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Dublin and Schengen: A tale of two cities

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Dublin and Schengen, two of the European Union's (EU) oldest and most fundamental accomplishments have come under pressure since the large influx of refugees in 2015. As the two systems were, from their very inception, closely linked to one another, it bears no surprise that problems in one (Dublin) have spilled over into the other (Schengen). This paper looks back at the systems' historical and systemic connections. It then traces the sequence of events which put them under strain and, subsequently, assesses the current state of affairs. On that basis, it argues that in the absence of political leadership, both in the context of the ongoing Dublin reforms and on the Schengen side, where internal border controls are upheld long passed any reasonable policy justification, the two systems risk going down together. This would, in turn, worsen an already sceptic public perception of the EU's added value in the context of managing the movement of people across borders. While problems in the Dublin system have received much public attention already, a continued or worsening situation in Schengen will pose further problems to the EU's legitimacy among its citizens, for whom the 'free movement of people, goods and services' represents the Union's most positive achievement.[1]

1. The early days: from Schengen to Dublin

The first steps towards an EU free movement zone were famously taken in 1985 when the three Benelux countries plus Germany and France signed the first Schengen agreement with the aim of abolishing internal border controls between them. While this first agreement only devoted three articles to immigration, by the time the negotiations on the 1990 implementing Convention took place, it had become a key issue on the agenda. The predominant policy assumption at the time was that abolishing internal border controls would lead to a loss of security, including in the context of migration control, which would need to be offset by compensatory, flanking measures.

This assumption was challenged from the very onset.[2] Amongst others, commentators drew attention to the fact that it rested on the contestable reasoning that the control of irregular movements, including of persons, happens primarily or most effectively at borders instead of, e.g., by conducting stronger controls in informal economy sectors.[3] Despite such contestation, however, the assumption was central to the debates and policymaking processes surrounding Schengen in the 1990s. Accordingly, when the final text of the 1990 implementing Schengen Convention was adopted, rules on how to provide stricter controls along the, now to be common, external borders had taken centre stage. As the accompanying declarations of the signatory states made clear, such stricter external border controls were needed given expected "risks in the fields of security and illegal immigration".[4] In that context, a separate chapter (Chapter 7) was also dedicated to setting out how the responsibility for asylum requests was to be allocated among the signatory states. Amongst others, member states feared that, upon abolishing internal border controls, they would see an increase of so-called 'asylum-shopping movements', whereby asylum seekers would lodge their claims in multiple states, possibly moving from one state to another in the event of an unfavourable outcome.[5]

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This latter set of Schengen rules was replaced by almost identical ones in the Dublin Convention, also agreed to in 1990. As the preamble of the first Dublin Convention made clear, the connection to Schengen was paramount. More precisely, the Convention was set up in light of the "joint objective of an area without internal frontiers".[6]

The Schengen rules on asylum applications, and later those in Dublin, established – at their core – that only one member state would be responsible for dealing with an asylum claim and that a rejection in one state would automatically apply in all signatory states. Based on this 'one state' premise, additional rules set out the criteria for how that responsibility was to be allocated. These criteria were premised on prior links between an asylum seeker and a state, expressed through, for instance, the presence of family members, the

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possession of a visa or residence permit issued by a state, or prior stays in that state. The default rule, however, applied when none of the other criteria was met, assigned responsibility to the state through which an asylum seeker first entered. On that basis, and as has been abundantly described and criticised since, an asymmetric system was put in place which left the states located at the EU's external borders, constituting the most obvious first entry points, with a disproportionate share of responsibility.

In spite of this structural design flaw, the system initially seemed to work. The reason for this, however, was that it did not have to be applied often. Figures from 1998-1999 show that only 6% of all asylum applications made in the EU were subject to a request for transfer to another member state in line with the Dublin rules (so-called 'Dublin transfers'). Given that not all requests were accepted by member states and, additionally, that not all acceptances resulted in actual transfers, the eventual number of asylum seekers transferred under Dublin was at a low 1.7%.[7] In other words, the overwhelming majority of asylum applications were taken charge of in the states where they were first made. While the numbers picked up in the early 2000s, they remained at a low 11.5% for requests made and at only 4% when considering actual transfers.[8]

Geographical realities play an important role in accounting for this initially limited application of the Dublin system. As Germany marked a significant part of the EU's external frontier at the time, it was an important point of first entry for asylum seekers arriving from the East (particularly in the context of political turbulence after the dissolution of the Soviet bloc). At the same time, it was also the preferred destination country for many.[9] Given that the first point of entry and preferred country of destination were the same in many cases, little to no Dublin transfers were called for.[10] In other words, in this first phase, the Dublin system did little more than draw a framework around already existent migration patterns. As a 2001 Commission staff working document phrased it: *"it has to be said that the Dublin Convention does not affect who takes responsibility for examining an asylum application very greatly"*.[11]

2. The 2000s: first cracks in Dublin and Schengen

This changed from the mid-2000s onwards. As new immigration peaks were registered and the EU's geographical outlook shifted following the 2004 enlargement, the asymmetric design of the Dublin-Schengen system was increasingly rendered visible.

