

EL ASILO CONFINADO **129**

ACCESO A LA PROTECCIÓN INTERNACIONAL Y LA ACOGIDA EN LA ERA COVID-19

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The European asylum regime's pre-pandemic coercive trajectory is consolidated

La consolidación de la trayectoria coercitiva del régimen europeo de asilo hasta la pandemia

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Abstract: How have European asylum policies developed during the COVID-19 pandemic, from the perspective of the long-term political trajectory of the European asylum regime? When the pandemic broke out, EU member states had for three decades been trying to resolve the shortcomings of the 1990 Dublin Convention. The weaknesses in the regime persisted both due to the overloading of frontline member states and the efforts to control secondary flows of asylum seekers within the EU. The pandemic has provided neither a hiatus nor a turning point in this regard but has produced a fluid situation that precipitated the United Kingdom's withdrawal and the consolidation of the long-term trend of coercion of asylum seekers, between member states and at their external borders.

Keywords: asylum, Council of the European Union, Dublin Convention, frontline member states, pandemic, refugees, relocations, COVID-19

Resumen: Desde la perspectiva de la trayectoria política a largo plazo del régimen europeo de asilo, ¿cómo se han desarrollado las políticas de asilo en Europa durante la pandemia de la COVID-19? Cuando esta estalló, los estados miembros de la UE llevaban tres décadas intentando sin éxito resolver las deficiencias del Convenio de Dublín de 1990, las cuales persistieron tanto por la sobrecarga de los estados miembros de primera línea como por los esfuerzos por controlar los flujos secundarios de los solicitantes de asilo en la Unión. Así, la pandemia no ha supuesto al respecto ni un paréntesis ni un punto de inflexión, sino más bien ha generado una situación fluida que ha precipitado la retirada del Reino Unido y la consolidación de la tendencia coercitiva a largo plazo hacia los solicitantes de asilo, entre los estados miembros y en sus fronteras exteriores.

Palabras clave: asilo, Unión Europea, Convenio de Dublín, estados miembros de primera línea, pandemia, refugiados, traslados, COVID-19

After the pandemic arrived in Europe in March 2020, a series of measures affected asylum seekers. The pandemic was seen as a short-term event in which special rules should apply. The drastic reduction in mobility to stem the number of infections and the temporary closure of asylum centres had significant effects on those seeking international protection, but, after a few months, with the pandemic receding, normal procedures were supposed to resume gradually. Yet, this article makes the radically new argument that the steps EU states and institutions have taken with regard to asylum seekers during the pandemic have completed the long-term trajectory of asylum policies in Europe.

This article offers insights into those steps by connecting them to this long-term trajectory. EU institutions refer to the policies addressing asylum seekers at the EU level as the “Common European Asylum System”, but the “European asylum regime” is conceptually more accurate. The concept encompasses various EU legal instruments for allocating asylum seekers to specific EU member states and for attempting to unify member states’ asylum standards and procedures. The groundwork for this research took place within the Horizon 2020 research project EU IDEA (Comte, 2020a).¹ The analysis relies on primary documents from EU institutions – mainly the Council and the Commission – government and NGO reports and four interviews conducted in spring 2020 with asylum policy experts posted in Brussels from Germany, Italy, Sweden and the United Kingdom.² All four countries have been prominent actors in the trajectory of the European asylum regime.

This investigation will show that a long-term shadow hangs over the issue of asylum seekers in the EU. Each member state has warily maintained its standards and procedures and aimed to reduce its number of asylum seekers, despite forming part of an area in which people can move easily between member countries because of the absence of internal border controls (Lavenex, 2001: 857, 865, 868; Cherubini, 2014: 254). Member states have attempted to overcome this contradiction by taking a coercive approach in their asylum policies, which is at odds with the goals of such policies (Juss, 2005: 766–7; Heijer et al., 2016). This article will detail this coercive trend and show that the pandemic has provided neither a hiatus nor a turning point. During the health crisis, states have employed greater coercion towards asylum seekers, using

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1. EU IDEA – Integration and Differentiation for Effectiveness and Accountability, funded by the European Union’s Horizon 2020 Research and Innovation Programme under Grant Agreement No. 822622, <https://euidea.eu>.
 2. See annex 1 at the end of the article.

swifter return procedures or their forced reallocation to certain member states. They have also used more coercion between each other in the application of stringent relocation mechanisms. In fact, the pandemic has seen the long-term trend towards coercion become consolidated.

To understand the culmination the pandemic brought about, we must return to the long-term predicament around asylum seekers in EU affairs. This article follows a thematic structure to present the three forms of coercion that have emerged. The first section starts with the shortcomings of the common rules as soon as the issue entered the EU policy field and the migration pressure that has stiffened interstate tensions since then. This has made the role of frontline member states critical, and in the second section the article describes the coercion that has resulted between member states. The problematic situation has also led to secondary movements of asylum seekers between member countries and in the third section the article presents the coercion of asylum seekers that has emerged. The fourth section expands on the unstable situation within the EU that these trends have created and on the resulting coercion at external borders. After this presentation of the different facets of the predicament and of the various forms of coercion that have emerged, the fifth and final section capitalises on this long-term perspective to show the adjustments made to each of these three forms of coercion during the pandemic.

