The Dublin III Regulation
A System Under Strain

Author: Guðrún Elsa Tryggvadóttir
ID Number: 110590 – 2459
Supervisor: Katrín Oddsdóttir

Lagadeild
School of Law
Útdráttur

Dyflinarreglugerðin III hefur verið kölluð hornsteinn samevrópska hæliskerfisins. Henri var ætlað að tryggja að einungis eitt aðildarríki bæri ábyrgð á meðferð umhönnun hæli hverju sinni. Með því átti umsækjendum að vera tryggjandi skjótur aðgangur að meðferð hælismsöken og komið yrði í veg fyrir frekari flutninga. Þrátt fyrir það hefur Dyflinnarkerfið verið gagnrýnt í nokkur ár fyrir að hafa ekki tekist að mæta makmiðum sínum sem skyldi. Þessi gagnrýni hefur orðið meira áberandi síðan aukinn fjöldi fólks för að sækja til Evrópu árið 2015 í von um vera boðin alþjóðleg vernd.


Af niðurstöðum þessarar rannsóknar má draða þá ályktun að beiting reglugerðarinnar er mismunandi eftir aðildarrikkjum, þó svo að sömu regluverk reynist þeim þorveldar í framlag. Jafnframt sýna niðurstöðurnar fram á að þeir misbrestir sem að leytt hafa til þess að ekki hefur tekist að ákvaðra ábyrgð á meðferð hælismsöken með heppilegum hætti er samverkun ófullkomsins regluverks og ófullnægjandi beitingar að hendi aðildarríkjanna. Að sumu leyti hefur Dyflinarreglugerðin jafnvil grafið undan markmiðum sínum frekar en að auðvelda framkvæmdina.
Abstract

The Dublin III Regulation has been called the cornerstone of the European Union’s Common Asylum System. Its purpose was to ensure that one Member State of the European Union be responsible for the examination of each application for international protection. By determining the responsible state, the Regulation was intended to provide applicants with swift access to the asylum procedure and limit secondary movement. However, for years the Dublin System has been criticised for not successfully achieving this objective, especially since increasing influx of asylum seekers began in 2015.

The title of this thesis is *The Dublin III Regulation: A System Under Strain*. It aims to provide a wider picture of the Dublin System than previous literature has achieved. For that purpose, its main focus is a comparison of the application of the Regulation in four Member States: Germany, Sweden, Greece and Italy. By looking into how these states apply the Dublin rules the thesis aims to answer two questions: first, what Dublin rules have proven difficult in practice and how their application might vary between different Member States; and second, whether the Dublin rules have a counteractive influence on the Member State’s use of the system and if so, how this effect might vary between different Member States.

From the outcome of this comparative study it is possible to conclude that the application of the Dublin Regulation differs somewhat between Member States, although the same rules have proven difficult in practice in all four states. Furthermore, the results obtained indicate that the inadequacy of the Dublin System to achieve its goals are a combination of a flawed structure of the Regulation itself and an unsuccessful application on behalf of the Member States. In some ways, the Dublin rules even undermine rather than facilitate the objectives of the system.
Table of Contents

ÚTDRÁTTUR ........................................................................................................ I
ABSTRACT ........................................................................................................ II
TABLE OF TABLES ............................................................................................. V
TABLE OF CASES ............................................................................................... VI
TABLE OF LEGISLATION ................................................................................... IX
LIST OF ABBREVIATIONS ................................................................................. XIV

1. INTRODUCTION ............................................................................................. 1

2. ASYLUM AND REFUGEE PROTECTION ......................................................... 3
   2.1 INTERNATIONAL REFUGEE LAW .......................................................... 3
   2.2 EU LEGISLATION ON ASYLUM ............................................................. 5
       2.2.1 From a Domestic Issue to Harmonisation ...................................... 5
       2.2.2 Enforcement of a Single External Border ...................................... 6
       2.2.3 The Means Applied by the Dublin System .................................... 7

3. THE EU AND THE SUDDEN MIGRATION WAVE ...................................... 10
   3.1 A WEIGHT-TEST FOR THE COMMON EUROPEAN ASYLUM SYSTEM .. 10
   3.2 HOW HAS THE EU RESPONDED? ....................................................... 11
       3.2.1 A European Agenda on Migration .............................................. 11
       3.2.2 Hotspots ..................................................................................... 12
       3.2.3 The EU-Turkey Statement .......................................................... 13
       3.2.4 Relocation .................................................................................. 14
   3.3 RESPONSES ON THE NATIONAL LEVEL ........................................... 15
   3.4 CONCLUSION ....................................................................................... 17


5. ISSUES IN THE FRAMEWORK OF DUBLIN III .......................................... 20
   5.1 NOT ALL STATES ARE THE SAME ..................................................... 20
   5.2 BURDEN-SHARING ............................................................................. 21

6. ISSUES IN THE APPLICATION OF DUBLIN III ......................................... 22
   6.1 THE RESPONSIBILITY CRITERIA ....................................................... 22
   6.2 PROCEDURAL RIGHTS ...................................................................... 24
   6.3 DETENTION ......................................................................................... 26
   6.4 TRANSFERS ....................................................................................... 27
   6.5 APPEALS ............................................................................................. 32

7. A COMPARISON: FOUR MEMBER STATES’ USE OF DUBLIN III ................. 32

8. GERMANY .................................................................................................... 33
   8.1 ADMINISTRATION .............................................................................. 33
   8.2 THE RESPONSIBILITY CRITERIA ....................................................... 33
   8.3 PROCEDURAL RIGHTS ...................................................................... 34
   8.4 DETENTION ......................................................................................... 35
   8.5 TRANSFERS ....................................................................................... 37
   8.6 APPEALS ............................................................................................. 41

9. SWEDEN ....................................................................................................... 41
   9.1 ADMINISTRATION .............................................................................. 41
   9.2 THE RESPONSIBILITY CRITERIA ....................................................... 42
Table of Tables

Table 1 - Germany, Overview .................................................................38
Table 2 – Germany, Outgoing Requests ..................................................38
Table 3 – Germany, Incoming Requests ...................................................38
Table 4 – Sweden, Overview .................................................................45
Table 5 – Sweden, Outgoing Requests ....................................................46
Table 6 – Sweden, Incoming Requests ....................................................46
Table 7 – Greece, Overview .................................................................53
Table 8 – Greece, Outgoing Requests .....................................................53
Table 9 – Greece, Incoming Requests .....................................................53
Table 10 – Italy, Overview .................................................................60
Table 11 – Italy, Outgoing Requests ......................................................61
Table 12 – Italy, Incoming Requests ......................................................61
Table of Cases

European Court of Justice


Case C-394/12 Shamso Abdullahi v Bundesasylamt [2013] ECL I-813

Case C-4/11 Bundesrepublik Deutschland v Kaveh Puid [2013] ECL I-740

Case C-528/15 Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others [2017] ECL I-213


Case C-63/15 Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie [2016] ECL I-186

Decision of the Council of the European Union

Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] OJ L157/23

European Court of Human Rights

Aden Ahmed v Malta [2013] ECHR 55352/12

Hirsi Jamaa and Others v. Italy [2015] ECHR 27765/09.

J.A. and Others v. the Netherlands [2015] ECHR 214559/14

K.R.S. v. the United Kingdom [2008] ECHR 32733/08
Mahammad and Others v. Greece [2015] ECHR 48352/12

Mohammed Hussein v. the Netherlands and Italy [2013] ECHR 27725/10

M.S.S. v. Belgium And Greece [2011] ECHR 30696/09

Rahimi v. Greece [2011] ECHR 8687/08

Richmond Yaw and others v. Italy [2016] ECHR 3342/11

Sharifi and Others v Italy and Greece [2014] ECHR 16643/09

Soering v. The United Kingdom [1989] ECHR 14038/88

Tarakhel v. Switzerland [2014] ECHR 29217/12


Vagra and Others v. Hungary [2015] ECHR 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13

European Court of Human Rights, Communicated Cases
Darboe and Camara v. Italy [2017] ECHR 5797/17

Germany
Administrative Court Braunschweig Case 5 A 332/15 of 12 October 2016
Administrative Court of Braunschweig Case 7 B 51/17 of 17 February 2017

Administrative Court of Göttingen Case 3 B 198/17 of 29 March 2017

Administrative Court of Potsdam Case 6 L 712/15 A of 17 June 2015

Administrative court of Saarland Case 5 K 981/15 of 15 March 2017

Constitutional Court of Germany Case 2 BvR 746/15 of 30 April 2015

Federal Constitutional Court of Germany Case 2 BvR 1795/14 of 17 September 2014

Federal Supreme Court Case V ZB 31/14 26 of 26 June 2014

High Administrative Court of Lower Saxony Case 11 LB 248/14 of 25 June 2015

**Sweden**

Migration Court of Appeal Case UM 1859-161 of July 2016

Migration Court of Appeal Case MIG 2015:5 of 3 June 2015

Migration court of Appeal Case UM 3212-15 of 26 November 2015

Migration Court of Appeal Case UM 607-06 of 22 January 2007

Migration Court of Appeal Case UM 8098-09 of 6 September 2010

**Greece**

Asylum Appeals Committee 11th AAC, Decision n. 95/000188424 of 11 February 2014

Asylum Appeals Committee 17th AAC, Decision n. 95/000190454 of 21 March 2014

Asylum Appeals committee 2nd AAC, Decision n. 95/000186004 of 29 November 2013
State Legal Council, Opinion n. 339/2013 of 22 October 2013

Italy
Administrative Court of Lazio, Session I-Ter, Case n. 9909 of 22 September 2016

Administrative Court of Lazio, Session I-Ter, Case n. 11911 of 28 November 2016

Civil Court of Trieste, Decision of 3 February 2017

Council of State, Decisions n. 3998, 3999, 4000 and 4002 of 27 September 2016

Council of State, Decision n. 4004 of 27 September 2016

Council of State, Decision n. 5738 2015

Table of Legislation

International Law
Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85


Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III)

**European Union Law**

**Treaties and Conventions**


Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention [1990] OJ C254/1

EC Treaty (Treaty of Rome, as amended)


**Directives and Regulations**


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 L050/0001

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9


Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 [2013] OJ L180/31
National Legislation

German Law
Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, Date of issue: 30.07.2004

Asylum Act, Date of issue: 26.06.1992

Swedish Law
Act on temporary restrictions of the possibility of obtaining a residence permit in Sweden, 2016:752

Administrative Law, 1986:223

Aliens Act, 2005:716

Law on Reception of Asylum Seekers and Others, 1994:137

Greek Law


Presidential Decree 113/2013, Gazette 146/A/14-06-2013

Presidential Decree 114/2010 “on the establishment of a single procedure for granting the status of refugee or of beneficiary of subsidiary protection to aliens or to stateless persons in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status,” Gazette 195/A/22-11-2010

**Italian Law**

Decree Law 17 February 2017 n. 13, Urgent measures for accelerating the proceedings related to the international protection, as well as for fighting against illegal immigration

Decree Law 29 March 2017, Provision of protective measures for unaccompanied minors

Law decree n. 144/2005 confirmed into statute law n. 155/2005, Urgent measures against international terrorism

Law n. 47/2017 of 7 April 2017, for Provision of Protection measures.

List of Abbreviations

Agreement on the European Economic Area = EEA Agreement
Asylum Information Database = AIDA
Common European Asylum System = CEAS
Commission Implementing Regulation (EU) No 118/2014 = Implementing Regulation
Directive 2011/95/EU = Recast Qualification Directive
Directive 2013/33 EU = Recast Reception Conditions Directive
European Asylum Support Office = EASO
European Council on Refugees and Exiles = ECRE
European Court of Human Rights = ECtHR
European Court of Justice = ECJ
European Convention of Human Rights = ECHR
German Federal Office for Migration and Refugees = BAMF
Gross Domestic Product = GDP
Italian System of Protection for Asylum Seekers and Refugees = SPRAR
Non-Governmental Organization = NGO
Programs of Development, Social Support and Medical Cooperation = PRAKSIS
Regulation (EU) No 604/2013 = Dublin III
Treaty on the Functioning of the European Union = TFEU
United Nations High Commissioner for Refugees = UNHCR
Universal Declaration of Human Rights = UDHR
Visa Information System = VIS
1. Introduction

International Refugee law was born when countries affected by sudden inflows of refugees found that they needed a global commitment to offer these individuals certain rights and protection. The situation in Europe following the Second World War was inevitably the most influential propulsion, bringing countries together to create international bodies and rules addressing refugee protection.\(^1\) The Member States of the European Union followed this international regime for a long time, but otherwise kept complete competence and jurisdiction as to their asylum policies.\(^2\) Then in the 1980’s and 1990’s a sudden growth in asylum applications brought to the attention of European leaders that asylum policies within the Union varied greatly. Some Member States had become more appealing to refugees than others and illegal entry was becoming more frequent, which concerned those who already envisioned a European Union free of internal borders.\(^3\) Soon a Community legislative competence in the field of asylum and refugee agenda was established, with the aim of developing a comprehensive and flexible migration policy, based on solidarity and responsibility. Both the needs of migrants and the EU Member States were to be considered.\(^4\)

In 2015, an unprecedented wave of people seeking international protection hit Europe and placed a sudden pressure on the Common European Asylum System.\(^5\) Concerns were raised as to profound problems within the European asylum policy,\(^6\) especially with regard to the Dublin III Regulation which establishes which Member State is responsible for examining asylum applications.\(^7\) The Regulation has been found to have failed to efficiently determine Member State responsibility and provide individuals with effective access to asylum procedures.\(^8\)

---

\(^7\) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 [2013] OJ L180/31 (Dublin III).
This thesis seeks to give a comprehensive account of the Dublin system, currently made up of the Dublin III Regulation and the Eurodac fingerprinting database. Previous literature on the subject has provided an overview of recognised flaws in the Regulation itself and some inefficiencies in its application. However, to the author’s best knowledge, the relationship between the structure of the Dublin System and the application of the Dublin rules on the national level has not yet been thoroughly discussed. This thesis proposes a new approach where four states will be analysed in detail as to how national authorities apply the Regulation. Two states in the northern part of Europe, Germany and Sweden, will be compared with two southern border states, Greece and Italy. By looking into how these states apply the Dublin rules the thesis aims to provide a better understanding of why the Dublin System failed its objectives.

These four states were chosen for the effect the migration wave has had on their asylum systems. Since most asylum seekers entre the EU through Greece and Italy their national systems have become overloaded. In contrast, these states are seen as temporary stops by most asylum seekers and large numbers continue on their journey towards Northern Europe. Most final decisions of non-EU asylum applications within the Union in 2016 were effectively registered in Germany and Sweden. By comparing the application of the Dublin rules in these four states two questions will be addressed: first, what Dublin rules have proven difficult in practice and how their application might vary between different Member States; and second, whether the Dublin rules have a counteractive influence on the Member States’ use of the system and if so, how this effect might vary between different Member States.

The thesis can be seen as divided into four main sections. First, the legal environment will be explored and the development of the European Union’s asylum policy described. This part will include an explanation of the Dublin rules. Secondly, the immediate reaction of the EU and its Member States to the current influx of migrants will be explored. Thirdly, the deficiencies of the Dublin Regulation and its application by the Member States will be covered, including a detailed comparison of the four focus countries. Finally, in the fourth section, the

---


Commission’s proposal for a Dublin reform will be considered briefly before final conclusions are drawn.

2. Asylum and Refugee Protection

2.1 International Refugee Law

The core of International refugee law is made up of legal instruments that define who may benefit from international protection and what rights such status entails.\(^{12}\) Refugees are a particular kind of migrants, whose main reasons for flight is to escape persecution. The term refugee has a long history as groups of people have been persecuted or displaced by war and colonisation for centuries. However, the international refugee law regime we know today originated in 20\(^{th}\) century Europe.\(^{13}\)

When the League of Nations was created in 1919 there already existed express treaties regarding extradition and the treatment of aliens, although rules regulating the status or rights of refugees were still unaccounted for. When masses of refugees from Russia entered Europe in reaction to the Bolshevik revolution, numerous states were concerned by these unidentified persons and their legal status.\(^{14}\) The League responded with the creation of the High Commissioner of Refugees in 1921, which was initially intended as a temporary solution to the ongoing situation. Furthermore, when the office of the United Nations High Commissioner for Refugees (From now on UNHCR) was established in 1950, it was intended as a temporary answer to the refugee problem in Europe which arose in the aftermath of the Second World War. Although early writings on the international refugee law regime generally describe it as a progressing humanitarian response, a more historically accurate way might be to call it the answer to a dilemma, based on juridical concerns, rather than a humanitarian impulse.\(^{15}\)

The 1951 Convention relating to the Status of Refugees (From now on the Refugee Convention) was adopted at a diplomatic conference in Geneva,\(^{16}\) and was later amended by the 1967 Protocol.\(^{17}\) These documents are overseen by the UNHCR and remain the most

---


\(^{13}\) Timothy J Hatton, ‘Refugee and Asylum Migration to the OECD: A Short Overview’ (Institute of Labour Economics 2012) 7004 2

\(^{14}\) McAdam (n 12) 6–7.

\(^{15}\) Peterson (n 1) 445–446; The author based his theory on Nevzat Soguk’s book ‘States and Strangers: Refugees and Displacements of Statecraft’ from 1999.


substantial sources of international protection for refugees there are. The Refugee Convention defines who is a refugee and what legal protection, assistance and social rights a refugee shall receive. According to article 1A(2) of the Convention a refugee is someone who is outside his or her country of nationality or habitual residence, has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution. Persons meeting this description should benefit from the rights, and be bound by the duties, of the Refugee Convention. Some categories of people do not qualify for protection under the Refugee Convention, as explained in Article 1F(a)-(c). That article applies where there are serious reasons which indicate that: The individual has committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge; or if they are guilty of acts which go against the purposes and principles of the United Nations.

Two key elements regarding the Refugee Convention should be mentioned here. The first is the right to seek asylum. Although the Refugee Convention does not guarantee a right to asylum, the introductory note indicates that refugees will be accorded the rights given in the Universal Declaration of Human Rights (from now on the UDHR) from 1948, which includes Article 14 on the right to seek and enjoy asylum from persecution in other countries. The second element is the principle of non-refoulement in Article 33(1). It is one of the Refugee Convention’s basic Articles to which no reservation is permitted. No Contracting State shall expel or return a refugee in any manner whatsoever to a country where he or she faces serious threats to his or her life or freedom, on account of his or her race, religion, nationality, membership of a particular social group or political opinion. Article 33(2) limits this protection as it may not be claimed by a refugee who can on reasonable grounds be regarded as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. The principle of non-refoulement can equally be found in Article 3 of the 1984 Convention Against Torture, where it is stated that a person shall not be returned to a country where he or she

18 McAdam (n 12) 10.
20 Refugee Convention, introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) para 1.
21 High Commissioner for Refugees, Note on Non-Refoulement, EC/SCP/2, 23 August 1977.
22 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
faces a real risk of torture. It is furthermore now considered as a rule of customary international law, and is as such, binding upon all states.23

The Refugee Convention and its Protocol remain the cornerstone of international refugee protection. Regional instruments have taken inspiration from these leading documents, including the 1969 OAU Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America and the Common Asylum System of the European Union.24

2.2 EU Legislation on Asylum
2.2.1 From a Domestic Issue to Harmonisation

The next two chapters will cover the development of the European Union’s competences in asylum matters. In order to understand the disparity of the Common Asylum System the Union aimed to achieve, and what has effectively been accomplished, it is important to understand how the policy developed.