To begin with, the 2004 accession of eight Central and Eastern European Countries (CEEC) and two Mediterranean island countries moved the EU's external border eastwards, from Germany towards the new CEEC and, to a lesser extent, further southwards with the accession of Cyprus and Malta. In line with the logic described above, responsibilities for dealing with asylum requests moved further onto those new EU member states. Particularly for the CEEC, the conditionality logic of accession and the connected obligation to implement the Dublin *acquis* meant that these states became "countries of immigration policy before they were ever countries of immigration".[12]

There was a coercive element at play in that their accession to the EU, and its highly-valued Schengen free movement zone, was made conditional on the adoption of the Dublin rules.[13] In more basic terms, and in continuation of the original policy premise informing the link between the two systems, access to the Schengen border-free zone required participation in the Dublin system of strict controls along the external border.

Soon after joining, the distributional imbalances and their shift towards the new EU member states became clear. European Commission figures for 2005, for instance, reported a strong inequity in the ratio of incoming versus outgoing Dublin transfer requests for Poland, Slovakia and Hungary. For these three states, the incoming numbers far exceeded the outgoing ones. The report noted a 20% increase in the total number of asylum seekers for Poland and a 10% increase for the latter two states.[14] In the hypothetical case that all transfer requests would be carried out (see also above), the increase in asylum responsibilities would amount to 40% for these three states.[15] Especially in Poland already under-resourced reception capacities were put under further strain after the country's accession to the EU and the Dublin system.[16]

However, the first real cracks in the system were not registered in the East, but in the South as increasing numbers of migrant arrivals from

the African continent led to increased 'first-entry' responsibilities for the states along the EU's southern external border.[17] A non-exhaustive overview of such first cracks includes, amongst other things, the situation in Malta in 2006 where, upon reports of overwhelmed reception facilities, a visiting European Parliament delegation made a note of arrival rates at 45% of Malta's birth rate, requiring the deployment of 10% of the Maltese army and police force to deal with the humanitarian emergency situation.[18]

Similar situations were reported in the Canary Islands that same year, as record numbers of immigrants arrived across the sea from Mauritania.[19] In the meantime, accounts of overcrowded facilities in Italy and Greece were also making headlines.[20] In 2008, UNHCR issued a recommendation to refrain from returning asylum seekers to Greece under the Dublin rules.[21] Two years later, it declared that the situation in Greece had taken on the nature of a "humanitarian crisis".[22] In January 2011, the European Court of Human Rights found that Belgium was in breach of its Convention obligations (notably, Article 3 ECHR) when returning an asylum seeker to Greece where he would be subject to conditions that amount to degrading treatment.[23]

Later that year, the EU Court of Justice in Luxembourg similarly established that the EU Charter of Fundamental Rights precluded Dublin transfers to a member state where it was clear that "systemic deficiencies" in its asylum system led to believe that the asylum seeker faced a real risk of being subjected to inhumane or degrading treatment (*NS*).[24]

These first cracks in the Dublin system led to the first cracks in the Schengen system. In 2011, against the background of the high numbers of arrivals from North Africa following the Arab spring, Italy granted temporary residence permits to Tunisian immigrants, allowing them to travel freely in the Schengen area. In response, and upon the subsequent movements of some of these Tunisian immigrants to France, Paris unilaterally reinstated border controls along its land border with Italy. The situation became tense as the French blocked trains coming from the Italian town of Ventimiglia. In what became known as the "Franco-Italian Affair", Italy's interior minister Roberto Maroni explained the country's actions by stating that his country had been left alone to "shoulder the immigration burden" and reproached his EU counterparts for not "showing solidarity".[25]