During the health crisis, states have employed greater coercion towards asylum seekers, using swifter return procedures or their forced reallocation to certain member states. They have also used more coercion between each other in the application of stringent relocation mechanisms. In fact, the pandemic has seen the long-term trend towards coercion become consolidated.

Migration pressure and the shortcomings of the common rules

In the late 1980s, European Community member states negotiated over third-country nationals' movement as they contemplated abolishing internal border checks to boost their internal market (Comte, 2020a: 5–8). Because removing controls within Europe meant third-country nationals, including asylum seekers, would be able to move across borders more easily once in Europe, the member states tried to define a common approach.

The rights granted to asylum seekers to access the labour market differed and their applications were processed using different procedures and criteria (Poptcheva and Stuchlik, 2015; Interview 4, 2020, see annex 1). There were vast discrepancies between refugee status recognition rates for the nationals of the same countries of origin (ECRE, 2008; Heijer et al., 2016: 609, 627). This heterogeneity made creating a harmonised set of rules a difficult task. The substantial migration pressure of the late 1980s and early 1990s was an additional factor that made more extensive cooperation unlikely (Joly, 2005: 4).

By the time the member states signed the Dublin Convention on asylum seekers on 15 June 1990, they had failed to define a common approach. Instead of harmonising, the Convention simply determined a way to allocate each asylum seeker to one member state and thereby avoid multiple applications. The criteria that emerged concerned whether a member state had already granted a family member of the applicant refugee status (article 4) or had issued the applicant with an entry visa or a residence permit (article 5); whether the applicant had reached the Community by irregularly crossing the border of that member state (article 6); or whether the asylum seeker had lodged the application for the first time in that member state (article 8) (Comte, 2018: 154).³

The last two criteria would place responsibility on southern members, through whose borders a rising number of asylum seekers were entering the Community, even though most aimed for the more prosperous north-western European countries. Greece, Italy and Spain were aware of the risk before signing the Dublin Convention. In March 1990, Spain criticised a scheme that would, in its view, force border states to become fortresses because of their contiguity to sensitive countries or illegal immigration channels.⁴ But the three Mediterranean states found themselves obliged to back down as France, Germany and the Benelux countries had begun separate negotiations to create the borderless internal market. The fear of being left out ultimately led Greece, Italy and Spain to accept the criteria (Comte, 2020a: 8).

3. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention. *Official Journal* C 254, 19/8/1997, p. 1–12. See the version currently in force: Regulation (EU) No 604/2013 of 26 June 2013, OJ L 180, 29/6/2013, p. 31–59, chapter III, articles 7–15.

4. Archives centrales du Conseil de l'Union européenne, Brussels (ACCUE). CM2 WGI 77.5. Observations de la délégation espagnole sur le régime prévu dans la Convention déterminant l'État responsable de l'examen d'une demande d'asile, 14/3/1990.

After the large waves of migration from central and eastern Europe in the 1990s and early 2000s, the main migration routes bringing asylum seekers towards the EU came from the Middle East and North Africa. Hence, the application of Dublin rules assigned greater responsibility for asylum applications to Greece, Italy and Spain, which became “frontline member states”. In practice, the last criterion in the Dublin Convention became the most important: the responsibility for most asylum seekers lay with the member state where they had lodged their first applications.⁵ Transfers of asylum seekers between member states have involved only a small minority of asylum requests and have aimed primarily at returning migrants to the countries where they had entered the EU or lodged their initial applications. Between 2008 and 2014, this was the case for 73% of Dublin transfers. In only 27% of transfers did member states seek to send asylum seekers to other countries because, for example, they had relatives in those countries.⁶

Revolutions in North Africa and the Middle East and civil wars in Libya and Syria from 2011 onwards brought new waves of asylum seekers towards the EU, entering predominantly through Greece and Italy. In 2015 and 2016, 1.4 million irregular immigrants reached the EU, in the vast majority across the Mediterranean and mostly between April 2015 and March 2016.⁷ This inflow contributed to a significant increase in asylum applications in the EU in both years, reaching about 1.2 million annually – versus 600,000 in 2014 and 400,000 in 2013.⁸ Even though the numbers of irregular crossings and asylum applications receded in the following years, 75% of first asylum applications in the EU in 2018

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5. 1) Economic and Social Committee. Opinion on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application. CES 352/2002 EN/o. 20/3/2002. 2) European Commission. Proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. COM (2016) 270 final. 4/5/2016.
 6. COM (2016) 270 final.
 7. UNHCR. Mediterranean Situation, (online). [Accessed on 4/2/2022]: <http://data2.unhcr.org/en/situations/mediterranean>.
 8. Eurostat, Asylum applications (non-EU) in the EU Member States, 2008–2020, (online). [Accessed on 3/2/2022]: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics.

took place in only five countries, among which figured the three Mediterranean member states.⁹

To better grasp the problem, in the following sections we will analyse national positions as expressed in Council debates. Only through such analysis we can highlight the incompatibility between member states' positions that has resulted in various forms of coercion.

