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Citizens' Rights and Constitutional Affairs



**REFLECTION NOTE ON THE EVALUATION OF THE
DUBLIN SYSTEM AND ON THE DUBLIN III PROPOSAL**

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**Directorate-General Internal Policies
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Citizens Rights and Constitutional Affairs**

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Abstract:

The note underlines the shortcomings of the evaluation report made by the Commission on the Dublin system. It stresses the effectiveness deficits of the Dublin system as an effective instrument of migration management and takes a broader perspective in view of a new common European asylum system.

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Introduction

The Commission's 2007 Evaluation Report conceded that "some concerns remain both on [...] practical application and [...] effectiveness", but reached a broadly positive conclusion: "the Dublin Regulation is in general being applied in a satisfactory manner and [...] it does provide a workable system for determining responsibility for the examination of asylum applications" (COM 2007a:6).

In the process of drafting the Dublin III Proposal (COM 2008a), the Commission has come to acknowledge the existence of additional "concerns". As a consequence, it has proposed amendments that aim to make the system not only more effective, but also fairer to asylum seekers and Member States (COM 2008a:5).

This notwithstanding, the positive conclusion of the 2007 Evaluation is still the conceptual foundation on which the Dublin III Proposal is premised. The Proposal does not purport to alter the general scheme of the Dublin system (COM 2008a:5). Indeed, proposing a far-reaching reform was not even taken into consideration as a "policy option" by the Commission (see COM 2008b). Whatever the political obstacles to change, such a single-minded preference for the *status quo* could only be defensible on the premise that the Dublin system worked by and large satisfactorily.

At this stage of our research, we are not in a position to draw any firm evaluative conclusions on the Dublin system. Yet, available evidence strongly suggests that the system has actually proved unworkable and dysfunctional. The Dublin III Proposal, premised on a flawed assessment, might very well fail to address the main weaknesses of the system, both in terms of effectiveness and of fairness. Under these conditions, and for reasons that will be more fully explained in the following pages, it would be in our view advisable for the LIBE Committee to subject the Dublin system to further scrutiny and, if appropriate, to reopen the debate on the system's fundamental features, before committing itself to the Dublin III Proposal.

The Commission's Evaluation: a Suitable Basis for Evidence-Informed Lawmaking?

The Conclusions of the 2007 Evaluation Report state that "the objectives of the Dublin system [...] have, to a large extent, been achieved" (COM 2007a:13). Such assertion presupposes the existence of solid evidence showing, at least, that the system effectively discharges its core functions, i.e. that:

1. Asylum claims are "to a large extent" examined by the Member States responsible under the criteria laid down in the Dublin Regulation;
2. Multiple applications are regularly detected, and usually followed by a successful transfer to the responsible State;
3. Swift access to status determination in one Member State is guaranteed.

Unfortunately, as the LIBE Committee has acknowledged, the Evaluation Report falls well short of substantiating these points (see EP 2008a:10-11). The data provided by the Commission suggest, rather, that the Dublin system has performed less than satisfactorily as an instrument of migration management (functions 1 and 2 above; see below for details). Moreover, the Report offers no evidence that the system has improved access to status determination. Several independent reports, and indeed later Commission documents (COM 2008b:19-20), rather suggest that its operation has generated delays and obstacles in the access to status determination procedures (see UNHCR 2006:40 and 50; ECRE 2006:150-152; ECRE 2008:11-12 and 14-15).

A comprehensive evaluation of the Dublin system would, of course, require more than a simple effectiveness check. First of all, it would require determining the costs of the system, in order to evaluate its cost-effectiveness. Secondly, it would require gauging the broader impact of the system in the light of considerations that, while not belonging to its policy objectives, are very much part of its policy framework: “fairness” to asylum seekers and Member States; the preservation of family unity; a full and inclusive application of the Geneva Convention.

The Commission’s Report does not, or does not adequately address these aspects. As the European Parliament has stressed, it provides no cost assessment (EP 2008b, para. 25). Moreover, it fails to adequately “factor in” and examine the impact of the Dublin system on the position and interests of protection seekers (e.g. on their chances to obtain protection, or on their family and private life). Finally, it provides interesting data on the system’s distributive impact on Member States, but reaches a conclusion that appears to be “based on rather shaky foundations” (EP 2008a:12) – namely, that the system does not place EU border States at a disadvantage.

In sum, the Evaluation Report is not only overly optimistic in its conclusions. It also fails to accurately describe and explain the problems encountered in (and generated by) the implementation of the Dublin system. In the following pages, we will illustrate this point by giving closer consideration to the effectiveness deficit of the system, and to the possible connections existing between such deficit and the basic features of the system.

The Dublin System: an Effective Instrument of Migration Management?

Even though the figures provided by the Evaluation Report are incomplete and not entirely reliable, they clearly highlight the following fact: of all the asylum applications that were filed in the relevant period with the Member States, only a relatively small proportion has given rise to transfer requests (indicatively 12%: see COM 2007b:18). In interpreting this fact, “take charge” requests, which relate to the system’s function of allocating responsibility, must be distinguished from “take back” requests, which relate to the function of preventing the examination of multiple applications.

