return to their country of origin. In **Greece** if the asylum seeker has received a first instance rejection and they have not appealed, then the asylum procedure has finished. Subsequently they are detained and the deportation process to the country of origin is initiated.

In **Italy**, if the asylum seeker has previously applied for asylum there, three scenarios may arise: 1) the applicant was granted protection in his/her previous asylum procedure but was not notified of this outcome; if the permit of stay is still valid then a residence permit will be issued to the person concerned; if the permit of stay is no longer valid then a procedure can be started to renew it. The applicant will be entitled to the same benefits as other beneficiaries of international protection; 2) If the applicant received a refusal on his/her first asylum application and was notified of this before leaving **Italy** and did not appeal against it, the asylum seeker will be notified of an expulsion order and possibly sent to a detention centre (CIE: Centre for Identification and Expulsion). If the person was only informed of the first instance refusal upon return, then he/she has the possibility to lodge an appeal within 15-30 days. If the person concerned decides not to submit an appeal, then he/she is required to leave **Italy** within 15 days at the latest. 3) If the applicant's asylum procedure in **Italy** is still pending, the Italian authorities will continue to examine his/her claim.

Good practice is reported in **Slovakia** in that once a Dublin transfer is confirmed in a take back situation the Slovak Dublin Unit informs the police department at the border check point or at the international airport and automatically admits the person transferred to the asylum procedure. In practice, this means that the police do not wait until the person requests asylum. Irrespective of that, the formal lodging and registration of the asylum application as such is still required. However, if it is a situation where the third country national's asylum application has been previously rejected as inadmissible or manifestly unfounded or in a case when the applicant was previously refused asylum in the previous asylum procedure in **Slovakia**, such a third country national is not deemed as an applicant upon return. He/She still has a right to submit a new asylum application but the asylum procedure does not start automatically upon return.

In the recent past access to the asylum procedure upon return to **Hungary** under the Dublin Regulation was particularly problematic. Asylum seekers returned under a take back procedure were not automatically treated as asylum seekers by the Hungarian authorities, despite the fact that

they previously applied for asylum there.<sup>154</sup> However, during the time of writing of this report, the Hungarian government changed their policy in with respect to the assessment of Dublin returnees' claims according to a press statement issued by the OIN in October 2012. The OIN stated "As of 15 July 2012 within the framework of existing national legislation Hungarian authorities examine each asylum application submitted by persons transferred under the Dublin procedure in merit."<sup>155</sup> Despite the fact that it is very early to give a valid general assessment of how the situation has changed in **Hungary** for such persons as a result of the amendments to Hungarian law and policy, the change of practice has been warmly welcomed by civil society and UNHCR.<sup>156</sup>



**Hungarian Case Study:** *An Iranian asylum seeker first entered the EU through Greece. He moved on to Austria where authorities wanted to send him back to Greece, so he continued his journey to Sweden. From there he was transferred back to Greece. He then travelled to Hungary through Serbia. Hungary asked Sweden and Austria to accept the responsibility for his case under the Dublin Regulation, but both countries refused. Hungary therefore took responsibility for his claim. His asylum application was rejected in the admissibility procedure on safe third country grounds, since he arrived via Serbia. His appeal was unsuccessful and the asylum seeker was transferred to Serbia. This is a particularly concerning example of the previous practice by the Hungarian authorities. Despite the fact that this applicant was present in four EU Member States, his asylum application was never examined on the merits by any of these EU Member States by virtue of the Dublin Regulation and the designation by the Hungarian authorities of Serbia as a safe third country.*<sup>157</sup>

## Jurisprudence

### Access to an asylum procedure and reception conditions subsequent to a Dublin transfer

Mr & Mrs D and their three children were subject to a Dublin transfer decision under take back conditions to France. Upon arrival at Roissy airport, Mrs D was taken in for questioning by administrative authorities and actions were taken to remove her from France. The family were also denied access to reception conditions in France. The Strasbourg Administrative Court held the actions of the administrative authorities to be unlawful and accepted Mrs. D's appeal. The Court noted the precarious situation of the family stating that such a situation infringes not only the fundamental rights of asylum seekers but also the rights of the child. The Prefect of Moselle was ordered within 24 hours to provide access to the asylum procedure and reception conditions for the whole family (Strasbourg Administrative Tribunal, France No. 100301, 25 January 2010).

<sup>154</sup> Such persons were obliged to re-apply for asylum once they have been returned to Hungary. These applications were considered to be subsequent applications, which means the persons concerned were required to show new elements in support of their claims which they could not have raised in their initial applications. Subsequent applications do not have automatic suspensive effect on expulsion or removal measures, if the OIN or Court in its previous examination of the applicant's claim, appeal or expulsion procedure decided that the prohibition on *refoulement* was not applicable. In most cases, upon return to Hungary, the issuance of an expulsion order was automatically followed by placement in administrative detention. As a result, asylum seekers transferred there under the Dublin Regulation were generally not protected against expulsion to third countries, even if the merits of their asylum claims have not yet been examined. See also UNHCR *Hungary as a country of asylum*, Observations on the situation of asylum-seekers and refugees in Hungary, April 2012, §20, accessible at: <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html> and Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, accessible at: <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

<sup>155</sup> For further information see: <http://www.kormany.hu/en/ministry-of-interior/news/the-ministry-of-interior-s-response-to-unhcr-s-note-on-asylum-seekers>

<sup>156</sup> The Hungarian Helsinki Committee has noted that the number of immigration detainees in general has decreased since November 2012 and the asylum authorities have stopped automatically considering Serbia as a safe third country. The asylum authorities are also no longer rejecting applications as inadmissible from asylum seekers who previously transited Serbia. See also UNHCR's updated note on Dublin transfers to Hungary of people who have transited through Serbia December 2012, accessible at: <http://www.unhcr.org/refworld/pdfid/50d1d13e2.pdf>

<sup>157</sup> It is important to note that all these events took place over three years. Over that time period no Member State substantively examined the applicant's claim for international protection effectively leaving him in limbo.

### 6.6.1.1. Subsequent asylum applications

The term ‘subsequent’ refers to an application submitted once a previous asylum procedure has been closed with a final decision or has been discontinued and/or closed.<sup>158</sup> If the applicant’s previous asylum application in the responsible Member State is finished he/she may be given the opportunity to submit a subsequent application for asylum. The Dublin recast compromise text under Art. 18 has clarified that when the responsible Member State has discontinued the examination of an application following its withdrawal by the applicant before a decision on substance in the first instance has been taken, it shall ensure that the applicant is entitled to request that the examination of his/her claim is completed or to lodge a new application for international protection. Such a new application shall not, however, be treated as a subsequent application under the Asylum Procedures Directive with its inherent conditions.

Any Dublin transfer in a take back scenario in **the Netherlands** is treated as a subsequent application for asylum, even if the person was not interviewed during the first asylum procedure there. Also, if an applicant is returned to **the Netherlands** after their first asylum application was formally rejected then he/she must lodge a subsequent asylum application and runs a higher risk of being detained than other asylum seekers.<sup>159</sup> The fact that it is a subsequent application has repercussions both for the asylum procedure itself and the reception conditions available to the asylum seeker. There is no formal rest and preparation period or accommodation available for the person concerned as he/she awaits a formal appointment for submitting a new application. This can take up to a few weeks and no attention is paid to the fact that the asylum seeker may be destitute and homeless during this period. In general subsequent applications for asylum are frequently rejected by the Dutch authorities if the first request had already been rejected due to lack of new facts and circumstances.

The requirement for news facts and circumstances for subsequent applications pursuant to a Dublin transfer is also shown in the national practice in **Greece, Hungary, Bulgaria, Italy and France.**

### 6.6.2. Access to the asylum procedure in a take charge situation

Normal procedural rules for accessing the asylum procedure apply in **Bulgaria, France, Italy, Greece and the Netherlands** when the Dublin transfer is on the basis of a take charge request. A ‘take charge’ case means that the asylum seeker has not applied for asylum before in the responsible Member State. Like all asylum applicants such persons face the same difficulties that all asylum seekers face in accessing the asylum procedure in **Greece.**

Access to the asylum procedure in **Bulgaria** is quite arbitrary and unpredictable in both take back and take charge situations, as in practice there is a gap in time between the submission and formal registration of an asylum procedure there. Even if a person has submitted the asylum application, he/she is not regarded as an asylum seeker until he/she is registered as such by the State Agency for Refugees. If there is a removal order against him/her, it can be executed in the meantime.

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<sup>158</sup> A previous discontinued asylum application refers to a case which is closed without a decision on the merits of the claim for example because the person absconded or was considered to have implicitly withdrawn in an early phase of the procedure.

<sup>159</sup> Detention is often used in such a situation as the authorities presume that the applicant is not willing to return to his country of origin and is therefore considered likely to abscond.

### National Fact:

**Slovakia** has an explicit provision in its Asylum Act with respect to applicants transferred there in accordance with the Dublin Regulation. Section 4(6) Asylum Act states “A foreigner who is not an applicant and who is returned to the territory of the Slovak Republic from another Member State of the European Union due to the fact that the Slovak Republic is competent to act in the asylum granting procedure shall be considered an applicant; except for a foreigner whose application for asylum had been rejected in the past as inadmissible or manifestly unfounded or who have not been granted asylum, the asylum granting procedure shall commence once the foreigner enters the territory of the Slovak Republic” (unofficial translation).

### 6.6.3. Access to the asylum procedure in a Member State which took over responsibility for an asylum application and repeat Dublin Regulation cases

Sometimes, the requesting Member State may become ultimately responsible for the asylum application for a number of reasons including the expiry of time limits under the Dublin Regulation or on human rights grounds. Therefore, given that the persons concerned have requested asylum and will not be transferred to another Member State, they should be granted access to the asylum procedure in the Member State where they are present. In **France**, in such scenarios these applicants may not be able to access the normal asylum procedure. This is dependent on where they are located in **France**. For example, in Rouen and Paris, practice has shown that such asylum seekers are systematically placed in an accelerated asylum procedure and are not provided with a temporary permit for the examination of an asylum application. This practice continues to occur despite the fact that the Courts have made several rulings against this inappropriate placement of applicants in the accelerated asylum procedure.<sup>160</sup>

Similarly, in **the Netherlands**, the asylum seeker has to submit a subsequent application despite the fact that their asylum claim was never examined by a Member State. The request is examined on its merits during the substantive asylum procedure, pursuant to the terms of a subsequent asylum application under national law.<sup>161</sup> As noted above, this means that the asylum seeker is deprived of a formal rest and preparation period and if his/her asylum request is rejected, he/she will not be entitled to four weeks of accommodation unlike other failed asylum seekers.

#### • Repeat Dublin cases

Limited information was gathered with respect to the issue of repeat Dublin cases concerning a repeated number of transfers to the responsible Member State. This occurs when asylum seekers are transferred to the responsible Member State but then return to the requesting Member State and are therefore subject to more than one Dublin procedure.

In **Austria**, if a person submits a further asylum application after an inadmissibility decision under the Dublin Regulation issued within 18 months of the first application then there is generally no suspensive effect for the subsequent application itself or any further appeal. In case the responsible Member State’s acceptance in the Dublin negotiations is still open for a number of reasons including if the first transfer was not enforced, or if the Member State agrees to take the asylum seeker back once more, the asylum seeker concerned is transferred immediately by the Austrian authorities without ever receiving a transfer decision which he/she could appeal against. In many cases such

<sup>160</sup> See for example the following French jurisprudence: Conseil d’Etat, No. 334865, 20 October 2009, CE 19 October 2010, No. 337932, confirming CE *Souleymanov* 31 December 2009, No. 334865; (Lyon Administrative Court, 1 October 2010; Suspension of a placement in fast-track procedure due to the non-execution of a Dublin readmission – Council of State, 25 October 2010, No. 342842, Mrs. Medena A., Dublin and fast-track procedure: Presentation of summons for readmission without children constituting an intentional evasion - Paris Administrative Court No. 0717755, 29 November 2010, Mrs. K. marries V. Ex-Dublin: cancellation of the placement in fast-track procedure).

<sup>161</sup> Art. 62(3) Aliens Act.



asylum seekers only receive a preliminary interview conducted by the police. Accordingly, this law, introduced in 2010, seems to drastically reduce the chance for an effective remedy and is in violation of Art. 19(2) of the Dublin Regulation.

In order to discourage repeated returns to **Switzerland** from the responsible Member State after Dublin transfers, the FOM brought in a new practice in April 2012. There will normally be no new asylum procedure if a person applies for asylum again in **Switzerland**, within six months after having been transferred to the responsible Dublin Member State. The asylum seeker will only receive an information notice stating that he/she previously requested asylum in **Switzerland** and subsequently had received an inadmissibility decision under the Dublin Regulation and was sent to the responsible Member State and must therefore leave **Switzerland**. The order to leave is based on the previous inadmissibility decision. The same canton which was responsible for the first Dublin transfer is responsible for the execution of the second removal to the responsible Member State. The cantonal authority may ask the FOM to introduce another take back request to the responsible Member State. The canton then grants the asylum seeker the right to be heard with a short interview and executes the transfer. Therefore, the FOM only starts another take back procedure with the responsible Member State upon request by the canton.

The FOM also has the power to decide whether or not the new asylum application should be treated as a request for re-examination with an according decision. This is the case if there are new relevant facts or evidence substantiating the need for a second application. This practice is still relatively recent therefore its impact is yet to be assessed. Vulnerable persons are exempted from this policy concerning repeat Dublin cases.<sup>162</sup> Therefore, vulnerable persons will receive another asylum Dublin procedure and will be accommodated in the usual reception facilities for asylum seekers.<sup>163</sup>

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Effective legal and procedural safeguards are essential for a fair and efficient asylum procedure including procedures related to the Dublin Regulation. The need for procedural safeguards derives from fundamental respect for the dignity of the individual and from the legal obligations undertaken by Member States by virtue of their accession to the 1951 Refugee Convention and its 1967 Protocol and other relevant international human rights instruments *inter alia* the Charter of Fundamental Rights and ECHR.<sup>164</sup> General principles of EU law such as the principle of effectiveness and effective judicial protection must also be respected by Member States in the operation of asylum procedures. However, this research shows that Member States are not fully respecting their international obligations in the Dublin procedure. It illustrates a Europe of varied practices, some positive, others infringing the very right to asylum guaranteed in the Charter of Fundamental Rights.

The right to information on the application of the Dublin Regulation is a central element of procedural fairness.<sup>165</sup> The possession of such information is essential for asylum seekers to fully comprehend their situation and to exercise their rights. It is positive to note that a significant number of Member States provide some form of information to asylum seekers on the Dublin Regulation. Despite this the amount and quality of the information delivered is extremely varied across the Member States surveyed. Obstacles to effective provision of information include the language employed and technical terminology used in leaflets and/or guidance notes as well as the quality of interpretation and translation of these documents. The efficacy of a leaflet is questionable when the recipient cannot fully understand its contents. In light of these findings the Commission should ensure in

<sup>162</sup> Vulnerable persons in Switzerland are deemed to include elderly or sick persons, women in advanced stage of pregnancy, single mothers with small children.

<sup>163</sup> FOM, circular letter to cantonal authorities and border guard agency, 23 March 2012.

<sup>164</sup> See Article 78(1) TFEU "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

<sup>165</sup> Fundamental Rights Agency (FRA), *The duty to inform applicants about asylum procedures: The asylum-seeker perspective, Thematic Report*, September 2010, accessible at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1052-asylum-access-info-report-092010\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1052-asylum-access-info-report-092010_en.pdf)

drawing up the common information leaflet envisaged under the Dublin recast compromise text that simple and accessible language is used.<sup>166</sup> It is also recommended that upon completion of the common leaflet a test phase is conducted with a sample group of asylum seekers for the purposes of cross-checking whether the information provided within the leaflet is understandable or not.

Another important procedural right is the granting of access to personal case files in line with Art. 41 Charter of Fundamental Rights. It is positive to note that a number of Member States already have such a procedure in place. Furthermore, asylum seekers should be kept informed of the progress of their Dublin case for example whether additional evidence is required to establish family links. The provision of a personal interview will also assist asylum seekers understanding of the Dublin Regulation and its effects. The explicit requirement to conduct a personal interview under the Dublin recast compromise text is likely to contribute to a much more effective application of the Dublin Regulation and is in the interests of Member States and asylum seekers alike. Therefore upon implementation, it is crucial that such interviews take place in a manner in which every opportunity is provided for asylum seekers to raise their reasons for wanting to have their claim examined in a particular Member State and/ or other relevant information as to identify the responsible Member State as part of the duty to consult and reflecting the right to be heard.<sup>167</sup> Omissions to a personal interview in the Dublin procedure should be applied narrowly given their crucial role in identifying the Member State responsible. The requirement under recast Art. 5(3) that Member States conduct the interview in a timely manner is welcomed as this research shows that in some Member States for example Germany a personal interview may only be held months after lodging an asylum application.

Asylum seekers are notified of a Dublin transfer mainly by written decision. The provision and quality of interpretation (if an asylum seeker is also notified orally) and/or translation are key factors in determining whether asylum seekers fully understand the consequences of such a decision and are able to access an effective legal remedy where necessary. Transfer decisions should include all the reasons upon which they are based and must be communicated to the person concerned in a reasonable period of time prior to removal.<sup>168</sup> Practice shows that not all persons subject to transfer are properly informed of a transfer decision in violation of Art. 19(1-2) and Art. 20(1)(e) of the Dublin Regulation. The fact that in Slovakia some persons subject to transfers are not issued an appealable decision is in violation of the right to an effective remedy under Art. 13 ECHR and Art. 47 Charter of Fundamental Rights.

The findings in this research demonstrate varied practices on the right to appeal a Dublin transfer decision in a manner of ways *inter alia* whether the appeal has suspensive effect, availability of legal aid, the competence of the Court and practical obstacles and administrative constraints to accessing a legal remedy. Recast Art. 27 has the potential to significantly improve access to an effective legal remedy in reflecting the jurisprudence of the European Court of Human Rights and CJEU. It is clear that the minimum content of the right to an effective remedy must satisfy the principle of effectiveness according to which the realization of rights conferred by EU law may not be rendered practically impossible or excessively difficult.<sup>169</sup> As outlined in the case of *M.S.S. v Belgium and Greece* “the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to

<sup>166</sup> Dublin recast compromise text Art 4(3) “The Commission shall, by means of implementing acts, draw up a common leaflet, as well as a specific leaflet for unaccompanied minors, containing at least the information referred to in paragraph 1. This common leaflet shall also include information regarding the application of Regulation (EC) No 2725/2000 and, in particular, the purpose for which the data of an applicant may be processed within Eurodac. The common leaflet shall be established in such a manner as to enable Member States to complete it with additional Member State-specific information. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).”

<sup>167</sup> See CJEU ruling in C-277/11 para. 85 and 87 in relation to the right to be heard.

<sup>168</sup> Recast Art. 27(2) states that “Member States shall provide for a reasonable period of time within which the person concerned may exercise his/her right to an effective remedy”. However, time prior to transfer may also be required for other reasons such as ensuring adequate health care needs are met during travel and in the responsible Member State and arranging practical details with family in the responsible Member State.

<sup>169</sup> See Opinion of Advocate General Trstenjak in the case of C-411/10, 22 September 2011, para 161.

*a remedy with automatic suspensive effect.*<sup>170</sup> A legal remedy must be effective and not illusory. Therefore it is critical that there are no practical obstacles preventing access to the Courts for challenging appeals on the Dublin Regulation.

One of the main objectives of the Dublin Regulation outlined in recital 4 is guaranteeing effective access to an asylum procedure but this study shows that the current operation of the Dublin system does not effectively guarantee such access. The failure to have a single Member State effectively examine an asylum claim is one of the most renowned problems with the Dublin system over the years and yet these problems continue to exist as evidenced above. The Dublin recast compromise text will solve some of these problems by obliging Member States to complete the examination of an asylum claim or ensure that the applicant is entitled to lodge a new application for asylum which shall not be treated as a subsequent application within the terms of the Asylum Procedures Directive.<sup>171</sup> However, it is not clear that recast Art. 18 of the Dublin Regulation will cover situations where an asylum claim has not been explicitly withdrawn by an applicant but has been closed for various reasons such as failure to comply with reporting requirements. It is imperative that such persons are also guaranteed access to an asylum procedure in accordance with the objective of ensuring full observance of the right to asylum guaranteed by Art. 18 of the Charter of Fundamental Rights.

## Recommendations

### Member States

**Applicants should be regularly provided with information on the progress of their case within the Dublin procedure.**

**Applicants in the Dublin procedure should be informed of a transfer decision within a reasonable period in advance of removal.**

**Pursuant to the right to asylum guaranteed by Art. 18 of the Charter of Fundamental Rights, all persons subject to the Dublin Regulation must be guaranteed access to an asylum procedure and to a full examination of their asylum claim.**

### European Commission

**When drafting the common information leaflet envisaged under a new implementing regulation, a test phase should be conducted with a sample group of asylum seekers to ensure that the content is sufficiently clear and understandable and presented in a user-friendly format.**

<sup>170</sup> ECHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011. para 293.

<sup>171</sup> For further information on the obligations of the Member State responsible see recast Art. 18 Dublin recast compromise text.

## VII. Vulnerable Persons Subject To The Dublin Procedure

The Dublin Regulation contains no explicit provisions on vulnerable persons subject to the Dublin procedure except implicitly within Art. 15(2) which refers to persons who may be dependent on the assistance of another “*on account of pregnancy or a new born child, serious illness, severe handicap or old age*”. Under the Dublin recast compromise text, Art. 32 explicitly obliges Member States to transmit health data with the responsible Member State for the exclusive purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence.

There is no formal definition of vulnerable persons in **Austria, Germany and the Netherlands**. Nevertheless, the Austrian Constitutional Court has considered the following groups as vulnerable persons within the context of the Dublin system: a single mother with three or more children; a family with a pregnant mother and a family with three children where the mother had a psychological condition. Similarly, in the **Netherlands**, unaccompanied children, single or pregnant women, persons with disabilities and victims of torture and sexual and gender-based violence are generally considered as vulnerable persons in need of special care within the Dublin procedure.

In **Italy and Hungary** there are specific references in the national legislation to vulnerable persons with special needs. Art. 8 of the Italian Legislative Decree 140/2005 states that the following should be considered vulnerable persons “*minors, disabled people, elderly people, pregnant women, single parents with children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence*”. In **Hungary** Section 2(k) Asylum Act defines the term ‘persons with special needs’ as an “*unaccompanied minor or a vulnerable person, in particular, a minor, elderly or disabled person, pregnant woman, single parent raising a minor child and a person who has suffered from torture, rape or any other form of psychological, physical or sexual violence, found, after proper individual evaluation to have special needs because of his/her individual situation*”. Furthermore the Hungarian Asylum Act stipulates that vulnerable persons should receive preferential treatment within the asylum procedure.<sup>172</sup>

There are no procedures for identifying vulnerable applicants in the Dublin procedure in **France, Hungary and Spain**. However, vulnerability of Dublin applicants in **the Netherlands** is identified by way of a medical check conducted during the rest and preparation period and through information provided by asylum seekers themselves during interviews.

### 7.1. Medical examinations within the Dublin procedure

Asylum seekers in **Bulgaria, Hungary and Slovakia** are subject to an obligatory medical screening upon arrival. In addition, in **Bulgaria** if the person is detained at any stage, national regulations on immigration detention provide for an obligatory medical examination before the person is released from the detention centre. The obligatory medical examination in **Hungary** does not include a psychological examination.

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<sup>172</sup> According to the Section 34 of the Asylum Act Governmental Decree, a person with special needs seeking recognition shall be eligible for the health care services, rehabilitation, psychological and clinical psychological care or psychotherapeutic treatment required by the person’s state of health provided free of charge with consideration for the person’s individual situation and according to the opinion of a medical specialist.

In **France** there is inconsistent practice among the different prefectures as to whether there are medical examinations conducted on behalf of the applicant or not. In **Austria**, if it is indicated that there are medical concerns at the admissibility interview, a medical examination can be undertaken by a specialist doctor. Furthermore, the national authorities provide access to doctors at the reception centers on a frequent basis for those with mental health concerns. According to Austrian jurisprudence, If there is a clear indication of the necessity of a medical examination, but no examination took place, this is considered as a failure by the Austrian authorities to correctly investigate the applicant's state of health for a Dublin procedure which can then be challenged by way of an appeal in case of an inadmissibility decision under the Dublin Regulation.

## 7.2. Impact of vulnerability on Dublin transfers

Specific policies may be developed with respect to the application of the Dublin Regulation to vulnerable groups as illustrated in national practice in **Italy**, **Germany** and **Spain**. In **Italy** a specific ministerial note has been developed with respect to vulnerable groups which provides for the possibility to request a re-examination of the application of the Dublin Regulation if there is documented evidence of a particular vulnerability.<sup>173</sup> In relation to transfers to **Greece** there have been specific policies of not transferring vulnerable groups there prior to the leading *M.S.S. v Belgium and Greece* judgment, for example in **Germany**, **Switzerland** and **Spain**.<sup>174</sup> A similar policy has also been applied in **Germany** since autumn 2009 of suspending transfers of particularly vulnerable persons to **Malta**.