Coercion between member states

The efforts to alleviate the burden on frontline member states largely failed due to the incompatibility of national positions. Frontline member states regularly suggested that Dublin rules led them to take on a disproportionate share of asylum applications in the EU. In their view, irregular entry via one member state's borders or the lodging of the first asylum application with one member state should not constitute the primary criteria for allocating asylum applications. In such a situation, merely controlling their borders would lead frontline member states to take responsibility for most asylum applications. Italy considered that "Member States' duty to guard their borders should not be confused with determining the Member State responsible for examining an asylum application".¹⁰ Greece and Italy wanted less importance to be given to whether migrants had crossed the EU's external border when allocating asylum applications. They wanted to "avoid penalising member states due to their geographical situation".¹¹ By contrast, France and Belgium repeatedly considered that "irregular entry should take precedence" in the hierarchy of criteria.¹² The conflicts between member states over distribution ended up with the status quo prevailing. In the successive recasts of the Dublin Convention, the irregular crossing of the EU's external border continued to be the main criterion for

9. Eurostat, Base Migr, Demandeurs et primo-demandeurs d'asile par nationalité, âge et sexe – données annuelles agrégées (arrondies) [migr_asyapctza], <https://ec.europa.eu/eurostat/fr/data/database>.

10. EU Council. Outcome of proceedings of Asylum Working Party on 1 and 2 October 2001. 12501/01. 10/10/2001 (online). [Accessed on 3/2/2022]; <https://data.consilium.europa.eu/doc/document/ST-12501-2001-INIT/en/pdf>

11. EU Council. Outcome of proceedings of the Strategic Committee on Immigration, Frontiers, and Asylum on 23 and 24 May 2002. 9305/1/02. 25/6/2002.

12. EU Council. 1) Presidency note to JHA Council on 14–15 October 2002. 12616/02. Annexe II. 8/10/2002. 2) Presidency note to the Strategic Committee on Immigration, Frontiers, and Asylum / Coreper. 13596/02. Annex I. 31/10/2002.

allocating asylum applications, with Article 10 of Regulation 343/2003 of 18 February 2003 (Dublin II) and then Article 13 of Regulation 604/2013 of 26 June 2013 (Dublin III, currently in force).¹³

Italy's primary goal has been to extend the family reunification criterion (Interview 2, 2020). While this criterion appeared first in the Dublin Convention, in practice it had little importance. The reason for this was the narrow definition of family links in the Convention and the fact that this criterion applied only when the family member was a refugee. Greece and Italy wanted to extend the definition to include "the spouse, father or mother, or a child, a brother or a sister" as family members.¹⁴ Also, whenever the family member of the asylum seeker resided legally in a member state, they argued, that member state should be responsible for examining the asylum application. The Netherlands, too, accepted a broader definition of family links, as well as going beyond the group of refugees, strictly speaking, to include family members benefitting from another form of protection. For Italy and Greece, only the "desire" of the applicant to be reunited with their family member should count, whereas other member states considered that both the applicant and the family member should agree.

France, by contrast, wanted to keep the definition narrow to avoid receiving more asylum seekers. Germany initially opposed attempts to consider all individuals under 18 years of age "unaccompanied minors" and tried to lower the age limit below 18.¹⁵ However, it ultimately accepted the age limit of 18 for unaccompanied minors in order to alleviate the pressure on frontline members.¹⁶ In a restrictive turn following French proposals, the agreement limited the family to the spouse or possibly partner, unmarried and minor children, or, when the applicant was minor or unmarried, the father, mother or guardian. It did not include siblings. The family member should have refugee status or a pending application, and both the applicant and the family member should agree to family reunification.¹⁷

Frontline member states also tried to offload asylum applications to other member countries where an asylum seeker had stayed irregularly for some time.

13. OJ, 1) L050, 25/2/2003, p. 1-10, 2) L 180, 29/6/2013, p. 31-59.

14. For this paragraph: EU Council. 1) Outcome of proceedings of the Strategic Committee on Immigration, Frontiers, and Asylum on 23 and 24 May 2002. 9305/02. 28/5/2002. 2) 9305/1/02.

15. EU Council, 12501/01.

16. Art. 2(h), OJ L 50, 25/2/2003, p. 1-10. Art. 2(i) and (j), OJ L 180, 29/6/2013, p. 31-59.

17. Art. 2(i), 7, and 8, OJ L 50, 25/2/2003, p. 1-10. Art. 2(g), 9, and 10, OJ L 180, 29/6/2013, p. 31-59.

France opposed the idea that an irregular stay in a member country could transfer responsibility for an application.¹⁸ Frontline member states also advocated that six months after a third-country national had crossed their borders from a third country, they should no longer be responsible for the asylum application. The UK agreed to 18 months, France, Germany and the Benelux countries 24.¹⁹ Non-frontline member states made some concessions to safeguard the internal market. Where it was established that an asylum seeker had lived continuously for at least five months in the territory of a member state before lodging the asylum application, that member state would be responsible. There was no mention, however, of an irregular stay. The member states also agreed that after a period of 12 months the irregular crossing of the EU's external border meant the frontline member state was no longer responsible for the application.²⁰

