# Reform of the European Asylum System: Why Common Social Standards are Imperative

Ulrich Becker and Julia Hagn[1]

The Common European Asylum System is occasionally referred to as a "lottery of protection".[2] This allegory points to considerable divergences in refugee recognition rates among EU States, which can hardly be explained by the mere peculiarities of individual cases. During the period between January and September 2015, for instance, the recognition rates for asylum seekers from Afghanistan varied from almost 100% in Italy to 5.88% in Bulgaria (Eurostat). Countries also varied in the type of status they granted to asylum seekers. Data from the European Asylum Support Office (EASO) for the 2nd quarter of 2015 revealed that some countries awarded refugee status to almost all Syrian nationals, such as Germany (99%), Greece (98%) and Bulgaria (85%); whereas others primarily awarded the status of subsidiary protection, such as Malta (100%), Sweden (89%), Hungary (83%) and the Czech Republic (80%) (European Commission 2016a, Fn 12). There are two important differences in the way that these two statuses affect the rights of the status-bearers. First, each status impacts the right of status-bearers to remain in the country of refuge. Second, they affect the range of rights that status-bearers may enjoy while living in the host country.

The "Refugee status" comes from the Geneva Convention on Refugees of 1951 (with the Protocol of 1976) and requires that a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality" (Art. 1 A No. 2 Convention Relating to the Status of Refugees). "Subsidiary protection", by contrast, covers all cases in which the refugee status is not applicable, particularly due to the absence of a specific motive for persecution, but in which people face a "real risk" of suffering "serious harm" in their home country. Such risk includes a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Today, both forms of protection are referred to as "international protection" rather than "asylum" because the term "asylum" was traditionally reserved for refugees in the stricter sense (Becker 2016, 82).

Although, according to the treaties upon which the EU is legally based, a Common European Asylum System (CEAS) should exist, it does not. To date, the Member States have not yet agreed on a coherent approach for dealing with the high influx of migrants seeking protection in the EU. Moreover, the System revealed serious shortcomings as recently as in 2015, when approximately 1.2 million applications for asylum were filed in the EU (Eurostat 2016). The high volume of applications for asylum ultimately triggered a complete breakdown of the Dublin system. With the number of refugee arrivals increasing, the border-states were no longer willing or able to take responsibility for the asylum seekers entering the EU, despite having the duty to do so pursuant to the Dublin III Regulation. In the Schengen area, an area with open borders, this situation led to largely uncontrolled migration and secondary movement. As a result, the distribution of refugees among EU Member States was very uneven[3] and prompted states like Sweden and Austria to close their borders.

The existing EU law on asylum is based on four pillars, which were established for the first time around the turn of the millennium and were reformed some years ago, albeit before the significant increase in refugee numbers. The four pillars relate to all major aspects of granting international protection. The first is the Qualification Directive (Directive 2011/95/EU;

[1] Max Planck Institute for Social Law and Social Policy (both).

[2] For example by Christine Langenfeld, chairwoman of the Expert Council of German Foundations on Integration and Migration in ZEIT ONLINE, as well as by the Refugee Council.

[3] In 2015, 80.5 percent of first-time asylum seekers were hosted by only six EU States, notably: Germany (35.2%), Hungary (13.9 %), Sweden (12.4%), Austria (6.8%), Italy (6.6%) and France (5.6%) (Eurostat 2016, 2).

European Commission 2011), which defines both the requirements for international protection and the fundamental rights associated with having been granted a protective status. The second is the Asylum Procedures Directive (Directive 2013/32/EU; European Commission 2013a), which addresses the procedures involved in the granting and withdrawal of international protection. Third, the reception of asylum seekers is governed by the Reception Directive (Directive 2013/33/EU; European Commission 2013b). Fourth, the contentious Dublin III Regulation (Regulation (EU) No 604/2013; European Commission 2013c) determines which Member State is responsible for adjudicating an asylum application, and accompanying regulations establish registration requirements for asylum seekers (the Eurodac Regulation, Regulation (EU) No 203/2013).