In **France** if a person's health impacts the Dublin procedure, he/she is recommended to submit a request for an informal review to the national authorities on the basis of the sovereignty clause or the humanitarian clause, accompanied by medical evidence. Similarly in **Spain**, the authorities may consider applying the humanitarian clause if medical evidence of the particular illness is submitted to them.

Some Member States conduct medical examinations prior to transfer to ensure that a particular person is fit-to-be transferred. If medical examinations in **Bulgaria** reveal that an applicant is not fit-to-be transferred then the date of his/her Dublin transfer is postponed rather than cancelled. Similar practice is shown in **Austria** and **Germany**, whereby medical reasons will only delay transfers rather than cancelling them altogether. In **Hungary** and **Slovakia** an additional medical examination prior to transfer is only undertaken if a person objects to the transfer on medical grounds or if he/she complains of a serious medical illness, which prohibits travel. In **France**, **Germany** and **Austria** it is difficult to stop a transfer on medical grounds as national authorities believe that an asylum seeker will receive equivalent care in the responsible Member State. Equally, in **Germany** it is hard to assess when an illness or medical condition is considered severe enough to invoke the sovereignty clause. In **Switzerland** according to the FOM if a person claims to be unfit for travel, they have to submit a corresponding medical report proving it. However, the Swiss authorities do not arrange for such medical examinations and neither is any legal aid provided for this cost. Generally, the asylum seeker has to pay for it himself/herself or rely on the goodwill of a medical professional to write a report without being paid for it.

In **the Netherlands**, examinations to determine whether a person is fit for transfer – ‘fit to fly’ – will only take place when there are indications that the medical situation of an asylum seeker is a real obstacle to the transfer. In such cases, the Repatriation and Departure service (hereafter DT&V) will seek medical advice from a physician to determine whether the asylum seeker is ‘fit to fly’.<sup>175</sup> The Dutch authorities ensure the transfer of vulnerable persons by providing a customized

<sup>173</sup> Italian circolare, 23 February 2009.

<sup>174</sup> In 2011 the Inter-ministerial Commission of Asylum and Refugees (the Eligibility Commission) in Spain also stopped transferring vulnerable asylum seekers to Greece.

<sup>175</sup> The physician is hired by the DT&V, but works for an independent medical institution, Information based on Interview with DT&V official, 26 April 2012. If the asylum seeker disagrees with the medical report produced by the Office for Medical Consulting (‘Bureau Medische Advisering’, (BMA)), they may challenge the expert report by carrying out a ‘contra-expertise’ (i.e. they may seek another

transfer. This means that the DT&V assess what care is need during the transfer. If it is established that an asylum seeker may not be removed due to a psychological or physical illness, Art. 64 of the Aliens Act is applied. On the basis of Art. 64 of the Aliens Act, removal is suspended if it is not medically safe for the asylum seeker – or one of their family members – to travel. For example, if stopping their treatment will result in a medical emergency, and if medical treatment is not available in responsible Member State. In this case, the transfer will be temporarily postponed, and the right to accommodation and other support in **the Netherlands** is extended.<sup>176</sup> However, the application of this provision has particular consequences within the Dublin procedure. The suspension of a transfer for medical reasons on the basis of Art. 64 Aliens Act has been found to be a ‘*residence document*’ in the sense of article 16(2) Dublin Regulation by the Dutch Courts.<sup>177</sup> Therefore, once Art. 16(2) of the Dublin Regulation is applicable, the responsibility for the examination of asylum application lies with **the Netherlands**.<sup>178</sup>

### 7.3. Continuity of care within the Dublin procedure

In **Switzerland**, if the asylum seeker needs medical care subsequent to the transfer to the responsible Member State, the Swiss Dublin office informs the authorities of that State accordingly. In **Germany** the BAMF often fails to inform the responsible Member State about the asylum seekers’ particular illness or his/her state of health of an asylum seeker before his/her transfer. There have also been instances where persons who were transferred from **Germany** were not allowed to take medicine with them with no equivalent medicine available in the responsible Member State. In some instances however, a German doctor accompanied the ill person on the transfer to the responsible Member State.

From the perspective of the receiving Member State it was reported that in the past, there were many instances whereby vulnerable persons were sent to **Greece**, without the Greek national authorities being informed sufficiently in advance of the particularly vulnerability or health concerns of persons transferred there. As a result **Greece** was not always prepared to provide the necessary continuity of care. Also when particularly vulnerable asylum seekers are transferred back to **Italy** under the Dublin Regulation, though formally there are accommodation and services within the SPRAR system for persons with special needs, in practice this is not always guaranteed due to problems with reception capacities within that system.



**Good Practice:** In the Netherlands, in some cases concerning vulnerable persons, the Dutch authorities make arrangements with the authorities in the other responsible Member State before the actual transfer, for example regarding guarantees on assigning guardianship to an unaccompanied child or the medical treatment of vulnerable persons.

opinion and request another medical report). The asylum seeker must pay for the costs of this further medical report which is a major obstacle in asylum procedures according to the Advisory Committee on Migration Affairs (ACVZ). See: ACVZ, “*Evaluating expertise: The role of expert advice in the asylum procedure*” (6 July 2012), accessible at: <http://www.acvz.org/en/index.php>.

<sup>176</sup> However, Article 64 Aliens Act does not provide the person concerned with a residence permit. The expulsion or transfer is only suspended for the period during which travelling on medical grounds is deemed irresponsible. An appeal may be lodged in Court against a decision by the IND not to apply Article 64 of the Aliens Act. The asylum seeker can request a provisional measure at this Court, preventing expulsion until a decision on his appeal has been reached. There is a special residence permit available for medical reasons, for which there are strict conditions.

<sup>177</sup> Council of State Case No. 201000724/1, 12 July 2010.

<sup>178</sup> This occurs after the transfer is suspended on the basis of art. 64 Aliens Act. As this suspension is not really a residence permit, the asylum seeker still has every interest in receiving a decision on his/her asylum application. If the asylum procedure has a negative outcome after medical recovery, the asylum seeker may be removed to their country of origin. Art. 16(2) of the Dublin Regulation states “*Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.*”

## Jurisprudence

### Availability of medical treatment in requested Member State

A Chechen family with a child who was severely handicapped in Austria were due to be transferred to Poland under the Dublin Regulation in a take back case. The family claimed they left Poland on the basis that they failed to access medical treatment for their child there. The administrative authorities and Asylum Court refused their appeals and therefore an appeal was submitted to the Constitutional Court. The Court ruled that the Asylum Court decision was in violation of Art. 3 ECHR as the child's life was at risk in being transferred to Poland. The Austrian authorities had failed to investigate whether medical treatment would be accessible to the child in Poland and therefore a potential violation of Art. 3 ECHR could not be discounted. The families appeal was successfully before the Constitutional Court and their asylum applications were examined in Austria. (Austrian Constitutional Court, Austria U591/09, 28 December 2011).

### Impact of actual Dublin transfer on child's health

The asylum applicant was a three month old baby born in Poland with parents from Chechnya. The child suffered from a life-threatening heart disease and had an operation shortly after his birth. His parents were separated and his mother came to Austria with her three other children as well. She claimed that the medical care in Poland was insufficient for the boy's medical needs. Also the child's grandmother and three aunts already had residence permission in Austria. The Austrian authorities tried to transfer the family to Poland, a decision which was appealed to the Asylum Court. The Austrian Asylum Court allowed the appeal on the grounds that the actual transfer itself was life-threatening for the child. Medical examinations found that because of the boy's heart disease even transportation could be life-threatening as the child does not receive enough oxygen when he is upset which could lead to severe brain damage or be fatal. The Court held that the Federal Office failed to adequately consider the applicant's medical condition and the risk of a violation of Art. 3 ECHR. The case was then referred to the Federal Asylum Office for further examinations and in August 2012 the family received subsidiary protection status (Austrian Asylum Court, Austria S7 423.367 to 370-1/2011/2E, 28 December 2011).

### Failure to investigate mental health condition of applicant

In November 2009 a Kurd applicant claimed asylum in Italy. In 2008 the asylum seeker had previously claimed asylum in the Czech Republic therefore the Italian Dublin Unit requested that Member State to take responsibility for his asylum application. The asylum seeker suffered from severe mental health problems and required targeted psychiatric visits to monitor his mental health. The applicant appealed to the Regional Administrative Tribunal (TAR-LAZIO) which declared the transfer order unlawful because the Italian administrative authorities had not verified thoroughly the applicant's health condition. TAR-LAZIO ordered the administrative authorities to apply the sovereignty clause and examine the applicants' asylum claim in Italy (Regional Administrative Tribunal TAR-LAZIO, Cn. 7657/2010, No. 05784/2011, 1 July 2011).

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Asylum seekers with special needs are often not adequately protected under the Dublin Regulation. Firstly there is the issue of identifying the special needs of asylum seekers in the process and then ensuring that procedural safeguards are put in place to meet these needs during the procedure itself. Sometimes, the specific needs of the applicant may also determine whether or not the Dublin Regulation should be applied at all. The fact that there are vast disparities in the provision of medical and rehabilitation services across Europe also needs to be taken into account in the context of the Dublin system.

Only a few Member States define vulnerable persons for the purposes of the Dublin procedure *inter alia* unaccompanied children, people with disabilities, elderly people, pregnant women, single parents with small children and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence. Specific policies and practices exist in some Member States for vulnerable persons indicating that administrative authorities take a more cautious approach to the application of the Dublin Regulation for this subset of asylum seekers. In

the past, good practice existed whereby traumatized asylum seekers would be *ipso facto* exempt from the Dublin Regulation for example prior to 2005 Austria operated such a policy.<sup>179</sup> The current practice shows that exemptions now only occur in narrowly defined circumstances depending on the individual asylum seekers vulnerability and sometimes the support services in the requested Member State. However, in cases related to health, questions remain as to how severe an illness must be before the sovereignty clause is applied. This should be viewed in the context of the asylum seekers' fundamental rights including respect for human dignity.<sup>180</sup> The transfer of persons suffering from illnesses may also have broader health implications as a matter of public policy. For example, the World Health Organization estimates that more than 400,000 tuberculosis (TB) cases occur in Europe, a large proportion of them among migrants and yet still asylum seekers suffering from TB continue to be transferred under the Dublin Regulation with no assurance of continuity of their medical treatment in the receiving Member State.<sup>181</sup>

In the Member States researched vulnerability *per se* will commonly not lead to a transfer decision being cancelled but may result in it being postponed till a later stage.<sup>182</sup> This research also demonstrates that continuity of care within the Dublin procedure is not always respected due to the failure of some Member States to effectively inform the receiving State of any medical conditions or illnesses the person may have in advance of transfer. Therefore, the new provision in the Dublin recast compromise text to oblige Member States subject to the principle of confidentiality to exchange health data for the exclusive purpose of the provision of health care is very much welcomed.<sup>183</sup>

Apart from persons particularly vulnerable on health grounds, insufficient empirical data was gathered at the national level with respect to other vulnerable groups *inter alia* LGBTI applicants and victims of trafficking.<sup>184</sup> Further research is necessary to examine the special needs of these groups under the Dublin Regulation.

The Dublin recast compromise text will go some way to securing Member States compliance in respecting the fundamental rights of vulnerable persons subject to the Dublin procedure. However, this can only be guaranteed if Member States also apply the sovereignty clause and/or humanitarian clause to take over responsibility for the examination of an asylum claim in appropriate cases.

## Recommendations

### NGOs operating in the field of asylum:

**Further research should be conducted on the application of the Dublin Regulation with respect to trafficking victims and LGBTI asylum seekers.**

<sup>179</sup> ECRE Guidelines on the treatment of Chechen Internally Displaced Persons, Asylum Seekers and Refugees in Europe, Revised March 2011, accessible at: <http://www.ecre.org/topics/areas-of-work/returns/174.html>

<sup>180</sup> See in particular, Art.1 and Art. 3(1) Charter of Fundamental Rights.

<sup>181</sup> World Health Organisation, *Wolfheze Transborder Migration Task Force, Minimum package for cross-border TB control and care in the WHO European region: a Wolfheze consensus statement*, May 2012. The task force recommended an amendment to the Dublin Regulation in order to foster and safeguard the continuity of TB care for asylum seekers. According to the task force, continuum of TB care between countries should be done through a shared updated list of TB services and national focal points for effective and timely communication regarding transferred TB patients.

<sup>182</sup> In many ways this is directly converse to the approach under recast Art. 16 for dependent asylum seekers/persons in a requesting Member State, whereby responsibility is assigned to the requesting Member State if the asylum seeker/dependent person cannot travel to the responsible Member State on health grounds for a significant period of time.

<sup>183</sup> See recast Art. 32 on the exchange of health data before a transfer is carried out.

<sup>184</sup> This problem of a lack of empirical data on the experience of LGBTI asylum seekers in the Dublin procedure was also noted in the *Fleeing Homophobia study undertaken by the VU University of Amsterdam in 2011*, *Vrije Universiteit Amsterdam, Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, accessible at: <http://www.unhcr.org/refworld/docid/4ebba7852.html>. As regards trafficking victims subject to the Dublin Regulation some national NGOs have advocated that they should be exempted from its application on protection grounds. For example, see Anti-Trafficking Legal Project, *Call for exemption from Dublin II procedures for victims of trafficking*, Joint submission with the AIRE Centre, Asylum Aid, ECPAT UK and Poppy Project, 30 April 2008, accessible at: <http://www.atlep.org.uk/policy-work-and-publications/publications-list/call-for-exception-from-dublin-ii-procedures-for-victims-of-trafficking/>. See also: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23we04.htm>. It should be noted that in Ireland trafficking victims appear to not be subject to the Dublin Regulation depending on whether they are identified as a trafficking victim, for further information see: <http://www.victimsofcrimeoffice.ie/en/vco/Humantraffickingguidelines.pdf/Files/Humantraffickingguidelines.pdf>



## VIII. Reception Conditions & Detention

### 8.1. Reception Conditions

The Dublin Regulation does not contain any rules on access to reception conditions for those subject to a Dublin procedure. However, the CJEU in the recent case of C-179/11 has clarified that asylum seekers under the Dublin procedure are entitled to benefit from the minimum reception conditions contained within the Reception Conditions Directive. In order to address this gap under the Dublin recast compromise text, recast recital 11 confirms that the Reception Conditions Directive should apply to those within the Dublin procedure. This section on access to material reception conditions is divided into the two different phases in the Dublin procedure principally in the requesting Member State and in the receiving Member State within a Dublin procedure.

#### 8.1.1. Reception conditions pending transfer in the requesting Member State

There is divergent practice within the Member States as to the rights and entitlements of asylum seekers within the Dublin procedure to support services and accommodation. Asylum seekers within the Dublin procedure generally have access to the same minimum standards under the Reception Conditions Directive as other asylum seekers in **Austria, Hungary, Slovakia, Spain and the Netherlands**.

In **Bulgaria** national legislation explicitly states that the Reception Conditions Directive is applicable to such persons, however, the legislation then goes on to state that asylum seekers in a Dublin procedure following irregular entry or stay, are granted more restricted rights, which do not include the right to accommodation. Similarly, in **Austria**, there may be a restriction on access to reception conditions for asylum seekers who submit a subsequent asylum application within six months of being transferred under the Dublin Regulation who come back to apply for asylum in **Austria** i.e. in a repeat Dublin case.

Sometimes, the fact that the asylum seeker is within a Dublin procedure leads to the assignment of different accommodation facilities as shown in **Austria**,<sup>185</sup> **Switzerland**<sup>186</sup> and **Bulgaria**. In 2012, **Bulgaria** established specific transit centres for accommodating asylum seekers in the Dublin procedure. Pending the construction of these transit centres, asylum seekers were detained in immigration detention centres for foreign nationals.

Accommodation facilities for asylum seekers subject to a Dublin procedure may also be limited in time as shown in the national practice of **France** and **the Netherlands**. This time limit varies from the date of notification of the Dublin transfer in **France**<sup>187</sup> or a standard four week period from the time of serving the inadmissibility decision in **the Netherlands**. Though there is a standard period of four weeks accommodation in **the Netherlands**, in practice, asylum seekers generally remain in a reception centre until they are taken into custody for the Dublin transfer.

Similarly, in **Italy**, according to national legislation, those in the Dublin procedure are entitled to be accommodated within the reception system. In practice however, once asylum seekers are notified of the transfer decision, they often have to leave the reception facility where they are housed, prior to the actual transfer to the responsible Member State. Given the structural problems and dire

<sup>185</sup> This is always the case in Austria where asylum seekers in the admissibility procedure are assigned different reception facilities to those asylum seekers having their claim examined on the merits.

<sup>186</sup> In Switzerland this is only in relation to repeat asylum applications involving the application of the Dublin Regulation i.e. repeat Dublin cases.

<sup>187</sup> On special dispensation grounds this may be extended by one month by the French authorities.

reception conditions in **Greece** for all asylum seekers, most persons in the Dublin procedure are left homeless pending transfer to another country.

Based on circular 18 December 2009 and circular 24 May 2011, asylum seekers under the Dublin procedure in **France** are supposed to have access to emergency accommodation facilities. However, as reported above, this accommodation is only available up until the notification of the transfer decision. In practice, access to accommodation for asylum seekers under the Dublin procedure in **France** often remains uncertain and varies according to the regions. The reception capacities are often insufficient in regions where there are large numbers of asylum seekers which results in many becoming homeless. Some asylum seekers with the support of NGOs can assert their right to accommodation before an administrative judge who frequently orders the Prefecture to find accommodation for them. However, the Prefectures do not always execute these Court decisions. In the past, asylum seekers subject to the Dublin procedure did not receive a temporary tide-over allowance.<sup>188</sup> Since the Court ruling in C-179/11, many asylum seekers in the Dublin procedure receive this tide-over allowance but the practice across **France** is inconsistent. For example, in Lyon, applicants in the Dublin procedure still receive no tide-over allowance.<sup>189</sup> As regards other reception facilities, access to food and clothing is only possible through charities in **France**. In practice, asylum seekers under the Dublin procedure have no access to universal healthcare coverage (CMU) in **France**. They may benefit from State medical aid (Aide Médicale d'Etat AME) but only after three months' residence in **France**. Before this three-month period, they only have access to emergency health care. In contrast, asylum seekers in the Dublin procedure in **Slovakia** receive the same medical care as other applicants i.e. only for urgent health care needs.

The quality of reception conditions varies according to different regions of the country as reported in **Austria, France, Italy** and **Switzerland**.<sup>190</sup> The lack and shortage of accommodation places is a common problem in **Italy** and **Greece**. In **Italy**, this has led to the creation of parallel reception systems run by the Civil Protection service for emergency purposes. Despite this, the lack of accommodation places has led to asylum seekers and migrants resorting to organising make-shift settlements themselves in metropolitan areas. For example, in Rome up to 1,200-1500 persons are estimated to live in these settlements.<sup>191</sup>

In **Switzerland** asylum seekers in the Dublin procedure are mainly accommodated in five federal reception centres near the border. They are entitled to stay there for a maximum of 90 days. If the Dublin procedure takes longer, they will be assigned to a regional canton and transferred to a canton reception centre. These centres normally have less reporting restrictions and are smaller than the federal reception centres. The actual conditions vary significantly between the different centres. Due to the rise in asylum applications at the end of 2011 and beginning of 2012,<sup>192</sup> there has been a shortage of accommodation places in **Switzerland**. The federal centres are full, and there have been a few reported incidents where asylum seekers in Basel were turned away and had to spend the night in an emergency shelter or even outdoors. In response to this, an army bunker was opened as an emergency shelter to provide additional places during the shortage. The placing of asylum seekers in army bunkers was supposed to be an interim measure for a few months. However it continues to be used and is clearly not suitable accommodation for families and/or traumatized asylum seekers.

As regards repeat Dublin cases, the new policy in **Switzerland** introduced in April 2012 envisages a restriction on reception conditions for these asylum seekers. They will not be accommodated in

<sup>188</sup> A temporary tide-over allowance is a monetary allowance of approximately €11 Euros per day per adult.

<sup>189</sup> It should also be noted that the November 2009 circular regarding the tide-over allowance has not been amended since the CJEU ruling in C-179/11.

<sup>190</sup> In Switzerland this is with regard to temporarily opened centres due to a shortage of accommodation places in 2011 and 2012.

<sup>191</sup> For further information see New York Times, *In Italy, Shantytowns of Refugees Reflect Paradox on Asylum*, 2 January 2013. Also PRO ASYL *The Living Conditions of Refugees in Italy, A report by Maria Bethke and Dominik Bender*, February 2011, accessible at: [http://www.proasyl.de/fileadmin/fm-dam/q\\_PUBLIKATIONEN/2011/Italyreport\\_en\\_web\\_ENDVERSION.pdf](http://www.proasyl.de/fileadmin/fm-dam/q_PUBLIKATIONEN/2011/Italyreport_en_web_ENDVERSION.pdf)

<sup>192</sup> As regards the increase in asylum applications in Switzerland note that in 2011 22'551 new asylum applications were submitted compared to 15'567 in 2010. 7'150 new asylum applications were also submitted in the first quarter of 2012 compared to 4'371 in the first quarter of 2011, see yearly and quarterly asylum statistics by the FOM, accessible at: [http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/zahlen\\_und\\_fakten/asylstatistik.html](http://www.bfm.admin.ch/content/bfm/fr/home/dokumentation/zahlen_und_fakten/asylstatistik.html).

regular reception centres, but instead will only receive emergency assistance (a very basic place to sleep, often in military bunkers and often only accessible during the night and provided with very minimal financial assistance for food or food vouchers).<sup>193</sup> Vulnerable groups are exempt from this national policy.

### 8.1.2. Reception conditions in the responsible Member State

Upon transfer to the responsible Member State, asylum seekers should be entitled to the same support services and accommodation as other asylum seekers. For those returned to **Bulgaria** under the Dublin Regulation, no reception rights are explicitly provided to Dublin returnees until they are formally admitted into the asylum procedure.

If an asylum seeker has never applied for asylum in **Hungary** before when they have been transferred there then they are entitled to the same reception conditions as other asylum seekers. However, if the person has to submit a subsequent asylum application, even if his/her first one was not substantively examined, they are not entitled to the same reception services as other asylum seekers. Returnees who are not held in detention are placed in the community shelter in Balassagyarmat where they do not have access to free legal assistance and the reception conditions can be problematic.

Upon transfer to **Italy**, access to reception conditions, including accommodation, is not always immediate since such services are only accessible after the formal registration of the international protection request, which can take several months. Therefore, during this interim period, asylum seekers often find themselves without accommodation unless they receive NGOs' support to find a place to stay. Asylum seekers are entitled to be accommodated in CARA or SPRAR centres in **Italy** for a maximum length of six months up to one year.

When an asylum seeker is returned under the Dublin Regulation to **Slovakia** having previously absconded and been taken back he/she shall be deprived of a monetary allowance granted to all asylum seekers. Art. 22(8)c) of the Asylum Act states: "*The applicant shall not be entitled to any pocket money if they have voluntarily left the territory of the Slovak Republic and were returned to the territory of the Slovak Republic...*".

#### National Fact:

**Italy:** In 2011, Italian authorities received 37,350 asylum applications whilst the SPRAR reception system can only accommodate 3,000 people. In addition, 13,715 incoming requests were sent to Italy and 4,645 asylum seekers were transferred to Italy under the Dublin Regulation that year.

<sup>193</sup> In some reception facilities there are cooking apparatus and utensils, however in other reception facilities this is not available. As regards financial assistance, it is very low, approximately 10 Swiss Francs per day (=8.33 EUR). It varies from canton to canton, and amounts are sometimes a bit higher where there is no possibility to cook. It is very little money considering the high cost of living in Switzerland, and it must cover everything needed, so in addition to food, hygiene products and other expenses must also be covered by this allowance.

## 8.2. Detention

Although there is no specific provision within the Dublin Regulation in relation to custodial measures and detention, over the past number of years ECRE, UNHCR and other organisations have noted the increasing resort to custodial measures and/or detention for those subject to the Dublin procedure.<sup>194</sup> For this reason, in the Dublin recast compromise text, there is a specific provision on detention (recast Art. 28) for the purpose of transfers. It aims to provide procedural safeguards and specific (short) time limits when a person is detained prior to a transfer. It only allows Member States to detain persons in order to secure transfer procedures when there is a significant risk of absconding, ascertained on the basis of an individual assessment, and only in so far as detention is proportional, if other less coercive alternative measures cannot be applied effectively.<sup>195</sup>

**Table 2: Detention and the Application of the Dublin Regulation**

Member State	Detention applied as part of the Dublin Procedure	Detention of unaccompanied children in the Dublin procedure
Austria	YES <sup>1</sup>	YES
Bulgaria	YES	-
France	YES	NO
Germany	YES	YES
Greece	NO	-
Hungary	YES <sup>2</sup>	NO <sup>3</sup>
Italy	NO	NO <sup>4</sup>
Slovakia	YES	NO
Spain	NO	NO
Switzerland	YES	YES
The Netherlands	YES	NO

<sup>1</sup> On a formal level in Austria, detention it is not a part of the Dublin procedure (which is regulated in the asylum law). Detention is regulated in the Foreigners police law which refers to the steps of the Dublin procedure. The asylum authorities conduct the Dublin procedure. However, the decision whether to detain someone is made by the foreigners police. So there are different legal acts and different authorities, but reference is made to each of these procedures in the national legislation.

