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IMMIGRATION LAW

THE DUBLIN III REGULATION: CRITIQUES AND LATEST ATTEMPTS OF REFORM

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ABSTRACT

The Dublin III Regulation is the latest European law instrument that defines the system with which the Member State responsible for examining an application for international protection is determined. Despite the important improvements made to the previous legislation, the Regulation is still an instrument suspended between new and old, which on the one hand responds to the innovations of the European Union in the field of asylum, but on the other hand, is not able to meet the new requirements remaining attached to cases that are over twenty years old.

The European Commission, in 2016, issued a proposal for a reform of the Dublin system. But, once again, instead of rethinking the fundamentally incorrect principles underlying the European Union's mechanisms, the proposed amendments reinforced many of the wrong premises. On 16 November 2017, then, the European Parliament, in examining the first reading of the Commission's proposal, adopted numerous amendments, eliminating or improving some of the controversial points of the text. However, the agreement between the European Parliament and the Council, imposed by the ordinary legislative procedure, will be difficult to achieve. The discussions under way in the Council since 2016 and not yet ended are totally disconnected from the Commission proposal and the Parliament amendments. Member States, in fact, are aiming for solutions to prevent solidarity from becoming mandatory and leaving everything in the hands of the Council.

It is not clear whether the European Institutions will find a compromise in order to improve the Dublin System or will opt for the establishment of new regulations with different premises and principles.

KEY WORDS

Amendment, application, asylum, Commission, competence, cooperation, Council, criteria, deficiencies, discretion, Dublin system, Parliament, European, family unit, first entry, foreigner, humanitarian ,international protection, jurisdiction, law, Member States, migration, obligation, procedure, proportionality, reform, refugee, regulation, relocation, responsibility, rights, security, solidarity, territory, transfer.

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INTRODUCTION

Regulation 604/2013, which is none other than the modified version of the previous Regulation 343/2003 that has transposed at the Community level the 1990 Dublin Convention[2], has shown its inefficiency and the need to overcome it.

The development of the Dublin system failed to respond to the exponential increase in the migratory phenomenon that has affected the European Union.[3] The Dublin III Regulation affirms its full confidence in the Dublin regime, considered the milestone in the construction of the Common European Asylum System, and consequently makes only a few changes to the previous provisions, leaving unchanged the essential core of the original discipline, failing to fill the defects of a legislation that cannot, therefore, keep up with the times.

Like the 1990 Convention, the 2013 Regulation is based on the principle of *one chance rule* which identifies one State as responsible for examining the application for international protection using the same criteria established in the Convention, only partly modified. The objective remains that of curbing the phenomenon of the applicants in orbit and to combat the practice of *asylum shopping*.[4] Furthermore, the functioning of the system is subject to numerous critiques, since it tends to attribute responsibility to the Member States of first entry on the territory of the Union. This criterion has serious repercussions on the asylum systems: in fact, the unequal distribution of applicants in the European Union contributes to widening the disparities between Member States in assessing asylum applications, as well as in their reception and integration systems. The imbalance produced by the Dublin system is exacerbated by the increase in the number of people in need of international protection, which has overburdened the reception capacity of some Euro-Mediterranean countries, making manifest the lack of solidarity among the Member States. Despite the measures taken by the Commission regarding the relocation mechanism in order to alleviate the burden of the asylum systems of the States most affected by the migration phenomenon, the European asylum system has proved to be fragile and inadequate, mainly due to the lack of stronger inter-state coordination and a more effective support system for the countries of

[2] Following the entry into force of the Treaty of Amsterdam in 1999, it was adopted the EC Regulation no. 343/2003, known as the Dublin II Regulation. From 1990 to 2013, the Dublin system progressively extended its territorial scope. The Dublin III Regulation binds twenty-seven EU Member States, including United Kingdom and Ireland, which have made use of the opt-in clause provided for by Protocol No. 21 attached to the Treaties. Furthermore, four States are associated with the Dublin system, on the basis of bilateral agreements with the EU: Iceland, Norway, Switzerland and Liechtenstein.

[3] In the Mediterranean there were 373.652 migrants who arrived by sea in 2016, 185.139 in 2017 and 141.472 in 2018[3]. In the same span of time the number of dead and missing people was respectively of 5.096, 3.139 and 2.277. https://data2.unhcr.org/en/situations/mediterranean.

[4] The asylum shopping consists in presenting more asylum applications simultaneously in different countries.

first entry. The need to translate the principle of solidarity into concrete measures has therefore emerged clearly, in order to favor a more equitable distribution of burdens and responsibilities between Member States.

A further attempt to reform the Dublin System has been proposed by the European Commission and then amended by the European Parliament. It is currently under discussion and approval of the European Council. But once again, it is anchored to the Dublin system, despite the evidence of the need for a complete and total revision of the principles underlying the European Union mechanisms for the determination of the competent State for the examination of the application for international protection.

1. INNOVATIONS AND LIMITS OF THE CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSALE FOR EXAMINING AN APLICATION FOR INTERNATIONAL PROTECTION

On 26 June 2013 the European Parliament and the Council approved Regulation n. 604.[5] This recently introduced Act, called Dublin III, is in complete continuity with the previous regulation, managing with obsolete rules the flows of asylum seekers and refugees coming into Europe. The principles underlying the functioning of the system, summarized in the objective of determining a single State responsible for examining the asylum application and the consequent identification of a series of objective criteria, remained unchanged. The changes made to the previous legislation, though important, cannot hide the true face of the Dublin III Regulation: an instrument suspended between new and old, which on the one hand responds to the innovations of the European Union in the field of asylum, but on the other hand, is not able to meet the new requirements remaining attached to cases that are over twenty years old.