To address the systemic weaknesses of the CEAS, the Commission has recently proposed reforms. It suggests transforming two Directives (Qualification Directive and Procedure Directive) into Regulations, which, upon entering into force, would be automatically and uniformly self-executing in all EU countries without the need to enact national laws. The line of reasoning is that the regulation's direct applicability will massively boost the convergence of asylum policies among Member States (European Commission 2016a, 4; European Commission 2016b, 3–4). However, the distinction between these two regulatory instruments, regulations and directives, has already diminished to some extent through the practice of Community law.[4]

The first aim of the reform is to prevent secondary movement and "asylum shopping" (European Commission 2016c, 3) within the EU. To this end, recasting the Dublin III Regulation envisages that an asylum seeker has to file his or her application in the country of first entry, and may not move to another country under any circumstances while his or her application is under adjudication.[5] Accordingly, an applicant for asylum or subsidiary protection is only entitled to the benefits and conditions guaranteed by the Reception Directive in the Member State where he or she is required to be present, which is generally the country of first entry, except when emergency health care is needed. (European Commission 2016c, Art. 5 (3) and European Commission 2016d, Art. 17a (1)). All proposals assert that disparities in the range of rights enjoyed by asylum seekers in various Member States "can create incentives for applicants for international protection to claim asylum in Member States where those rights (…) are perceived to be higher than others" (European Commission 2016a, 4), thereby creating pull factors and ultimately leading to an uneven distribution among the Member States (European Commission 2016d, 1).

This argument has a lot in common with the welfare magnet hypothesis, which suggests that welfare systems are potential pull factors for migration. Borjas (1999) first formulated the welfare magnet hypothesis, where he argued that immigrants will settle down in states that offer the highest benefits. Razin and Wahba (2011) specify the hypothesis by demonstrating that it can be particularly expected in free-migration regimes, where migrants are free to self-select. Even though Borjas' model does not take into account other relevant determinants of immigration, such as immigration policy (Giulietti and Wahba 2012, 8–9), the fact that welfare systems can play a significant role in selecting a destination country cannot be ignored. Therefore, it is imperative that Member States maintain relatively comparable reception standards.

There is a second reason for ensuring common reception standards that guarantee a dignified standard of living: A Member State may transfer an asylum seeker back to a previously traversed Member State if existing regulations oblige the latter to complete the determination of the asylum seeker's status. This procedural obligation would be strengthened by the proposed reform of the Dublin III Regulation whereby the first responsible Member State – usually the country of first entry – would remain responsible. No longer would the responsibility to determine an asylum seeker's status shift 12

[4] A directive is only intended to indicate the required result, while affording discretion to the Member States as to the form and methods of implementation (Art. 288(3) Treaty on the Functioning of the European Union). However, there are nonetheless many directives that feature extremely detailed provisions. Such directives leave the national legislator with limited discretion, so that lawmakers may only determine the type of domestic norm within which to cast a predetermined text that has already been set out in detail by the directive. Moreover, according to the case law of the European Court of Justice, provisions in directives can also have a direct domestic effect where they have not been transposed in due time, but are sufficiently precise and unconditional in their content and their ability to identify intended subjects. There is, furthermore, recognition of a general obligation on the part of national authorities and courts to take into account directives that have not yet been transposed when interpreting national law. If individual directives are similar to regulations in their effects, then there are also examples of regulations that do not take their typical form as a complete and directly binding norm. This is particularly true in cases where the norms contained within a regulation cannot be given effect without the promulgation of further implementing provisions (Schwarze, Becker and Pollak 1994, 32–4.)

[5] This prescription is accompanied by restrictions on the freedom of movement foreseen in the new Reception Directive. For example, in the event that an applicant has been assigned a specific place of residence, but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, a Member State may detain the applicant in order to ensure the fulfilment of the obligation to reside in a specific place (European Commission 2016d, Art. 8 (3)(c)).

months after the date that he or she irregularly crossed the border (European Commission 2016c, Art. 15).

However, automatically returning an asylum seeker to the responsible Member State as a matter of course would be legally invalid if a responsible Member State were not to guarantee refugees a dignified standard of living while they undergo the asylum procedure. Such a situation would be inconsistent with the obligation of all EU Member States to observe the rights enshrined in the European Convention on Human Rights. No state may transfer a person seeking protection back to a state wherein the treatment of applicants is so deprived that it violates human rights law. Consequently, however, a state could evade its obligation to grant protection to asylum seekers by withholding minimum social protection from the applicants. EU bodies should respond accordingly by enforcing human rights law in all Member States. Ultimately, however, the solution will determine on whether all EU States accept their responsibility to safeguard social standards and take practical steps in that direction (Becker 2016, 83–4).

The establishment of common reception standards, however, is still in its very early stages. For the time being, a veritable patchwork of regulations and provisions prevails in Member States. The range of services provided by national legal orders is rather wide and varies according to type, modality and scope. Services also vary in accordance with the stage of the asylum procedure or the type of procedure in question (accelerated procedure, regular procedure, Dublin procedure). This was the result of a comparative legal analysis carried out at the Max Planck Institute for Social Law and Social Policy.[6] The study included the southern European border states of Spain, Italy and Greece, two states located on the so-called Balkan route (Hungary and Bulgaria), Germany's most important neighbouring states (France, Austria, Poland and the Netherlands), and the United Kingdom, Sweden and Turkey. It concentrated on the social rights of persons seeking protection during the recognition procedure, specifically in relation to four areas: accommodation, ensuring the means of subsistence, healthcare and access to the labour market.

