Flygtningenævnets baggrundsmateriale

Bilagsnr.:	**186**
Land:	Diverse Emner
Kilde:	UNHCR
Titel:	Left in Limbo. UNHCR study on the implementation of the Dublin III Regulation
Udgivet:	august 2017
Optaget på baggrundsmaterialet:	3. november 2017

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The UN Refugee Agency

LEFT IN LIMBO

UNHCR STUDY ON THE IMPLEMENTATION OF THE DUBLIN III REGULATION

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ACKNOWLEDGEMENTS

This research was coordinated by Silvia Cravesana in UNHCR's Bureau for Europe (Policy and Legal Support Unit). This report was written by Silvia Cravesana and Maria Hennessy.

This report brings together the main findings of national reports produced by Lucienne Joergensen (Denmark), Claire Callejon (France), Aida Worku (Germany), Aliki-Eleni Georgiadi (Greece), Pietro Sullo (Italy), Paolo Biondi (Malta), Vigdis Vevstad (Norway), Marta Gorczynska (Poland), Cynthia Orchard and Helen-Marie Fraher (United Kingdom).

Particular thanks go to staff in UNHCR's national offices in France, Germany, Greece, Italy, Malta, Poland and the United Kingdom, and in the Regional Representations for Western and Northern Europe for their important contributions. Appreciation is also extended to Reem Alsalem, Lucie Bichet, Sam Boutruche, Zoé Campiglia, Elena Colunga Caballero, Kate Connelly, Cathryn Costello, Alexander de Châlus, Yolande Ditewig, Madeline Garlick, Kristof Gombeer, Sophie Magennis, Hugh Massey, Maeve Patterson, Cornelia Schick, Juliette Tassy, Andrea Vonkeman and Cornelis Wouters for their inputs and support.

Particular thanks also go to the colleagues in other organizations who provided advice and inputs in the initial phase of this research: Anneliese Baldaccini (Amnesty International), Daphné Bouteillet (ECRE) and Marc Provera (JRS).

Finally, UNHCR expresses its sincere gratitude to Member State officials, representatives of organizations, lawyers, asylum-seekers and many others who agreed to be interviewed and provided information in the course of this research.

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Cover photo: Altaf holds out his palm revealing his wife's passport photograph. His wife and two of his children are in Germany where they have applied for asylum. Altaf and his oldest son Majd are in Athens, Greece. They hope to reunite with their family members who are awaiting a decision on their application for international protection in Germany. © UNHCR / A. D'Amato / June 2014.

Layout & Design: BakOS DESIGN

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LIST OF ABBREVIATIONS

Dublin Regulation/Regulation 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 (recast)

AWAS Agency for the Welfare of Asylum Seekers (Malta)

BAMF Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, Germany)

BUMF Federal Association for Unaccompanied children (Germany)

BIA Best interests assessment

CEAS Common European Asylum System

CJEU Court of Justice of the European Union

CRC UN Convention on the Rights of the Child

DIS Danish Immigration Service (Denmark)

EASO European Asylum Support Office

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EU European Union

EU Charter Charter of Fundamental Rights of the European Union

EUAA EU Agency for Asylum

FRA Fundamental Rights Agency

IOM International Organization for Migration

ISS International Social Service

NGO Non-governmental organization

NOAS Norwegian Organization for Asylum Seekers (Norway)

NPIS National Police Immigration Service (Norway)

OFII French Office of Immigration and Integration (France)

OFPRA Office for the Protection of Refugees and Stateless people (*Office Français de Protection des Réfugiés et Apatrides*, France)

RAO Regional Asylum Office (Greece)

RefCom Refugee Commissioner (Malta)

Refugee Convention 1951 Convention Relating to the Status of Refugees and its 1967 protocol

SOP Standard operating procedure

SPRAR Protection System for Refugees and Asylum Seekers (*Servizio centrale del sistema di protezione per richiedenti asilo e rifugiati*, Italy)

TFEU Treaty on the Functioning of the European Union

UDI Directorate of Immigration (*Utlendingsdirektoratet*, Norway)

UKBA UK Border Agency (UK), now UK Visas and Immigration (UKVI)

UN United Nations

UNHCR United Nations High Commissioner for Refugees

VIS Visa Information System

INTRODUCTION

1. Background, aims and scope of the study

The objective of this study was to examine how the Dublin III Regulation is applied and to assess the extent to which the procedures, safeguards and guarantees under the Dublin III Regulation are implemented and deliver on the aims of determining swiftly the Member State[1] responsible for examining an application for international protection in accordance with the criteria under the Regulation.[2] In this context, it should be acknowledged that there may be other ways of ensuring swift access to an asylum procedure; not least, through the taking charge of responsibility for the examination of an application for international protection on a discretionary basis by the Member State where an applicant is present. Such an approach may not only be quicker, but may also prove more efficient in terms of procedural and cost efficiency. Further, there may be situations where, despite a swift determination of responsibility under the Regulation, effective access to an asylum procedure is not ensured, because either the transfer to another Member State takes a long time or because the asylum system in the Member State determined as responsible is deficient.

With the prospect of further reform of the Dublin system being proposed, the research seeks to assess the extent to which the Dublin Regulation is implemented as well as the challenges that Member States face in effectively implementing it. The research aims, on the one hand, to formulate recommendations to maximise – in the interim – the potential of the Dublin III Regulation as it currently stands and provide, on the other hand, recommendations for the longer term to feed into ongoing discussions on the proposed reform.

For practical and other purposes, UNHCR limited the research to 9 of the 32 Member States that take part in the Dublin system: Denmark, France, Germany, Greece, Italy, Malta, Norway, Poland, and the United Kingdom. While the study is confined to a limited number of Member States, its findings are indicative of wider challenges and discrepancies among all Member States applying the Dublin Regulation.

Furthermore, the study does not review the Dublin Regulation in its entirety. Instead, it looks at State practice in the application of the criteria for determining the Member State responsible that relate to children (Article 8) and family members (Articles 9 and 10), the dependency criteria (Article 16) and the discretionary clauses (Article 17) and in this way complements the evaluation of the implementation of the Dublin III Regulation carried out by the European Commission which was issued in March 2016.[3]

The study focuses on assessing how the procedural safeguards and guarantees for applicants are applied in practice in the Dublin procedure, in particular as regards: the provision of information to applicants about their rights and obligations (Article 4), the opportunity for applicants to provide information to help determine the Member State responsible (Article 5), guarantees for children (Article 6), the notification of transfer decisions to applicants (Article 26(1)) and the modalities of transfers. In the context of transfers, the study looks also at whether applicants who are subject to transfer continue to benefit from the provision of reception conditions up until the point of their departure to the Member State responsible. It also looks at whether and how often detention (or an alternative to detention) is used for purposes of securing a transfer carried out in accordance

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1 The Dublin III Regulation is applicable to all the 28 EU Member States and four associated countries (Iceland, Lichtenstein, Norway and Switzerland). "Member States" is used throughout the report to refer to the countries applying the Dublin Regulation, regardless of whether they are EU Member States or associated countries.

2 The other stated aim of the Dublin system is that of preventing abuse by avoiding multiple applications. However, this study did not seek to assess the extent to which this aim is achieved in practice.

3 European Commission (DG Migration and Home Affairs), *Evaluation of the Implementation of the Dublin III Regulation, Final Report*, 18 March 2016, available at: http://goo.gl/aEDtyE.

with the Dublin Regulation (Article 28), including what criteria for defining a "risk of absconding" have been established in national law (Article 2(n)) and how those criteria are applied in practice. Finally, the study looks at the reasons for the low rate of successful transfers of applicants.

