

POLICY PAPER

Untying the Gordian Knot of the Common European Asylum System: Dublin IV Reform

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- **The reform of Dublin IV regulation under the Common European Asylum System (CEAS) has stagnated for years, leaving the EU ill-prepared for future migration and asylum challenges.**
- **A reform of Dublin IV is a prerequisite to a comprehensive CEAS reform towards greater solidarity and fairer sharing of responsibilities between the Member States, yet divisions between Parliament and Commission as well as liberal and 'illiberal' fault lines have complicated the reform process.**
- **The EP elections will most likely stagnate the process further due to a surge in nationalist Eurosceptic MEP's, which could delay CEAS reform for the foreseeable future, to the detriment of the EU.**



Reforming the Common European Asylum System (CEAS) has for years, particularly since the so-called “migration crisis” in 2015-2016, been a priority within the EU. However, the reformation of it has become victim of rising divisions and a struggle between nationalist Eurosceptics and those in favor of deepened European integration. The most contentious part of the CEAS, the reform of the Dublin III Regulation towards a Dublin IV, has become emblematic of this schism, and made the CEAS reform into a Gordian Knot. Unharmonized national asylum and migration policies have fueled a ‘race to the bottom’ in an attempt to disincentivize asylum seekers, which in turn has undermined rule of law, solidarity, international conventions and human rights, all of which underpin the foundations of the European Union.

This paper aims to analyze the provisions of the Dublin IV Regulation reform process, whether or not it achieves its stated objectives of promoting solidarity and equitable burden-sharing, as well as the political obstacles needed to be overcome in order to facilitate its successful implementation. Those include the corrective allocation mechanism, a permanent relocation mechanism, the ‘pre-procedure’, and secondary movement of asylum seekers. Lastly, based on the analysis, a set of recommendations for the Dublin IV reform are presented.

Introduction

After the migration crisis in 2015, the influx of migrants to the EU through points of entry in countries with external borders underlined the urgent necessity for CEAS reform in general, and Dublin IV reform in particular; Dublin III’s stipulation that processing of asylum applications to take place in the country of entry made it politically untenable both due to the volume of migrants but also politically, as it provided the catalyst for a surge in nationalist Eurosceptic populism. Although the proposal for Dublin IV was tabled shortly afterwards in 2016, the reform

of the Dublin Regulation has stagnated, despite being a crucial cornerstone policy in the effort to reform the CEAS towards more egalitarian burden-sharing based on solidarity.¹ This stagnation is largely the result of irreconcilable political divisions and politicization of the wider topic of migration and asylum. Without a functional CEAS and the Dublin IV reform to support it, there are no incentives towards solidarity between Member States compared to the domestic political gains that can be reaped from capitalizing on the issue through hardline anti-immigrant politics emphasizing national sovereignty over European cooperation. Without Dublin IV and the CEAS to harmonize asylum systems and facilitate the implementation of relocation and allocation mechanisms, asylum recognition rates will continue to vary dramatically as countries are incentivized politically to minimize the number of successful asylum applications – or outright stall the processing of them in the hopes of asylum seekers leaving the country – in order to not compromise domestic political support. In the process, fundamental rights, European values, solidarity and rule of law are eroded, as evidenced by developments in particularly Hungary.

Thus, reforming Dublin IV has become politically sensitive due to the rise of anti-immigrant sentiments. However, reforming the CEAS and Dublin IV is crucial, not least due to the predicted rise of migrants and displaced people due to climate change and escalating global conflicts fueled by populists, the rise of China, and the increasingly erratic behavior of both Presidents Trump and Putin, which is predicted to lead to increased migratory pressure on Europe.

¹ European Commission, the Common European Asylum System background information. Available at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background->

[information/docs/20160406/factsheet_the_common_european_asylum_system_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet_the_common_european_asylum_system_en.pdf)

From Dublin III to Dublin IV: How the Crisis of 2015 Exposed the need for Dublin IV Reform

