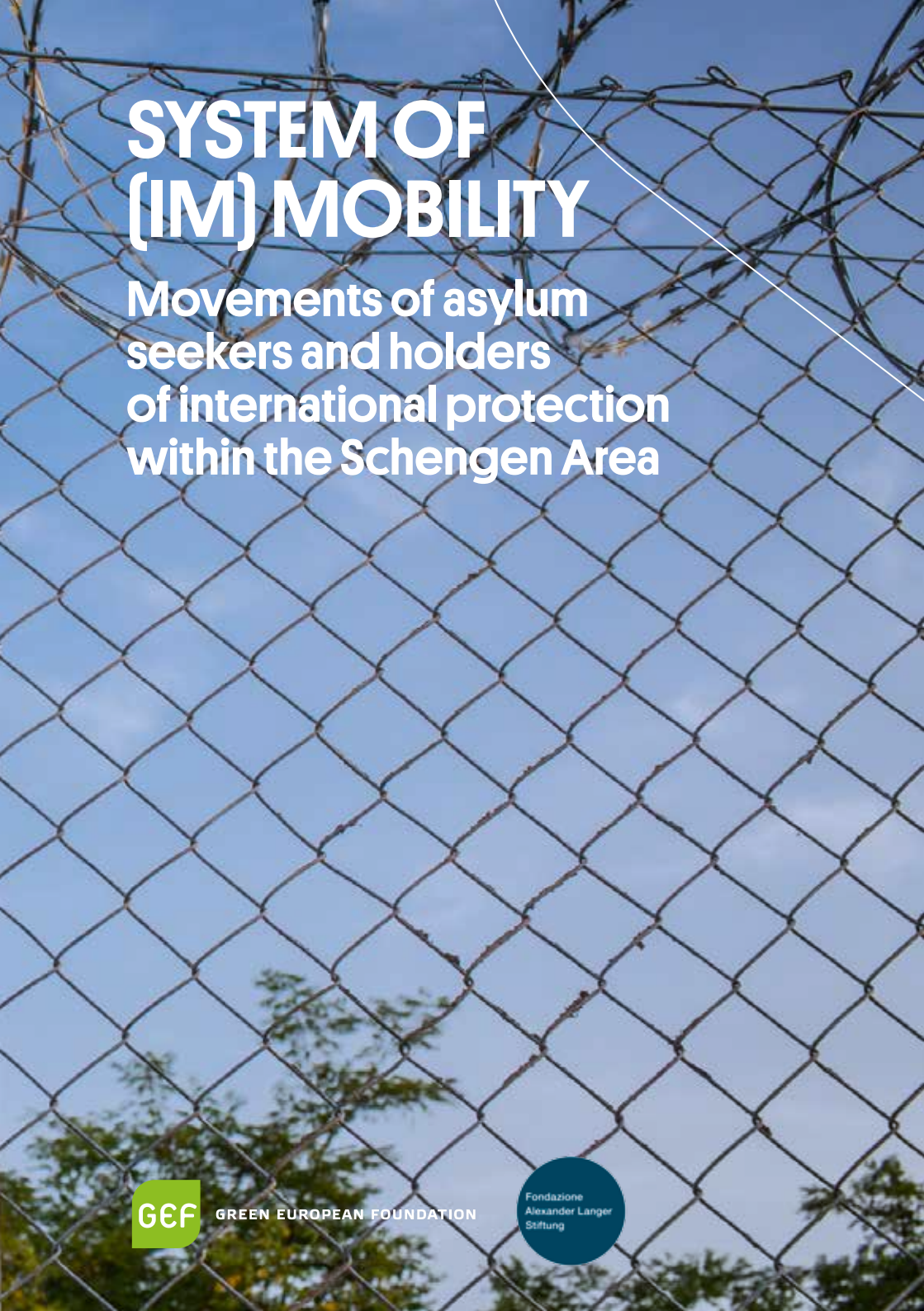

SYSTEM OF (IM) MOBILITY

Movements of asylum seekers and holders of international protection within the Schengen Area

GREEN EUROPEAN FOUNDATION

Fondazione Alexander Langer Stiftung

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Introduction

What is the impact of the current European legislation on the mobility of asylum seekers and holders of international protection within the Schengen area?

This question cannot be answered without first distinguishing two fundamental and distinct phases of this mobility process: the time of arrival in Europe and that of permanence and therefore of the potential possibility of movement within the Schengen Area after having obtained the recognition of international protection.

The contributions contained in this booklet are dedicated to analysing the state of the art of European legislation, as well as the possibilities of reforming it, with reference both to the entry of non-EU citizens into the Schengen Area, and to their opportunities to move around by themselves or to be joined by family members.

For the first of the two segments, entry into the EU, it will therefore only be possible to start from the analysis of the Dublin Regulation, from its hypotheses and prospects for reform, as well as from the failure of the Relocation system and other attempts to regulate admissions constituted by bilateral agreements.

For the second segment, on the other hand, not only the (limited) legislative possibilities that allow holders of international protection to move within the Schengen area, but also the limited right to be joined by their family members are highlighted.

One assumption is clear from the contributions contained in this booklet. The current system of „mobility“ of asylum seekers and holders of international protection is increasingly characterised by arbitrary measures, clauses that allow exceptions (such as contained in the rules of family reunification in the case of the „Dublin“ procedure), which are however only interpreted strictly; or by bilateral and cooperation agreements only between some Member States.

On the one hand this demonstrates the intent of some countries that want to develop solutions to overcome the stalemate created on an institutional level due to the deep divisions between countries, and on the other hand these measures give an excessive uncertainty and instability to the entire system.

But what are the prospects for reform of the Common European Asylum System in terms of mobility of applicants and holders of international protection? What are the fundamental guidelines that these reform projects will have to follow in order to achieve a balanced management of migratory flows and borders, the implementation of solidarity between Member States, and the respect of obligations deriving from international law and the European Union treaties?

And above all: is it still possible, and if so in which hypothetical legislative framework, to enhance the right to mobility of asylum seekers and holders of international protection within the European Union?