3. The 2015 collapse: from Dublin to Schengen

In 2015, as the Syrian conflict entered its fourth year, arrival numbers peaked again and Dublin finally "collapsed under its own weight".[26] With over 1.2 million asylum requests submitted in the EU – around double the figure registered in the preceding year[27] – the system's lack of a sustainable responsibility-sharing mechanism and the connected limitations were painfully and definitively laid bare. Reception facilities in the states along the EU's southern as well as eastern borders became structurally overwhelmed resulting in mass 'secondary movements' from those first arrival states towards the northern and western states, particularly towards countries like Germany and Sweden. [28]

Faced with images of caravans of asylum seekers arriving in Hungary and Slovakia and in view of the mounting evidence of structural reception capacity problems there and elsewhere, the German federal government unilaterally suspended Dublin returns for Syrian refugees in the late summer of 2015. Two weeks later, however, faced with domestic political pressures as high arrival numbers were registered in Bavaria, Germany reinstated checks along its land border with Austria. Bavarian finance minister Markus Söder had publicly called for such checks stating that "when the EU's external borders are not protected, the German government needs to think about how it will protect German borders".[29]

This course of events in Germany marked the start of the spill-over of the Dublin crisis into the Schengen system. This spill-over followed the same policy assumption that had originally linked one system to the other, that is: a common free movement zone requires strong external border controls. However, the original direction of the link was reversed: that is, in the absence of a functioning external border control system an internal free movement zone could not be upheld. Nevertheless, the premise remained the same and, on that basis, a (partial) suspension of Dublin was seen as necessitating a (partial) suspension of Schengen.

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A chain reaction followed after Germany's reinstatement of border controls. Beginning with Austria and Slovenia (September 2015), other states also re-introduced border checks, initially to avoid becoming '*culs-de-sac*' where asylum seekers could get stranded.[30] Between October and December, France, Hungary,

Sweden and Norway (in that respective order) also introduced internal border checks. They were followed by Denmark and Belgium in early 2016, leading to a total of nine countries that reintroduced border checks in the Schengen zone at that time.

Like Germany, these member states predominantly cited a "fear of secondary movements" of asylum-seekers as their justification for the reintroduction of border controls to the Commission.[31] More than two and a half years later, six states (Austria, Germany, France, Sweden, Denmark and Norway) still uphold internal border checks. Their practice of accumulating different legal bases for introducing what are intended to be 'temporary' checks, as well as the limited justifications provided for doing so, have been the source of much controversy and the subject of charges of unlawful behaviour.[32]

4. Dublin and Schengen: a tale of mutual dependency

Writing in early June 2018, the cards are stacked unfavourably for a political solution to be found soon. On the Dublin side, discussions on a relocation scheme, aimed at finally inserting the much-needed redistributive and responsibility-sharing element into the system, have been a source of political contention since mid-2015. The Visegrád countries (Poland, Hungary, Slovakia and the Czech Republic) have consistently and vocally opposed all proposals which would include a mandatory relocation mechanism.[33] They were recently joined by Austria, next in line to take over the EU Council presidency in the second half of 2018 and originally amongst the strongest defenders of a mandatory relocation system when such proposals were first made.[34] The states along the EU's southern border, on the other hand, strongly favour a mandatory relocation mechanism as was recently further exposed in a leaked non-paper.[35] Italy's new government has been particularly outspoken in this respect, both in its coalition agreement and in the media.[36] Caught in the middle are the northern and western European states, which, except for large net receivers such as Germany and Sweden, have an interest to maintain the *status quo*. As arrival numbers have dropped since 2016, with them, dangerously, the sense of urgency was reduced for this latter group of states.[37]

On the Schengen side, the continued internal border controls can no longer be justified on the basis of sincere public policy considerations. Instead, the more time passes, the more it becomes clear that there is only a limited value, in policy terms, to these controls. On that basis, the controls seem to be predominantly informed by electorate-pleasing political motivations of a short-sighted nature. While exact figures are hard to come by, the European Commission reported in September 2017 that onward secondary movements of asylum seekers had, in any event, become "limited" (European Commission, 2017).[38] Nevertheless, member states' most recent notifications to prolong border controls continue to refer to the risk of secondary movements, amongst others, because large numbers of asylum seekers are still in Greece.[39] This continued presence, in turn, cannot be addressed without a structural reform of the Dublin-based responsibility-sharing principles. On that basis, the debate comes full circle again.