The continuous pressure on frontline member states led to discussing other criteria for transferring some asylum applications to other member states. Italy and Greece argued that it should not be possible to return an applicant suffering from a severe health problem.²¹ Greece considered that the member states should produce “verifiable evidence ... that the applicant [had] entered the country via the border of a particular Member State” to be able to return them.²² Greece, Italy, Spain and Portugal, this time joined by Austria and France, considered that Dublin criteria should not apply to a request for international protection based on criteria other than the Geneva Convention. Germany, the Netherlands, the UK, Sweden and Finland shared the opposite view.²³ In an effort at conciliation, Dublin II and III set out the proof or circumstantial evidence required to return asylum seekers.²⁴

As we have seen, the incompatibility of various national positions created a deadlock, which is fundamental to understanding the asylum predicament in the EU. These issues often pitted France and northern countries against Italy and other southern countries, with Germany attempting to show signs of compromise to safeguard the internal market. Nevertheless, frontline

18. EU Council, 9305/02 and 9305/1/02.

19. EU Council. Presidency note to JHA Council on 28-29 November 2002. 14651/02. Annex I. 25/11/2002.

20. Art. 10, OJ L 50, 25/2/2003, p. 1-10. Art. 13, OJ L 180, 29/6/2013, p. 31-59.

21. EU Council, 12501/01.

22. EU Council. Outcome of proceedings of Asylum Working Party on 20 and 21 March 2002. 6485/02. 26/3/2002.

23. EU Council. Outcome of proceedings from the Strategic Committee on Immigration, Frontiers, and Asylum and from Coreper on 5 and 7 November 2002. 13915/02. 8/11/2002.

24. OJ, 1) Art. 18(3), L 50, 25/2/2003, p. 1-10, 2) Art. 22(3), L 180, 29/6/2013, p. 31-59.

member states endured constant coercion to take in asylum seekers. From 2004 onwards, EU enlargements to central and eastern Europe transformed the confrontation. The presence of a third group of member states with a lower level of power created the irresistible temptation to coerce them into absorbing a growing proportion of asylum applications.

Things came to a head in the 2015 migration crisis. As the number of asylum seekers escalated in Greece and Italy throughout the spring and summer, the member states attempted to relieve frontline members of some asylum seekers by transferring 160,000 to other countries. Denmark, Ireland and the UK used their opt-outs in asylum cooperation to avoid taking part in relocation decisions (Heijer et al., 2016: 614).²⁵ This withdrawal meant the transfers would rely even more on central and eastern European countries. Even though the Czech Republic, Hungary, Romania and Slovakia voted against the scheme in the Council, a qualified majority outvoted them. Several central or eastern European member states then applied the resulting relocation decisions only minimally or did not apply them at all (Comte and Lavenex, 2021: 16). In 2017, the European Commission launched an infringement procedure against the Czech Republic, Hungary and Poland for failing to implement the scheme (Goldner Lang, 2020).²⁶ After the coercive allocation of asylum seekers to frontline members under French pressure, the equally coercive relocation of some asylum seekers to new countries of immigration in central and eastern Europe had come to fruition by the time of the recent migration crisis.

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25. COM (2016) 270 final.

26. "Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland." Press release, 14/6/2017 (online). [Accessed on 3/2/2022]: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1607. See final judgment, Judgment of the Court (Third Chamber) in Joined Cases C-715/17, C-718/17 and C-719/17, Actions for failure to fulfil obligations under Article 258 TFEU, brought on 21 and 22 December 2017, 2/4/2020.

Coercion of asylum seekers

In parallel to the conflicts over distribution and the resulting coercive measures for allocating asylum seekers, the incompleteness of EU asylum rules caused another set of problems to emerge due to the desire of asylum seekers to reach countries other than those to which Dublin rules assigned them. The persistent heterogeneity of national asylum rules to some extent explains this, with migrants seeking to apply for asylum in the countries offering the best chances of success in the shortest amount of time. From the member states' point of view, secondary movement complicated the issue of allocating asylum seekers to specific countries. As a result, the member states set about gradually harmonising their asylum legislation (Comte, 2020a: 10–13). Here again, it is important to review member states' contrasting positions as expressed within the Council in order to grasp the depth of the problem.

Negotiations were arduous over the drafting of a common list of safe third countries from which any asylum applicants would be denied refugee status. In the absence of such a list, asylum seekers had better prospects in certain member states than others. It was an issue that set the most northern member states – Finland, Sweden, the UK and Ireland – against the other member states – even though France adopted contradictory positions. The latter group, affected by direct inflows or secondary movements, favoured a common list of safe third countries. By contrast, the most northern member states had little interest in transferring their regulatory power on this issue to the European level.²⁷ Ultimately, the efforts failed and there is still no common list of safe third countries (Interview 1, 2020).