One issue that the study was only partially able to address is that of the extent to which certain provisions, such as the discretionary clauses, are utilised. This is due to the lack of complete and/or reliable statistical information on the use of the Dublin Regulation. Further details on statistical information are provided below under *"Use of statistics"*.

2. Methodology

The research was conducted between October 2015 and March 2016. However, the analysis covers the period between 1 January 2014 – when the Dublin III Regulation entered into force – and February 2016. It should be noted that practice referenced in this report may have evolved between the finalization of the research phase and publication of the report.

Selection of the countries surveyed

The selection of the countries was based on several factors. Firstly, the countries were selected having regard to their profile as "entry", "transit" or "destination" countries with the aim of diversifying the sample. Secondly, consideration was given to the share of applications that these countries receive, again with the aim of diversifying the countries surveyed. Consequently, the implementation of the Dublin Regulation in countries with a small or relatively small caseload was compared with its implementation in countries with a (significantly) greater caseload. Finally, three countries which do not fully take part into the Common European Asylum System (CEAS), but only into the Dublin system (Denmark and Norway) or which did not opt in to the second phase of the CEAS (the United Kingdom) were purposely selected to further diversify the sample.

Other elements of diversification emerged during the research phase, such as for example the relatively limited experience of certain countries in regard to treating cases concerning unaccompanied children, due for example to the fact that they move on[4] and the fact that few unaccompanied children lodge an application for international protection there.[5] It should also be noted in this context that the increased number of asylum applications lodged in certain countries in 2015 and 2016 affected those Member States' practice in the implementation of the Dublin Regulation[6] as well as the capacity of some Member States' officials to be interviewed and provide the information requested for the purposes of this study, including statistical information and case files.

Research methods

The research was conducted by a national researcher in each of the countries surveyed using interviews (in person, in writing or by telephone) as well as through the audit of case files and the observation of personal interviews in each of the Member States surveyed. In each Member State, representatives of the national authorities involved in the Dublin procedure, NGOs and legal advisors, child representatives as well as, where relevant, organizations involved in family tracing and other stakeholders, were interviewed.

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4 For example Italy and Poland.

5 For example in France.

6 This is reflected in the findings of this report, which sought to analyse the practice of the concerned Member States both in times of "regular" arrivals as well as during the increased inflows, in an attempt to analyse the extent to which Member States are capable of reacting to such variations and/or the Dublin Regulation allows for such flexibility.

Table 1. Methodology overview.

Member State	Number of case files audited	Number of personal interviews observed	Number of applicants interviewed	Number of national stakeholders consulted				
				National Authorities	NGOs and Legal advisors[7]	Child representatives	Organizations involved in family tracing	Others (judicial authorities, Dublin experts, etc.)
Denmark	42	5	9	3	2	1	1[8]	
France	17	7	10	5	20	1		1
Germany	28	10	10	3	9	1	1	
Greece	27	3	16	3	5[9]	5[10]	1	1
Italy	7	15	21	9	9	2	1	3
Malta	2	12	16	3	2		1	1
Norway	18	3[11]	16	5[12]	2	3		
Poland	24	10	16	5	4		1	2
UK	41	10	12	4	3	3	2	3
Total	206	76	126	40	56	16	8	11
Total				131				

Interviews with national stakeholders

Interviewees were mainly identified by the national researchers in consultation with the national UNHCR office. In some instances, respondents suggested additional interviewees. Two semi-structured questionnaires with open questions were used for interviews. One questionnaire was specifically targeted at representatives of the national authorities, while one was targeted towards civil society representatives and legal advisors. The questionnaires were developed on the basis of the Dublin III Regulation and each contained questions under the following sections: right to information; personal interview; guarantees for children; hierarchy of criteria; dependent persons; discretionary clauses; take back and take charge requests; detention and notification of a transfer decision and transfers.

Interviews were used in most cases rather than written questionnaires, in order to achieve a high response rate and thus ensure a balanced and representative study. Where requested, the questionnaire was shared with the respondent prior to the interview. National authorities also received a letter presenting the study as well as the terms of reference of the study.

In consideration of the limited competencies of some of the stakeholders interviewed in the context of the Dublin procedure, some interviewees did not respond to the entire questionnaire, but only to questions

7 This includes both NGOs and independent legal advisors. However, in some instances this can include NGOs that provide legal assistance to applicants.

8 Different departments of the Red Cross provide representation to children and perform family tracing in Denmark; therefore, this organization is mentioned under "*Child representatives*" and "*Organizations involved in family tracing*".

9 This refers to the number of NGOs interviewed. In some cases, more than one legal advisor or other counsellor working within the same NGO was interviewed.

10 This refers to the number of NGOs that provide representation to children in the Dublin procedure. It should be noted that NGO staff (legal aid providers or other counsellors) provide representation to children in the Dublin procedure, therefore the same organizations are mentioned under *"NGOs and Legal aid providers"* and *"Child representatives"*.

11 2 out of the 3 interviews were not observed in their entirety as in Norway personal interviews for the purposes of the Dublin procedure are carried out in the context of the registration of the application for international protection. Consequently, it was not relevant for the purposes of this study to observe those interviews in their entirety.

12 Representatives from different department within the Directorate of Immigration (UDI) were interviewed (Dublin Unit, Statistics Unit, Arrival Unit and International Unit).

under selected topics. At times, several interviews were conducted with the same respondent in order to complete the questionnaire, or follow-up interviews were held where further information was necessary. In total, 131 different stakeholders were interviewed, of which 40 national authorities, 56 national NGOs and legal advisors, 16 child representatives, 8 organizations involved in family tracing, and 11 other national stakeholders, including experts and academics. Table 1 above provides a detailed overview of the interviews conducted in each Member State.

Interviews with applicants

Interviewees were mainly identified by the national researchers in consultation with national stakeholders, including detention and reception centres, NGOs and legal advisors, as well as the national UNHCR office. In some instances, respondents suggested additional interviewees.

To the extent possible, respondents were selected having regard to diversifying the sample of interviewees on the basis of their profile, the provisions applicable to their case under the Dublin Regulation, as well as gender, age and nationality of the applicant. Where possible, applicants belonging to the top nationalities of application in each country were interviewed to ensure a representative sample.

One semi-structured questionnaire with open questions was used for interviews. Whilst the questionnaire covered the same topics as the ones for national stakeholders, the questions were aimed at gathering information on the applicant's experience of the Dublin procedure. In all cases, interviews were conducted in person. Prior to the interview, applicants were informed that the information gathered during the interview would remain anonymous and all gave consent to the use of the information provided for the purpose of this study. Where necessary, the interviews were conducted with the assistance of an interpreter. All interpreters signed a confidentiality form.

In total, 126 applicants were interviewed in the 9 countries surveyed. Table 1 above provides a detailed overview of the interviews conducted in each Member State.

Audit of case files

Case files were audited in each Member State. Whilst the research aimed at auditing a total of 50 case files in each Member States, a number of practical obstacles limited the number of cases that could be audited in practice. In some Member States, the filing system did not allow to retrieve case files on the basis of the criteria identified for the selection of the sample, whilst in other cases the limited capacity of the authorities – due in particular to the increased workload during the period when this research was carried out- had an impact on the number of case files that could be provided for the purpose of the study. In one Member State, the researcher was not granted access to the case files by the authorities, and the case files audited were provided by the national UNHCR office there. Also in other Member States some case files were provided by other stakeholders, such as NGOs and legal advisors.

To the extent possible, when selecting the case files, researchers had regard to diversifying the sample on the basis of the provision used and the type of case (i.e. incoming or outgoing). Whilst the audit focused mainly on case files concerning take charge procedures on the basis of the family criteria, including the dependency clause (Articles 8 to 10, and 16), and the discretionary clauses, case files concerning take charge procedures on the basis of other provisions and case files concerning take back procedures were also audited.