Regulation 604/2013 still submits the competence to examine the application for international protection to the application of objective criteria ordered in a hierarchical manner. The criteria of jurisdiction remain, for the most part, unchanged, considering to the existence of family ties, the issue of a residence permit or a visa, and the place where the person first entered, regularly or irregularly, the European territory.[6]

Important innovations are related to the criterion of the family unity. This is the principle whereby applications for international protection that are proposed by people belonging to the same family must be dealt with by the authorities of the same Member State: this way an in-depth examination of the application is

[5] *Regulation (EU) No 604/2013 Of the European Parliament and 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*. L 180/31.

[6] Art 9,10 and 13 of the Regulation 604/2013 of the European Parliament and the Council

endured, as is the coherence of the decisions taken towards them, and above all the separation of the members of the same family unit is avoided.[7] The respect for family life, in accordance with the ECHR and the Charter, should, moreover, constitute a fundamental criterion in the application by the Member States of the Regulation.[8] This objective is pursued through the introduction of a broader definition of the "family member" of the applicant and the creation of the concept of "relatives ", so as to favor the functioning of the related competence criteria.

In accordance with the first aspect, it should be noted that art. 2 of Regulation 343/2003 includes a restricted notion of family member, circumscribed to the members of the nuclear family: this concept does not include the adult children, brothers, uncles, cousins, grandparents or grandchildren of the applicant; it requires that the family member, already in the European territory, is a refugee or an asylum seeker and only if the applicant is an unaccompanied minor, Regulation 343/2003 takes into consideration the State where one of his/her family members is legally living.

In relation to this profile, the innovative intervention of the Dublin III Regulation is relevant, although it cannot be fully satisfactory. Article 2, letter g) of Regulation 604/2013 renews the relevant definitions related to family matters, removing, in relation to minor children, the requirement that these must be charged to the applicant. Moreover, if the latter is an unmarried minor, it is considered as a family member, not only the parent, but also an adult responsible for the applicant according to the law or the practice of the Member State in which the adult is located.

The new Regulation also introduces notions unknown to Regulation 343/2003, such as that of "relatives" which includes the uncles, the grandparents of the applicant who are in the territory of a Member State regardless of whether the applicant is a legitimate, natural or adoptive child according to the definitions of national law[9], as well as that of the minor's representative.[10]

Indeed, this innovation does not seem to significantly affect the operation of the criteria on which the Regulation is based, if the protection applicant is not an unaccompanied minor. When, in fact, the application is proposed by an adult foreigner, art. 9 and 10 establish the jurisdiction to examine the request of the adult applicant in favor of the Member State in which a family member, but not also a relative, has requested or has obtained international protection.[11] This implies that,

[7] Whereas n. 15 of the Regulation 604/2013 of the European Parliament and the Council.

[8] Whereas n. 14 of the Regulation 604/2013 of the European Parliament and the Council.

[9] Art 2 letter g of the Regulation 604/2013 of the European Parliament and the Council.

[10] Art 2 letter k of the Regulation 604/2013 of the European Parliament and the Council.

[11] Art 9 of the Regulation 604/2013 of the European Parliament and the Council establishes that "Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for

even in the regime of Regulation 604/2013, the request, proposed or accepted, of a brother, uncle, nephew of the applicant does not affect the competence of the asylum application, with negative effects on the breakdown of the family unit. This seems a questionable element because often the applicants come from situations of internal conflict or political and humanitarian crises where the disintegration of the family units is very frequent; therefore, the reunification in the territory of the Union with a family member is the only possibility of re-establishing a part of his or her previous life. The Regulation could have extended the notion of family member, relevant for the purposes of determining the competence for the asylum application, making it possible to include different relatives, even those of a further degree of kinship.

Instead, the provision introduced by art. 7 par. 3 is innovative. It intends to favor the competence of the Member State connected to the family member of the applicant especially if, for special reasons of health and weakness, such as recent maternity, pregnancy, serious illness, disability or seniority[12], the foreigner depends on the assistance of a family member; in such cases, the new Regulation establishes in general that "in view of the application of the criteria referred to in articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance".[13] This innovation significantly facilitates the use of the family unit criterion and covers a clear gap of Regulation 343/2003.

It should also be noted that art. 16, par. 1 regulates in a more detailed and extensive way the case of dependent persons, that is the possibility that a Member State takes charge of an applicant's request, if he/she depends on the assistance of his or her son, brother or parent legally resident in one of the Member States or if a

international protection, provided that the persons concerned expressed their desire in writing". Art 10 of the Regulation provides that "If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing". Compared to Regulation 343/2003, the new elements of Art. 9 consist in the abandonment of the requirement that the foreigner's family should already be established in the State of origin and in the fact that the applicant and the family member concerned have expressed this desire in writing. Also in relation to the hypothesis contemplated in Art. 10 the requirement of the written request by the interested parties is introduced.

[12] Art 16 of the Regulation 604/2013 of the European Parliament and the Council.