Alessia Di Pascale[1]

Reform of the Common European Asylum System: the state of play

Introduction

Managing and controlling borders and migrant flows, ensuring solidarity between member states, respecting obligations under international and European Union (EU) law, fighting people trafficking, and cooperating with countries of origin and transit: these are all interconnected issues that are increasingly in the spotlight.

In the spring of 2015, the EU began to address these issues. It established the European Agenda on Migration[2] - which outlined immediate measures in response to the situation in the Mediterranean, together with initiatives to be developed in subsequent years - and followed this up with a flurry of proposals that in turn were criticised on the grounds of, amongst other things, adequacy, fairness and respect for fundamental rights. The member states most exposed to migrant flows, those at the external borders of the EU, continued to call for solidarity from other member states, which took the form of a relocation mechanism that ended up being largely ignored. Only about a third of the 106,000 potential beneficiaries of the scheme - in other words applicants for international protection who arrived in Italy and Greece between September 2015 and September 2017 and holding nationalities with international protection recognition rates of 75% or higher - were in fact relocated to other European states (thanks also in part to the contribution of Switzerland, Liechtenstein and Norway, which are not members of the EU) in the face of refusals and protests. The Eastern European states known as the 'Visegrád Group' (Poland, the Czech Republic, Hungary and Slovakia) had flatly refused to take part in any relocation scheme, resettling no or just a handful of migrants (Slovakia and Hungary also appealed to the European Court of Justice to annul the second EU Council decision on relocation. Their appeal was, however, dismissed in its entirety).

1 Associate Professor of EU Law and Professor of Foreign Law at the University of Milan

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240 final, 15 May 2015.

Reform of the Common European Asylum System

One of the many initiatives taken by the European Commission to tackle the migration crisis is reform of the Common European Asylum System (CEAS), a series of instruments (four specific directives on reception conditions for asylum seekers, temporary protection, qualification criteria for refugee status and asylum procedures, as well as the Dublin Regulation), adopted in their current form based on Article 78 of the Treaty on the Functioning of the European Union (TFEU)

This system has certainly favoured a harmonisation process and laid the foundations for a "European" asylum system with its own distinct features (notably the explicit recognition of a form of "subsidiary" protection that complements and supplements the protection of refugees enshrined in the Geneva Convention). However, it has not eliminated the deep differences between member states and has been criticised for failing to ensure the respect of fundamental rights (with the Dublin system, in particular, being criticised by the European Court of Human Rights and the European Court of Justice). These differences have had extremely serious consequences, with systematic violations of Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (CFR) leading to the suspension of asylum seeker transfers to certain countries.

As a result, in April 2016, the Commission released a communication announcing its intention to reform the Common European Asylum System[3] (the second phase of amendments to the CEAS ended in 2013) by tackling its structural flaws.

On 4 May and 13 July 2016, the Commission presented seven legislative proposals for reforming the Common European Asylum System, thus marking its third phase. The package included the recasting of the Dublin Regulation[4] and the Eurodac Regulation[5], a proposed regulation on the creation of the European Union Agency for Asylum (EUAA) [6], a proposed regulation establishing a common procedure for international protection in the EU[7], a proposed regulation on qualification[8], the recasting of the Reception Conditions Directive[9] and a proposed regulation establishing a Union Resettlement Framework[10].

3 Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 def., 6 April 2016.

4 COM(2016) 270 final, 4 May 2016

5 COM(2016) 272 final, 4 May 2016

6 COM(2016) 271 final, 4 May 2016.

7 COM(2016) 467 final, 13 July 2016.

8 COM(2016) 466 final, 13 July 2016.

9 COM(2016) 465 final, 13 July 2016

10 COM(2016) 468 final, 13 July 2016.

Reform of the Dublin system

The first proposed change concerns the most controversial and relevant instrument in managing applicants for international protection, namely the Dublin III Regulation. Contrary to expectations, the new text did not change the overall system, but simply introduced corrective mechanisms intended to allow the sharing of applicants for international protection in the event that a member state is faced with disproportionate pressure on its asylum system. The reform introduces the possibility of sharing responsibility among member states – building on, or rather, better defining the failed relocation mechanism – whenever certain thresholds are exceeded. Other than in an emergency, the goal remains to identify a single member state responsible for processing the claim based on pre-set criteria. So, nothing revolutionary. To overcome the resistance already shown towards the relocation mechanism, it introduced a "solidarity contribution" for member states deciding not to participate, in other words, a payment of 250,000 euro for each applicant not relocated.

Indeed, more than ensuring solidarity among member states by relieving the burden on border countries, this new structure was clearly intended to discourage so-called secondary movements of asylum seekers between countries within the European Union, in breach of the criteria set out in the regulation. Key proposals include: making responsibility for examining asylum applications permanent, whereas under the current system responsibility ceases after 12 months; simplifying mechanisms for taking charge of and taking back applicants, whose activation would in future only require a simple notification; and the implementation of a series of significant procedural sanctions for asylum applicants who abscond. The proposal therefore dashed hopes of a greater sharing of the burden by clearly worsening the position of first-entry countries.

Outlined in the Wikström report and approved by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in November 2016, the European Parliament's position is radically different. The text put forward fundamentally changes the Commission's proposal, definitively abolishing the country of first entry criterion and establishing an automatic and mandatory redistribution mechanism for asylum seekers arriving in the EU using quotas based on population and GDP. Satisfying the wishes of various parties, the text also takes into consideration the prospects for subsequent integration. Albeit without taking into account the preferences of applicants, the text considers their ties or any other objective reasons that may facilitate their integration into the host country: family ties, in a broader sense than is currently the case (no longer just parents and minor children, but also siblings and, in certain cases, adult children), and cultural or social ties (previous stays or studies in the host country, and sponsorship by an accredited organisation). The key feature of this proposal is the idea that the country of first entry is no longer the only country responsible for examining the request and subsequently settling the applicant, but is the arrival point to the EU, fully involved and obliged to take charge of the applicant.