In total, 206 case files were audited. Table 2 below provides an overview of the case files audited. It should be noted that some of the case files audited were incomplete. This may be due to a lack of information recorded in the case file, or to the fact that a particular case was still ongoing at the time of the audit. As a consequence, only limited information could be gathered and analysed from such case files. This explains why, at times, a more limited number of case files were available for analysis in relation to certain operational aspects of the Dublin Regulation.

Table 2. Overview of the case files audited on the basis of the provision used.

		Article 8 Children	Article 9 Family members (beneficiaries)	Article 10 Family members (applicants)	Article 12 Residence documents or visas	Article 13 Entry and/or stay	Article 16 Dependency clause	Article 17.1 Sovereignty clause	Article 17.2 Humanitarian clause	Article 18 (b), (c), (d) or 20(5) Take back requests	Other Provisions
Denmark (42)	Incoming	3	2	1	1		1	3	2		
	Outgoing	9[13]		2		6	2		3	7	
France (17)	Incoming	1						1			
	Outgoing				3	3	1			8	
Germany (28)	Incoming	4	2	7			2	3	5		
	Outgoing	2	1				2				
Greece (27)	Incoming	1									
	Outgoing	6	2	12			1		5		
Italy (7)	Incoming	3				1					
	Outgoing	2					1				
Malta (2)	Incoming	1							1		
	Outgoing										
Norway (18)	Incoming	2	2				1		2	1	2
	Outgoing	2	1	1					2	2	
Poland (24)	Incoming	1						2			
	Outgoing	3	2	2			3		6	5	
United Kingdom (41)	Incoming	13	8				1		8		5
	Outgoing					1				5	
Total (206)		53	22	23	4	11	15	9	34	28	7

Observation of personal interviews

Personal interviews for the purposes of the Dublin procedure were observed by the researchers in all the Member States surveyed. In some Member States, personal interviews for the purposes of the Dublin procedure are carried out together with the registration or admissibility interview. In such cases, for practical reasons -such as that it was not possible to know in advance whether an interview would be relevant for the purposes of this study- a more limited number of interviews could be observed. In all cases, the researcher was authorised to observe the personal interview by the national authorities responsible for carrying out personal interviews.

Overall, 76 personal interviews were observed. Further details on the number of interviews observed in each Member State are provided in Table 1 above.

[13] Due to the fact that certain case files were incomplete, 8 out of these 9 case files were not included in the analysis in section 3 of Chapter II (Unaccompanied children (Article 8)) of this report.

3. Terminology, statistics and translations

Use of terminology

For the purposes of this report, the Office of the United Nations High Commissioner for Refugees (UNHCR) has used terminology drawn from the recast 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[14] (Dublin Regulation, or Regulation). Exceptions to this concern the use of the term "child" instead of "minor",[15] the use of the term "family reunion" instead of "family reunification" to refer to the bringing or keeping together of families under relevant provisions of the Dublin Regulation.[16]

It should also be noted that the terms "representative" and "representation" are used, in accordance with Article 2 of the Dublin Regulation, to designate the provision of representation to unaccompanied children. Depending on the national system, it can take different forms and can be referred to as guardianship, and can be performed by social workers, professional or volunteer guardians or representatives, NGOs, etc. "Representation" shall be distinguished from "legal advice".[17] Lawyers and legal aid providers are referred to as "legal advisors" throughout this report.

"Member States" is used throughout the report to refer to the countries applying the Dublin Regulation, regardless of whether they are European Union (EU) Member States or associated countries.[18]

Finally, due to their common use among practitioners, the terms "sovereignty clause" and "humanitarian clause" are used to refer to the discretionary clauses provided under Articles 17(1) and 17(2) respectively.

Where relevant, the use of country-specific terminology is explained in the text.

Use of statistics

Statistical information on the application of the provisions of the Dublin Regulation was initially sought from the relevant national authorities in each of the Member States surveyed. However, where statistics were provided, they were not sufficiently disaggregated or contained omissions and inconsistencies. To ensure

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[14] 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 (recast), 26 June 2013, available at: http://goo.gl/XnJ2mV.

[15] However, where an Article of the Dublin Regulation is cited, the original terminology "minor" is maintained.

[16] As opposed to "family reunification" under *Directive 2003/86/EC on the right to family reunification ("Family Reunification Directive")*.

[17] Legal advice is sometimes commonly also referred to as "legal representation". However, this terminology will not be used in this report.

[18] The Dublin III Regulation is applicable to all the 28 EU Member States and four associated countries (Iceland, Lichtenstein, Norway and Switzerland).

coherence and comparability of the data covering the different Member States surveyed, the statistics used in this study are mainly based on data provided by Eurostat for 2014, 2015 and 2016.[19]

Eurostat data should however be considered with caution. Firstly, the data available on Eurostat and included in this study remains subject to changes. Additionally, according to the European Commission, "accuracy problems related to the differences in reporting latency and practices across Member States remain" in Eurostat's statistics on the application of the provisions of the Dublin Regulation.[20]

Eurostat statistics were not available for all the Member States surveyed at the time of writing this report, therefore limiting comparability. Additionally, this study found that, in some instances, certain provisions of the Dublin Regulation can be applied implicitly and therefore Eurostat does not provide a complete picture of their application. For example, this is the case of Article 17(1) (the sovereignty clause). This means that the statistical information provided in this report on its use may not accurately reflect reality. The extent to which Member States make an implicit use of this provision was not explored in detail in this study. For the purposes of this report, requests for re-examination were not considered.

In the specific case of Denmark, it should be noted that the collection of data disaggregated on the basis of the provisions in the Dublin III Regulation was only started in the course of 2015. Data concerning the use of specific provisions by Denmark up to 2015 may therefore not accurately reflect the Member State's actual practice.

Data provided by the national authorities in the Member States surveyed was used where relevant statistics are not compiled by Eurostat, such as on the duration of detention for the purposes of securing transfers under the Dublin Regulation. Additionally, some of the statistical analyses included in this study were elaborated on the basis of the data obtained from the case files audited (for more information on the audit of case files see above under *"Methodology"*).

Translations

All translations in this report are unofficial translations by UNHCR, unless otherwise specified.

[19] Eurostat, the European Commission's statistical office, collects data on the application of the provisions in the Dublin Regulation in line with Article 4(4) of Regulation 862/2007. See European Parliament and Council, *Regulation No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers*, Strasbourg, 11 July 2007, available at: http://goo.gl/6vtm5m.

[20] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 862/2007 on Community statistics on migration and international protection*, COM(2015) 374 final, Brussels, 30 July 2015, available at: http://goo.gl/anwT59.

4. The Dublin system: legal framework

The recast Dublin III Regulation was adopted on 26 June 2013, replacing the Dublin II Regulation (which was adopted on 18 February 2003) and applies to applications for international protection lodged as from 1 January 2014, and, from that date, to any request to take charge of or take back applicants for international protection, irrespective of the date on which the application for international protection was lodged.[21]

The Dublin III Regulation is binding in its entirety and directly applicable in all the 28 EU Member States and four associated countries (Iceland, Lichtenstein, Norway and Switzerland). The participation of Denmark, which does not take part in the other instruments of the CEAS, is based on a Council decision of 21 February 2006.[22] The Dublin Regulation also applied to Iceland and Norway and to Lichtenstein and Switzerland by way of two Council Decisions of 21 February 2006[23] and 28 January 2008[24] respectively. The same legal basis allowing these countries to participate in the Dublin II Regulation applies to the Dublin III Regulation.

The Dublin III Regulation is supplemented by Regulation (EC) No 1560/2003 of 2 September 2003 (Implementing Regulation)[25] as amended by Regulation (EU) No 118/2014,[26] which lays down rules for the practical application of the Dublin III Regulation, providing also for standard forms for the exchange of information between Member States prior to transfers and the provision of information to applicants.