[13] Art 7.3 of the Regulation 604/2013 of the European Parliament and the Council.

child, a sibling or a parent legally residing in a Member State depends on the assistance of the applicant. In this hypothesis, Regulation 604/2013 is concerned with establishing that such family members are left united or reunited, provided that certain conditions exist: that family ties existed in the country of origin, that the child, the sibling, the parent or the applicant are able to provide assistance to the dependent person and that those interested have expressed that wish in writing.

New critical or problematic elements are registered, instead, in relation to the subject that can be considered to be in the care of the applicant, or who takes charge of the applicant, being limited to the son, brother/sister or parent, against the generic expression *another relative* of the Dublin II Regulation.

Regardless of the provisions described so far, the strengthening of the protection of family units in the procedure for determining the competence for examining the application for protection could actually be obtained by enhancing the will of the applicants according to the criteria of competence, but such a possibility is not taken into account.

Yet the possibility for the applicant, unaccompanied minor or adult, to choose the Member State responsible for reasons of family kinship to foreigners already present in the territory of a certain Member State could guarantee a wider protection of the applicant's personal interests and his/her aspirations for life as well as integration into the society of the host State; this would also favor legal certainty, in a context often characterized by a chronic complexity and application uncertainty, also due to the not always clear explanation of the criteria of competence. This case, of course, should be limited to purely family reasons and not be established as a criterion of general jurisdiction since this would favor the so-called asylum shopping that the Dublin system aims to neutralize.

Moreover, in the Dublin III system there is a tendency to favor the competence for examining an application for international protection of the State which played the main role in relation to the entry and residence of the asylum seeker. Art 13.1 of the Regulation, in fact, establishes that "where it is established, […] that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection". In addition, art 13.2 states that "When a Member State cannot or can no longer be held responsible in accordance with paragraph 1 of this article and where it is established […] that the applicant — who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established — has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection".

The fact that the mechanism for allocating jurisdiction is still anchored to the criterion of the Member State of first entry, established in art. 13, is at the basis of the structural failings of the division of powers system. The valorization of the place of first entry, in fact, ends up concentrating applications for protection in certain Member States, especially those at the southern border, favoring the emergence of systematic crises in them and, therefore, the risk of violations of the fundamental rights of the applicant. Moreover, this criterion undermines the interests of foreigners in search of protection, forcing them to present the application in a place that not only would not have been the one in which they would have been interested in staying, but in which they may have arrived randomly and unexpectedly, for example, for environmental reasons or for the opportunistic choices of the organizers of illegal journeys.

2. STRNGHTENING OF THE FONDAMENTAL RIGHTS PROTECTION

With regards to a second profile of innovation, Regulation 604/2013 is characterized by the general tendency to strengthen the protection of the fundamental rights of the applicants. This aspect is certainly the most relevant of the renewed regulatory framework with which the institutions intended to respond to criticism of the Dublin system in the application of the two previous instruments of harmonization, especially in relation to substantial migratory flows and situations of strong pressure on the external borders of the southern European Union.

However, the tension of the rules of the Regulation to respect fundamental rights does not only manifest itself in relation to the emergent circumstances of the entry and reception system, but also in relation to the stay of the foreigner in the territory of the Union waiting for the recognition of the refugee or the subsidiary protection status. The issue of the protection of fundamental rights emerges in all its urgency with respect to the different phases of the procedure, starting from the moment when the foreigner presents the application; it runs throughout the course of the procedure, until the time when the asylum seeker is transferred to a Member State other than the one requested, if the application has been lodged in a non-competent State and it is thus forwarded to the competent national authorities. This is connected to the situation of those who, as a result of the transfer order arranged according to the rules of the Regulations, are forced to return to the State of origin or are rejected in the third, intermediate, starting State.

It is in this scenario that the real breaking point of the Dublin III Regulation emerges. It refers to the overcoming the presumption of conformity of the behavior of all Member States to the parameters of protection of fundamental rights and, therefore, of the condition of mutual security among them. On this premise, moreover, stands the possibility of transferring responsibility for examining the asylum application from one Member State to another according to the uniform criteria of the Regulation.

With Regulation 604/2013, therefore, an essential element of the Dublin system was overcome: the general presumption of security of the Member States, that is the homogeneity of protection of fundamental rights in the different legal systems, in a context that makes it possible to suppose that all the participating States, be they Member States or third countries, respect fundamental rights, including the rights that are based on the Geneva Refugee Convention and the 1967 Protocol, as well as in the ECHR, and that Member States can trust each other in this regard.[14] The new rules of the Regulation take into account, instead, the results of the practical application of the Regulation and no longer presuppose, in fact, a common protection by the Member States, requiring, instead, a concrete assessment in the individual situations in relief.

With this in mind, art. 3 of the Dublin III Regulation requires Member States not to transfer an applicant to a State that would be competent to review the application for protection, if there are reasons to believe that in that State applicants could suffer inhuman and degrading treatments due to systemic deficiencies of the asylum procedure and in the reception conditions. The norm was introduced following important rulings by the European Court of Human Rights and the Court of Justice of the European Union (CJEU). The Courts reach different conclusions about the parameter by which to evaluate the compliance of Member States' behavior with fundamental rights. For the Luxembourg Court, the presumption is lost if systematic and generalized weaknesses are found in the protection system. On the contrary, the Court of Strasbourg uses more rigorous scrutiny procedures, verifying in practice, in light of the individual situation of the appellant, the respect of the obligations coming from the ECHR.

