

European Refugee Policy

Pathways to Fairer Burden-Sharing

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By mid-2015, a “Common European Asylum System” (CEAS) is to be implemented across the European Union. According to the responsible Commissioner Cecilia Malmström, this will ensure better access to asylum procedures, faster and fairer decisions, and dignified and decent conditions for refugees. However, scepticism is indicated. Firstly, the new rules offer too much leeway for them to guarantee truly equal conditions for asylum-seekers across the European Union. Secondly, there has been no progress on the question of the distribution of refugees among EU member states. The “Dublin system”, under which in most cases the country in which an asylum-seeker first enters the European Union is responsible for housing them and processing their application, remains in place – and with it the problem of a highly uneven distribution of asylum-seekers. The member states should therefore develop a procedure for determining fair reception quotas, for example using a multi-factor model. The fair quotas determined by such a method could then serve as the basis for the political debate about redistributing refugees or providing financial assistance.

The Dublin Agreement of 1990 was a turning-point in the development of a European asylum policy. One of its fundamental principles is that the EU member-state through which an asylum-seeker first demonstrably entered the Union remains in most cases responsible for processing their asylum application. This principle was intended to prevent refugees from applying for asylum in several states within the European Community and to prevent states from seeking to offload their responsibility onto others. In the Amsterdam Treaty of 1997, the member states agreed to jointly address important aspects of asylum and immigration

polies, and draft uniform norms and procedures within five years. At its meeting in Tampere in 1999, the European Council formally approved the establishment of a shared European asylum system. It was to be “based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees” in order to ensure that no person would be sent back to a place where they were exposed to persecution (principle of non-refoulement).

Since then several directives on minimum standards have been adopted: the Reception Conditions Directive of 2003, which stipulates a baseline for reception,

housing, and material living conditions; the Asylum Qualification Directive of 2004, establishing minimum standards for recognition of asylum-seekers and for the rights of recognised refugees and beneficiaries of subsidiary protection status; and the Asylum Procedures Directive of 2005, which also defines minimum standards with the aim of harmonising asylum procedures. At the same time, the European Refugee Fund was set up to assist member states dealing with large numbers of refugees.

In all phases of European refugee policy to date, the question of sharing the burdens of refugee protection has played an important role. While the Amsterdam Treaty already proposed the introduction of a compensation system for the reception and care of refugees and displaced persons, it has to this day produced nothing in the way of convincing solutions. Instead, in 2000, the Eurodac Regulation was adopted to make the Dublin mechanism workable in practice. It provides for the fingerprints of all asylum-seekers to be kept in an EU-wide database accessible to all member states. In 2003 the Dublin Agreement was converted into an EU regulation (Dublin-II). It is now easier for EU member states to determine the country of first entry – and thus also responsibility for the asylum procedure and accommodation.

Unequal Protection

The gains of this first harmonisation phase have not resolved the challenges of European refugee protection. The greatest problem is that states continue to receive widely differing numbers of asylum-seekers. This becomes especially obvious if the figures are examined in relation to size of population: in the five years from 2008 to 2012 Malta received 21.7 asylum applications per 1,000 inhabitants, Sweden 16.0, whereas the average for the EU-27 was just 2.6 applications per 1,000 inhabitants – and the figure for Germany just 2.4.

Additionally, different standards continue to be applied in all spheres of refugee

protection: reception and living conditions, length and quality of asylum process, and recognition rates. Thus the overall protection rate – recognition of refugee protection or another humanitarian status as a proportion all first-instance asylum decisions – continue to exhibit considerable differences between member states. A comparison of overall protection rates for Afghanistan, Iraq, Somalia and Syria – countries from which especially large numbers of refugees arrived in recent years – shows that the chances of receiving at least subsidiary protection depend very heavily on the receiving country. For example, in 2012 the EU's overall protection rate for asylum-seekers from Iraq was 53.7 percent. But the discrepancies between member states were huge: 92.3 and 75.3 percent respectively for Italy and Austria, but just 10.0 and 2.9 percent for Denmark and Greece. Similar differences are found in the protection rates for Afghans and Somalis, while the discrepancies are much smaller in the case of Syria.

Towards Uniform Standards

In view of these problems the member states decided in the European Pact on Immigration and Asylum of 2008 to complete the Common European Asylum System through measures that include continuing enhancement and harmonisation of protection standards, founding a European Asylum Support Office (EASO), and agreeing greater solidarity over refugee arrivals both within the European Union and towards third states.

The Common European Asylum System, agreed after prolonged negotiations, essentially comprises three revised directives (Asylum Qualification Directive, Asylum Procedures Directive, Reception Conditions Directive) and two reworked regulations (Eurodac and Dublin-III). While the directives must be implemented in national law within two years, the two regulations come into force directly on 1 January 2014.