Dublin III regulation, being implemented in 2013, was mainly criticized for not working fairly and not being able to prevent asylum shopping efficiently due to the lack of provisions regarding corrective allocation mechanisms and swift permanent relocation mechanisms²; therefore, it was incapable of dealing with the influx of migrants and refugees in 2015 in an egalitarian way, resulting in external border countries, such as Hungary and Italy, having to process a large number of refugees without robust provisions to facilitate egalitarian burden-sharing as they were, through Dublin III, responsible for the processing of applications. This emphasis on countries of entry being responsible for asylum applications fueled criticism of the system as it compounded the asymmetric sharing of responsibility, leading to a failure of solidarity among EU member states.³ As a result of the influx, the conditions of the border countries in the south became worse⁴, partially due to the countries being legitimately overburdened relative to their capacities at the time, partially because the issue of asylum-seeking and migration became politicized for domestic political gains, leading to ineffective, lagging or even antagonistic asylum processing procedures. As a

result, secondary movement of asylum seekers surged sharply; in 2014, 24 percent of asylum applicants had launched previous applications at the other member states⁵, whereas in 2016 it was 30 percent⁶, indicating a rising prevalence in asylum shopping due to worsened conditions and widening discrepancy in asylum conditions across Member States, particularly those with external borders (i.e. Hungary) and those without (i.e. Germany, Scandinavian countries).⁷ Due to lack of agile administrative framework governing relocation, allocation and transfer mechanisms efficiently under Dublin III, secondary movement was further incentivized from the perspective of asylum seekers and migrants as waiting times for asylum application processing increased dramatically in countries of entry. Thus, the impetus for Dublin IV and its cornerstone provisions of corrective allocation mechanism, the pre-procedure, and mitigating secondary movements. Corollary to the latter includes provisions pertaining to family reunification procedures, which under Dublin III proved to be another strong incentive for secondary movement.

Analysis of Dublin IV's Key Provisions

The stated objectives of the Dublin IV reform aim at strengthening solidarity between Member States and ensure equitable sharing of responsibilities for asylum and migration processes. Often confounded with the much-

² European Commission: 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), 2016. Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-270-EN-F1-1.PDF>

³ Tubakovic, Tamara, A Dublin IV recast: A new and improved system? European Policy Brief no. 46 March 2017, Egmont Royal Institute for International Relations, p. 2. Available at: <http://www.egmontinstitute.be/wp-content/uploads/2017/03/EPB- A-Dublin-IV-recast-A-new-and-improved-system-new.pdf>

⁴ Johnson, Jessica. THE DUBLIN SYSTEM: PREVENTING 'ASYLUM SHOPPING', 2015. Available at:

<http://www.keepcalmtalklaw.co.uk/the-dublin-system-preventing-asylum-shopping/>

⁵ European Commission: 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), 2016. P.11

⁶ [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI\(2017\)608728_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf)

⁷ European Parliament, Asylum in the EU: Facts and Figures, 2015. Available at:

http://www.epgencms.europarl.europa.eu/cmsdata/upload/d15622d3-b9fc-466c-960b-57c1fecef29b/Session_2_-_Briefing_Asymlum_in_the_EU_facts_and_Figures.pdf

and Ceaseval, Evaluation of the Common Asylum System under Pressure and Recommendations for Further Development, 2018. P.15. Available at:

<http://ceaseval.eu/publications/baseline%20study%20final.pdf>

maligned redistribution quotas that were proposed during the inception of the migration crisis, Dublin IV comprehensibly strives to address systemic deficiencies exposed by the migration crisis under Dublin III. However, the system fails to address the fundamental political obstacles are still not solved in the aforementioned core provisions of the reform.

Pre-procedure

The reformed Dublin system establishes the pre-procedure to initially and swiftly assess asylum applications with the aim of facilitating an initial verdict governing future procedures with the objective to stymie secondary movement. It starts with an obligation to introduce a claim for international protection in the Member State of first irregular entry. The Member State then has the obligation – not to be confused with ‘possibility’ – to check whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. If this is the case, the applicant will be returned to that country. If the person comes from a safe country of origin or presents a security risk, the application must be dealt with in an accelerated procedure.⁸ If the right to asylum is recognized, further processing will be initiated.