In the absence of a durable and prompt solution, the future looks bleak. As the systems' interconnected historical development shows Dublin and Schengen are mutually dependent, linked through the policy assumption that an internal free movement zone requires a common control regime along the external border. As highlighted at the beginning of the text, this policy assumption can and has been contested. Despite these objections, however, and as the 2015 events have shown – or earlier on, the 2011 Franco-Italian affair or the conditionality dynamics in the 2004 enlargement – this assumption has continued to dominate thinking in political and policymaking circles. As long as that is the case, the fall of one (Dublin) will likely entail a gradual fall of the other (Schengen). This would subsequently pose major risks to the EU's legitimacy among its citizens, who consider the "free movement of people, goods and services" to be the Union's most positive achievement, even surpassing that of "peace amongst the member states".[40]

Political leadership and conciliatory thinking are urgently called for, both in the context of the Dublin discussions as on the Schengen side where a more responsible engagement with one of the EU's most foundational accomplishments is pressing.

This slippery slope downwards seems well on its way. Hopes for reaching a consensus premised on a sustainable and structural solution at the upcoming June Council summit are fading as more time passes.

Political leadership and conciliatory thinking are urgently called for, both in the context of the Dublin discussions as on the Schengen side where a more responsible engagement with one of the EU's most foundational accomplishments is pressing.

[1] Eurobarometer (2017), "Public opinion in the European Union", November 2017, available at: http://www.poci-compete2020.pt/admin/images/Standard_Eurobarometer_88_UE_dez-2017.pdf, accessed on [08/06/2018].

[2] Kühne, Hans Heiner (1991), Kriminalitatsbekampfung Durch Innereuropaische Grenzkontrollen?: Auswirkungen Der Schengener Abkommen Auf Die Innere Sicherheit, Trier: Duncker & Humblot; Bigo, Didier (1996), "L'illusoire maîtrise des frontières", Le Monde Diplomatique, p. 8; Bigo, Didier (1996), "L'illusoire maîtrise des frontières", Le Monde Diplomatique, p. 8; and Huysmans, Jef (2006), The Politics of Insecurity: Fear, Migration and Asylum in the EU, London: Routledge.

[3] Ibid.

[4] Convention Implementing the Schengen Agreement of 14 June 1985 («1990 Schengen Implementation Agreement») [OJ L 239, 22.9.2000].

[5] For a critical appraisal, see: Mouzourakis, Minos (2014), "We Need to Talk about Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union", Refugee Studies Centre Working Paper Series, Number 105.

[6] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ("Dublin Convention") [OJ C 254, 19.8.1997].

[7] In real numbers, for the EU as a whole, this amounted to by and large 10,000 transfers that year: European Commission (2001), "Commission Staff Working Paper: Evaluation of the Dublin System", SEC(2001)756, p.2-3.

[8] European Commission (2007a), "Commission Staff Working Paper Accompanying document to the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System", SEC(2007)742.

[9] Menéndez, Agustín José (2016), "The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration", European Law Journal, Volume 22, Number 4, pp. 394

[10] This predominantly German responsibility was originally unanticipated. As developed in Hailbronner, Kay and Thiery, Claus (1997), "Schengen II and Dublin: Responsibility for Asylum Applications in Europe", Common Market Law Review, Volume 34, Issue 4, pp. 987; the first discussions on the responsibility-sharing rules in Schengen and Dublin took place in the mid-1980s. At that time, geopolitical realities were dominated by the Cold War and a 'closed' Soviet bloc in the East precluded (large-scale) migration movements to the West.

[11] European Commission (2001), "Commission Staff Working Paper: Evaluation of the Dublin System", SEC(2001)756.

[12] Geddes, Andrew and Scholten, Peter (2016), The Politics of Migration & Immigration in Europe, London: SAGE Publications, p. 196.

[13] Ibid, and Vermeersch, Peter (2005), "EU Enlargement and Immigration Policy in Poland and Slovakia", Communist and Post-Communist Studies, Volume 38, pp. 71–88.

[14] In real numbers this amounted to an additional 1048 asylum applications for Poland, and 421 and 154 for Slovakia and Hungary respectively (see European Commission 2007a, p. 52 for this further breakdown).

[15] European Commission (2007b), "Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System", COM(2007)299, pp. 12-13; ECRE (2008), Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, available at: https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Sharing-Responsibility-for-Refugee-Protection-in-Europe-Dublin-Reconsidered_March-2008.pdf, accessed on [08/06/2018].

[16] Kosowicz, A. (2004). "Hunger strike reveals strains in Polish asylum system", (December 2004); available at: http://www.unhcr.org/news/latest/2004/12/41bdc0a42/hunger-strike-reveals-strains-polish-asylum-system.html, accessed on [02/06/2018].