According to Article 78 of the Treaty on the Functioning of the European Union (from now on TFEU), The EU will develop a common policy on asylum which shall ensure compliance with the principle of non-refoulement, and the Refugee Convention, along with its Protocol.25 However, asylum was not always a part of EU law, but used to be an autonomous national matter. The original position of the EU was that the Member States kept sole competence and jurisdiction with regard to their asylum policies as asylum and immigration fell under the “Third Pillar.”26 Furthermore, by the time of their individual accession to the Treaty of Rome,27 each Member State of the Union was already a party to the Refugee Convention and the 1967 Protocol.28 Yet, the Refugee Convention was not found capable of handling a sudden influx of people, as well as it allowed host states to adopt their own policies.29 When Europe experienced a sudden growth in asylum applications in the 1980’s and 1990’s each Member State had their own perception of the Refugee Convention. Northern states, such as Germany and Holland, became popular destinations, while southern states

---

24 ibid 1; Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).
26 Selanec (n 2) 42.
27 EC Treaty (Treaty of Rome, as amended).
28 Woods and Watson (n 3) 581.
received very few requests. The unbalanced burden sharing was partly attributed to different asylum practices in different Member States, leading to what has been called “asylum shopping” among refugees. Furthermore, some European governments began restricting migration of persons from poorer countries of origin which led to a rise in illegal entry of refugees. The Union felt it needed to secure its external borders and control the flow of asylum seekers. These circumstances and the corresponding actions marked the beginning of a Common European Asylum System (from now on CEAS).  

2.2.2 Enforcement of a Single External Border

In 1993, the Maastricht Treaty created a Community legislative competence in the field of asylum and refugee agenda and rules on asylum were moved to the “First Pillar.” About a decade before that, the Member States had begun debating whether internal borders in the EU should be removed to ensure free movement of persons within the Union. The original Schengen Agreement was adopted in 1985 by France, Germany, Belgium, Luxembourg and the Netherlands and a further Convention drafted in 1990. The Schengen Convention took effect in 1995, abolishing checks at the internal borders of the participating countries, creating a single external border. When the Amsterdam treaty was adopted in 1997, the Schengen rules were incorporated into the EU framework with a protocol. Third countries with specific relations to the EU soon took part in the Schengen area. In the case of Iceland, Norway and Liechtenstein this was done through the Agreement on the European Economic Area (EEA Agreement) and by the Agreement on the Free Movement of Persons in regard to Switzerland.

Measures enforcing the EU’s external borders started to appear from the early adoption of the Schengen Agreement. The most significant of these was the Dublin Convention drafted

---

30 Woods and Watson (n 3) 581.
31 Hatton ‘European Asylum Policy’ (n 29) 108; Samantha Velluti, Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts (Springer 2014) 13; Treaty on European Union (Maastricht Treaty).
in 1990.\textsuperscript{35} The Dublin system was intended for three main purposes. The first, to establish a clear and workable mechanism providing that only one Member State be responsible for the examination of an application for international protection. The second, to provide swift access to the asylum procedure and prevent asylum seekers “left in orbit”, a situation where no Member State accepts responsibility for the applicant, delaying access to protection. The third was to prevent applicants from applying for asylum in various Member States, and thereby limit secondary movement of asylum seekers.\textsuperscript{36}

In October of 1999, after a meeting in Tampere, Finland, the European Council confirmed the Amsterdam treaty by agreeing to work towards establishing a Common European Asylum system, based on the 1951 Convention.\textsuperscript{37} This led to the adoption of the Dublin II regulation which replaced the Dublin convention.\textsuperscript{38} With the exception of Denmark, which did not take part in the adoption of the regulation to begin with, all the Member States of the EU acceded to the Dublin II, as well as the non-EU Schengen members. Dublin II maintained the criteria determining responsibility under the Dublin Convention but laid down more detailed rules for its application. The European Council and Parliament presented a revision of the Dublin system in 2013, addressing some of the problems of the 2003 legislation. Dublin III came into effect in January 2014. It brought with it further improvements, namely clarifying the hierarchy of criteria laid down in the earlier regulation in order to determine Member State responsibility.\textsuperscript{39}

2.2.3 The Means Applied by the Dublin System

At this point the term “asylum seeker” should be clarified. It refers to an individual who has applied for international protection (asylum) in a country which is not his or her own, but whose protection status according to the Refugee Convention or corresponding provisions in

\textsuperscript{35} Hatton ‘European Asylum Policy’ (n 29) 108; Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention [1990] OJ C254/1 (Dublin Convention).


\textsuperscript{38} Woods and Watson (n 3) 581–582; 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 L050/0001 (Dublin II).

\textsuperscript{39} Fratzke (n 8) 3; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 [2013] OJ L180/31.
EU law has not yet been determined. The Dublin system was created for the controversial aim of facilitating and legitimizing the deflection of asylum applications within the EU. This rationale of the Dublin system is not easily reconciled with the border-free area, since internal border controls were considered necessary for at least one group of persons: asylum seekers.

The Dublin III Regulation and the Eurodac Regulation, which created a database of fingerprinting of asylum applicants, together make for the so-called Dublin System. Essentially the Dublin System determines that asylum seekers may only make one application for international protection within the European Union, which in practice usually indicates the first Member State they enter. If asylum seekers submit an application in a different Member State than the one deemed responsible for their application, they can be returned to that country.

Dublin III provided more clarification than Dublin II did, particularly in regard to the hierarchy of criteria by which the responsible Member State is determined. The first three criteria in Articles 8 to 11 focus on family unity and the best interests of unaccompanied minors. Asylum seekers with family members who have the recognized refugee status, or who are currently applying for asylum in a Member State, will have their claim examined in the same state as their nuclear family members. If an unaccompanied minor has family members in another Member State, that State will take responsibility for the minor, as long as it is in the best interest of the minor. When no family relations are known, but the asylum seeker has a valid or recently expired residence document or visa, the Member State which issued the

---

42 Takle and Seeberg (n 9) 12; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1.
45 Article 2(g) Dublin III defines “family members” as family that already existed in the country of origin and may be applied to a spouse or a partner; minor children; or the father or the mother, or another adult responsible for a minor applicant.
documents is responsible for his or her application by Articles 12 and 14. When these criteria do not apply, persons who illegally transited through another Member State when entering the EU shall be the responsibility of the first Member State in which that person arrived, according to Article 13. Finally, where an application for asylum is made in the international transit area of an airport in a Member State, that Member State shall be responsible for examining the application according to Article 15.

There is a default rule in Article 3(2) for situations where no Member State can be found responsible on the basis of the criteria. In these cases, the first Member State where an application was lodged is responsible. Furthermore, the second and third sub-paragraph of Article 3(2) are meant to ensure that a refugee is not sent to a Member State where there are substantial grounds for believing that systematic deficiencies in the asylum procedures and reception conditions in that Member State put the refugee at risk of being submitted to inhuman or degrading treatment. If there is a risk of this kind the Member State determining responsibility must continue to examine the criteria and find another responsible Member State, or otherwise take responsibility itself. Finally, Article 17(1) allows Member States to examine an application even when the responsibility criteria do not set them out as the responsible State. States can equally request that another state take charge of an application on the basis of humanitarian reasons, as explained in Article 17(2). These reasons include health problems or family unity in cases of extended family.

A Member State that finds another Member State responsible for an application can issue a “take charge” or “take back” request with that Member State. A take back request is issued when the applicant has already applied for asylum in a different Member state, and a take charge request when the applicant has not applied for asylum before, but another Member State is responsible based on the criteria. When asylum authorities request that another Member State take charge of an application, in accordance with Article 21, a request is sent to the other Member State within three months of when the application was received in the sending state, or within two months of finding a Eurodac data record pursuant to Article 14 of Regulation (EU) No 603/2013. The receiving state then has two months to accept or reject the request. If the receiving state accepts, a transfer of the applicant must take place within six months, as explained in Article 29. When a Member State requests that another Member State take back an asylum seeker, according to Article 23 and 24, the request must be filed within three months of when the application was submitted in the sending state, or from the time when the state

46 Dublin III Article 21(1) and 23(2).
became aware of another state’s responsibility. In the case of a Eurodac hit the time limit is two months. In accordance with Article 25, the receiving Member State must reply within a month, and as explained in Article 29, has six months to complete the transfer.

The time limits explained above are in line with the aim of providing applicants with swift access to the asylum procedures and therefore preventing the phenomenon of asylum seekers in orbit.47 Moreover, if the applicant disagrees with a transfer decision, an appeal may be filed or review sought, according Article 27. Applicants may be detained during this process, according to Article 28, if there is a significant risk that they will abscond.

3. The EU and the Sudden Migration Wave

3.1 A Weight-Test for the Common European Asylum System

In 2015, a record of 1.3 million migrants applied for asylum in the European Union, Norway and Switzerland. This number doubled the last record from 1992, which occurred after the fall of the Iron Curtain and the collapse of the Soviet Union.48 Europe is currently facing an inflation in the numbers of migrants seeking protection. Thousands of migrants, including refugees, keep arriving on its shores and at inland borders.49 Large groups of Syrians, Iraqis, Libyans, Afghans and Eritreans are seeking to enter Europe for a number of reasons, including war, ethnic conflict or economic hardship.50 Although the overall numbers are decreasing the wave has not yet deceased. Latest available data shows that 381,892 migrants arrived in Europe over the Mediterranean and by land through Bulgaria in 2016.51 Moreover, 11.075 people

47 ‘Evaluation of the Dublin III Regulation’ (n 36) 8.
arrived in Italy by sea in March 2017, which compared with the same periods in 2016 and 2015 is an increase by about 29% and 139% respectively.\textsuperscript{52}

It quickly became clear that the European asylum law regime did not keep pace with the growing numbers of migrants. The EU began struggling to agree on a collective and sustainable response.\textsuperscript{53} Large-scale migration has occurred before, namely in the 1990’s, during conflicts in the former Yugoslavia and in 2011 as a consequence of the Arab Spring. However, the current situation is different from previous movements of people. Today Europe is facing a more diverse group, coming from further away and through various routes.\textsuperscript{54}

The author of this thesis has chosen the term “migration wave” to demonstrate the sudden influxes of migrants that started arriving in Europe in 2015, although these events have been referred to as the “migration crisis” by most researchers. The author finds that the word “crisis” indicates that asylum seekers are a problem and a threat to European countries, and that this wording fuels the agenda of those who remain in opposition to offering refugees international protection. The term “migration wave” is intended to illustrate that these events have not only placed pressure on the asylums systems, but more importantly affected the lives of those seeking asylum.

The wave presents an essential moment for the CEAS. Its conceptual foundations have been disclosed and a reconstruction of the system seems inevitable. After all, the original Greek definition of the word “crisis” refers to a turning point or a decision.\textsuperscript{55} However, it should be kept in mind that the situation in Europe mirrors a global development and that at the beginning of 2015, around 60 million people were forcibly displaced worldwide.\textsuperscript{56}

3.2 How has the EU responded?

3.2.1 A European Agenda on Migration

On 23 April 2015, a European Council Meeting called upon the European Commission to prevent further tragedies at sea by strengthening marine forces in the Mediterranean and stop

\textsuperscript{53} Hampshire (n 43) 8–9.
\textsuperscript{54} Gertrud Malmersjo and Rémác (n 44) 1.
smugglers and traffickers. The Commission proposed the European Agenda on Migration on 13 May 2015, with the intention of responding to the immediate and long-term challenges facing Europe. According to the Agenda, Frontex and Europol would be strengthened and safe and legal resettlement secured. A more coordinated European approach, based on solidarity and common responsibility, was presented as the only effective way to handle the wave of migrants. The Agenda also mentioned the Commission’s commitment to evaluate the Dublin system in 2016, where the experience of the relocation mechanism would be considered when deciding whether a revision of Dublin III would be necessary.

3.2.2 Hotspots

In order to support Member States faced with the heaviest migratory pressure hotspots were installed to swiftly identify, register and fingerprint migrants, as well as facilitate the implementation of relocations and returns. The European Asylum Support Office (from now on EASO), Frontex and Europol were assigned to assist Member States with the processing of asylum applications and coordinate the returns of irregular migrants not in need of protection. The measure has been criticized for using practices and standards that disrespect fundamental rights. For instance, police officers in Italy conduct the first selections between persons in need and those who are not, a disproportionate responsibility for this authority. In Greece, delays and the lack of capacity of the Asylum Service to accommodate new arrivals has raised concerns. In both countries detention is used as a key measure to ensure the function of the hotspots. Given the pressure of registering all arriving migrants, the hotspots are becoming a standard procedure applied to migrants, where they are pre-identified, forced to be fingerprinted and classified on an inadequate summary assessment.

59 ibid 2–3.
60 Selanec (n 5) 76; European Commission Communication on a European Agenda on Migration, COM(2015)240, 13 May 2015 (n 4) 2.
3.2.3 The EU-Turkey Statement

By the end of June 2015, the European Council initiated an increased cooperation with countries in the Middle East such as Turkey, Iraq, Jordan and Lebanon. The most important arrangement was made with Turkey, as that country that has received the heaviest flow of refugees worldwide. On 18 March 2016, the EU and Turkey signed a Statement to jointly manage irregular migration from Turkey to the EU and end human trafficking. All refugees arriving in Greece through Turkey after 20 March 2016, were to be sent back and for each person sent back the EU would accept one Syrian refugee over its borders. According to a progress report issued by the Commission in September 2016, 578 people who entered Greece irregularly had been returned to Turkey since the Statement took effect. Another report from December 2016 describes how, despite some difficulties, the Statement resulted in a steady delivery of results. These results included a lower number of crossings, fewer lives lost at sea and a significantly lower number in the daily arrivals from Turkey to the Greek islands than in the same period a year before. Against positive reports from the Commission, the measure has been criticised for delays in the asylum processing and in returns to Turkey, the different asylum procedures offered to people on the mainland compared to those in the Greek islands and the deviating treatment of nationalities. A heavy burden is placed on Greece and large groups of people in need of protection are stranded on the Greek islands, since all arriving migrants are placed in crowded detention facilities, instead of being returned to the mainland. Turkey is in the position of having to accept every returned applicant from Greece and prevent new routes from opening up. More importantly, rescue teams have warned that since the

70 European Commission, Communication on Fourth Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792, 8 December 2016 1.
Agreement was adopted the dangerous Mediterranean Sea route has become the main pathway for refugees to Europe, as the safer crossing over the Aegean Sea has been blocked.\textsuperscript{72} What is more, Turkish border police have been found to have shot Syrian refugees at the Turkish-Syrian border. Turkey now hosts the largest population of refugees in the world, amounting to 2.6 million Syrians in November 2016. It is concerning that according to the EU-Turkey statement, Turkey is a safe third country of asylum.\textsuperscript{73}

3.2.4 Relocation

For the first time, the emergency response system in Article 78(3) TFEU was activated as the Justice and Home Affairs Council agreed to establish a temporary relocation mechanism on 20 July 2015, relocating individuals in obvious need of international protection from Italy and Greece to other Member States.\textsuperscript{74} The Home Affairs Ministers adopted a decision on 14 September 2015 where it was decided that 40,000 people in need of international protection would be relocated from Italy and Greece. A second decision was made on the following 22 September, regarding the relocation of 120,000 people.\textsuperscript{75}

Notwithstanding these efforts, the number of relocation transfers and pledges remains low. On 10 April 2017, only 16,340 persons had been relocated, or 10.2\% of the intended 160,000. Of these, 5,001 were from Italy and 11,339 from Greece.\textsuperscript{76} These results can partially be explained by a lack of willingness by other Member States to contribute, but also by the reluctance of the applicants themselves. Many have withdrawn from the program or absconded before their relocation could take place. As applicants do not have a say in where they are


transferred, many are unhappy with being sent to poorer EU countries or afraid of being transferred far from relatives and friends.\footnote{77 Esin Küçük, “The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?” (2016) 22 European Law Journal 448, 461; Duncan Robinson, ‘Refugees in Greece Refuse to Relocate across EU’ (Financial Times, 16 May 2016) <https://www.ft.com/content/826f1bf2-1b75-11e6-b286-cddde55ca122> accessed 9 April 2017.}

3.3 Responses on the National Level

Perhaps because of a lack of successful solutions on the EU level, European countries have turned to their own measures. In 2015, Hungary built fences along its borders with Serbia, and Bulgaria blocked the route leading into the EU from Turkey.\footnote{Tina Askanius and Tobias Linné, ‘Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries’ (Cardiff School of Journalism 2015) 3 <https://lup.lub.lu.se/search/publication/c064846f-6183-4d3c-9f72-4a5d37f0cb9b>.} Hungary has also arrested those who trespass its borders, violating Article 31 of the Refugee Convention, which prohibits states from imposing penalties on refugees based on their illegal entry or presence.\footnote{Ruth Green, ‘Refugee Crisis Management’ (International Bar Association, 16 August 2016) <http://www.ibanet.org/Article/NewDetail.aspx?ArticleId=23c6be9e-d959-4fc7-8bb8-dba874299bc1> accessed 20 February 2017.} Furthermore, detention has been used excessively by Hungarian authorities, and the ECtHR has found Hungary in breach of Article 3 ECHR for inhuman treatment, and of Article 3 ECHR in conjunction with Article 13, for a lack of remedy to complain.\footnote{Vagra and Others v. Hungary [2015] ECHR 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.} Already in 2012, the UNHCR urged EU Member States to stop Dublin transfers to Hungary.\footnote{‘Note on Dublin Transfers to Hungary of People Who Have Transited through Serbia -- Update’ (UNHCR) <http://www.refworld.org/docid/50d1d13e2.html> accessed 27 April 2017.}

Other Member States have provided extended protection, not accounted for by EU law.\footnote{‘Sweden Will Grant Permanent Residence Permit to Syrian Refugees’ (Asylum Information Database, 3 September 2013) <http://www.asylumineurope.org/news/17-10-2014/sweden-will-grant-permanent-residence-permit-syrian-refugees> accessed 21 February 2017; Rättsliga ställningstagandet (RCI 12/2014) angående säkerhetsituationen i Syrien, 2013-09-02.} As the situation in Syria\footnote{Selanec (n 5) 107–108.} was already getting increasingly worse in 2013, the Swedish government announced permanent residence permits for Syrian asylum seekers.\footnote{‘Sweden Will Grant Permanent Residence Permit to Syrian Refugees’ (Asylum Information Database, 3 September 2013) <http://www.asylumineurope.org/news/17-10-2014/sweden-will-grant-permanent-residence-permit-syrian-refugees> accessed 21 February 2017; Rättsliga ställningstagandet (RCI 12/2014) angående säkerhetsituationen i Syrien, 2013-09-02.} Sweden became a primary destination for people fleeing the Syrian war. Consequently, the Government announced on 24 November 2015 that apart from quota refugees, all refugees would now be provided with temporary permits.\footnote{‘Government Proposes Measures to Create Respite for Swedish Refugee Reception’ (Government Offices of Sweden, 24 November 2015) <http://www.government.se/articles/2015/11/government-proposes-measures-to-create-respite-for-swedish-refugee-reception/> accessed 20 February 2017.} The new restrictive approach was found necessary to ease
domestic problems and influence other Member States to accept more refugees.86 Subsequently, numbers have been kept down by obligatory ID checks on carriers entering the country, at the time of writing most recently extended for another three months from 11 February 2017 to 10 May 2017.87 In June 2016, the Council equally granted Sweden a one-year suspension from its obligations under the relocation scheme considering the strain on its asylum system.88 The suspension expires in June 2017, and Sweden has begun pledging its intention to meet the country’s legal commitments.89

