



Statewatch Analysis

The revised 'Dublin' rules on responsibility for asylum-seekers:

The Council's failure to fix a broken system

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Introduction

As part of the project to create a 'Common European Asylum System', the EU adopted legislation between 2003 and 2005 on four key issues: the definition (ie, 'qualification') for refugee status; asylum procedures; reception conditions for asylum-seekers (dealing with issues like their welfare and employment); and responsibility for asylum-seekers (ie the 'Dublin' rules, which in principle require asylum-seekers to apply in one Member State only, which is determined by those rules).

These measures were considered to form the 'first phase' of the Common European Asylum System, and the EU's Hague Programme, which set out an agenda for the development of EU Justice and Home Affairs Law from 2005-2010, set the objective of adopting legislation establishing the second phase of the Common European Asylum System by 2010. This deadline was later extended to 2012, but obviously even this later deadline will soon expire.

The European Commission then tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. The European Parliament (EP) and the Council agreed in mid-2011 on the revision of the Qualification Directive, which was then officially adopted in November 2011. Subsequently, in March 2012, the Member States' representatives to the EU (known as 'Coreper') apparently agreed in principle on the text of the revised Directive on reception conditions (see the previous Statewatch analyses from February and March 2012). The final text of this Directive will now be negotiated between the Council and the EP.

Shortly before Easter, Coreper also agreed on the proposed 'Dublin III' Regulation, which sets out a revised set of rules on responsibility for asylum-

seekers' applications. The final text of this Regulation now has to be negotiated between the Council and the EP, but this is an opportune moment to assess the Member States' preferred version of the text.

Background

The EU's Member States first agreed on rules regulating responsibility for asylum-seekers in 1990 in the form of an international treaty, known in practice as the 'Dublin Convention'. That Convention entered into force on 1 September 1997. It was replaced by Regulation 343/2003 (known in practice as the 'Dublin II' Regulation), as from 1 September 2003. The 2008 proposal for a new Regulation (the 'Dublin III' proposal) would replace the Dublin II Regulation six months after its formal adoption.

The Dublin rules are closely linked to a system known as 'Eurodac', operational since 2003, which Member States' authorities use (among other things) to compare the fingerprints of asylum-seekers. That system was set up by a Regulation adopted in 2000. The Commission also proposed to amend the Eurodac Regulation in 2008, and amended that proposal in 2009 and 2010, but discussions are stalled for now.

Also, the Dublin rules have a wider geographical scope than other EU asylum law measures. They apply not only to all Member States, including the UK, Ireland and Denmark (by virtue of a treaty between the EU and Denmark), but also to the four non-EU States associated with the EU's 'Schengen' rules on abolition of border controls: Norway, Iceland, Switzerland and Liechtenstein. So 31 States will be bound by the new rules. They will also apply immediately to Croatia once that State joins the EU (its intended accession date is 30 June 2013).

The current rules in the Dublin II Regulation comprise a series of criteria for allocating responsibility, which apply in the order in which they appear in the Regulation. In turn, the criteria allocate responsibility essentially where: an unaccompanied minor has a family member or (failing that) where the minor made his or her asylum application; the asylum-seeker has a family member who has applied for or received asylum; an asylum-seeker has been given a visa or residence permit; an asylum-seeker has crossed the external border of or remained in a Member State without authorisation; an asylum-seeker is admitted without needing a visa; an asylum-seeker made an application in the international transit visa of an airport; or (as a default) where the asylum-seeker first applied for asylum.

There is also a 'humanitarian clause' containing three rules. First of all, a Member State *may* bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations' (Article 15(1)). Secondly, in the case of dependency for reasons such as a serious illness, Member States 'shall normally' keep or bring together the asylum-seeker with a relative (Article 15(2)). Finally, if the asylum-seeker is an unaccompanied minor with

relatives in a Member State, Member States 'shall if possible' reunite the minor with those relatives (Article 15(3)).

In practice, the Dublin rules have been widely criticised for allocating responsibility for asylum-seekers in many cases to poorer Member States on the EU's eastern and southern borders. The result has been a challenge for these countries to set up the infrastructure necessary to deal with large numbers of applications. In particular, in recent years Greece has systematically failed to observe its obligations as regards the reception conditions, procedural rights and qualification of asylum seekers, as set out in EU law, the European Convention of Human Rights (ECHR) and the Geneva Convention on Refugee Status. This has been confirmed by rulings of both the European Court of Human Rights and the EU's Court of Justice in 2011 (respectively the cases of *MSS v Belgium and Greece* and *NS and ME*). The result of this has been the suspension of transfers of asylum-seekers to Greece from other Member States. Some asylum-seekers have alleged that there are also such deficiencies in other Member States.

The 2008 proposal

The Commission's proposed Dublin III Regulation would have made a number of changes to the existing legislation, in order to address six different issues. First of all, the proposal would have extended the Dublin rules so that they applied not just to applications for refugee status pursuant to the Geneva Convention, but also to applications for 'subsidiary protection' status as defined by EU law, ie to people claiming that they needed protection but whose claims fell outside the scope of that Convention. Secondly, some of the proposed changes aimed to improve the efficiency of the Dublin system, for instance to set time limits for Member States to request other Member States to take responsibility for asylum-seekers. Thirdly, the proposal included legal safeguards for asylum-seekers, notably: more detailed rights to information; the right to ask for a personal interview; a right to appeal against a transfer decision, with some suspensive effect of an appeal; related rules relating to notification, time limits and legal aid; and rules on detention.