[17] For a good overview of these arrivals and how they compare to past trends see Fargues, Philippe (2017). "Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence". Geneva: International Organization for Migration.

[18] European Parliament (2006), "Resolution on the situation with refugee camps in Malta", P6_TA(2006)0136.

[19] The Guardian, "Canary Islands fear disaster as number of migrants soars", (September 2006), available at: https://www.theguardian.com/world/2006/sep/04/spain.mainsection, accessed on: [04/06/2018].

[20] Euobserver, "Italian treatment of refugees in breach of human rights, say MEPs", (September 2005), available at: https://euobserver.com/justice/19904, accessed on [08/06/2018]. Euobserver, "Greece under fire over refugee treatment", (April 2008), available at: https://euobserver.com/justice/25910, accessed on [08/06/2018].

[21] UNHCR (2008). UNHCR Position on the Return of Asylum-seekers to Greece under the "Dublin Regulation", available at: http://www.unhcr.org/protection/operations/482199802/unhcr-position-return-asylum-seekers-greece-under-dublin-regulation.html, accessed on: [04/06/2018].

[22] UNHCR (2010).UNHCR says asylum situation in Greece is 'a humanitarian crisis', available at: http://www.unhcr.org/4c98a0ac9.html, accessed on: [04/06/2018].

[23] MSS v Belgium and Greece, Application No. 30696/09, judgment of 21 January 2011, ECHR

[24] Joined Cases C-411/10 NS and C-493/10 M.E. and others, judgment of 21 December 2011, ECLI:EU:C:2011:865.

[25] Euobserver, "Italian minister questions value of EU membership", (April 2011), available at: https://euobserver.com/justice/32155, accessed on [08/06/2018].

[26] Menéndez, Agustín José (2016), "The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration", European Law Journal, Volume 22, Number 4, pp. 388–416.

[27] Eurostat (2016). "Asylum in the EU Member States", Eurostat newsrelease, Number 44/2016, available at: http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6, accessed on [08/06/2018].

[28] Ibid. and Niemann, Arne and Zaun, Natascha (2018), "EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives," Journal of Common Market Studies, Volume 56, Number 1, pp. 3–22.

[29] Die Spiegel, "CSU streitet über Grenzzäune", (October 2015), available at: http://www.spiegel.de/politik/deutschland/fluechtlinge-csu-streitet-ueber-grenzzaeune-a-1055796.html, accessed on [08/06/2018].

[30] Pastore, F. & Henry, G., (2016), "Explaining the crisis of the European migration and asylum regime", The International Spectator; Italian Journal of International Affairs, 51 (1), p. 54.

[31] For a comprehensive overview, see: Guild, Elspeth, Carrera, Sergio, Vosyliute, Lina, Groenendijk, Kees, Brouwer, Evelien, Bigo, Didier, Jeandesboz, Julien and Médéric, Martin-Mazé (2016), "Internal border controls in the Schengen area: is Schengen crisis-proof?", Study for the European Parliament, LIBE Committee, Brussels.

[32] European Parliament (2008), "Report on the annual report on the functioning of the Schengen area", A8-0160/2018.

[33] Bamberg, Katharina, Llonch Valsells, Marta and De Somer, Marie (2018). "Policy Update February 2018", EPIM Policy Updates, Brussels.

[34] On the shifts in the Austrian position see: Zaun, Natascha (2018), "States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System", Journal of Common Market Studies, Volume 56, Number 1, pp. 44–62.

[35] Politico, "Southern rim rebels against EU migration proposal", (April 2018), available at: https://www.politico.eu/article/eu-migration-crisis-italy-spain-rebels-bulgaria-dublin-quotas-proposal/, accessed on: [04/06/2018].

[36] Le Figaro, "Migrants : Matteo Salvini dit «non» à la réforme de Dublin", (June 2018). Available at: http://www.lefigaro.fr/international/2018/06/04/01003-20180604ARTFIG00259-migrants-matteo-salvini-dit-non-a-la-reforme-de-dublin.php, accessed on [08/06/2018].

[37] Zaun, Natascha (2018).

[38] European Commission (2017), "Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen", COM(2017)570.

[39] Carrera, Sergio, Stefan, Marco, Ngo, Chun Luk and Vosyliute, Lina (2018), "The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016, Study for the European Parliament, LIBE Committee, Brussels.

[40] Eurobarometer (2017), "Public opinion in the European Union", November 2017, available at: http://www.poci-compete2020.pt/admin/images/Standard_Eurobarometer_88_UE_dez-2017.pdf, accessed on [08/06/2018].

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