Another way to prevent secondary movements was to meet asylum seekers' needs more homogeneously. In 2004, the Council established the European Refugee Fund with this objective. It became the Asylum, Migration and Integration Fund in 2014. Between 2014 and 2020, the fund operated with a budget of nearly €7 billion. Its action, however, went beyond improving the situation of asylum seekers in frontline countries. The fund paid for relocation expenditures and allocated states a lump sum for each person

27. EU Council. 1) Presidency note to Asylum Working Party on 12 June 2003. 10064/03. 4/6/2003. 2) Outcome of proceedings from Asylum Working Party on 12 June 2003. 10456/03. 19/6/2003. 3) Note from the Presidency to the Asylum Working Party on 4 and 5 September 2003. 11575/03. 31/7/2003. 4) Note from the Presidency to the Asylum Working Party on 16 and 17 September 2003. 12281/03. 11/9/2003.

relocated to their territory (Baumgartner and Wagner, 2018: 8). As a result, the fund primarily benefited the non-frontline member states from north-western Europe.²⁸

Those conditions offered asylum seekers few positive incentives not to engage in secondary movements. As a result, European states started to resort to coercive methods. As early as the late 1990s, they decided to fingerprint all irregular migrants whose identity they could not establish with certainty and to share this information with each other in order to monitor the movements of asylum seekers (Mainwaring, 2019: 38). In 2000, they created the European dactylographic system or Eurodac,²⁹ a database to help identify whether a member state had previously registered an asylum seeker and received their asylum application. This instrument would help return the asylum seeker to the appropriate country.

In Rodaan Al Galidi's novel *Two Blankets, Three Sheets*, the narrator Samir Karim recounts his unsuccessful attempts to flee the Netherlands, where he had lodged his asylum application after reaching Europe via Amsterdam Schiphol Airport (Al Galidi, 2020). His asylum application in the Netherlands took years, and the way Dutch services handled it gave him little hope of a positive outcome. He tried to flee the country to apply for asylum in Germany and, before embarking on the journey, he placed his fingerprints in liquid cement a few times a day to change his skin. Despite the acute pain of the dry skin, he was glad to see his lines becoming thicker. After reaching Germany on a local train, the German police returned him to the Netherlands because, after reading his fingerprints, they discovered that the Netherlands had already registered his application for asylum. He fled again to Norway, which "didn't cram hundreds of people into a single building," and where "the Foreigners' Police were more friendly, Social Services were easy-going, sick people received proper care." This time, he put glue on his fingers to make his fingerprints unrecognisable. After he reached Norway, a Norwegian police officer took two hours with his fingers and was able finally to access his record in both the Netherlands and Germany. Samir realised he "didn't stand a chance anywhere outside the Netherlands, and [his] fingerprints made the Netherlands [his] entire world." Coercion worked in his case, despite his determination to move.

28. European Commission. Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010. SEC (2004) 161. COM (2004) 102 final. 12/4/2004.

29. Regulation (EC) No. 2725/2000. OJ L316, 15/12/2000, p. 1-10.

Coercion at external borders

The deadlock over allocating asylum seekers among member states and preventing secondary movements created a precarious situation, the only solution to which appeared to exert greater coercion at external borders. The pressure on frontline member states led them to tighten their border controls, creating the risk of denying migrants the opportunity to lodge asylum applications. An early episode of heightened tensions occurred from October 2004 to March 2005, when Italian authorities expelled vast numbers of migrants from the Italian island of Lampedusa to Libya, then under Muammar Gaddafi's rule. They did not grant the UN High Commission for Refugees (UNHCR) access to the reception centre in Lampedusa, and the

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UNHCR condemned the return on 17 March 2005 of 180 people to Libya – a country it did not consider safe for asylum seekers. It doubted that the Italian authorities had taken the necessary precautions under international asylum law.³⁰

This situation led to an acrimonious debate in the European Parliament in Strasbourg on 14 April 2005. Examining it will help us understand how, as the distribution of asylum seekers pitted member states against each other, they were nevertheless all embarrassed by the resulting situation at the southern border. Following an attack by the Catalan Member of the European Parliament (MEP) Raül Romeva i Rueda, the right-wing Italian MEP Luca Romagnoli expressed his “strong outrage ... at the vile attempt to offend Italy's national dignity”. Cypriot MEP Marios Matsakis compared Lampedusa to “a bloodstain of shame for the Italian Government ... the Commission and the Council”. French MEP Martine Roure questioned the “respect for the right to asylum and the Geneva Convention” by Italian authorities. According to her, “we cannot be certain that genuine asylum seekers have not been sent back to dangerous situations”. As for German MEP Bernd Posselt, he advocated “sharing the burden between the member states and bringing their standards

30. European Parliament. Preparatory documents to the resolution on Lampedusa. Debates. P6_TA(2005)0138. 14/4/2005 (online). [Accessed on 3/2/2022]: https://www.europarl.europa.eu/doceo/document/CRE-6-2005-04-14_EN.html#creitem31.

for refugees and asylum seekers into line”, arguing that what the member states “needed most of all was fixed quotas in order to share the burden”.³¹