<sup>2</sup> Up until recently, asylum seekers were frequently detained upon transfer to Hungary. However, since November 2012 the Hungarian Helsinki Committee has recorded a decrease in the number of such asylum seekers detained there.

<sup>3</sup> It is specifically prohibited in Hungarian law to detain unaccompanied children. However, instances have occurred whereby asylum seekers who look clearly underage are detained in Hungary. The age of such persons may be disputed.

<sup>4</sup> In Italy there is an explicit prohibition to detaining unaccompanied children in the Dublin procedure according to Art. 26(6) of the Italian Procedure Decree.

According to national law detention in the Dublin procedure may be invoked specifically for the purpose of carrying out Dublin transfers, or it may be applied on other immigration-related grounds whilst the person is in a Dublin procedure depending on the Member State. This section specifically focuses on the use of detention for the purpose of a Dublin transfer. However, the national reports also document the legal guarantees available for those detained pursuant to the Dublin Regulation.<sup>196</sup> It was not possible to gather information on the estimated number of people subject to detention within the Dublin procedure, due to the fact that no comparable data was available from the Member States included in the scope of this research project. Nonetheless, it is clear that Member States frequently use custodial measures on persons subject to a transfer decision in order to prevent them from absconding before the transfer is carried out.

<sup>194</sup> The use of detention in the Dublin procedure was also highlighted in the following reports: ECRE/ELENA *Report on the Application of the Dublin II Regulation in Europe*, March 2006; UNHCR *The Dublin II Regulation: A UNHCR Discussion Paper*, April 2006. Commission (EC) Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, SEC (2007) 742, COM(2007) 299 final, 6.6.2007 ('Commission 2007 Evaluation Report').

<sup>195</sup> Recast recital 20 also states that the detention of applicants must be in accordance with Art. 31 of the 1951 Refugee Convention and subject to the principle of necessity as well as proportionality.

<sup>196</sup> For further information the national reports are available at [www.dublin-project.eu](http://www.dublin-project.eu)

In the majority of Member States detention is used to transfer asylum seekers to the responsible Member State. Sometimes, the fact that the person previously absconded or entered the country irregularly is also used as a ground for further detention as shown in the practice of **Austria, Bulgaria** and **the Netherlands**. Detention is systematically applied immediately prior to the Dublin transfer in **France** and **the Netherlands**. On average, asylum seekers within the Dublin procedure in those Member States are detained respectively for three to five days prior to transfer.

In **Austria**, under §76 of the Foreigners Police Act (Fremdenpolizeigesetz) there are an extensive number of grounds under which someone may be detained within the Dublin procedure. The grounds are, not only limited to when a transfer order is issued, but also apply in the inadmissibility stage when it appears likely that another Member State is responsible. In **Austria**, detention is almost systematic during the 24 hours preceding a Dublin transfer. In **Switzerland**, detention may be applied prior to a Dublin transfer decision or after notification of another Member State's responsibility when enforcement of the transfer is imminent.

In **Austria** and **France**, families may be detained within the Dublin procedure. It is not uncommon in **France** for families to be put in detention the morning before being transferred. However, there have been some improvements to this detrimental practice in both Member States. In 2010, in **Austria**, a new procedure was established so that whole families may wait in apartments pending removal instead of being detained, under-which circumstances often, the father would be separated from the family for custodial purposes. An internal circular was issued in July 2012 by the administrative authorities in **France** indicating that restrictions should be put in place for the detention of families and children, encouraging the use of house arrest and/or confinement instead.<sup>197</sup>

Unaccompanied children may be detained in **Austria** and **Switzerland** (only for children between the ages of 15-18 years old). There is a prohibition on the detention of unaccompanied children when they are clearly recognized as children in **France, Hungary, Slovakia** and **the Netherlands**. Nevertheless, according to the Hungarian Helsinki Committee's experience there have been instances when persons clearly underage have been detained in **Hungary**.

In **the Netherlands** both border detention and/or immigration custody can be applicable depending on whether the asylum seeker arrived at an international airport or if he/she was found on the territory. Border detention is enforced at Schipol Airport Application Centre (Aanmeldcentrum, AC). Asylum seekers may be detained there until the transfer to another Member State and therefore face lengthier detention. Those persons located within **the Netherlands** may also be subject to immigration detention if there is a reasonable prospect of removal and/or if it is required for public order or national security. Detention may be necessary if there is a demonstrable risk of absconding. Dublin applicants are generally detained for a maximum of five working days at the deportation centre in Rotterdam under immigration detention just before the actual transfers to the responsible Member State.

In **Germany**, the Police authorities are required to apply for detention before the Courts as a judge is required by law to order the detention with some exceptions. A decree of the Federal Ministry of the Interior from 3 March 2006 also shows that detention within the Dublin procedure is politically intended. It stated, *"In cases in which third country nationals are caught at the border or after illegal entry in the border area (...) and where take charge or take back procedures against another Member State are initiated, the asylum application of a foreigner which, if applicable, is submitted from detention or from an appointed attorney, should not be considered. The foreigner should be informed that his request for asylum should be addressed to the border police (...). The aim is to achieve detention pending deportation and to transfer the foreigner directly from detention to the responsible Member State within the Dublin procedure"* (unofficial translation).

<sup>197</sup> Circulaire du ministère de l'Intérieur du 6 juillet 2012 relative à la mise en œuvre de l'assignation à résidence prévue à l'article L.561-2 du CESEDA en alternative au placement des familles en rétention administrative sur le fondement de l'article L.551-1 du même code NOR : INT/K/12/07283/3.

Until relatively recently, detention was the rule rather than the exception in **Hungary**.<sup>198</sup> Apart from general immigration grounds for detention, there is also a specific detention provision for those in a Dublin procedure under Art. 49(5) Asylum Act providing for detention prior to the applicant's transfer. This detention period cannot be longer than 72 hours in order to ensure that the transfer actually takes place. In October 2012 according to a press statement from the OIN the Hungarian government revised its detention practice regarding those returned under the Dublin Regulation.<sup>199</sup> The OIN stated that during the asylum procedure as a general rule asylum seekers transferred under the Dublin procedure should be accommodated in open reception facilities and provided with basic living conditions. A Hungarian Helsinki Committee's lawyer who works in an open reception centre in Debrecen also observed that an increasing number of asylum seekers returned under the Dublin procedure are being accommodated there as opposed to being detained. UNHCR has also noted that the number of asylum seekers detained in Hungary has significantly declined in 2012.<sup>200</sup>

Asylum seekers subject to transfers to other Member States are not detained in **Greece, Italy and Spain** prior to their transfer to another Member State. Similarly, in **Slovakia**, detention of asylum seekers is not common practice, but NGOs have monitored cases where detention was applied for practical reasons a few days prior to transfer.<sup>201</sup> Asylum seekers who are returned to **Greece** under the Dublin Regulation and who apply for asylum for the first time are detained for a short period in order to process and check their fingerprints. The legality of this detention has been questioned.<sup>202</sup>

## Jurisprudence

### Purpose of Detention

In September 2011, a Nigerian person was arrested at Bratislava airport, Slovakia. He submitted a travel document and an Austrian residence permit belonging to his friend, which he reported to the police. He stated that he was an asylum seeker in Austria. The Austrian authorities did not confirm that the person was an asylum seeker and the Slovak authorities issued a decision on his detention and subsequent removal to Nigeria. One week later the Austrian authorities confirmed that he was an asylum seeker in Austria and accepted to take him back under the Dublin Regulation. His removal to Nigeria was stopped but he was not released from detention. Upon appeal the Regional Court of Trnava ordered his release on the grounds that the continuation of the applicant's detention after the Dublin procedure was initiated was illegal because the applicant had been detained for the purpose of removal to Nigeria and not in accordance with the Dublin Regulation (Regional Court of Trnava, XX v. the Department of Foreign Police Bratislava, 38Sp/12/2011, 22 November 2011).

<sup>198</sup> Section 55(1) of the Third Country Nationals Act sets out the grounds for detention in order to secure an expulsion or a transfer under the Dublin procedure. For further information see UNHCR *Hungary as a country of asylum*, Observations on the situation of asylum-seekers and refugees in Hungary, April 2012, accessible at: <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html> and Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, accessible at: <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

<sup>199</sup> See <http://www.kormany.hu/en/ministry-of-interior/news/the-ministry-of-interior-s-response-to-unhcr-s-note-on-asylum-seekers>

<sup>200</sup> UNHCR Note on Dublin transfers to Hungary of people who have transited through Serbia –update, December 2012, accessible at: <http://www.unhcr.org/refworld/pdfid/50d1d13e2.pdf>

<sup>201</sup> Recent practice in the second half of 2012 was also monitored by NGOs in Slovakia whereby third country nationals were detained for the purposes of a Dublin transfer just based on fingerprint data found in the Eurodac system on the same day they lodged asylum applications there and before the actual Dublin procedure was initiated. However, thus far the Court has cancelled such decisions on detention for example see Decision no. 38Sp/24/2012 from 7 August 2012 of the Regional Court in Trnava 38Sp/25/2012 and 38Sp/23/2012.

<sup>202</sup> AITIMA Programme for the Provision of Legal and Social Support to Asylum Seekers Transferred to Greece under Dublin II Regulation, [22 February – 14 April 2010], First Conclusions and Recommendations, accessible at: <http://www.aitima.gr/?q=en/en/page/project-airport-elftherios-venizelos>

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Everyone is entitled to a basic standard of living in accordance with international human rights law.<sup>203</sup> Equally, respect for the principles of human dignity and non-discrimination should underpin the policies of Member States with respect to reception conditions.<sup>204</sup> Despite this, the operation of the Dublin system depicts a Europe of varying standards of reception facilities and social conditions where asylum seekers in the Dublin procedure are frequently treated as a secondary category of people subject to fewer entitlements. The issue for applicants in the Dublin procedure is both one of access to reception conditions and the standard of the facilities and services provided. The information gathered in this report mainly focuses on access to accommodation. Asylum seekers are often granted fewer rights in terms of reception both pending and subsequent to a Dublin transfer. In the majority of Member States researched NGOs and charities play an invaluable role in meeting this protection gap and assisting destitute asylum seekers depending on their own resources and capacities.

Of particular concern is the fact that some Member States penalize returned asylum seekers who previously claimed asylum, either by providing less monetary allowance or by placing them in reception centres with more limited support services. Formally this administrative action is in compliance with Art. 16 Reception Conditions Directive but such sanctions should not jeopardize the rights of asylum seekers to pursue their asylum application, their human dignity and the rights of their family members to a basic standard of living including with respect to health care, accommodation and social assistance.

The issue of access to adequate reception conditions can also have consequences for applicants' right to asylum. As pointed out by UNHCR, the denial of reception conditions may infringe other rights, in particular the right for an asylum seeker to submit an asylum claim in a fair and efficient asylum procedure and to exercise his/her right to appeal a transfer decision.<sup>205</sup> The CJEU has confirmed that the Reception Conditions Directive is applicable during the Dublin procedure in C-179/11. National implementation of that Court ruling will be key in ensuring that all asylum seekers receive the minimum standards of reception conditions as outlined in that Directive.

An increasing trend towards detaining applicants in the Dublin procedure is apparent from this research. From the perspective of Member States detention is an important tool to secure transfer to the responsible Member State under the Dublin Regulation but this comes at a human cost. The harsh impact of detention on asylum seekers and its long-term effects cannot be underestimated. Asylum seekers as a group are inherently vulnerable in detention and the use of such custodial measures also has negative consequences on their mental health.<sup>206</sup> Detention has the potential to hinder the long-term integration prospects of asylum seekers. Furthermore the negative effects of detention may be compounded by the possibility of previous arbitrary detention in the country of origin.

<sup>203</sup> See for example Universal Declaration on Human Rights, Article 25(1) "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"; Office of the High Commissioner for Human Rights, CESCR General Comment No. 4 The Right to Adequate Housing [Art.11(1) of the Covenant]; See also the Constitutional Court of South Africa, Port Elizabeth Municipality v Various Occupiers – [CCT 53/03] [2004] ZACC 7; 2005 (1) SA 217 (CC); available at: <http://www.saflii.org/za/cases/ZACC/2004/7.html> and the German Constitutional Court decision on inhuman conditions for asylum seekers: German Federal Constitutional Court, Judgment of 18 July 2012; 1 BVL 10; 1 BVL2/11; available at: <http://www.bverfg.de/pressemitteilungen/bvg12-056en.html> Zitierung: BVerfG, 1 BvL 10/10 vom 18.7.2012, Absatz-Nr. (1 - 140).

<sup>204</sup> There may, however, be differentiation of services in order to positively assist those with special needs. See ECRE Position on the Reception of Asylum Seekers, November 2001, accessible at: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/143.html>

<sup>205</sup> UNHCR Statement on the reception conditions of asylum-seekers under the Dublin procedure, 1 August 2011, C-179/11, accessible at: <http://www.unhcr.org/refworld/docid/4e37b5902.html>

<sup>206</sup> ECHR, M.S.S. v. Belgium and Greece, Application No. 30696/09, 21 January 2011 paras 232 and 251; JRS Europe, *Becoming vulnerable in Detention*, Civil Society Report on the Detention of vulnerable asylum seekers and irregular migrants in the European Union, June 2010, accessible at: [http://detention-in-europe.org/images/stories/DEVAS/jrs\\_europe\\_becoming%20vulnerable%20in%20detention\\_june%202010\\_public\\_updated%20on%2012july10.pdf](http://detention-in-europe.org/images/stories/DEVAS/jrs_europe_becoming%20vulnerable%20in%20detention_june%202010_public_updated%20on%2012july10.pdf) See in particular, pg. 69 "In the case of "Dublin II" asylum seekers, 77 percent describe their mental health as being poor while in detention."

Nine out of the eleven Member States researched commonly use detention as part of the Dublin procedure. The average length of detention varies significantly ranging from 24 hours prior to travel or for the whole duration of the Dublin procedure (six months or longer). It is almost systematically used immediately prior to transfer in the majority of Member States surveyed. The fact that an asylum seeker is detained may also hinder to his/her access to justice and judicial protection, including their ability to contact a lawyer to lodge an appeal where necessary.

Whereas the current Dublin Regulation contains no provisions dealing with the detention of Dublin applicants, the Dublin recast compromise text introduces a specific provision on detention for the purpose of a transfer (Recast Art. 28).<sup>207</sup> The proposed safeguards in the Dublin recast compromise text are aimed at reducing the risk of arbitrary detention. However, serious concerns remain that Member States will continue to detain asylum seekers in the Dublin system. Recast Art. 28 provides clarity on the grounds, limits and procedural guarantees to be respected when asylum seekers are detained in the Dublin procedure but its role in assigning Member State responsibility may have the perverse effect of increased use of detention in order to shift responsibility to other Member States by default.<sup>208</sup> The failure of a requested Member State to speedily respond within a two week deadline will lead to the acceptance of responsibility by that Member State by default.<sup>209</sup> Despite this provision having the positive objective of restricting the duration of detention for the purposes of securing a transfer, it may potentially lead to differential treatment for detained Dublin applicants leading to a 'two-tier' Dublin system. As noted by the Commission in its 2008 impact assessment, detention is sometimes wrongly used simply to accelerate the Dublin procedure under Art. 17(2) of the current Dublin Regulation, which allows a Member State to claim urgency in receiving a reply to its request in the case of detention.<sup>210</sup> It is imperative that under the new recast rules, detention is not used as a method of fast-tracking the Dublin procedure, which could in turn lead to an increased resort to such custodial measures. A quick resolution to identify the correct Member State responsible for examining an asylum application is in the interests of both asylum seekers and States but this should not occur to the detriment of the detained applicant if responsibility is assigned merely because the requested administrative authority could not respond within the two week deadline. To prevent such an occurrence, it is vital that the administrative authorities in all Member States have the capacity to efficiently fulfill the required administrative duties for transfers with due diligence, especially for those in detention.<sup>211</sup>

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<sup>207</sup> Recast Recital 20 is also of relevance as it reflects the principles of ECHR jurisprudence providing that "*detention should be for as short a period as possible and subject to the principles of necessity and proportionality*".

<sup>208</sup> Recast Art. 28(2) states that "*When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively*". As regards the conditions and procedural guarantees in detention recast Art. 28(4) provides that recast Article 9, 10 and 11 of the Reception Conditions Directive shall apply.

<sup>209</sup> Recast Art. 28(3) also states "*When a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from then lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within a two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.*"

<sup>210</sup> See Commission staff working document accompanying 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), Impact Assessment, SEC(2008) 2962, 3.12.2008. p.13. ('Impact Assessment Paper'), p. 18.

<sup>211</sup> Article 22(1) of the Dublin Regulation requires Member States to ensure that those authorities responsible for fulfilling the obligations arising under the Dublin Regulation have the necessary resources for carrying out their tasks. This provision is also retained within the Dublin recast compromise text.



Given the harmful effects of detention, upon application of the recast Dublin Regulation at the national level, the Commission with the support of NGOs should carefully monitor its use as a priority issue of concern. Currently no empirical data is available on the number of asylum seekers subject to detention within the Dublin procedure so it is not possible to estimate just how many people are affected by this policy of detention. Member States should only use detention on an exceptional basis, as a measure of last resort where non-custodial measures have been demonstrated not to work. Nevertheless, if detention is utilized, it should be for the shortest time possible bearing in mind the inherent vulnerability of asylum seekers. As for the detention of unaccompanied children in the Dublin procedure, this practice should be abolished immediately.<sup>212</sup>

## Recommendations

### Member States

**Immediate steps must be taken to implement the CJEU Court ruling of C-179/11 and ensure equivalent standards of reception conditions for all asylum seekers including in the Dublin procedure.**

### European Commission

**Monitoring national practices on the reception and detention of asylum seekers in the Dublin procedure should be prioritised by the European Commission with the support of EASO, taking into account all available sources, including UNHCR and NGOs.**

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<sup>212</sup> See for example ECHR, *Rahimi v Greece*, Application No. 8687/08, 5 April 2011. In that case for a child even two days in detention was held to be unlawful. Greece was held to be in violation of ECHR for its failure to consider the best interests of the child.

# IX. Practical Aspects Of The Application Of The Dublin Regulation

## 9.1. Transfer Procedures

Art. 19(3) and Art. 20(1)(d) both stipulate that Dublin transfers shall be carried out in accordance with the national law of the requesting Member State, after consultation with the receiving Member State. Chapter III of the Implementing Regulation contains a number of provisions on practical arrangements and co-operation for transfers, postponed and delayed transfers and guidelines should transfers follow an acceptance by default under the Dublin Regulation. The Dublin recast compromise text introduces a number of provisions aimed at improving the efficiency of Dublin transfers whilst also ensuring that the fundamental rights of asylum seekers are safeguarded during the procedure. In accordance with recast recital 24 Member States should promote voluntary transfers under the Dublin Regulation by providing adequate information to the applicant and ensuring *'...that supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child and taking utmost account of developments in the relevant case law in particular as regards transfers on humanitarian grounds'*.<sup>213</sup> Recast Art. 29 also requires in mandatory terms that Member States ensure that if transfers are carried out by supervised departure or under escort, it must be in a humane manner with full respect for fundamental rights and human dignity.

### 9.1.1. Responsible authorities

In the majority of Member States researched immigration authorities and /or border police are responsible for undertaking transfers under the Dublin Regulation. In **Hungary**, the Dublin unit co-ordinates the arrangements for transfer whilst the Police actually undertake the transfer to the responsible Member State. In **the Netherlands**, the immigration police detain Dublin applicants and hand them over to the DT & V to conduct the transfer to the responsible Member State. The cantonal authorities in **Switzerland** are responsible for executing the transfer to the responsible Member State, following notification of transfer decisions by the FOM.

### 9.1.2. Transfer methods and modalities

Transfers by force are predominantly used to execute removals pursuant to the Dublin Regulation in **Austria, Switzerland and Germany**. By comparison, voluntary transfers are the main method of removal in **Bulgaria, Spain and Greece** and they sometimes can occur in **Hungary**. Only voluntary transfers are specifically used in **Spain** as the Spanish authorities consider that their duty under the Dublin Regulation is completed once the correct Member State has been identified and responsibility has been confirmed with the asylum seeker.

In **France**, there is divergent practice across the different Prefectures. Some Prefectures allow the asylum seeker to travel voluntarily to the responsible Member State whilst others apprehend the applicant as soon as the transfer order is notified to them and only conduct forced transfers. Similarly, in **Switzerland**, the manner and method of transfer varies according to the different cantons and the individual circumstances of the case. Depending on the cooperation of the asylum seeker, he/she is either taken to the airport by cantonal police, and accompanied onto the plane, or only informed of the date and time of the flight and required to go to the airport by himself/herself. Applicants may be accompanied on the flights arranged in **Switzerland** for outgoing transfers

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<sup>213</sup> Recast Recital 24 of the Dublin Regulation.

depending on the case concerned. When unaccompanied flights are used, applicants are given a laissez-passer and an instruction to contact the relevant authorities in the responsible Member State upon arrival or accompanied flights available. If the destination in the responsible Member State is near the border with **Switzerland**, the asylum seeker can also be driven to the border and handed over to the border officials.

Once an asylum seeker has been notified of a Dublin transfer decision in **Germany**, the authorities do not provide any advance information to the person about the planned removal and it may be implemented immediately (§ 34a AsylVfG (Asylum Procedure Act)). In the German Residence Act (Aufenthaltsgesetz) there is no specific provision on transfers under the Dublin Regulation, but in practice removal is carried out under Section 57 (Removal) or Section 58 (Deportation) of that Act. Even asylum seekers who wish to travel to the responsible Member State are not allowed to do this by way of voluntary departure. The Federal authorities in **Germany** generally oppose the use of voluntary transfers in case the asylum seeker absconds before the planned transfer.

Asylum seekers removed for **Germany** under the Dublin Regulation may face additional difficulties in that a deportation, removal or expulsion from **Germany** may lead to the issuance of an unlimited re-entry ban under Section 11 AufenthG (Residence Act Aufenthaltsgesetz).<sup>214</sup> This can have long-term implications for those Dublin applicants transferred to the responsible Member State in accordance with Section 58 AufenthG (Deportation -Residence Act Aufenthaltsgesetz). If at a later stage such persons wish to re-enter **Germany** for family purposes or other reasons they will be required to apply for a visa. If the re-entry ban is still in force, the German authorities will deny the visa request. The re-entry ban may be limited upon request but this is conditional on whether a significant period of time has passed and the State costs of the previous removal under the Dublin Regulation has been reimbursed by the person concerned to the German Aliens Authority.

In the case of a forced transfer from **Austria** to the responsible Member State the police usually arrive at the asylum seekers' residence very early in the morning and apprehend him/her. The applicant is brought to a detention centre for one to two days prior to transfer. Depending on the responsible Member State and the number of persons being transferred, the transfer takes place by plane, by bus or by police car under escort. In **Greece** transfers to other Member States take place on a voluntary basis, as the asylum seeker usually wants to reunite with family members present in other Member States. However, it must be noted that the cost of outgoing transfers from **Greece** are usually paid for by the asylum seekers themselves to avoid lengthy administrative delays by the Greek authorities taking into account the financial difficulties beset by the Greek national administration.

In **Hungary**, if the transfer is by flight the competent police authority assists with boarding the person concerned on the plane. They may travel under escort depending on the age of the asylum seeker and/or his/her conduct. As regards overland transfers from **Hungary**, the competent police authority hands over the person concerned directly to the authorities of the responsible Member State at the border.