Germany equally reacted to the migration wave with an initial open-door policy. On 24 August 2015, the German Federal Office for Migration and Refugees (from now on the BAMF) suspended Dublin III for Syrians, processing their applications no matter where they first entered the EU.90 However, on 21 October 2015, German Federal Minister of the Interior, Thomas de Maizière, announced that the procedure was waived and that the Dublin regulation would be reinstated with regard to Syrians entering Germany.91 Although the original suspension was based on humanitarian reasons, and the practical aspect of relieving the BAMF of a part of their procedure, the decision resulted in a unforeseen mass of asylum seekers of too great extent.92 Statistics show that applications from Syrians went from 9.413 in July, to 10.2015 in August and 16.838 in September 2015.93 Like Swedish officials, de Maizière

announced that other Member States would have to fulfil their legal and humanitarian obligations.\textsuperscript{94} Germany has relocated the largest number of applicants from Greece and Italy according to the relocation scheme, amounting to 3,511 people so far. Despite this effort, it remains just over 10\% of Germany’s allocation.\textsuperscript{95}

Italy and Greece, still struggling from the financial blow of 2007, soon became overburdened by migrants.\textsuperscript{96} Arrivals continue at low levels but these countries are still under pressure. According to latest reports from the European Commission, over 62,200 migrants still remain on Greek territory. By mid-April 2017, 24,672 migrants had arrived in Italy since the beginning of the year, which makes for a 36\% increase since the same period the year before.\textsuperscript{97} Both states have been criticised for breaking European and International law in the last couple of years, Greece by seemingly collective expulsions and Italy by pushbacks off its shores resulting in numerous deaths.\textsuperscript{98} Italy was already found to have violated Article 3 and 4 ECHR by collective expulsions of migrants to Libya in 2012 in ECtHR’s judgment Hirsi Jamaa\textsuperscript{99} and later in Sharifi and Others, where individuals travelling by boats from Greece to Italy were immediately refouled back to Greece.\textsuperscript{100}

3.4 Conclusion

Despite recent efforts, the EU’s reaction to the migration wave has not given any long-lasting results. Difficult negotiations between Member States have resulted in a series of ad-hoc measures, but not a way to fully cope with the ongoing situation.\textsuperscript{101} In its 2016 report for the year 2015, the Human Rights Watch expressed concerns, noting that the EU focused on preventing migrants from arriving in Europe and transferring those not deemed in need of

---

\textsuperscript{94}’Flüchtlinge: Deutschland Will Syrer Wieder in Andere EU’ (n 91).
\textsuperscript{96}Küçük (n 77) 452.
\textsuperscript{99}Hirsi Jamaa and Others v. Italy [ 2015] ECHR 27765/09.
\textsuperscript{100}Sharifi and Others v Italy and Greece [2014] ECHR 16643/09.
protection to other regions.\textsuperscript{102} What is to come is still uncertain and ongoing debates might end with a genuine European consensus on asylum, just as well as they might result in a standstill or decline. Resettlement schemes and cooperation with countries such as Turkey or Libya might be the building blocks of the future European policy on asylum, as long as the evident division between the EU Member States is resolved.\textsuperscript{103} However, the crisis management techniques of the EU still uphold the Dublin system as the general rule and it must be questioned whether a solution can be found while the Regulation remains as it is.\textsuperscript{104}

4. Dublin III: The Controversial Cornerstone of the CEAS?

The common policy on asylum discussed in Tampere in 1999 finally got a legal basis in 2009 with the Lisbon Treaty.\textsuperscript{105} The Stockholm Programme followed, laying out the policy which the Lisbon Treaty embedded.\textsuperscript{106} The idea was to develop a comprehensive and flexible migration policy, based on solidarity and responsibility. Both the needs of migrants and the Member States were to be considered.\textsuperscript{107}

A set of rules was created, laying out a common standard and cooperation ensuring equal and fair treatment of applicants.\textsuperscript{108} Notwithstanding the Dublin III Regulation and the Eurodac Regulation, the other building blocks of the CEAS today are: The recast Qualification Directive, which lists the criteria an applicant needs to fulfil to benefit from the refugee status; the recast Asylum Procedure Directive, which sets out common rules for the asylum procedure and how protection is granted and withdrawn; and the recast Reception Conditions Directive,

\textsuperscript{103} Thym (n 55).
\textsuperscript{104} Selanec (n 5) 91–92.
\textsuperscript{105} The Treaty of Lisbon (The Lisbon Treaty) art 78 TFEU (ex Articles 63, points 1 and 2, and 64(2) TEC).
which regulates access to healthcare and other social rights and sets out rules for detention.\textsuperscript{109} As this study focuses on the Dublin Regulation these legal acts will not be explained further, but will be mentioned when relevant to the Dublin System.

The increasing migration invoked a discussion about the Common European Asylum System and its shortcomings. The Dublin System has been particularly criticised and called the fundamental weakness of Europe’s asylum policy.\textsuperscript{110} On 6 April, 2016, the Commission issued a Communication towards a reform of the CEAS, notably expressing its concerns as to the Dublin rules.\textsuperscript{111} Ever since the Dublin Convention was adopted, the Dublin System has been considered of great importance for the CEAS to function. The Stockholm program describes the Dublin Regulation as the cornerstone in the creation of the CEAS, because of its clear allocation of responsibility. Moreover, Member State officials have expressed that the Regulation is necessary and more suitable than ad hoc negotiations between states, like those used throughout most of the 1990’s before the Dublin Convention took effect.\textsuperscript{112} The system has indeed been useful for Member State communication regarding asylum claims, which was the main intention of the original convention. At the same time, it has not achieved its objective of being a quick and efficient responsibility mechanism, offering individuals effective access to asylum procedures.\textsuperscript{113}

It is important to recognize that the Dublin system was designed at a time when European asylum cooperation was at a very different stage.\textsuperscript{114} In 1990, the Dublin Convention was most likely agreed upon with the border States anticipating that the shift of claims from


\textsuperscript{110} Wendel (n 6) 1006.

\textsuperscript{111} European Commission, Communication towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 6 April 2016.

\textsuperscript{112} Migration Policy Institute Europe, Interview with official in the Immigration Department, Danish Ministry of Justice (16 June 2014); Migration Policy Institute Europe, Interview with official in the Department of Asylum, Rescue, and Return, Directorate General for Immigration, Dutch Ministry of Security and Justice (27 June 2014).

\textsuperscript{113} Fratzke (n 8) 1, 6.

the centre to the external borders of the Union would not work in practice. Asylum responsibility was eventually distributed in a way that is probably very different from what was envisioned at the time.\(^{115}\) More importantly, the inflow of migrants was of a different nature and scale.\(^{116}\) This might explain at least to a certain extent why the current influxes of migrants have not been manageable under the Dublin Rules. It does not mean, however, that the Regulation was never criticised before 2015. Dublin has been an issue of debate for years and the current migration wave only brought the discussion to a boiling point.\(^{117}\) Dublin makes it mandatory for asylum seekers to submit their application in the Member State of first arrival which has resulted in an uneven burden placed upon a few states. Furthermore, applicants have been deprived from choosing where they wish to seek protection. The structural deficiencies are not the only issue. The regulation also suffers from implementation deficits. A difference can be found between Member States in the treatment of asylum seekers and in how applications are processed.\(^{118}\)

The following Chapters 5 and 6 will provide an overview of recognised deficiencies in the framework of the Regulation and in its application on the national level. Then, Chapter 7 will provide a detailed comparison of how the regulation has been applied by different Member States.

5. Issues in the Framework of Dublin III

5.1 Not all States are the Same

One of the goals of the Dublin system was to avoid multiple asylum applications in different Member States by setting out clear criteria to determine the responsible state. All the same, secondary movement of asylum seekers within the Schengen area remains frequent as refugees continue moving on from the first state they enter. In reality, not all European Countries offer applicants the same benefits or will process their application in the same way. Welfare policies, labour market opportunities, reception systems, asylum legislation and practices still vary between states. Recognition rates for the same nationalities differ noticeably, meaning that applicants’ chances of receiving the refugee status depending on

\(^{115}\) Mouzourakis (n 41) 11.


where they come from are not the same in every Member State. A further incentive for secondary movement are personal reasons of the applicant such as the presence of friends or relatives outside the immediate family, colonial links with a corresponding familiar language or a settled co-ethnic or co-national community.\textsuperscript{119}

Many applicants attempt to avoid the Dublin system by keeping clear of fingerprinting. Even if registered into the Eurodac database, many travel onward, hoping to either live clandestinely in another state or getting their application accepted on the merits.\textsuperscript{120}

\subsection*{5.2 Burden-Sharing}

According to the Preambles to Dublin II and III, one of the system’s key goals is to “strike a balance between responsibility criteria in a spirit of solidarity.”\textsuperscript{121} The principle of solidarity can equally be found in Article 80 of the TFEU. However, Dublin III was not designed to share responsibility fairly between European States and does not address disproportionate distribution of asylum applications. The criteria fail to consider whether Member States have the capacity to process asylum claims at a given time. Stakeholders have argued that practical application of the criteria has increased these disparities even further. As already explained, Dublin III places family unity as the primary criterion. In practice however, criteria related to the documentation and first country of entry are more frequently used.\textsuperscript{122} Since most migrants enter Europe through the southern border states, Italy and Greece, the majority of asylum applications become the responsibility of a few states, leaving them with the greatest burden.\textsuperscript{123} This additional pressure is difficult to handle and places refugees in a vulnerable position where a fair evaluation of asylum claims cannot be guaranteed.\textsuperscript{124}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{121}] \textsuperscript{121} Dubil II, recital 8; Dublin III, recital 25.
\item[\textsuperscript{122}] \textsuperscript{122} ‘Evaluation of the Dublin III Regulation’ (n 36) 4.
\item[\textsuperscript{123}] \textsuperscript{123} Selanec (n 2) 60.
\end{itemize}
\end{footnotesize}
6. Issues in the Application of Dublin III

6.1 The Responsibility Criteria

Chapter 5 provided an overview of the most controversial issues within the legal framework of Dublin III. Chapter 6 will in turn cover how some articles of the Regulation have proven difficult in practice. It seems appropriate to begin this discussion by the responsibility criteria.

Member States seem to have developed a higher evidence threshold for the criteria of family unity than for the first-entry criterion, or simply fail to take family unity into account, making the first-entry criterion the only effective ground for transferring responsibility for asylum applications. The hierarchy of criteria in Chapter 3 of the Dublin Regulation gives clear priority to the best interests of minor applicants and respect for family unity. Family unity has a fundamental meaning in international law and is rooted in several universal and regional human rights instruments, including Article 16 of the UDHR. According to Recital 14 of Dublin III, family life should be a primary consideration of Member States when applying the Regulation. Article 8 places responsibility for unaccompanied minors on the Member State in which the minor has family members, but otherwise the Member State where the minor applied for asylum is responsible. More broadly, Article 7(3) requires Member States to take into account all evidence that indicate that the applicant might have family members in another Member State. This includes relations beyond immediate family, whereas Articles 9 and 10 on family unity only apply to a spouse/partner or minor children. An applicant who has an immediate family member in another Member State, who is a beneficiary of or applicant for international protection, becomes the responsibility of that Member State. Moreover, Article 11 guarantees family procedures if members of the same family are separated because of the criteria and have submitted claims together or within a short lapse of time in the same Member State.

The UNHCR’s guidelines on the credibility assessment in EU asylum systems emphasise that national authorities shall use all means possible to produce necessary evidence for asylum applications and may need to assume greater responsibility when needed. Member State officials maintain that the family criteria are always taken into account but that a lack of evidence makes reuniting families difficult. On the one hand, Dublin III is applied in conjunction with the Eurodac fingerprinting database of asylum seekers and irregular migrants. Each applicants’ fingerprints are put into the database where it can be verified if the applicant has previously been registered in another Member State. In these cases, Dublin III may determine that another state shall take on the procedure. On the other hand, the Implementing Regulation, which lays down rules for the application of Dublin III, provides a list of evidences which has been found insufficiently detailed. Documentation of visas and fingerprints from the first country of arrival can be verified, whereas there is little information available about family ties. Authorities must rely on the refugees themselves to provide the necessary evidence. However, applicants may have left their home briskly without the opportunity to gather more than basic personal belongings. The UNHCR’s Handbook on Procedures and Criteria emphasis this fact. Although the burden of proof lies on the applicant, the duty to ascertain and evaluate the facts is shared between the applicant and the authorities involved. It only seems natural that this principle be applied in Dublin cases.

Articles 16 and 17 of the Regulation equally form a part of the responsibility criteria. According to the dependency clause in Article 16, Member States shall reunite family members when the applicant is dependent on a relative or vice versa, due to issues such as a pregnancy or disabilities. The interpretation of the dependency clause varies between Member States and agreeing on appropriate proof has been challenging. The Article is rarely used, possibly since

---

129 ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 27.
130 Fullerton (n 120) 69.
Article 17 can be applied to most of these cases.\textsuperscript{135} Article 17(1), formerly known as the sovereignty clause but now called the discretionary clause, permits Member States to take responsibility for applications they would not be expected to examine. Its use remains rare.\textsuperscript{136} Article 17(2) follows with the humanitarian clause. A Member State may request of another Member State, other than the one found responsible, to take on an application on humanitarian grounds. This applies particularly to family or cultural reasons. Member States’ use of the humanitarian clause is rare, and most states have reported to primarily rely on it for particularly serious medical concerns. What constitutes a humanitarian need has been debated and as before, the lack of evidence found challenging. Member States have not been keen to accept applications according to Article 17(2), and there is a tendency to apply a narrow interpretation to its provisions.\textsuperscript{137}

6.2 Procedural Rights

This Chapter will focus on procedural guarantees and safeguards in Dublin III, and how their use has been found lacking by the Member States. Dublin III introduced a number of new procedural rights to be respected at the early stages of Dublin procedures. Article 4 concerns the right to information, Article 5 the personal interview and Article 6 guarantees for minors.

Article 4 obliges competent authorities to inform applicants of the function of the Regulation immediately after they submit their application.\textsuperscript{138} Dublin III specifies which rules should be explained, including the objectives of the Regulation and the consequences of making another application in a different Member State or moving from one Member State to another, the criteria used to determine Member State responsibility and its hierarchy, information about the interview according to Article 5 and the possibility to challenge a transfer decision.\textsuperscript{139} Article 4(2) provides that the information shall be given in writing in a language the applicants are assumed to understand and when necessary, this information shall equally be given orally. Records show that in reality applicants often receive information exclusively in writing or only by oral instructions, in breach of the Regulation. Furthermore, almost half of the Member States have reported that the information provided is of a “general” kind which may fall short of what is required in Article 4(1).\textsuperscript{140} In \textit{Ilias and Ahmed}, the ECtHR emphasized

\textsuperscript{135}‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 33–34.
\textsuperscript{136}ibid 35.
\textsuperscript{137}ibid 35–36.
\textsuperscript{138}Dublin Regulation, Article 4
\textsuperscript{140}‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 9–11.
how important it is to inform applicants of the Dublin procedures.\textsuperscript{141} Otherwise, applicants will not know which elements are necessary to adequately circumstantiate their claims, or which steps to take to navigate through the procedures, threatening their right to an effective remedy by Article 13 ECHR.\textsuperscript{142}

The personal interview in Article 5 is intended to facilitate the process of determining the responsible Member State.\textsuperscript{143} Having a close link to Article 4, the interview helps applicants understand the Dublin system, gives them a chance to provide information about family members in other Member States and to challenge a transfer decision. According to Article 5(2) a personal interview may only be omitted if the applicant has absconded or if he or she has already provided the necessary information to determine the responsible Member State. Still, other reasons have been used as grounds for the omission of an interview, including the applicant refusing to participate or submitting subsequent applications, in cases of family reunification, when the case is manifestly unfounded or when the applicant has considerable health problems. The legitimacy of reasons like these must be questioned as the list in Article 5(2) is exhaustive.\textsuperscript{144} What is more, if the interview is not conducted properly there is a risk of a breach of the applicant’s right to be heard.\textsuperscript{145}

According to Article 5(4)-(6) a list of safeguards must be respected, such as the importance of using a language that the applicant understands, the availability of interpreters, that the interview is conducted by a qualified person and that the applicant is given access to a written summary of the interview. It has worried Non-Governmental Organizations (from now on NGOs) that language problems are often an issue and that required qualifications of interviewers vary greatly between Member States.\textsuperscript{146}

Finally, Article 6 identifies the best interests of the child as a primary consideration in respect to all Dublin procedures.\textsuperscript{147} Minors require special assistance through the Dublin process.\textsuperscript{148} Article 6(3) indicates according to which factors the best interests of the child shall be determined: Family reunification; the minor’s well-being and social development; safety and security, particularly when it comes to human trafficking; and the minor’s views as appropriate given his or her age and maturity. There are no other agreed upon criteria or indicators to help

\textsuperscript{141} Ilias and Ahmed v Hungary [2017] ECHR 47287/15 (Ilias and Ahmed).
\textsuperscript{142} Ilias and Ahmed para 116, 124-125.
\textsuperscript{143} Dublin Regulation Article 5(1).
\textsuperscript{144} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 13.
\textsuperscript{146} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 14–15.
\textsuperscript{147} Dublin Regulation Article 6(1)
\textsuperscript{148} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 15.
Member States determine what is in the best interest of the child in each case, or which factors should matter more in the final decision. This means that in practice each Member State gives its own interpretation of the Dublin rules in regard to minor children.\textsuperscript{149}

6.3 Detention

Detention is addressed in the recast Reception Conditions Directive, the recast Returns Directive and in the Dublin III Regulation. Each of these legal instruments stresses that detention is only to be used when necessary and that when possible, less coercive measures than detention should be applied.\textsuperscript{150} The conditions under which an applicant can be placed in detention during a Dublin procedure are explained in Article 28 of Dublin III. According to Article 28(2) an applicant may only be placed in detention when there is a significant risk of the applicant absconding. Article 2(n) of the Regulation defines the risk of absconding as the existence of reasons in an individual case, based on objective criteria defined by law, that indicate that an applicant or a third country national or a stateless person subject to a transfer procedure may decide to abscond. Most Member States have not defined the objective criteria in their national legislation and in those Member States that have, the significance of the risk may not be sufficiently defined.\textsuperscript{151} The European Court of Justice (from now on the ECJ) gave an interesting ruling on 15 March 2017 in \textit{Al Chodor}.\textsuperscript{152} The Court found that Member States must establish an objective criterion of the risk of absconding under Dublin III, in a binding provision of general application such as in a regulation or in law. If such provisions are lacking, detention on this ground is unlawful.

Detention is not an obligation but a possibility, as explained in Article 28(2). However, the risk remains that national authorities might be tempted to see anyone subject to Dublin III as an absconding risk.\textsuperscript{153} In fact, detention tends to fall into a systematic application.\textsuperscript{154} Article 28(3) concerns time limits. Detention should not exceed one month after the lodging of an application and not more than two weeks should be given for a reply from the responsible state.

\textsuperscript{149} ibid 16.

\textsuperscript{150} Reception Conditions Directive Article 8(2) and Recitals 15 and 20; Return Directive Article 15(1) and Recital 16; Dublin III Article 28(2) and Recital 20.

\textsuperscript{151} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 65.

\textsuperscript{152} Case C-528/15 Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others [2017] ECL I-213.


