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UNHCR STUDY ON THE IMPLEMENTATION
OF THE DUBLIN III REGULATION

EXECUTIVE SUMMARY

TABLE OF CONTENTS

1. Introduction	4
2. Key findings	5
2.1 Provision of information and personal interviews	5
2.2 Children	6
2.3 Determining Member State responsibility for examining an application for international protection	7
2.4 Discretionary clauses	8
2.5 Transfers	9
2.6 Use of detention	9
3. Building on lessons learned: restoring trust in the Dublin system in the interests of Member States and applicants alike	10



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Cover photo: Altaf holds out his palm revealing his wife's passport photograph. His wife and two of his children are in Germany where they have applied for asylum. Altaf and his oldest son Majd are in Athens, Greece. They hope to reunite with their family members who are awaiting a decision on their application for international protection in Germany.
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Layout & Design: BakOS DESIGN

1. Introduction

More than two years after the entry into force of the Dublin III Regulation in January 2014, and with a further reform of the Dublin system being proposed, the UN Refugee Agency (UNHCR) conducted a study to evaluate the implementation of the Dublin III Regulation.¹

The study provides evidence-based information on the implementation of the Dublin system. It draws on the analysis of over 200 Dublin case files and the observation by the researchers of personal interviews. It also draws on the information provided by over 130 national authorities and civil society representatives and the testimonies of over 120 applicants who underwent a Dublin procedure in nine selected Member States (Denmark, France, Germany, Greece, Italy, Malta, Norway, Poland and the United Kingdom). Whilst the research was conducted between October 2015 and March 2016, the analysis covers the period between the entry into force of the Dublin III Regulation and February 2016. The findings of this report provide an evidence base for UNHCR's proposals for a revitalized and effective Common European Asylum System (CEAS) as set out in the paper "*Better Protecting Refugees in the EU and Globally*"² of December 2016. UNHCR would like to thank the national authorities, civil society representatives and applicants who agreed to participate in the study, which would not have been possible without their cooperation.

In December 2016, UNHCR issued comments on the European Commission's proposal for a recast Dublin Regulation of May 2016, setting out how the Dublin Regulation should be reformed.³ Yet, as the Dublin III Regulation will continue to be in place until the adoption of a new instrument, UNHCR trusts that this study and its recommendations will serve as useful resources in addressing the current protection and procedural deficiencies in the Dublin system. At the same time, the study and its recommendations aim to contribute to enhancing Dublin during the reform process, for it to deliver a functioning mechanism in the interests of applicants and Member States alike.

One of the stated objectives of the Dublin system is to provide a method to rapidly determine the Member State responsible for examining an application for international protection, based on identified criteria to be applied in the order set out in the Regulation ("hierarchy of criteria"), to guarantee effective and swift access to asylum procedures. This method should be based on objective and fair criteria both in the interests of the Member States and the applicants concerned (Recital 5 of the Dublin III Regulation). With this objective in mind, the study looked at how and the extent to which the procedural safeguards and guarantees for applicants, such as the provision of information and a personal interview, the best interests of the child, and the safeguards surrounding detention, are applied in practice in the Dublin procedure.

¹ Regulation (EU) No 604/2013 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 national or a stateless person (recast), 26 June 2013, available at: <http://www.refworld.org/docid/51d298f04.html>.

² UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>.

³ UNHCR, *UNHCR comments on the 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) 270, 22 December 2016, available at: <http://www.refworld.org/docid/585cdb094.html>.

In light of the focus on family unity in determining responsibility for examining an application, the study concentrated on assessing whether applicants for international protection are benefitting to the full extent possible from the Dublin Regulation's hierarchy of criteria which should, if implemented correctly, allow applicants to reunite with family in a Member State.⁴ It also looked at the use of the "dependency clause", which allows related dependent persons to be reunited, and the "discretionary clauses", which enable Member States to take responsibility for an applicant beyond the "hierarchy of criteria". The study also examined how transfers of applicants to other Member States following responsibility determination are carried out, and obstacles to their effective implementation. Whilst this study is confined to nine Member States, its findings are indicative of wider challenges and discrepancies among all Member States applying the Dublin Regulation.