In the N.S. case of 21 December 2011[15], the CJEU claims that, as far as possible, the general presumption of conformity of the Dublin system to fundamental rights must be maintained, because it is on this presumption that "the raison d'être of […] the Common European Asylum System" rests.[16] However, the Court sets a threshold above which the presumption must be considered overturned and the Dublin regime must be suspended.[17] This threshold is particularly high, since if any violation of the rules for the protection of persons in need of international protection should have the consequence of suspending the transfers to the responsible State, this would deprive "those obligations of their substance and endanger the realization of the objective of quickly designating the Member State

[14] M. Spatti, *La disciplina comunitaria relativa all'allontanamento dei richiedenti asilo verso Paesi sicuri,* in *Diritto pubblico comparato ed europeo,* 2007, pag. 217 e ff.

[15] Justice Court of the European Union , December 21 2011, *N.S. c. Secretary State for the Home Department and M.E and others vs. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform,* Joined cases C-411 and 493/10.

[16] Paragraph 83.

[17] Paragraph 62.

responsible for examining an asylum claim lodged in the European Union".[18] Therefore, the only parameter suitable to suspend the Dublin regime is the existence of systematic deficiencies in the asylum procedure and in the conditions of reception of the applicants, such as a violation of art. 4 of the Nice Charter.[19]

The European Court of Human Rights, instead, in the *M.S.S. c. Belgium and Greece* judgment stated that the contracting States cannot rely on the presumption that the asylum seeker is treated in accordance with the international and European obligations assumed on fundamental rights by the country to which they have the transfer, having to ascertain that the measure adopted under the Dublin Regulation is not equivalent in practice to refoulement. This applies not only when the risk of suffering inhumane and degrading treatments is affected by the Member State to which the transfer is made, but also when it invests the sending State of origin of the foreign transferred to which the Member State responsible for knowing the asylum application dispose the next repatriation.

From the comparison of the *M.S.S.* case and the subsequent *Tarakhel*[20] case it emerges that the European Court of Human Rights operates two different tests to assess the compliance with the ECHR of a transfer under the Dublin procedure. In situations of generalized deficiencies in the protection system, the violation of article 3 of the ECHR is established without the applicant being required to demonstrate the existence of an individual risk of suffering inhumane and degrading treatment.[21] In fact, the objective situation present in the State dispenses both the applicant from the burden of proof and the Court from proceeding with the examination of the specific case. Instead, in the absence of systematic gaps in the protection system, the Court will examine the legitimacy of the transfer in the light of the specific individual situation of the applicant.[22] In conclusion, the jurisprudence of the European Courts marks the definitive end of the presumption of security between the Member States and introduces, in fact, a criterion of identification of the State to compete in examining an application for international protection.[23]

Despite the undoubted virtuousness of the provision, the prohibition of transfer of art. 3 of the Regulation shows a certain weakness of content regarding the procedural guarantees of the mechanism. The provision does not clarify some practical profiles related to its operability, such as, in particular, the identification of the parties entitled to ascertain the existence of systematic crises that could

[18] Paragraph 85.

[19] Paragraph 86.

[20] European Court of Human Rights, GC November 4 2014, *Tarakhel vs. Switzerland,* appeal n. 2917/12.

[21] Case M.S.S par. 359.

[22] Par 104. Cfr. Vicini G., *op. cit.*, 216-217.

[23] F. Graziani, *Lacune e inefficienze del Regolamento Dublino III: l'urgenza di un suo superamento,* in *Rivista del diritto alla navigazione,* 2015, pag. 11 e ff.

trigger a serious risk of violation of the fundamental rights of the asylum seeker. The norm, in fact, assigns every assessment to the competent authorities of the Member States that have decided in favor of the transfer. This is debatable, both for the eventuality of a different degree of protection in the single systems in relation to fundamental rights, and for the different capacity of the same to ascertain conditions of systemic crises that could trigger the prohibition of art. 3. This solution can lead to uncertain and uneven outcomes in the application of the prohibition and it would have been perhaps more reasonable to entrust such control to the European Commission, which could have offered more guarantees on the protection of fundamental rights.

Finally, a further critical profile of art. 3 consists in the fact that it expressly refers to the only risk of forbidden treatment pursuant to art. 4 of the Charter; this excludes the prohibition of transfer operate even when the systematic crisis involves the violation, even serious, of different fundamental rights. This provision can also be criticized for referring only to infringements occurring in cases of systematic failures of Member States in the field of asylum. Certainly such contexts favor the demonstration of the existence of a risk for the protection of the fundamental rights of the applicant, but it is not excluded that the danger of inhuman and degrading treatments prohibited by art. 4 of the Charter also take place in States that do not suffer systematic crises in this matter. The Dublin III Regulation, therefore, seems indifferent to this eventuality.

3. THE SOVEREIGNTY CLAUSE: DISCRETIONARY OR COMPULSORY NATURE?

Article 17, par. 1 of the Dublin III Regulation, which includes the sovereignty clause, establishes that "each Member State may decide to examine an application for international protection […], even if such examination is not its responsibility under the criteria laid down" in the Dublin System. The exercise of the clause is subject to a discretionary decision by the State, it is not subject to any conditions, it does not depend on the attitude of the Member State that would be competent under the Dublin system and does not require the consent of the individuals concerned for its application.[24] In this regard, State practice is highly varied. The sovereignty clause has been invoked for different reasons: in some cases, the use of the clause has been justified to guarantee greater rapidity in the rejection of manifestly unfounded applications; in other cases, the assumption of responsibility was motivated by humanitarian reasons and by the particular condition of vulnerability of the asylum seekers.[25]

[24] F. Graziani., *Lacune e inefficienze del Regolamento Dublino III: l'urgenza di un suo superamento,* 2015, pag. 13.