After a transfer notice is issued to the asylum seeker in **the Netherlands** they are generally given a term of 28 days to leave the country. Nevertheless, enforced Dublin transfers sometimes take place within that time period. Normally the applicant is detained and the DT & V arranges a flight

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**214** Section 11 AufenthG (Residence Act Aufenthaltsgesetz) Ban on entry and residence [1] A foreigner who has been expelled, removed or deported shall not be permitted to re-enter or stay in the Federal territory. He or she shall not be granted a residence title, even if the requirements entitling him or her to a title in accordance with this Act are fulfilled. Time limits shall be applied to the effects stated in sentences 1 and 2 on application. The time limit shall be set according to individual case concerned and may only exceed five years if the foreigner has been expelled on the grounds of a criminal conviction or if he or she poses a serious danger to public safety or law and order. The setting of the time limit shall take due account of whether the foreigner has left the Federal territory voluntarily and in good time. The time limit begins upon the person concerned leaving the Federal territory. No time limit shall be applied if a foreigner has been deported from the Federal territory on account of a crime against peace, a war crime or a crime against humanity, or on the basis of a deportation order pursuant to Section 58a. The supreme Land authority may permit exemptions from sentence 7 in individual cases. [2] By way of exception, the foreigner may, except in cases covered by sub-section 1, sentence 7, be granted temporary entrance into the Federal territory for a short period prior to expiry of the exclusion period stipulated in accordance with sub-section 1, sentence 3, if his or her presence is required for compelling reasons or if the refusal of permission would constitute undue hardship. Sub-section 1, sentence 8 shall apply *mutatis mutandis* in cases pursuant to sub-section 1, sentence 7 [official translation].

to the responsible Member State within five working days. On the day of the transfer, the asylum seeker receives a laissez-passer<sup>215</sup> and any identity document and/or money and other personal belongings they may have had in their possession on arrival. Three days are spent preparing the asylum seeker for transfer. During this preparation time, he/she undergoes medical examinations, has an appointment with a DT&V official for discussing the transfer procedure and has his/her luggage checked. Dublin liaison officers may also make extra travel arrangements depending on the circumstances of a case. When an asylum seeker is transferred by plane the DT&V staff check whether the asylum seeker has a valid flight ticket, their money and other personal belongings, valid travel documents and personal luggage and, if necessary, a fit-to-fly statement.<sup>216</sup>

### 9.1.2.1. Transfers of unaccompanied children

Some Member States have special arrangements set in place for transferring unaccompanied children under the Dublin Regulation. In **Slovakia** a guardian may accompany such children and other vulnerable persons subject to a Dublin transfer to the responsible Member State depending on the individual circumstances of the case. In practice this is generally only applied with respect to small children. Similarly, in **the Netherlands**, special rules apply for the transfer of unaccompanied children. Firstly, instead of booking the flight five days in advance, a flight is booked two weeks in advance and the receiving Member State is notified of the planned transfer two weeks in advance in contrast to five days in the regular removal procedure. This gives the receiving Member State time to arrange appropriate reception facilities and guardianship. Secondly, the DT&V notifies the guardianship organisation NIDOS by letter about the preparations for transfer and the planned flight. The Dutch authorities rely on NIDOS to contact guardianship organisations/institutions in the responsible Member State to arrange for the assignment of a guardian for the unaccompanied child. In the case of children below the age of 16, the DT&V consults with NIDOS to see whether the guardian can accompany the child to the border. It is important to note that if a child is transferred to another Member State NIDOS must transfer the guardianship to a guardian in the responsible Member State. The new guardian must declare in writing that he/she is willing to take over guardianship of the child. NIDOS also investigates if accommodation for the unaccompanied child is guaranteed upon arrival in the responsible Member State.

### 9.1.3. Voluntary return to the country of origin

Supplementary information was gathered on the use of voluntary repatriation to the country of origin instead of Dublin transfers to the responsible Member State. The reasons behind such practice were beyond the scope of this research but require further consideration. **The Netherlands** and **Switzerland** both have specific procedures in place for persons subject to the Dublin Regulation to choose to voluntarily return to their country of origin rather than being transferred to another Member State.

In **the Netherlands**, if the asylum seeker within the Dublin procedure indicates that they want to return to their country of origin, the International Office for Migration (hereafter IOM) may offer support for voluntary repatriation including a financial contribution.<sup>217</sup> DT&V is more favourably disposed towards voluntary repatriation if it can take place within 30 days after applying for repatriation. However, the DT&V will hold to a Dublin transfer and enforce it if the asylum seeker concerned

<sup>215</sup> In cases where the asylum seeker travels independently to the responsible country, the laissez-passer is given directly to the asylum seeker. If the asylum seeker travels under supervision, the supervisor will keep the laissez-passer with them. When transferred by airplane, the laissez-passer is given to the aircraft commander, who will hand over the document to the border authorities upon arrival.

<sup>216</sup> For further information on fit-to-fly statements in the Dutch practice see chapter VII of this report.

<sup>217</sup> The financial contribution offered by IOM amounts to a minimum of €200 and a maximum of €500 for an adult or unaccompanied child. The asylum seeker may also be eligible for a supplementary reintegration contribution of €1750. Some nationalities are excluded from receiving a subsistence allowance and reintegration grant due to alleged abuse. Recently, the Dutch Minister halted this procedure for asylum seekers from Belarus who arrived in the Netherlands after 16 November 2011 and for Russian applicants within the Dublin procedure as of August 2012. The relief contribution has also been stopped for asylum seekers from Macedonia and Georgia. See [http://www.iom-nederland.nl/english/Programmes/Return\\_Reintegration](http://www.iom-nederland.nl/english/Programmes/Return_Reintegration) (last accessed August 2012).

returned to his/her country of origin with IOM before or if they have a record of applying for asylum in several countries.

In **Switzerland** the FOM has produced policy guidelines for cantonal authorities for situations where a person prefers to return to his/her country of origin instead of returning to the responsible Member State.<sup>218</sup> According to those guidelines, the cantonal authorities can organize returns to the country of origin instead of another Member State up until three months before the transfer deadline lapses.

Recent practice in **Switzerland** reveals a contrasting trend whereby the Swiss authorities have, in a number of individual cases where the Dublin Regulation is appropriate, applied inadmissibility decisions on the basis of different grounds to return the applicant directly to the country of origin. As an example, a Swiss lawyer has reported recently coming across a number of cases where a Eurodac hit from another Member State was present showing the applicability of the Dublin Regulation, and yet the case was found inadmissible on other grounds and no request was sent to the responsible Member State. These cases all concerned asylum seekers who would have preferred to go to the responsible Member State under the Dublin Regulation as opposed to their country of origin. Though formally in compliance with Art. 3(3) of the Dublin Regulation, such actions must respect the right to asylum guaranteed by Member States under the Charter of Fundamental Rights.

#### National Fact:

**The Netherlands:** Between September 2011 and April 2012, of the Dublin Regulation related files received by the DT&V, 10-15% of these cases involved persons who returned voluntarily to their country of origin with IOM rather than be sent to another Member State under the Dublin Regulation.

## 9.2. Time Limits

The Dublin Regulation sets various time limits during the process of identifying the responsible Member State and in relation to conducting transfers to that Member State. The overall objective is to ensure that a single Member State is identified as responsible as quickly as possible in order to guarantee effective and efficient access to an asylum procedure. Time limits are set out in Art. 17, 18 and 19 of the Dublin Regulation in relation to making requests to take charge or take back asylum seekers, responding to such requests and effectuating transfers to the responsible Member State within certain deadlines. The Dublin recast compromise text introduces more explicit deadlines both with respect to take back and take charges cases with the aim of ensuring that the responsibility determination process will become more efficient and rapid.

### 9.2.1. Respect for time limits

As the internal administrative progress on Dublin cases are not always conducted in a transparent manner it was difficult for national partners to gather detailed information on whether time limits are being complied with by Member States. Time limits for requests and transferring asylum seekers appear to be largely complied with by Member States with notable exceptions.

In the past, prior to the general suspension of transfers to **Greece**, the Greek authorities were unable to respect all the time limits for responding to incoming requests. This led to **Greece** frequently becoming responsibility for asylum applications by default. At that time this was due to the heavy workload and large amount of requests from other Member States combined with the limited

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<sup>218</sup> However these guidelines are not publicly available.

capacity of the Greek Dublin unit. Now, the timeframes for sending out requests from **Greece** are generally respected by the Greek Dublin unit. Nevertheless, sometimes deadlines are missed in take charge requests, for example, due to delays by the Greek police in identifying whether the Dublin Regulation is applicable in a particular case.

In general the time limits set out in the Dublin Regulation are respected in **France, Slovakia** and **Switzerland**, although in **France** there have been some transfers conducted beyond the six-month deadline under Art. 19(3). In **Spain** there are often delays in the transmission of information requests to other Member States from the national authorities, which may have an impact on the deadlines for transfers. If a request to take charge or take back a Dublin applicant has been sent to a responsible Member State, the admissibility procedure in **Spain** may be extended to two months<sup>219</sup> to await the response of the requested Member State. This is still within the required time limits in the Dublin Regulation.

Long delays in the Dublin procedure are reported in **Austria** and **Germany**. In **Austria**, in practice in complex cases, there may be more than one Dublin transfer decision and appeal making the whole process a protracted one before a Member State finally examines the asylum application. Likewise, in **Germany**, the Dublin procedure can take several months if not longer. In response to queries on this issue, the Dublin unit officials explained that this is often due to heavy workload despite the fact that the German Dublin units are among some of the more staffed Dublin units across Europe. As take back requests are not time-bound, those cases are not considered as priority matters in **Germany** and are therefore often examined months after the asylum application has been submitted. There are cases in which it took over a year until a request to the potentially responsible Member State was even sent out. Another reported problem in **Germany** is that take charge requests are sent to other Member States after the required three months under Art. 17(1) and then the case is simply declared as a take back request even though there is no evidence of a previous asylum application in the other Member State.

If the time limits expire before the applicant is transferred under the Dublin Regulation, the requesting Member State becomes *de facto* responsible and must examine his/her asylum application. In general the requirement to accept responsibility pursuant to an expired time limit is respected by most Member States. However, there may be exceptions as shown in **Switzerland**, where the receiving Member State still agreed to take back an asylum seeker despite the fact that the deadline had expired. The Swiss Court confirmed in a leading judgment in 2010 that transfers could still be carried out if the Member State concerned agrees to take back the asylum seeker despite the lapsing of deadlines.<sup>220</sup>

There have been a number of judicial decisions regarding time limits in **Spain**, whereby the Spanish Courts consider the six months deadline for transfer not binding if the applicant has been properly informed as to the responsible Member State.<sup>221</sup> Another issue evident from case law in **France** is that sometimes Member States try to extend the time limit for reasons other than that provided in the Regulation i.e. for reasons other than imprisonment and absconding under Art. 19(4) and Art. 20(2).

If the transfer deadline lapses in **the Netherlands**, it becomes responsible for the asylum application. However, the asylum seeker concerned must then formally lodge an application for asylum in **the Netherlands**, which is treated as a subsequent asylum application with its inherent limitations, despite the fact that his/her asylum claim has not been substantively examined.

<sup>219</sup> In Spain the admissibility procedure is normally only one month.

<sup>220</sup> Swiss Federal Administrative Court, BVGE 2010/27 E-6525/2009, 29 June 2010 accessible at: <http://www.bvger.ch/publiws/download?decisionId=3b504784-5ac7-456d-92f3-aa1a45048719>

<sup>221</sup> For example, National High Court ruling SAN 937/2010 appeal 583/2009 where the Court dismissed the appeal brought by a Colombian asylum seeker and decided to transfer her back to Belgium under the Dublin Regulation despite the fact that the six-month deadline had lapsed.

## Jurisprudence

### Lengthy delays in processing outgoing requests result in the assumption of responsibility for the examination of an asylum claim

In Germany, an unaccompanied child was interviewed about his reasons for claiming asylum by the BAMF. The Federal Office requested Hungary to take responsibility for his asylum application under the Dublin Regulation eight months later. The Hamburg Administrative Court granted interim relief (Eilrechtsschutz) against the Dublin removal on the basis that Hungary should no longer be held responsible for examining the asylum application. This was on the grounds that a personal interview about fleeing and seeking asylum may be interpreted as invoking the sovereignty clause, if it is not solely aimed at determining the responsible Member State. The Court considered that the decisive role of the Dublin Regulation is guaranteeing effective access to the asylum procedure within a reasonable period of time. The Court stated that *“If within eight months after the interview, the Federal Office for Migration and Refugees has not taken any measures with regard to take charge or take back procedures, it sufficiently demonstrates a clear intention of carrying out the asylum procedure itself that is invoking the sovereignty clause”*. The BAMF was ordered to deliver the decision two weeks before the planned removal to Hungary (Hamburg Administrative Court, Germany 19 AE 173/11, 11 April 2011).<sup>222</sup> This is a particularly significant case in highlighting the objective of the Dublin Regulation to afford rapid access to the asylum determination procedure.

### Grounds for the extension of the time limits under Art. 19(4) and 20(2)

A Russian family requested asylum in France having previously submitted an asylum claim in Poland. They had a very ill son. Poland accepted to take the family back in February 2010 and then after August 2010 the French authorities informed the Polish authorities of the need to extend the time limit for transfer on the basis of the son’s ill health. The family appealed the decision to be transferred to Poland. The first appeal was rejected however, the Conseil d’Etat accepted their appeal holding that there are only two grounds in which the extension of time limit is possible under Art 19(4) and Art. 20(2) of the Dublin Regulation. Art. 9(1) in the Implementing Regulation does not have the legal effect of allowing the extension of time limits for transfer for other physical reasons.<sup>223</sup> The Court ruled that if a transfer is postponed due to health reasons this has to be within the six month time limit. Such reasons are no basis for an extension of that time limit (Conseil d’Etat, France No.343184, 17 September 2010).

### Transfer of an applicant after procedural deadlines had lapsed under Art. 20(2)

The asylum applicants, a Somali family, were registered on the basis of Eurodac data as having previously been present in Italy. The FOM in Switzerland issued a transfer decision to Italy on the basis of the Italian authorities’ tacit acceptance of a take back request. However the planned transfer could not be carried out as the mother’s pregnancy was at an advanced stage. Her child was subsequently born in Switzerland. Following that, the applicants made a request for reconsideration to the FOM, claiming changed circumstances since the transfer deadline of six months had lapsed. The FOM rejected the request on the grounds that Italy had accepted the take back request by default despite the lapsed transfer deadline, and that the applicants could not deduct any individual rights from the Dublin Regulation with which they could challenge Italy’s responsibility, as long as this did not violate their fundamental rights, holding that this was not the case in this situation. The applicants were then transferred to Italy. Their legal representative submitted an appeal to the Federal Administrative Court. Firstly the Court clarified that an asylum seeker who receives a negative Dublin decision and who has already been transferred can still have a practical and ongoing interest to appeal the decision. The Court stated that an asylum seeker can rely upon an individual provision of the Dublin Regulation if it is self-executing. This is the case if the provision is sufficiently defined and clear, if it addresses

<sup>222</sup> This judgment is accessible at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18463.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18463.pdf)

<sup>223</sup> Article 9(1) Implementing Regulation states *“The Member State responsible shall be informed without delay of any postponement due either to an appeal or review procedure with suspensive effect, or physical reasons such as ill health of the asylum seeker, non-availability of transport or the fact that the asylum seeker has withdrawn from the transfer procedure.”*

the authorities applying the law and aims at protecting the rights of the asylum seeker. The Court held that the following provisions under the Dublin Regulation were sufficiently defined Art. 19(4), 20(1)(d) and Art. 20(2). Furthermore these provisions aim at protecting the rights of the asylum seeker i.e. the right to an examination of the asylum claim within a reasonable period of time. Therefore the asylum applicants had a right to rely on these provisions. It held that if the person is still in Switzerland and the transfer deadline has lapsed, then he/she can claim that the responsibility for his/her asylum application has transferred to Switzerland. On the other hand, if the person has already been transferred and if according to the circumstances it can be assumed that the other Member State still assumes responsibility then in this case Italy should still be considered responsible. The applicants had brought nothing forward to refute this presumption and therefore the FOM had been right in rejecting the asylum applicants' request for reconsideration. The appeal was rejected. (Leading case by the Federal Administrative Court, Switzerland BVGE 2010/27 E-6525/2009, 29 June 2010).

### 9.2.2. Extension of the time limit for transfer on the basis that the asylum seeker has absconded

Art. 19(4) and Art. 20(2) allow for the extension of the time limit for a transfer on the basis that the applicant cannot be transferred due to imprisonment (one year) or because he/she absconded (18 months). This provision is maintained within the recast Dublin compromise text (recast Art. 29(2)). Member States have discretion to extend the time limits up to the maximum of 18 months if the asylum seeker absconds but administrative authorities in **Austria, Germany and France** interpret 'absconding' relatively broadly, which in turn impacts the deadlines for Dublin transfers.

In **Austria**, an asylum seeker may be deemed to have absconded by the administrative authorities often without realizing it themselves for example if he/she does not return to the reception centre allocated to him/her by a certain time in the evening or in case he/she misses a presence check.<sup>224</sup> In such situations he/she will automatically be removed from the reception centre and will have limited possibility to be housed in an accommodation centre again. In these cases the time limits for transfer is almost immediately extended by the Austrian authorities. Asylum seekers registered as homeless in **Austria** are always considered to have absconded with the resultant time limit under Art. 19(4) and Art. 20(2) Dublin Regulation being extended for transfers.

In **France**, the notion of absconding has been defined through the Court's jurisprudence as follows "*an asylum seeker absconds when they intentionally and systematically elude control by the administrative authorities in order to delay the implementation of the decision to hand them over to the authorities of the country responsible for their asylum request*" (informal translation).<sup>225</sup> In practice, however, Prefectures interpret absconding extremely broadly and have extended time limits to 18 months, for example, where asylum seekers have only missed one appointment at their offices.

In **Germany**, if a person absconds, the time limit is always extended to the maximum of 18 months despite the fact that the length of time is discretionary and 18 months is only identified as the maximum amount of time it can be extended to before the cessation of responsibility under the Dublin Regulation. The Administrative Court of Braunschweig criticised this approach and stated that the Art. 20(2) provision entails discretionary powers concerning the question of whether the time limit should be extended and if so for how long.<sup>226</sup> Like the French Prefectures, the German authorities also apply a wide interpretation of absconding. A person may be deemed to have absconded for not being present in their assigned room in a reception centre when the German

<sup>224</sup> A presence check in Austria is called «Anwesenheitskontrolle.» Under this system the asylum seekers receive a note, which informs them when the reception centre will check for the presence of asylum seekers at the reception centre. This check takes place about once every 48 hours. At this certain time every asylum seeker has to be in his / her room to confirm that he / she is still in the reception centre and the bar code which is on the green card will be scanned as evidence that the person concerned was present.

<sup>225</sup> Conseil d'Etat No 307401 of 17 July 2007. This jurisprudential approach has also been confirmed in the April 1 2011 Circular: Application du règlement CE n° 343/2003 du Conseil du 18 février 2003 dit règlement Dublin.

<sup>226</sup> Braunschweig Administrative court, decision of 9 August 2011, 2 B 196/11, accessible at: [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18899.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18899.pdf)



authorities call upon them, irrespective of the fact that they may have just left the room and may be in a different area of the premises. In practice, a large number of notifications from **Germany** to other Member States on extension of time limits for absconding lack substantive foundation.

Furthermore, in **Germany**, there is also the controversial issue of whether seeking ‘open church asylum’ constitutes absconding for the purposes of a Dublin transfer. This occurs in cases where a church community admits and shelters someone on their premises. The German authorities will not remove someone by physical force from Church grounds. According to the Dortmund Dublin unit this is not absconding and therefore the time limit should not be extended on this ground. In practice, however, ecumenical groups have come across a number of cases where a person’s time limits were extended under the Dublin Regulation on the basis of ‘*open church asylum*’.

In **the Netherlands** the practice surrounding the extension of time limits under the Dublin Regulation is more restrictive with asylum seekers having more than one opportunity to report to the authorities before being deemed to have absconded.

According to Art. 19(4) and Art. 20(2) the extension of the time limit must be notified to the receiving Member State, but questions have also been raised as to whether the asylum seeker concerned should also be informed of this whilst imprisoned or after reporting back to the authorities subsequent to being deemed to have absconded. In **France** the Conseil d’Etat has held that the right to information does not include the obligation to inform the asylum seeker that the time limit for his/her transfer to the responsible Member State will be extended if they were previously informed about the application of the Dublin Regulation, its time limits and effects. Thus, the Conseil d’Etat held that the extension of the transfer time limit in accordance with Art. 20(2) of the Dublin Regulation requires the requesting Member State to inform the responsible Member State but not the individual asylum seeker concerned.<sup>227</sup>

## Jurisprudence

### Requirement to provide reasoning for deeming that an applicant has absconded

Mr. J, an asylum seeker, transited through Greece on his way to France where he claimed asylum. On 24 October 2009 the French authorities requested Greece to take back Mr. J on the basis of Eurodac data. On 26 February 2010 the Prefecture summoned Mr. J and a transfer order was issued to Greece. He was arrested and placed in detention in order to enforce his transfer. Subsequently Mr. J was released from detention by the liberties and detention judge. On 14 July 2010 Mr. J was arrested again and placed in detention on the basis of a new transfer order. He submitted an urgent application to the Paris Administrative Court arguing that the six month time limit under Art. 19 of the Dublin Regulation expired on 24 June 2010 and by default, France was responsible for his asylum application. The Prefecture claimed that the transfer order was legal, as Mr. J had absconded. Firstly, the Paris Administrative Court ruled that Mr. J could not be considered as having absconded as he always attended summons at the Prefecture and had provided his address. In addition, the Prefecture did not provide any reasons as to why it found that Mr. J had absconded. The Court ruled that as Mr. J had not absconded, France was responsible for examining his asylum application since 24 June 2010 when the six month time limit for transfer to Greece had expired. Although this case does not specifically concern the extension of time limits for transfer it provides some background on the interpretation of absconding in France (Paris Administrative Court, France No. 1013300, 17 July 2010).

227 Conseil d’Etat, No. 343807, 25 October 2010.

## 9.3. Circumstantial Evidence

Art. 18(3) Dublin Regulation designates the establishment of a list of elements of proof and circumstantial evidence that shall be used by national authorities in determining the Member State responsible. Art. 18 also provides further details on what constitutes proof and circumstantial evidence as well as declaring that the requirement of proof should not exceed what is necessary for the proper application of the Dublin Regulation. Furthermore, as required under Art. 18(3), Annex II of the Implementing Regulation contains lists of probative and indicative evidence for means of proof and circumstantial evidence necessary for identifying the correct Member State.

The majority of Member States use the probative and indicative elements of evidence in the Implementing Regulation. However, some Member States gather further information. For example, **Bulgaria** has also tracked flight paths into Europe, which asylum seekers claimed they took, to identify whether another Member State was responsible under the Dublin Regulation. In **the Netherlands** the Dutch Council of State has ruled that it does not follow from the Dublin Regulation and Annex II of the Implementing Regulation that 'other circumstantial evidence of the same kind' should be derived from an 'objective source' thus that the source concerned (e.g. witness/family member) may not have an interest in the outcome of the proceedings. As an example, a statement from a family member may not necessarily be an objective source for information, yet the information they provide must be taken into consideration along with all other available evidence in identifying the responsible Member State is possible under Art 19(4) and Art. 20(2) of the Dublin Regulation.

As regards circumstantial evidence in **Switzerland**, all indications that another Member State may be responsible are taken into account by the national authorities. In **Slovakia**, the Dublin unit does not accept circumstantial evidence alone as the basis for proving Member State responsibility. Rather, it uses circumstantial evidence only if submitted together with, or later supported by, other means of evidence or proof.

### 9.3.1. Evidentiary requirements for proving family links

In a number of Member States the evidentiary requirements for proving family links can be quite stringent with an increasing resort to DNA tests in disputed cases. If necessary, DNA testing may be required to verify that the persons concerned are related in **Austria**,<sup>228</sup> **Slovakia**, **Germany**, **Greece** and **the Netherlands**. In cases concerning unaccompanied children, the guardian in **the Netherlands** needs to give permission for a DNA test to be carried out by the authorities. Equally, the guardian may consider whether requesting a DNA test from the administrative authorities is in the best interests of the child. In case of a negative result, the child concerned must cover the cost of it himself/herself. If the DNA test is positive the IND pays for it.

The requirement to request DNA tests can pose practical difficulties for unaccompanied children in **Greece** who wish to be transferred to other Member States where their family members are present. Most reception centres for unaccompanied children are in distant provincial cities whilst DNA tests can only be conducted in Athens. Asylum seekers, including children, are required to pay for these DNA tests themselves as they are not included in the free medical care offered by the Greek authorities.

In **Austria**, in order to prove family links in case a family did not arrive simultaneously in Europe, every asylum seeker must have explicitly mentioned the other family member before in his / her asylum procedure, even in other Member States where they might have applied for asylum before. Marriage certificates and/or birth certificates are required on a regular basis to prove family links. Depending on the country of origin and source of these documents, they are assessed by the Federal Bureau of Criminal Investigation (*Bundeskriminalamt*) to prove authenticity. Additionally, in

<sup>228</sup> The asylum seeker first has to pay the DNA test by himself / herself in Austria. In case the DNA test is positive and the asylum seeker is still present in Austria, the asylum seeker can apply to get the costs refunded.

case there are doubts concerning the family status, oral hearings may be conducted to see if the family members deliver consistent statements concerning their family life. If DNA tests are required in **Austria**, asylum seekers themselves must pay for the cost. There is no possibility for the asylum seekers concerned to get money in advance and often they have to try and borrow to cover the cost of the DNA test from other asylum seekers.

There have been reported problems in **Germany** concerning the non-recognition of marriage certificates of couples that do not have children. This in turn has implications for the application of 'take charge' requests under Art. 7 and Art. 8 Dublin Regulation and the bringing together of family members during the asylum procedure.