Then, a transfer must be carried out within six weeks from the date on which the request was accepted. This means that the process should be carried out within 12 weeks when an individual is detained.\(^{155}\) Member States have been found to breach these limits, leading to applicants being held in detention for long periods of time without any psychological support, where they suffer from anxiety and depression.\(^{156}\)

Article 29(4) of Dublin III refers to safeguards for detained applicants in Articles 9, 10 and 11 of the recast Reception Conditions Directive. These include guarantees such as the applicant’s right to be notified of the reasons for detention, access to free legal assistance and the possibility of a legal review at reasonable intervals.\(^{157}\) The ECtHR has e.g. found that legal aid is an important part of a detained applicant’s right to effective remedy.\(^{158}\) Furthermore, the ECJ has clarified that detention must be carried out in special facilities and not in regular prisons.\(^{159}\) Detention must equally be applied with consideration of the needs of vulnerable individuals and the best interests of the child.\(^{160}\) The Council of Europe Committee of Ministers released recommendations on measures of detention of asylum seekers in 2003 with a special chapter on minors. As a rule, detention should be avoided when minors are concerned, unless absolutely necessary, and they must never be placed in prison-like conditions.\(^{161}\) In reality, the use of these safeguards vary noticeably between Member States, as a further comparison in chapters 8-11 will demonstrate.\(^{162}\)

6.4 Transfers

Three issues should be addressed here regarding the implementation of Dublin transfers. The first is the low transfer rate. For instance, in 2014 only 8% of accepted requests were followed with a transfer. This can partially be explained by delayed transfers not captured in the annual data, and applicants appealing transfer decisions or absconding before the transfer can take place. There have also been delays in Member States responding to incoming requests

\(^{155}\) ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 70.
\(^{157}\) Recast Reception Conditions Directive Article 9.
\(^{158}\) Aden Ahmed v Malta [2013] ECHR 55352/12 para 66.
\(^{160}\) Recast Reception Conditions Directive Article 11.
\(^{162}\) ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 72.
because of disagreements regarding the evidence supporting the applied criteria or because of incomplete requests.\textsuperscript{163} The second challenge is the net effect Dublin transfers have on the final number of requests each Member State takes on. Since transfers from country A to country B are often cancelled out when states exchange a substantial number of requests, the time and costs which Member States put into these procedures are of no use. Member States frequently put considerable expenses into these transfers, although the result is a similar number of applications to examine.\textsuperscript{164}

The third challenge, and a primary concern regarding the implementation of transfer decisions, is the impossibility to return applicants to a country where they may face inhuman or degrading treatment according to Article 3 ECHR, Article 4 of the Charter of Fundamental Rights of the European Union (from now on the Charter) and relevant case law from the ECtHR and the ECJ.\textsuperscript{165} The legal order of the EU is based on mutual trust, which derives from the believe that there exists a shared set of values within the Union and that the Member States do not diverge in any considerable way from one another.\textsuperscript{166} However, the issue soon arose whether Member States could always conduct Dublin transfers under the assurance of mutual trust. In 2011, the ECtHR answered this question in the ground-braking case \textit{M.S.S.}\textsuperscript{167} Before discussing the judgement further, earlier Strasbourg case law on Dublin transfers should be explored.

To begin with, in 2000 the ECtHR held that transferring Member States still hold their duties under the ECHR. The case, \textit{T.I v UK}, concerned an applicant who had sought protection in Germany but been refused on the ground that the inhuman and degrading treatment he risked in Sri Lanka did not emanate from state actors.\textsuperscript{168} After fleeing to the UK, the applicant was facing a transfer back to Germany according to the Dublin Convention. The ECtHR found that the UK must examine the risks involved in the transfer, particularly risks involved in the applicant’s removal to Sri Lanka, his country of origin. The Court confirmed that Article 3 ECHR extends to cases where the risk of inhuman or degrading treatment derives from non-state actors and that Germany should ensure that the applicant would not face such risks on return. The UK had a duty to make this assessment regardless of the fact that Germany was a

\textsuperscript{163} & \textit{Evaluation of the Dublin III Regulation’} (n 36) 6, 8.
\textsuperscript{164} & Charter of Fundamental Rights of the European Union [2012] OJ C326/391; Fratzke (n 8) 11; Mouzourakis (n 41) 25.
\textsuperscript{165} & ‘Evaluation of the Dublin III Regulation’ (n 36) 16.
\textsuperscript{167} & \textit{M.S.S. v. Belgium And Greece} [2011] ECHR 30696/09 (\textit{M.S.S.}).
\textsuperscript{168} & \textit{T.I. v United Kingdom} [2000] ECHR 43844/98.
party to the ECHR. However, the Court found that Germany would afford the applicant adequate protection and declared the case inadmissible. While the irrefutable presumption of safety was not accepted, the UK was allowed to transfer the applicant to Germany based on a reading of German law.

In 2008, an applicant protested a transfer to Greece in *K.R.S*, referring to deficiencies in the Greek asylum system. While the ECtHR accepted the “independence, reliability and objectivity” of the UNHCR and its concerns towards the standards of asylum reception in Greece, it found that it could not be relied upon to prevent the transfer. The Court held that the EU asylum system protected fundamental rights “as regards both the substantive guarantees offered and the mechanisms controlling their observance.” Not long after this, the UNHCR released a report where it encouraged Member States to avoid returning asylum-seekers to Greece. Then in 2011, the Grand Chamber got the chance to revisit *K.R.S*. The issue arose whether Member States could always transfer asylum seekers to other Member States, under the assurance of mutual trust. In the ground-breaking case *M.S.S.*, the Grand Chamber of the ECtHR now found that Belgium had breached Article 3 ECHR when transferring asylum seekers to Greece in accordance with the Dublin II Regulation. There were considerable deficiencies in the Greek asylum system and poor detention and living conditions for applicants. The transfer was considered as likely to expose the individual to ill treatment. The court found that Belgium had violated Article 13 ECHR in conjunction with Article 3 ECHR for a lack of effective remedies against the decision. It could not be presumed that the applicant would be treated in conformity with the ECHR upon transfer. National authorities should verify how asylum practices in other Member States are conducted and in cases where evidence point to a risk of a breach of the ECHR in regard to asylum seekers, the transfer should be revoked and the sovereignty clause applied instead. A failure to verify conditions in other Member States could amount to a violation of Article 3 ECHR.

The ECJ confirmed *M.S.S.* in the *N.S.* case. Article 4 of the Charter should be interpreted in a way that ensures that Member States may not transfer asylum seekers to another Member State when the sending state cannot be unaware of systematic deficiencies in the

---

169 *K.R.S. v. the United Kingdom* [2008] ECHR 32733/08 (*K.R.S.*)
170 *K.R.S.* 1B para 3-4.
171 *K.R.S.* 1B para 2.
asylum procedure and reception conditions of the receiving state, amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.\textsuperscript{174}

A few years later the ECtHR addressed conditions in Italy in the case of Mohammed Hussein in 2013.\textsuperscript{175} The case concerned a woman and her two young children who protested a transfer from the Netherlands to Italy. The Court did not find a sufficiently real and imminent risk of hardship severe enough for Article 3 ECHR to apply, nor did the asylum system in Italy show any systemic failings. However, the Court took a different view a year later in Tarakhel, where it equally explained the meaning of "systematic deficiencies."\textsuperscript{176} An Afghan family with young children was to be returned to Italy. The ECtHR held that the presumption that States participating in the Dublin system will comply with their human rights obligations is rebuttable by evidence and requires a case-by-case examination. The ECtHR clarified that it is not necessary to show evidence of systematic deficiencies in the receiving State’s asylum procedures or reception conditions, but that the correct test was set out in Soering v. the United Kingdom, demanding that the sending State make a thorough, individualised examination of each case, and would repeal the transfer if the applicant was found to risk inhuman or degrading treatment.\textsuperscript{177}

Following the jurisprudence explained above, Dublin III brought a new rule to the Dublin system. The second paragraph of Article 3(2) now specifies that a transfer may not be effected when there are substantial grounds to believe that there are systematic flaws in the asylum procedure and reception conditions for applicants in that Member state, which would result in a risk of inhuman or degrading treatment of the applicant, within the meaning of Article 4 of the Charter. However, the Article does not give Member States any further indications as to how systematic flaws should be determined. Although Dublin III clarified the rights of applicants, studies of national jurisprudence show that there exist considerable disparities in what is considered as systematic flaws and what conditions are contemplated.\textsuperscript{178} The case law shows that for the Dublin system to function deficiencies in the asylum systems of the Member States must be addressed.\textsuperscript{179} Three years after the ruling in M.S.S., the ECJ ruled

\begin{footnotesize}
\begin{enumerate}
\item N. S. para 106.
\item Mohammed Hussein v. the Netherlands and Italy [2013] ECHR 27725/10.
\item Tarakhel v. Switzerland [2014] ECHR 29217/12 (Tarakhel).
\item Tarakhel para 58-63; Soering v. The United Kingdom [1989] ECHR 14038/88.
\item Mouzourakis (n 41) 13.
\end{enumerate}
\end{footnotesize}
in *Puid* that Greece remained an unsafe country for asylum seekers. However, in December 2016, the European Commission issued a Recommendation to the Member States of the EU to reinstate Dublin procedures in respect of asylum seekers entering Greece from 15 March 2017 onwards. Greece has expressed concerns to this reinstatement, as the enormous burden on its asylum system has resulted in capacities having reached their limits. Furthermore, the European Council on Refugees and Exiles (From now on ECRE) has found Greek reception capacity to remain short of meeting the accommodation needs of asylum seekers entering the country, placing those not qualifying for relocation at risk of destitution contrary to Article 17 of the recast Reception Conditions Directive, Articles 1 and 4 of the Charter and Article 3 ECHR.

As to Italy, most states changed their national practices following the *Tarakhel* judgement and started requiring individual guarantees as to accommodation and family unity before transferring families with children to Italy. However, in November 2015, the ECtHR adopted a new position in *J.A.*, claiming that the Italian authorities’ commitments were sufficient to transfer a family with children to Italy. At the same time investigations and interviews with asylum seekers have shown that conditions in Italian reception centres are unsanitary, and that families have been torn apart. Only a small number of unaccompanied children has been found to be living in the intended centres.

In contrast, a 2017 ruling by the ECJ in *C. K.* increases the rights of asylum seekers in the Dublin System. The court established that Dublin transfers should be revoked if the asylum seeker risks individual danger of becoming a victim of inhuman or degrading treatment because of his or her special circumstances. This could be the case if the asylum seeker has a

---

180 Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] ECL I-740.
182 ibid 4 para 6.
185 *J.A. and Others v. the Netherlands* [2015] ECHR 214559/14 (*J.A.*).
mental or physical condition. In these circumstances a transfer can present a severe risk, meaning that systematic deficiencies in an EU Member State is not the only criterion that needs to be considered for Dublin transfers.

6.5 Appeals

Another improvement to the system provided by Dublin III is the right to challenge transfer decisions in Article 27, reflecting both Article 13 ECHR and Article 47 of the Charter. The Article equally provides for guarantees such as access to legal assistance and interpreters and the right to an effective remedy within a reasonable time. Yet, since the Article does not set out a time limit significant variations can be found in the implementation of the Member States.

The effects of an appeal are described in Article 27(3), including the right to remain in the Member State during the appeal or review, or to have the transfer automatically suspended while a tribunal or a court makes a decision. Free legal assistance should be provided during the appeal in accordance with Article 27(5). Legal assistance can only be restricted when the appeal or review is found to have no foreseeable prospects of success. In practice, legal assistance varies between Member States creating a risk of divergence in effective remedies.

The ECJ concluded in Abdullahi that applicants could only appeal against a transfer decision because of systematic deficiencies in the asylum procedure or in the reception system of the responsible Member State. However, in 2016, the ECJ delivered two judgements that confirmed that within the scope of the effective remedy is also the correct application of Dublin III, including the correct application of the responsibility criteria. These cases inevitably increase applicants’ rights to effective remedy provided by Article 13 ECHR.

7. A Comparison: Four Member States’ Use of Dublin III

Chapter 6 provided an overview of recognised challenges in the application of Dublin III. To explore the rules further, Chapters 8-11 will cover their application in four Member States: Two states in the northern part of Europe, Germany and Sweden, will be compared with two southern border states, Greece and Italy.

188 Dublin III Article 27(2).
189 ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 76.
190 Ibid 79.
191 Case C-394/12 Shamso Abdullahi v Bundesasylamt [2013] ECL I-813.
Most asylum seekers enter the EU through Greece or Italy whose asylum systems have become overloaded. Applicants often see these states as temporary stops and wish to continue on their journey towards Northern Europe.\(^{193}\) By far the highest number of first instance and final decisions of non-EU asylum applications in 2016 were registered in Germany, at 1,149,075 decisions. Sweden followed with 631,085 decisions and Italy came third with 95,540. In Greece, 11,455 decisions were registered.\(^{194}\) It is therefore interesting to compare the use of Dublin III in these four states, as they have each been heavily affected by the migration wave, as the next few chapters will demonstrate. To conclude, Chapter 12 will reflect on what has been discussed.

8. Germany

8.1 Administration

In Germany, the responsibility assessment is conducted by the Federal Office for Migration and Refugees, or Bundesamt für Migration und Flüchtlinge (BAMF).\(^{195}\) The examination of whether another State is responsible for an asylum application, either through the Dublin Regulation or based on the German “safe third country” principle, is an element included in the regular procedure. Therefore, a Dublin procedure is not a separate operation in German law, but refers to a shift of responsibility within the administration, where the Dublin Units of the BAMF take over.\(^{196}\)

8.2 The Responsibility Criteria

In practice, German authorities rely immensely on the Eurodac database and the determination of the country of first entry. Individuals who avoid registration in the first Member State of arrival are therefore more likely to have their applications processed. Travel documents and other information on applicants’ travels through Europe are not given much attention, and the family criteria has been found to be neglected.\(^{197}\) In 2016, 38,537 of the total 55,690 outgoing Dublin requests made by Germany were based on Eurodac hits.\(^{198}\) Germany receives large numbers of applications and when authorities begin the responsibility evaluation

---

\(^{193}\) Menéndez (n 10) 397.
\(^{194}\) ‘Asylum and Managed Migration: Database’ (n 11).
\(^{195}\) Kalkmann (2015) (n 91) 12.
\(^{197}\) Takle and Seeberg (n 9) 15–16.
\(^{198}\) Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) Application of the Dublin criteria.
the aim is to avoid starting the asylum process before identifying the responsible state. The
Eurodac system provides the necessary information to apply the first-entry criterion, while it
can be difficult to retrieve information about family links. A general reliance on Eurodac has
therefore become the norm.

As to the use of Article 16 and 17, Germany took responsibility for 39,663 cases where
“de facto impediments” to transfers were found to be present in 2016, most likely relying on
the discretionary clause in Article 17(1). Whether or not this includes cases in which the
humanitarian clause in Article 17(2) was used is unclear. This number is perhaps not
particularly high, given that Germany received 745,545 asylum applications in 2016. German
authorities have essentially applied the discretionary clause to particularly vulnerable persons
if a transfer can place the person in a situation of undue hardship. Cases concerning such
circumstances have gone before German courts.

8.3 Procedural Rights

Information on Dublin procedures according to Article 4 of the Regulation is given to
applicants both in writing and orally. At the same time, investigations conducted in 2016
showed that the leaflet distributed by the BAMF consisted of only one page and the information
Article 4(1)(b), (c) or (f) of Dublin III require were not listed. German authorities have argued
that a more detailed leaflet would be too complicated for applicants.

Dublin interviews according to Article 5 of Dublin III are provided by German
authorities unless found unnecessary in accordance with the Regulation. These interviews are
not conducted in any consistent manner, taking place at various stages in the asylum
proceedings. In that way, the Dublin procedure may be going on simultaneously with the

---

199 Takle and Seeberg (n 9) 15–16.
201 For example, Administrative Court of Hannover Case no. 1 B 5946/15, 7 March 2016. the Court overturned
the Federal Office’s decision to deny a Russian national and her three minor children international protection in
Germany in accordance with Article 17(1). The Court found that the best interest of the children and respect for
family unity must be considered when applying the Regulation. Since the father of the children was imprisoned
in Germany, and their grandparents were residing there and could provide for them when their mother was
unavailable due to her mental health issues, the mother and her children were provided with international
protection.
203 ibid 12; 4(1)(b) Information about the criteria for determining the Member State responsible and its
hierarchy, the effects of lodging an application in a Member State; 4(1)(c) information about the persona
interview and the right to provide information about family members in other Member States; 4(1)(f) the right to
access and request corrections to date registered about the applicant.
regular procedure, which raises concerns as to the quality of the interview. Questions are largely based on the applicant’s travel route, shifting the focus away from family links, effectively threatening the applicants right to be heard. Furthermore, poor language skills of German interpreters have frequently resulted in misunderstandings which have become more common in the last couple of years. Mistakes made during the interview are difficult to correct as transcripts are written in German and sent to decision-makers who never meet the applicants. Although legal assistance is provided during interviews, lawyers have criticised how short they are (15-20 minutes) and the pressure this puts on applicants.

The rights of unaccompanied minors according to Article 6 of Dublin III are ensured by the welfare office. On 1 February 2017, 43,840 unaccompanied minors were under its protection, in addition to 18,000 young adults. A guardian is provided, but this role remains unclear in the asylum procedure, and since the system became overburdened officers struggle to offer sufficient assistance. Practices vary between federal states and only in some parts of the country are guardians capable of offering their protégés legal representation. Stakeholders worry that the current legal situation is not in line with EU law, as there is no guarantee that qualified professionals will represent the children.

8.4 Detention

In Germany, the absconding of persons awaiting Dublin transfers has proven an obstacle to the effective functioning of Dublin procedures, resulting in detention being deemed necessary by the Dublin Unit in accordance with Article 28 of Dublin III. Conditions in detention centres have been described as acceptable and applicants are among other things

---

204 Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196).
205 Takle and Seeberg (n 9) 15–16; ‘Common Asylum System at a Turning Point: Refugees Caught in Europe’s Solidarity Crisis - Annual Report 2014/2015’ (n 145) 74.
210 Takle and Seeberg (n 9) 16.
provided with social and psychological care.\textsuperscript{211} A person may be kept in detention for up to 18 months, but this period lasts on average about three weeks before deportation takes place.\textsuperscript{212}

German law provides detailed definitions as to when individuals may be detained. The German Residence Act was amended in August 2015,\textsuperscript{213} and the grounds for detention of individuals subject to Dublin III were defined.\textsuperscript{214} Section 2(14) lists these grounds as follows: (1) the individual has evaded apprehension by changing his or her residence, (2) has given misleading information about his or her identity or destroyed documents, (3) has not cooperated with authorities to establish his or her identity and is suspected of trying to avoid deportation, (4) the individual has paid smugglers or traffickers and is therefore suspected of trying to avoid deportation, (5) the person has declared he or she will try to avoid deportation or (6) the person has committed other acts of comparable severity to avoid deportation. Moreover, section 2(15) of the Residence Act contains a special provision for detention in Dublin cases. The grounds referred to above are to be regarded as objective criteria for the risk of absconding within the meaning of Article 2(n) of Dublin III. This section equally defines another criterion for the risk of absconding, that is, if the asylum seeker has left another Dublin Member State before his or her asylum procedure or the Dublin procedure has been concluded and nothing indicates that the applicant will return to that state in the near future. Finally, a new measure in section 62b of the Residence Act allows for detention in the transit zone of airports or in other facilities from where direct departure is possible. NGOs are concerned as to how broad these measures appear and how they might be used to authorise boundless extensions of acceptable reasons for detention. Furthermore, applicants are required to cover the cost of legal representation in case of judicial review, as legal aid is rarely granted, breaching Article 9(6) of the recast Reception Conditions Directive which states that in case of a judicial review legal assistance and representation shall be ensured without charge.\textsuperscript{215}

In 2016, most transfers from Germany were preceded by detention. Moreover, detention is almost only ordered when an asylum application has been rejected, which includes

\textsuperscript{213} Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, Date of issue: 30.07.2004 (German Residence Act).
\textsuperscript{214} Kalkmann (2015) (n 91) 10.
\textsuperscript{215} Kalkmann (n 209) 81, 75.
cases where Dublin III is found to be applicable and applicants are transferred to another Member State for their procedure to be carried out there. However, most deportations and Dublin transfers are carried out within one day without a formal order and applicants are placed in temporary police custody. Therefore, cases where formal detention is applied are rare. This can possibly be linked to a 2014 judgement from the German Federal Supreme Court which found that detention must be ordered with a solid line of reasoning, more detailed than an alleged risk of absconding. Although Section 62 of the German Residence Act states that detention should only be used when its purpose cannot be achieved by other less severe means, lawyers and NGOs have found local courts to apply it in a hasty manner and often for too long. Higher courts often overturn these decisions upon appeal.