According to Commission estimates, roughly 70% of Dublin requests are “take back” requests (COM 2007b:16). EURODAC theoretically guarantees the detection of all multiple applications¹, and these constitute a small fraction of all asylum applications. It is therefore quite possible that under the Dublin system all multiple claims are detected, and that most of them give rise to take back requests. This does not mean, of course, that the system always prevents the *examination* of multiple claims, since most of the agreed transfers, “take backs” included, are ultimately not carried out (COM 2007a:4).

As the Commission stresses, this is a significant problem for the effective application of the system. However, it might not be the most serious problem – not if we consider the Dublin system’s performance as an allocation mechanism.

The figures that have been recalled above indicate that only a *tiny fraction* of asylum applications give rise to a “take charge” request – somewhere in the region of 4% (calculation based on COM 2007b:18). In other words: responsibility ultimately lies, in the overwhelming majority of cases, with the State where the application is first filed. The Report does not elaborate on this fact, or even take note of it. This is surprising, because this fact tells us something important about the system’s (in)effectiveness.

¹ In submitting an asylum application, asylum seekers necessarily make contact with the authorities, who are in turn duty-bound to take their fingerprints and store them in EURODAC.

Firstly, it might imply that most of the procedures that are launched to determine responsibility (Dublin procedures) do not produce “take charge” requests, let alone transfers (see ECRE 2008:4) – hardly a positive finding in terms of cost-effectiveness. Such a conclusion would of course presuppose that Dublin procedures are launched for all or most asylum applications – a point that the Report does not substantiate, and on which some doubts are permitted (see COM 2008b:11 and footnote 32)

Secondly, the rarity of “take charge” requests, let alone of transfers, might mean that asylum claims are most often examined by a State that would *not* be responsible under the Dublin criteria. Such a conclusion would only be incorrect if asylum applications were most frequently filed with the State responsible according to the criteria – a rather implausible hypothesis. Available information suggests a different scenario: that Member States rarely dispose of sufficient evidence to issue a “take charge” request (COM 2007a:7; COM 2007b:23-25), and frequently become responsible “by default” according to Article 13 of the Dublin Regulation. Recourse to the sovereignty clause, for reasons of expediency or for compassionate reasons (COM 2007a:7), provides an additional explanation for the rarity of “take charge” requests. Either way, the “hierarchy of criteria” enumerated in the Regulation remains strictly theoretical.

In the light of the above, it is difficult to see how the Commission could conclude that the Dublin system achieves its migration management objectives “to a large extent”. A more balanced assessment might be that while the Dublin system prevents the examination of multiple claims to some extent, it is practically inoperative as a mechanism to govern the allocation of responsibility.

Effectiveness, Fairness, and the Structural Incentives to Avoid the System

In explaining the effectiveness deficits of the Dublin system, the Evaluation Report devotes considerable attention to the imperfections and inaccuracies of the Dublin Regulation. Without denying the possible relevance of these technical aspects, we would be inclined to think that the problem lies elsewhere: in the structural features of the system and in the incentives they provide to its main actors – States and asylum seekers.

The proposition that asylum seekers have reasons to try and evade the system does not need lengthy explanations. We will only recall two points here:

- The Dublin system is operated in a situation where the very same asylum application might have radically different outcomes depending on the Member State where it is examined (as acknowledged by EP 2009, para. 3).
- The Dublin criteria based on family ties are restrictively framed and restrictively applied (COM 2007a:23-24); moreover, the system is “blind” to other connections that asylum seekers may have with a particular Member States (e.g. previous abode and linguistic ties; for critical comment: EP 2009a, para. 31).

Both circumstances place the Dublin system on a collision course with the objectives of giving asylum seekers a fair protection chance, and of improving their reception and integration. More to our point, both circumstances provide asylum seekers with strong

incentives to avoid responsibility allocation *à la* Dublin, even at the cost of reducing or forfeiting their protection chances², or to file multiple applications³.

This fact is nowhere mentioned in the Evaluation Report, which is again surprising. Indeed, the uncooperative behaviour of asylum seekers might well be the major cause of the system's ineffectiveness (as it was under the Dublin Convention, see COM 2001:6 and 18). Two findings seem to support this hypothesis:

- The failure to carry out agreed transfers is most frequently due to absconding – a fact that is further borne out by the higher success rate of the Member States that systematically detain Dublin transferees (see COM 2007b:29-30)⁴.
- As mentioned earlier, the destruction or withholding of evidence appears to be a key obstacle to the application of the responsibility criteria.

If our hypothesis is true, then there are serious reasons to doubt that the Dublin III Proposal will significantly increase the effectiveness of the system. On the one hand, it does not address the disparities of standards existing across the EU – it could not, since the problem is exogenous to the Dublin system. On the other hand, it brings a welcome but marginal extension of the criteria based on family ties. In short, it does not fundamentally alter the incentives that asylum seekers have to circumvent the system.