The Dublin system is further complemented by Regulation (EU) No 603/2013 (Eurodac Regulation) of 26 June 2013,[27] which provides for a fingerprinting database that supports the operation of the Dublin Regulation.

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21 Article 49 of the Dublin Regulation.

22 Council of the European Union, *Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention*, 21 February 2006, available at: http://goo.gl/aHeAu7

23 Council of the European Union, *Council Decision of 21 February 2006 on the conclusion of a Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway Text with EEA relevance Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway*, 21 February 2006, available at: http://goo.gl/mQ96Yg

24 Council of the European Union, *Council Decision of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland*, 28 January 2008, available at: http://goo.gl/wQwEXa

25 Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2 September 2003, available at: http://goo.gl/ZH1YLq.

26 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 30 January 2014, available at: http://goo.gl/g5HLyi.

27 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, 26 June 2013, available at: http://goo.gl/L1ZGfn.

5. The Dublin system and European Human Rights law: an overview[28]

The Dublin Regulation is based on the premise that all Member States respect the principle of *non-refoulement* and can thus be considered as 'safe' for third country nationals[29] and that applicants are able to enjoy comparable levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States. In practice, however, significant divergences exist in reception conditions and in the approach to the granting of international protection across the Member States. UNHCR is concerned that the lack of harmonization may lead to direct or indirect *refoulement* in view of the inconsistent interpretation of the refugee definition contained in Article 1 A of the Refugee Convention and/or the risk of inhuman or degrading treatment in violation of Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (EU Charter). Given the primacy of fundamental rights, the Dublin Regulation, as secondary EU legislation, must always be interpreted and applied in a manner which is compliant with international refugee and human rights law.[30]

Over the years both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have examined the compatibility of the Dublin system with the fundamental rights of applicants subject to this system. Although the CJEU has also pronounced on the interpretation of certain provisions of the Dublin Regulation on aspects such as time limits and the impact of withdrawal of an application,[31] this section primarily focuses on the Dublin system in the context of the applicant's fundamental rights.

Risk of inhuman or degrading treatment or punishment

In particular, under the non-derogable right of Article 3 ECHR,[32] the ECtHR has consistently held that this right imposes an absolute obligation on Contracting States to the ECHR not to expel a person to a country where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to

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[28] The reference period for this section extends to 31 July 2017.

[29] Recital 3 of the Preamble of the Dublin Regulation. UNHCR has recognised "*the advisability of concluding agreements among States directly concerned, in consultation with UNHCR, to provide for the protection of refugees through the adoption of common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum and refugee status and for granting the protection required, and thus avoiding orbit situations.*" UNHCR has also emphasized that such procedures and agreements must include safeguards adequate to ensure in practice that persons in need of international protection are identified and that refugees are not subject to *refoulement*. Similar to the safe third country concept this requires an individual assessment of whether the other Member State will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from *refoulement*. Such principles also apply in the context of the Dublin Regulation. For more information see: UNHCR, *General Conclusion on International Protection*, 8 October 1993, No. 71 (XLIV) – 1993, para. K) available at: http://www.refworld.org/docid/3ae68c6814.html and UNHCR, *UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)*, 16 August 1991, 3 European Series 2, p. 385, available at: http://www.refworld.org/docid/3ae6b31b83.html.

[30] UNHCR, *UNHCR intervention before the Court of Justice of the European Union in joined cases of NS and ME and Others*, 28 June 2011, C-411/10 and C-493/10, para. 5-6, available at: http://www.refworld.org/docid/4e1b10bc2.html.

[31] See for example *Migrationsverket v. Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati* , C-620/10, Court of Justice of the European Union, 3 May 2012, available at: http://www.refworld.org/docid/4fa783182.html; *Migrationsverket v. Petrosian and Others*, Case C-19/08, Court of Justice of the European Union, 29 January 2009, available at: http://www.refworld.org/docid/498964e32.html

[32] Article 3 ECHR provides that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

torture or inhuman or degrading treatment or punishment.[33] The Court has stated in the context of the Dublin Regulation, that *"Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."*[34] In effect, Member States cannot rely automatically on arrangements under the Dublin Regulation.[35]

Furthermore, the case law of the ECtHR has established that the Dublin system must be applied in a manner compatible with the ECHR.[36] In the seminal case of *M.S.S. v. Belgium and Greece* the Grand Chamber of the Court held that Belgium violated Article 3 of the ECHR for transferring an asylum-seeker to Greece for exposing the applicant to risks, contrary to Article 3, arising from the systemic deficiencies in the asylum procedure and detention and living conditions in Greece.[37] The Court observed *"that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."*[38] Given the deficiencies in the asylum procedure and reception conditions in Greece, the Court held that the Belgian government *"knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities."*[39]

Similarly, the CJEU in the joined cases *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10*, held that Article 4 of the EU Charter must be interpreted as meaning that the Member States, including the national Courts, may not transfer an asylum-seeker to the *"Member State responsible"* within the meaning of the Dublin Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum-seekers in that Member State amount to substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. The Court noted that when applying the sovereignty clause (then Article 3(2)), its discretionary power must be exercised in accordance with other provisions of the Regulation.[40] The Court confirmed that the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which

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[33] *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at: http://www.refworld.org/docid/3ae6b6fec.html ; *T.I. v. The United Kingdom*, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, available at: http://www.refworld.org/docid/3ae6b6dfc.html; *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: http://www.refworld.org/docid/3ae6b69920.html.

[34] *T.I. v. The United Kingdom*, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, note 61, available at: http://www.refworld.org/docid/3ae6b6dfc.html.

[35] UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of M.S.S. v. Belgium and Greece*, June 2010, para. 5.1 available at: http://www.refworld.org/docid/4c19e7512.html.

[36] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, (*M.S.S. v. Belgium and Greece*) available at: http://www.refworld.org/docid/4d39bc7f2.html ; *Sharifi et autres c. Italie et Grèce*, Requête no 16643/09, Council of Europe: European Court of Human Rights, 21 October 2014, available at: http://www.refworld.org/docid/544617ad4.html.

[37] See *M.S.S. v. Belgium and Greece*, para. 347, para. 352: *"the numerous reports and materials have been added to the information available to it when it adopted its K.R.S. decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis... In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof."*

[38] *M.S.S. v. Belgium and Greece*, para. 353.

[39] *Ibid*., para. 358.

[40] *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, Court of Justice of the European Union, 21 December 2011, (N.S. and M.E.), para. 66, available at: http://www.refworld.org/docid/4ef1ed702.html.

would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law.[41] The Court went on to state that *"if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision."*[42] In such circumstances, the Member State may not transfer the applicant to that State. In examining whether another Member State may be responsible for the applicant the Court clearly stated that *"the Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time."*[43] It may, therefore, be necessary for it to take over responsibility for the examination of the applicant's application for international protection. This is in accordance with the objective of ensuring swift access to an asylum procedure.

In the case of *Tarakhel v. Switzerland*, the ECtHR confirmed the individual nature of the test for Dublin transfers, i.e. whether substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving Member State.[44] This approach, combining the assessment of the general situation and the individual circumstances, was more recently confirmed by the CJEU in the case PPU C.K. and Others v. Supreme Court of Republic Slovenia, C-578/16 (C.K. and Others), in which the Court stated that *"a reading of Article 3(2) of the Dublin III Regulation [which excludes the possibility that considerations linked to real and proven risks of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, might, in exceptional situations, have consequences for the transfer of a particular asylum seeker] would be, first, irreconcilable with the general character of Article 4 of the Charter, which prohibits inhuman or degrading treatment in all its forms. Secondly, it would be manifestly incompatible with the absolute character of that prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible."*[45]

The provision of reception conditions to applicants in the Dublin procedure

Access to reception conditions during the Dublin procedure as part of the right to dignity under the EU Charter was also addressed by the CJEU in the case of *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, C-179/11* (Cimade and GISTI).[46] The Court held that the Reception Conditions Directive[47] in that regard must be interpreted in light of its general scheme and purpose, whilst respecting the fundamental rights in the EU Charter *"in particular to*

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41 *Ibid.*, para. 77.