2. Key findings

This study was conducted at a time when some national asylum systems in Europe faced significant increases in applications for international protection, during 2015 and 2016. Against this backdrop, the findings reflect, at times, insufficient implementation of elements of the Dublin Regulation due to constraints on certain Member States' asylum systems. This includes significant delays in conducting Dublin procedures and suspension of, or delays in, conducting personal interviews. However, the findings also demonstrate that Member States can, even when experiencing significant pressure, apply Dublin Regulation procedures in an efficient manner and in the best interests of applicants. Examples include the proactive use of the family reunion provisions (Articles 8, 9 and 10 of the Dublin III Regulation) and the "humanitarian" clause (Article 17(2) of the Dublin III Regulation), where appropriate.

2.1 Provision of information and personal interviews

The study highlighted the central role that a timely, accessible and accurate provision of information to applicants about the application of the Regulation, their rights and obligations plays in ensuring swifter determination of responsibility. The personal interview in line with the Dublin Regulation is also essential to ensure efficient Dublin procedures. The findings, however, show that there is a marked disparity between policy and practice in these areas. For example, the study found that information provided to applicants is often either incomplete, outdated, inaccurate, or simply not available. Interviews in some Member States are omitted for reasons that may go beyond the permissible grounds for exclusion under the Regulation. When held, they are not always conducted in a manner that enables applicants to clarify the information provided. Sometimes applicants were not able to fully provide relevant information to enable the authorities to correctly determine responsibility in conformity with the Regulation.

A key aspect of the findings of the study is the important role that legal advisors and the judiciary have in framing the safeguards and obligations surrounding the Dublin system, not only through ever evolving jurisprudence, but also assisting to ensure the correct determination of responsibility. Furthermore, NGOs have a central role in the provision of information and assistance to applicants, including, for example, in the submission of evidence and documentation to prove family links.

⁴ "Member States" refers to the countries applying the Dublin Regulation, regardless of whether they are European Union (EU) Member States or associated countries.

KEY RECOMMENDATIONS

- Information on the application of the Dublin Regulation should be comprehensive, accurate and accessible, including for children and illiterate applicants; to this end, Member States should put in place alternative ways of providing information such as audio-visual materials; such information should be provided prior to the personal interview, which should effectively be used for the purpose of clarifying information to the applicant.
- Mechanisms should be established to identify applicants with specific needs as early as possible in the procedure so that appropriate procedural arrangements can be put in place in a timely manner, including for the purpose of the personal interview.
- Interviews should be conducted by trained personnel in an environment that is conducive to confidentiality to ensure that personal interviews effectively serve the purpose of expediting procedures by enabling the gathering of relevant information at an early stage.
- Quality legal advice free of charge should be provided as early as possible to applicants to ensure they receive the necessary assistance including during the personal interview.

2.2 Children

The best interests of the child should guide any decision that may affect them. However, the findings show that at times there is a marked disparity between the principles of the best interests of the child and family unity and the manner in which the procedural safeguards for children and family reunion possibilities guaranteed under the Dublin Regulation as well as in international law are respected in practice. The findings show that, if conducted at all, best interests assessments (BIA) are often not comprehensive in nature and do not take into account, as a minimum, the key factors outlined in the Regulation. Family tracing is often not carried out in a proactive manner by the relevant authorities. Rather, it is left in most cases to the applicants to instigate, including children, who have to submit information on the presence of family relations in other Member States. Challenges concerning the methodology of and mutual recognition of age assessment outcomes, the verification of the existence of family links, lack of clarity as to the role of representatives⁵ and delays in their appointment can also impair the timely identification of family relations. These issues ultimately impact the possibility for children to benefit from family reunion under the Dublin Regulation in a timely manner.