As far as accommodation is concerned, it is common for Member States to restrict the residency or movement of asylum seekers during their asylum procedures. Countries varied in their use of the three accommodation options provided for in the EU legislation, namely the "premises used for the purpose of housing applicants during the examination of an application for asylum lodged at a border or in transit zones", "accommodation centres" and "private or other premises adapted for housing applicants". Although some specifications govern the quality of accommodations, practical difficulties remain in providing suitable accommodation for all asylum seekers. However, in almost all countries, and particularly in those receiving higher inflows of refugees, the quantity of accommodation is insufficient. This is due to inadequate preparation in many countries for the high volume of claims for international protection. For this reason, the draft for a reformed Reception Directive provides that Member States establish, and regularly update, contingency plans, which specify the measures that would foreseeably ensure adequate reception of applicants in the event that "the Member State is confronted with a disproportionate number of applicants" (European Commission 2016d, Art. 28 (1)).

In terms of the material conditions of reception, an "adequate standard of living" is the requirement applicable under EU law. Compliance with this standard presupposes that asylum seekers are guaranteed an adequate standard of living along with the protection of their physical and psychological health. In ensuring subsistence, a considerable number of countries tend to make use of the possibility of establishing different levels of support for their own and foreign nationals. In many places, this practice is evidently linked with the risk of failing to comply with the subsistence level.

The provision of healthcare services appears to be somewhat more favourable. Different regulatory approaches can be observed here, which are based on residency and ultimately give rise to three different situations. First, under some legal orders, asylum seekers can claim the same services in terms of medical treatment as the citizens of the country in question (for example in Italy, Poland and the United Kingdom). Second, as for the provision of basic services, asylum seekers only have access to basic medical care, which is not necessarily equivalent to the national catalogues of basic services, as this is the case in Bulgaria. Third, in some countries the right to treatment is limited to acute care (in Germany and Sweden, for example). Incidentally, the circumstances in Germany have already demonstrated that when it comes to healthcare services, what matters most is the actual provision of care, which operates far from smoothly. Furthermore, access to the healthcare

[6] The results were published in the journal "Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht" (ZIAS) 1/2015 and 2/2015. The further explanations relate to the results of the study, which are summarised in Becker and Schlegelmilch (2015).

system depends on the proper registration of asylum seekers, which was not always performed in some countries. Consequently, some asylum seekers were not in a position to claim the health services for which they were theoretically eligible.

As for access to the labour market, obstacles clearly exist in most Member States. EU law currently offers many options to the Member States in this regard: access must only be provided to asylum seekers after nine months and only if no prior decision has been made on their application for protection. The priority given to EU citizens and third-country nationals with rights of residence is understandable in terms of labour market policy. However, carrying out the priority review is often a very long-winded process, thus the obligation under EU law to provide asylum seekers with "effective access to the labour market" remains unfulfilled in too many cases. This situation is further aggravated by the practice of some states to permit asylum applicants to work only in certain occupations, for example, as seasonal workers or in selected industries that suffer from a shortage of labour. Although asylum applicants may work in the asylum accommodation where they live, the number of such employment opportunities remains extremely limited, and the earning potential from such employment is very modest. To enhance integration prospects and reduce dependency on the welfare systems, the envisaged reform aims to facilitate access to the labour market. Most importantly, states would be permitted to forbid the applicant's labour activities for only six months after the date of application (European Commission 2016d, Art 15 (1)). If refugees are allowed to work, Member States are obliged to treat them in the same way as their nationals with regard to working conditions.[7]

Achieving common reception standards in all Member States is both important and extremely difficult. The EU Commission only has limited legislative competence in this regard – a fact that was acknowledged by keeping the status of the Reception Directive unchanged. Even though EU law touches on and sometimes intersects with national social law, the competence for social welfare, particularly the implementation of political aims through the grant of social benefits, rests with the nation states (Becker 2012, 7). For exactly this reason, the so-called European Pillar of Social Rights is supposed to become only a reference framework "to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area" (European Commission 2016e, 2). The pillar can thus serve primarily as a common normative basis for States' welfare policies. Besides the States' interest to retain their legislative authority in this area, the sheer variety of welfare systems in Europe, their interrelatedness with economic and budgetary conditions and the complexity resulting therefrom render a uniform welfare system in the EU hardly feasible. These factors also obstruct the harmonisation of reception conditions for refugees (European Commission 2016d, 6). Respective standards should not be introduced through the backdoor; instead benefits for refugees must be embedded into Member States' social welfare systems – which are generally weak in some cases, such as in the European south.