42 *Ibid.*, para.86.

43 *Ibid.*, para. 98.

44 The ECtHR therefore confirmed the approach previously taken in the *Soering* case. *Tarakhel v. Switzerland*, 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/docid/5458abfd4.html; para. 104: *"The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established."*

45 *C. K., H. F., A. S. c. Republika Slovenija*, C578/16, European Union: Court of Justice of the European Union, 16 February 2017, available at: http://www.refworld.org/cases,ECJ,58a71ae04.html

46 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, Court of Justice of the European Union, 27 September 2012, available at: http://www.refworld.org/docid/506425c32.html.

47 The judgment concerned Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, 27 January 2003, available at: http://goo.gl/oFj8Uy.

ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter."[48] Therefore, applicants in the Dublin procedure must also have access to reception conditions similar to other applicants. The Court went on to state that *"further to the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not […] be deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to another Member State – of the protection of the minimum standards laid down by [the Reception Conditions] directive."*[49]

The rights of children in the Dublin procedure

Both Courts have also examined the application of the Dublin Regulation in relation to children. In *Tarakhel v. Switzerland* the Grand Chamber of the ECtHR ruled on the transfer of an Afghan couple and their six minor children to Italy from Switzerland under the Dublin Regulation.[50] It held that there would be a violation of Article 3 of the ECHR if the family were returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the family would be cared for *"in a manner adapted to the age of the children" and "kept together."*[51] Referring to previous established case law the Court observed that the UN Convention on the Rights of the Child[52] (CRC) encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents.[53] The Court stated that *"it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status."*[54] The Court also affirmed that the correct standard in assessing the risk upon transfer to the responsible Member State is the Soering v the United Kingdom standard, *"where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment."*[55] It clarified that the source of the risk does nothing to alter the level of protection guaranteed under the ECHR, or ECHR obligations, thereby rejecting the test of "systemic deficiencies" set out in the CJEU decision of *N.S. and M.E.* The CJEU also addressed the application of the Dublin Regulation with respect to unaccompanied children in the case of *M.A. and Others* who lodged an application for international protection in the United Kingdom after having previously applied for international protection in the Netherlands and Italy.[56] It held that the best interests of the child is a primary consideration in the application of the Dublin Regulation in light of Article 24(2) of the EU Charter and that Article 6 of the Dublin Regulation must be interpreted in a manner compliant with that right.[57] The Court went on to state that *"since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State*

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48 *Ibid*., para. 42.

49 *Ibid*., para. 56.

50 *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/docid/5458abfd4.html

51 *Ibid*., para. 122.

52 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, available at: http://www.refworld.org/docid/3ae6b38f0.html.

53 *Ibid*., para. 99. ; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, available at: http://www.refworld.org/docid/45d5cef72.html; *Popov c. France*, Requêtes nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, available at: http://www.refworld.org/docid/4f1990b22.html

54 *Ibid*., para. 99.

55 *Soering v. The United Kingdom*, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989, available at: http://www.refworld.org/docid/3ae6b6fec.html

56 *MA, BT, DA v. Secretary of State for the Home Department*, C-648/11, Court of Justice of the European Union, 6 June 2013, available at: http://www.refworld.org/docid/51b0785e4.html

57 *Ibid*., para. 56.

responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State."[58] Therefore, the best interest of the child must be a primary consideration when designating the Member State responsibility under the Dublin Regulation.

Dependency and humanitarian grounds

In the case of *K*, the CJEU also examined the interpretation of the dependency clause (then Article 15) and ruled that it must be interpreted and applied in line with its humanitarian purpose[59] stating also that *"the competent national authorities are under an obligation to ensure that the implementation of the Dublin Regulation [No 343/2003] is carried out in a manner which guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application."*[60]

Overall, the case law of both Courts demonstrates that the Dublin Regulation cannot be interpreted and applied in a vacuum but must be compliant with fundamental rights, the ECHR and general principles of EU law. Member States must interpret and assess the assignment of responsibility under the criteria in Chapter III of the Dublin Regulation, the dependency clause and/or the discretionary clauses in a manner which respects fundamental rights. Furthermore, Member States cannot abdicate their responsibilities and human rights obligations by transferring applicants to the responsible Member State and must assess whether such transfers do not place applicants at risk of human rights violations pursuant to the jurisprudence of the ECtHR and CJEU.

[58] *Ibid*., para. 55.

[59] *K. v. Bundesasylamt*, C 245/11, Court of Justice of the European Union, 6 November 2012, Paras 40-41 available at: http://www.refworld.org/docid/50a0cd8e2.html

[60] *Ibid*., para. 48.

I. PROCEDURAL SAFEGUARDS FOR APPLICANTS IN THE DUBLIN PROCEDURE

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1. Provision of information

The provision of information to applicants in the Dublin procedure

Article 4 of the Dublin Regulation requires national authorities to provide information on the application of the Regulation *"as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State"*. This is a particularly important safeguard to ensure that applicants receive timely accurate information on the Dublin system which in turn facilitates the proper functioning of the Dublin procedure. Under this provision, applicants shall be informed as early as possible of the application of the Dublin Regulation, its functioning, and the information required to determine responsibility for the examination of the application for international protection.[61]

[61] Article 4(1) Dublin Regulation.

In the majority of Member States some form of information is provided when the application for international protection is formally lodged with the national authorities of the Member State concerned.[62] In some Member States information is also provided to applicants upon arrival at reception centres.[63] Providing information at an early stage of the asylum procedure is necessary to ensure that the applicant has the requisite knowledge to provide relevant information and personal data for the correct application of the Dublin Regulation in his or her own case. However, in some Member States the timing of the delivery of information may negatively impact upon the correct application of the Regulation where there are significant delays in its provision, including when information is only provided after the personal interview. This renders the personal interview less effective in facilitating the determination of the responsible Member State as applicants, without knowledge of the Dublin system beforehand, may not raise during the interview relevant personal information which will enable the authorities to apply the correct criteria for determining responsibility for the examination of an application for international protection. Due to pressure in some Member States in light of the increased arrivals of applicants, significant delays exist in the lodging of applications for international protection, which also impacts upon the provision of information and the scheduling of the personal interview. Such delays not only affect the timing of when such information is provided but also the quality of information provided as frequently there are limited opportunities to clarify information orally.[64]

Whether the applicant is located within the territory of a Member State may also impact upon whether he or she receives information or not; for example, in one Member State applicants in the border procedure at certain airports or in administrative detention reportedly receive no information on the Dublin Regulation.[65] Information is only provided in some Member States if there is an indication that the Dublin Regulation may be applicable in an applicant's individual case by way of Eurodac or visa data.[66]

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62 As reported in Denmark, France, Germany, Greece, Poland and the United Kingdom.

63 As reported in Italy, Malta, Norway and the United Kingdom. This occurs in Italy in SPRAR (Protection System for Refugees and Asylum Seekers) and government-managed reception centres, although information varies in quality. In the UK an NGO called 'Asylum Help' has offices in all initial accommodation centres and also provides advice sessions in three detention centres. However, some applicants claimed only to have received information once they were in initial accommodation, to which they have access only after the personal interview for Dublin purposes takes place.