The new version of the Asylum Qualification Directive (2011/95/EU) defines some-

what higher standards of protection, both for the criteria of recognition and for the rights of already recognised refugees and beneficiaries of subsidiary protection status. Thus member states can no longer simply reject an asylum application with reference to safe havens within the country of origin, as the possibility for the asylum seeker to safely and legally reach that part of the country is a necessary condition for declining the need of protection. Gender-specific persecution now also represents grounds to grant asylum. One central innovation is the far-reaching equalisation of the legal positions of persons with subsidiary protection status and recognised refugees under the Geneva Refugee Convention (GRC). This applies especially with respect to “family asylum”, where close relatives profit from a person’s protected status and may also receive asylum. In terms of access to the labour market and integration services, too, both groups are to be treated equally in future.

The revision of the Asylum Procedures Directive (2013/32/EU) aims to bring about an improvement in procedural standards. For the first time, European law establishes deadlines for the processing of asylum applications. As a rule, applications must be processed within six months, although exemptions for exceptional cases – such as the absence of cooperation by the applicant or a large volume of applications – permit a duration of 15 to 21 months. As with the Asylum Qualification Directive, subsidiary protection status and refugee status under the Geneva Refugee Convention are granted procedural equality; the right to both types of protection must in future be examined in the same process. The improved rights of information and appeal for asylum-seekers are also significant. They now receive expanded possibilities to provide all the information required to justify their application in a personal hearing.

The reworked Reception Conditions Directive (2013/33/EU) introduces above all a more precise definition of the minimum standards for reception. With respect to

living conditions and integration, the reduction of the maximum period for which asylum-seekers may be excluded from the labour market from twelve months to nine is central. Altogether, significantly greater consideration must in future be given to the situation of persons with special needs (such as minors, single parents, the physically or psychologically ill), for example through appropriate care services. After controversial debates between Council and Parliament about the preconditions for detention of asylum-seekers, six possible reasons were defined (identification, securing evidence, decision on right to enter, late asylum application to delay or frustrate return, national security and public order, transfer under Dublin rules). This list leaves member states a great deal of room for interpretation. Even unaccompanied minors can still be imprisoned, although now not in normal prisons and not together with adults. Access to legal assistance has been improved, granting asylum-seekers a right to free legal advice and representation under certain circumstances.

Meanwhile, it is problematic that the new Dublin-III Regulation (No. 604/2013) leaves the principle of responsibility unaltered. The country of first entry remains in most cases responsible for process and accommodation. In fact, the group covered by the regulation has been expanded, with the Dublin system no longer applying only to the sphere of refugee protection under the Geneva Refugee Convention, but also to those who apply for subsidiary protection status. It is thus no longer possible to avoid transfer to the state responsible under the Dublin rules by lodging an application for subsidiary protection. On the positive side, the regulation does strengthen the rights of asylum-seekers in certain areas. They now enjoy the right to a hearing before any transfer to another EU member-state, where they may present reasons mitigating against a transfer, such as family ties. The obligation on member states to inform asylum-seekers punctually and comprehensively about the stages and consequences of the Dublin pro-

cess, and the legal instruments available to them, is now also defined more precisely than before. Applicants also now have a right of appeal with suspensive effect, although the member states have leeway concerning the deadlines, and thus the quality of this legal protection.

The new Eurodac Regulation (No. 603/2013) points in the same direction as the new Dublin-III Regulation. It contains above all new provisions relating to data protection, such as specific deadlines for member states to supply fingerprints and an expansion of the authorised users of the Eurodac database to include law enforcement agencies. This will also grant national police authorities and Europol access to the data – albeit under precisely defined conditions.

Challenges of Joint Asylum Policy

When the new CEAS rules are put into practice, the decisive point will be how the somewhat higher standards are implemented in those states whose national asylum systems are overstretched or already fail to meet the minimum standards demanded under current EU law. For example, implementation of the new Reception Conditions Directive would improve the suboptimal conditions as regards reception, procedures and the quality of asylum decisions in countries such as Greece, Hungary and Cyprus, where asylum-seekers are still subject to intolerable conditions. The Common European Asylum System would certainly represent a gain if asylum-seekers were able to expect that the rights anchored in EU law, the Geneva Refugee Convention and the European Convention on Human Rights (ECHR) would be fully respected across the entire European Union. But above all, equal treatment under the Asylum Qualification Directive is crucial. Only once it is ensured that similar asylum cases are treated equally in all member states will this objective have been achieved. This would then be reflected in a noticeable equalisation of protection rates for individual countries of origin. On the other hand, it is of concern that even

under the revised Asylum Procedures Directive member states are still permitted to define for themselves which third states and countries of origin are safe; a binding joint list is not proposed.