### 9.3.2. Evidence concerning stay outside the territory of Member States under Art. 16(3)

Pursuant to Art. 16(3) of the Dublin Regulation, the obligations to take charge or take back shall cease where a third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible. The burden of proof is on the applicant to show that they stayed outside EU territory for at least three months. Annex II List A (9) and List B (9) of the Implementing Regulation also include two lists of probative and circumstantial evidence to be considered in identifying a departure from the territory of Member States.

It appears that a lot of Member States interpret evidence of being outside the territories of Member States under Art. 16(3) in accordance with the Implementing Regulation's list of probative evidence. In **France** Prefectures only accept time outside the EU territory if there is evidence and material proof of exit and re-entry to the EU territory. Therefore, official documents issued by hospitals or local authorities in a third country certifying time spent outside the EU territory is generally not considered as sufficient. Asylum seekers are often requested to provide the travel documents used when leaving the EU territory, as well as any travel documents used upon his/her return. This can prove difficult when the asylum seeker has been forced to travel by clandestine means. The French Dublin unit has stated that a train ticket or a ferry ticket can serve as proof but the asylum seeker must submit the original travel ticket to the French authorities. Similarly, in **Spain**, statements by the asylum seeker as to time spent outside are not sufficient for cessation of Member State responsibility. The asylum seeker must also show formal evidence of exit and re-entry to the EU territory.

In **the Netherlands**, an asylum seeker is rarely considered to have proved that they left the territory of the EU Member State for at least three months. Evidence taken into account by the Dutch authorities consists *inter alia* of credible and consistent statements made by the asylum seeker as well as hard evidence such as flight tickets or municipal registration in a non-Dublin country. In **Austria**, asylum seekers have to prove that they left the EU as well as prove the duration of their stay outside the territory of Member States. Ideally, this evidence is provided by documents from another Member State authority, documents from an NGO, which provided assistance when leaving the country and/or a certificate from the former responsible Member State who registered the departure of the asylum seeker.<sup>229</sup>

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<sup>229</sup> In this context it is important to note that Art. 16(4) also provides that the obligations to take back under Art. 16(1)(d) and (e) shall cease once the Member State responsible for examining the application had adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third country national can go to his country of origin or to another country to which he may lawfully travel.

## Jurisprudence

### The sourcing of evidence to show time spent outside the territory of Member States

An asylum application of an Afghan asylum seeker was rejected in the Netherlands on the basis that Norway was responsible for the examination of the claim under the Dublin Regulation. The applicant claimed that he had left Norway and spent more than three months outside the EU territories in Afghanistan and then subsequently claimed asylum in the Netherlands. The Dutch Minister refused this claim stating that the evidence submitted by the asylum seeker to prove this were not from an objective source. Upon appeal the Council of State held that the applicant's employer's statement and payslips were sufficient enough to be considered as circumstantial evidence under Annex II of the Implementing Regulation and not all evidence has to be from an objective source. Nevertheless this evidence was considered to be insufficient to demonstrate that the asylum seekers have left the EU territories for more than three months so the transfer to Norway was upheld and the asylum seekers appeal was rejected (Council of State (Administrative Law Section), the Netherlands, Nr. 201002493/1/V2, 28 April 2011).

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In accordance with the Dublin Regulation and its implementing rules, transfers to the Member State responsible for the examination of an asylum claim can take place in the following ways: on a voluntary basis, by supervised departure or under escort. In 2007 the Commission evaluation report highlighted that Member States often encounter practical difficulties in implementing accepted transfers.<sup>230</sup> This issue is still apparent today as illustrated by Eurostat statistics that on average between 2009 and 2010 only 25.3% of outgoing requests resulted in transfers and only 47% of accepted requests resulted in transfers.

In most Member States the main methods of implementing transfers are by supervised departure or under escort. The promotion of voluntary transfers is preferred over forced transfers, which are often accompanied by other harsh measures such as detention. The means of transfer is also inextricably linked to the information an applicant receives in so far that only when asylum seekers have the requisite understanding of the Dublin Regulation and its consequences then they are more likely to comply with its implementing measures. Slovakia and the Netherlands can to a certain extent be identified as examples of good practice with respect to the provision of additional procedural safeguards for the transfer of unaccompanied children.

The German practice of issuing a ban on re-entry on the basis of a Dublin Regulation transfer is difficult to reconcile with the principle of proportionality particularly where the transfer is for take charge purposes. The imposition of such a sanction can also have long term ramifications for a person's freedom of movement within the Schengen area beyond the examination of his/her asylum claim. Further research is necessary to discover how widely re-entry bans are used pursuant to Dublin transfers. This practice of issuing re-entry bans should be abolished. However, if this practice is to remain in place, re-entry bans should only be issued on the basis of a reasoned decision as to its application, which is subject to a separate appeal. Administrative procedures should also be in place to allow for the withdrawal of such a re-entry ban when the person concerned can demonstrate that he/she has fully complied with the Dublin transfer decision.

Further research and statistical data is also required as to the phenomenon of voluntary return to the country of origin being used instead of transfers in accordance with the Dublin Regulation. Voluntary repatriation schemes need to be monitored carefully to ensure that the assistance and advice they offer is appropriate (including with respect to an up-to-date assessment of conditions

<sup>230</sup> The Commission impact assessment also noted that the number of implemented transfers is low in comparison to the number of acceptances for example in 2006 implemented transfers represented 61.3% of outgoing requests and 54.4% of incoming requests, Commission Impact Assessment, p. 8.

in the country of origin) and that their voluntary nature is not compromised. Asylum seekers should only consider voluntary return following a full consultation with an independent legal advisor. Given that applicants within the Dublin procedure may never have had their asylum claim substantively examined it is advisable that national administrative authorities do not promote voluntary return during the duration of the procedure for identifying the Member State responsible for the examination of his/her asylum application.

Member States broadly appear to be respecting the time limits required under the Dublin Regulation though there are exceptions to this practice as reported in France, Germany and Switzerland. Jurisprudence surrounding the extension of deadlines in the Regulation is significantly varied across the Member States included in this study. Some national Courts have declared that lengthy delays in processing outgoing requests indicates an assumption of responsibility whilst other Courts found that transfers can still occur beyond the six month time limit if the receiving Member State continues to be willing to accept responsibility. Further data should be collected on the average length of the Dublin procedure in order to assess whether it meets the objective of efficiency identified in the Preamble to the Regulation.

As declared by the CJEU in the case of C-245/11 “...the competent national authorities are under an obligation to ensure that the implementation of Regulation No 343/2003 is carried out in a manner which guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application”.<sup>231</sup> The experience of lengthy delays in the Dublin procedure is at variance with its objective of guaranteeing swift access to an asylum procedure. In particular the absence of time limits for take back requests leads to significant delays in the processing of such Dublin cases. Therefore it is positive to note that this issue is remedied under Arts. 23 and 24 in the Dublin recast compromise text, which provides for explicit deadlines in submitting such take back requests.<sup>232</sup>

With respect to time limits this research shows that too wide an interpretation is taken for determining that a person has absconded for the purposes of obtaining more time to undertake transfers. Member States should not misuse this system by applying it too broadly in inappropriate situations.<sup>233</sup> Further litigation may be necessary to define the relevant circumstances for indicating that a person has absconded.

A broad interpretation of absconding may also have implications for the use of detention and/or access to reception facilities as reported in Austria. The risk criteria for defining ‘absconding’ should be defined narrowly in national legislation.<sup>234</sup> Administrative authorities must be able to demonstrate clearly why the person concerned is considered to have absconded by providing a reasoned decision to that effect. In order to ensure that time limits are only extended in the appropriate cases and in line with the principle of sincere co-operation the requesting Member State should always provide a reasoned decision as to why a person has been deemed to have absconded for the purposes of extending transfer deadlines. Applicants, once located, should also be informed of the reasons for an extension of the time limits for his/her transfer as part of Member States obligations under Art. 41 Charter of Fundamental Rights.

231 C-245/11 para 48.

232 Recast Art 23 obliges Member States to submit a take back request as quickly as possible and in any event within two months of receiving a Eurodac hit. If the take back request is based on other evidence it shall be sent to the requested Member State within three months of the date on which the asylum application was lodged. With respect to the submission of a take back request when no new application has been lodged in the requesting Member State recast Art. 24 provides that the take back request should be made within two months of a Eurodac hit or if the take request is based on other evidence, within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.

233 Further clarification as to what absconding means could have been provided by the CJEU in the case of C-666/11 but this reference for a preliminary ruling was later withdrawn by the referring Court as Germany took over responsibility for the asylum seekers’ claim. In the case of C-666/11 a German Court submitted a preliminary reference to the CJEU which included a question on whether a “suicide attempt, even one which is faked, as a result of which transfer to the Member State responsible is not possible, constitute absconding” within the meaning of Art. 19(4) of the Dublin Regulation.

234 Recast Art 2(n) of the Dublin recast compromise text incorporates a definition of ‘risk of absconding’ for the purposes of detention as meaning “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.”

As regards circumstantial evidence, this report shows that evidentiary requirements for proving family links can be restrictive as illustrated in the national practices of a number of Member States. In countries where DNA tests are an obligatory requirement for proving family links the cost of obtaining such tests may prove prohibitive for asylum seekers with little financial means. This in turn impacts their ability to prove their relationships with family members and reunite with them during the course of their asylum procedure. Annex II List A.1 of the Implementing Regulation clearly shows that DNA or blood tests should only be used where necessary, in the absence of other probative evidence. If DNA testing is an essential requirement Member States should fund such tests particularly with respect to unaccompanied children. Furthermore it is recommended that additional research be carried out as to how much of a barrier the requirement for DNA tests is for family unification during the Dublin procedure. As regards other forms of documentary proof, due account of the particular circumstances of asylum seekers should be taken into account for example difficulties in obtaining formal documentation due to the manner in which the person had to flee and/or the consequences of conflict in the country of origin.

## Recommendations

### Member States

**In order to ensure that the objective of swift access to an asylum procedure is achieved in practice, all Member States must strictly adhere to the time limits set out in the Dublin Regulation.**

**Transfers pursuant to the Dublin Regulation should not result in the imposition of re-entry bans.**

**The definition of absconding should be narrowly defined for the purposes of extending the procedural time limits under Art. 19(4) and Art. 20(2).**

**DNA testing should only be used in complex Dublin cases where necessary in the absence of other documentation proving family links. If DNA tests are a requirement for proving family links in the Dublin procedure, Member States should provide them free of charge.**

# X. Member State Cooperation

## 10.1. Administrative Cooperation

Member State co-operation is central to the effectiveness of applying the Dublin Regulation. Chapter VI of the Dublin Regulation sets out a number of provisions aimed at ensuring the smooth functioning of the Dublin system by means of effective communication between Member States. The Implementing Regulation was also established to facilitate cooperation between the competent State authorities in applying the Dublin Regulation.

### 10.1.1. Communication between Member States (Art. 21)

Art. 21 of the Dublin Regulation provides the opportunity for Member States to exchange information and request personal data concerning an asylum seeker for the purposes of determining the responsible Member State, for examining the application for asylum or for the implementation of any other obligation arising under the Dublin Regulation as long as such requests are appropriate, relevant and non-excessive. From the information gathered, in general, it appears that communication for the purposes of the Dublin Regulation are sufficient between Member States. A number of Member States reported insufficient communication with the Italian Dublin Unit in relation to transfers to **Italy**. A common problem reported was that, even though **Italy** accepts the transfer of an applicant to its territory either explicitly or by default, there is no further follow up regarding arrangements for actual transfers.

When **Bulgaria** receives negative replies from other Member States in relation to the establishment of responsibility under 'take back' and 'take charge' requests the Bulgarian authorities often ask for a request to be re-examined in accordance with Art. 5(2) of the Implementing Regulation. Many of the transfer decisions to other Member States from **Bulgaria** reveal that the receiving Member States' acceptance for the transfer has only taken place on the basis of a request for re-examination or review. According to IND staff in **the Netherlands**, disputes sometimes arise over responsibility for a particular asylum application between Member States. However, the Dutch authorities try to solve such disputed cases through liaison officers in other Member States, via bilateral consultations and by visiting and inviting delegates of other Member States to **the Netherlands** for discussion.

It is reported that in **France**, co-operation and communication can be difficult with **Italy** and the **UK**. Cooperation with **Italy** is difficult mainly due to organisational problems concerning the modalities of transfer. Cooperation with the **UK** can also be difficult as there have been cases where the British authorities have incorrectly transferred applicants to **France** where it clearly was not responsible for them under the Dublin criteria. In the past **Greece** commonly did not respond to information requests under Art. 21 Dublin Regulation. However, since 2011, an improvement in communication has been reported which has resulted in the Greek authorities responding in a timely manner to information requests.



Case Study

#### German Case Study:

*In January 2011 Sweden requested Germany to take back an Afghan asylum seeker who had previously submitted an asylum application in Germany. The German authorities accepted the take back request. The Federal Office for Migration and Asylum arranged a date for the substantive asylum interview in March 2011 but the applicant was not informed of this date nor was he able to attend it as he was only transferred to Germany two weeks after the scheduled interview. Still the Federal Office rejected his asylum application as manifestly unfounded because he was deemed to have not offered a reasonable explanation for his absence at the interview.*

### 10.1.1.1. Provision of incorrect information (Article 21 (8))

Pursuant to Art. 21(8) of the Dublin Regulation Member States are obliged to exchange accurate and timely information with one another. If incorrect information is transmitted, the transferring Member State has an obligation to immediately inform the receiving Member State and correct the information or have it erased.

There have been several instances whereby the Austrian authorities deliberately omitted relevant facts from such correspondence to Dublin units in other Member States, which would have demonstrated **Austria's** own responsibility for the asylum application. The Austrian authorities have sometimes sent out take back or take charge requests with insufficient information to correctly determine the responsible Member State for example submitting requests that only stated that the applicant claimed to have left the EU for a certain number of months and that this was not credible without providing information on the evidence submitted by the applicant and how it was determined not to be credible.

In **Germany**, lawyers have come across cases where the German authorities did not inform other requested Member States that there were any indications that an applicant had left the EU territories, even though the applicants clearly told the officers they did leave the territory of Member States during their interview. Such an omission may also be due to insufficient internal administration within the relevant authorities resulting in the asylum seeker's case file not being systematically updated within the German Dublin units. For example interview records sometimes may only be added to the files in the Dublin unit after two to three months. In such a scenario the case officer in the Dublin unit will have no knowledge of the statements of the asylum seeker submitted during his/her interview, which may indicate another Member State's responsibility.

## Jurisprudence

### Failure to provide all the relevant information to the requested Member State

A woman traveled through Poland en-route to joining her husband in Austria. The Austrian authorities initiated a Dublin transfer procedure to Poland for the woman without informing the Polish authorities of the presence of her husband who was a refugee in Austria. Upon appeal the Austrian Asylum Court in striking out the transfer decision order, stated: "... *If the Member States lead a consultation procedure in a way that manifestly violates the legal principles of the Dublin II Regulation, a decision according to Art 19 (1) regulation 343/2003 cannot be valid. It cannot be excluded that Poland would have refused Austria's request knowing that she is married to a refugee. [...] Based on that the Federal Asylum Office's decision has to be cancelled*" unofficial translation (AsylGH Austrian Asylum Court, S1 404.238-1/2009/2E, 10 February 2009).

A family was granted subsidiary protection in Austria, which remained valid after a short trip to Chechnya where they transited Poland on the return journey. The Polish authorities accepted responsibility without being informed of the family's residence status in Austria. Austrian officials transferred the family to Poland under the Dublin Regulation even though they had the right to remain in Austria. The Austrian Asylum Court stated upon appeal: "*In this context there is a procedural error. It would have been necessary to inform Poland in the request that the claimant has [...] the status of subsidiary protection. Based on the duty to make a transparent consultation procedure, which allows Poland to decide on the case, the lack of information is a fundamental error. The Dublin II Regulation requires a good cooperation based on trust between the Member States. This includes an exchange of fundamental information concerning the examination of the responsibility for the conduction of an asylum procedure. [...] The Federal Asylum Office led the consultation procedure in an arbitrary way. It did not inform Polish Dublin authorities that the claimant has the status of subsidiary protection in Austria. This lack of information makes the consultation procedure illegitimate because it is a breach of trust between the Member States of the Dublin II Regulation. Based on that breach of trust Poland's acceptance is invalid*" unofficial translation (AsylGH Austrian Asylum Court S23 242.800-3/2012/4E and others, 20 January 2012).



### 10.1.2. Bilateral administrative arrangements (Art.23)

Member States may establish on a bilateral basis administrative arrangements between themselves concerning the practical details of the implementation of the Dublin Regulation under Art. 23. Bilateral administrative arrangements are used to facilitate the application of the Dublin Regulation and increase its effectiveness. Such arrangements may relate to the exchange of Dublin liaison officers and the simplification of procedures and the shortening of time limits relating to the transmission and examination of requests to take charge of or take back asylum seekers. There is an obligation on Member States to report these arrangements to the Commission to verify whether the procedural aspects of the arrangement do not infringe the Dublin Regulation itself. Under the Dublin recast compromise text this provision will be maintained with an additional stipulation that the Commission may check the compatibility of any amended or new administrative arrangement under recast Art. 36(1)(b) with the Dublin Regulation.<sup>235</sup>

**Table 3: Bilateral administrative arrangements between Member States**

Member State	Bilateral Administrative Arrangement with these Member
Bulgaria	Austria, Hungary & Romania
Hungary	Austria, Bulgaria, Romania, Slovenia & Slovakia
Slovakia	Austria & Hungary
Switzerland	Austria & Germany
France	Germany & Switzerland

The bilateral administrative arrangements indicated above commonly result in shorter timeframes for sending and responding to requests and include provisions on practical timeframes regarding actual transfers.<sup>236</sup> The Bulgarian agreement with **Romania** also includes details on the documentary evidence required to process the requests for take back or take charge cases. For example, this requires parties to the agreement to present a written declaration by the asylum seeker concerned describing the route they traveled through Member States, where appropriate. The **Slovakia-Hungary** agreement establishes three agreed border crossings for Dublin transfers and includes the possibility of arranging an adhoc-working group to resolve disputes.

#### 10.1.2.1. Bilateral agreements beyond the Dublin Regulation

In some Member States information was also obtained on other readmission and border control agreements outside the context of the Dublin Regulation. These concern the bilateral agreements between **Italy** and **Greece** and **Greece** and **Bulgaria** respectively. The use of the safe third country concept by **Hungary** in relation to Serbia also has implications for asylum seekers transferred to **Hungary** who previously transited Serbia as they may be denied effective access to an asylum procedure in **Hungary**.<sup>237</sup> However it should be noted that recent reports on Hungarian practice as of November 2012 indicate that the safe third country concept is no longer being automatically applied in relation to asylum seekers returned there who have previously transited Serbia.<sup>238</sup>

<sup>235</sup> Recast Art. 36(4) states that "If the Commission considers the arrangements referring to in paragraph 1(b) to be incompatible with this Regulation, it shall, within a reasonable period, notify the Member States concerned. The Member States shall take all appropriate steps to amend the arrangement concerned within a reasonable period of time in such a way as to eliminate any incompatibilities observed".

<sup>236</sup> Further detailed information on the substantive content of each of these agreements are available in the relevant national reports at [www.dublin-project.eu](http://www.dublin-project.eu)

<sup>237</sup> For further information see: UNHCR *Hungary as a country of asylum*, Observations on the situation of asylum-seekers and refugees in Hungary, April 2012, accessible at: <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>; UNHCR, *Serbia as a country of asylum. Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, accessible at: <http://www.unhcr.org/refworld/docid/50471f7e2.html> and Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, accessible at: <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf> and Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited*, June 2012, accessible at: <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>

<sup>238</sup> Email correspondence with Hungarian national expert, January 2012.

Since March 1999 **Italy** and **Greece** have implemented a bilateral agreement on the readmission of migrants.<sup>239</sup> This readmission agreement does not include the Dublin Regulation (and the Dublin Convention) within its scope. However, indirectly it impacts those seeking asylum in **Italy** who are turned back by the Italian authorities to **Greece**.<sup>240</sup> This agreement applies predominantly to persons moving between **Greece** and **Italy** on the Adriatic Coasts and Border Police implement it with no engagement by the Dublin authorities. It is particularly concerning that not all asylum seekers on this route are identified as such.<sup>241</sup> These people are given no access to the asylum procedure in **Italy** and are sent directly back to **Greece** as irregular migrants.<sup>242</sup> In a recent report by the Greek Council for Refugees and Pro Asyl entitled “*Human Cargo: Arbitrary readmission from the Italian sea ports to Greece*” research findings clearly indicate that “*in the majority of cases at the Italian sea ports, people in need of international protection and unaccompanied minors who are detected and apprehended in the Italian ports and in the southern coasts of Italy, are either refused entry to the Italian territory or are readmitted back to Greece, without being granted any access to international protection, to any sort of registration of their claim, identification and individual evaluation of their case and/or vulnerability*”.<sup>243</sup> This can be seen as an indirect violation of the objective of the Dublin Regulation as it denies access to the asylum procedure for those seeking international protection subject to this readmission agreement.<sup>244</sup> By implementing the readmission agreement in this manner **Italy** is disregarding its obligations deriving from the Dublin Regulation. As UNHCR has noted “*in practice ....Italy does not apply the Dublin II Regulation to asylum seekers it wishes to return to Greece, invoking instead the readmission agreement as its basis for such returns*”.<sup>245</sup>

**Greece** also has a readmission agreement with **Bulgaria** for the movement of irregular migrants between these Member States.<sup>246</sup> In 2012 concerns were raised as to whether persons subject to the readmission agreement include asylum seekers seeking international protection in **Bulgaria**.<sup>247</sup> According to case law noted by the national expert, **Bulgaria** avoids registering asylum seekers who have entered the country from **Greece** and treats them as irregular migrants, sending them

239 “*Accordo tra il Governo della Repubblica Italiana e il Governo della Repubblica Ellenica sulla riammissione delle persone in situazione irregolare*” signed on 30 April 1999 and entered into force on 1 February 2001.

240 The readmission agreement contains a number of theoretical safeguards for example Art. 6 states that the obligation to readmit is not applicable inter alia to those individuals recognized by the requesting State as refugees under the 1951 Refugee Convention. The agreement also explicitly excludes from its scope those third country nationals to “*whom the Dublin Convention of 15 June 1990 is applicable*”.

241 The CoE Commissioner for Human Rights has also referred to “*automatic returns to Greece*” in the context of that readmission agreement; See pg. 3 onwards in his July 2012 report on Italy: “*There are also numerous reports concerning persons arriving in an irregular manner in Italian ports on the Adriatic who are returned to Greece without having access to procedures aimed at formally clarifying their status and identifying any protection needs*”. Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012, CommDH(2012)6 accessible at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2143096&SecMode=1&DocId=1926434&Usage=2>

242 However, according to CIR’s experience at these ports, it should be pointed out that many persons subject to this agreement prefer to be sent back to Greece as they do not want to seek asylum in Italy and would rather reach, irregularly, other European countries where their family members and other third country nationals reside. Irrespective of this, the ECtHR Grand Chamber has held that it considers that “*it is for the national authorities, faced with a situation in which human rights were being systematically violated...to find out about the treatment to which the applicants would be exposed upon their return....the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Art. 3*” see *Hirsi Jamaa & Others v Italy*, Application no. 27765/09) 23 February 2012, para 133.

243 For further information see, for example, Greek Council for Refugees and ProAsyl *Human Cargo, Arbitrary Readmissions from the Italian Sea Ports to Greece*, July 2012, accessible at: [http://www.proasyl.de/fileadmin/fm-dam/p\\_KAMPAGNEN/Flucht-ist-kein-Verbrechen/humancargo\\_01.pdf](http://www.proasyl.de/fileadmin/fm-dam/p_KAMPAGNEN/Flucht-ist-kein-Verbrechen/humancargo_01.pdf); UNHCR *Recommendations on Important Aspects of Refugee Protection in Italy*, July 2012, accessible at: <http://www.unhcr.org/refworld/docid/5003da882.html>; Human Rights Watch *Turned Away, Summary Returns of unaccompanied migrant children and adult asylum seekers from Italy to Greece*, January 2013, accessible at: [http://www.hrw.org/sites/default/files/reports/italy0113ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/italy0113ForUpload_0.pdf)

244 This practice by the Italian authorities is inter alia based on a translation error in the Italian language version of the Dublin Regulation which states under Art. 3(3) that “*Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a country, in compliance with the provisions of the Geneva Convention*”. The authoritative English text in Art. 3(3) refers to a ‘*third country*’ and hence outside the participating States of the Dublin Regulation. The Italian version of the Dublin Regulation omits the word ‘*third*’ and therefore the Italian authorities maintain that this confers a right to send people without formalities to other Member States under the Dublin Regulation. For further information see UNHCR *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece* (Application No. 16643/09), October 2009, available at: <http://www.unhcr.org/refworld/docid/4afd25c32.html>.

245 UNHCR *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece* (Application No. 16643/09), October 2009, pg. 7.

246 Law 2406/1996 Agreement between the Republic of Bulgaria and the Republic of Greece on the Readmission of Illegally Staying Persons, signed in Athens on 15 December 1995. The text of the agreement is not public, only the decision of the Council of Ministers to confirm the agreement is published.