While this should accelerate processing time on the application and thus more rapidly establish following procedures before secondary movement takes place, it fails to address one of the main shortcomings of the Dublin III regulation, namely that of lacking solidarity and equitable distribution. The main burden for processing the application still falls on countries of entry, which, due to geography, compounds an uneven burden carried by countries with

external borders. The corrective allocation mechanism, intended as a fairness mechanism, is intended to address this through a threshold reference number which, if exceeded, will shift the burden to other EU Member States. While in theory a good valve to ensure no overburdening, it is unlikely that this threshold will be exceeded as most applicants will arrive from designated ‘safe countries’ such as Turkey, likely resulting in a high number of them being returned once the pre-procedure is concluded. Thus, the pre-procedure cements the EU-Turkey Agreement, whose legality, although working currently, is uncertain as a legally binding Agreement.⁹

Additionally, potential reasons of asylum shopping remain unaddressed as the Dublin IV regulation does not address national discrepancies fostered by the foundational principle within the Dublin Regulation of countries of entry having responsibility for the procession of the asylum claim. Thus, standards of protection, family reunification laws being the under the purview of national law, and varying levels of conditions and opportunities still incentivize secondary movement, nor does it eliminate the ‘race to the bottom’ of Member States striving towards disincentivizing.¹⁰ Case in point: in the 3rd quarter in 2018, the recognition rate of asylum applications was 8 percent in Czech Republic, whereas in Luxemburg it was 67 percent, even though the two countries received similar number of applications.¹¹ Another case in point would be Hungary, where “Automatic inadmissibility” has become the norm. According to the latest report from European Union Agency for Fundamental Rights (FRA), in most of the inadmissibility cases in Hungary, the applicants were rejected based on the fact that they had arrived from Serbia¹², which is considered as a safe-third country, irrespective of the fact that the

⁸ Prof. Dr. Sarah Progin-Theuerkauf, Fribourg (Switzerland): “The “Dublin IV”-Proposal: Towards more solidarity and protection of individual rights?” p. 3.

⁹ CJEU General Court, Cases T-192/16, T-193/16 and T-257/16, Orders of the General Court (First Chamber, Extended Composition) of 28 February 2017, ECLI:EU:T:2017:128 ECLI:EU:T:2017:129 and ECLI:EU:T:2017:130

¹⁰ European Parliament, Briefing Secondary Movement of Asylum Seekers in the EU Asylum System, 2017. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI\(2017\)608728_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf)

¹¹ Eurostat, File:Table 5 First instance decisions by outcome and recognition rates, 3rd quarter 2018

Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Table_5_First_instance_decisions_by_outcome_and_recognition_rates_3rd_quarter_2018.png

¹² European Parliament, Briefing Secondary Movement of Asylum Seekers in the EU Asylum System, 2017. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI\(2017\)608728_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf) p3

situation for migrants in Serbia is untenable, often leading to attempts at entry into the EU or prolonged uncertain legal status of people stranded in Serbia.¹³

The Dublin IV reform perpetuates the above-stated issues; along with the pre-procedure, an abolished 'possibility of cessation of responsibility' in case of irregular crossing of an external border is established. In practice, this means that the Member States at the borders will remain responsible forever for the given migrant or refugee as they cannot, after a certain period of time, secede their responsibility in favor of another country. While from a perspective of solidarity this makes sense, it will further perpetuate the root causes for member states to deteriorate asylum and migrant conditions in order to disincentivize. Furthermore, depending on the given state, this could either lead to Member States becoming disincentivized to even register the claimants, thus incentivizing further secondary movement, or to perpetuating the aforementioned deterioration of recognition rates and processing procedures.

Corrective Allocation Mechanism

As mentioned above, Dublin IV introduces a so-called "fairness mechanism", the corrective allocation mechanism. Once applications within a country reaches 150 percent of the country's "quota" (again not to be confused with the oft-maligned redistribution quotas proposed during the migration crisis), which is based on a weighted aggregate of the country's total GDP (weighted at 50 percent) and the size of population (weighted at 50 percent) relative to other EU Member States¹⁴, the relocation mechanism will automatically be triggered and new exceeding applicants

will be relocated to other EU Member States. However, it is unlikely this threshold will be exceeded even under extraordinary circumstances as the pre-procedure remains solely the duty of the country in which entry is made. Furthermore, due to the EU-Turkey Agreement and Turkey being recognized as a 'safe country', except, paradoxically yet understandably, for certain Turks, it is unlikely that this mechanism of solidarity will be effectuated in practice due to return to Turkey being the verdict in most cases. However, the administrative and bureaucratic burden of the pre-procedure process falls squarely on the Member State of entry, making the Corrective Allocation Mechanism an empty gesture.