Detention of vulnerable individuals such as minors should be avoided while they contain the status of asylum applicants. Nevertheless, asylum seekers lose this status when a Dublin procedure is initiated and can therefore be detained. According to Section 62(1) of the Residence Act, minors can be detained although their well-being should be considered. No recent cases of detention of minors have been reported, although minor children being transferred to other Member States are usually taken into custody for a few hours on the day of their transfer.

8.5 Transfers

Germany received a considerable amount of asylum seekers in 2016, amounting to 745,545 applications. Furthermore, Germany issued 55,690 outgoing requests to other Member States, out of which only 3,968 resulted in a transfer. As to incoming requests, Germany received 31,523 requests which resulted in 12,091 transfers. The country, therefore, took responsibility for an extensive amount of applications in 2016. These numbers can be observed in table 1 on the next page. The numbers of outgoing requests from Germany are rising, having been 44,288 in 2015. At the same time, the rate of outgoing transfers per number of requests is going down. In 2015, 8.1% of transfers were effected, having now dropped down to 7.1% in 2016.

---

216 ibid 72–73.
217 Case V ZB 31/14 26 of 26 June 2014.
218 Section 62 I German Residence Act.
220 Kalkmann (n 209) 77.
221 Informationsverbund Asyl und Migration, ‘Statistics - Germany’ (n 200); Asylum Information Database, ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 189) 4, 6.
Table 1 - Germany, Overview

<table>
<thead>
<tr>
<th></th>
<th>Germany - 2016 Statistics(^{222})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum Applications</td>
<td>745,545</td>
</tr>
<tr>
<td>Outgoing Requests</td>
<td>55,690</td>
</tr>
<tr>
<td>Effected Outgoing Transfers</td>
<td>3,968</td>
</tr>
<tr>
<td>Incoming Requests</td>
<td>31,523</td>
</tr>
<tr>
<td>Effected Incoming Transfers</td>
<td>12,091</td>
</tr>
</tbody>
</table>

Most of the outgoing requests were sent to Italy, Hungary and Poland.\(^{223}\)

Table 2 – Germany, Outgoing Requests

<table>
<thead>
<tr>
<th>Outgoing Requests from Germany in 2016(^{224})</th>
<th>Effected Transfers from Germany in 2016(^{225})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>Total</td>
</tr>
<tr>
<td>55,690</td>
<td>3,968</td>
</tr>
<tr>
<td>Italy</td>
<td>Italy</td>
</tr>
<tr>
<td>13,010</td>
<td>916</td>
</tr>
<tr>
<td>Hungary</td>
<td>Hungary</td>
</tr>
<tr>
<td>11,998</td>
<td>249</td>
</tr>
<tr>
<td>Poland</td>
<td>Poland</td>
</tr>
<tr>
<td>6,728</td>
<td>884</td>
</tr>
</tbody>
</table>

Incoming requests were mostly from France, the Netherlands and Sweden.\(^{226}\)

Table 3 – Germany, Incoming Requests

<table>
<thead>
<tr>
<th>Incoming Requests to Germany in 2016(^{227})</th>
<th>Effected Transfers to Germany in 2016(^{228})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>Total</td>
</tr>
<tr>
<td>31,523</td>
<td>12,091</td>
</tr>
<tr>
<td>France</td>
<td>France</td>
</tr>
<tr>
<td>5,904</td>
<td>695</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Netherlands</td>
</tr>
<tr>
<td>5,828</td>
<td>1,686</td>
</tr>
<tr>
<td>Sweden</td>
<td>Sweden</td>
</tr>
<tr>
<td>4,523</td>
<td>3,684</td>
</tr>
</tbody>
</table>

\(^{222}\) ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6; Informationsverbund Asyl und Migration, ‘Statistics - Germany’ (n 200).

\(^{223}\) ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6.

\(^{224}\) ibid.

\(^{225}\) ibid.

\(^{226}\) ibid.

\(^{227}\) ibid.

\(^{228}\) ibid.
Regarding time-frames, Dublin procedures in Germany took on average 3.2 months in 2016.\(^{229}\) Whether or not this means that Dublin time frames were respected or not is difficult to tell, given the varying time-frames for different requests. It suggests however that possible delays have not been excessive as Dublin procedures must take between 2.5 and 5 months.\(^{230}\) At the same time, information from the German border police suggests that transfers are frequently carried out too quickly. The German border police initiated Dublin procedures in cases where individuals were apprehended at the border until July 2013.\(^{231}\) The BAMF then announced that Dublin procedures would be carried out exclusively by the Federal Office.\(^{232}\) In 2016 the border police began referring to returns of individuals in their documents, who had asked for asylum but were returned to other Member States under Dublin III. This indicates that former practices have been recommenced, and that asylum seekers are being returned at the border under Dublin rules. This is worrying since a proper Dublin procedure can hardly be carried out within such a short period of time that would allow for it to be completed at the border.\(^{233}\)

Suspensions of transfers to certain states have been debated in the last few years. Although Germany suspended Dublin procedures for Syrian nationals to the greatest extent in August 2015, Syrians have been treated as other applicants since the practice was changed in October the same year. As most European countries, Germany has not transferred applicants to Greece since M.S.S. and has taken charge of cases in which Greece is found responsible for asylum applications in accordance with the discretionary clause.\(^{234}\) In December 2016, German Federal Minister of the Interior Thomas de Maizière, announced that although no transfers to Greece had been made since 2011, they would be reintroduced in 2017 subject to strict conditions.\(^{235}\) This came following the European Commission’s Recommendation of 8 December 2016.\(^{236}\) De Maizière clarified that in accordance with the recommendation, transfers will only take place for those who entered Greece illegally after 15 March 2017, or for those

\(^{229}\) Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) Transfers.

\(^{230}\) Dublin III Articles 21(1), 22(1), 23(2), 24(2) and 25(1).

\(^{231}\) Kalkmann (n 209) 28.


\(^{233}\) Asylum Information Database, ‘Country Report: Germany’ (n 243) 28.

\(^{234}\) Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) The discretionary clauses.


individuals that Greece is responsible for from 15 March 2017 under other Dublin criteria. An individual assurance would be necessary for the transfer to take place, where Greek authorities will have to ensure that the individual will be provided with the necessary accommodation. For now, vulnerable persons, especially unaccompanied minors, will not be transferred. In addition to Greece, transfers to Malta were stopped in 2009, and there have been several hundred court cases where transfers to Italy, Hungary and Bulgaria have been revoked. The German Interior Ministry announced on 11 April 2017 that transfers to Hungary will be stopped until it can be ensured that applicants will be treated according to European procedures.

Administrative courts do not always agree on whether transfers to certain countries should be carried out. Despite high numbers of transfers from Germany to Italy in 2016, the Tarakhel judgement has had its effect on cases involving vulnerable asylum seekers. Even before Tarakhel, the Federal Constitutional Court of Germany ruled on 17 September 2014 that the BAMF must be cautious in cases where children up to the age of three may face risks to their health in the receiving state, and that acceptable accommodation once in Italy must be confirmed. Furthermore, the Court demanded individualized guarantees. Several Administrative Courts have argued that the necessity to obtain individual guarantees from Italy extends to all asylum seekers and not only to vulnerable groups. Despite this case law, the BAMF rarely presents individualised guarantees from Italian authorities during Dublin procedures which has resulted in numerous litigations before Administrative Courts.

---

237 ‘Letter from Thomas de Maizière, Federal Minsiter of the Interior, to the Parliamentary Committee for Interior Matters and to the Petitions Committe’ (n 235).
238 Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) Suspension of transfers; Recent examples being Administrative court of Saarland Case 5 K 981/15 of 15 March 2017 in regard to Hungary, Administrative Court of Göttingen Case 3 B 198/17 of 29 March 2017 in regard to Bulgaria and Administrative Court of Braunschweig Case 7 B 51/17 of 17 February 2017 in regard to Italy.
240 Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) Suspension of transfers.
241 Nils Muiznieks, ‘Report by Nils Muizieks Commissioner for Human Rights of the Council of Europe Following His Visit to Germany on 24th April and from 4 to 8 May 2015’ (Commissioner for Human Rights 2015) 22 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806db6f5> accessed 14 March 2017; For example Case 2 BvR 746/15 of 30 April 2015 where the German Constitutional Court suspended the return of a Syrian family with 5 children to Italy.
242 Case 2 BvR 1795/14 of 17 September 2014.
243 for example, High Administrative Court of Lower Saxony Case 11 LB 248/14 of 25 June 2015 and Administrative Court of Potsdam Case 6 L 712/15 A of 17 June 2015.
244 This lack of individual guarantees was criticised by the Administrative Court of Braunschweig in Case 5 A 332/15 of 12 October 2016.
8.6 Appeals

As of 6 August 2016, Section 29 of the German Asylum Act renders Dublin cases inadmissible, as Dublin procedures are now part of the German “safe third country” provisions.245 An appeal can be lodged against a Dublin decision before an Administrative Court, in accordance with Article 27 of the Regulation. There is no automatic suspensive effect to these appeals but the applicant can request it of the Court. No transfer will take place until the court has given its answer. Only if the Court rejects the request, or if the applicant missed the deadline, can the transfer take place. Detailed material requirements are made for a successful appeal and a short deadline of seven days makes forming the appeal and a request to restore suspensive effect difficult for asylum seekers, as these demands must be carefully substantiated. Applicants are not offered any systematic legal counselling, as described in Article 27(6) Dulin III, and preparing an application which requires expert knowledge of German law can prove impossible. Even if the applicant manages to contact a lawyer, the time limit makes it hard to prepare a sufficiently substantial application.246 This raises concerns, as Article 27 of the Dublin Regulation obliges Member States to provide an effective remedy with regard to transfer decisions. These procedures may even affect minor applicants, since their representation depends on their guardian.247

9. Sweden

9.1 Administration

In Sweden, the Migration Agency or the Migrationsverket, which falls under the Ministry of Justice, takes on the responsibility assessment. Administration in Sweden is quite different from what can be found in other European countries when it comes to the division of tasks. All government decisions are collective and all public agencies independent from the government. Therefore, Secretaries of State have limited discretion when taking independent decisions, as all decisions are taken jointly by the government. The Migration Agency is the central administrative authority in asylum matters and subordinates to the Government as a whole, cooperating with the Ministry of Justice.248

245 Section 34a(1) Asylum Act.
246 Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) Appeal.
247 Kalkmann (n 209) 43–44.
9.2 The Responsibility Criteria

As in the case of Germany, Swedish authorities have developed a reliance on the Eurodac database and the first-entry rule when identifying Dublin cases, paying less attention to travel documents and neglecting the family criteria. This practice has been explained by the effective value of Eurodac data in comparison to other information retrieved from applicants.\textsuperscript{249} In 2016, 22,765 fingerprints were submitted in Sweden while 10,991 hits were made in Eurodac and 6,673 in VIS, mostly coming from Greece, Germany, Hungary, Italy and Denmark. Subsequently, most outgoing requests were sent to these countries,\textsuperscript{250} although transfers to Greece have not taken place since 2011.\textsuperscript{251}

Sweden has not used Articles 16 and 17 as frequently as Germany, but at the same time it received fewer asylum seekers in 2016, or 28,939 applications. Seven applications were considered under the dependency clause and 313 applications under the discretionary clauses.\textsuperscript{252} Interestingly, article 16 is mostly used to reunify applicants already residing within Sweden, but not as an applicable criterion for outgoing transfers.\textsuperscript{253} As in Germany, the best interest of a child to be with his or her parents is one of the main reasons for the application of Article 17(1).\textsuperscript{254}

Since the migration wave began a temporary law restricting residence permits for asylum applicants was introduced in July 2016 to be valid until July 2019.\textsuperscript{255} The change brought Swedish legislation down to the minimum requirements of European Law. Individuals possessing the refugee status and a three-year permit will be able to reunite with their nuclear family members, but those assessed as having the subsidiary protection status, and a 13-month permit, only have a very limited possibility for family reunification.\textsuperscript{256}

\begin{itemize}
  \item ---\textsuperscript{249} Takle and Seeberg (n 9) 15–16.
  \item ---\textsuperscript{250} Michael Williams and Lisa Hallstedt, ‘Country Report: Sweden’ (Asylum Information Database 2016) 25
  \item ---\textsuperscript{251} Informationsverbund Asyl und Migration, ‘Dublin Procedures: Germany’ (n 196) The discretionary clauses.
  \item ---\textsuperscript{252} The dependent persons and discretionary clauses <http://www.asylumineurope.org/reports/country/SWEden/statistics> accessed 28 April 2017.
  \item ---\textsuperscript{253} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 34.
  \item ---\textsuperscript{254} For example, Swedish Migration Court of Appeal Case UM 8098-09 of 6 September 2010.
\end{itemize}
9.3 Procedural Rights

In Sweden, just as in Germany, all information about Dublin procedures is given to applicants both in writing and orally.\(^{257}\) Swedish authorities provide more detailed information in their leaflets than German authorities, respecting Article 4 of Dublin III, although applicants have struggled to understand the more technical aspects of the procedures.\(^{258}\) The personal interview is now mandatory following a decision from the Migration Court of Appeal in January 2007, where the Court concluded that a transfer to Germany following a procedure which had been completed entirely in writing was a breach of provisions regarding oral hearings in Chapter 13 of the Aliens Act.\(^{259}\) The Migration Agency organises the interviews with interpreters and guardians for unaccompanied minors. Lawyers are not usually present but a legal representative can be requested for unaccompanied minors. As in Germany, a transcript of the interview is made, but usually in Swedish, and applicants are not given a copy. This practice is most likely a violation of Article 5(6) of the Dublin Regulation.\(^{260}\)

Since the beginning of 2017, about 100 unaccompanied minors apply monthly for asylum in Sweden.\(^{261}\) Legal counsel and a guardian are provided, although concerns have been raised as to how many children each guardian represents simultaneously since the migration wave began.\(^{262}\) Mental health issues have become common and about 70 children attempted suicide between 2016 and 2017, mostly out of uncertainty concerning the asylum process and a fear of being deported after their 18\(^{th}\) birthdays. The Red Cross and Save the Children have raised concerns to re-registration of age occurring in practice.\(^{263}\)

9.4 Detention

As in Germany, applicants awaiting a transfer from Sweden are sometimes detained for a fear that they will abscond.\(^{264}\) Individuals issued with an expulsion or a refusal of entry may be detained for up to 12 months, while the average period of detention in 2016 was 26.6 days.\(^{265}\)

---

\(^{257}\) ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 9.

\(^{258}\) Flyktinggruppernas Riksård FARR, ‘Dublin Procedures: Sweden’ (n 252) Procedure.


\(^{260}\) Flyktinggruppernas Riksård FARR, ‘Dublin Procedures: Sweden’ (n 252) Personal Interview.

\(^{261}\) ‘Monthly Data Collection on the Migration Situation in the EU: April 2017 Monthly Report 1-31 March 2017’ (n 87) 110.

\(^{262}\) Williams and Hallstedt (n 250) 36–37.

\(^{263}\) ‘Monthly Data Collection on the Migration Situation in the EU: April 2017 Monthly Report 1-31 March 2017’ (n 87) 111.

\(^{264}\) Takle and Seeberg (n 9) 13.

Detained individuals are provided with health care and psychological support, leisure activities and opportunities for religious worship.\textsuperscript{266}

Under Chapter 10, section 1 of the Aliens Acts, an alien may be detained if (1) his or her identity is unclear and (2) the right of the alien to stay in Sweden cannot be established.\textsuperscript{267} Moreover, detention can be applied when (1) it is necessary to determine whether the individual will be allowed to stay in Sweden, (2) when it is likely that the individual will be refused entry or be expelled or finally (3) for the purpose of deportation. For the last two points, detention will not be ordered unless there are reasons to suspect that the individual will abscond or will engage in criminal activity in Sweden.\textsuperscript{268} These provisions have been found to allow detention more broadly than the Dublin rules intended and in 2015 the Migration Court of Appeal found that in Dublin cases the Aliens Act should not be applied.\textsuperscript{269} This means there is no objective criterion in place for the risk of absconding under Dublin III, which evidently goes against the \textit{Al chodor} ruling.

