



On the Future of the Common EU Refugee and Asylum Policy

Response of the Expert Council of German Foundations on Integration and Migration (SVR) to the public consultation "Debate on the future of Home Affairs policies: An open and safe Europe – what next?" of the European Commission, Directorate-General for Home Affairs

The *Expert Council of German Foundations on Integration and Migration (SVR)* is an independent scientific monitoring, evaluating and advisory council. Its primary objective is to critically follow political and policy debates on the national, *Länder* and municipal level in Germany, to provide the public with objective and impartial information, and to give research-based practical recommendations in the fields of integration and migration. Beyond, the *SVR* also follows and evaluates policy developments at the EU level.¹

The SVR considers Refugee and Asylum Policy as a key area of EU Home Affairs Policies and welcomes the opportunity to respond to the Commission's call for opinions on a Communication on the New Agenda for Home Affairs. Thus, it will focus its contribution on some recommendations to further develop the common asylum and refugee policy, with special emphasis on the future of the so-called Dublin mechanism.

Background and open questions

For many years now, intensive efforts have been underway to harmonise refugee and asylum policy in Europe. However, because a unanimous vote was still required in the European Council during the first harmonisation phase (1999–2005), not much more was accomplished than establishing common minimum standards. The second wave of harmonisation efforts after 2005 aimed at the development of common and at the same time higher (not only minimum) standards for the protection of refugees applicable in all member states. In this second wave the European Parliament played a stronger role and new voting laws applied in the EU Council

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of Ministers. Existing legislation was amended under a specific procedure known as a *recast process*. In June 2013, after long negotiations a package of regulations and directives was adopted. It represents an important milestone on the path to achieving a Common European Asylum System (CEAS), which has long been a goal. The reform package created the basis for strengthening the asylum and refugee policy at European level and bringing protection standards in line with one another. However, the package also contains a number of optional regulations that once again give member states considerable leeway at national level to specify their refugee and asylum policy. This will necessitate both a re-definition and an adjustment of some aspects in concrete terms (most likely including court rulings).

Regrettably, the big issues that have already been discussed for decades have (once again) not been addressed: **how does Europe deal with refugees fleeing from crisis and poverty** of select hot spots, e. g. in Africa and Asia, and **where is inner-European solidarity when it comes to share the burden** with those member states where the numbers of refugees and asylum-seekers are particularly high? The impression conveyed by the media, that the countries in Southern Europe are generally overburdened has proven to be largely wrong: In a calculation based on a multi-factor model, SVR's Research Unit shows that a few of the countries at the EU's outer borders such as Greece and Cyprus have indeed taken in disproportionately higher numbers of asylum-seekers, exceeding their capacity; however, other large member states like Italy, Spain or Portugal which are also at the EU's external borders, have only taken a fraction of the asylum applicants that they could have accepted based on their economic strength, size and unemployment rate.² The media's generalised portrayal of the countries in the South of the EU as accepting high numbers of refugees and the countries in the North of failing to meet their obligations is not entirely accurate.³

Whatever the case may be, it is a fact that the numbers of refugees in Europe is quite unevenly distributed – which may invite some countries to take a *NIMBY (Not In My BackYard)* approach and leave other, more heavily affected countries on their own. The measures undertaken so far (increased Europeanisation through a CEAS, more border protection through Frontex) cover only one small part of what is needed. From the SVR's perspective, direct reforms to refugee policies are thus necessary. These will be described in detail below.

Dublin system: many judicial changes

One central pillar of the Common European Asylum System is the Dublin mechanism. The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have

² A fair reception quota can be calculated using a weighted model based on economic strength, population, size and unemployment rate; see "European Refugee Policy: Pathways to Fairer Burden-Sharing" (http://www.svr-migration.de/content/wp-content/uploads/2013/12/European-Refugee-Policy_SVR-FB.pdf), p. 7.