[25] L. Grasso, *Rispetto dei diritti fondamentali dei richiedenti asilo e operatività della sovereignity clause nel regolamento Dublino II,* in *Dir. Pubbl. comp. Eur.*, 2012, pag. 733 e ff.

It is necessary to understand if and when the sovereignty clause loses its own nature, of mere faculty, to act as an obligation for the States participating in the Dublin system. Three considerations may be derived from the judgments of the European Courts. Firstly, Member States must use the clause when its application is the only way to respect fundamental rights during the request for international protection. According to the CJEU, the sovereignty clause, while giving the States a discretionary power, is an integral part of the Common European Asylum System and meets the limit of respect for the human rights protected by the Union itself. If it is not possible to identify a competent State for the purpose of examining the asylum application, or, in the case where such determination risks having an unreasonable duration, the Member State is obliged to take charge of the application, using the sovereignty clause. The European Court of Human Rights, instead, has rebuilt this clause in different terms. The existence of systematic deficiencies in the asylum protection system obliges the State not to proceed with repatriation and to exercise, therefore, the clause. On the other hand, in the absence of generalized deficiencies, since the State has to take into account the individual situation of the applicant, the clause may not be used, to the extent that the State intending to make the transfer obtains from the competent State specific and detailed guarantees regarding taking charge of the applicants.[26]

Secondly, outside the mentioned cases, the sovereignty clause retains its discretionary nature. In the judgment *Halaf* of May 30, 2013, the Court of Justice stated that "the exercise of this right is not subject to special conditions" and allows each Member State to "decide, in full sovereignty, on the base of political, humanitarian or pragmatic conditions, to accept the examination of an asylum application".[27]

Finally, it cannot be deducted from the case law of the European Courts that there is an obligation for the Member States to suspend the transfer to a particular State. The use of the exception provided for by art. 17, par. 2 presupposes an analysis conducted on a case by case basis, in the light of the situation existing in the State which would be competent under the Dublin regime and the particular conditions in which the applicants are. From this latter point of view, the sovereignty clause is not a substitute for the suspension mechanism of the Dublin procedure, proposed by the European Commission, but not accepted during the adoption of the Regulation. In fact, the mechanism designed by the Commission aimed at centralizing within the Commission itself the verification of systematic crises in the asylum procedures and in the maintenance of national reception systems. Instead, even in the hypothesis of use of the sovereignty clause, it is up to the State authorities to evaluate the conditions likely to activate the prohibition on transfer of the protection applicant; this is doubtlessly questionable, since this

[26] ECHR, GC November 4 2014, *Tarakhel vs. Switzerland,* appeal n. 2917/12, par 120.

[27] Justice Court, May 30 2013, *Zuheyr Frayeh Halaf,* Case C-528/11, par 36-37 and par. 44.

solution could generate uncertainties and inhomogeneities in the concrete application of the prohibition.[28]

4. AN ATTEMPT OF REFORM OF THE DUBLIN SYSTEM MADE BY THE EUROPEAN COMMISSION

In May 2015, the European Commission acknowledged that the Dublin regime is not functioning as it should and therefore decided to proceed with an assessment of the Dublin system in 2016 with a view to its revision.[29]

There are three main objectives of the reform of the Dublin III Regulation presented by the Commission in May 2016. The first objective is to increase the capacity of the system to efficiently and effectively determine a single member State responsible for examining the application for international protection. The second is to discourage, through sanctions, the so-called secondary movements of asylum seekers who try to reach a country other than the one in which they are required to submit their application. The third is to allow a fair sharing of responsibilities between member States, establishing a corrective redistribution mechanism for asylum seekers, which would automatically be activated if a member State were to face a disproportionate number of asylum applications.

Before the beginning of the process of determining the competent Member State, the proposed Regulation introduces the obligation of the State in which the application is submitted to verify whether the application is inadmissible on the basis that the applicant comes from a safe first country of asylum or a safe third country. It is also established that the State will have to examine the application with an accelerated procedure if the applicant comes from a safe country of origin or if it can be considered a danger to the national security or the public order of the Member State.[30]

The proposal in art. 4 introduces a new obligation according to which the asylum seeker must submit an application in the Member State in which he or she first entered illegally or in the Member State where he or she is already legally present. This change shows that the applicant does not have the right to choose the Member State in which to apply.

Moreover, the applicants' cooperation requirement is strengthened to ensure rapid access to the status determination procedures and the proper functioning of the system. The Regulation establishes proportionate obligations for the applicant with regard to the timely submission of any relevant element and information for the determination of the competent Member State. Applicants are also required to be present and available to the authorities of the competent Member State and to

[28] O. Feraci, *Il nuovo regolamento Dublino III,* in *Osservatoriosullefonti.it*, 2013, fasc. 2.

[29] European Commission, *Agenda on Migration,* 15-5-2015, COM(2015) 240 final, cit., 11 e 13.