Other instruments

To ensure greater uniformity by reducing the differences in recognition rates between member states and ensuring the same conditions for holders of protection statuses, the Commission has proposed replacing the directives currently in force (which set out the procedure and criteria for granting international protection status) with regulations on, respectively, a common EU asylum procedure and harmonised standards and rights on international protection. Greater consistency in the system was also supposed to have been ensured by the new mandate for the current European Asylum Support Office (EASO), which envisages turning it into a genuine EU asylum agency with a significantly expanded role to play in terms of technical and operational assistance. The Commission has explicitly stated that the goals of the new agency include: ensuring a high degree of uniformity in the application of the legal framework on asylum and greater convergence in the assessment of applications for protection across the Union, as well as providing greater operational and technical assistance to member states in managing asylum and reception systems, particularly in cases of disproportionate pressure.

In addition, the Commission also deemed it appropriate to better structure and widen the framework for resettlement, hitherto carried out by individual member states. It proposed a regulation establishing a European resettlement framework, based on past national experience with humanitarian programmes, which would set out common rules for admission and resettlement, the status granted to applicants, and financial support.

On some of these proposals, particularly the EU resettlement framework, in addition to the regulation on qualification, the new directive on reception conditions, the regulation on the European Union Agency for Asylum and the EURODAC regulation, an agreement seemed possible. But despite numerous calls to redouble efforts to adopt the reform before the EU parliamentary elections[11], differences between member states proved insurmountable and the Commission's proposal to pass the texts separately was rejected. In this case, the issue of solidarity and sharing the burden remain the crux of the matter and something on which member states seem incapable of reaching a common position.

11 In addition to the Commission communication COM(2018) 798 final, see the conclusions of the European Council of 13-14 December 2018.

The outlook

Consecutive presidencies of the Council, including the Austrian presidency in the second half of 2018, which supported the idea of "mandatory solidarity", have tried to devise a solidarity mechanism balanced by a responsibility component. However, more than two years after the Commission unveiled its proposal, the positions of member states have remained at odds, preventing the Council from adopting a mandate to start negotiations with the European Parliament, despite co-legislators having made this reform a priority.

On 23 September, a migration summit was held in Malta between five member states (in addition to Italy and Greece, the border states most directly affected, France, Germany and Finland also attended). At the meeting, an agreement was reached to allow the relocation to other European countries of the some of the migrants rescued by Italy and Malta. The agreement was, however, temporary (pending a hoped-for reform of the Common European Asylum System) and voluntary, designed to avoid seeking agreements on a case-by-case basis to relocate newly landed migrants, while leaving unresolved the issue of sharing the burden among member states. Despite the invitation for other member states to join, the text was not adopted, as had been hoped, at the meeting of the Justice and Home Affairs Committee held on 8 October in Luxembourg.

The year 2019 also saw elections for the European Parliament, which partially changed the previous political landscape. The new Parliament is currently in the process of nominating the new European Commission. Reform of the Dublin system and the Common European Asylum System, as well as finding solutions to the issues outlined above, were frequently mentioned by the newly elected President of the European Parliament, David Sassoli, and by the President-elect of the European Commission, Ursula von der Leyen, in their first speeches following appointment. We will, however, have to wait until the new Commission takes office to get a better idea of how it intends to proceed on these matters: will it pursue the previously proposed reform of the Dublin Regulation, or put forward a new reform, along the lines of the Malta agreement?

Maria Giovanna Manieri[12]

The state of play of the negotiations on the reform of the Common European Asylum System (CEAS) with particular regard to the Dublin Regulation

CEAS: history and background

Ten years have now passed since the European Union institutions were first mandated to draw up legislation in the area of asylum as part of the Treaty of Amsterdam and its operationalisation with the Tampere Programme in October 1999.

The first phase of negotiations on the Common European Asylum System (CEAS) was carried out from 1999 to 2004, and resulted in the establishment of minimum standards for the reception of asylum seekers, criteria and mechanisms for determining the Member State responsible for examining asylum applications (replacing the intergovernmental 1990 Dublin Convention), qualifications for international protection and procedures for granting and withdrawing refugee status and the Eurodac database for storing and comparing fingerprint data of asylum seekers.

A second phase of negotiations on the CEAS took place from 2004 with the adoption of the Hague Programme, and concluded in 2012. This second phase of CEAS negotiations aimed at going beyond the adoption of minimum standards towards a common asylum system[13], including uniform procedures and guarantees throughout the European Union. In 2012, the existing CEAS was adopted. The existing CEAS is currently composed of: a Qualification Directive,[14] Eurodac

12 Advisor on Civil Liberties, Justice and Home Affairs for the Greens/EFA group in the European Parliament

13 Since the entry into force of the Treaty of Lisbon in December 2009, Article 80 of the TFEU explicitly provides for the principle of solidarity and fair sharing of responsibility between Member States and measures on asylum are no longer aiming at establishing minimum standards, but at creating a common system comprising a uniform status and uniform procedures.

14 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, OJ L 337, 20.12.2011, p. 9–26.

Regulation;[15] the Dublin III Regulation;[16] the Reception Conditions Directive;[17] and the Asylum Procedures Directive,[18] which all entered into force in July 2013.

The transposition of the current CEAS in 2015 coincided with a peak of increased spontaneous arrivals of asylum seekers at the external borders of the European Union, following which the European Commission issued the European Agenda on Migration in May 2015, proposing several measures to manage spontaneous arrivals including through the so-called hotspot approach aimed at setting up migration management support teams composed of EASO, the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Law Enforcement Cooperation (Europol) at specific locations at the external borders of the European Union.

The European Agenda on Migration also called for a third set of negotiations on the CEAS, and presented a reform as a set of two packages of legislative proposals in May and July 2016 and on which the EU co-legislators have not managed to find an agreement to date, due to the stalemate in Council.

The CEAS package proposed reform sought to promote further harmonisation of the EU asylum *acquis* by proposing directly applicable regulations instead of directives (with the one exception of the Reception Conditions Directive). The seven proposals included: a new Asylum Procedures Regulation;[19] a Qualifications Regulation;[20] a Dublin recast Regulation;[21] a Eurodac recast Regulation;[22] a Reception Conditions recast Directive;[23] a new Regulation establishing a European Asylum Agency[24] –to replace EASO and; a new Regulation establishing an EU Resettlement Framework.[25]

It has to be noted that, despite having a much needed reform of the Dublin Regulation at its core, the 2016 CEAS reform as proposed by the European Commission included provisions significantly lowering protection standards and adopting in large part a punitive approach for non-compliance with different requirements at various stages of the asylum procedure.

