SUMMARY  The EU asylum system, and in particular the Dublin regime, has come under criticism in recent years. Member States (MS), as well as NGOs, claim that transferring asylum-seekers to the MS responsible for examining their application under the rules of the Dublin II Regulation overloads the asylum systems of some MS, resulting in violations of the asylum-seekers’ fundamental rights.

Recent rulings of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) stress that asylum-seekers must not be transferred to MS whose asylum systems manifest systemic deficiencies. The CJEU also confirmed that MS must ensure asylum-seekers undergoing a ‘Dublin-transfer’ procedure benefit from minimum reception conditions.

The European Parliament (EP) has endeavoured to reflect the latest standards in protection for asylum-seekers in its amendments to the current proposals to update the legislation. It managed to preserve a clause on the suspension of “Dublin transfers” in the draft Dublin III Regulation, and to secure the application of the Reception Conditions Directive to asylum-seekers falling under the Dublin regime.

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Glossary

**Refugee**: A person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country", Article 1(2), Geneva Convention on Refugee Status.

**Asylum-seeker**: A person whose claim to be a refugee has not been yet evaluated.

Context

**Multi-level legal framework**

Although MS are primarily responsible for the implementation of asylum rules, asylum is governed by a multi-level legal framework consisting of international law, EU and national rules.

The UN **Geneva Convention on Refugee Status** (GC) is the main legal instrument of international refugee law. All EU MS have ratified the GC and are thus bound by it.

Asylum-seekers also enjoy protection under the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR). Although the ECHR does not directly provide a right to asylum, the European Court of Human Rights (ECtHR) has interpreted Articles 2 and 3 ECHR in the sense that governments are obliged not to subject people to inhuman or degrading treatment, and that they must also refrain from deporting them to a country in which there is a risk of such treatment.¹
At EU level, asylum is regulated both in primary and secondary Union law. Although the EU is not a Contracting Party to the GC, both the EU Charter of Fundamental Rights (Articles 18 and 19(2)) and the Treaties (Article 78 TFEU) establish that the right to asylum shall be granted with due respect for the GC. Besides, the Lisbon Treaty provided a legal basis for a common asylum policy (Article 78 TFEU), instead of the minimum-standard measures previously provided for.\(^2\)


**The Dublin rules**

A corner-stone of the EU Asylum system is the Dublin regime, consisting of the Dublin II\(^3\) and the EURODAC Regulations.

Beside the EU MS, Iceland, Norway, Switzerland and Liechtenstein also participate in the Dublin system. The Dublin II Regulation establishes the criteria for determining which MS is responsible for examining an application for international protection; by default this is the first MS that the applicant entered.\(^4\) The Dublin II Regulation seeks to prevent multiple asylum applications, as well as asylum shopping, and also to avoid the phenomenon of "refugees in orbit" (asylum-seekers in search of the responsible MS).\(^5\)

The Dublin rules were not, however, designed to be a solidarity mechanism to distribute responsibilities among MS according to their capacities.\(^6\) As a consequence the rules mean a heavier burden for MS at the EU’s southern and eastern borders. In this context, the Dublin rules have been strongly criticised for leaving responsibility for asylum-seekers with MS particularly hit by the euro crisis.

In 2008 and 2009 the Commission submitted several legislative proposals to amend the EU Asylum system, addressing amongst other matters transfers to MS according to the Dublin II Regulation as well as the living conditions of asylum-seekers.

Amidst the debate on "Dublin transfers", several judgments of the ECtHR and the Court of Justice of the EU (CJEU) were delivered in 2011 and 2012 on the fundamental rights of asylum-seekers in Europe. In particular the judgements related to transfers of asylum-seekers under the Dublin rules as well as to the reception conditions of asylum-seekers have attracted attention, not least due to the ongoing legislative amendments in these fields.

**Suspension of 'Dublin transfers'**

**Presumption of safety**

In April 2011, Cyprus, Malta, Italy, Greece and Spain called for the proposed Dublin III Regulation to include "a mechanism to suspend transfers to MS facing particular pressure on their national asylum systems".

But the Dublin rules are blamed not only for the overload on some MS, but also for the impact\(^7\) this has had on the treatment of asylum-seekers. NGOs have consistently criticised "Dublin transfers", claiming that asylum-seekers are automatically transferred to the MS responsible under the Dublin regime, without examining the risks to which they might be exposed in the destination MS. NGOs repeatedly report violations of asylum-seekers' human rights, particularly in Greece and Hungary,\(^8\) denouncing illegal detention and ill treatment of asylum-seekers.

"Dublin transfers" to the responsible MS fall under the non-refoulement rule of the GC.

The principle of non-refoulement means that asylum-seekers may not be returned to a State where they face serious threats to their lives or freedom.

Nonetheless, "Dublin transfers" are carried out automatically according to the criteria established, based on mutual trust in the quality and efficiency of MSs' asylum
systems. Indeed, the Dublin Regulation provides the possibility for an MS to decide not to transfer an asylum-seeker to another MS ("sovereignty clause" of Article 3(2) of the Dublin II Regulation), but this provision is applied by MS only in very exceptional circumstances. This mutual trust among the MS as regards their asylum systems has been described as a "presumption of the safe country".