A parallel argument can be made, *mutatis mutandis*, in respect of Member States. The Evaluation Report suggests that border States fail to systematically fingerprint illegal entrants, thus reducing the effectiveness of EURODAC as a tool for the implementation of the Dublin criteria (COM 2007a:9). Such uncooperative behaviour, rather than being the reaction of disadvantaged States, might reflect the spirit in which Member States *generally* approach Dublin implementation. All States reportedly set high evidentiary requirements before accepting transfers. Many States, including one of the most advantaged by the system, Ireland, go so far as to require DNA tests before accepting responsibility based on family ties (COM 2007b:24; ECRE 2006:159). In short, Member States seem bent on minimizing their responsibilities under Dublin, and the evidentiary difficulties posed by the Dublin criteria provide them with good opportunities to do so, to the detriment of the system's effectiveness. The Dublin III Proposal, which maintains those very same criteria, would do little to improve this situation.

Before concluding on this point, it is worth noting that the persistence of “harmful” structural incentives might reduce not only the efficiency gains expected from Dublin III, but also the progress it promises in terms of human rights. Detention is a case in point. As noted above, nothing suggests that the new Regulation will sharply reduce the propensity of asylum seekers to avoid transfers. And as said, the Evaluation Report demonstrates that overall, the States who systematically use detention have a higher success rate in transferring asylum seekers (COM 2007b:30). Against these (unchanged) structural factors, the well-meaning but flexible provisions of the Dublin III Proposal on detention (Art. 27) might simply not be enough to make a real difference.

² Disposal of travel documents, for instance, is penalized under the Procedures Directive (Art. 23(3)f and 28(2)). In order to “escape” Dublin, asylum seekers are moreover “pushed into illegality” (COM 2008b:20) and possibly renounce to pursue their claim (see COM 2001:3).

³ It is an established fact that multiple applications have *increased* during the period covered by the Evaluation Report (see COM 2007b:46-47).

⁴ Needless to say, more effectiveness is here bought at a high financial and human cost.

Taking a Broader Perspective: is Dublin the Right System for the New CEAS?

These structural problems are not the only reason that militates in favour of revisiting the Dublin system. Reforming Dublin is part and parcel of a broader process, a process that should rest upon a holistic evaluation of the Common European Asylum System (CEAS), and be driven by coherent policy guidelines. Put differently, reforming Dublin involves thinking in terms of the new CEAS. Some of the problems that plague the system today might in time be solved by the evolution of the *acquis* – e.g., by the achievement of convergent and sufficient standards of protection throughout the EU. Yet, the evolution of the *acquis* could also reduce the value and sense of a system whose purpose is to assign a particular asylum seeker to a particular national jurisdiction. The planned introduction of forms of mobility for protected persons, to which the European Parliament is strongly committed (EP 2009, para. 32 and 37), would have just that effect, and would require an in-depth re-evaluation of the cost-benefit calculus underpinning the Dublin system.

Concluding Remarks

The Conclusions of the Report on the evaluation of the Dublin system, adopted by the LIBE Committee on 2 July 2008, read as follows: “we must bring into question whether the Dublin system is really ‘fit for purpose’” (EP 2008a:13). To our mind, this question is as relevant today as it was at that time, before the Dublin III Proposal was tabled.

In spite of its optimistic conclusion, the 2007 Evaluation Report provides data suggesting that the Dublin system is *not* fit for purpose. These data suggest, more precisely, that the Dublin system does not achieve its objectives, failing in particular to allocate responsibility on the basis of the criteria it defines. For reasons of space, we could not insist on the costs at which such meagre results are bought – financial costs, human costs, and costs for the coherence and functionality of the CEAS.

The Dublin III Proposal would introduce several welcome amendments, largely reflecting the recommendations formulated by the European Parliament in 2008 (EP 2008b; for a comment, see UNHCR 2009). However, it would also maintain the basic principles of the Dublin Regulation. From what we know today, this might amount to importing into the new CEAS the problems that have so far characterized the Dublin experience.

In our view, therefore, there are compelling reasons to subject the Dublin system to further scrutiny before deciding on the Commission’s proposal. On the basis of the available evidence, we would also say that there are compelling reasons to reopen the debate on the system’s fundamental features. This is particularly true of the principles of responsibility sharing, which in our opinion need to take more account of protection seekers’ interests if the system is to work properly.

Several commentators seem to consider that placing such fundamental questions on the table would be unthinkable today, as most Member States “favour maintaining the founding principles of the Dublin Regulation” (see COM 2008a:5). This may well be true. For our part, we would note that the present legislative procedure takes place in a wholly new institutional setting, and offers an unprecedented occasion to reopen the discussion on the principles of responsibility allocation in the EU. A discussion that was held behind closed doors during the negotiation of the Dublin Convention, at the end of 1980s, in a very different European Union, and that has not been really reopened since.

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