

# DUBLIN II REGULATION

## *Lives on hold*

European Comparative Report - Executive Summary





# 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>

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## 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’.

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<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>

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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.



# European Network for Technical Co-operation 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 caselaw 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



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