[30] Art. 3.3 Proposal for a Regulation of the European Parliament and the Council 2016/270.

comply with the transfer decision.[31] Failure to comply with the obligations established will have proportionate procedural consequences for the applicant, such as the examination of the application with an accelerated procedure and the non-acceptance of information submitted with delay.[32]

With the reform, the criteria for determining the competent State remain unchanged, especially the one in relation to the State of first arrival.

Another important change concerns the limitations placed on the discretionary clause. This can be invoked only if no Member State has been determined as competent and only for humanitarian reasons in relation to the extended family.[33]

A network of Dublin units is also established, with the help of the European Union asylum Agency, to foster practical cooperation and the sharing of information on all issues related to the application of the Regulation, including development of practical tools and guidelines.[34]

The proposal is more inclined to respect fundamental rights and the general principles of European Union law. In particular, the right to information for asylum seekers is improved so that they can better defend their rights and in order to reduce the level of secondary movements as the applicants may be more motivated to respect the system. The right to a judicial appeal is made more effective, specifying the scope of the appeal and harmonizing the deadlines for decision-making. The appeal also has an automatic suspensive effect. Lastly, the right to freedom and free movement in the territory of the competent State is strengthened, reducing the time limits within which a person can be held in the exceptional cases prescribed by the Regulation and only if this is in line with the principles of necessity and proportionality.

In the attempt to correct the inequality of the criteria of competence, the Commission presented, in the proposal, a crisis relocation mechanism modifying Regulation 604/2013. This mechanism is activated when there is a disproportionate influx of applicants for international protection in one Member State, i.e. more than 150% of a national quota defined for each State through a reference key based on two equivalent criteria: the number of inhabitants and the gross domestic product. The relocation mechanism is permanent, it is contained in the Regulation and therefore it is applicable whenever the crisis situation is established, but at the same time it is temporary because the Commission has the power to establish the period of application of the mechanism, as well as to determine the number of asylum seekers to be relocated, which in any case cannot exceed 40% of the number of applications submitted in that Member State during the six months prior to the adoption of the delegated act. Evaluating the situation,

[31] Art. 4.3 Proposal for a Regulation of the European Parliament and the Council 2016/270.

[32] Art. 5 Proposal for a Regulation of the European Parliament and the Council 2016/270.

[33] Art. 19.1 Proposal for a Regulation of the European Parliament and the Council 2016/270.

[34] Art. 49 Proposal for a Regulation of the European Parliament and the Council 2016/270.

the Commission takes into account, moreover, the total number of applicants for international protection and the irregular entry of third-country nationals and stateless persons in the six months prior to the adoption of the delegation act, the increase in this number over the same period in the previous year and the number of applications per capita presented in the Member State benefiting from relocation in the previous 18 months compared to the Union average.

The conditions for activating the crisis relocation mechanism are rigorous and provide first of all for the Commission to verify, on the basis of information provided by EASO and Frontex, that the crisis is such that it does not allow the correct functioning of Regulation 604/2013. The relocation also provides for measures to be taken by the Member State benefiting from this mechanism: it must draw up an action plan to improve the conditions of its asylum system and it can be sanctioned by the Commission with the suspension of relocation if it does not comply with the obligations contained in the plan. In reality, despite the proposal for a Regulation requires a rapid activation of the parties involved, it does not contain stringent deadlines, except for a maximum of two months for the conclusion of the procedures, but only from the moment in which the Relocation State declares the number of applicants it is able to host. Nothing is said about the previous phase.

The mechanism in question does not prohibit the Council from adopting temporary measures for the benefit of a State pursuant to art. 78, par. 3 TFEU. Indeed, it may happen that, under the conditions to activate emergency measures, it would not be possible to activate the crisis relocation mechanism. This provision suggests that the hypotheses that the mechanism is used are really reduced. The proposal adds a section VII that contains precisely the "crisis relocation mechanism": pursuant to the new art. 33, only applicants who have applied for international protection in a Member State facing a crisis situation and for which that Member State would otherwise have been competent according to the criteria for their determination would be subject to the relocation, and applicants belonging to nationalities for which the percentage decision of recognition of international protection, based on the latest Eurostat quarterly average data, is equal to or greater than 75% of the decisions on the applications for international protection adopted. Finally, the proposal provides that the relocation State may refuse to relocate, or partially relocate, persons in clear need of international protection for reasons of public order and public safety; in this case, however, it is expected that this Member State will contribute financially to the Union budget with a contribution of 0.002% of its GDP, to be reduced if it replaces part of the number foreseen for it.[35]

[35] L. Di Fabio, *Il sistema europeo comune di asilo (SECA): una critica all'istituto dell'asilo a livello dell'UE,* in *Europeiunite,* 22 febbraio 2016.

The initiative of the European Commission presents undoubted strong points, because it goes beyond the logic of emergency and makes the principle of solidarity enunciated in the art. 80 of the TFEU concrete, establishing a sharing of responsibilities between the Member States. However, it appears to be an insufficient answer. The problems posed by the migratory flows affecting Europe require, in fact, more courageous responses and certainly a greater effort than that deriving from proposals aimed at making specific and precise changes to the Dublin III Regulation.

Furthermore, the reform proposal presents a general tightening of the already established criteria and rules, above all to counteract secondary movements: the obligations of applicants for international protection and the consequent sanctions in case of non-compliance are clearly established, including the possible exclusion from reception system.