Additionally, the weighted thresholds, while fair in theory, are not feasible in contemporary European political context. For instance, according to the study from The Fondazione ISMU, under the Dublin IV Corrective Allocation Mechanism, Italy would have to take 14 percent of the total number of asylum applications to the EU in 2016 based on this distribution mechanism; however, in 2016 Italy's total share of applicants received was 'merely' 10.5 percent.¹⁵ Given the contemporary political reality in Italy, the political opposition to this, irrespective of whether or not it is fair and advancing solidarity, would be fierce, and the policy would not likely survive. The same would apply in most other European Member States vehemently opposed to migration.

Family reunification

Family reunification remains the second reason when lodging legal residence application from non-EU citizens¹⁶, and it has proven to be problematic in Dublin III regulation

¹³ UNHCR "Between Closed Borders – Joint-Agency Paper on Refugees and Migrants in Serbia 2017"

¹⁴ European Commission: 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), 2016.article 35

¹⁵ Van Wolleghem, If Dublin IV were in place during he refugee crisis... A simulation of the effect of mandatory relocation,

ISMU, 2018.p.7. Available at: http://www.ismu.org/wp-content/uploads/2018/01/VanWolleghem_January2018.pdf

¹⁶ Eurostat, Residence Permit Statistics, 2017. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics and European Commission, EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices. P.43. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_synthesis_report_final_en_print_ready_0.pdf

concerning numerous problems such as not being able to reunite with siblings and not being able to provide adequate proof due to undocumented traveling.¹⁷ Although Dublin IV regulates the time period for the member states to process the applications¹⁸, there is still lacking a common time frame for decisions for processing family reunification request for member states. Coupled with no universal standard in family reunification criterion between member states and lacking data collection within member states in terms of family reunification, Dublin IV does not address the inherent difficulties in assessing the possible demand for family reunification.¹⁹

More concerningly, due to the new pre-procedure under Dublin IV, it will be more and more difficult to have one's asylum claim assessed in the EU, not least partially due to the EU-Turkey Agreement. The pre-procedure might also bear the risk of a violation of the principle of family unity, as persons will be sent back notwithstanding the presence of family members in the EU. This particularly applies to minors on the verge of turning 18; in a recent report by the Danish Refugee Council (DRC), some case stories are outlined, such as that of an 18-year-old Syrian man who came by boat to Greece, when he was 17 years and wanted to reunite with his older sister in Germany. "The Greek authorities did not manage to send the request to Germany before he turned 18 years, so Germany refused to accept him, because they did not grant him the special guarantees of a minor and because they did not agree to

accept the man due to humanitarian reasons," DRC noted.²⁰

Lengthy waiting period is also an unharmonized problem in the EU member states even though the EU Commission has stated that waiting periods for family reunification of over one year is inappropriate.²¹ Case in point, in the Netherlands, the decision period of the asylum family reunification is 3 months (6 months at most).²² However, in Denmark, the waiting period for family reunification can be up to 3 years.²³ Coupled with countries of entry being the sole purveyors of asylum processing, Dublin IV fails to address the risks of human rights violations present under Dublin III by leaving families separated for an excessive length of time. Additionally, based on the above-stated discrepancies, secondary movement remains an attractive option.

Evaluating the Invaluable – Will Dublin IV's "Financial Solidarity" be a Change for Good?

Dublin IV introduces the concept of "Financial Solidarity" in which Member States can opt out of receiving an asylum applicant from a state "under pressure" as determined by the aforementioned Corrective Allocation Mechanism by paying 250.000 euros to the overburdened state.²⁴ This concept is patently absurd; not only will it not further solidarity between member states, it will contribute to the opposite by institutionalizing a mechanism through

¹⁷ Danish Refugee Council, When the Dublin system keeps families apart, 2018. Available at: <https://drc.ngo/media/4530554/drc-policy-brief-when-the-dublin-system-keeps-families-apart-may-2018-final.pdf>

¹⁸ For instance, article 4 and article 5 regulate the document submission deadline, and article 29 and 30 regulates the time when requesting for transfer

¹⁹ European Union Agency for Fundamental Rights, Thematic focus: Family Tracing and Family Reunification, 2016. Available at: <https://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family>

²⁰ <https://www.infomigrants.net/en/post/9844/dublin-regulation-keeps-families-divided-danish-refugee-council>

²¹ Council of Europe, Realising the right to family reunification of refugees in Europe. 2017. Available at