**Case law**

This presumption was first challenged before the ECtHR. In its judgment in the *M.S.S. v. Belgium and Greece* case of 21 January 2011, the ECtHR found that the transfer of an Afghan asylum-seeker from Belgium to Greece violated Article 3 ECHR due to systematic deficiencies in the Greek asylum system, and that EU MS may not assume that asylum-seekers would be treated in conformity with the ECHR standards in other MS.

In December of the same year, the CJEU also delivered a judgment on the suspension of Dublin transfers. In the *N.S. v. Secretary of State for the Home Department* case, the Court held that the presumption that MS are observing the fundamental rights enshrined in the EU Charter of Fundamental Rights must be rebuttable. This presumption is rebutted when there are systematic deficiencies in asylum procedures and in the reception conditions of asylum-seekers. However, not every violation of fundamental rights would suffice for this, but rather the systemic deficiencies need to amount to a real risk of inhuman or degrading treatment of asylum-seekers in the sense of Article 4 of the Charter. In this case MS are obliged to refrain from transferring an asylum-seeker to the MS responsible under the Dublin regime ("sovereignty clause" of Article 3(2)).

**Draft Dublin III Regulation**

The 2008 Commission proposal for a revised Dublin II Regulation envisaged addressing deficiencies in the asylum systems of a particular MS by establishing a procedure for the possible suspension of the Dublin rules in such cases (Article 31).

However, the Council initially refused to agree to a suspension clause and introduced instead an "early warning mechanism". The Council's approach has been to seek to allocate the burden better among MS, but has focused on preventing uneven pressure on national asylum systems rather than suspending Dublin transfers as a response to existing violations of fundamental rights in MS. By introducing a mechanism for early warning, preparedness and crisis management involving collaboration between MS and the European Asylum Support Office (EASO), the Council seeks to "address deficiencies before they potentially grow into a fully fledged crisis".

**Stakeholders' positions**

Both approaches have been criticised for not sufficiently addressing the issues at stake. The suspension mechanism has been criticised for applying only when systematic flaws result in a risk of human-rights violations, not when some countries face pressure on their national asylum systems. Some NGOs argue that this approach may lead to situations where documented cases of human-rights violations or even judicial decisions are needed before the suspension clause is invoked. Amnesty International warns that the suspension mechanism could work as a "reward" for MS which do not comply with EU asylum legislation.

FRONTEX notes that the suspension of transfers to Greece has made secondary movements from Greece to countries such as Belgium, Finland, France, the Netherlands and the United Kingdom more attractive for asylum-seekers. The agency reports that data on intra-Schengen flights seem to suggest that the use of false documents to fly from Greece to other MS has increased.
Dublin transfers", mainly to Greece, had been suspended by some MS on the basis of the "sovereignty clause" of Article 3(2) of the Dublin II Regulation even before the rulings of the ECtHR and the CJEU. In some MS, e.g. Germany, Denmark, Iceland and Luxembourg, policy instructions have been issued prohibiting transfers to Greece, whereas in others, "Dublin transfers" have been suspended in individual cases by national courts e.g. in Austria, France, Hungary, Italy, and Romania.

Early-warning mechanisms focus, in contrast, on preventing pressure on MS's asylum systems and subsequent development of systemic deficiencies. Therefore, it has been argued that, since such preventive measures are not aimed at providing an immediate response to shortcomings in the protection of the fundamental rights of asylum-seekers, they should be combined with transfer suspensions.

Reception conditions under the Dublin regime

The 2003 Reception Conditions Directive (RCD) sets the minimum reception standards applicable to asylum-seekers across the EU pending examination of their claim. In 2008 the Commission proposed a revised version of the RCD, aimed at harmonising divergent national practices, in order to ensure that asylum-seekers enjoy an equivalent standard of reception conditions in all MS. The Directive contains provisions on detention, access to the labour market, food, housing, financial aid, etc.

Reception conditions for persons under the Dublin regime

According to Article 3 RCD, the Directive applies to persons applying for asylum in an EU MS "as long as they are allowed to remain on the territory as asylum-seekers". Thus, the question arises whether asylum-seekers pending transfer to the MS responsible for the asylum decision according to the Dublin Regulation are "allowed" to remain on the territory of the MS from which they are to be transferred.

Whereas the 2008 Commission proposal for a revised RCD as well as the 2011 amended proposal included in the preamble a broader provision on the application of the material reception conditions to the Dublin regime, the Council opted for a more restrictive wording, repeating the limitation established by Article 3 to asylum-seekers who are allowed to remain in the MS concerned as asylum-seekers.11

The point at stake is the fact that while the Dublin rules apply in all MS and in four further states (Schengen associates), the RCD would not apply in the Schengen associates or in Ireland, the UK12 and Denmark. Thus, it has been argued that those countries could apply conditions below the protection level ensured by the RCD. This would lead to unequal treatment of asylum-seekers under the Dublin regime and miss the set target of the RCD, i.e. to ensure equality of asylum-seekers across the EU regardless of the MS responsible for deciding on the asylum application.