³ Sweden and Belgium have exceeded their acceptance quotas the most calculated on the basis of the multi-factor model. In Germany, the acceptance of refugees corresponds more or less to the calculated quota.



clarified and defined this mechanism in more detail in numerous decisions over the last few years; most importantly, they have defined circumstances in which it is necessary to depart from it. In two of the more prominent rulings, the ECtHR and ECOJ – in light of the serious human rights violations in Greek refugee camps – held that asylum-seekers may not be sent back to countries where there is a risk of inhumane treatment pursuant to Art. 3 of the European Convention on Human Rights (ECHR), even within the EU.⁴ These rulings partially invalidated the Dublin II Regulation. As a result, all Dublin countries have suspended return transfers to Greece. The requirements for imposing a ban on transfer, however, are very strict; it may only be considered if inhumane treatment and a “systemic deficiency” in the respective asylum system can be assumed.⁵ This has only been found to be the case in Greece so far. With regards to conditions in Italy, the ECtHR has explicitly ruled several times that conditions do not violate Art. 3 of the ECHR, and has declared transfers to Italy legal.⁶

The judicial decision to suspend transfers to Greece can be considered serious because it imposes a threat to the entire CEAS and thus an important element of European integration as a whole. Even though the existing criticism of the Dublin system is still justified, the system itself is not seriously up for discussion, neither politically nor legally. The Dublin mechanism is based on the assumption that the qualitative standards for processing, protecting and housing refugees are similar throughout the EU. Indeed, protection processes and standards have become much more uniform in legislative terms. However, a number of serious deficiencies still remain when it comes to implementation and application. By way of contrast, in terms of housing and basic supplies, conditions vary greatly. This is particularly a result of the fact that the general social standards across the EU are still very heterogeneous. Only minimum standards are guaranteed when it comes to the requirement to treat refugees the same as the inhabitants of the respective member state. The legislation adopted in the CEAS package aims to set more appropriate standards in all areas.

Enforcing the standards for humanitarian protection, which are anchored in EU law, the Geneva Convention on Refugees (GCR) and in the ECHR, must become an EU-wide political priority. Furthermore, both the Commission and the newly founded European Asylum Support Office (EASO) must take a central monitoring role and safeguard that these legal standards are actually met and measures undertaken if necessary. In particular, it has to be guaranteed that all member states eliminate the risk of inhuman or degrading treatment of applicants for international protection – which may give cause for Courts to detect a systemic deficiency in the asylum procedure and in the reception

⁴ ECtHR, judgement from 21.01.2011, *M.S.S. v. Belgium and Greece*; ECOJ, judgement from 21.12.2011, C-411/10 and C-493/10.

⁵ ECtHR, ruling from 02.04.2013, *Hussein v. Netherlands and Italy*, para. 78.

⁶ The Grand Chamber of the ECtHR is currently working on a case to determine whether transfers to Italy are still possible. The question is whether Italy's asylum system and housing conditions show systemic deficiencies as stipulated in the legislation of the ECtHR (*Tarakhel v. Switzerland*; ECtHR, no. 29217/12).



conditions (followed by a ban on Dublin transfers), and share their responsibility as part of the CEAS.

Another challenge to the Dublin system is the fact that it is being undermined continuously: In a lot of cases it is impossible to determine how refugees have reached the respective EU member state; and thus it becomes impossible to identify, and transfer an applicant for protection to the country of entry. This weakens the responsibility mechanism established by Dublin II.

Thus, **the Dublin mechanism must continue to evolve. On top of the current regulation, an equitable system for solidarity-based burden-sharing has to be created and organised around principles that are as transparent as possible.**

Adding a burden-sharing instrument to the Dublin mechanism

The Dublin principle is a political reality that is hardly being called into question by any of the influential political actors. Furthermore, in terms of its content, there is a lot worth keeping – but it needs to be modified and expanded. Two prominently discussed alternatives to the principle of submitting the asylum application in the first country of entry, however, would not improve the asylum and refugee policy status quo:

(1) Several non-governmental organisations argue for the complete abolition of this mechanism in favour of free choice of country. However, this would most probably shift asylum and refugee policy right back to the national level. Not only would this be unacceptable in terms of European integration as a whole, it might also trigger an EU-wide ‘race to the bottom’ in the area of protection, processing, supply and housing standards for asylum-seekers.

(2) Also discussed as an alternative is an EU-wide mechanism that would require all member states to accept and process a certain number of refugees based on a centrally administered distribution key. To achieve this, however, a responsible EU body would have to be established or the EASO would have to be granted the respective powers. This scenario would necessitate a significant amount of additional bureaucracy and could also give rise to (new) issues of fairness.⁷

The Dublin principle should therefore be retained and further developed, not least because there are no convincing alternatives.