For those migrants that managed to enter the EU, reception centres in frontline member states were on the verge of collapse, generating even more human rights condemnations. In 2006, Human Rights Watch labelled detention conditions in frontline member states intolerable (Human Rights Watch, 2006). In January 2011, the European Court of Human Rights ruled that the member states of the Dublin system should not return asylum seekers that escaped from Greece, given the horrific living conditions in Greek asylum centres, where applicants slept in overcrowded, rat-infested facilities while awaiting decisions on their claims for indefinite periods (Könner, 2018: 39; Tribune de Genève, 2016).³² The ruling thus suspended the application of Dublin rules to Greece.³³ In February 2016, the European Commission addressed a recommendation to Greece to take measures that would allow Dublin transfers to be resumed.³⁴ Yet, the situation did not improve. In October 2017, Human Rights Watch categorised asylum seekers’ living conditions on Greek islands as “abysmal” (Human Rights Watch, 2017). In September 2019, Médecins Sans Frontières (2019) accused Greek and EU authorities of deliberately neglecting people trapped on islands. One month later, the Commissioner for Human Rights of the Council of Europe called upon the Greek government to evacuate asylum seekers from the Aegean Islands to the mainland to improve their living conditions (Arnoux-Bellavitis, 2020: 8-9).

As for the regulatory framework to allocate asylum seekers to member states, the Commission concluded in May 2016 that “the entry into force of the Dublin III Regulation in 2014 has made it harder for the member states to reach consensus on the responsibility”.³⁵

In those circumstances, European governments reverted to the default strategy of tightening external borders. The European Border and Coast Guard Agency – meant to help frontline member states control the EU’s external border –

31. European Parliament, P6_TA(2005)0138.

32. “Des enfants migrants enfermés par centaines.” *Tribune de Genève*, 12/9/2016. <https://www.tdg.ch/monde/enfants-migrants-enfermes-centaines/story/29870285>.

33. European Court of Human Rights. Case of MSS v. Belgium and Greece (Application No. 30696/09). Judgement. 21/1/2011.

34. European Commission, DG Home. Recommendation to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013. C(2016)871. 10/2/2016.

35. COM (2016) 270 final.

has existed in various formats since 2004,³⁶ and came to include rapid border intervention teams.³⁷ The member states also increased funding steadily to enforce the return of those whose asylum applications they rejected (Slominski and Trauner, 2018: 107). The plan established in 2015 was to increase the agency's budget to €239 million in 2016 and then gradually up to €322 million in 2020.³⁸ The proportion of returns implemented against return decisions increased from 39.5% in 2011 to 46.4% in 2016.³⁹

Far from solving the problem, restrictions at the southern border worsened it, culminating in the humanitarian disaster of the 2015 migration crisis, when nearly 6,000 migrants lost their lives at sea in 12 months (Könner, 2018: 1). Social scientist Cetta Mainwaring (2019: 9) gave an affecting description of the deaths at sea: "The bodies of the drowned are sometimes retrieved from the sea by fishermen

The EU-Turkey statement was part of a broader strategy of externalising migration controls to stop migrants as early on their route to Europe as possible and avoid scandals at European borders.

and other mariners or wash up on beaches days later. Brown bodies are bleached white by the sun and sea salt. Eyes are gouged out by seagulls".

Such a tragedy did not lead the member states to adopt a different approach but to strengthen their

restrictive policies. In March 2016, the EU-Turkey statement ended the crisis by arranging for Turkey to take back all new irregular migrants or asylum seekers crossing from Turkey to the Greek islands whose applications EU states declared inadmissible.⁴⁰ The move was part of a broader strategy of externalising migration controls to stop migrants as early on their route to Europe as possible and avoid scandals at European borders. In short, it was a way for EU member states to evade their obligations towards asylum seekers (Müller and Slominski, 2020). Here are a few cases. In 2013, the EU had launched the European Union Integrated Border Management Assistance Mission in Libya with a budget of

36. Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders. OJ L 349, 25/11/2004, p. 1-11. 2) Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard. OJ L 251, 16/9/2016, p. 1-76

37. Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams. OJ L 199, 31/7/2007, p. 30-39.

38. European Commission. Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard. COM(2015) 671. 15/12/2015.

39. European Commission, DG Home. *2016 Annual Activity Report*. Ares(2017)2636753 (online). [Accessed on 03.02.2022]: https://ec.europa.eu/info/sites/info/files/file_import/aar-home-2016_en_0.pdf.

40. EU Council. EU-Turkey statement. Press Release 144/16, 18/3/2016.

€30 million to carry out its tasks for the first 12 months.⁴¹ The EU extended the mission's mandate several times until it became a civilian mission under the Common Security and Defence Policy in December 2018, with a budget of €61.6 million.⁴² In July 2017, the EU approved a €46 million programme to reinforce Libyan border control capacities (Mainwaring, 2019: 81). The EU also allocated €140 million to support Morocco's efforts to stem irregular migration in 2018 (Okyay et al., 2020: 7). This was the state and the dynamic of European policies towards asylum seekers on the eve of the COVID-19 pandemic.