As to the review of detention, Swedish law foresees that decisions must be reconsidered within two weeks, although this limit is two months when a removal decision has been ordered.\textsuperscript{270} However, after three days the applicant is offered free legal assistance, as provided by the Reception Conditions Directive.\textsuperscript{271}

According to Chapter 10, Section 6 of the Aliens Act, supervision is an alternative measure to detention, although decisions often lack argumentation as to why alternative measures cannot be used.\textsuperscript{272} Applicants are not usually detained while they await information on Dublin transfers, but individuals submitted to the Dublin procedure must wait in accommodations close to an airport or are moved to an accommodation which anticipates the impending transfer, instead of being able to settle anywhere in Sweden.\textsuperscript{273} This approach might raise human rights concerns in light of the ECtHR’s ruling in \textit{Ilias and Ahmed}. The Court found that an applicant’s detention in a border transit zone in Hungary for 23 days amounted to a de facto deprivation of liberty. This practical arrangement not incarnated by a formal decision of legal relevance was seen as a breach of Article 5(1) ECHR on the right to liberty and security.\textsuperscript{274}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{266} Williams and Hallstedt (n 250) 60.
  \item \textsuperscript{267} Swedish Aliens Act, Ch. 10, Section 1, para 1.
  \item \textsuperscript{268} Swedish Aliens Act, Chapter. 10, Section 1, para 2.
  \item \textsuperscript{269} Migration Court of Appeal Case MIG 2015:5 of 3 June 2015.
  \item \textsuperscript{270} Swedish Aliens Act, Chapter 10, Section 9, para 1.
  \item \textsuperscript{271} Swedish Aliens Act Chapter 18, Section 1, para 1(4).
  \item \textsuperscript{272} Williams and Hallstedt (n 250) 57.
  \item \textsuperscript{273} Flyktinggruppernas Riksård FARR, ‘Dublin Procedures: Sweden’ (n 252) Transfers.
  \item \textsuperscript{274} \textit{Ilias and Ahmed} para 67-68.
\end{itemize}
\end{footnotesize}
Vulnerable individuals are not excluded from detention in Sweden, including minors.\textsuperscript{275} However, a child shall never be detained longer than 6 days.\textsuperscript{276} If the child is unaccompanied, he or she should not be detained unless under exceptional circumstances.\textsuperscript{277} According to information provided by the Asylum Information Database (from now on AIDA) children are rarely detained in Sweden, although this number arose to 108 children in 2016.\textsuperscript{278}

9.5 Transfers

Sweden received 28,939 applications in 2016, a remarkably lower number than registered in Germany the same year. Consequently, Sweden issued fewer requests, amounting to 12,118 requests in 2016, but completed more transfers, or 5,244. Incoming requests amounted to 5,582 out of which 3,306 were effected with a transfer. The number of outgoing requests from Sweden is rising having been 11,254 in 2015. Sweden is equally carrying out more transfers now, as the transfer rate went from 17.4\% in 2015 to 43.2\% in 2016.\textsuperscript{279}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Sweden - 2016 Statistics}\textsuperscript{280} & \\
\hline
Asylum Applications & 28,939 \\
\hline
Outgoing Requests & 12,118 \\
\hline
Effected Outgoing Transfers & 5,244 \\
\hline
Incoming Requests & 5,582 \\
\hline
Effected Incoming Transfers & 3,306 \\
\hline
\end{tabular}
\caption{Sweden, Overview}
\end{table}

Most outgoing requests were sent to Germany, Hungary and Italy.\textsuperscript{281}

\textsuperscript{275}Chapter 10, Section 2 of the Aliens Act.
\textsuperscript{276}Chapter 10, Section 5 Aliens Act.
\textsuperscript{277}Chapter 10, Section 3 Aliens Act.
\textsuperscript{278}Williams and Hallstedt (n 250) 58.
\textsuperscript{279}Flyktinggruppernas Riksård FARR, ‘Statistics - Sweden’ (n 252); ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 4, 6.
\textsuperscript{280}Flyktinggruppernas Riksård FARR, ‘Statistics - Sweden’ (n 252); ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6.
\textsuperscript{281}‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6.
### Table 5 – Sweden, Outgoing Requests

<table>
<thead>
<tr>
<th>Outgoing Requests from Sweden in 2016</th>
<th>Effected Transfers from Sweden in 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td>12,118</td>
<td>5,244</td>
</tr>
<tr>
<td>Germany</td>
<td>Germany</td>
</tr>
<tr>
<td>5,156</td>
<td>3,668</td>
</tr>
<tr>
<td>Hungary</td>
<td>Hungary</td>
</tr>
<tr>
<td>1,841</td>
<td>111</td>
</tr>
<tr>
<td>Italy</td>
<td>Italy</td>
</tr>
<tr>
<td>1,106</td>
<td>292</td>
</tr>
</tbody>
</table>

As to incoming requests, Sweden received most request from Germany, Denmark and Austria.

### Table 6 – Sweden, Incoming Requests

<table>
<thead>
<tr>
<th>Incoming Requests to Sweden in 2016</th>
<th>Effected Transfers to Sweden in 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td>5,582</td>
<td>3,306</td>
</tr>
<tr>
<td>Germany</td>
<td>Germany</td>
</tr>
<tr>
<td>1,911</td>
<td>993</td>
</tr>
<tr>
<td>Denmark</td>
<td>Denmark</td>
</tr>
<tr>
<td>774</td>
<td>556</td>
</tr>
<tr>
<td>Austria</td>
<td>Austria</td>
</tr>
<tr>
<td>722</td>
<td>448</td>
</tr>
</tbody>
</table>

Dublin procedures in 2016 took longer in Sweden than in Germany, or on average 4.7 months. Therefore, some delays most likely occurred, given the time frames of 2.5-5 months mentioned before. Most Dublin transfers from Sweden are completed with the voluntary participation of the applicant but a number of people abscond, many of those being unaccompanied children.

All transfers from Sweden to Greece have been suspended since the ruling in *M.S.S.*, unless the individual has already been offered a protection status in the country. Furthermore, transfers to Italy and Hungary have been cancelled by courts or by the Migration Agency when vulnerable individuals are involved. The Swedish Migration Agency made a narrower reading of the *Tarakhel* ruling than German authorities, holding that obligations to

---

282 ibid.
283 ibid.
284 ibid.
285 ibid.
286 ibid.
288 ibid Suspension of transfers.
289 For example, Swedish Migration Court of Appeal Case UM 1859-161 of July 2016, a transfer to Hungary was annulled for the sake of young children.
seek individual guarantees from the receiving state only apply to vulnerable groups such as families with children. Moreover, since persons with residence permits in Italy do not enter the reception system upon return the ruling is not considered relevant to them. The Agency issued a new opinion in January 2016 based on information provided by Italy to the Commission and on the J.A. ruling, confirming that Italy now fulfils the requirements of the Tarakhel ruling and that Sweden will no longer feel obliged to attain individual guarantees before initiating a transfer. The Swedish Migration Court of Appeal confirmed this position in November 2015, where it declared that the situation in Italy had changed in such a way that it now meets the requirements of Tarakhel.

9.6 Appeals

In a similar way to Germany, Dublin cases in Sweden are not provided legal assistance at first instance, except when unaccompanied minors are involved or on exceptional grounds such as when reception conditions in the receiving country are known to be poor. Otherwise, asylum seekers must appeal alone or seek support from NGOs. Decisions must be appealed within three weeks and have automatic suspensive effect. The applicant can ask for an oral hearing, but it is not mandatory and depends on the court. For instance, in 2016, Malmö granted oral hearings in 39.4% of cases while Luleå approved a hearing in 14.5% of cases, which raises questions of equality.

10. Greece

10.1 Administration

The Greek Police was in charge of the responsibility assessment under the Dublin Regulation in Greece until 2013. Now, the task has been taken over by the Asylum Service, which falls under the Ministry of Interior and Administrative Reconstruction. The Greek asylum system was reformed with a new legal framework in 2011. The law on the establishment of an Asylum Service and a First Reception Service created an Asylum Service,

---

290 Swedish Migration Agency, Rättslig kommentar angående Europadomstolens dom i målet Tarakhel mot Schweiz, ansökan nr 29217/12.
293 Williams and Hallstedt (n 250) 15; Chapter 23 Section 2 Administrative Law (Förvaltningslagen), 1986:223; Chapter 12, Section 10 Aliens Act.
294 ibid 22; Asylum Act, section 36.
a First Reception Service and an Appeals Authority. The new Asylum service opened on 7 June 2013 and the old and the new system have operated simultaneously since then, where the Police authorities and the Asylum Service share responsibility for applications for international protection at the first instance and carry out Dublin procedures.

10.2 The Responsibility Criteria

It is safe to assume that in Greece fingerprinting is essentially not conducted in order to establish the responsible Member State, since most migrants entering the country have not reached other destinations beforehand. However, Greece has obligations under the Eurodac regulation to fingerprint and register every illegal migrant. Since few Eurodac hits are found by Greek authorities, 4,276 of the total 4,886 transfer request coming from Greece in 2016 were based on the family criteria in Article 6 and 8-11 of the Dublin Regulation. Most of the remaining requests were based on Articles 16 and 17. This indicates an active use of the family criteria, as the total number of applications submitted in Greece was 51,091. Despite this effort, only 19.3% of requests resulted in a transfer in 2016, consequently leaving most of these applicants in orbit without their applications being processed.

Many attempt to avoid the Dublin system. Families prefer not to apply for asylum in Greece, but wait while one or more member of the family moves onwards to other Member States, where they later request family reunification. If the Dublin regulation were applied as intended, these applicants should be returned to Greece. However, since most Member States have not transferred asylum seekers back to Greece after M.S.S, the discretionary clause is invoked and the second Member State accepts the take charge request. However, even when family members are residing in other Member States, obstacles to family reunification arise

---

297 Menéndez (n 10) 397.
298 Eurodac Regulation, Article 9.
301 ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 3.6.
302 Tsipoura (n 296) 49.
from strict requirements of proof from the receiving states, such as DNA testing.\textsuperscript{303} At the same time, the Greek Dublin Unit takes no responsibility for legal assistance during the preparation of Dublin-related case files. Applicants are responsible for submitting necessary documents in order for the Dublin Unit to establish a take charge request based on a proof of family links.\textsuperscript{304} Even minors face a lack of such assistance, despite the law stating their right to necessary representation.\textsuperscript{305}

Greek authorities rely on the Humanitarian clause when requiring other Member States to accept responsibility for asylum applications, especially when the family criteria cannot be applied.\textsuperscript{306} As already mentioned, Greece has reported its use of Article 16 and 17(2) for outgoing transfer requests in 2016. Out of 4,886 outgoing requests, the humanitarian clause was used for 354 requests and the dependency clause for 97 requests.\textsuperscript{307} However, according to a 2012 study by ECRE, Greek authorities never adapted an application of the sovereignty clause of Dublin II.\textsuperscript{308} This appears to be the case still today when it comes to the discretionary clause of Dublin III. Although authorities claim that they take responsibility for applications to keep families together when a Eurodac hit can be found in another Member State for one family member, or when there is evidence of serious health reasons which make a transfer impossible, no numbers were provided.\textsuperscript{309}

10.3 Procedural Rights

Applicants are rarely given information in writing as Greek authorities rely on oral instructions. This goes against Article 4(2) of Dublin III. These are general instructions and largely insufficient. Information about the Dublin criteria, the documents required as evidence or relevant deadlines are often neglected. The only written information is on leaflets or billboards, where different terms are used making the process confusing.\textsuperscript{310} Since the migration wave started multiple international bodies have attempted to help applicants, meaning that the


\textsuperscript{304} Greek Council for Refugees (n 299) The application of the Dublin criteria, Legal assistance.

\textsuperscript{305} Tsipoura (n 296) 74.


\textsuperscript{307} Greek Council for Refugees (n 299) Outgoing Dublin requests by criterion: 2016.


\textsuperscript{309} Greek Council for Refugees (n 299) The dependent persons and discretionary clauses.

\textsuperscript{310} Mouzourakis (n 303) 23.
Asylum Service, EASO, UNHCR, NGOs, legal practitioners and volunteers, all provide fragments of procedural and practical information making the procedure unduly complicated for everyone involved.\textsuperscript{311}

Detailed personal interviews are usually not provided if an outgoing request can be made under the family reunification procedure, while precise interviews are more frequent in the rare cases where the asylum seeker is shown to have applied for asylum in another EU Member State before arriving in Greece, usually by entering through the Turkish-Bulgarian borders.\textsuperscript{312} Legal assistance is not provided during interviews, nor is any information given on how to access such services.\textsuperscript{313}

In Greece, the public prosecutor for Minors or the First Instance Public Prosecutor act as provisional guardians for unaccompanied minors and take steps to appoint a permanent guardian.\textsuperscript{314} In reality, permanent guardians are rare and the prosecutor lacks the capacity to handle large groups of children.\textsuperscript{315} On 17 March 2017, some 890 children were waiting to be referred to the National Centre for Social Solidarity for accommodation. 130 of these children were staying in reception and identification centres and 18 in police stations. The estimated number of unaccompanied children currently residing in Greece is 2,000, as of 17 March 2017.\textsuperscript{316} Last year, the ECTHR found in Rahimi that arrangements for unaccompanied minors and the poor quality of the system of guardianship in Greece breaches Article 3 and 13 of the ECHR. The UN Special Rapporteur on the human rights of migrants has emphasised that this problem should be addressed as a priority.\textsuperscript{317}

\textsuperscript{311} ibid 22.
\textsuperscript{313} ‘Evaluation of the Implementation of the Dublin III Regulation’ (n 125) 15.
\textsuperscript{314} Article 19 PD 220/2007.
\textsuperscript{316} ‘Monthly Data Collection on the Migration Situation in the EU: April 2017 Monthly Report 1-31 March 2017’ (n 87) 59.
10.4 Detention

Detention can be prolonged for up to 18 months according to Greek law. The law lists 5 grounds for detention, the last of which refers to Dublin III and the need to detain an individual in order to complete a transfer decision if there is a serious risk of the applicant absconding. For the establishment of a risk of absconding the law refers to a list of objective criteria: (1) The applicant does not comply with a decision of a voluntary departure, (2) has stated that he or she will not comply with a return decision, (3) has forged documents, (4) has provided false information, (5) has been convicted of a crime or is undergoing prosecution or clear indications exist that he or she has committed a crime, (5) the applicant does not have travel documents or other identity documents, or finally (6) the applicant has previously absconded and does not comply with an entry ban. Alternatives to detention such as surveillance are usually not applied, making detention arbitrary in practice.

Because of the EU-Turkey statement all third-country nationals arriving after 20 March 2016 are automatically detained in overcrowded hotspots where healthcare and hygiene is lacking, including unaccompanied minors and vulnerable persons. This is in clear violation of the ECtHR’s case law which has found automatic application of detention to breach Article 5(1)(f) ECHR. Furthermore, in its recent judgement Ilias and Ahmed, the ECtHR emphasised that Article 8 of the recast Reception Conditions Directive prohibits detention of individuals for the sole reason that they are asylum applicants, and thus automatic detention of asylum seekers equally stuns from European Union Law. In March 2017, about 2,750 people were detained in pre-removal centres throughout Greece, including 79 unaccompanied

319 Article 46(1) L 4375/2016.
320 Article 46(2) L 4375/2016.
322 Article 18(g)(a)-(h) L 3907/2011.
323 Tsipoura (n 296) 92–93.
324 Ibid 25; Georgopoulou and Drakopoulou (n 312) 16.
325 Rahimi.
326 Ilias and Ahmed para 63.
Otherwise, detention is usually not ordered to complete Dublin transfers, but rather in cases of individuals guilty of law-breaking conduct, in accordance with Article 46(2) L 4375/2016.

Greek legislation allows detention of vulnerable individuals but their vulnerability is to be taken into account and detention of minors is to be avoided. In practice, however, individuals belonging to vulnerable groups are systematically detained. Conditions in detention centres have been reported to be very poor. For instance, the ECtHR has found aliens in the Greek detention centre of Fylakio to be living under conditions amounting to inhuman and degrading treatment under Article 3 ECHR, such as a lack of hygiene and limited options of going outside. Their right to a brisk examination of the legality of their detention by Article 5 ECHR had equally been violated, as the law did not allow them to challenge the decisions on grounds of their living conditions. The law has now been amended and an automatic judicial review added, although it is too soon to tell whether the measure will have its desired effect. Although Article 46(7) L 4375/2016 provides for free legal assistance for the review of detention, as Article 9 of the recast Reception Conditions Directive foresees, no legal aid system has been set up in practice. Therefore, legal aid is offered by NGOs and remains limited due to a lack of funding.

10.5 Transfers

Greece received 51,091 asylum applications in 2016 and sent out 4,886 requests out of which 946 led to transfers. Incoming requests were 4,415 although only three were effected. This can be explained by most Member States avoiding transferring asylum seekers to Greece since M.S.S.

Greece sent out considerably more requests in 2016 than in 2015, when 1,117

329 Article 46(8) L 4375/2016.
330 Geogopoulos and Drakopoulos (n 312) 125.
331 Mahammad and Others v. Greece [2015] ECHR 48352/12 (Mahammad and Others).
332 Mahammad and Others 65-69.
333 Article 46(5) L 4375/2016; Tsipoura (n 296) 133–134.
335 Greek Council for Refugees (n 300); ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6.
336 Tsipoura (n 296) 48.
requests were sent out resulting in 847 transfers. The transfer rate was also much higher in 2015 at 75.8%, as it fell down to 19.3% in 2016.  

### Table 7 – Greece, Overview

<table>
<thead>
<tr>
<th>Asylum Applications</th>
<th>51,091</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outgoing Requests</td>
<td>4,868</td>
</tr>
<tr>
<td>Effected Outgoing Transfers</td>
<td>946</td>
</tr>
<tr>
<td>Incoming Requests</td>
<td>4,415</td>
</tr>
<tr>
<td>Effected Incoming Transfers</td>
<td>3</td>
</tr>
</tbody>
</table>

Most outgoing requests were sent to Germany and Sweden.  

### Table 8 – Greece, Outgoing Requests

<table>
<thead>
<tr>
<th>Outgoing Requests from Greece in 2016</th>
<th>Effected Transfers from Greece in 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>4,886</td>
</tr>
<tr>
<td>Germany</td>
<td>3,527</td>
</tr>
<tr>
<td>Sweden</td>
<td>347</td>
</tr>
<tr>
<td>Total</td>
<td>946</td>
</tr>
<tr>
<td>Germany</td>
<td>Unknown</td>
</tr>
<tr>
<td>Sweden</td>
<td>Hungary</td>
</tr>
</tbody>
</table>

Detailed information on incoming requests was not provided but they resulted in two transfers from Hungary and one from Switzerland.  

### Table 9 – Greece, Incoming Requests

<table>
<thead>
<tr>
<th>Incoming Requests to Greece in 2016</th>
<th>Effected Transfers to Greece in 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>4,415</td>
</tr>
<tr>
<td>Hungary</td>
<td>Unknown</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Unknown</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1</td>
</tr>
</tbody>
</table>

---

337 *The Dublin System in 2016: Key Figures from Selected European Countries* (n 221) 4, 6.
338 ibid 6.
339 ibid.
340 ibid.
341 ibid.
342 ibid.
343 ibid.
344 ibid.
All Asylum applicants arriving in Greece are to be fingerprinted immediately and since the Hotspot Measure was installed almost all arriving migrants have been successfully registered. An Aitima investigation of Greek procedures conducted in late 2016 and early 2017 concluded that transfers and family reunification is not a priority for the Greek State. Long delays occur during registration, which affects entries into the family reunification procedure. Once the responsible Member State has accepted the request, the waiting time for a Dublin transfer can take about 5-6 months, which remains within the 6-month limit of Article 29(1) of Dublin III.

Serious problems have occurred when children are left in Greece while their family members travel further north. The system which appoints guardians is not working as it should and after the Asylum Service, the Police or a First Reception Centre has informed the Juvenile Public Prosecutor about the child, it receives very little support. The Public Prosecutor acts as a temporary guardian but this role is only applicable in theory. The transfer of these children is often delayed due to a shortage of staff to escort them. Unaccompanied children wait on average one year before being reunited with their parents, as the process can drag on for up to 15-18 months. Despite delays, transfers are usually carried out without family reunification being jeopardised. However, in the past most applicants have been made to cover their own travel expenses due to budgetary constraints of the Asylum services. Despite attempts to meet these expenses, applicants were still paying for their own travels in September 2015.

According to the Greek Asylum Service conditions in receiving states are considered, but no individual guarantees have been requested so far. The appeals committee concluded in a few cases that asylum seekers should not be transferred to Bulgaria because of risks of violations to Article 3 ECHR, but these cases do not seem to have created any sort of precedent. According to the Greek Council of Refugees, a number of subsequent second instance decisions have confirmed transfers to Bulgaria, even when some of the applicants had been found to be victims of torture. Moreover, when family reunification cases are

---

345 Papadopoulou (n 63) 11.
347 Greek Council for Refugees (n 299) Transfer procedures.
348 ibid The application of the Dublin criteria.
349 Mouzourakis (n 303) 19–20.
350 Greek Council for Refugees (n 299) Transfer procedure.
351 ibid Individualised guarantees.
352 17th AAC, Decision n. 95/000190454 of 21 March 2014; 11th AAC, Decision n. 95/000188424 of 11 February 2014; 2nd AAC, Decision n. 95/000186004 of 29 November 2013.
353 Tsipoura (n 296) 52; precisions as to which cases were not provided.
concerned, reception conditions in the receiving state are not examined and it is considered sufficient that the applicant is willing to be transferred and does not appeal the decision.  