Concretely, the SVR proposes installing a solidarity-based burden-sharing system designed to support the countries that are overwhelmed.⁸ Similar to the euro

⁷ Using this mechanism, it would be conceivable that two refugees who arrive in Greece at the same time are redistributed throughout the EU with one going to Sweden and the other to Romania. It is obvious that this would create completely new problems of fairness.

⁸ Situations in which countries are overwhelmed or overburdened can either arise from a sudden influx of refugees or because the necessary administrative infrastructure is non-existent or inadequate.



bailout fund, the individual EU member states would have to demonstrate their inability to cope with the situation to the European Commission or to a new EU asylum committee (a kind of 'refugee policy troika', which would have to be established). The respective committee, according to objective criteria and evaluation, would then have to assess whether the situation is actually overwhelming and make a recommendation to the European Council. A useful tool in the assessment would be the question of whether the country in question had already fulfilled its fair reception quota, which is defined based on certain criteria.

The SVR's Research Unit has developed a calculation instrument for these types of quotas using a multi-factor model, which considers economic strength, population, territorial size and unemployment rate. In order to adequately reflect the influence of these individual factors different weights are assigned.⁹ The quota derived from the model should not be viewed as a static or absolute value, but rather serve as a reference point for the EU committee to assess a member state's claim of inability to cope with the situation.

If the committee agreed that the respective country was overwhelmed with the situation, an EU-wide mechanism would then be activated which provides special technical and financial support to the member state affected, including the requirement for other member states to take in a specific number of asylum applicants.

Supplementing the Dublin mechanism, this approach could help relieve the burden on countries affected by high numbers of refugees and would simultaneously uphold and further develop the proven principle of application submission in the first country of entry.

EU-wide creation of a Temporary Protected Status

Apart from a mechanism that redistributes the burden in certain circumstances in the spirit of solidarity, **a process should be introduced – as a complement and not as a replacement – that temporarily allows taking in large numbers of people collectively in temporary crisis situations (like civil wars) without subjecting them to individual protection processes. Beyond the national framework, the EU member states should agree to create a Temporary Protected Status to allow the EU to take in, for example, Syrian refugees for humanitarian reasons in a coordinated effort.**

This is possible under the scope of the directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons (2001/55/EC). Efforts in this direction have not been successful so far. In view of more than two million Syrians who have fled their country, and another four million refugees inside Syria, however, the EU must not

⁹ See "European Refugee Policy: Pathways to Fairer Burden-Sharing" (http://www.svr-migration.de/content/wp-content/uploads/2013/12/European-Refugee-Policy_SVR-FB.pdf), p. 6.



look the other way. Accepting Syrian refugees is necessary for humanitarian reasons but also to help ease the plight of Syria's direct neighbours that have taken in a large number of Syrian refugees, also in relation to their populations. According to the UNHCR, Lebanon (4.3 million inhabitants) already has more than one million refugees, Jordan (population of 6.5 million) has taken in more than 500,000 refugees.

Conclusion

With regards to international refugee crises such as the prevalent one in Syria, the EU should not only help with financial support but also grant refugees a safe haven. The current patchwork of several member states admitting (rather small) quotas according to their individually defined prerequisites, and others not considering any (temporary) resettlement programmes at all, falls short of the EU's high standards of solidarity towards the global community.

In terms of EU-internal sharing of responsibilities and burdens resulting from the CEAS (including the Dublin system), not only the Commission, but also the European Parliament and the Council have repeatedly paid lip service to an asylum system that lives up to the principle of solidarity stated in the EU treaties.

The SVR considers it essential that the Commission places due emphasis on both adding a solidarity-based instrument to the Dublin system, including a mechanism to detect overwhelming situations in member states, and creating a feasible Temporary Protected Status at EU level to respond to crisis situations in its upcoming Communication on the New Agenda for Home Affairs. In this respect, the Stockholm Programme has left considerable room for policy development, which should be addressed by the European Council from 2014 onwards.

On behalf of the Expert council of German Foundations on Integration and Migration (SVR),

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