It is now important to harmonize the application of these directives. The EASO can play an important role here, and possesses the mandate to do so. Beyond that, decisions of national and European courts will also continue to be of great importance, because the new legal package contains a number of interpretable passages.

Refugee Reception: Alternatives to Dublin?

However, determination of responsibility for asylum applications via the Dublin Regulation remains a core problem, as the new Common European Asylum System will do little to change a situation where certain member states are disproportionately affected by refugee arrivals. All that is proposed within the scope of the Dublin-III Regulation is a non-binding early-warning system to flag overstretch in national asylum systems, and support from EASO in coping with crises. This shifts the question of improving the Dublin mechanism to the heart of future joint asylum policy. The Commission, the European Parliament and the Council have all repeatedly called for an asylum system that lives up to the principle of solidarity stated in the EU treaties. NGOs campaigning for the rights of refugees argue for the complete abolition of the Dublin Regulation in favour of free choice of country of asylum. Certain parties in Europe call for a new system where each member-state would agree to accept and process a certain number of asylum-seekers on the basis of a proportional allocation system. So far, however, no proposal has passed the Council. Instead, most EU member states strictly reject new obligations. There is currently not even a majority for a proposal for voluntary relocation measures, to coordinate redistribution of smaller contingents of asylum-seekers from especially

affected member states to elsewhere in the European Union.

One Possible Approach: Fair Reception Quotas

In view of these deficits, the EU member states need to find a new and fairer mechanism for receiving refugees and processing their applications. One obvious route would be to specify an equitable reception quota for each member-state, to be adjusted annually according to a transparent calculation method. In the model proposed here, refugee allocations are based on the respective reception capacity. The UNHCR has for years reported the number of asylum applications in relation to each country's economic strength and population size in order to create rankings. In the model developed here, these two parameters also appear as the most important variables. But they are supplemented by two other factors: territory and unemployment rate. In order to smooth out short-term economic fluctuations, a multi-year moving average is used (see Table 1).

The respective member-state's share of the EU's GDP is proposed as a major factor (weighted with 0.4) on the assumption that the strongest economies – independently of all other circumstances – will also be able to shoulder the greatest burdens. Population enters the calculation as the second major factor, with the same weighting (0.4).

The larger the population (and thus the size of the labour force) the easier it will be for a country to accept asylum-seekers. The third factor of geographical area pursues a similar intention, in particular addressing the “space problem” sometimes put forward by smaller countries such as Malta. Here the smaller weighting (0.1) reflects the fact that many of the European Union's geographically larger countries also include large thinly populated areas. The fourth and last factor, also with minor weighting (0.1), is unemployment. Even powerful economies can be affected by high unemployment. As migration research in sociology and social psychology has found, xenophobic attitudes increase during phases of high unemployment, while the willingness to grant protection to refugees falls.

Applying the model with the aforementioned factors and weightings produces the following reception quotas for 2013 (see Table 2, p. 6).

Unfair Distribution

If the multi-factor model is applied to the approximately 1.3 million asylum applications made in the European Union between 2008 and 2012, we find that only eight member states were disproportionately affected. Under the quota Sweden would have received about 42,000 asylum applications in the five-year period, whereas it actually took in more than three times that number

Table 1
Multi-factor model for calculating reception quotas

<i>Factor</i>	<i>Indicator</i>	<i>Effect</i>	<i>Weighting</i>
Economic strength	Gross domestic product (mean of last five years)	Proportional; the higher the national share of EU GDP, the higher the factor	40%
Population	Total population (mean of last five years)	Proportional; the higher the national share of EU total population, the higher the factor	40%
Area	Geographical area (square kilometres)	Proportional; the higher the national share of EU total territory, the higher the factor	10%
Unemployment	Unemployment rate (annual averages over past five years)	Inversely proportional; the higher the unemployment rate, the lower the factor	10%

Source: Authors.

Table 2
Fair reception quotas for 2013 using the
multi-factor model

<i>EU member-state</i>	<i>Quota</i>	<i>EU member-state</i>	<i>Quota</i>
Germany	15.80%	Portugal	1.83%
France	13.11%	Denmark	1.74%
United Kingdom	11.54%	Hungary	1.60%
Italy	10.78%	Ireland	1.28%
Spain	8.30%	Bulgaria	1.27%
Poland	5.19%	Slovakia	0.98%
Netherlands	3.98%	Croatia	0.94%
Sweden	3.22%	Luxembourg	0.76%
Romania	3.06%	Slovenia	0.74%
Belgium	2.46%	Lithuania	0.72%
Austria	2.45%	Latvia	0.57%
Finland	2.14%	Cyprus	0.55%
Greece	2.09%	Estonia	0.50%
Czech Republic	1.94%	Malta	0.50%

Sources: Eurostat, own calculations.