10.6 Appeals

When it is found that Dublin III applies, applications for international protection are declared inadmissible. Applicants may lodge an appeal within 15 days, directed against the transfer decision which is a part of the inadmissibility decision. The appeal has suspensive effect until the Appeals Committee has made its decision. On 9 September 2016, a Ministerial Decision was published introducing free legal assistance in asylum appeals procedures in Greece. According to the Decision, asylum seekers are provided with free legal assistance if they lodge a request at least 10 days before the examination of their appeal and may ask that the procedure be postponed at least 5 days beforehand if legal assistance has not been provided. However, according to the most recent AIDA Country Report on Greece, there are still many obstacles in the system and NGOs have had to step in.

According to an opinion by the State Legal Council in October 2013, Greek administrative law makes no obligation for an oral hearing in cases examining applications for international protection. As representation by a lawyer is not necessary for filing an appeal, and given the lack of legal aid provided to asylum seekers, those who cannot acquire legal assistance on their own risk submitting insufficiently substantiated appeals. This makes the lack of opportunity to present a case orally even more serious. A recent amendment to the Greek Asylum law removed Article 62(1)(c), which previously gave applicants the right to

---

354 Greek Council for Refugees (n 299) Individualised guarantees.
355 Article 25(1)(b) PD 114/2010.
356 Article 25(2) PD 114/2010.
358 Georgopoulou and Drakopoulou (n 312) 52; Greek Council for Refugees (n 299) Suspension of transfers.
360 Tsipoura (n 296) 44–45.
request an oral hearing before the Appeal Committee, inevitably enforcing the above mentioned general rule of examinations “sur dossier.”

11. Italy

11.1 Administration

In Italy, the Dublin Unit or the Unità Dublino falls under the Ministry of the Interior Civil Court. During the formal registration process the police authorities of the Immigration Office of the Police, called the Questura, ask asylum seekers questions related to Dublin III which are followed by a verification from the Dublin Unit. If Italy is responsible, the applicant will be directed to the Questura for a regular procedure. As Dublin procedures are handled by the Dublin Unit, situated in Athens, the role of Regional Asylum Offices has been removed when it comes to Dublin cases, which results in the Dublin procedure taking longer than otherwise.

11.2 The Responsibility Criteria

In a similar way to Greek authorities, Italian authorities have attempted to base their outgoing requests on the family criteria. All circumstantial evidence is examined, including family photographs or reports from caseworkers. Even when the asylum seeker has not indicated having family members in another Member State, the case is often reconsidered and additional information examined. Applicants do not, however, receive much legal assistance from authorities during this process, as it is mostly provided by NGOs and depends on their funding at the given time. This can e.g. come down on details provided on family links.

ASGI has confirmed that the Italian Dublin Unit does not provide precise data on the application of Articles 16 and 17, although the discretionary clause is used more frequently than the humanitarian clause, particular in cases of vulnerable persons or because of health

---

362 Bove (n 98) 17.
363 Mouzourakis (n 303) 20.
364 Bove (n 98) 32–33, 35.
issues. A 2012 report by ECRE describes the latest data recorded to be from 2008. Italy took jurisdiction in 178 cases that year, only 2 of which were based on the humanitarian clause. When ECRE’s research was conducted, this tendency remained unchanged. On a positive note the report further noted that Italian authorities had shown a tendency to apply the subsidiarity clause in cases of documented vulnerability and a good collaboration had been developed with social assistance associations.

11.3 Procedural Rights

In a similar way to Greece, Italian authorities provide little written or oral information to asylum seekers. When the Commission made inquiries in March 2016, information leaflets had not been renewed since the adoption of Dublin III and were only found online. Instead, authorities rely on NGOs to provide information about the Dublin rules. When ASGI spoke with third-country nationals in Como in 2016, few had been informed on how to apply for international protection, which criteria establishes state responsibility or about the possibility to request relocation. Few had applied for international protection in Italy and waited anxiously to cross the border. The pressure on the system is evident and personal interviews by the Questura are often done in a hasty manner allowing for important information to get lost. Unfortunately, some of those who avoid fingerprinting and move onward, do so in order to join family members. This might partly be the result of Italian authorities not informing asylum seekers of their legal right to family reunification, or because of a lack of trust towards the lengthy process of the Italian system.

Italian legislation does not refer to a personal interview for Dublin cases. Instead the Questura is in charge of “verbalisation” with applicants. Language problems are frequent and often no interpreters are present. Furthermore, interviews are conducted by police officers who lack necessary skills and knowledge of foreign languages. Despite the effort to reunite families the pressure on the Italian system has resulted in information on family links often


368 Bove (n 98) 19.

369 Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Procedure.

370 ibid Personal Interview.

being gathered in a superficial manner. Although applicants are given the opportunity to provide additional information, the police is not equipped to register and take note of them.

By 22 March 2017, some 2,290 unaccompanied children had arrived on Italian shores this year alone. The Questura notifies the Judge for guardianship of unaccompanied minors, who then appoints a legal guardian within 48 hours. The guardian assists the child during the procedures, even after the child receives a negative decision such as in Dublin cases, and helps the child appeal the decision when necessary. In practice, legal guardians are rarely appointed within the time limit and several weeks may pass without the child being properly represented. This affects possible family reunification and relocation of the minor. Furthermore, guardians usually have no special training and no monitoring system verifies their work. A recent report describes the situation for unaccompanied minors in Como as particularly bad, where only a small portion of the children is living in government encampments and many abscond. In contrast, on 7 April 2017 the Italian parliament passed a new law, referred to as the “Zampa Law,” on measures to protect unaccompanied migrant children. Sandra Zampa, the parliament member who proposed the law, states that she first introduced it in 2013 but that it has been waiting approval ever since. The law was welcomed by NGOs and praised for being the most elaborated system for child protection in Europe, introducing protective measures such as foster care and host families for unaccompanied children. Hopefully, this new law will improve minors’ protection, especially for those who decide not to apply for international protection, since investigations shows that in practice they are frequently denied any kind of special assistance nor appointed guardians.

372 Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Personal interview.
374 ‘Monthly Data Collection on the Migration Situation in the EU: April 2017 Monthly Report 1-31 March 2017’ (n 87) 73.
376 Bove (n 98) 49–50.
378 Law n. 47/2017 of 7 April 2017, for provision of protection measures.
11.4 Detention

According to Italian law maximum detention is 12 months. Applicants may only be detained on the basis of a case to case evaluation. The reasons for detention are listed as follows: (1) the applicant falls under the exclusion clause in Article 1F of the 1951 Convention, (2) the applicant is issued with an expulsion order because of a danger to public order or state security or is suspected of serious criminal activity, (3) the applicant is considered as a danger to public order and security or (4) the applicant presents a risk of absconding. The assessment of such risk is determined on a case to case basis when the applicant has provided false declarations or documents in order to avoid deportation or when the applicant has not respected alternatives to detention. Furthermore, the Decree-Law which entered into force on 18 February 2017 describes an applicant who refuses to undergo fingerprinting as a possible risk of absconding. The law equally refers to alternatives to detention, although rarely used. Furthermore, the Questora systematically neglects to refer to specific reasons for the need of detention or why alternatives cannot be applied. As in Greece, migrants are automatically detained without court orders since the Hotspot approach was adopted. However, detention is rarely applied in order to conduct a Dublin transfer.

The management of detention centres is left up to private entities through public procurement contracts, based on a value for money criterion. Legal assistance is provided to detainees for the extension or review of their decisions, although these lawyers have been described as unfamiliar with asylum law and unable to give each case the necessary time. In

---

383 Articles 6(1) and 6(2) LD 142/2015.
384 Article 13(1) TUI, Article 13(2)(c) TUI, Article 3(1) LD Law decree n. 144/2005 confirmed into statute law n. 155/2005, Urgent measures against international terrorism – (Misure urgenti per il contrasto del terrorismo internazionale).
385 Article 13(5), (5.2) and (13) and Article 14 TUI.
386 Article 17(3) Decree Law 17 February 2017, n. 13 - Urgent measures for accelerating the proceedings related to the international protection, as well as for fighting against illegal immigration.
387 Article 6(5) LD 142/2015
388 Bove (n 98) 89.
390 Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Transfers.
392 de Donato (n 389) 102–103.
October 2016, the ECtHR found Italy to have broken Article 5 ECHR regarding detention of asylum seekers whose detention was extended without a hearing. According to Italian law unaccompanied children are never to be held in detention centres, whereas the law is silent regarding detention of other vulnerable persons. Children can be placed in detention with their parents, yet AIDA reports found that in practice very few children are detained. However, on 14 February 2017 the ECtHR communicated the case of Darboe and Camara v. Italy, where two unaccompanied minors were residing in a reception centre for adults in Cona. The Court applied an interim measure ordering that the minors be transferred to a facility adapted to children.

11.5 Transfers

Italy received 123,370 asylum applications in 2016 and sent out 14,229 Dublin requests, out of which only 61 transfers were made. At the same time, Italy received 26,116 incoming requests out of which 2,086 resulted in a transfer. The transfer rate remains low at 0.4% in 2016, in comparison to 0.6% in 2015.

<table>
<thead>
<tr>
<th>Table 10 – Italy, Overview</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Italy - 2016 Statistics</strong></td>
</tr>
<tr>
<td>Asylum Applications</td>
</tr>
<tr>
<td>Outgoing Requests</td>
</tr>
<tr>
<td>Effected Outgoing Transfers</td>
</tr>
<tr>
<td>Incoming Requests</td>
</tr>
<tr>
<td>Effected Incoming Transfers</td>
</tr>
</tbody>
</table>

393 Richmond Yaw and others v. Italy [2016] ECHR 3342/11
394 Article 19(4) LD 142/2015.
395 Bove (n 98) 90.
396 Darboe and Camara v. Italy [2017] ECHR 5797/17.
398 ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 6.
Most outgoing requests were sent to Hungary, Germany and Austria.399

Table 11 – Italy, Outgoing Requests

<table>
<thead>
<tr>
<th>Outgoing Requests from Italy in 2016400</th>
<th>Effected Transfers from Italy in 2016401</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>26.116</td>
</tr>
<tr>
<td>Hungary</td>
<td>935</td>
</tr>
<tr>
<td>Germany</td>
<td>746</td>
</tr>
<tr>
<td>Austria</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>2.086</td>
</tr>
<tr>
<td>Hungary</td>
<td>4</td>
</tr>
<tr>
<td>Germany</td>
<td>15</td>
</tr>
<tr>
<td>Austria</td>
<td>2</td>
</tr>
</tbody>
</table>

Incoming requests came mostly from Germany, Switzerland and France.402

Table 12 – Italy, Incoming Requests

<table>
<thead>
<tr>
<th>Incoming Requests to Italy in 2016403</th>
<th>Effected Transfers to Italy in 2016404</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>14.229</td>
</tr>
<tr>
<td>Germany</td>
<td>6.385</td>
</tr>
<tr>
<td>Switzerland</td>
<td>5.300</td>
</tr>
<tr>
<td>France</td>
<td>4.357</td>
</tr>
<tr>
<td>Total</td>
<td>61</td>
</tr>
<tr>
<td>Germany</td>
<td>229</td>
</tr>
<tr>
<td>Switzerland</td>
<td>817</td>
</tr>
<tr>
<td>France</td>
<td>136</td>
</tr>
</tbody>
</table>

It should be emphasised here that the Dublin Regulation and the relocation measures have been applied simultaneously in both Italy and Greece in a contradictory manner. While Greece has mostly been relieved of the Dublin system for a few years, Italy still receives incoming transfers. From 1 January to 30 November 2016, 1.803 individuals were relocated from Italy according to the relocation scheme, while 61 people were transferred under the Dublin rules from Italy to other Member States. This means that 1.864 individuals left the country according to these two measures. At the same time 2.086 individuals were transferred to Italy through the Dublin System. Italian authorities therefore took responsibility over 222 asylum seekers in the end, after considerable costs in the system.405

399 ibid.
400 ibid.
401 ibid.
402 ibid.
403 ibid.
404 ibid.
405 ibid 5.
Registration of fingerprints used to be difficult before the Hotspot Measure was implemented. Migrants prefer to submit their applications in other member States and have attempted to avoid the Dublin System. For instance, 62,000 people applied for asylum in Italy in 2014 which makes for only half of the arriving migrants that year.\textsuperscript{406} However, since the Hotspot Measure took place, almost all arriving migrants are fingerprinted and registered into the Eurodac database.\textsuperscript{407} The police even apply coercive measures and physical force to ensure registration. The numbers of fingerprints stored has gone from 36\% in September 2015, to 87\% in January 2016 and close to 100\% by September 2016.\textsuperscript{408} The majority of applicants set up for a Dublin transfer from Italy abscond and do not present themselves on the given date. Therefore, the few transfers that occur are in cases of individuals with special needs. Transfers to Hungary have been de facto impossible due to obstacles organised by the Hungarian authorities. The airport has been closed for Dublin transfers except for one or two days per month and dates are confirmed only three days before a transfer is intended to take place.\textsuperscript{409}

The high numbers of applicants which abscond might be explained by severe delays in the Italian system. A UNHCR report from 2013 showed that it often took up to 24 months for a Dublin procedure to be completed, making living conditions of refugees considerably difficult.\textsuperscript{410} Applicants often wait for months without any information on whether the Dublin procedure has begun or not, where a transfer request has been sent and on what grounds. Information provided to applicants in order to navigate through the system mostly comes from NGOs.\textsuperscript{411}

As to incoming transfers, recent investigations show that individuals sent back to Italy from other Member States risk being placed in poor reception conditions.\textsuperscript{412} On 8 March 2015 the Italian Government sent other Dublin Units a list of centres for families, organised within the System of Protection for Asylum Seekers and Refugees (from now on SPRAR) with

\textsuperscript{406} François Crépeau, ‘Report by the Special Rapporteur on the Human Rights of Migrants: Follow-up Mission to Italy (2–6 December 2014)’ (Human Rights Council 2015) 16\textsuperscript{<http://www.refworld.org/docid/5576e8404.html> accessed 26 March 2017.}

\textsuperscript{407} Papadopoulou (n 63) 11.

\textsuperscript{408} Bove (n 98) 21.

\textsuperscript{409} Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Procedure, transfers.

\textsuperscript{410} ‘UNHCR Recommendations on Important Aspects of Refugee Protection in Italy’ (UNHCR 2013) 7\textsuperscript{<http://www.refworld.org/docid/522f0efe4.html> accessed 22 March 2017.}

\textsuperscript{411} Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Transfer.

\textsuperscript{412} ‘Is Mutual Trust Enough? The Situation of Persons with Special Reception Needs upon Return to Italy’ (Danish Refugee Council 2017) 22–23\textsuperscript{<http://www.refworld.org/docid/58a1a9a94.html> accessed 22 March 2017.}
integrated reception and adequate services. An update was later sent out on 15 February 2016 with a new list which included 85 places reserved for families with minors. Nevertheless, a report released in February 2017 by the Danish and Swiss Refugee Councils found that none of the applicants involved in their research had access to SPRAR centres upon arrival in Italy, and that in one case family unity was not ensured. The report concluded that the way in which families and individuals with special needs were treated created a risk of human rights violations.

Italian authorities do not have any official policy regarding a systematic suspension of Dublin transfers but avoid transferring individuals to Greece, in accordance with M.S.S. Furthermore, Transfers to Hungary and Bulgaria have on some occasions been cancelled and these countries considered unsafe. These decisions have, however, not provoked a change in the overall procedures.

11.6 Appeals

When the Italian Dublin Unit finds another Member State responsible for an application on the grounds of Dublin III, the asylum procedure is closed and the Dublin Unit issues a decision which is transmitted to the applicant through the Questura. Information on options to appeal are usually provided by NGOs. The time frame to appeal is 15 days and the applicant can request suspensive effect. Since Dublin III entered into force an effective remedy against a transfer has been compromised. Many Questuras do not consider the time

---

413 ‘Letter from the Italian Ministry of Interior to All Dublin Units, Circular Letter to All Dublin Units on Dublin Regulation Nr. 604/2013. Guarantees for Vulnerable Cases: Family Groups with Minors’ (8 June 2015).
415 ‘Is Mutual Trust Enough? The Situation of Persons with Special Reception Needs upon Return to Italy’ (n 412) 22–23.
416 Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Suspension of transfers.
417 Council of State, Decision n. 4004 of 27 September 2016. The Council of State found that a transfer would violate Article 4 of the charter because of the recent legislative and policy developments in Hungary which have led to an increase in detention measures, risks of refoulement to third countries, and the deficiencies in the asylum procedure and reception conditions; Council of State, Decisions n. 3998, 3999, 4000 and 4002 of 27 September 2016. The Council of state found risks of inhuman or degrading treatment in Bulgaria make transfers contrary to Article 4.
418 Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Suspension of transfers.
419 ibid Transfers.
420 ibid Appeal; Article 19(3) LD 150/2011 as amended by Article 27 LD 142/2015.
allowed to appeal or the time necessary to receive an answer from the Court as a period during which a transfer should be suspended.\textsuperscript{421}

In 2016, Administrative Courts started expressing their view that Dublin procedures were a part of the asylum procedure and as such should fall under the jurisdiction of ordinary courts or a “natural judge” of individual rights.\textsuperscript{422} However, on 3 February 2017, the Civil Court of Trieste considered the ordinary judge to lack jurisdiction and referred the case to the Administrative Courts.\textsuperscript{423} This means that currently asylum seekers facing a Dublin transfer lack an actual and certain remedy. Even though Courts give applicants time to restart the procedure before a competent judge the transfer is not suspended.\textsuperscript{424}

12. Findings

To reflect upon preceding chapters, the essence of this study and main findings will now be presented. This research on the application of Dublin III has shown varying practices and frequent breaches of the Dublin rules.

Varying practices may partially be explained by Dublin being an administratively enforceable procedure, as reflected in Chapter 7 of the Regulation, “Administrative Cooperation.” Dublin III requires national bodies to enforce its measures and thus the Member States have granted administrative authorities, mostly governmental departments, the responsibility of applying the rules.\textsuperscript{425}

The first set of rules this study recognised as difficult in practice are the family unity criteria. Here, differences in the application of the regulation between the north and the south were the most evident. As border states, Greece and Italy appear to rarely use Eurodac data, while it was shown to be the main instrument Germany and Sweden rely on. Greece and Italy might systematically attempt to produce necessary evidence for family reunification, but it seems to be difficult and transfers remain rare.