64 As reported in France, Germany, Greece and Norway. For example, in Germany 476,649 applications for international protection were lodged in 2015 while 1,091,894 arrivals of asylum-seekers were registered in the same period. The high number of arrivals had a substantial impact in the processing of cases; see for example the BAMF official asylum statistics for 2015, available at: https://goo.gl/NSafwZ. In February 2016, there was a backlog of approximately 400,000 pending applications. On the number of unprocessed applications in Germany see BAMF official asylum statistics for the month February 2016, available at: http://goo.gl/ZE6ko7; Germany in response has taken several measures to manage the influx, including an increase in staffing resources. Applications for international protection also rose by 22 per cent in 2015 to 79,126 in France. For more information see: Ministry of the Interior, "*Les demandes d'asile*", 15 January 2016, available at: http://goo.gl/pKXkeP); in Norway, 31,000 applications were submitted in 2015 compared to 11,500 in 2014.

65 Concerning applicants in detention, the issue was reported by NGOs operating in Roissy and Orly airports in Paris, France, who stated that information leaflets are not provided in the border procedure for applicants. In France, information leaflets are also reportedly not systematically distributed among all administrative detention centres.

66 As reported in France, Greece and Italy. For example, a national authority staff member in one Member State reported that if there is no Eurodac hit after the fingerprinting has taken place the asylum-seeker does not receive any information concerning the Dublin Regulation *"because it is not necessary"*.

GOOD PRACTICES

A **good practice** existed in the past in Italy as part of the Praesidium[67] inter-agency project by UNHCR, IOM, Save the Children and Italian Red Cross where asylum-seekers provided information upon arrival to Italy on the Italian asylum procedure and received preliminary information on the Dublin Regulation. In the context of the project, unaccompanied children were identified after disembarkation, given information and interviewed in order to reduce the possibility of mistakes in the age assessment and to facilitate family tracing. Furthermore, within the PRUMA project[68] – Promoting Family Reunification and Transfer of Unaccompanied Minor Asylum Seekers under the Dublin Regulation- led by IOM in partnership with Save the Children and UNHCR, unaccompanied children received information by the Italian social services before applying for international protection. In the context of the Access project, founded under AMIF, UNHCR provides information about the asylum procedure and the Dublin Regulation to persons arriving by sea.

A **good practice** is reported in Italy in that NGOs are contracted to provide information and advice at certain airports (Milan Malpensa, Venice, Ancona, Bari, Brindisi, Bologna, Rome Fiumicino) or ports to potential applicants for international protection including on the Dublin Regulation.

Methods of providing information

According to the Dublin Regulation while information should be provided in writing in a language that the applicant understands or is reasonably supposed to understand, information may also be supplied orally where necessary for the proper understanding of the applicant.[69] Although most Member States of focus in this research provide some form of information, the content and delivery of that information varies. Information on the Dublin Regulation and procedure appears to be generally provided to applicants through a combination of different methods with the exception of two Member States.[70] Information is mostly provided in writing by way of information leaflets and notices, which are sometimes complemented by oral information provided during the personal interview, mostly upon request by the applicant. In practice, however, issues related to the provision of information are reported in all the surveyed Member States.

It appears in most Member States that the way in which information is provided fails to properly take into account the specific profile of the applicant with the exception of unaccompanied children. With regard to illiterate applicants, although limited information is available on the practice surrounding this issue, it appears from some Member State practice that oral information may be provided for such persons as long as applicants request it and inform the interviewer of their illiteracy.[71] Illiterate applicants in the majority of Member States, however, are at a distinct disadvantage as the emphasis is on providing written information by national authorities compared to other methods. It does not appear that applicants are routinely asked if they are illiterate or not so the onus is on the individual applicant to proactively indicate this to national authorities.

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67 For further information on the *Praesidium* project see: http://goo.gl/rh8hhn

68 For further information on the *PRUMA* project see: http://goo.gl/UkjxEL

69 Article 4(2) Dublin Regulation.

70 In France, information is reportedly provided in writing only, although some basic information as to the reasons why an applicant has been placed under the Dublin procedure and on the subsequent steps may be provided orally after the personal interview; whilst in Italy the *Questura* offices (Police Headquarters) only provide information orally, although NGOs may provide Dublin-related information through other methods.

71 As reported in Germany and the United Kingdom. In Germany it was reported that if an applicant was illiterate, information would be read out from the leaflets via the interpreter.

Information leaflets

Annex X of the Implementing Regulation to the Dublin Regulation provides common information leaflets to be issued to applicants in accordance with Article 4.[72] In practice, there have been significant delays in the use of these common information leaflets by Member States for various reasons, including the lack of resources, for example to translate them,[73] and technical issues not dependent on the Member State. Therefore, one Member State had only recently started issuing the common information leaflets to applicants[74] while other Member States were still preparing the leaflets for distribution by adapting them to the national context.[75] Even where the common information leaflets or other national information leaflets are in use,[76] these are often reported not to be available in sufficient numbers[77] or at all relevant locations[78] or effectively handed out to applicants.[79] Sometimes the information is left in official waiting rooms to be picked up by applicants of their own initiative or advertised on national authority's office walls. The availability of different language versions also has a significant impact in the provision of information with some Member States only providing the common information leaflets in one to four languages despite requiring them for applicants from a variety of different nationalities.[80]

Other written materials on the Dublin Regulation consisting of information brochures, leaflets and notices are available in a number of Member States and are issued by either the national authorities of the State concerned or by other stakeholders, such as NGOs. Incomplete, inaccurate and/or outdated information are reported to have been provided in written materials in a number of Member States and in particular, outdated information pertaining to the Dublin II Regulation in some instances was still being distributed to applicants despite the recast of the Dublin Regulation.[81] For example, a booklet prepared by the International Organization for Migration (IOM) which is distributed in an inconsistent manner by the authorities to applicants in one Member State contains outdated information on the criteria of the Dublin Regulation as noted in this extract *"the European law states that the country in which you first arrive is the one that is responsible for examining your asylum request and giving you protection if you qualify for it"*.[82] This overlooks the hierarchy of criteria in Chapter III of the Dublin Regulation and incorrectly describes the purpose of the Regulation.

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72 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for the examining an asylum application lodged in one of the Member States by a third-country national, Annex X, available at: http://goo.gl/kwE3C3.

73 As reported in France, Germany, Italy and the United Kingdom.

74 As reported in Greece.

75 As reported in Germany, Italy, Malta and Norway.

76 As reported in Denmark, France, Greece, Malta, Norway, Poland and the United Kingdom.

77 As reported in Malta.

78 For example, Norway and France. Some Prefectures in France reported that limited funding impacts the possibility of printing information leaflets for every applicant.

79 As reported in Denmark, Greece, Malta, Poland and the United Kingdom.

80 For example, the United Kingdom provides the common information leaflets in English only and in Greece the common information leaflets are provided only in 4 languages. However, in Malta the common information leaflets are available in 11 languages, in France in 15 languages, in Germany in 15 languages, although they are not used in practice due to obstacles concerning their implementation, and in Poland in 10 languages. In Norway, the Norwegian Organization for Asylum Seekers' (NOAS) information leaflet is available in 14 languages.

81 For example, in Italy in one particular *Questura* and at the Fiumicino Airport in Rome, in Greece, in Malta and to a limited extent in Poland. In Greece, the information leaflet for asylum-seekers entitled "*Basic Information for People Seeking International Protection in Greece*", which is available to all applicants who register their application for international protection (issued in June 2013), contains some basic information on the Dublin II Regulation.

82 The booklet is issued in Malta and is entitled *"Practical Handbook for Persons Seeking Asylum in Malta"* and it was finalised by IOM in 2011 and as such refers to the previous Dublin II Regulation.