Fourthly, the proposal aimed to enhance the right to family life, by widening the definition of family members and strengthening the various provisions relating to family members and humanitarian cases. Fifthly, the proposal aimed to improve the position of unaccompanied minors and other vulnerable groups, by adding a new provision with guarantees for all children, strengthening the provisions relating to unaccompanied minors and providing for the exchange of information relating to the transfer of asylum applicants who need various forms of assistance. Finally, the proposal aimed to address deficiencies in the asylum system in (a) particular Member State(s) by establishing a mechanism for the possible suspension of the Dublin rules in such cases.

The Member States' position

The Council has accepted the extension of scope of the Dublin rules (the first issue addressed by the proposal) without any controversy. It has also accepted the amendments relating to the efficiency of the system (the second issue), with some modest amendments. However, it has only accepted the proposal as regards the next three issues (legal safeguards, family reunion, and vulnerable persons) to a very limited extent. Finally, as regards the sixth issue, the Council has completely rejected the idea of a mechanism to suspend transfers, agreeing instead to insert rules on an 'early warning mechanism' which would not affect the application of the Regulation as such (compare Article 31 of the proposal and the Council's text).

In detail, the legal safeguards proposed by the Commission have been weakened (compare Articles 4-5 and 25-27 of the proposal and the Council's text; also the Council has dropped recital 17 in the preamble of the proposal) by: reducing the requirements to give information to asylum-seekers, and to notify them of a transfer decision; providing for possible exceptions from the right to a personal interview; removing some provisions requiring Member States to give asylum-seekers sufficient time to appeal; removing the suspensive effect of a request to suspend a transfer, as well as the obligation to state reasons for refusing such a request; weakening the legal aid provisions; and removing any specific obligations relating to detention conditions and related guarantees.

On the detention issue, while the Council's text includes a general reference to international and EU law as regards these issues, there is no precise obligation to comply with the detention standards in the EU's reception conditions Directive. In fact, recital 18 in the preamble to the proposed Regulation has been amended to remove a reference to that Directive in this context. A broader reference to that Directive has also been dropped from recital 8 of the preamble of the proposed Regulation. This leaves open the question of whether, and to what extent, that Directive applies to persons subject to the Dublin rules - an issue which will soon be addressed by the EU's Court of Justice (see the pending Case C-179/11 *CIMADE and GISTI*, which will be the subject of an Advocate-General's opinion in May). If it does not, then Member States are free to subject asylum-seekers subject to the Dublin rules to even lower standards (as regards not only detention but also any other issue, such as social assistance) than the Directive provides for. While the Schengen associates and two Member States (Ireland and Denmark) are not subject to the current reception conditions Directive (and the UK will not be subject to the revised Directive), it would be possible to specify either that the Directive's standards apply to persons covered by the Dublin rules in all Member States and the Schengen associates, or at least that the Directive's standards apply to persons covered by the Dublin rules in those 25 or 24 Member States which are subject to (respectively) the current and future Directive.

Next, the rules on family reunion have also been weakened, first of all by rejecting some of the proposed new wider definition of family members: the Council did not accept that married minor children or siblings could be covered by the concept. Also, the Council rejected the proposal that the *most recent* application for asylum should be decisive as regards the operation of the family reunion clauses, stating instead that the most recent application should be 'take[n] into consideration', moreover in fewer cases than the Commission had proposed.

Finally, the rules on vulnerable persons have been weakened by: reducing the number of new protections for children; cutting back the scope of the proposed changes on unaccompanied minors; pushing the new clause on responsibility for dependent family members from near the top of the hierarchy of responsibility criteria to the very bottom (compare Art. 11 of the proposal to Art. 16A of the Council's text); weakening the remaining humanitarian clause; and dropping a proposed ban on transferring asylum-seekers who are not fit to travel. These changes may bring the text to a point below the current standards in two respects. First of all, the Council intends to specify that only the unaccompanied minor's first application for asylum is taken into account, whereas a case pending before the Court of Justice - Case C-648/11 *MA* - asks whether the first or latest application by such persons is decisive. Secondly, the Court of Justice has been asked to rule on the interpretation of the current humanitarian clause (Case C-245/11 *K*, pending; hearing due in May 2012). The question of the application of the reception conditions Directive to Dublin cases (see discussion above) is also relevant in this context also.

Conclusion

The Council appears to have little regard for the case law of the European Court of Human Rights or the EU's Court of Justice, as regards the issue of suspending transfers in light of justified human rights concerns. Moreover, the Council clearly wishes to 'jump the gun' on a number of other issues pending before the Court of Justice as regards the Dublin rules (the humanitarian clause, the rules on unaccompanied minors, and the application of the reception conditions Directive to Dublin cases).

This disdain for the rule of law can also be seen in the Council's approach to the proposed new safeguards for asylum-seekers, which will rob those safeguards of much practical effect - since the asylum-seekers will likely already have been transferred by the time their complaint is heard.

It is striking that the Council is not willing to contemplate a suspension clause for the Dublin rules, even in order to protect human rights, whereas in parallel it is supporting legislation that provides for the possible suspension of visa waivers and for the potential reintroduction of internal border controls. Moreover, the Council is not willing to do very much to improve the position of family members and vulnerable persons. So ultimately the Council has not accepted *either* of the two remedies which the Commission had proposed to fix the Dublin system - the suspension of

that system or the significant improvement of the rules relating to family members and vulnerable persons. It remains to be seen whether the EP is willing to recognise that the Dublin system is broken, and to demand that more serious steps be taken to fix it.

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