15 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, OJ L 180, 29.6.2013, p. 1–30.

16 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, OJ L 180, 29.6.2013.

17 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.

18 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

19 Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final 2016/0224 (COD), 13.7.2016.

20 Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final 2016/0223 (COD), 13.7.2016.

21 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 final/2 - 2016/0133 (COD), 4.05.2016.

22 Proposal for a Regulation of the European Parliament and of the Council 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] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final 2016/0132 (COD), 4.5.2016.

23 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final 2016/0222 (COD), 13.7.2016.

24 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM/2016/0271 final - 2016/0131 (COD), 4.05.2016.

25 Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final - 2016/0225 (COD), 13.07.2016.

The stalemate of the CEAS: negotiations causes and effects

EU co-legislators have been unable to date to finalise the still ongoing negotiations on the reform of the CEAS.

This stalemate has been caused in particular by the lack of political will in Council to reform the Dublin Regulation, thus failing to agree on a much needed mandatory and long-term system for EU solidarity replacing the key dysfunctional norm in the current EU asylum *acquis*, namely the principle setting the responsibility for determining an asylum application on the first country of arrival, further to the measures of the current Dublin Regulation.

During the past legislature, trialogue negotiations have advanced and almost concluded on five of the seven proposals comprising the CEAS.[26] However, the two institutions have shared -although for different reasons- a position that links all the CEAS proposals into a "package", which, for the European Parliament, has the reform of the Dublin Regulation at its core.

Seeking to address the stalemate of negotiations, and in an attempt to deliver before the end of the past legislature, the European Commission has tried to persuade the co-legislators to adopt those five proposals where negotiations were most advanced and proposed to focus on short-term solutions for relocation and disembarkation until a solution on the Dublin reform can be found. However, leaving the adoption of the Dublin Regulation behind may not be a clever political move, especially as the five new proposals which could have been concluded, would introduce a set of measures which in large part would constitute a lowering of protection standards and safeguards for asylum seekers as compared to the current CEAS.

What next?

At the time of writing this article, it is not yet clear whether the CEAS package reform would find a renewed impetus through the resuming of negotiations or, most likely, through the withdrawal of such proposals and the presentation of a new package at the hands of the European Commission. This has been confirmed by Ursula von der Leyen, in her first political guidelines for the next European Commission (2019-2024), where she mentioned her intention of proposing a New Pact on Migration and Asylum, including the relaunch of the Dublin reform of asylum rules.[27] It remains to be seen how the content of such renewed legislative proposals will differ from the CEAS package which has already been on the table of the co-legislators for the past three years.

26 Negotiations have advanced and almost concluded on the Resettlement Regulation, Qualifications Regulation, Reception Conditions Directive, Eurodac and the European Asylum Agency Regulation. However, trilogues on the Dublin Regulation and Asylum Procedures Regulation did not even start during the past legislature as Council has been unable to adopt a common approach on such proposals.

27 See: Ursula von der Leyen, 'A Europe that strives for more. My agenda for Europe', political guidelines for the next European Commission 2019-2024.

Minos Mouzourakis[28]

Implementing or bypassing the Dublin Regulation? Relocation and bilateral agreements

The persisting divisions between European Union (EU) Member States on the allocation of responsibility for asylum seekers have cast the reform of the Common European Asylum System (CEAS) into uncertainty. The stalemate in negotiations on the Dublin IV proposal has in turn cast compliance with the Dublin III Regulation into uncertainty, with individual countries increasingly showing preference for bilateral and multilateral non-legislative measures. While some of those make use of discretionary provisions in the Dublin system, others entail a circumvention of applicable standards and safeguards and are liable to expose individuals to ill-treatment. This note summarises the observations of the European Council on Refugees and Exiles (ECRE) on arrangements on return of asylum seekers and relocation within the EU.[29]

Bilateral agreements on the return of asylum seekers

The establishment of bilateral agreements for the return of asylum seekers engaging in secondary movement has emerged as a German initiative in the course of 2018, predominantly driven by internal tensions within the ruling coalition on how to handle migration in the run-up to the June 2018 European Council meeting. Germany resolved political tensions between its Chancellor and Federal Minister of Interior by concluding agreements with Spain, Greece, Portugal and France.

To ECRE's knowledge, the bilateral agreements initiated by Germany have taken the following forms:

"Administrative Arrangement pursuant to Article 36 Dublin III Regulation… on practical modalities for facilitating and expediting the Dublin procedure in accordance with Regulation (EU) No 604/2013"; or "Administrative Arrangement… on cooperation when refusing entry to persons seeking protection in the context of temporary border controls at the internal German-Austrian border"

28 Head of Legal and Policy Research a.i. ECRE

29 The note is based on existing ECRE analysis: ECRE, Bilateral agreements: Implementing or bypassing the Dublin Regulation?, December 2018, available at: https://bit.ly/2WFfw7v; Relying on relocation, January 2019, available at: https://bit.ly/2CmSCIR.

The former type of agreement has been signed by Germany with countries such as Portugal and France. The arrangement, implemented by the German Federal Office for Migration and Refugees (BAMF) and the respective authorities in charge of the implementation of the Dublin Regulation, sets out modalities to facilitate Dublin procedures, in accordance with the power of Member States to set up "administrative arrangements" for that purpose under Article 36 of the Dublin Regulation.[30] The agreement foresees *inter alia* shorter time limits for replying to incoming Dublin requests: one month instead of three for "take charge" requests and "as soon as possible" for "take back" requests. The provisions of the Regulation remain applicable if these rules are not complied with.

Conversely, the bilateral agreements signed by Germany with Greece and Spain are deeply problematic. Although they appear to borrow the terms "administrative arrangement" from Article 36 of the Dublin Regulation, they deal rather with refusal of entry under the Schengen Borders Code in case of temporary checks at internal borders than with the Dublin procedure. Part II of the Germany-Greece agreement sets out a specific procedure for the application of the family provisions in the Dublin Regulation with respect to "take charge" requests already accepted by Germany before 1 August 2018.