KEY RECOMMENDATIONS

- Since effective cooperation between Member States on BIA procedures and family tracing is essential to ensure swift procedures, Member States should develop appropriate guidance and common standards on BIA procedures and the proof or evidence required to prove family links.
- The BIA should involve interviews and/or consultations with the child, as well as additional information gathering as needed by professionals with the required expertise, knowledge and skills in child protection, including the child's representative.

⁵ "Representative" refers to the person or organization appointed to assist and represent the child in the procedures provided for under the Dublin Regulation, in accordance with Article 2(k) of the Dublin III Regulation.

- A representative should be appointed as early as possible after a child's arrival in a Member State to support the child including from the beginning of a Dublin Procedure and including during the lodging of an application. The establishment of a European guardianship network with a clear mandate i.a. to provide representation to children in Dublin procedures and participate in BIAs on the basis of standard procedures should be considered; this has the potential to enhance cooperation on BIAs as well as assist with the timely exchange of relevant information.
- In order not to delay transfers in the best interests of the child, a mechanism should be developed to foster mutual acceptance of age assessment outcomes to avoid duplication.
- UNHCR stands ready to support the European Asylum Support Office's (EASO) ongoing work in the above areas; the new EU Agency for Asylum (EUAA) could have a role in providing relevant guidance to be applied in all Member States to ensure a consistent and effective implementation of the Dublin Regulation provisions.

2.3 Determining Member State responsibility for examining an application for international protection

Responsibility for examining an application for international protection is determined on the basis of a set of criteria, which run, in hierarchical order, from family reunion considerations, to the issuance of residence documents or visas and (irregular) entry and/or stay ("hierarchy of criteria"). On the basis of Eurostat data, the most frequently used criteria in the majority of Member States surveyed are "entry and/or stay" (Article 13 of the Dublin III Regulation) and the "issue of residence documents or visas" (Article 12 of the Dublin III Regulation). Statistical data by itself does not definitively conclude whether this is at variance with a correct application of the "hierarchy of criteria". However, the findings do suggest that the manner in which information is gathered prioritizes certain criteria over others, with evidence such as fingerprints recorded in the Eurodac system ("Eurodac hits") being more commonly and routinely accepted over other evidence. This in turn leads to an inconsistent practice with respect to the application of the "hierarchy of criteria" whereby certain evidence, for example concerning the presence of family relations in a Member State, may be overlooked. At times, the limited possibilities for applicants to submit information outside of the personal interview, including to correct erroneous assessments or responsibility, exacerbate the negative consequences of such a practice. This often results in more appeals and thus lengthy procedures, which are inefficient and costly for applicants and Member States alike.

The study revealed that the family definitions are applied in a restrictive way. This, coupled with varying requirements among Member States to establish the existence of family links, can in practice limit the application of the family provisions. Ambiguity also exists as to what constitutes a sufficient threshold of dependency to trigger the application of the dependency clause, which allows applicants who are "dependent" on another member of their family, or members of a family dependent on an applicant (on both accounts, based on a range of criteria including pregnancy, serious illness and old age) to be reunited. As a consequence, this provision is rarely applied in practice. These issues, along with administrative delays in processing Dublin cases, can contribute to applicants resorting to moving onwards by their own means and/or remaining outside the Dublin system in order to join family in other Member States.

The excessive length of time of the Dublin procedure is a prevailing issue throughout this study, which defeats the overall aim of the Regulation to ensure swift access to an asylum procedure in the responsible Member State. Yet, the provision of information in an effective and accessible manner and using the personal interview to ensure that applicants have a meaningful opportunity to present any relevant information for the determination of responsibility under the Regulation, would go some way to alleviating applicants' reported difficulties under the Dublin system. Crucially, it would also enhance their understanding of the Dublin Regulation, and consequently assist in enhancing compliance with the system.