It is easy to see how the system can encourage Member States in the north, that usually receive asylum seekers who have made their way through several Member States, to focus on registered data provided by Eurodac. By strict requirements for proof for family ties the ball of

\textsuperscript{421} ibid Suspensive Effect.
\textsuperscript{422} Council of State Decision n. 5738 2015; Administrative Court of Lazio, Session I-Ter, Case n. 9909 of 22 September 2016; Session I-Ter, Case n. 11911 of 28 November 2016.
\textsuperscript{423} Civil Court of Trieste, Decision of 3 February 2017.
\textsuperscript{424} Association for juridical Studies on Immigration ASGI, ‘Dublin Procedures: Italy’ (n 365) Suspension of transfers.
\textsuperscript{425} Wendel (n 6) 1012; Notices from Member States, Authorities responsible for fulfilling the obligations arising under Regulation (EU) No 604/2013 [2015] OJ C55/5.
responsibility is thrown back to the border states, which according to the criteria, must accept it.\textsuperscript{426} At the same time, registered data is seen as accepted testament by almost all of the Member States.\textsuperscript{427} This practice has undermined the hierarchy of the Regulation at the expense of border states.\textsuperscript{428} It furthermore ignores the responsibility placed on authorities in these situations, as emphasised by the UNHCR.\textsuperscript{429}

The second issue is that Member States appear to systematically breach multiple safeguards and disrespect procedural rights. For instance, three states (Sweden excluded) were found to provide applicants with imprecise information concerning Dublin procedures, and all four states appear to fail in their task of gathering information from applicants during personal interviews. This was particularly evident in the case of Greece and Italy, even though they rely on the family criteria. These two states, who have experienced undeniable pressure on their asylum systems, were sometimes found to abandon personal interviews altogether for reasons not included in the Regulation.

A possible explanation could be that the Dublin System was not designed to handle massive influxes of asylum seekers and states cannot keep up. Ensuring an efficient flow in national procedures is especially important when large numbers of migrants are seeking international protection. What works against achieving a steady flow is that Dublin procedures are in essence lengthy, even without the added pressure. States might attempt to process each case quickly, which in turn results in them breaking Dublin rules.\textsuperscript{430}

The third issue is that Member States spend considerable time and resources on procedures which never result in actual transfers. Only a small fragment of asylum seekers in Europe have been effectively regulated by the Dublin rules so far.\textsuperscript{431} Dublin transfers often have little effect on the overall amount of applications each state examines. An example of this is Sweden in 2016, as similar numbers of incoming and outgoing transfers occurred, cancelling each other out. This has been the case for most Member States in the EU, and has been seen as a sign of how the Regulation is in fact an ineffective mechanism. In contrast, states that either have a relatively positive or a relatively negative net transfer rate show a higher redistribution effect.\textsuperscript{432} Germany issued numerous outgoing requests out of which few resulted in a transfer.

\textsuperscript{426} Mouzourakis (n 41) 12.
\textsuperscript{427} ‘Evaluation of the Dublin III Regulation’ (n 36) 7.
\textsuperscript{428} ibid.
\textsuperscript{430} ‘Evaluation of the Dublin III Regulation’ (n 36) 4.
\textsuperscript{431} ‘The Dublin System in 2016: Key Figures from Selected European Countries’ (n 221) 4.
\textsuperscript{432} ‘Evaluation of the Dublin III Regulation’ (n 36) 10.
At the same time, it received multiple incoming transfers and finally took responsibility for a substantial amount of applications because of the Dublin system. Italy was not successful in effecting transfers and still received high numbers of incoming transfers. Although this means that the Dublin redistribution mechanism is affecting the amount of applications these Member States take on, this study would suggest that it merely confirms the unbalanced burden sharing and the fact that transfer rates in certain states are very low.

This analysis cannot determine the exact reasons for low transfer rates, although some assumptions may be drawn. For instance, numbers from 2016 show that a large part of outgoing requests from Germany and Sweden were sent to Italy and Hungary. Meanwhile, transfers to these states are consistently revoked because of systematic deficiencies in their asylum systems. The same can be said about Italy, where most requests were sent to Hungary, to which transfers have frequently been annulled and where national authorities have been exceptionally uncooperative. While most outgoing requests from Greece were sent to Germany and Sweden, the fact that Greece relies mostly on family criteria in outgoing transfer requests indicates that these Member States might be requiring more detailed requests than Greece can provide. Furthermore, since the migration wave began and a strain was placed upon national asylum systems, the quality of transfer requests may have gone down. Finally, the problem of applicants absconding remains an obstacle to the system.433

The fourth issue is that some Articles of the Regulation give Member States a certain leeway in their application which has resulted in different practices. Although the EU has been working on improving the CEAS since 1999, differences remain in practices and standards, including the implementation of the Dublin rules.434 Firstly, Articles 16 and 17 have been interpreted very differently. While Germany showed the most commitment to applying these Articles, Greece was not found to have developed any systematic use of the discretionary clause and applied the humanitarian clause exclusively for outgoing requests. At the same time, Sweden was found to use the dependency clause to reunite applicants already residing in Sweden, and not as a responsibility criteria at all.

Secondly, Articles 28(2) and 2(n) on the definition of grounds for detention give Member States liberty to redefine the objective criteria in their national legislation, resulting in diverging rules, some more open than others. This raises concerns as to whether the requirements for detention are too inconsistent, and whether reasons for detention are

433 These speculations are in line with the European Commission’s Study from 2015, ibid 6.
434 ibid 3.
interpreted too broadly in some states. Thirdly, the implementation of Article 27 of the Regulation, which provides applicants with the right to appeal a transfer decision but contains no time limits, might not always ensure the right to an effective remedy. In the case of Germany applicants are only given a week to form their appeal which has been found too short for applicants to effectively seek their rights, especially since no legal assistance is provided. In comparison, Sweden gives applicants three weeks to appeal.

Fourthly, Article 3(2), which came as an addition to Dublin III following the already discussed case law of the ECtHR and the ECJ, is meant to ensure that refugees are not sent to a Member State where there are substantial grounds to believe that systematic deficiencies in the asylum procedures and reception conditions in that Member State put the refugee at risk of being submitted to inhuman or degrading treatment. The Member States have interpreted the term “systematic deficiencies” and the aforementioned case law in divergent ways. Broadly speaking, no common understanding seems to have been formed as to what should be considered as “systematic deficiencies” or specifically to which countries applicants should not be transferred, with the exception of Greece. In Greece and Italy national case law even remains conflicting as no precedence appears to have been formed as to when a transfer should be annulled.

To conclude, although solidarity is a fundamental aim in the CEAS, existing regulations and directives have not fully translated into cohesive administrative practices. The whole CEAS endures shortcomings in compliance, which must be addressed if the system is not to fully collapse. Absolute compliance might be impossible, but as it is, mutual trust among Member States is at risk. As addressed early on in this thesis, Member States used to have complete control over their borders before asylum became a part of the first pillar. With the migration wave they might find themselves unable to treat entry into their territory as a sovereign choice. It is perhaps also for this reason that states attempt to protest and govern asylum in their own ways. In the end, these are sovereign states, and sovereignty is not lost, but has taken a different form. While Dublin fills the crucial role of providing a way to determine responsibility for asylum claims, creating a common policy does not on its own ensure the establishment of a uniform system across the EU. Asylum applications are still

435 Thym (n 55).
processed at a national level, within divergent Member States, that each have their own national procedures.  

13. A New Proposal

As a final input to this thesis chapter 9 will briefly cover the Commission’s proposal for a Dublin reform from 4 May 2016.  

The most interesting change proposed is a corrective allocation mechanism. When a Member State is placed with a disproportionate amount of applications, rising above 150% of their recommended capability, the measure would be activated and applicants relocated to other Member States. Each states’ capability would be based on the size of the population and each state’s Gross Domestic Product (GDP). States choosing not to accept allocation can then make a solidarity contribution. Once the number of applications in the benefitting State goes under 150% once again, the measure would be stopped.  

On 24 February, 2017, a report was published on the reform by ALDE MEP Cecilia Wikström. The proposal had been modified and the option to refuse allocations removed, binding Member States to accept asylum seekers in order to relieve burdened states. The threshold of the reference key was also lowered to 100%, in order for the measure to be triggered before the benefitting state becomes overly affected. Equally, the measure would not be stopped unless the reference key was down to 75%.  

The Commission’s proposal and the subsequent report evidently attempt to address the problem of uneven burden sharing. However, both reports fail to address the most obvious deficiencies in the current system. The corrective allocation mechanism is intended to complement the current structure, but not revision it. The measure provides a remedy to the situation where a Member State has to accept a disproportionate number of asylum applications, rather than ensuring fair sharing of responsibility to begin with. In a similar way to the relocation scheme of 2015, this new mechanism would run alongside the Dublin rules in

438 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), COM(2016)0270, 4 May 2016.
439 ibid Articles 34-36.
441 ibid Articles 34-36 amended.
a counter-intuitive manner.\textsuperscript{442} Moreover, instead of creating a sustainable system which takes into consideration asylum seekers’ meaningful links to certain countries, such as extended family, language skills or educational background, the present criteria in Dublin III are to be maintained. The majority of cases will still be the initial responsibility of the border states. This will most likely continue to encourage applicants to abscond and make their way through Europe to the country they prefer to reside in.\textsuperscript{443}

14. Conclusion and Final Remarks

Although originally established as a provisional measure, the Refugee Convention and later its Protocol, are today’s most imperative international legal sources for refugee protection in the world. The directives and regulations forming the CEAS are built in respect to these texts. Yet, what the EU has attempted to create is a system which exceeds these provisions. A wider set of rules was established to meet changing patterns in migration and the needs of the evolving legal framework of the Union. The Dublin Convention, and later the Dublin Regulations II and III, became the most important management tools in the CEAS. The system was intended to effectively provide individuals with protection in a single Member State, instead of having asylum seekers apply in various Member States or remain in orbit where no Member State accepts responsibility for their applications. Despite these efforts secondary movement remains frequent; asylum seekers submit several applications around Europe; and many remain in orbit as Member States seek to shift responsibility between themselves.

This thesis has explored the inefficiencies of the Dublin system, taking into consideration the legal framework of the Regulation itself as well as Member State application of the rules. The aim was to paint a wider picture of the relationship between the legislation and its implementation than previous literature on the subject had achieved, and provide a better understanding of why the Dublin System has not satisfied its purpose. In that regard, four states were examined: Germany and Sweden as popular destinations in the north, and Greece and Italy, as overburdened frontline states in the south. The thesis set out to answer two questions: first, what Dublin rules have proven difficult in practice and how their application might vary between different Member States; and second, whether the Dublin rules have a


counteractive influence on the Member State’s use of the system and if so, how this effect might vary between different Member States.

To answer the first question, all four states were found to struggle with the same rules, although particular Articles and corresponding case law is approached differently. The Dublin System is based on mutual trust and cannot function properly without it. There is, however, no trust without harmonization. The equivalent protection standards the CEAS aimed to create have not been achieved and varying practices in national asylum systems are still an issue. The apparent dependency on the Eurodac database by Germany and Sweden, and their focus on the first entry criterion is concerning. The high evidence threshold which has been established for family criteria, effectively increases the disproportionate responsibility placed on border states. At the same time, the transfer rate to these states is low, either because the sending state must accept responsibility on account of Article 3(2) and the case law of the ECtHR and the ECJ, or because applicants refuse to cooperate and abscond. The border states remain initially responsible which has generated ambiguity as to when these states can effectively receive transferred applicants or not. Furthermore, the level of protection and respect for procedural rights differs. In most aspects, the southern states were found to be less inclined to respect applicants’ rights, although all four states were found to breach Dublin III and the recast Reception Conditions Directive in some ways.

As to the second question, this study finds that it is not only Member States refusing to play by the rules that makes for a flawed system, but that the Regulation itself was constructed in a way which fails to meet its original objectives and could not have provided an effective response to the current migration wave. It appears that the inefficiencies of the Dublin System, as it is today, are a combination of a flawed structure and an inadequate application. In some ways, the Dublin rules even undermine rather than facilitate their objectives. Multiple issues support this conclusion. To begin with, case law has confirmed that the Dublin system requires reparations of deficiencies in national asylum systems, but states in danger of becoming inefficient have not been provided with any reliable remedies. Dublin III does not address the situation where a few Member States are left responsible for the majority of applications. The system relies on other European countries to show solidarity and go beyond the necessary requirements to relieve the former of their burden. The migration wave has proven that this approach is not realistic.

Furthermore, the system fails to consider the applicants themselves and their preferences. As Minos Mouzourakis brilliantly described in a Working Paper for the Refugees Study Centre, Dublin formed a wall between the procedure and the asylum seeker, allocating
responsibility for the procedure rather than the individual. While applicants attempt to evade Dublin procedures by avoiding registration, Member States apply confinement and even force in order to respect their responsibilities under EU law. This oversight of not taking the human aspect into consideration can equally be found in the relocation scheme and can largely be blamed for its deficiency.

It is the culmination of this thesis that the Dublin system must inevitably be reconsidered. Therefore, it is disappointing to see that the recent proposal for a Dublin IV does not offer a new approach. In a similar manner to the ad hoc measures installed to complement the Dublin Regulation, the suggested allocation mechanism will take place alongside the traditional Dublin rules. As relocations from Italy to other Member States has shown, this creates the obscure situation where a number of applicants leave the country and others return simultaneously. While Greece received only a nominal number of transfers in 2016, the situation in Italy is quite different. States have begun announcing that they will once again start transferring applicants to Greece, and the country will be placed in the same position as Italy.

Based on the findings presented in this thesis, further research into asylum procedures in Europe could be advantageous for future policy making. For instance, national case law could be given more scrutiny and social responses within the Member States studied, including possible hate crime incidents. Some of the findings were, moreover, unexpected and deserve more attention, such as Italy’s unprecedented step towards protection for unaccompanied minors. In any respect, it will be interesting to follow the development of migration and asylum policies in the EU in the months and years to come.

---

444 Mouzourakis (n 41) 5.
References


Askanius T and Linné T, ‘Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries’ (Cardiff School of Journalism 2015) <https://lup.lub.lu.se/search/publication/c064846f-6183-4d3c-9f72-4a5d37f0cb9b>


<https://www.freemovement.org.uk/dublin-regulation-to-be-scrapped/> accessed 5 March 2017


‘Common European Asylum System’ *(European Commission, Migration and Home Affairs)*


Council of the European Union, Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] OJ L157/23

———, Presidency Conclusion, Tampere European Council 15 and 16 October 1999, 16 October 1999

<http://www.refworld.org/docid/5576e8404.html> accessed 26 March 2017

‘Cruscotto Statistico Giornaliero’ *(Dipartimento Libertà Civili e Immigrazione)*

‘Danish Refugee Council’s Position on the Reform of the Dublin System’ *(Danish Refugee Council 2017)*

‘Das Gefängnis Der Offenen Türen’ *(Neue Presse, 21 February 2015)*


———, Communication on Fourth Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792, 8 December 2016

———, Communication towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 6 April 2016

——, 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), COM(2016)270, 4 May 2016

——, Recommendation addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, C(2016)8525, 8 December 2016


European Parliament and Wikström C, Draft Report on the 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), COM(2016)0270, 24 February 2017


For farahat a and markard n, ‘forced migration governance: in search of sovereignty’ (2016) 6 german law journal 923

‘flüchtlinge: deutschland will syrer wieder in andere eu’ (spiegel online, 10 november 2015) <http://www.spiegel.de/politik/deutschland/fluechtlingskrise-deutschland-wendet-dublin-verfahren-an-a-1062156.html> accessed 20 february 2017


fratzke s, ‘not adding up: the fading promise of europe’s dublin system’ (migration policy institute europe 2015) <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system> accessed 30 january 2017


Hampshire J, ‘Europe’s Migration Crisis’ (2015) 6 Political Insight 8


——, ‘Refugee and Asylum Migration to the OECD: A Short Overview’ (Institute of Labour Economics 2012) 7004
High Commissioner for Refugees, Note on Non-Refoulement, EC/SCP/2, 23 August 1977

‘Hotspots - Italy’ (Asylum Information Database)  


——, ‘Duration of Detention: Germany’ (Asylum Information Database)  

——, ‘Statistics - Germany’ (Asylum Information Database)  
<http://www.asylumineurope.org/reports/country/germany/statistics> accessed 28 April 2017

‘Is Mutual Trust Enough? The Situation of Persons with Special Reception Needs upon Return to Italy’ (Danish Refugee Council 2017)  
<http://www.refworld.org/docid/58a1a9a94.html> accessed 22 March 2017


<http://www.asylumineurope.org/reports/country/sweden> accessed 12 March 2017

‘Justice and Home Affairs Council, 20/07/2015’ (European Council, Meetings, 20 July 2015)  

‘Kabinett Beschließt Ersten Bericht Zur Situation Unbegleiteter Ausländischer Kinder Und Jugendlicher’ (Bundesministerium für Familie, Senioren, Frauen und Jugend, 15 March 2017)  

<http://www.asylumineurope.org/reports/country/germany> accessed 12 March 2017

——, ‘Country Report: Germany’ (Asylum Information Database 2016)  
<http://www.asylumineurope.org/reports/country/germany> accessed 26 March 2017

‘Letter from the BAMF to the Federal States and the Border Police, “Änderung Der Verfahrenspraxis Des Bundesamtes Im Rahmen Des Dublinverfahrens”’ (17 July 2013)

‘Letter from the Italian Ministry of Interior to All Dublin Units, Circular Letter to All Dublin Units on Dublin Regulation Nr. 604/2013. Guarantees for Vulnerable Cases: Family Groups with Minors’ (8 June 2015)

‘Letter from the Italian Ministry of Interior to All Dublin Units, Circular Letter to All Dublin Units on Dublin Regulation Nr. 604/2013. Guarantees for Vulnerable Cases: Family Groups with Minors’ (10 February 2016)

Accessed 22 February 2017

‘Letter from Thomas de Maizière, Federal Minsiter of the Interior, to the Parliamentary Committee for Interior Matters and to the Petitions Committe’ (30 December 2016)

Accessed 17 March 2017

‘Managing the EU Migration Crisis: From Panic to Planning’ (Ernst & Young 2016)

Accessed 10 February 2017


Accessed 2 February 2017

McAdam J, Complementary Protection in International Refugee Law (Oxford University Press 2007)


Migration Policy Institute Europe, Interview with official in the Department of Asylum, Rescue, and Return, Directorate General for Immigration, Dutch Ministry of Security and Justice (27 June 2014)

Migration Policy Institute Europe, Interview with official in the Immigration Department, Danish Ministry of Justice (16 June 2014)

Mitsilegas V, ‘Solidarity and Trust in the Common European Asylum System’ (2014) 2 Comparative Migration Studies 181


Accessed 2 February 2017


‘Note on Dublin Transfers to Hungary of People Who Have Transited through Serbia -- Update’ (UNHCR) <http://www.refworld.org/docid/50d1d13e2.html> accessed 27 April 2017

Notices from Member States, Authorities responsible for fulfilling the obligations arising under Regulation (EU) No 604/2013 [2015] OJ C55/5


Parusel B, ‘Sweden’s U-Turn on Asylum’ [2016] Forced Migration review 89


‘Report of the Fact-Finding Mission by Ambassador Tomáš Boček Special Representative of the Secretary General on Migration and Refugees to Greece and “the Former Yugoslav Republic of Macedonia” 7-11 March 2016’ (Council of Europe 2016) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680648495> accessed 16 April 2017

Robinson D, ‘Refugees in Greece Refuse to Relocate across EU’ (Financial Times, 16 May 2016) <https://www.ft.com/content/826f1bf2-1b75-11e6-b286-cddde55ca122> accessed 9 April 2017


Swedish Migration Agency, Rättslig kommentar angående Europadomstolens dom i målet Tarakhel mot Schweiz, ansökan nr 29217/12


‘The New Temporary Law Has Entered into Force’ (Migrationsverket, 16 August 2016) <https://www.migrationsverket.se/English/About-the-Migration-Agency/News-


‘UNHCR Recommendations on Important Aspects of Refugee Protection in Italy’ (UNHCR 2013) <http://www.refworld.org/docid/522f0efe4.html> accessed 22 March 2017

Velluti S, Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts (Springer 2014)