The consolidation of coercion during the COVID-19 pandemic

Immediately before the pandemic broke out, European policymakers were in an even greater rush to reduce asylum requests. In the first months of 2020, Turkey was increasingly reluctant to stick to the agreement with the EU (Interview 1, 2020), with the Turkish government criticising EU funding as insufficient to cope with the number of immigrants in Turkey. Most EU funding to stabilise migrants in camps in Turkey went to NGOs, such as the Red Cross, rather than the Turkish government. Turkey also reacted to the EU's lack of support for its military operations in Syria. Lastly, despite the pledges in the EU–Turkey statement of March 2016, accession negotiations with Turkey did not progress and Germany was reluctant to lift visa requirements for Turks.⁴³ EU policymakers then suspected Turkish authorities were moving migrants to the Greek–Turkish border, telling them that it was open. Migrant pressure at the border resulted in a stand-off with the Greek police for several days at the beginning of March. However, most EU member states still favoured cooperating with Turkey out of fear that an aggressive Turkish policy on migrants would create a panic, leading them to restore border controls, and disrupt the internal market – at least temporarily. In the first months of 2020, the number of asylum applications in the EU increased markedly (Arnoux-Bellavitis, 2020: 6).

41. EU Council. Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), p. 3-4.

42. EU Council. “EUBAM Libya becomes a fully-fledged civilian CSDP mission.” Press release, 17/12/2018.

43. EU–Turkey statement, 18/3/2016.

When the pandemic broke out in March, the number of infections in refugee camps skyrocketed. The population density and poor healthcare conditions created an even more dangerous situation than usual. In this extreme situation, the Commission was under even more pressure than before to find criteria to allocate asylum seekers to member states effectively and rapidly. Germany and the Commission discussed a new Commission proposal to replace Dublin III (Interview 1, 2020). The previous negotiations had failed due to the opposition of central and eastern European member states to receiving more asylum seekers. Germany recognised that the situation in frontline member states was not sustainable and that the internal market was in danger. It suggested allocating asylum seekers to each member state in proportion to their population and GDP. Sweden, which had opposed the criterion of population density – which would burden it as a

In this extreme situation, the Commission was under even more pressure than before to find criteria to allocate asylum seekers to member states effectively and rapidly.

large and sparsely populated country – could accept the German proposal (Interview 4, 2020). It meant that frontline member states would receive many fewer asylum applications, most traditional immigration countries

slightly fewer, and central and eastern European member states more.

Given the urgent need to find a solution, the Commission decided over the spring to use a distribution key based on 50% population and 50% GDP – a solution that would coerce central and eastern European member states into taking more asylum seekers. This key would apply directly to those migrants rescued from search and rescue operations at sea. On 23 September 2020, the Commission came up with an extensive “New Pact on Migration and Asylum”. The project included a proposal for a new Regulation on asylum and migration management, which included the distribution key based on 50% population and 50% GDP (Arnoux-Bellavitis, 2020: 10).⁴⁴

Among traditional immigration countries, the UK was the only one that the new distribution key could disadvantage. Because of its peripheral geographical location in Europe and the difficulty of reaching Great Britain irregularly for migrants, the UK received comparatively few asylum applications.⁴⁵ The

44. European Commission. 23/9/2020. 1) Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109. COM(2020) 610 final, Whereas 22. 2) Proposal for a regulation addressing situations of crisis and force majeure in the field of migration and asylum. COM (2020) 613 final, p. 14.

45. Eurostat, Dublin statistics on incoming and outgoing Dublin transfers (online). [Accessed on 3/2/2022]: <https://ec.europa.eu/eurostat/web/main/data/database>.

relocation of asylum seekers was a significant issue for the UK. The British took part in the European asylum regime primarily to return asylum seekers to frontline member states. For this purpose, participation in the Eurodac database was important to the UK, as it allowed an asylum seeker to be traced to the country where they had entered the EU in order to return them there. The UK was against relocation from frontline member states, arguing that it was a pull factor for immigrants in the Mediterranean. Only the country of first entry, the UK argued, should process applications (Interview 3, 2020).

British nervousness grew as incoming Dublin transfers to the UK outstripped outgoing. But this was less due to the number of actual requests than to their processing rate: the British office in charge of incoming transfers simply worked faster than the office for outgoing transfers (Interview 3, 2020). In the Brexit negotiations, the UK placed a condition upon its remaining within the European asylum regime: abolish the family reunification rule for asylum seekers or the deadline after which it could no longer return asylum seekers to the countries of first entry.⁴⁶ EU reluctance to accept this request and the prospect of a new agreement allocating migrants proportionally to GDP and population meant the UK would have to take up a more substantial number of asylum seekers on a permanent basis. This sufficed to convince the cabinet of Prime Minister Boris Johnson that the UK should withdraw from the European asylum regime entirely when Brexit occurred on 1 January 2021 (Comte, 2020b).