The scope and contents of the latter type of agreements serve to circumvent the applicable legal framework altogether. ECRE has highlighted several concerns regarding the legality of the agreements:

Legal basis: The agreements foresee that persons having applied for asylum and having been fingerprinted in Greece or Spain (and stored as "Category 1" in the Eurodac database) who express the intention to seek asylum in Germany will be refused entry at the German-Austrian land border. However, the EU legal basis for refusal of entry procedures, Article 14(1) of the Schengen Borders Code, unequivocally states that refusal of entry is "without prejudice to the application of special provisions concerning the right of asylum and to international protection".

Article 18(1) of the Dublin Regulation sets out special rules for such cases, since it expressly requires the Member State responsible to "take back" a person whose asylum claim is pending, withdrawn or rejected, and who applies for asylum or is found in an irregular situation in another country. Therefore, by applying refusal of entry to persons who have sought asylum in one or more EU Member States, the arrangement contravenes both the Dublin Regulation and the Schengen Borders Code.

Procedural safeguards prior to transfer: Circumventing the applicable legal framework through such a bilateral agreement deprives asylum seekers of crucial procedural safeguards in the Dublin Regulation. Individuals subject to Dublin procedures are entitled *inter alia* to a personal interview, and to appeal against a transfer decision "within a reasonable period of time" and with suspensive effect automatically or upon request. Furthermore, they are entitled to reception conditions until their transfer, and their liberty can only be deprived where a "significant risk of absconding" exists, and for a specified time limit.

These procedural safeguards are rendered illusory by the implementation of the agreements. In practice, asylum seekers are unable to put forward reasons why they should not be returned before the German Federal Police, or to effectively challenge their return in court.

Human rights constraints: Regardless of the removal procedure employed, Member States are bound by their human rights obligations, including the prohibition of direct or indirect *refoulement* stemming from Article 3 of the European Convention on Human Rights (ECHR) and Articles 4 and 19(2) of the Charter of Fundamental Rights of the European Union ("Charter"). The case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) firmly prohibits states from transferring an asylum seeker to a country where he or she would face a risk of inhuman or degrading treatment, whether or not that risk results from systemic flaws in the asylum procedure or reception conditions in the receiving country. The ECtHR has further held that, as far as persons with special needs such as families with children are concerned, the authorities of the sending country are required to obtain individual guarantees from the receiving state that the applicants will have access to suitable accommodation following a Dublin transfer.

The obligation to obtain guarantees on human rights-compliant treatment post-transfer is highly pertinent in the Greek context. In its Recommendation of 8 December 2016 on the reinstatement of Dublin transfers to Greece, bearing in mind that the country was "still facing a challenging situation" and that there were "further important steps to be taken to remedy the remaining shortcoming in the Greek asylum system", the European Commission reiterated the need for Member States to obtain guarantees that asylum seekers would be fairly and adequately treated in Greece. It also specified that "[v]ulnerable asylum applicants, including unaccompanied minors, should not be transferred to Greece for the time being." In 2016, the Commission urged the Greek authorities to provide guarantees to other countries' Dublin Units that asylum seekers would have access to a fair procedure and adequate reception. Failure to do so prior to a Dublin transfer would amount to a violation of the prohibition of *refoulement* on the part of the sending state.

The elaboration of a bilateral arrangement in parallel to Dublin has already had an impact on compliance with human rights in practice. In the cases witnessed so far, the German Federal Police has not obtained any assurances on

30 Article 36 enables administrative arrangements on "simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants".

asylum seekers' access to the procedure and adequate reception conditions upon return. In at least one case, the asylum seeker has ended up in detention under inhuman conditions following return to Greece. In addition, Germany has transferred applicants with evident vulnerabilities, such as victims of torture recognised as vulnerable during their prior asylum procedure in Greece, in direct contravention of Commission guidance.

To the extent that they undermine instead of facilitating the implementation of the asylum *acquis*, the bilateral agreements developed by Germany are a highly worrying practice, and one likely to be proliferated in the future. The European Commission, for its part, has neither been consulted nor officially taken a position on the German-Greek agreement or the German-Spanish agreement.

Ad hoc relocation

The Dublin Regulation affords Member States discretion to undertake responsibility for an asylum claim or to request another country to do so based on humanitarian considerations. As correctly stated by the European Asylum Support Office (EASO), Article 17 of the Regulation offer a basis for voluntary relocation schemes such as those implemented since 2018 in the context of disembarkation in the Central Mediterranean.[31] In this respect, the discretion offered by the Dublin system can be put to use in order to support responsibility-sharing arrangements at bilateral and multilateral level.

However, the manner in which individuals have been received and distributed under *ad hoc* arrangements on relocation since 2018 has often raised questions of compliance with the EU asylum *acquis* on the part of both sending and receiving countries. First, some countries of disembarkation have arbitrarily deprived rescued persons of their liberty and obstructed the right to seek asylum. This has notably been the case in Malta, where several ships have disembarked since the summer of 2018 following negotiations with other coastal states. Disembarked persons are *de facto* detained in the Marsa Initial Reception Centre and the Safi Barracks detention centre without being allowed to lodge an asylum application. In some cases, people have remained *de facto* detained in the facility without holding asylum seeker status until their transfer to other countries, for periods reaching two months in some cases. Member States of disembarkation have therefore not complied with their obligation to register asylum claims and provide reception conditions in line with the recast Asylum Directives in the context of relocation arrangements following disembarkation. In addition, insofar as rescued persons are not recognised as asylum seekers, transfer procedures are not carried out in accordance with the Dublin Regulation as should have been the case for asylum seekers.

Second, the persisting discretionary practice of certain countries receiving asylum seekers in the context of *ad hoc* arrangements undermines legal certainty and may contravene the asylum *acquis*. For the persons France has received from Malta and Italy, for example, the Office of Protection of Refugees and Stateless Persons (OFPRA) has conducted missions with a view to selecting persons "relating to asylum" (*relevant du droit d'asile*), i.e. in need of international protection, who would be eligible for transfer. This assessment appears to consist of fully-fledged refugee status determination or a nationality-based screening. Portugal has also screened persons through interviews with its Aliens and Borders Service (SEF) prior to their transfer.