KEY RECOMMENDATIONS

- National authorities involved in the Dublin procedure, namely the Dublin Units, should be sufficiently capacitated and equipped to ensure that appropriate resources are available for the effective functioning of the system. This would ensure that procedures can be carried out within the prescribed time limits in the interests of applicants and Member States alike.
- All available information and evidence, including applicants' statements, should be given due consideration to ensure a correct determination of responsibility.
- Member States are encouraged to assess the possibility of applying the family reunion criteria, including the dependency clause, in a proactive manner and without additional requirements beyond those foreseen under the Regulation. The principle of family unity should always be upheld by Member States in their decisions.
- The presence of liaison officers in other Member States' Dublin Units should be enhanced as this could assist in ensuring common understanding and speeding up procedures, in particular in relation to specific caseloads, such as children, or at times of particular pressure on a Member State.

2.4 Discretionary clauses

Though of limited application, the “sovereignty clause” (Article 17(1) of the Dublin III Regulation), which permits a Member State to take responsibility for examining an application, on a discretionary basis, even if it is not responsible under the criteria laid down in the Regulation, is used for a variety of reasons. These include, but are not limited to, humanitarian considerations, mostly concerning the health and vulnerability of the applicant concerned and/or conditions in the responsible Member State, family considerations, and efficiency and cost effectiveness. The study shows that the “sovereignty clause”, as formulated in the Dublin III Regulation, constitutes a vital safeguard on account of its inherent flexibility to respond to different situations and circumstances.

The findings also illustrate that the “humanitarian clause” (Article 17(2) of the Dublin III Regulation), which allows the Member State where an applicant is present to request another Member State to take responsibility for an applicant to reunite families on humanitarian grounds, even where that Member State is not responsible, is seldom applied. In the limited cases where it is applied, it is primarily for the purpose of reunion with family relations that do not fall within the family definitions provided in the Regulation. However, limited flexibility concerning the assessment of family links appears to limit a more systematic application of this clause. UNHCR has consistently called for a proactive and flexible use of the “humanitarian clause”, and is of the view that it constitutes a key safeguard in a system that duly upholds the principle of family unity and the best interests of the child and recognises the importance of family and other connections to a State, including as a vehicle for integration.

KEY RECOMMENDATIONS

- Where family relations fall outside the scope of the family criteria leading to family separation, Member States should make use of the “discretionary clauses” to keep or bring together families, ensure respect for the principle of family unity and reduce onward movement.
- With a view to foster a consistent and more effective use of the “discretionary clauses”, EASO or the new EUAA could offer guidance on their application by compiling best practices on their use across the Member States. UNHCR stands ready to assist EASO or the new EUAA and the Member States in this regard.

2.5 Transfers

As regards transfers of applicants under the Dublin Regulation, similarly to previous studies, this study shows that only a minority of transfer decisions result in actual transfers to the responsible Member State. This is due to a myriad of reasons, including applicants moving onward by themselves on account of prolonged Dublin procedures, expiration of the procedural time limits to carry out a transfer under the Regulation, and insufficient resources to conduct transfers. The Dublin Regulation promotes the use of voluntary transfers (Recital 24 of the Dublin III Regulation) but these are seldom used, with the most common methods being supervised or escorted transfers with only a small number of Member States promoting voluntary transfers in practice. The study demonstrates also that the way in which transfer decisions are notified can have an effect on the applicant's ability to access an effective remedy.

KEY RECOMMENDATIONS

- Member States should promote voluntary transfers: swifter procedures and appropriate provision of information would contribute to ensuring applicants' compliance and therefore the success rate of voluntary transfers; voluntary transfers would also ensure lighter and more cost-effective transfer procedures.
- Transfer decisions should be issued as soon as possible to both applicants and their legal advisor or counsellor (and representative in the case of unaccompanied children) to ensure that they have access to an effective remedy in practice as well as in law.
- All necessary information concerning the applicant, including on his or her health needs, should be submitted to the receiving Member State in a timely manner through a more systematic use of the available standard forms.