The health emergency and the prospect of British departure favoured the reflexive reversion to restricting inflows at external borders. As early as March 2020, EU authorities were determined to improve external border capacities. Faced with the rising tension with Turkey, the European Border and Coast Guard Agency organised contributions to help Bulgaria, Greece, and Cyprus step up border controls. The Commission planned to provide up to €700 million to Greece, while Germany would lend a helicopter and 20 staff members (Interview 1, 2020). In those circumstances, the COVID outbreak provided a serendipitous motive for closing the external borders physically.

After the crisis of early March 2020, the focus on the health situation made asylum a less salient issue in public debates, while offering governments the

46. UK Negotiating Team. "Draft Agreement on the Readmission of Persons Residing without Authorisation". 5/2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886021/DRAFT_Agreement_on_the_readmission_of_people_residing_without_authorisation.pdf.

chance to achieve complete restrictions at borders (Armakolas et al., 2021). Commercial flights were suspended almost entirely. At sea, Cyprus pushed back boats of Syrian migrants. Italy and Malta declared their ports unsafe in order to refuse NGO boats permission to disembark migrants (Arnoux-Bellavitis, 2020: 6–7). For instance, in April 2020 Italian authorities cited public health reasons in their refusal to allow the disembarkation of the German NGO ship *Alan Kurdi*, which was engaged in search and rescue operations (Interview 2, 2020). Likewise, Austria authorised the rejection of asylum applicants who could not present a medical certificate. Belgium, France, Greece, Hungary, the Netherlands, Poland, Slovenia and Spain officially suspended the access to asylum procedures. Whereas there had been 60,000 asylum applications in the EU, Norway and Switzerland in February 2020 that number plummeted to 34,000 in March and 7,000 in April. Only from June onwards did asylum applications increase again (Arnoux-Bellavitis, 2020: 7).

Yet policymakers also anticipated that the migration pressure could soon worsen due to the economic and social disruption that occurred during the pandemic (Interview 2, 2020). The Commission created a long-term framework to ensure the swift returns of the largest possible number of asylum seekers from entry points. Northern members supported such a policy. Sweden accepted relocations but wanted a pre-screening of asylum applications directly at entry points based on general criteria such as the country of origin and the claim's general nature (Interview 4, 2020). This formula ended up in the Commission's proposal for a new regulation on asylum and migration management.⁴⁷ The primary innovation of the Commission's package of proposals was to determine the potential of asylum applications rapidly and enforce immediate returns when this potential was low – at the risk of denying a complete asylum procedure to genuine but unusual cases. The package included a separate proposal for a regulation introducing screening.⁴⁸ The Commission proposed “to establish a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure”.⁴⁹

47. COM(2020) 610 final, Whereas 14 and 27.

48. 1) COM(2020) 610 final, p. 5. 2) European Commission. Proposal for a Regulation introducing a screening of third-country nationals at the external borders. COM(2020) 612 final. 23/9/2020.

49. European Commission. Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum. COM(2020) 609 final. 23/9/2020.

Conclusions

The European asylum regime applies substantial coercion between member states, in assigning destination countries to asylum seekers and at external borders. Coercion in the relationships between member states resulted from the implications for southern European member states of the criteria in the first Dublin Convention, the failure to alleviate their burden, and the relocation mechanisms disputed by central and eastern European countries. Coercion in assigning destination countries to asylum seekers overlooked their preferences for richer north-western European countries and the impact of the heterogeneity of asylum legislation and procedures. It operated via a narrow definition of family links, the non-recognition of irregular stays and the Eurodac system. Coercion at external borders acquired dramatic proportions with the Lampedusa crisis of 2004 and 2005, the creation of Frontex, the European Border and Coast Guard, the rapid intervention teams, the EU–Turkey statement and the increased funding for returns.

The most recent steps in this coercive trend have taken place during the pandemic, with the nearly total physical closure of external borders for several months, the agreement on a new distribution key for transferring asylum seekers to central and eastern European countries more permanently and the agreement on swift return procedures at external borders. The pandemic thus created propitious circumstances for taking significant measures. It raised the fears that asylum seekers' housing conditions and the current regime were not sustainable, allowing policies to be aligned on their long-term coercive and restrictive trajectory. The Commission's proposals remain under discussion in the Council, but the political direction is clear. Despite the minimal numbers of irregular inflows during the restrictive period of the pandemic, the US withdrawal from Afghanistan provoked a sudden shock in Europe in late summer 2021 that was revealing. The European asylum regime is meant to help manage inflows of asylum seekers, but the extensive coercion on which the current regime relies suggests that it could be destabilised by any new source of refugees.

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Annex 1: Interviews of experts in Brussels

Interview 1: A German expert from the Permanent Representation of Germany to the EU. Brussels, 6 March 2020.

Interview 2: An Italian expert, currently in Rome, formerly at the Permanent Representation of Italy to the EU. Interview by phone, 3 April 2020.

Interview 3: A British expert from the UK mission in Brussels. Interview by phone, 27 April 2020.

Interview 4: A Swedish expert from the Swedish Permanent Representation to the EU. Interview by phone, 30 April 2020.

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