These forms of selection of asylum seekers prior to relocation are likely to continue in the future. EASO has developed standard operating procedures (the "Messina Model") for *ad hoc* relocation from Italy and Malta, in which the Agency supports Member State selection missions and at times conducts the selection process on their behalf.[32]

Under these arrangements, the selection of persons eligible for relocation does not follow objective criteria that would safeguard individuals from arbitrary preferences of receiving Member States. In many cases key steps of the asylum procedure are being conducted by one country's authority, or EASO on its behalf, on another country's territory before persons are transferred. This also means that the persons concerned may be unable to access the rights and benefits they are entitled to under the EU asylum *acquis* for a considerable period of time. France appears to select for relocation only those individuals who qualify for international protection according to OFPRA, even though they have not always held asylum seeker status at the moment of their interview on Maltese or Italian soil. Organising a personal interview with a Member State's asylum authority engages that Member State's jurisdiction and is therefore in clear contradiction with its legal obligations if conducted prior to having an asylum application lodged and without offering the guarantees laid down in the recast Asylum Procedures Directive.

31 EASO, Note on the 'Messina Model' applied in the context of ad hoc relocation arrangements following disembarkation, EASO/ED/2019/403, 10 September 2019, available at: https://bit.ly/2JO2hMG.

32 Ibid.

Mads Melin[33]

Separated families in the Dublin system

Every day people are forced to flee their countries of origin to seek asylum. The journey to safety is often long and dangerous, and many families become separated during the journey.

Once in the EU, many people seeking international protection find themselves unable to reunite with their family members because they have been registered by the authorities in different member states.

Legally, it is possible for member states to use the Dublin III Regulation to reunite families who have become separated either before or after entering the EU. In fact, it is clear from the Preamble to the regulation that the EU co-legislators intended for the best interests of the child and respect for family life to be primary considerations when states apply the regulation.[34]

However, despite the broad and inclusive language of Recitals 14, 15, 16 and 17, 'family members' are narrowly defined in Article 2(g) of the Dublin III Regulation. For adult asylum seekers, family members are, insofar as the family already existed in the country of origin, the applicant's spouse or unmarried partner in a stable relationship as well as the applicant's unmarried minor children.

Although many find that their relationships are not covered by the narrow definition of family members in the Dublin III Regulation, member states can still decide to keep the families together. With Articles 17(1) and (2), known as the discretionary clauses, states can decide to examine an asylum application even if it is not responsible following the criteria in chapter III of the Dublin III Regulation.

The discretionary clauses could be an effective way of protecting the family life of asylum seekers and refugees who do not fall within the narrow definition of family members, but in practice these articles are only used in so-called exceptional cases.[35]

In some countries, political and/or administrative decisions are main hindrances when it comes to the protection of family life in the Dublin system. However, this presentation will draw upon examples of how families are separated in the Danish Dublin procedure[36], where the Danish Refugee Council (DRC) represents most asylum seekers who wish to challenge a transfer decision under the Dublin III Regulation.

33 Legal Advisor – Asylum Department at the Danish Refugee Council

34 See Recitals 13 and 14 and Article 6(1) of the Dublin III Regulation.

35 See UNHCR, August 2017, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, pp. 115-132

Separation of spouses and partners in stable relationships

In general, spouses are considered family members under the Dublin III Regulation. Many spouses are nonetheless separated or kept apart because their marriage is not recognized under national law in the member states. In Denmark, this is often the case if a couple's religious marriage is not registered with their national authorities, although there are many reasons why couple's might be unable or - due to a well-founded fear of persecution – unwilling to contact their national authorities. In these cases, the Danish authorities often apply a formalistic interpretation of Article 2(g) and refuse to apply the family provisions of the Dublin III Regulation. In such situations, an additional problem for the couples is that the Danish authorities most often refuse to apply the discretionary clauses, even when the wife is pregnant, meaning that the couples might be separated or kept apart.

DRC has also represented LGBTI couples seeking asylum, who in most cases have been unable to marry or live together in their countries of origin, and who are therefore unable to meet the requirements under Article 2(g). Although some LGBTI couples seek asylum in order to be able to live together in safety, they nonetheless risk being separated or kept apart if they are registered in different member states. This illustrates that a flexible use of the discretionary clauses is needed to protect their family life.

An additional hindrance to the protection of asylum-seeking couples' family life is the pre-flight criterion of Article 2(g). Thus, families formed in transit or on the territory of the member states are not considered family members under the Dublin III Regulation[37], even if they have spent several years outside their countries of origin before they were able to seek asylum in the EU.

36 It is clear from several studies that the Dublin system also keeps families apart in other countries. See e.g. Danish Refugee Council, May 2018, *When the Dublin system keeps families apart*; Danish Refugee Council and Swiss Refugee Council, February 2017, *Is Mutual Trust Enough? The situation of persons with special reception needs upon return to Italy*, case. 4.1; UNHCR, August 2017, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*.

37 An exception is Article 9, which states that the article applies regardless of whether the family was previously formed in the country of origin.

Children separated from their families

Despite the emphasis on the best interests of the child, member states often apply the Dublin III Regulation in ways that separate children from their family members. This is partly because of the narrow definitions of family members in Article 2(g) and the member states' practice when applying the discretionary clauses, but it is also because states often fail to take the best interests of the child adequately into consideration when applying the regulation.

In practice, the lack of thorough best interest assessments is a problem when the child is accompanied by one parent and the other parent is legally present in Denmark but is neither a beneficiary of international protection nor an asylum seeker. In these cases, the Danish authorities often do not adequately consider if it is in the child's best interest that the asylum case is examined in Denmark, although this would be an effective way to avoid separating the child from one of the parents.