247 For further information see *Arbitrariness regarding access to the asylum procedure in Bulgaria*, Information Note, Dr. Valeria Ilareva 2 January 2012, accessible at: [http://lcrien.files.wordpress.com/2012/01/information\\_note\\_access.pdf](http://lcrien.files.wordpress.com/2012/01/information_note_access.pdf) and <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR29/60-61.pdf>

back under the readmission agreement to **Greece**.<sup>248</sup> An indication that this may be occurring can be seen by the sharp rise in the number of persons returned under the readmission agreements from 79 in 2010 to 230 in 2011.<sup>249</sup> The vast majority of these readmissions are under the agreement with **Greece**. This can be derived from the fact that following the judgments by ECtHR and CJEU, **Bulgaria** ceased sending outgoing requests to **Greece**. The Bulgarian case study below highlights the manner in which the Bulgarian authorities apply the readmission agreement in a way that can hinder access to an asylum procedure for individual asylum seekers.



### Bulgarian Case Study:

*On 15 December 2010, an Iraqi family consisting of a single mother and two children were found hidden in a truck by Bulgarian authorities after entering Bulgaria from Greece. The asylum seekers had boarded the truck at an unspecified location outside Greece. They fled persecution in Iraq on the basis that the principal asylum seeker's husband had been killed and her son had been kidnapped. The mother was in a very fragile physical and mental state as she had also suffered violence in Iraq. On 16 December 2010 the Bulgarian border police issued orders for their deportation as irregular migrants under the readmission agreement and they were placed in an immigration detention centre in Sofia. The family requested asylum and their applications reached SAR on 22 December 2010. However the asylum authority did not register their applications for asylum in spite of repeated requests by the family with the help of a lawyer on 4, 14 and 25 January 2011. On 13 January 2011 the mother was hospitalized in Sofia due to illness. On 9 February 2011 each of the asylum seekers, represented by a lawyer instituted proceedings before the Sofia City Administrative Court, requesting the Court to compel SAR to register and process their asylum applications. At the same time a Rule 39 interim measure was submitted to the European Court of Human Rights to prevent their immediate deportation to Greece. The explanation provided by the Bulgarian asylum authority for its inaction to register the asylum seekers was because they did not want to interfere in the powers of the Border Police to return irregular immigrants under the readmission agreement between Bulgaria and Greece.<sup>250</sup> The State Agency for Refugees (SAR) stated that their intention had been to "process the case as one under the Schengen agreement", the latter's entry into force for Bulgaria being imminent despite the fact that the applicants had requested asylum. The European Court of Human Rights granted a Rule 39 interim measures against the family's removal and on the basis of subsequent national Court challenges the family were registered as asylum seekers in May 2011 and were subsequently granted subsidiary protection.<sup>251</sup>*

### 10.1.3. Dublin liaison officers

Liaison officers for the purpose of the Dublin Regulation appear to be employed by only a certain number of Member States, predominantly those with larger Dublin units and resources. Dublin liaison officers perform a variety of functions such as liaising with national authorities in a receiving Member State in individual cases to exchanging information and policy developments in the field of asylum and the Dublin Regulation. The presence of Dublin liaison officers in other Member States serves as a form of practical cooperation for the efficient functioning of the Dublin system.

<sup>248</sup> The national expert Valeria Ilareva has gathered information as a law practitioner in Bulgaria from the cases she has observed.

<sup>249</sup> These statistics were obtained from the Bulgarian Migration Directorate.

<sup>250</sup> Agreement between the Republic of Bulgaria and the Republic of Greece on the Readmission of Illegally Staying Persons, signed in Athens on 15 December 1995.

<sup>251</sup> ECHR, *Kerim and Others v. Bulgaria*, Application no. 28787/11. This case was subsequently struck out by the ECtHR as the applicants were registered as asylum seekers in Bulgaria and were not at risk of further removal to Greece.

**Table 4: Dublin Liaison Officers present in Member States**

Member State	Dublin Liaison Officers Presence in Member States
The Netherlands	Present in Belgium & Germany
Germany	Present in the Netherlands, France, Greece, UK, Ireland, Poland, Italy & Hungary
Switzerland	Present in Italy as part of a Pilot Project
UK	Italy

The Dutch IND Dublin liaison officers have regional responsibility for a number of Member States depending on where they are stationed, so for example, the Dutch liaison officers present in **Belgium** are also responsible for the **UK** and **France**, whilst those in **Germany** are also responsible for **Switzerland, Austria** and the **Czech Republic**. These liaison officers stationed abroad are responsible for conducting research and collecting updates on the latest developments in policy linked to the Dublin Regulation in their respective countries.

Dublin liaison officers from **the Netherlands, Belgium** and the **UK** are present in **Germany**. The German liaison officers stationed in other Member States are tasked with providing an advisory and mediating role with respect to individual asylum seekers and collecting updates on relevant policy developments as well as exchanging country of origin information and national jurisprudence with the host Member State.

Currently in **Greece** there is one liaison officer present from **Germany** based at the Greek Police Headquarters. Previously in 2010 there was also a liaison officer from **the Netherlands** present in **Greece**. At that time both Dublin liaison officers were tasked with ensuring that asylum seekers transferred from their respective Member States received access to the asylum procedure in **Greece**. Since the suspension of transfers from **Germany** to **Greece** the German Dublin liaison officer now co-operates with the Greek authorities in relation to individual cases where **Germany** may be responsible and also provides technical assistance on asylum issues to the Greek authorities.

The Italian Dublin Unit hosts two Dublin liaison officers from the **UK** and **Germany** who intervene in individual cases where applicants are particularly vulnerable in order to facilitate solutions to their cases. Additionally, **Switzerland** has recently sent a Dublin liaison officer to Rome, as part of a pilot project aimed at exploring closer co-operation in relation to the Dublin Regulation. This is due to the fact that **Italy** is **Switzerland's** most important partner under the Dublin Regulation. After the conclusion of this pilot project, the Swiss authorities will evaluate whether a liaison officer will be stationed in Rome permanently, or not, with the Italian authorities consent.<sup>252</sup>

Similarly, **France** employs a general liaison officer for immigration questions in some of its European embassies. These persons are not Dublin liaison officers specifically but their mission is to facilitate cooperation between the French authorities and their European counterparts.

<sup>252</sup> Federal Department of Justice and Police, Press Release, 20 September 2011, <http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2011/2011-09-200.html>.

## 10.2. Heterogeneity in the application of the Dublin Regulation within Member States

The Dublin system, as established by way of regulation under EU law has direct effect in Member States. Nevertheless, it is evident that Member States' practice varies in relation to certain aspects of the Dublin system. Information was also gathered on whether there was a consistent application of the Dublin Regulation at the national level. Whether there is varied practice or not within a specific Member State depends on whether the administrative functions for applying the Dublin Regulation are centralized in that State.

The fact that there is a centralized system with only one Dublin office operating within the national authorities in **Slovakia, the Netherlands** and **Greece** means that in practice there is a high level of uniformity in decisions concerning the application of the Dublin Regulation within those States. As regards **Switzerland**, within the FOM there is consistency in relation to Dublin Regulation decisions. However, varied practice is reported in relation the practice of conducting Dublin transfers because this is the responsibility of the regional cantons.

In **France** there is divergent practice across the different Prefectures.<sup>253</sup> This variation in practice relates not only to different interpretations of certain concepts such as the humanitarian clause, but also to the procedures put in place. Some Prefectures, for example, regularly summon the asylum seeker to give them progress updates on the Dublin procedure or to verify that they have not absconded, whilst others only contact the asylum seeker to inform him/her of the transfer decision.

Although there are two centralized Dublin units established in **Germany** the practice across these regions is varied. This is due to the fact that local branch offices of BAMF, spread throughout Germany, implement different aspects of the Dublin procedures. The method of conducting interviews, for example, and the duration of the procedures are by no means homogenous in the different government branches. Further regional differences exist due to the fact that Dublin transfers are carried out by regional or local Aliens Authorities. The impact of these differences is highlighted in relation to practice surrounding notification of transfer decisions. Since summer 2011, four out of 16 Federal States issue a Dublin decision a few days before the planned removal in order to inform the person affected, enabling him/her to take the opportunity to submit an appeal, whilst in all other Federal States, the practice remains of notifying the asylum seeker of his/her removal on the day of transfer, subject to some regional exceptions.

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Effective cooperation is central to the functioning of the Dublin system. Any arrangement for determining responsibility for examining asylum applications can only operate efficiently with good communication and partnership between Member States.<sup>254</sup> In accordance with the principle of sincere cooperation under EU law Member States must provide accurate, detailed information in consultations with one another to enable the correct identification of the responsible country for the examination of an asylum claim.<sup>255</sup> Cross-agency cooperation at the national level is also necessary for the smooth operation of the Dublin system. Nevertheless this study shows variation in practices related to the Dublin Regulation both between Member States and at the national level. Steps must be taken by national authorities to ensure consistency and streamline Dublin procedures at the national level so that for instance an asylum seekers' access to procedural rights is not dependent on his/her location in that Member State.

253 There are 32 Prefectures all together across France.

254 It is also important to ensure that the fundamental rights of applicants with respect to the processing of their personal data is protected in consultations between Member States (Art. 8 CFR).

255 Article 4(3) TEU Treaty on European Union: *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The presence of Dublin liaison officers in a number of Member States is a positive practical cooperation mechanism to enhance mutual trust between countries. It is also one way of enabling administrative authorities in the requesting Member State to gain greater knowledge on the conditions in the requested Member State.

As regards other practical cooperation measures, a significant number of Member States use bilateral agreements to accelerate the operation of the Dublin procedure whilst simplifying the process of assigning Member State responsibility. Although bilateral agreements can be used, they must not be applied in a manner which violates the fundamental rights of asylum seekers. The readmission agreements that Bulgaria and Italy have established with Greece are particularly concerning in that their application may lead to persons in need of international protection being sent back to Greece, in violation of their fundamental rights under international human rights law. The duty to respect the right to asylum cannot be circumvented by the application of bilateral readmission agreements. In accordance with the principle of *pacta sunt servanda* a Member State cannot evade its obligations under international human rights law by relying on commitments made under bilateral readmission agreements.<sup>256</sup> Equally given that EU law takes precedence these readmission agreements must not be used to disregard obligations under the Dublin Regulation. It is clear that these readmission agreements cannot be applied in good faith in accordance with international law as long as there is no system in place both in practice and in law to properly identify persons in need of international protection.

## Recommendations

### Member States

**Readmission agreements should not be used to circumvent Member States obligations under the Dublin Regulation and international human rights and refugee law.**

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<sup>256</sup> See *Hirsi Jamaa & Others v Italy*, Application no. 27765/09) 23 February 2012.

## XI. The Implementation Of European Jurisprudence At National Level

Over recent years there has been a significant increase in jurisprudence concerning the Dublin Regulation at both the national and European level. It is not inaccurate to say that the Dublin system is one of the most litigated pieces of legislation within the EU asylum *acquis*. Several factors have influenced this development *inter alia* the expansion of scope for preliminary references to the CJEU post the Lisbon Treaty and the stark deficiencies in asylum systems in some Member States, most notably with respect to Greece. This section of the report provides a brief overview of Member States' implementation of the main judgments from the ECHR and CJEU concerning the Dublin Regulation by way of changes to national policies, practices or jurisprudence.<sup>257</sup>

### 11.1. The ECHR *M.S.S. v Belgium and Greece* judgment and the joined CJEU cases *NS & Others C-411/10 and C-493/10*

*M.S.S. v Belgium and Greece* was the European Court of Human Rights' landmark decision with respect to the Dublin Regulation. It concerned an Afghan asylum seeker who lodged an asylum application in Belgium. Based on the Dublin Regulation, Belgium sent him back to Greece, the country through which he had irregularly entered the EU. In Greece he was placed in detention twice, during which he was subjected to degrading detention circumstances. After his release, he was abandoned to live on the streets without any support by the Greek authorities. The Courts' Grand Chamber found Greece to be in violation of Art. 3 ECHR both with respect to the detention and living conditions there and regarding deficiencies in the asylum procedure where there was held to be a violation of Art. 13 in conjunction with Art. 3 ECHR. With respect to the Dublin Regulation what is important to note is that Belgium was held to be in violation of Art. 3 and Art. 13 ECHR for exposing the asylum seeker to the risks arising from the deficiencies in the asylum procedure in Greece. The Belgian authorities knew or ought to have known that the applicant had no guarantee that the Greek authorities would seriously examine his asylum application. Given the evidence presented on the situation in Greece, the Belgian authorities could not presume that the applicant would be treated in conformity with human rights obligations but it was up to them to first verify how the Greek authorities applied their legislation on asylum in practice.

The joined CJEU cases of C-411/10 from the UK Court of Appeal and C-493/10 the Irish High Court dealt with the same issue of transfers to Greece within the context of EU law. The CJEU Grand Chamber held that EU law precludes a conclusive presumption that the responsible Member State observes the fundamental rights of the EU. It declared that a Member State may not transfer an asylum seeker to the responsible Member State where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in a receiving 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 Art. 4 of the Charter of Fundamental Rights. The principle in this judgment has been codified within the Dublin recast compromise text under Art. 3(2) albeit without the important safeguard in the judgment that

<sup>257</sup> This section does not contain information on the implementation of the CJEU rulings in the cases of C-179/11 and C-245/11 due to the fact that the Court only issued these decisions relatively recently in September and November 2012 respectively. Therefore it still remains to be seen how they will interpreted and implemented at the national level.

if the examination of further criteria to determine if another Member State is responsible takes an unreasonable amount of time, the present Member State must itself examine the asylum application by using the sovereignty clause.<sup>258</sup>

### 11.1.1. Transfers to Greece

The majority of Member States officially suspended transfers to **Greece** in the direct aftermath of the *M.S.S. v Belgium and Greece* judgment.<sup>259</sup> However, a number of Member States have not issued a general policy prohibiting Dublin transfers to **Greece**, as reported in **Austria, Italy, Slovakia** and **Switzerland**. In **Austria**, for example, an individual assessment of each case continues to be made, but there have been relatively few transfers in practice to **Greece** since January 2011. Similarly, in **Switzerland**, on the basis of an individualized assessment, certain persons may be transferred to **Greece**, for example, the authorities held it was valid to return someone who has access to the asylum procedure and accommodation there. Since a leading Constitutional Court decision in May 2011, **Slovakia** has not transferred an asylum seeker to **Greece**. Any official policy prohibiting the transfer of asylum seekers to **Greece** has not been issued in **Slovakia**, but when it is indicated that **Greece** is the responsible Member State, the Slovak authorities simply do not apply the Dublin procedure and rather examine the asylum application themselves.

Likewise, in **Italy**, there has been no general official suspension of Dublin transfers to **Greece**. An individual examination of each case is conducted. In 2011, the Italian authorities sent requests in 210 cases to **Greece** to take responsibility for asylum applications. Nevertheless, in practice, only two actual transfers were conducted to **Greece** from **Italy** in the context of the Dublin Regulation. The Italian Courts have adopted the principles in the *M.S.S. v Belgium and Greece* judgment and have increasingly stepped in to stop transfers to **Greece**. In a recent judgment by the TAR LAZIO, the Italian authorities were forced to pay the legal costs for the case, as the judge outlined that they had not respected the principles laid down in the European jurisprudence stating that “*the non-respect of European principles concerning Greece on the part of the Italian Government implies serious responsibilities both on the diplomatic side and on the image of the country*”.<sup>260</sup>

In August 2011, the Federal Administrative Court in **Switzerland** strengthened the preconditions set in place for conducting a Dublin procedure with **Greece** by requiring that the asylum seeker has obtained residence status there.<sup>261</sup> In practice, the FOM applies the sovereignty clause in most cases concerning **Greece**. However, it should be noted that between February 2011 and February 2012, there were 14 cases of Dublin transfers to **Greece** from **Switzerland**.<sup>262</sup>

The policy of **Bulgaria** towards suspension of transfers to **Greece** is divided into two different phases. In the first phase, from January 2011 to August 2011, the SAR and the Bulgarian Court continued carrying out Dublin transfers to **Greece** despite the *M.S.S. v Belgium and Greece* ruling. Within that time period, **Bulgaria** sent 63 outgoing requests and carried out 44 transfers in practice

<sup>258</sup> Recast Art. 3(2) “...Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State becomes the Member State responsible for examining the application for international protection”

<sup>259</sup> A number of Member States had already unofficially suspended transfers to Greece in the lead up to the *M.S.S. v Belgium and Greece* judgment, for example, Belgium suspended transfers in October 2010. This was for a number of reasons including the fact that the European Court of Human Rights indicated to Member States that, pending the adoption of the *M.S.S. v Belgium and Greece* judgment, the Court would grant Rule 39 of the Rules of the Court in any case where an asylum seeker in another Contracting State challenges his or her return to Greece. The European Court of Human Rights invited Member States to refrain from issuing transfers in respect of asylum seekers who claimed that their return to Greece might expose them to ill-treatment in violation of the Convention. For further information see ECRE/ELENA *Research on ECHR Rule 39 interim measures*, April 2012; UNHCR *Updated information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, 31 January 2011, accessible at: <http://www.unhcr.org/refworld/pdfid/4d7610d92.pdf>

<sup>260</sup> TAR-LAZIO c. N. 6471/2009 S. N. 7880/2012 of September 19th 2012.

<sup>261</sup> Federal Administrative Court, BVGE 2011/35 of 16 August 2011.

<sup>262</sup> FOM letter to the Swiss Refugee Council 24 January 2012.



to **Greece**. During these months it was also noted by legal practitioners' that the SAR started to refrain from registering asylum seekers who entered **Bulgaria** irregularly through **Greece**. The second phase of Bulgarian policy towards transfers to **Greece** became apparent in the period subsequent to August 2011.<sup>263</sup> Since then, no transfers under the Dublin Regulation have taken place and the Bulgarian authorities have stopped sending Dublin requests to **Greece**. Despite this good practice, it appears that the readmission agreement with **Greece** is being applied in its place. There have been reported instances of **Bulgaria** preventing the registration of claims from asylum seekers who transited **Greece**, treating them as irregular migrants so they can be removed under the readmission agreement to **Greece**.<sup>264</sup>

**France** suspended Dublin transfers to **Greece** on 2 March 2011 until further notice. However, there were some initial difficulties in applying it due to some transfers of persons not being immediately suspended and the fact that some asylum seekers had to wait a number of months before their request for asylum was registered at the competent Prefecture. Since the *M.S.S. v Belgium and Greece* judgment, in **Hungary**, transfers to **Greece** have only been carried out on the basis when asylum seekers explicitly consent to being sent there. The Federal government in **Germany** announced a general policy of suspending transfers to **Greece** until January 2012. This was subsequently extended to January 2013. In December 2012, the decision was made by the German government to extend this policy of suspension till January 2014.

In **the Netherlands**, a general suspension of transfers to **Greece** was implemented in October 2010.<sup>265</sup> This was a result of a letter from the European Court of Human Rights requesting that no transfers were conducted pending the Grand Chamber ruling in the *M.S.S. v Belgium and Greece* case.<sup>266</sup> At that time, **Greece** was responsible for the asylum applications of approximately 1900 asylum seekers present in **the Netherlands**.<sup>267</sup> As a result of this change of policy, **the Netherlands** examined approximately 2050 'Greek' Dublin cases.<sup>268</sup> Following the ECtHR Court ruling, **the Netherlands** effectively prohibited all transfers under the Dublin Regulation to **Greece**. According to Dutch policy, it is the asylum seeker's responsibility to rebut the presumption that another Member State is safe and respects its obligations under both EU and International refugee and human rights law.<sup>269</sup> Though there has been a suspension on transfers to **Greece**, the policy rules in the Dutch Aliens Circular have not yet been brought into line with the *M.S.S. v Belgium and Greece* judgment and C-411/10 and C-493/10 judgments, and there is no indication that a revision of the Aliens Circular is planned on this issue.

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<sup>263</sup> It is unclear why there was only a change of policy in August 2011 by the Bulgarian authorities, several months after the issuing of the *M.S.S. v Belgium and Greece* ruling.

<sup>264</sup> For further information on the impact of the readmission agreement between Greece and Bulgaria see Chapter X, 10.1.2 above.

<sup>265</sup> This suspension was only applicable to cases where asylum seekers appealed their removal to Greece on the basis of a risk of a violation of ECHR.

<sup>266</sup> ECRE/ELENA *Research on ECHR Rule 39 interim measures*, April 2012.

<sup>267</sup> Letter from the Minister of Justice, 13 October 2010, Kamerstukken II 2010/2011, 19 637, no.1363.

<sup>268</sup> Once the Netherlands started examining applications of Dublin applicants who entered through Greece, around 100 additional Dublin applicants reported to the IND, who had previously departed to 'an unknown destination'. See Ministry of Interior and Kingdom Relations '*Rapportage Vreemdelingenketen januari-juni 2011*' p. 18. At the end of November 2011, more than 90% of the 'Greek' asylum requests had been processed, of which 60% were granted a permit. See reply to Parliamentary Questions: '*Beantwoording schriftelijke vragen met kenmerk 2011Z24518 (het lid Spekman over Rapport Vreemdelingenketen juli - januari 2011)*' (31 January 2012).

<sup>269</sup> Aliens Circular C2/3.6.1.

### 11.1.1.1. Interpretation of the Principles in the Joined CJEU cases of *NS & Others C-411/10 and C-493/10*

Currently, there is diverging practice amongst Member States concerning the interpretation of paragraph 107 in *NS & Others*.

#### **NS & Others C-411/10 and C-493/10**

**107:** Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

**108:** The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible, which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

When a transfer is not possible to **Greece**, administrative authorities in **Switzerland, Austria** and **Germany** sometimes try to identify another Member State as responsible usually on the basis of an irregular border crossing under Art. 10. The FOM in **Switzerland** has sometimes requested **Hungary** or **Italy** to take over responsibility for an asylum application where **Greece** was the primary responsible Member State.

The BAMF in **Germany** considers that paragraph 107 has given clarity as to whether the responsibility of other Member States can be examined. This has been explained by representatives of BAMF as meaning that **Germany** is entitled to transfer an asylum seeker to **Italy** if they entered **Germany** via **Greece** and **Italy**. BAMF representatives claim that **Italy** is equally responsible for invoking the sovereignty clause for all asylum seekers who entered **Italy** via **Greece** then **Germany** and therefore **Italy's** obligation to invoke the sovereignty clause may antecede **Germany's** obligation. Such an interpretation of the CJEU ruling seems at variance with the overall objective of the Dublin Regulation to rapidly identify one responsible Member State for the examination of an asylum claim. However, a similar practice is evident in **Austria**, in that theoretical responsibility by **Greece** is no longer assumed and instead the Austrian authorities considers that the next Member State which the asylum seeker transited is responsible under the Dublin Regulation. Due to this diverging practice, the Constitutional Court ordered the Austrian Asylum Court to request a preliminary ruling seeking clarification by the CJEU which the Austrian Court did, in the case of C-394/12 which is still pending before the CJEU at the time of writing.<sup>270</sup>

#### **National Facts:**

**Austria:** In 2010 Greece accepted to take back 494 asylum seekers from Austria and 178 persons were actually transferred there under the Dublin Regulation. In 2011 Greece accepted to take back 124 asylum seekers from Austria and only two persons were transferred there under the Dublin Regulation (Source: Parliamentary enquiry to the Austrian Ministry of the Interior).

**Greece:** In 2011 a total of 55 asylum seekers were transferred to Greece under the Dublin Regulation, 43 of whom came from Bulgaria (Source: Eurostat statistics). From January to September 2012 there were 38 transfers to Greece from other Member States (Source: Greek Dublin Unit).

<sup>270</sup> See VfGH 27.06.2012, U330/12. Accordingly the Austrian Asylum Court sent a number of preliminary reference questions to the CJEU concerning the interpretation of Art. 18, 19 and Art.10 Dublin Regulation in the case of C-394/12 which is still pending before the Court at the time of writing this report.



### Case Study:

*In September 2012 the Swiss authorities transferred a Syrian family to Greece that had applied for asylum on the grounds that this family had residence permits in Greece when they claimed asylum in Switzerland (Art. 9 Dublin Regulation). The family was transferred to Greece despite the fact that their residence permits had expired. (National litigation in Switzerland is still pending in this case).*

## 11.1.2. Transfers to other Member States

Recently questions have been raised concerning reception conditions and asylum procedures standards in relation to transfers to countries such as **Hungary, Italy and Malta**.<sup>271</sup> For example in **Germany** there have been more than 200 administrative Court decisions since January 2011 stopping transfers to **Italy** under the Dublin Regulation. *NS & Others* are often cited in decisions by the administrative authorities in **Austria** in relation to Dublin transfers to **Italy and Hungary** but only to emphasise that conditions in Member States in those Member States are 'not as bad as **Greece**'. Italian Courts have in individual cases stopped transfers to **Malta and Hungary** on the basis of the conditions in those States in light of the CJEU rulings.