2.6 Use of detention

Detention is commonly used for a short period of time to effect transfers. Whilst the time limits set out in the Dublin Regulation for carrying out a Dublin procedure when an applicant is detained appear to be respected in practice, alternatives to detention are not sufficiently used and the risk of absconding is often given a wide interpretation to justify detention. This raises concerns in terms of compatibility with the safeguards in the Regulation and international law.

KEY RECOMMENDATIONS

- Detention should only be used as a measure of last resort on the basis of an individual assessment of the necessity, proportionality and reasonableness to detain an applicant, and after assessing that alternatives to detention cannot be applied effectively.
- Children should not be detained for immigration related purposes, including for the purpose of carrying out procedures under the Dublin Regulation, irrespective of their legal/migratory status or that of their parents.
- UNHCR urges those Member States who make use of detention for securing transfers under the Dublin Regulation who have not yet adopted national law clearly defining the objective criteria for determining the existence of a 'significant risk of absconding' to do so, in compliance with their obligations under the Dublin Regulation.

3. Building on lessons learned: restoring trust in the Dublin system in the interests of Member States and applicants alike

This study shows that despite being a Regulation with direct effect (i.e. which does not need to be transposed into national law), the Dublin Regulation is not applied in a consistent and coherent manner. The lack of clear guidance and common standards in aspects of the Dublin procedure, such as BIAs and the assessment of family links or dependence, has contributed to diverging practices and inadequate implementation. In practice, this has led to a lack of common understanding and hampers efficient cooperation between Member States. One key consequence is the failure of the Dublin system in its objective to ensure swift access to an asylum procedure.

The study shows that the current implementation gaps and lack of a harmonized approach in the implementation of the Dublin system contribute to both applicants' and Member States' lack of trust in the system. This reflects negatively also on the trust between Member States, within a system that by nature requires inter-state cooperation for its efficient functioning.

In UNHCR's view, the Dublin III Regulation has the potential, in the immediate term, to assist in reuniting families within the EU, provided that it is applied in a proactive and efficient manner, including through the use of the "discretionary clauses", and that sufficient resources are allocated for an enhanced functioning of the system, including through further support by EASO.

At the same time, the study shows that for any "Dublin system" to work effectively, there needs to be, in addition to common standards and procedures, a clarity and common understanding of key principles and terms such as "best interests of the child", "family unity", "dependency", etc. The fundamental aim of the system, that is to allow for the swift examination of an application for international protection of every asylum-seeker through clear criteria for determining the Member States responsible, and the centrality of family unity and the best interests of the child, are crucial elements that should be retained in any future system. Further to the harmonization of policies and practices regarding the implementation of the system, a centralized monitoring system needs to be in place.

In UNHCR's paper "*Better Protecting Refugees in the EU and Globally*",⁶ building on elements of the existing CEAS and some of the reforms proposed by the Commission, UNHCR proposes a simplified system that would facilitate the efficient management of population movements. A key element of this system is the prioritization of family reunion directly after the registration phase. In addition, rather than foreseeing mandatory admissibility procedures, the system would incorporate streamlined asylum determination procedures to manage mixed arrivals of refugees and migrants. Under this scheme, asylum-seekers with manifestly well-founded or unfounded claims and those from safe countries of origin would be channelled into accelerated procedures to provide quick access to international protection for those who need it, and to facilitate the return of those who do not. This would link to a fair and workable distribution mechanism to manage disproportionate arrivals in an EU Member State through responsibility sharing.

UNHCR trusts that these proposals and the recommendations arising from the study will assist in restoring trust in the CEAS, and reduce current delays. This would enhance procedural and cost efficiency for States, and swift access to fair and efficient procedures for applicants.

⁶ See above footnote 2.