Oral information

Oral information during the personal interview is reportedly provided in some Member States to complement written information but often it is not provided in a detailed manner or limited to information considered relevant in the applicant's case in the opinion of the interviewer. The limited nature of oral information provided by the national authorities was highlighted by one applicant:

> *"The police does not give information. The police wants information."*
>
> [Applicant interviewed in Norway]

The findings show that the personal interview is not generally used as an opportunity to clarify information the applicant has previously received and ensure he or she has a proper understanding of the Dublin system as required under Article 5(1).[83]

GOOD PRACTICES

A **good practice** exists in Norway as part of the Norwegian Organization for Asylum Seekers[84] (NOAS) Information Programme whereby applicants are given the opportunity to seek clarifications from staff and to express concerns about their situation, their family and other specific needs. NOAS can then transmit that information to UDI if the applicant gives his or her consent.

Other alternative methods of providing information were reported in some Member States such as the use of audio-visual material and DVD's although the efficacy of these alternative methods is not clear.[85] Some Member States also provide information online but applicants are not actively informed of its presence on the internet and so do not always avail themselves of it.[86]

[83] As reported in Germany where applicants seem to perceive there are limited opportunities to seek clarifications. As also reported in Denmark, where applicants have the possibility to ask questions during the interview during which an interpreter is present, can contact the Danish Immigration Service (DIS) for clarifications through mail, phone and in person and can also seek clarifications at the reception centre where staff can provide interpretation; however, this always requires the applicant's own initiative and resources. Some applicants in Malta who were interviewed for the purpose of this study also reported that sometimes they did not have the opportunity to seek clarifications with the Refugee Commissioner (RefCom) staff; therefore, clarifications can only be sought if they proactively seek assistance from NGOs or UNHCR in Malta. In the United Kingdom, the personal interview is not used for the purpose of clarifying information provided to the applicant on the Dublin Regulation; although applicants are able to seek clarifications and have access to interpreters, clarifications are not proactively provided and the onus is fully on the applicant. Language barriers in Italy constitute a problem for applicants to seek clarifications in different *Questura* offices where interpreters may not be available in sufficient numbers for the languages required. A similar problem is reported in France due to the lack of interpreters, where one applicant interviewed stated: *"if you ask something, you don't get an answer. No one is ready to speak English."*

[84] For more information on NOAS see: http://www.noas.no/en/

[85] As reported in Denmark, Malta and Norway.

[86] Information is available online in Greece, Norway and the United Kingdom.

Provision of information to unaccompanied children

In accordance with Article 4(3) of the Dublin Regulation, Annex XI of the Implementing Regulation provides a common information leaflet for unaccompanied children.[87] Most Member States utilise this information leaflet for unaccompanied children or similar national information leaflets adapted to the specific needs of children.[88] As with the common information leaflet for adults, it is also reportedly not effectively distributed in some Member States.[89] Oral information is usually provided to unaccompanied children in the presence of their representatives during the personal interview in the majority of Member States surveyed. The information provided during the personal interview may often be limited in nature when the child has a representative as in some Member States there appears to be an assumption that the child has already been informed about the Dublin Regulation by his or her representative. It was noted in some Member States[90] that there is no standard operating procedure (SOP) or established practice in place for the provision of information to unaccompanied children. Delays in the appointment of representatives also have a negative impact in the provision of information in some Member States surveyed.[91]

The findings show that there is no systematic approach to providing information to children and the practice often varies amongst individual officers interviewing children. A positive practice is that some Member States arrange an early initial meeting with unaccompanied children in order to provide information to them, for example in one Member State an information session is scheduled with the child within three days of his or her arrival when a representative has not been appointed to his or her case[92] and in another Member State an "informal conversation" is arranged between caseworkers and the child a few days after their application for international protection has been lodged.[93]

GOOD PRACTICES

In Denmark complex terminology and other relevant information are explained more thoroughly to unaccompanied children during the personal interview held by DIS. DIS also selects interpreters who are considered particularly skilled to work with children. DIS indicated that this is also necessary in order to make an assessment of the maturity of the child.

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87 Annex XI of the Implementing Regulation – Information for Unaccompanied Children who are applying for International Protection pursuant to Article 4 of Regulation (EU) No 604/2013.

88 As reported in Denmark, France, Greece, Italy, Poland and the United Kingdom. In Germany, the specific common information leaflet for children has been translated into 15 languages; however, it is not yet distributed due to practical obstacles and children receive a provisional information leaflet which is however not adapted to the specific needs of children.

89 As reported in Denmark, Italy and the United Kingdom. A stakeholder in Denmark reported that in their experience the leaflet for unaccompanied children is not distributed during the registration or finalization of the registration of applications for international protection (at the Sandholm centre). Also, in France, it was reported that the leaflet for unaccompanied children is not systematically distributed during the registration of a child's application for international protection.

90 As reported for example in Greece, Italy and Malta. In Greece in particular, children who do not have a representative (aged 14 and older) do not always receive representation in the asylum and Dublin procedures.

91 As reported in France, Germany and Italy. In the latter, if a child is transferred to another reception facility, a different representative needs to be appointed, which can result in long delays in the procedure. For further information on the role of the representative see section 3 of Chapter I (The representative for unaccompanied children).

92 As reported in Malta.

93 A conversation is arranged with the UDI Arrival Unit staff who are specialised in interviewing children in Norway. The objective of this conversation is to gather more information about the child's age, health, his or her reason for applying for international protection as well as regarding family relations in Norway and/or ties to other countries. This is also when UDI can ask for the child's consent to conduct an age assessment.

AWAS in Malta organizes one-to-one orientation sessions with the child and his or her representative who provides detailed information of relevance in the child's case in relation to the Dublin procedure and the general asylum procedure. If necessary, other actors may attend the orientation session, such as staff of the RefCom, NGOs or UNHCR to provide information on certain matters, including family tracing, Dublin transfer or social services support.

Information is similar in content to that provided to adults but it is adapted to the needs of the child and child friendly language is used by interviewing staff in some Member States,[94] while in other Member States it was reported that during interviews with children concepts and terminology are generally explained more thoroughly.[95] Unaccompanied children, like adults, are not often fully informed as to the different steps and duration of the Dublin procedure, which may have implications in their engagement in the process of assigning Member State responsibility for the examination of their application for international protection. This may have a more acute impact for children given that their perception of time may be different to adults.

The responsibility for providing information to unaccompanied children is shared among different actors depending on the Member State, including the national asylum authorities, the representative, social worker or guardian, staff of NGOs and the legal advisor. At times this is part of a formalised practice[96] while other times it is due to the fact that NGOs and other actors fill in the gaps where the authorities do not provide detailed and/or timely information.[97] This sometimes means that there is no central actor with a clear duty to ensure that unaccompanied children fully understand the application of the Dublin Regulation.

GOOD PRACTICES

In Denmark, the Danish Red Cross established what is referred to as an "Observer-information" session, where staff from the Danish Red Cross visit centres for unaccompanied children. During these sessions they provide information to large groups of children in a repetitive manner as the Red Cross believes that repetition is one of the best ways to ensure that children fully understand the information provided. This arrangement is, however, challenged by the fact that the unaccompanied children are moved from those reception centres to other centres after approximately 3-7 days.

A reported difficulty in some Member States is that representatives may not have sufficient knowledge of the Dublin Regulation to explain it thoroughly to children or may not have capacity to provide the time and support needed to fully ensure that the child understands the information provided. For example, in some Member States surveyed, representatives may have to take care of forty to fifty separated children at a time.[98] The added strain on the capacity of national authorities due to the influx of applicants in 2015 and 2016 has also resulted in significant delays in the assignment of Member State responsibility under the Dublin Regulation for unaccompanied children.

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94 For example, Malta and the United Kingdom.