Some national Courts view **Greece** as the general benchmark against which all Member States are to be compared with when faced with challenges from asylum seekers on the basis that the conditions in the responsible Member State may result in a violation of ECHR or the Charter of Fundamental Rights. Frequently national jurisprudence contains statements to the effect that a particular Member State respects the 1951 Refugee Convention, the ECHR and relevant EU law, holding that there is nothing to the contrary to suggest otherwise in country reports on that Member State. On occasion external factors in the responsible Member State are taken into account for example interim reliefs were granted in some cases in German Courts to stop removals to **Italy**, a relevant fact at that time being the large influx of refugees from North Africa.<sup>272</sup>

A few common trends can be drawn from the jurisprudence gathered as part of this research.<sup>273</sup> The main factors taken into account by Member States' administrative authorities and Courts when evaluating the risks that asylum seekers may face in a particular State are whether:

- a) the Commission has started infringement proceedings before the CJEU against that Member State for non-compliance with relevant EU asylum legislation;<sup>274</sup>
- b) regular and unanimous reports by NGOs have been published documenting practical problems in the implementation of relevant EU asylum legislation in that Member State;
- c) UNHCR and/or NGO's have formally recommended that transfers to certain Member States are suspended.

Depending on the individual circumstances of a case national Courts sometimes take into account whether the administrative authorities obtained pre-removal assurances for example whether housing was available for particularly vulnerable persons.<sup>275</sup> Member States have a duty to investigate the conditions in the responsible Member State particularly when different parties have raised concerns over a period of time. The asylum seekers' past experiences in the responsible Member State is

<sup>271</sup> For example a transfer decision was suspended by the Regensburg Administrative Court RO 7 E 11.30131 on the basis of the detention practice and conditions in Malta, which were held to be in violation of Art. 3 ECHR, accessible at: [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18418.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18418.pdf); Similar cases from German Courts which granted interim relief against deportation to Malta on this issue include: Administrative Court Regensburg Decision of 06.09.2011 - RN 7 E 11.30429; Administrative Court Darmstadt Decision of 15.03.2011 - 4 L 316/11.DA.A(1); Administrative Court Magdeburg Decision of 28.06.2011 - 5 B 174/11 MD; Administrative Court Regensburg Decision of 24.06.2011 - RO 7 E 11.30281; Administrative Court Schleswig-Holstein Decision of 08.06.2011 - 11 B 36/11.

<sup>272</sup> Frankfurt Administrative Court 7/3/2011 7 L. 449/II.F.A.

<sup>273</sup> Case summaries of all the jurisprudence gathered as part of this project are available in the jurisprudence database at [www.dublin-project.eu](http://www.dublin-project.eu)

<sup>274</sup> Austrian Asylum Court, S22 423.415-1/2011-3E, 16 January 2012 in the context of transfers to Italy; See also Italian TAR decision Cn. 3310/2011 regarding the cancellation of a transfer decision to Hungary.

<sup>275</sup> Austrian jurisprudence from December 2011: S16 422.756-1/2011-5E; S16 422.757-1/2011-5E; S16 422.758-1/2011-5E; S16 422.759-1/2011-5E; S16 422.760-1/2011-5E.

also a relevant factor in determining whether they are at risk upon return to that State.<sup>276</sup> A small number of Courts have also addressed the issue of challenges to transfers on the basis of different asylum policies in Member States, an example of which is provided below concerning a Court case in **Switzerland** challenging a transfer to **Romania** on the basis of their policy on returns.<sup>277</sup>

## Jurisprudence

### Challenges to transfers on the basis of Member State policy

A Tibetan asylum seeker claimed asylum in Switzerland after having claimed asylum in Romania the previous year. He claimed the interpreter in the Romanian asylum procedure had leaked some of his information to the Chinese authorities as his brother there was subsequently arrested. He feared being sent back to China if he was transferred to Romania. The Federal Administrative Court in Switzerland suspended the transfer to Romania. Letters were submitted from the Romanian Council for Refugees demonstrating that Romania had a policy of returning Tibetans to China. This is in contrast to Swiss practice whereby according to national jurisprudence most Tibetans are generally granted asylum, as expulsion to China would violate the *non-refoulement* principle. The transfer order was cancelled and the case was remitted back to the FOM to apply the sovereignty clause (Federal Administrative Court Switzerland E-5265/2011 7 December 2011).

## 11.2. The CJEU case of *Migrationsverket v Petrosian* C-19/08

The CJEU ruling of C-19/08 concerned the interpretation of Art. 20(1)(d) and Article 20(2) of the Dublin Regulation where a national procedure has an appeal with suspensive effect and accordingly at what stage does the period for the implementation of transfer start to run from under those provisions. The CJEU held that with respect to time limits, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

Most Member States researched did not have any further information on this apart from acknowledging that it is applied in cases where suspensive effect is granted at the appeal stage. In **Austria**, it was reported that in many cases when appeals granted are remitted back to the Federal Asylum office there may be more than one Dublin decision and appeal. Therefore, as the deadline for transfers starts anew each time, this makes the whole process a protracted one and asylum seekers can be subject to considerable delays before their asylum application is examined by a Member State.

In **Switzerland**, the national authorities apply this Court ruling but there is one point that may require further clarification as to what happens to the time limit when the Court grants an appeal against a Dublin decision and the case is sent back to be re-examined by the FOM. In such a scenario there is ambiguity as to when the new six month deadline for implementation of the transfer starts i.e. at the moment of the decision of the Court to send the case back to the FOM or at the moment of the new FOM decision. A literal reading of the CJEU ruling in C-19/08 seems to suggest that the time starts from the moment of the Court's decision to send the case back to FOM but further guidance may be required as the Dublin Regulation and operative rules do not seem to resolve this issue.

<sup>276</sup> Conseil d'Etat N° 1013868/9- regarding the transfer of an asylum seeker from France to Hungary ; see also the Conseil d'Etat decision regarding a transfer to Cyprus in Case No. 306700.

<sup>277</sup> See also Bulgaria Sofia City Administrative Decision no. 79 of 2009, Admin case no. 7450 of 2009, 30 November 2009.

The Dutch Council of State's interpretation of article 20(1)(d) is in accordance with the judgment in C-19/08. In **the Netherlands** the Council of State has also held that an interim measure under Rule 39 of the procedures of the European Court of Human Rights suspends the transfer term in article 20.<sup>278</sup> Once an interim measure has been issued an asylum seeker enjoys lawful residence in **the Netherlands**,<sup>279</sup> and may therefore not be transferred under the Dublin Regulation. An interim measure from the European Court of Human Rights is regarded as a factual barrier relating to the postponement of the moment of transfer.<sup>280</sup>

### 11.3. The CJEU case of *Migrationsverket v Kastrati* C-620/10

The CJEU case of C-620/10 concerned the effect a withdrawal of an asylum application had on the operation of the Dublin Regulation. The CJEU held that the withdrawal of an asylum application, which occurs before the Member State responsible has agreed to take charge of the applicant, has the effect that the Regulation can no longer be applicable.

Only limited information was available on the impact of withdrawing from an asylum application in the Member States researched. In **Slovakia** it was reported that the act of withdrawing the asylum application has no influence on the continuation of the Dublin procedure in relation to take back cases, but the Dublin Unit has an obligation to inform the responsible Member State about the act of withdrawal. In practice no transfer is made to another Member State when the person concerned has withdrawn their asylum application.

As regards **Switzerland**, submitting an asylum application is a personal right, so it is possible to withdraw at any time. However, according to established case law, the withdrawal of an asylum application does not impact the Dublin procedure and it may be continued as the asylum procedure and the Dublin procedure are considered to be independent of each other.<sup>281</sup>

C-620/10 is interpreted as follows in Dutch practice in **the Netherlands**, if an asylum request is withdrawn before the claim to take charge of the request is accepted by the Member State considered responsible, the transfer is cancelled because the asylum request has lost its relevance. However if the withdrawal takes place after the Dublin request was accepted by the responsible Member State, then the person concerned can still be transferred.<sup>282</sup>

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It is clear that the Dublin Regulation cannot operate in a legal vacuum detached from Member States obligations under international law. The *M.S.S. v Belgium and Greece* judgment shows that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection for those subject to the Dublin Regulation.

Both *M.S.S. v Belgium and Greece* and the joined CJEU cases of C-411/10 and C-493/10 have significantly affected the way in which the Dublin Regulation is applied in respect of transfers to Greece and to a certain extent beyond that to other Member States. Nevertheless variations still exist with respect to the interpretation of the CJEU rulings, further clarification of which should occur

<sup>278</sup> ABRvS [Council of State], 22 February 2012, case no. 201105103/1/V4.

<sup>279</sup> ABRvS [Council of State], 25 May 2004, case no. 200400863/1.

<sup>280</sup> ABRvS [Council of State], 11 November 2011, case no. 201007173/1/V4.

<sup>281</sup> FOM, Dublin Office 1, information provided in writing, 29 March 2012. It was not known whether this jurisprudence has been revised in light of C-620/10 at the time of writing this report.

<sup>282</sup> This is in accordance with previous practice in the Netherlands.

in the Court's ruling in the pending case of C-394/12.<sup>283</sup> The jurisprudence gathered as part of this project shows that Member States have a restrictive approach to identifying situations where there is a serious risk of asylum seekers' fundamental rights in other Member States than Greece despite the presence of objective evidence by NGOs and other actors. It is imperative that administrative authorities and Courts recognize that the presumption of safety within the Dublin system cannot outweigh respect for the fundamental rights of each and every person subject to it. As to when the presumption of safety is rebutted will vary depending on the circumstances of the case and Greece should not be viewed as 'the benchmark'. Therefore it is also essential that administrative authorities conduct a close and rigorous scrutiny of the individual circumstances of each case and that all persons subject to the Dublin procedure have access to an effective legal remedy in the requesting Member State.<sup>284</sup>

In the aftermath of these milestone judgments it is important to underscore the need for legal practitioners, and NGOs to monitor, report and disseminate relevant national case law regarding challenges to the Dublin transfers and the implementation of these rulings.<sup>285</sup> Awareness raising of the quality of reception conditions and asylum procedures in Member States is also central to ensuring that Member States fully comply with their international obligations when they transfers applicants under the Dublin Regulation.

## Recommendations

### Member States

**Member States must ensure that Dublin Regulation is applied in a manner consistent with the jurisprudence of the European Court of Human Rights (ECtHR) and CJEU.**

### European Commission

**The European Commission should ensure that the recast Dublin Regulation along with other EU asylum legislation is properly implemented at the national level and take infringement proceedings where appropriate.**

<sup>283</sup> The questions in the CJEU case of C-394/12 are as follows: Is Article 19 in conjunction with Article 18 of Regulation (EC) No 343/2003 to be interpreted as meaning that, following the agreement of a Member State in accordance with those provisions, that Member State is the State responsible for examining the asylum application within the meaning of the introductory part of Article 16(1) of Regulation No 343/2003, or does European law oblige the national review authority where, in the course of an appeal or review procedure in accordance with Article 19(2) of Regulation (EC) No 343/2003, irrespective of that agreement, it comes to the view that another State is the Member State responsible pursuant to Chapter III of Regulation (EC) No 343/2003 (even where that State has not been requested to take charge or has not given its agreement), to determine that the other Member State is responsible for the purposes of its appeal or review procedure? In that regard, does every asylum seeker have an individual right to have his application for asylum examined by a particular Member State responsible in accordance with those responsibility criteria? Is Article 10(1) of Regulation (EC) No 343/2003 to be interpreted as meaning that the Member State in which a first irregular entry takes place ('first Member State') must accept its responsibility for examining the asylum application of a third-country national if the following situation materialises: A third-country national travels from a third country, entering the first Member State irregularly. He does not claim asylum there. He then departs for a third country. After less than three months, he travels from a third country to another EU Member State ('second Member State'), which he enters irregularly. From that second Member State, he continues immediately and directly to a third Member State, where he lodges his first asylum claim. At this point, less than 12 months have elapsed since his irregular entry into the first Member State. Irrespective of the answer to Question 2, if the 'first Member State' referred to therein is a Member State whose asylum system displays systemic deficiencies equivalent to those described in the judgment of the European Court of Human Rights of 21 January 2011, M.S.S., 30.696/09, is it necessary to come to a different assessment of the Member State with primary responsibility within the meaning of Regulation (EC) No 343/2003, notwithstanding the judgment of the European Court of Justice of 21 December 2011 in Joined Cases C-411/10 and C-493/10 [*NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner*]? In particular, can it be assumed that a stay in such a Member State cannot from the outset constitute an event establishing responsibility within the meaning of Article 10 of Regulation (EC) No 343/2003?

<sup>284</sup> See for further analysis on this issue: Violeta Moreno Law, 'Dismantling the Dublin System: *M.S.S. v Belgium and Greece*', European Journal of Migration and Law Vol 14 No. 1 2012, pp.1-31; Cathryn Costello, 'Courtting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) Human Rights Law Review, 287; Patricia Mallia 'Case of *M.S.S. v Belgium and Greece*, a Catalyst in the Re-thinking of the Dublin II Regulation' Refugee Survey Quarterly, Vol. 30 No.3, pp. 107-128.

<sup>285</sup> International Commission of Jurists, workshop on migration and human rights in Europe: Non-refoulement in Europe after *M.S.S. v Belgium and Greece*, July 2011. In this context see also the European Database on Asylum Law (EDAL), accessible at: <http://www.asylumlawdatabase.eu/>.

## XII. Conclusion

As the ten year anniversary of the Dublin Regulation approaches, the findings in this report raise questions as to the *raison d'être* of such a system which frequently fails to achieve its objective of identifying a Member State responsible for the examination of an asylum claim. Many of the issues identified by UNHCR and ECRE in 2006 are as applicable today as they were then.<sup>286</sup>

A harmonized application of the Dublin Regulation is far from reality in the eleven Member States, which have been the subject of this study. There are vast and worrying disparities in the way different Member States apply the binding Dublin criteria and discretionary provisions. Procedural safeguards vary significantly both within and across Member States. Asylum seekers in the Dublin procedure are often subjected to less than adequate reception conditions with Member States frequently resorting to the use of detention to secure Dublin transfers. Cooperation between Member States is inconsistent leading to lengthy delays in identifying a responsible Member State or, in the worst case, identifying no Member State, thus perpetuating the situation of “*asylum seekers in orbit*”. This report also shows that readmission agreements are sometimes implemented by Member States in a manner that results in evading obligations under the Dublin Regulation and under international human rights law, most notably the fundamental right to asylum.

It is acknowledged that this report comes at a time when EU institutions and Member States are engaged in the revision of the Dublin Regulation as opposed to a fundamental re-thinking of the Dublin system. This is regrettable as though an improved recast Dublin Regulation will be helpful it may not in itself rectify a number of problems identified in this report. Nevertheless, it is important to highlight the problems characterizing the current operation of the Dublin system to ensure that they do not occur again under this next phase of the CEAS.

In this new stage of the CEAS, the challenge for Europe will be to apply the recast Dublin Regulation effectively, while fully respecting the fundamental rights of those subject to it. Improvements in the application of the Dublin Regulation alone will not suffice, as the Dublin system will continue to create hardship for asylum seekers as long as there is an ‘asylum lottery’ in Europe. Therefore a harmonized application of EU protection standards, which meet international and regional protection obligations, is essential in the next stage of the CEAS. This research calls for the position of the Dublin system as a ‘*cornerstone in building the CEAS*’ to be fundamentally reviewed as other components of the CEAS and EU solidarity tools are built up.<sup>287</sup> Ultimately, the solution lies in replacing the Dublin Regulation with an alternative system that ensures genuine responsibility sharing and takes into account meaningful connections between asylum seekers and Member States.<sup>288</sup>

On the basis of this research, specific recommendations have been provided throughout the report. In order to ensure that the Dublin Regulation is applied in a manner consistent with the respect and protection of the fundamental rights of asylum seekers the following additional measures are recommended:

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<sup>286</sup> ECRE/ELENA *Report on the Application of the Dublin II Regulation in Europe*, March 2006; UNHCR *The Dublin II Regulation: A UNHCR Discussion Paper*, April 2006.

<sup>287</sup> Recital 9 of the Dublin recast Dublin compromise text.

<sup>288</sup> ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008 [‘Dublin Reconsidered’].

## Recommendations

### Fundamental Rights Agency (FRA)

**FRA should undertake research on the impact of the Dublin system on asylum seekers fundamental rights in Europe**

### European Asylum Support Office (EASO)

**In view of the establishment of a mechanism for early warning, preparedness and crisis management, EASO should:**

**create expert workshops competent to address problematic national practices related to the application of the Dublin Regulation which will include organizations with specific expertise in this field.**

**enhance and publish the collection of data on the quality and operation of Member States' asylum systems that it obtains.**

**EASO should conduct a thorough review of the implementation of the European Asylum Curriculum Dublin Regulation module by Member States at the national level.**

### Council of Europe

**The Council of Europe Commissioner for Human Rights should continue to monitor the impact of the Dublin system and press Member States to apply the Dublin Regulation in a manner consistent with their ECHR obligations.**



# *Annexes*



# Annex I

## Definitions

- **Take Charge: Application for Asylum:** means an application made by a third-country national which can be understood as a request for international protection from a Member State under the Geneva Convention (Art. 2(c) Dublin Regulation).
- **Asylum seeker/Applicant:** means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken (Art. 2(d) Dublin Regulation).
- **Dublin returnees/Dublin transferees:** asylum seekers/applicant subject to a transfer decision under the Dublin Regulation.
- **Take Charge:** 'Take charge' means the procedure under which a Member State takes responsibility for an applicant on the basis of the objective and hierarchical criteria laid down in the Regulation (such as family reasons, legal or illegal entry, etc.) and consequently has to examine the application.
- **Take Back:** 'Take back' refers to the situation where the applicant leaves the territory of the responsible Member State and enters another Member State where he or she might apply again for international protection or might stay without permission, in which case the responsible Member State must at the latter's request take him/her back.
- **Incoming Request:** Requests for an asylum seeker to be taken back in order to complete his/her asylum application, or for taking charge of an asylum seeker in order to examine his/her asylum application, sent by another Member State.
- **Outgoing Request:** Requests for an asylum seeker to be taken back to complete his/her asylum application, or for taking charge of an asylum seeker in order to examine his/her asylum application, sent by the referring Member State to another Member State.
- **Requesting/Transferring Member State:** these terms are used interchangeably in the Dublin report to signify that the Member State is sending an outgoing request and/or transferring an asylum seeker to the receiving Member State.
- **Requested/Receiving Member State:** these terms are used interchangeably in the Dublin report to signify that the Member State is receiving an incoming request and/or receiving an asylum seeker from the requesting Member State.
- **Secondary movement:** voluntary displacement of the asylum seeker within the EU Member States to Member States different from the one of first arrival.
- **Cedolino:** a receipt provided to asylum seekers at the end of their identification procedure, which provides information on where and when his/her future appointments with the Questura will be held.
- **Prefecture:** regional delegations of the State administration in France who are in charge of registering asylum seekers and delivering residence permits.

## Annex II

# Recommendations

### European Commission

1. With respect to the forthcoming 'fitness check':
  - The European Commission should conduct a comprehensive audit of all costs associated with the Dublin system.
  - More quantitative and qualitative data should be gathered by the European Commission with the support of Member States on the impact of the Dublin system on unaccompanied children.
  - Further study should be conducted on the reasons why limited Member State responsibility is assigned on the basis of family members.
  - Monitoring national practices on the reception and detention of asylum seekers in the Dublin procedure should be prioritised by the European Commission with the support of EASO, taking into account all available sources, including UNHCR and NGOs.
2. When drafting the common information leaflet envisaged under a new implementing regulation, a test phase should be conducted with a sample group of asylum seekers to ensure that the content is sufficiently clear and understandable and presented in a user-friendly format.
3. The European Commission should ensure that the recast Dublin Regulation along with other EU asylum legislation is properly implemented at the national level and take infringement proceedings where appropriate.

### Council of Europe

1. The Council of Europe Commissioner for Human Rights should continue to monitor the impact of the Dublin system and press Member States to apply the Dublin Regulation in a manner consistent with their ECHR obligations.

### Fundamental Rights Agency (FRA)

1. FRA should undertake research on the impact of the Dublin system on asylum seekers fundamental rights in Europe.

### European Asylum Support Office (EASO)

- 1 In view of the establishment of a mechanism for early warning, preparedness and crisis management, EASO should:
  - Create expert workshops competent to address problematic national practices related to the application of the Dublin Regulation which will include organisations with specific expertise in this field.
  - Enhance and publish the collection of data on the quality and operation of Member States' asylum systems that it obtains.
2. EASO should conduct a thorough review of the implementation of the European Asylum Curriculum module on the Dublin Regulation by Member States.

## Annex II

# Recommendations

### Member States

1. The collection of statistics on the application of the Dublin Regulation should be published and enhanced in compliance with Member State obligations under Regulation (EC) 862/2007.
2. Dublin Regulation statistics should be disaggregated on the basis of sex and age.
3. Comprehensive data on the financial cost of operating the Dublin system should be collected and published by Member States.
4. With respect to unaccompanied children:
  - The principles of the best interests of the child should be the paramount consideration in identifying the responsible Member State;
  - Member States should be more consistent and assiduous in their efforts to trace family members of unaccompanied children in the Dublin procedure living elsewhere in the territory of Member States;
  - The benefit of the doubt should be applied in age-disputed cases given the margin of error and the variety of methods used in age determination procedures.
5. Member States must ensure that the principle of family unity is respected within the Dublin procedure by applying the humanitarian clause in cases where adherence to the binding criteria would result in such families being separated.
6. Member States must respect the duty to apply the sovereignty clause where a transfer would be incompatible with their obligations under international law.
7. The sovereignty and humanitarian clause should be applied in a fair, humane and flexible manner that addresses the complex and varying situations in which many asylum seekers find themselves.
8. Applicants should be regularly provided with information on the progress of their case within the Dublin procedure.
9. Applicants in the Dublin procedure should be informed of a transfer decision within a reasonable period in advance of removal.
10. Pursuant to the right to asylum guaranteed by Art. 18 of the Charter of Fundamental Rights, all persons subject to the Dublin Regulation must be guaranteed access to an asylum procedure and to a full examination of their asylum claim.
11. Immediate steps must be taken to implement the CJEU Court ruling of C-179/11 and ensure equivalent standards of reception conditions for all asylum seekers including in the Dublin procedure.
12. In order to ensure that the objective of swift access to an asylum procedure is achieved in practice, all Member States must strictly adhere to the time limits set out in the Dublin Regulation.
13. Transfers pursuant to the Dublin Regulation should not result in the imposition of re-entry bans.
14. The definition of absconding should be narrowly defined for the purposes of extending the procedural time limits under Art. 19(4) and Art. 20(2).
15. DNA testing should only be used in complex Dublin cases where necessary in the absence of other documentation proving family links. If DNA tests are a requirement for proving family links in the Dublin procedure, Member States should provide them free of charge.
16. Readmission agreements should not be used to circumvent Member States obligations under the Dublin Regulation and international human rights and refugee law.
17. Member States must ensure that Dublin Regulation is applied in a manner consistent with the jurisprudence of the European Court of Human Rights (ECtHR) and CJEU.

### NGOs operating in the field of asylum

1. Further research should be conducted on the application of the Dublin Regulation with respect to trafficking victims and LGBTI asylum seekers.

## Annex III

# Report on the Implementation of the Project

### First phase of the project

In December 2009, Forum Réfugiés-Cosi established a project entitled “*Transnational advisory and assistance network for asylum seekers under a Dublin process*” which was supported by the European Refugee Fund. This project aimed at providing more support to persons placed under the Dublin procedure in its different stages. Based on a European network of refugee-supporting organisations and associations, the project established a cross border “case referral” system.

This project consisted of two objectives, which were specific and interdependent:

- 1) to strengthen the ability of associations and organisations to inform asylum seekers on the process of being taken in charge, or taken back by Member States under the Dublin Regulation.
- 2) to ensure continuity in the legal, social and practical support provided to the asylum seeker. In practice, Dublin transfers often result in an interruption in the legal, social and medical support to which an asylum seeker is entitled.

In order to achieve these goals, the project partners<sup>288</sup> undertook research on the national application of the Dublin II Regulation, results of which were compiled in the final report.<sup>289</sup> Information booklets on national asylum systems and the application of the Dublin Regulation at national level were also created (Eight national leaflets were created and provided in six different languages: English, French, Russian, Arabic, Somali, Farsi).<sup>290</sup>

A website dedicated to the Dublin Regulation project was established during this first phase ([www.dublin-project.eu](http://www.dublin-project.eu)). It provides the latest news on the operation of the Dublin system and resources and information on the situation in each country in relation to the Dublin Regulation. In addition, the collection of tools developed within this first phase of the project are available on this website.