Another problem facing children is the application of Article 7(2) of the Dublin III Regulation, which states that the responsible member state shall be determined based on the situation obtaining when the applicant first lodged his or her asylum application in a member state. In practice, Article 7(2) can be applied in a way that negatively affects children born after their asylum-seeking parent lodged his or her asylum application. Thus, if a child's father has been granted international protection in Denmark, but the child is born after his or her mother applied for asylum, then the child is considered accompanied by the mother in accordance with Article 20(3). In such cases the mother and child might be separated from the father without consideration of the best interests of the child.

Family relations not protected in the Dublin system

Regardless of the emphasis placed on the best interest of the child and respect for family life, many families are separated because they are not considered family members within the meaning of the Dublin III Regulation.

For example, children and their parents are not considered family members once the child turns 18. This means that children, who enter Europe together with their families, but turn 18 before they can apply for asylum, risk being separated from their families, if the family gets separated and the family members are registered in different member states. In some cases, a member state might apply the discretionary clauses to keep or bring the family together, but this is not always the case.

Similarly, siblings who recently turned 18 are also not covered by the family definition in the Dublin III Regulation even if they are unmarried and have always been part of the same household. They are therefore often separated if they have been registered in different member states, as the discretionary clauses are rarely applied to keep or bring adult siblings together.

For the same reasons, also elderly parents risk being separated from their adult children granted international protection in a member state, if they have been registered in a different member state than the one where their children live.

Considering the abovementioned examples regarding the narrow definition of family members and the practice concerning the discretionary clauses, an additional problem for families in the Dublin system is that Article 16 concerning dependent persons only applies if the dependent person is a child, sibling or parent and if they depend on each other for specific reasons. With reference to the CJEU, it can be argued that Articles 16 and 17(2) should be interpreted more broadly.[38] However, this rarely happens in practice.

A need for a better protection of family life in the Dublin procedure

One of the main purposes of the Dublin III Regulation is to protect the family life of asylum seekers and refugees, yet many families are separated because of the narrow definition of family members in the regulation and because member states are reluctant to apply the discretionary clauses to keep families together.

The Dublin procedure is very complicated and based on the DRC's experience, asylum seekers require access to independent and high-quality legal aid to be able to navigate the complex rules, including the rules on how they can reunite with their families.

Furthermore, if member states want to protect the family life of asylum seekers and refugees, they ought to develop more transparent and flexible guidelines to promote a proactive and flexible use of the dependency clause and the discretionary clauses in the Dublin III Regulation. Together with independent and high-quality legal aid, such guidelines could be an important step towards ensuring that family life and the best interests of the child also become primary considerations in practice, so people forced to flee from their countries of origin do not find themselves separated from their families within the EU.

38 See CJEU, 6 November 2012 in case C-245/11 (K v. Bundesasylamt)

Golde Ebding & Karla Kästner

moveurope! A pilot project to promote legal migration channels in the EU for holders of a humanitarian residence permit / refugees

moveurope! is a German-Italian pilot project initiated and realised by the associations migration_miteinander (Witten, Germany) and Associazione Interculturale UNIVERSO (Bologna, Italy). *moveurope!* wants to make legal tools accessible for refugees to promote their mobility in the European space. With that, *moveurope!* lays the foundation for refugees' active citizenship and self-determination in the European context.

To do so, *moveurope!* highlights the path for legal migration across the visa application procedure based on examples of apprenticeship and voluntary service. Since its foundation in 2017, it makes tangible mobility opportunities for refugees with Italian residence permits in the Ruhr Region (Western Germany).

Context of *moveurope!*

According to European law, refugees must make an asylum application in the country to which they first enter the European Union (EU) and remain there permanently. Legal secondary movements within Europe are hardly possible. As a result, many asylum applications in Germany are not initially examined in terms of content, but formally decided (and rejected), since responsibility for the asylum procedure lies with another member state in accordance with the Dublin-Regulation. A lot of people, however, migrate to other EU countries, since in many countries at the EU external border there is no functioning asylum system and many states cannot provide sufficient protection for refugees. As a consequence, they either find themselves in irregular situations without access to the first labour market or make a second asylum application and have to face the protracted process of the Dublin procedure which possibly comes along with benefit cuts from the state, constant fear of deportation in the first country of entry and ban on employment. For the persons concerned, this legal discrimination means years without a secure residence status - often associated with an increase in marginalisation and non-participation in society, exclusion from the labour market and the health system.

Goals of *moveurope!* and how do we intend to achieve them?

Through *moveurope!* we have worked out a way which helps people with a residence permit from another EU state (whether already in Germany or still in another EU country) to obtain a regular residence permit in Germany via the visa procedure with a focus on migration for educational purposes (§17 AufenthG). As a necessary intermediate step on the way to a training contract, we organise internships and/or voluntary services for refugees in Germany. Legal migration by the visa procedure can be a promising alternative to a Dublin procedure or illegal stay in Germany and should be a realistic option for more refugees in Europe. Thus, it helps to create a prerequisite for a self-determined, independent life for the target group.

Legal migration: *moveurope!*'s 4 mobility opportunities

The objectives of *moveurope!* are to make the life situations of refugees in Europe visible and to actively promote their freedom of movement within Europe. Together with a strong network of active people, we want to (further) develop potential solutions, both in the transnational context between Italy and Germany and Europe-wide. To do so, **we offer both in Italy and in Germany:**

- **legal counselling** concerning the visa procedure and necessary documentation
- **individual assistance** regarding documents, necessary administration, linguistic support, companionship in the visa procedure
- **orientation** in the process of finding suitable mobility opportunities
- **organization of trainings** for social workers, educators, cultural mediators and refugee community leaders interested in mobility opportunities and the related legal framework
- **organization of public events and awareness raising campaigns concrete mobility opportunities in Witten, Germany,** at our office and/or in partner institutions

THE FOUR MOBILITY TYPES

INTERCULTURAL YOUTH EXCHANGES
Intercultural youth exchanges last between 10 days and 3 weeks and bring together young people residing in different European countries to promote their Active Citizenship and intercultural competences. Good English skills are required. A youth exchange offers the possibility of a first short stay in Germany.

INTERNSHIP
So-called "Hospitationspraktika" (internships) last for up to 90 days and serve to better understand the German work culture, to improve one's German skills and to possibly already look for a next mobility whilst on the ground. Accommodation and board is taken care of.