Against this background, unsurprisingly, Member States were particularly hesitant to introduce a common EU benchmark that would determine the level of financial support to be provided to applicants for the following reasons: First, most Member States do not meet material reception requirements through the provision of financial support, but rather provide benefits in kind or as a combination of in-kind and financial support. Second, the financial support currently provided to applicants is, in most cases, "well below all the possible benchmarks or thresholds examined (at-risk-of-poverty threshold, severely materially deprived threshold, and minimum income threshold)". A harmonisation of support levels would entail raising the level of support in many Member States, and could, in some cases, result in more favourable treatment being given to applicants than to Member States' indigent nationals (European Commission 2016d, 8). It is therefore envisaged that Member States shall be required only to take into account, rather than forced to implement, operational standards and indicators on reception conditions developed by EASO (European Commission 2016d, Art. 27 (1)).

Without guaranteeing adequate social protection on a common basis, even a reformed CEAS will not function as intended. Member States may circumvent their obligation to grant asylum protection by refusing to grant minimum social rights to refugees. In this context, it is particularly problematic that there is, as of yet, no agreement on how a dignified standard of living can be defined (European Commission 2016d, 7). Any effort to

[7] Working conditions cover, at minimum, pay, dismissal, health and safety requirements at the workplace, working time and leave, as well as a consideration of collective agreements in force. The proposal also grants applicants equal treatment as to freedom of association and affiliation, education and vocational training, the recognition of professional qualifications and social security (Article 15(3)).

standardise reception conditions must inevitably tackle a decisive question: how can comparable reception standards be achieved in light of differing living standards and economic wealth among Member States, especially since welfare benefits are primarily the responsibility of nation states? Finding an answer is a difficult, but necessary task if a "fair sharing of responsibility" between Member States, as called for in Art. 80 TFEU (Treaty on the Functioning of the European Union), is to be achieved.

## References


Becker, U. (2016), *European Solidarity with Refugees?*, Annual Report 2015 of the Max Planck Society, 82–5.

Becker, U. and M. Schlegelmilch (2015), "Sozialer Schutz für Flüchtlinge im Rechtsvergleich: Auf dem Weg zu gemeinsamen Standards für Schutzsuchende in der EU – Einführung und Auswertung", *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 29 (1), 1–40.

Becker, U. (2012), "Leistungen für langjährig Rentenversicherte in Südeuropa – Eine rechtsvergleichende Analyse", *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 26 (1), 1–15.

Borjas, G. J. (1999), "Immigration and Welfare Magnets", *Journal of Labor Economics* 17 (4), 607–37.

European Commission (2011), *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, 13 December 2011, Brussels.

European Commission (2013a), *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection*, 26 June 2013, Brussels.

European Commission (2013b), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection*, 26 June 2013, Brussels.

European Commission (2013c*), Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person*, 26 June 2013, Brussels.

European Commission (2016a), *Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents*, COM(2016)466 final, 13 July 2016, Brussels.

European Commission (2016b), *Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM (2016) 467 final, 13 July 2016, Brussels.

European Commission (2016c), *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) 270 final, 4 May 2016, Brussels.

European Commission (2016d), *Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (Recast)*, COM(2016) 465 final, 13 July 2016, Brussels.

European Commission (2016e), *First Preliminary Outline of a European Pillar of Social Rights Accompanying to the Communication Form the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a Consultation on a European Pillar of Social Rights*, COM(2016) 127 final, ANNEX 1, 8 March 2016, Strasbourg.

Eurostat (2016), News Release 44/2016: Record Number of over 1.2 Million First Time Asylum Seekers Registered in 2015, http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 (accessed 5 September 2016).

Giulietti, C. and J. Wahba (2012), "Welfare Migration", *IZA Discussion Paper* no. 6450.

Maisch, A. (2016), "Wenn Asyl Glückssache ist", *ZEIT ONLINE*, 29 April, http://www.zeit.de/politik/ausland/2016-04/fluechtlinge-anerkennung-unterschiede-europa (accessed 1 September 2016).

Razin, A. and J. Wahba (2011), "Welfare Magnet Hypothesis, Fiscal Burden and Immigration Skill Selectivity", *NBER Working Paper* no. 17515.

Refugee Council (2016), "Protection in EU a Lottery for Refugees", http://www.refugeecouncil.org.uk/latest/news/4154_protection_in_eu_a_lottery_for_refugees (accessed 29 September 2016).

Schwarze, J., U. Becker and C. Pollak (1994), *The Implementation of Community Law*, Nomos, Baden-Baden.