As another part of this first phase, an individual standardized identification sheet for asylum seekers in a Dublin procedure was designed. This file was intended to gather as much information as possible about the situation of asylum seekers subject to the Dublin procedure. The file is completed during interviews by the network member in the country of transfer and transmitted to their counterpart in the readmission country when the transfer takes place. This aims at ensuring continuity of care for the asylum seeker concerned in both the transferring Member State and the receiving Member State.

### Second phase of the project

The second European Refugee Fund project “*European network for technical cooperation on the application of the Dublin regulation*”, started in July 2011. The aim of this project is to further develop stakeholder’s capacity to deal with issues related to the implementation of the Dublin II Regulation at national and European levels. This project focused on information gathering and knowledge sharing, with a special focus on the legal and judicial aspects of the Dublin system.

This project maintains the general objectives of the first transnational Dublin project, utilizing the experience gained from that project whilst enhancing it with the additional activities. The new activities

<sup>288</sup> The partner organizations were Asyl in Not (Austria), Italian refugee Council (Italy), Comisión Española de Ayuda al Refugiado (Spain), Danish Refugee Council (Denmark), Dutch council for Refugees (Netherlands), Forum réfugiés (France), France Terre d’Asile (France), Helsińska Fundacja Praw Człowieka (Poland), Hungarian Helsinki Committee (Hungary), Irish Refugee Council (Ireland), Jesuit Refugee Service (Romania), Organisation Suisse d’Aide aux Réfugiés (Switzerland), Vluchtelingenwerk Vlaanderen (Belgium). These information leaflets are accessible at: [www.dublin-project.eu](http://www.dublin-project.eu)

<sup>289</sup> Transnational advisory and assistance network for asylum seekers under a Dublin process, Final Report, 2011.

<sup>290</sup> Information leaflets are available in the following countries: Austria, Belgium, Ireland, Denmark, Switzerland, Spain, Italy, Hungary, Romania, France, Poland and the Netherlands.

included the development of a training module for legal representatives and support staff who come into contact with asylum seekers in the Dublin procedure and to enhance knowledge on the technical application of the Dublin Regulation itself.

Most of partner organisations for the first project participated in this second phase of the project, except Ireland, Belgium and Poland.<sup>291</sup> The scope of the project was also extended to four more countries. When the network was extended, particular consideration was given to:

- a) Member States where information on the application of the Dublin procedure was scarce and where there are high stakes regarding their geographical location at the external borders of the European Union: Slovakia and Bulgaria;
- b) Member States with particular difficulties with regard to the execution of transfers to these States and the situation of asylum seekers arriving in these States: Greece;
- c) A major Member State regarding the impact of the Dublin II Regulation (i.e. a country which received a high number of in-coming and out-going requests): Germany.

## Project activities

The project activities can be divided into a number of different themes: 1) Legal, social and material assistance and follow-up for asylum seekers which includes the development of an information leaflet; 2) Enhance knowledge and share expertise on legal standards and case law among different Member States regarding the application of the Dublin II Regulation; 3) Dublin II Regulation Training Module; 4) The production of national reports and a European comparative report on the application of the Dublin II Regulation.

### 1. Legal, social and material assistance and follow-up for asylum seekers in a Dublin procedure

This activity aims to monitor the treatment of the asylum seekers in both the country of transfer and the country of readmission when the transfer actually takes place. The individual monitoring form for asylum seekers in a Dublin procedure continues to be used by the partners and has also been provided to new partners right at the start of this project. This tool is operational and it is used systematically by most of the partners.

However, monitoring asylum seekers in a Dublin procedure, and filling out the individual monitoring form is often difficult, due to lack of time with the asylum seeker or the absence of an interpreter. Some asylum seekers, therefore, received assistance from partner organisations without the form ever having been completed. Throughout the network, we have assisted and provided specific counselling to more than 1,000 asylum seekers under a Dublin procedure.<sup>292</sup>

As in the previous project, information leaflets/brochures were developed by the new partners and distributed to asylum seekers in the Dublin procedure<sup>293</sup>.

### 2. Enhance knowledge and share expertise on legal standards and case law among different Member States regarding the application of the Dublin II Regulation.

The project partners collected existing national case law on the application of the Dublin Regulation to help identify current failures as well as good practices and focusing on sensitive issues like family unity, vulnerable persons and the use of detention. This information was converted into briefing notes following an established methodology, which summarized the key legal elements of each judicial decision. 193 case summaries have been drafted and uploaded on the project website within a jurisprudence database.

<sup>291</sup> Partner organizations are: Asyl in Not (Austria), Italian Refugee Council (Italy), Comision Espanola de Ayuda al Refugiado (Spain), Dutch Council for Refugees (Netherlands), Forum Réfugiés (France), France Terre d'Asile (France), Hungarian Helsinki Committee (Hungary), Jesuit Refugee Service (Romania), Aitima (Greece), Legal Clinic for Refugees and Immigrants (Bulgaria), Human Rights League (Slovakia), European Council on Refugees and Exiles, Danish Refugee Council (Denmark) and Organisation Suisse d'Aide aux Réfugiés (Switzerland).

<sup>292</sup> Several partners organizations use the individual monitoring form on a regular basis: Asyl in Not (Austria), Hungarian Helsinki Committee (Hungary), Legal Clinic for Refugees and Exiles (Bulgaria), Human Rights League (Slovakia), Forum réfugiés-Cosi (France) and France Terre d'asile (France).

<sup>293</sup> New information leaflets were provided for the following countries: Greece, Slovakia, Bulgaria and Germany.

Given that there is a considerable amount of litigation in most Member States related to the operation of the Dublin system, a European legal seminar was organised in September 2012 in Budapest, Hungary to bring together various legal practitioners, experts and members of the judiciary to discuss the legal challenges surrounding the Dublin II Regulation. Participants included the project partners, legal officers, legal experts, lawyers and judges. A summary report of the main findings arising from this legal seminar will be published as part of the project activities.

In addition, the project website was further developed with the creation of a database of European and national case law regarding the application of the Dublin II Regulation which will be highly useful for asylum organisations, administrative authorities and legal practitioners across Europe.

### **3. Dublin II Regulation Training Module**

A very important achievement of the project is the creation of a training module on the Dublin II Regulation. This interactive module is designed for lawyers and legal practitioners and it will also be beneficial for NGO staff and other support/service providers who come across asylum seekers subject to this Regulation. It provides an overview of the Dublin system, based on the Dublin II Regulation, its supporting regulations, European Human Rights law and other relevant EU asylum legislation. The module uses examples from lawyers' practice on how the Dublin II Regulation works. Each chapter contains general principles, case studies and exercises for readers to enable them to recap on their knowledge of this Regulation.

The training module can be downloaded directly from the projects' website. It is translated into the national languages of partner countries and is available in 11 different languages (English, French, Romanian, Bulgarian, German, Italian, Spanish, Greek, Hungarian, Bulgarian, Slovakian). Based on this training module, project partners at the national level delivered one seminar open to a multidisciplinary audience of professionals (NGOs, lawyers, social workers...).

### **4. The production of national reports and a European comparative report on the application of the Dublin II Regulation**

The national reports drafted by project partners are the fruit of extensive research work carried out in every country. They aim to clearly set out the technical application of the Dublin II Regulation at the national level. Supplementary information was also gathered on reception conditions and the general asylum systems in these Member States. This work is strengthened by the European Comparative Report which is a synthesis of the national reports and sheds light on the overall European situation in relation to the application of the Dublin II Regulation in Europe.

## ANNEX IV

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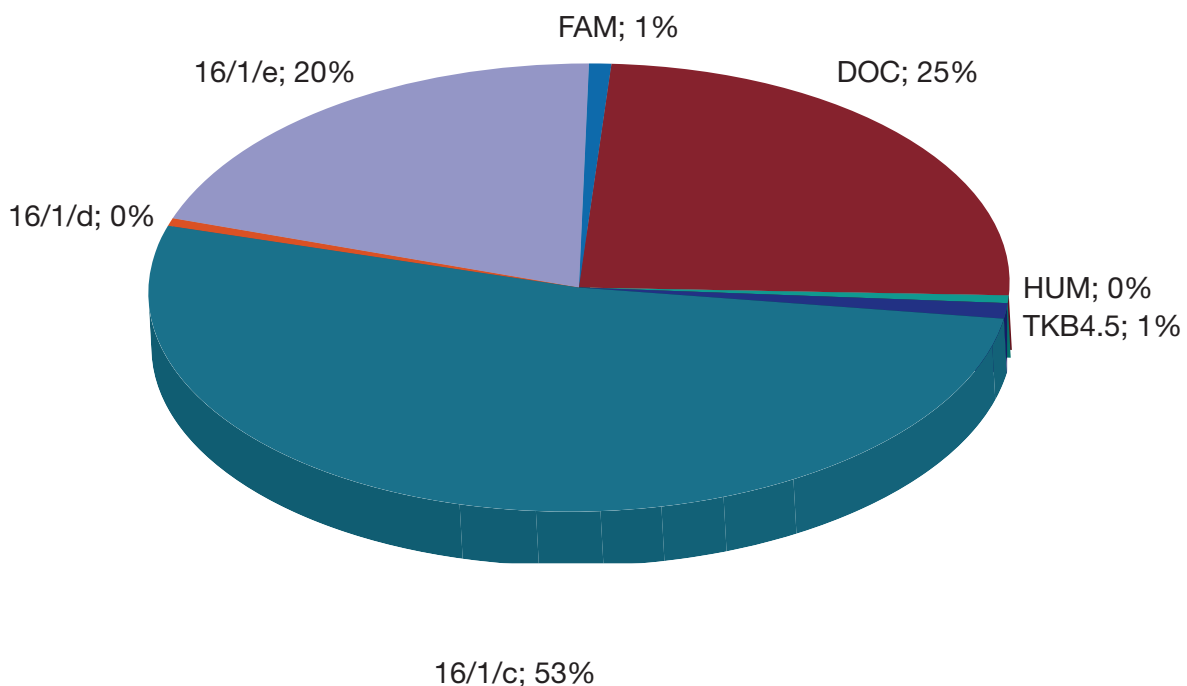
## ANNEX V

### CORRIGENDUM

Due to an unfortunate error in the interpretation of the statistical data related to the Dublin II Regulation from the Eurostat database, the Dublin Transnational Network project partners wish to draw attention to the following correction and include additional information in Chapter 3 on statistics related to the Dublin system. This error highlights the lack of clarity and inaccessibility of Eurostat statistics on this issue and in general there is a need to improve the manner in which the Dublin statistics are presented due to their inherent complexity.<sup>1</sup> Overall, the following pie charts illustrate the fact that the Dublin II Regulation is predominantly used on the basis of Eurodac data compared to other forms of evidence identifying the responsible Member State.

## 1. The statistical chart on page 22 should be replaced as follows:

Chart on the main legal grounds for outgoing requests in 2010<sup>2</sup>



<sup>1</sup> In assessing Eurostat data related to the Dublin II Regulation reference can also be made to the Technical Guidelines for the Data Collection under Art. 4.4. of the Regulation 862/2007 – 'Dublin Statistics', Eurostat, 17 November 2008 which was recently published online as an annex to the metadata at: [http://epp.eurostat.ec.europa.eu/cache/ITY\\_SDDS/fr/migr\\_dub\\_esms.htm](http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/fr/migr_dub_esms.htm).

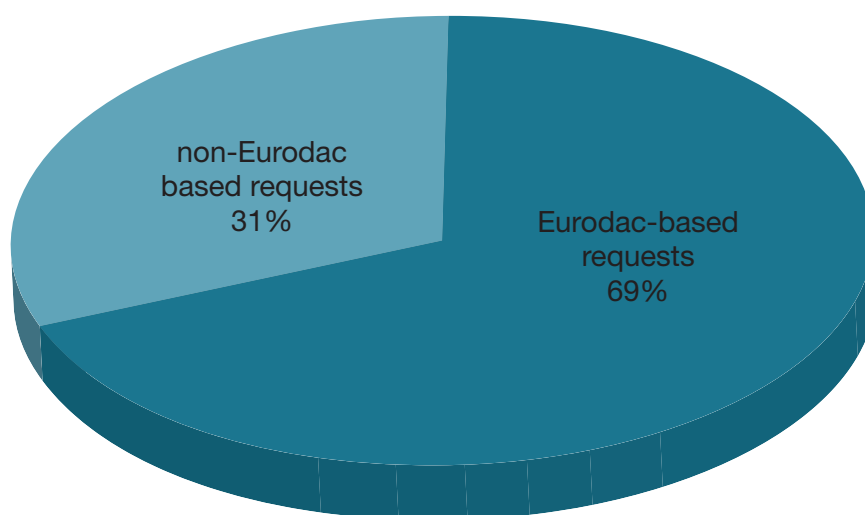
<sup>2</sup> The pie chart rounds the data figures to the nearest percentage whilst the legend below provides a detailed overview of the exact percentages and numbers for the main legal grounds for outgoing requests in 2010.

<b>FAM</b>	Family (Art 6, 7, 8, 14) = 0.9% (no. =367)
<b>DOC</b>	Documentation & entry reasons (Art 9, 10, 11, 12) = 24.8% (no.=9806)
<b>HUM</b>	Humanitarian reasons (Art 15) = 0.2% (no.=93)
<b>TKB_4.5</b>	Taking back requests: Withdrawal of application during Dublin procedure (Art.4.5) = 0.6% (no.=228)
<b>TKB_16/1/c</b>	Taking back requests: Under examination - no permission to stay = 53% (no. 20931)
<b>TKB_16/1/d</b>	Taking back requests: Withdrawal - new application = 0.1 %
<b>TKB_16/1/e</b>	Taking back requests: Rejection - no permission to stay = 20.2% (no. = 7972)

The pie chart above depicts the percentage of the average number of outgoing requests for the year 2010 on the relevant grounds of the Dublin Regulation for all Member States.<sup>3</sup>

**Chart depicting the use of Eurodac data and the Dublin Regulation**

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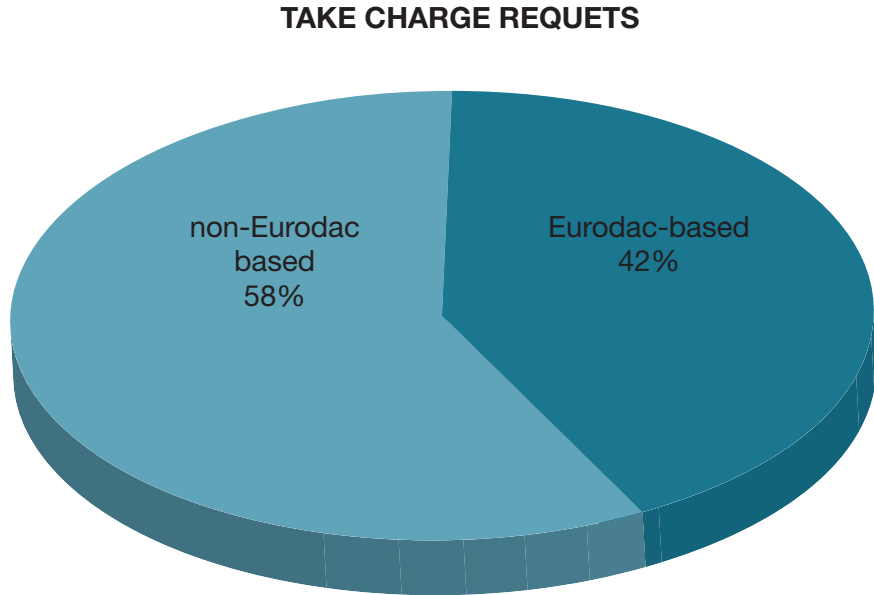


The pie chart above illustrates the percentage of both incoming and outgoing requests based on Eurodac data in 2010.<sup>4</sup>

<sup>3</sup> This pie chart was produced on the basis of calculating the average number of outgoing requests from each Member State and the according legal basis for that request as provided in Eurostat data. This is only an approximation of data determined by the fact that one Member State has not provided detailed information on the basis of its outgoing requests.

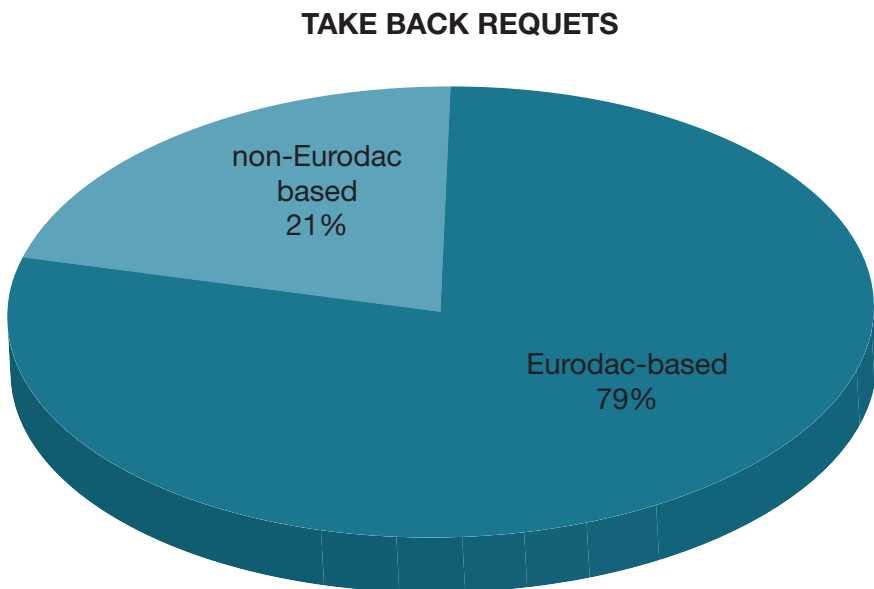
<sup>4</sup> The number of Eurodac based requests in 2010 was 27385 whilst the number of non-Eurodac based requests was 12113.

Chart depicting the use of Eurodac in take charge requests



The pie chart above illustrates the percentage of take charge requests based on Eurodac data compared to non-Eurodac data.<sup>5</sup> ‘Take charge’ means the procedure under which a Member State takes responsibility for an applicant on the basis of the objective and hierarchical criteria laid down in the Regulation (such as family reasons, legal or illegal entry, etc) and consequently has to examine the application.<sup>6</sup>

Chart depicting the use of Eurodac in take back requests



<sup>5</sup> This is an approximation of data determined by the fact that one Member State, Denmark has not provided detailed information specifying the use of Eurodac in take charge requests. The number of Eurodac based take charge requests was 4,313 whilst the number of non-Eurodac based take charge requests was 5,953 resulting in 42% and 58% respectively.

<sup>6</sup> See Annex 4 Asylum Glossary to the Commission [EC] Staff working document accompanying 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), Impact Assessment, SEC (2008) 2962, Brussels, 3.12.2008.

The pie chart above illustrates the percentage of take back requests based on Eurodac data compared to non-Eurodac data.<sup>7</sup> 'Take back' refers to the situation where the applicant leaves the territory of the responsible Member State and enters another Member State where he or she might apply again for international protection or might stay without permission, in which case the responsible Member State must at the latter's request take him/her back.<sup>8</sup>

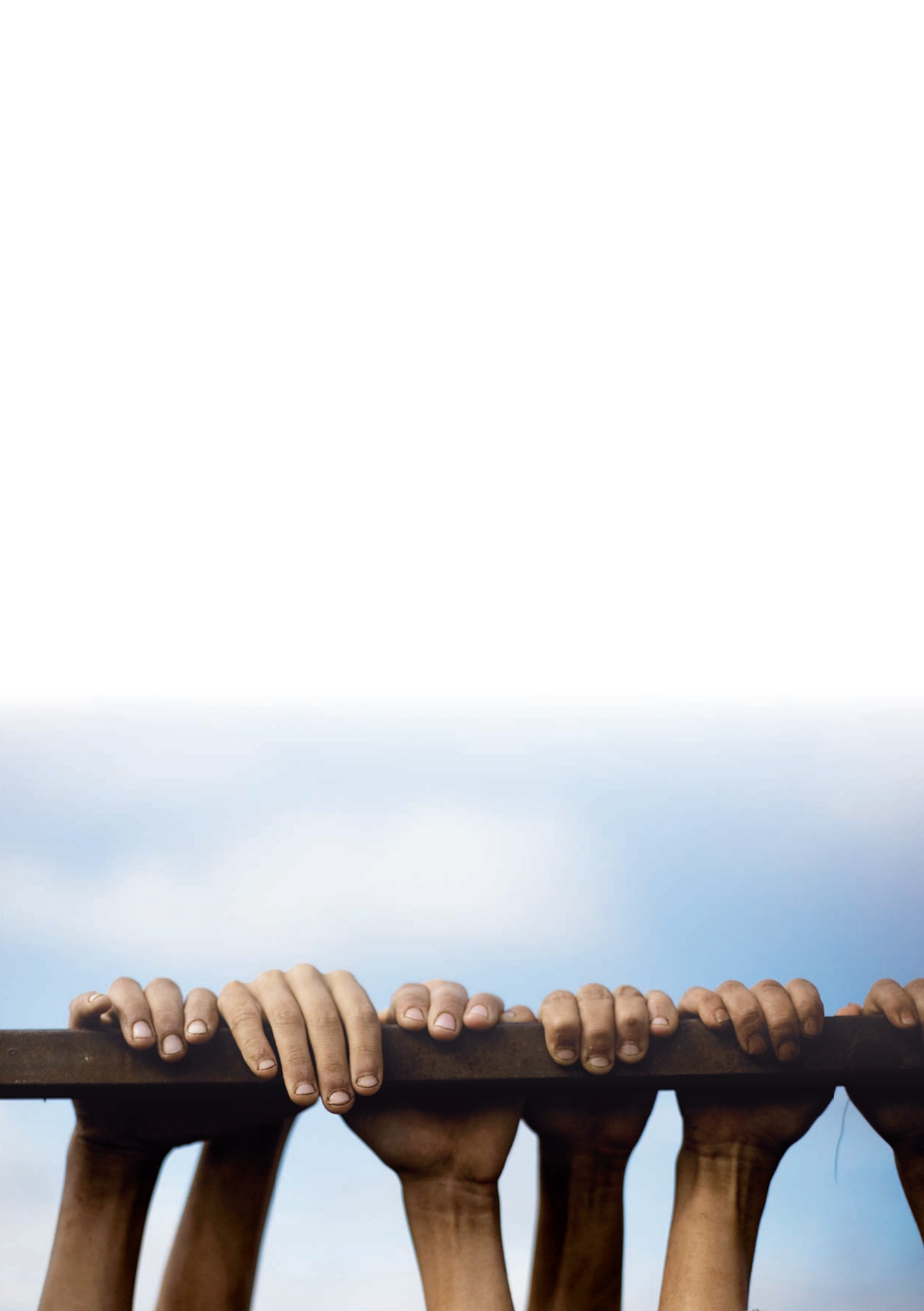
## 2. Page 22 paragraph 1 line 3-5 should read:

For example, in 2010 only 0.9% of outgoing requests to another Member State under the Dublin Regulation were on the basis of family reasons. Even fewer outgoing requests were sent to other Member States for humanitarian reasons under Art. 15 i.e. 0.2% of requests in 2010 were on this basis.

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<sup>7</sup> This is an approximation of data determined by the fact that one Member State, Denmark has not provided detailed information specifying the use of Eurodac in take back requests. In 2010 the number of Eurodac based take back requests was 23,072 whilst the number of non-Eurodac based take back requests was 6,160.

<sup>8</sup> See Annex 4 Asylum Glossary to the Commission [EC] Staff working document accompanying 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), Impact Assessment, SEC (2008) 2962, Brussels, 3.12.2008



# European Network for Technical Cooperation on the Application of the Dublin II Regulation

By creating a European-wide network of NGOs assisting and counselling asylum seekers subject to a Dublin procedure, the aim of the network is to promote knowledge and the exchange of experience between stakeholders at national and European level. This strengthens the ability of these organisations to provide accurate and appropriate information to asylum seekers subject to a Dublin procedure.

This goal is achieved through research activities intended to improve knowledge of national legislation, practice and jurisprudence related to the technical application of the Dublin II Regulation. The project also aims to identify and promote best practice and the most effective case law on difficult issues related to the application of the Dublin II Regulation including family unity, vulnerable persons, detention.

During the course of the project, national reports were produced as well as a European comparative report. This European comparative report provides a comparative overview of the application of the Dublin II Regulation based on the findings of the national reports. In addition, in order to further enhance the knowledge, we created information brochures on different Member States, an asylum seekers' monitoring tool and a training module, aimed at legal practitioners and civil society organisations. They are available on the project website.

The Dublin II Regulation aims to promptly identify the Member State responsible for the examination of an asylum application. The core of the Regulation is the stipulation that the Member State responsible for examining the asylum claim of an asylum seeker is the one where the asylum seeker first entered.

[www.dublin-project.eu](http://www.dublin-project.eu)

## European Partner Organisations:



Hungarian Helsinki Committee



CIR  
CONSIGLIO ITALIANO  
PER I RIFUGIATI



Comisión Española de  
Ayuda al Refugiado  
CEAR



VluchtelingenWerk  
Nederland



forum réfugiés  
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Cosi  
www.cosi.it



France  
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Hungarian Helsinki Committee



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