<https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0> p8

²² IND, FAQ journey in connection with family reunification asylum. Available at: <https://ind.nl/en/Pages/FAQ-journey-in-connection-with-family-reunification-asylum.aspx>

²³ Denmark, Supreme Court Judgement, case no. 107/2017. Available at: <http://www.asylumlawdatabase.eu/en/case-law/denmark-supreme-court-judgement-6-november-2017-case-no-1072017-v-immigration-appeals-board#content> and Council of Europe, Realising the right to family reunification of refugees in Europe. 2017. p40

²⁴ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf

which Member States can pass unwanted yet legitimate asylum applicants between them. It will only prolong the time in which applicants will have to wait as Member States jockey “financial solidarity” contributions around, with all the requisite bureaucratic and legal framework being put to work in order to facilitate this.

Conclusion

Reforming the fairer responsibility sharing system in Dublin IV system is an arduous task. The analysis shows clear political obstacles in the key areas that Dublin IV strives to address, and that it manifestly fails in achieving its stated objectives, namely equitable distribution and promoting genuine solidarity between EU Member States. Furthermore, there is a genuine risk of Dublin IV, in its current iteration, exacerbating current fault lines within the EU and remaining politically divisive to the point of rendering the reform – and by extension the CEAS – irrelevant by relegating it to the proverbial policy dustbin for the foreseeable future.

With the upcoming European Parliament elections which are predicted to see a surge in Eurosceptic and nationalist MEP’s, it is unlikely that a conducive environment for ambitious and necessary reforms of the CEAS and Dublin IV will be fostered. However, it is vital that political leadership, even those forsaking European solutions, show commitment to ambitious humanitarian reforms based on common European values; according to the UN, there will be between 200 million and 1 billion climate refugees by 2050.²⁵ This coincides with an increasing demographic deficit within the EU; according to the aging report in 2018, the working-age population (15 -64) will decrease from 333 million in 2016 to 292 million in 2070 reflecting the fertility rate, structural changes and migration inflows. Simultaneously, the population of retirees (65+) is estimated to soar to 28.8 percent of the total population compared with 19.3 percent in 2016.²⁶ Having robust and

efficient frameworks based on European values regulating migration and asylum procedures in an equitable manner based on solidarity will be necessary if the EU hopes to tackle the migratory waves of tomorrow – not only to maintain the Union’s integrity, but also to achieve genuine European solidarity befitting the Union.

Policy Recommendations

Prefacing the recommendations, it is necessary to state that The Dublin IV Regulation Proposal is simply not efficient. To repair the problem, solidarity, consent, finetuning the role of the European Union and holding Member States liable for breaches of the laws should be considered. The latter, in particular, is by the authors seen as a more honest avenue of action rather than proverbial carrots in the form of “financial solidarity.” A CEAS and Dublin IV Regulation are impossible to achieve without genuine solidarity. Solidarity is not a concept alien to Member States, but without enforcement, it will not manifest. Having said that, a fundamental recast of Dublin IV is unlikely to happen in the foreseeable future. With that in mind, the following recommendations are made:

- Processing of asylum applications within the country of origin remains an obstacle to solidarity due to geography and remains a politically divisive and untenable cornerstone of Dublin III as well as Dublin IV. Furthermore, dramatically varying asylum recognition rates makes the process opaque and encourages secondary movement. The pre-procedure exacerbates this rather than eliminates it. Thus, the establishment of a unit or agency within the EU comprised of officials from all Member States to evaluate asylum applicants within countries of entry should make processing more rapid, as well as distribute responsibility of processing equitably rather than being the sole responsibility of the country of entry.

²⁵ <https://unu.edu/media-relations/media-coverage/climate-migrants-might-reach-one-billion-by-2050.html>

²⁶ European Commission, 2018 Ageing Report: Policy challenges for aging societies. Available at:

https://ec.europa.eu/info/news/economy-finance/policy-implications-ageing-examined-new-report-2018-may-25_en p.3 & p.23

- The preferences of asylum seekers under such a system should be taken into consideration in order to prevent secondary movement, although this preferential system should not take precedence over equitable distribution within Member States.

This should, however, take precedence over the externalization of the issue to Turkey under a legally flimsy Agreement that is patently not a long-term sustainable solution to the wider issue of migration.



Co-funded by the
Europe for Citizens Programme
of the European Union

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