However, the Commission proposal has led to numerous critiques from jurists and organizations advocating the rights of migrants and refugees. In October 2016, the European Council for Refugees and Exiles(ECRE) published a detailed review[36] of the reform defining it "all but reasonable" and urging the European Parliament to change it in order to make it more respectful of the fundamental rights of asylum seekers. According to ECRE, the Dublin Regulation's reform proposal presents two main characteristics of concern. On the one hand, instead of rethinking the fundamentally incorrect principles underlying the European Union's mechanisms to determine the responsibility of the Member State responsible for examining an asylum application, the proposed amendments reinforce many of the wrong premises of this mechanism. With some limited exceptions, applicants are faced with stricter and unfair rules, including strong sanctions to contrast secondary movements, limitations of the right to an effective asylum procedure, and the possibility of seeing their application rejected because of a transfer from one State to another. Member States, on their part, see the inequalities in the distribution of very exasperated responsibilities: the States of first arrival should carry out assessments of admissibility and merit before even applying the Dublin Regulation, and would have no means for enforcing their obligations when a member country does not respect the terms of the transfer of an applicant.

The proposal presents an insufficient and inefficient redistribution mechanism within which the disparity between States continues to be a key factor in the European system of responsibilities distribution. In order for it to be understood and applied correctly the Dublin System must be able to protect both the rights of States and those of asylum seekers.

[36] ECRE Comments on the Commission Proposal for a Dublin IV Regulation, COM(2016) 270, October 2016.

The Commission's proposal does not face the main reason for the failure of the current legislation: entrusting the management of the migratory phenomenon to geography, establishing a relationship between the country of first entry into the European Union and its responsibility in examining the application. Finally, it is necessary that a principle of solidarity and fair sharing between the different countries should intervene from the moment when an applicant enters the country of first entry and not only into a situation of particular suffering in that country. This breakdown should take place taking into account the connection factors between the asylum seeker and a given country, a criterion now limited to the existence of close family ties and, in practice, scarcely applied.

For these reasons, ECRE urges the legislators to adopt a review of the entire Dublin system and to go beyond the bland reform proposals of the Commission.

5. THE EUROPEAN PARLIAMENT POINT OF VIEW: THE EMENDED REFORM.

On 16 November 2017, the European Parliament, in examining the first reading of the Commission's proposal, adopted numerous amendments, eliminating or improving some of the controversial points of the text.[37]

The criterion of the country of first arrival is exceeded with the introduction of an automatic transfer system with a fixed distribution method, no longer conditioned to exceed 150% of the quota considered sustainable for the State.[38] In fact, the report proposes to trigger the corrective redistribution mechanism when the reception capacity of a State is exceeded, and grants a transitional period of five years for countries with less experience in receiving asylum seekers.[39]

One point on which all the parliamentary groups agree is that it must not be possible to get out of the solidarity system. In fact, the report eliminated the possibility of paying a sum for any unaccepted asylum seeker.[40] In this regard, the rapporteur, Cecilia Wikstrom[41], stressed that it is unacceptable to assign a price to human beings seeking international protection, while observing the hostility of some governments towards the principle of equitable and compulsory division of asylum seekers.

Furthermore, the report states that the choice of the transferring country should take place on the basis of the enhancement of the social ties between the

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[37] *Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (recast)(COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)).

[38] Amendment no. 167 Report of the European Parliament, 2 November 2017.

[39] The first year would receive 20% of their share, the following year 40% and so on.

[40] Amendment no. 178 Report of the European Parliament, 2 November 2017.

[41] Swedish MEP, part of the parliamentary group of the Alliance of Liberals and Democrats for Europe.

applicants and the destination country: family ties, extended to adult children in charge of parents, brothers and sisters, having taken a course of study in a country or even having lived there should be taken into account when choosing the State to transfer the request for international protection. The transfers of people, even when it comes to extradition or expulsion, tend to be always very difficult to achieve, even more so when they should concern tens of thousands of people. This is why the voluntary acceptance of applicants for international protection is essential and the Parliament's proposal to introduce additional criteria that enhance links with the competent State goes in the right direction.[42] While arguing, like the Commission, that asylum seekers do not have the right to choose which State to apply for, the Parliament offers the possibility of expressing preferences. Without being revolutionary, the proposal opens a window into a coercive system that treats asylum seekers as pawns to be moved across Europe.

Finally, the proposal eliminates the admissibility check of asylum applications[43] which would create an insurmountable administrative burden for frontline States and sanctions for insubordinate asylum seekers.

At the same time it reintroduces the discretionary clause, which allows a Member State to decide to examine an asylum application even if the Dublin Regulation does not provide for it.[44]

However, the agreement between the European Parliament and the Council, imposed by the ordinary legislative procedure, will be difficult to achieve. The discussions already under way in the Council are totally disconnected from the Commission proposal and the Parliament amendments. Member States are aiming for solutions to prevent solidarity from becoming mandatory and leaving everything in the hands of the Council.

On 26 May 2016 the Asylum Working Party[45] started reviewing the Commission proposal for a reform of the Dublin III Regulation. The Council recognized the need to reform the current Dublin System to ensure a faster and more efficient determination of the Member State responsible and a prevention of secondary movements. However, the discussion has not yet come to an end. The most controversial factor in the reform is the reinforcement of the principle of solidarity and responsibility of the Dublin system. Some countries proposed alternative amendments, clearly in contrast with the Parliament's view. For example, in February 2018 the Hungarian government proposed a more strict expulsion policy and a rejection of any kind of mandatory admittance quota. In

[42] C. Favelli, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo,* in *Questione Giustizia,* February 2018.