"Cimade and GISTI" ruling of the CJEU

This issue was addressed by the Court of Justice in its judgment in the case CIMADE and GISTI of 27 September 2012. The French authorities had refused to grant an allocation temporaire d'attente (temporary tideover allowance) to asylum-seekers pending transfer to the MS responsible for examining the asylum application according to the Dublin II Regulation (requested State).

The CJEU held that the obligation on an MS in receipt of an asylum claim to grant the minimum reception conditions applies only to asylum-seekers allowed to remain in the territory of the MS concerned as an asylum-seeker. The Court clarified that EU law allows asylum-seekers to remain not only in the territory of the State in which the application shall be examined according to the Dublin rules, but also in the territory of the MS in which the application was lodged.
The obligation to guarantee minimum reception conditions to asylum-seekers applies, according to the CJEU, throughout the procedure for determining the MS responsible and ends only with the actual transfer of the asylum-seeker.

The Court clarified however that this does not affect an MS’s power to limit or withdraw allowances in situations listed in the Directive, where the asylum-seeker does not comply with the reception rules (e.g. not meeting reporting duties, etc.).

**EP position and legislative responses**

**Dublin III**

The EP has sought to amend the Dublin system by ensuring better solidarity and burden-sharing among MS, taking fully into account the principles established by the CJEU. Therefore, the amendments proposed by the EP aim not only to prevent deficiencies in national asylum systems due to overload of asylum applications but also to protect asylum-seekers from fundamental rights shortcomings already existing in MS.13

The EP managed to reflect these developments in the draft Dublin III Regulation, which would now make it impossible to transfer asylum-seekers to an MS where "there are systemic flaws in the asylum procedure and reception conditions... resulting in risks of inhuman or degrading treatment". Although there will be no formal procedure for suspending transfers as the Commission had proposed, it has been positively assessed that the EP has achieved the inclusion of an express reference to human rights and an important role for the EP within the procedures for early-warning mechanisms.

A triilogue agreement on the draft Dublin III Regulation was endorsed by the LIBE committee on 27 November 2012, with 18 votes in favour, 5 against and 25 abstentions. The draft Regulation is now awaiting Council adoption and will then be tabled for second reading in plenary.

Furthermore, in order to tackle the uneven pressure on MSs’ asylum systems, the EP called upon the Commission to include in its future legislative proposal for a permanent intra-EU relocation mechanism an "EU distribution key" for relocating beneficiaries of international protection among the MS.

**Reception conditions**

**Political agreement** has been reached on the Reception Conditions Directive. The LIBE committee endorsed the draft Directive on 19 September, and the Council adopted its first reading on 25 October 2012. It is now awaiting second reading in plenary.

**Commentators** credit the EP with having secured the application of the Reception Conditions Directive to persons awaiting a "Dublin transfer" by defending during the negotiations the respective provisions in the preamble to the revised RCD and the draft Dublin III Regulation.

Further reading

- The Luxembourg Court: conductor for a disharmonious orchestra? Mapping the national impact of the four initial asylum-related judgments of the EU Court of Justice/ G Gyulai, Hungarian Helsinki Committee, 2012.

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Endnotes

1 Judgment of the European Court of Human Rights in the cases Soering v. the United Kingdom (judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91). Later, in the Chahal v. the United Kingdom and Saadi v. Italy cases the Court confirmed the absolute nature of the prohibition of torture so that the expulsion to a State with the risk of ill-treatment or torture is prohibited even in the case of a danger to national security in the receiving State.


3 The Dublin II Regulation of 2003 replaced the 1990 Dublin Convention, bringing its provisions into the EU legal framework.

4 Chapter III of the Dublin II Regulation establishes a hierarchy of criteria, taking first into account special circumstances such as e.g. the condition as an unaccompanied minor, family member of a refugee, etc. The irregular entry at an EU external border is also one of those special criteria (Article 10 of the Dublin II Regulation) but is the most frequently applicable one.

5 Opinion of Advocate General Trstenjak, C-411/10, N.S. v. Secretary of State for the Home Department, para. 94 et seq.

6 This fact has been also bemoaned by the Parliamentary Assembly of the Council of Europe in 2011.


8 The NGO ProAsyl reports also on violations of fundamental rights in Malta, Italy and Germany.


10 European Asylum Law and International Law/ H Battjes, 2006.

11 Recital 8 of the preamble to the amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum-seekers (Recast): “In order to ensure equal treatment of asylum-seekers throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection and in all locations and facilities hosting asylum-seekers.”

12 Recital 8 according to the Council amendment: “In order to ensure equal treatment of asylum-seekers throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection and in all locations and facilities hosting asylum-seekers, as long as applicants are allowed to remain on the territory as asylum-seekers”.

13 While the UK did participate in the old Reception Conditions Directive (2003/9/EC), it has not opted in to the revised version. Directive 2003/9/EC will therefore remain in force as regards the UK.