(almost 154,000). Belgium, Greece and Austria also received more than twice as many asylum-seekers as suggested by the quota model. Germany, Denmark and the United Kingdom would have slightly underfulfilled their quotas, thus accepting rather fewer asylum applications than their capacities would suggest. But many member states accepted only a fraction of the number of asylum-seekers that they could have taken according to their economic strength, population, area and unemployment rate. These are above all the states of the European Union's 2004 and 2007 eastern enlargements, but also Spain and Portugal (see Table 3, p. 7).

Political Options

If the EU member states were to agree on such a multi-factor model for determining fair reception quotas, it could be used in two different ways. First of all, the quotas could serve as the basis for a fairer actual distribution. Member states would fulfil their quotas, fixed at the beginning of each year, with real arrivals and process their asylum applications. If the number of asy-

lum-seekers exceeded a country's quota and the affected state requested a remedy, contingents would be dispersed to other EU member states – in principle to those whose actual refugee arrivals lay well below their fair share according to their quota. In individual cases this would also offer the possibility to satisfy the needs of asylum-seekers to pursue their application in a particular member-state, for example where family members already live. Such an approach would be based on the willingness to exercise solidarity in burden-sharing on the basis of accepted quotas, and could be negotiated in the European Council.

As an alternative option, fair reception quotas could serve to develop a system of financial compensation for the costs of accommodating asylum-seekers and processing their applications. In this case member states could pay an annual contribution to a solidarity fund defined by their quota. The size of the fund could be set by the total number of asylum applications in the European Union in the previous year, based on an average lump sum per application. Payments from the fund at the end of the year would then be based on the number of actual received asylum-seekers.

Thus, member states that repeatedly take in fewer asylum-seekers than their fair quota suggests would be the net payers into a "Dublin compensation fund". This option would leave the allocation of responsibility under the Dublin Regulation unaltered, while offering a supplementary financial compensation arrangement. It would have to be ensured that such a fund could not be misused by member states to deliberately keep their asylum-seekers numbers low and "buy their way out". The new Asylum and Migration Fund (AMF) for 2014–2020 already provides a similar compensation mechanism, although only for EU resettlement measures (refugees brought directly from abroad on the basis of a voluntary reception offer). The extent to which this mechanism can also serve as a model for developing a solidarity fund under the Dublin rules remains to be examined.

Table 3

Actual asylum applications in relation to the multi-factor model, 2008–2012

	<i>Fair quota</i>	<i>De facto applications</i>	<i>Deviation from fair quota (%)</i>
Sweden	42,017	153,900	+266.3%
Belgium	32,017	95,720	+199.0%
Greece	27,189	64,970	+139.0%
Austria	31,960	71,510	+123.7%
Cyprus	7,193	13,680	+90.2%
Malta	6,457	9,060	+40.3%
France	170,953	232,680	+36.1%
Netherlands	51,954	62,080	+19.5%
Germany	205,974	201,350	-2.2%
Denmark	22,706	21,100	-7.1%
United Kingdom	150,457	137,940	-8.3%
Italy	140,580	107,800	-23.3%
Finland	27,905	19,960	-28.5%
Hungary	20,837	13,740	-34.1%
Ireland	16,629	10,730	-35.5%
Luxembourg	9,951	5,810	-41.6%
Poland	67,695	38,590	-43.0%
Bulgaria	16,568	4,750	-71.3%
Slovakia	12,738	3,140	-75.3%
Croatia	12,195	2,600	-78.7%
Lithuania	9,350	1,740	-81.4%
Czech Republic	25,262	4,570	-81.9%
Romania	39,924	7,100	-82.2%
Spain	108,289	16,260	-85.0%
Slovenia	9,622	1,240	-87.1%
Latvia	7,416	690	-90.7%
Portugal	23,860	1,040	-95.6%
Estonia	6,537	230	-96.5%

Sources: Eurostat, UNHCR, own calculations.

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Outlook

The Common European Asylum System developed since 2007 should be seen as a step on the way to a coherent EU refugee and migration policy. What is needed now is rapid and comprehensive implementation of the reforms, a fair distribution system and a reliable mechanism to identify overburdened national asylum systems. This would represent a major step forward for the joint refugee policy. Although the most recent EU summit made no progress on this matter, the heads of state and government did at least decide to “return to

asylum and migration issues in a broader and longer term policy perspective in June 2014”. The strategic guidelines for further legislative and operational planning should thus be laid out during the EU Council Presidencies of Greece and Italy in the first and second halves of 2014. It can be expected that those states particularly affected by refugee flows will argue for a system of burden-sharing. The procedure for determining fair reception quotas proposed here could be helpful in that debate.