VOLUNTARY SERVICE
The voluntary service normally lasts about one year and traditionally takes place in the second sector (work with elderly people, with children, with disabled, with migrants). Accommodation is provided and the volunteers receive a monthly stipend (up to 350 EUR/month). To do a voluntary service in Germany the visa procedure has to be launched. The requisites are comparatively low but basic German skills are of great advantage.

APPRENTICESHIP
The apprenticeship in Germany takes 2 to 3 years, is already paid and prepares the trainee for a qualified job.
To do an apprenticeship in Germany, the visa procedure has to be launched. Different requisites have to be given such as A2 German level and the ability to ensure one's livelihood.

With moveurope!, we have worked out four mobility opportunities:

two short-term mobilities, where no visa procedure is needed, namely youth exchanges (1-3 weeks) and internships (1-3 months), as well as two long-term mobilities offering a perspective of long-term migration and where a visa procedure is needed: voluntary service (10-12 months) and apprenticeship (1-3 years).

Target group of *moveurope!* – Who can benefit from the mobility opportunities?

(1) refugees involved in the Dublin procedure in Germany, where another Member State is responsible for them, according to the current Dublin Regulation (Dublin III VO, more information regarding the respective law is in the next section, or rather according to §29/Nr. 2 AsylG displaced with international protection status in another EU-state),

(2) refugees staying in Germany, without a German residence permit, and hence fall under Dublin-III-Regulation,

(3) refugees, who are holders of an international protection residence permit and who are residing in the first entered Member State, but who wish to migrate to another EU-State.

Displaced people must have a valid European residence permit for the first entered Member State and a valid travel document to be applicable for the described mechanism.

How does the visa procedure work? What are the requirements?

In order to make a stay possible through the visa procedure, the applicant must be in the originally responsible Member State for review of the asylum application. Persons who are already (irregularly) in Germany must, for the time being, return to this Member State to apply for a visa for Germany from there.

Specifics for safe third country regulation for holders of an international protection status

Refugees in the Dublin procedure have to make their departure transparent with the responsible immigration office. The departure must be registered with the immigration office as voluntary departure , so that no re-entry lock is imposed according to §11 AufenthG, as is the case of deportations. With re-entry barriers people are not allowed to return to Germany for a certain period of time, which should of course be prevented. Here, a so-called pre-approval of the immigration authority should be obtained in accordance with §31 AufenthV in order to reduce the risk of rejection when applying. The required positive decision of the priority review (see p. 14/15) by the Federal Employment Agency is best requested directly there and subsequently submitted to the immigration office. In the case of refugees in the Dublin process, the consent of the immigration office is always required, since the person either has previously obtained a residence permit, [...] has stayed based on an acquiescence (dt. Duldung) or has a residence title for a specific purpose in the Federal ter-

ritory or if against him, residence-ending measures have taken place (§31I2c AufenthV). When applying for a visa, the embassy must therefore submit the application to the immigration office and ask for the assessment of the immigration office. In the case of a prior consent, the immigration office will give its written consent before applying for a visa, which can then be submitted accordingly upon application.

In the originally responsible country, an appointment for a visa application is made to the German Embassy. Since there are often weeklong waiting times, the appointment should be made as early as possible. If necessary, a brief interview will be conducted as part of the application to test language skills, motivation and readiness to return. The readiness to return is an important aspect for the German diplomatic representations in rather short stays, such as voluntary services. The price for a visa application is around 70€ (since 01.01.2019). The embassy reviews the application regarding §5 AufenthG and, if applicable, involves the Federal Employment Agency for the purpose of a priority examination or the immigration office for any prior stay in Germany. It is important to secure livelihood means during the visa procedure. After processing the application, the visa is issued, if accepted, and entry is made possible. On-site in Germany, the visa can then be converted into a German residence permit (exception: voluntary service).

Documents that need to be submitted to the embassy:

National passport or travel document as passport substitute for refugees (on entry it has to be valid for at least 6 months, and cannot be older than 10 years)
Residence permit of the actually responsible Member State (important: the proof of application for extension is sufficient!)
Proof of secure livelihood (depending on the purpose of stay! See p. 14)
Work or training contract (depending on the purpose of stay!)
If necessary, proof of language skills (if applicable proof qualifications/de

Obstacles of moveurope!

moveurope! is elaborated in a complexe legal framework composed by national Asylum law(s) and European policy (Dublin III and CEAS). Also, politically, the mobility of refugees in EU is not really wanted and kind of a hot potato, stigmatized by European mass media. moveurope! is still a pilot project and we are regularly facing especially legal obstacles, also because our network is still not elaborated enough. The most important obstacle we are facing is lack of knowledge on the existing channels of all parties involved, this includes politicians, social workers and especially the refugees themselves. There is furthermore a huge lack of awareness for the need of legal mobility channels on a society and political level. Plus, the visa procedure is often overcomplicated, with too much bureaucracy and requirements, which holds many persons off even trying to apply for a visa. Last but least, we recently observe a legal exclusion of refugees from certain mobility programs, for example Germany excludes people holding an international protection from participating in the European Solidarity Corps program (AufenthG §18d), and in general, (youth) mobility programs are not promoted for refugees (youth exchanges, voluntary services)

moveurope! Case Sample for legal migration

Legal migration as an alternative to illegal migration or a further asylum procedure

A. from Mali has an Italian residence permit and his Malian national passport. Since he has been in Italy for many months now without a steady job, he sees no strong future there, and wants to migrate to Germany. As the first step, he completes a 3-month internship in a social institution and learns about the German working culture. He does not need a visa for this stay, because he can travel visa-free for 90 days in the Schengen area. After the 3 months, the person responsible for the facility is so pleased with the work of A. that he offers to do a one-year voluntary service with them. To do so A. must leave Germany once again and then apply for a visa in the German Embassy in Rome. As there are special arrangements for voluntary services, no priority check will be carried out and the voluntary service and accommodation contract will be sufficient to secure the livelihood. A. returns with his visa to Germany. Since the visa is issued to the volunteer for the duration of the voluntary service, he does not have to go to the immigration office to convert the visa into a residence permit.

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