[43] Amendment no. 52 Report of the European Parliament, 2 November 2017.

[44] Amendment no. 67 and 125 Report of the European Parliament, 2 November 2017.

[45] The Council preparatory body responsible for issues relating to the CEAS.

addition, several Member States suggested a reduction of the "fare share"[46] and an alleviation of procedural burdens for the frontline Member States under pressure.

In May 2018 a proposal was submitted to the JHA Council for a debate. As it became known, the ECRE immediately underlined that the proposal represented a deterioration of the rights of refugees and asylum seekers, while making the system too complex, with a set of different, partly overlapping procedures in different Member States.

At the European Councils of June 2018, October 2018 and December 2018, the EU leaders were not able to achieve any final decision on internal aspects of migration and the European Union asylum policy, showing different position among Member State as regards in particular the Reform of the Dublin Regulation.[47]

Faced with these two clearly different positions, the Commission, as underlined by Elena Schlein[48], should have claim its political role, proposing an ambitious solution, overcoming the criterion of the State of first entry and a real mechanism of redistribution, but it did not. Once again it seemed more attentive to the wishes of the Council than actually solving the problems that have always existed and which have become evident after the recent increase in migratory flows to Europe.

CONCLUSION

The solidarity that has been achieved so far has been a defensive solidarity, characterized by a rhetoric based on the anxiety of invasion that has meant that the humanitarian aspect of the phenomenon has been regulates the secondary role compared to the issues related to security and control of borders.

It should be also noted that the real possibility of achieving an effective reform of the system in question seems to be impeded by the lack of interest in the adoption of rules which really allow the full sharing of responsibility among all Member States in the management of asylum seekers, as well as a full protection of their fundamental rights, still appearing as a primary objective to contain as much as possible a phenomenon that is hardly contained in practice.

Beyond the possible solutions to effectively replace the Dublin system, it is evident that the real European challenge currently concerns the entire asylum system, which will hopefully become common not only in its intentions and principles but also in rules and practice.

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[46] Number of applicants that each Member States could be expected to hande.

[47] A. Radjenovic, *Briefing of the adoption of Legislation by EP and Council,* European Parliament, March 2019

[48] Italian MEP of the parliamentary group Progressive Alliance of Socialists and Democrats in the European Parliament.

Secondly, an aspect which runs counter to the protection of the fundamental rights of applicants for international protection and which represents a further weak point of the current Common European Asylum System is that of the measures to combat immigration. The actions undertaken in this context show a central role of the Member States along the external borders of the Union, which are more exposed to migration flows, particularly the southern border. This model is characterized by the development of tools for cooperation with countries of origin and transit of flows aimed at fighting immigration. Through these policies, Member States try to overcome the problem of the vulnerability of their borders through an anticipation of the control activities, which takes the form of an outsourcing of surveillance measures. Given that the instruments of cooperation do not provide adequate guarantees to protect the asylum seekers, the impact of the externalization of border controls in terms of access to international protection appears to be very significant: indeed, through this policy, there is the establishment of substantial barriers on the borders of the European Union and as a result the application for asylum is hindered. This consideration is confirmed by the fact that in the presence of certain measures aimed at preventing the entry of illegal immigrants, there is a decline in the applications for protection.

Finally, outside the European Union, the true reform of the Dublin Regulation presupposes the establishment of protected humanitarian channels and mechanisms to manage the applications for international protection outside the European territory. The prediction of a so-called Protected Entry Procedures[49] would allow a number of benefits to be achieved: to significantly lighten third States that are more responsible for the reception of asylum seekers and refugees, whose implosion could trigger other and much more serious crises; to enable those entitled to reach the Dublin space safely; to fight against the transnational organized crime that profits from the trafficking of migrants and of human beings; to contain the indistinct flows, considering that a large number of applications for international protection presented in the European Union are unfounded; to achieve a better use of the existing public resources, both from the States and from the Union.

It is difficult to say whether these or other proposals will meet the favor of the Member States. The signals are not encouraging. The number of States that restored border controls is on the rise, invoking the derogation provided for by the Schengen Agreements. Above all, from the examination of the practice, it emerges

[49] The Protected Entry Procedure is defined as "an overarching concept for arrangements allowing a non national to approach the potential host State Outside its territory with a claim for asylum or other form of international protection and to be granted an entry permit in case of positive response to that claim, be it preliminary or final". G. Noli, J. Fagerlung, F. Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure , Final Report*, the Danish Centre for Human Rights, European Commission, 2002.

that the EU's immigration and asylum policy is essentially focused on two complementary lines: the securing of external borders, to prevent illegal crossing, and the assistance to third countries that host subjects in need of international protection. However, the Union action risks appearing as not effective and not credible. On the one hand, the tightening of the measures against irregular immigration does not produce the expected results, appears to be unsustainable economically and involves exorbitant human costs. On the other hand, the cooperation with third States represents the mentioned desire of the Member States to externalize the control of migratory flows outside European territory, limiting access to the European borders of foreigners who, in principle, should benefit from the right to cross them. This practice is the demonstration that today the States, in order to solve a problem that seems to be now unmanageable without a rethinking of the whole immigration and asylum system, are willing to pay to stop a wave of migration perceived as unacceptable.

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