95 As reported in Denmark.

96 For example, the NOAS Information Programme and representatives appointed by the County Governors in Norway and the arrangements with certain NGOs in different airports and ports of entry in Italy, for example ONLUS Cooperativa Olivotti at Venice airport and port and Gruppo Umana Solidarietà (GUS) at Rome Fiumicino airport.

97 For example, in France, Germany, Greece and Malta. In Germany, a provisional information leaflet is always provided by the BAMF to unaccompanied children (including by being sent by post) and other actors such as representatives, social workers or legal advisors normally provide additional information on the Dublin procedure.

98 As reported in Norway. Similar issues are also reported in Germany, Italy and Malta. A representative working for the city of Rome indicated that in 2015 and 2016 until the time of writing this report only 12 representatives were responsible for around 900 children in Rome.

One case in Norway illustrates this:

> *A boy was showing signs of exhaustion and depression after arrival in Norway. He was staying with his uncle at Refstad transit centre for a long time. The uncle was worried about his nephew and informed NOAS about relatives in Sweden and their wish to join these relatives in Sweden. NOAS brought this information to the attention of the Norwegian Directorate of Immigration (UDI) who stated they would need to enquire with Swedish authorities. UDI said they could not carry out an arrival interview with the boy until the National Police Immigration Service (NPIS) had finished registering the cases. The police, however, had no time to carry out registration at this point in time with the increase in arrival numbers. UDI did ask for a listing of family members in Sweden and the case was followed up by NOAS towards UDI. However, no request was sent by UDI to the Swedish authorities. In the meantime, the uncle and the boy were moved to another reception centre and remain in Norway."*

Information providers & quality of the information provided

Article 4(1) indicates that the competent authorities have a duty to provide information as soon as the applicant has lodged his or her application for international protection. In principle, national asylum authorities have the central responsibility to provide this information in the majority of Member State's surveyed. Sometimes immigration police and border guards convey information to applicants depending on the Member State concerned.[99] NGOs also play an important role in the provision of information and are at times commissioned by Member States to provide information on the Dublin procedure.[100]

GOOD PRACTICES

NOAS is contracted by UDI to provide an information programme to applicants for international protection on the general protection procedure including the Dublin Regulation at transit reception centres to which applicants are referred after registering their applications. NOAS provides written and oral information in the applicant's own language or in a language he/she understands well. NOAS also provides for further consultation on an individual basis when required.

An organization called "Asylum Help" which is part of the Migrant Help charity in the United Kingdom is funded by the UK Home Office to provide confidential and independent advice to applicants for international protection about their rights and entitlements, including with respect to the Dublin Regulation. They provide a multi-lingual website with information leaflets on the international protection procedure in sixteen languages that can be accessed in a printable or oral format. They also provide multilingual advice phone helplines as well as face-to-face advice sessions to newly arrived applicants at initial accommodation centres and are present in detention centres on a regular basis.[101]

Staff in reception centres, representatives and legal advisors may also be involved in the provision of information. In some Member States specialised staff provide information during the personal interview

[99] As reported in Denmark, Italy, Malta, Norway, Poland and the United Kingdom. For instance, in the United Kingdom if the applicant claims asylum upon arrival at a sea port or airport or if a person is encountered by immigration officials following irregular entry to the United Kingdom, information may be provided by border guards.

[100] As reported in Italy, Malta, Norway and the United Kingdom.

[101] For further information on Asylum Help see: http://asylumhelpuk.org/our-services/.

to certain categories of applicants.[102] For example, in two Member States specific units of interviewers are trained and have specialised skills to work with children.[103]

The possibility to seek clarifications on information provided is limited in some Member States by the fact that responsible staff may not have the required knowledge to resolve any queries the applicant may have.[104] Furthermore, there appears to be no standard procedure in place to check whether applicants have clearly understood the information provided to them or to complement the information orally where needed. This was an issue examined by a Court in one Member State that found that ticking a box on an information notice certifying that the applicant has received a copy of the national information leaflet was not sufficient to establish whether he had been provided with all the relevant information regarding his situation as an applicant in the Dublin procedure.[105]

The issue of the limited capacity of staff to provide clarifications is illustrated in the following case.

> *"When I had questions on the procedure, I turned to my lawyer. There are too many applicants and not many employees at "Katehaki", they do not have the time to provide much information on the Dublin procedure."*
>
> [Afghan man, interviewed in Greece]

Delays in the provision of information

Article 4(1) requires Member States to provide information as soon as an application for international protection is lodged but the findings of this research show that the provision of information is frequently subject to delay[106] or at times provided after the personal interview.[107] Such practice does not allow applicants

[102] As reported in Norway and the United Kingdom, where specific qualifications are required for working with unaccompanied children. In Denmark, unaccompanied children are interviewed by caseworkers who only work with unaccompanied children and who receive, in addition to general training on interviewing techniques, also training on interviewing children, although not specifically on asylum. In Poland, the Border Guard Headquarters stated that Border Guards receive obligatory training on how to identify vulnerable persons but it should be noted that two Border Guard Regional Units stated that they had no identification mechanism in place for vulnerable persons in practice. In the United Kingdom, interviewing officers responsible for interviewing families, unaccompanied children and potential victims of trafficking will have received training for those purposes.

[103] As reported in Norway and the United Kingdom.

[104] As reported in Germany, Greece and Malta.

[105] As reported in France. Nantes Administrative Court of Appeal, two Decisions of 10 November 2015, No. 14NT02890, available at: http://goo.gl/bhCbUC; and No. 14NY02891, available at: http://goo.gl/Kfz1ri, according to which *"The circumstances that the application form for the residence permit for asylum-seekers, signed by the person concerned, shall indicate that he certifies on his honour that the "Asylum-seeker's Guide" and the information on the European Regulations were given to him, that he benefitted from a personal interview and he was able to lodge a suspensive appeal against the decision ordering his transfer to the German authorities, is not sufficient to establish that he received all information relevant to his situation as an asylum-seeker for whom the administration intends to apply the Dublin Regulation."*, para. 5.

[106] As indicated above, this may be caused by pressure on Member States due to the increase in the number of applications for international protection.

[107] As reported in Denmark, France, Poland and the United Kingdom. The practice is inconsistent in this regard in Denmark where it was reported that applicants do not always receive the different information leaflets, which in principle should be handed out by the Danish National Police and the DIS. It was also reported that when DIS hands out the information leaflet, this can at times happen after the personal interview or even after the provisional transfer decision or transfer decision has been taken, and thereby after the information relevant to assess the case has already been collected. In Poland, practice was observed in one of the Border Guard Regional Units where the information leaflets were only handed to the applicants at the end of the registration process. In the United Kingdom, it appeared that in some instances applicants only received the information leaflet after the personal interview had taken place, and in some instances only at the stage where the transfer decision had been served and/or removal directions set. Removal directions are a notice served on individuals due to be removed informing them of the time, date and the country to which they are due to be returned.

concerned the opportunity to take in information before the interview and provide evidence for the correct determination of responsibility. It also means the personal interview cannot be used to obtain clarifications on the information leaflets. The substantive right to information as part of an effective remedy and aspect of procedural fairness has been examined by Courts both at the national[108] and regional level.[109] While the Dublin Regulation clearly places upon the State the responsibility for providing information to applicants, often in practice there seems to be no clarity as to the clear line of responsibility for the provision of information at the national level. In one Member State the Supreme Administrative Court similarly held that applicants have a subjective, non-derogable right to information, which could not be discharged by the personal interview alone.[110] Therefore, information must be provided both in writing and orally for the purposes of Article 4. However, practice shows that applicants in this Member State continue to be mainly provided with oral information.

Content of information provided

In terms of the content of information provided, Article 4(1) offers an illustrative list of elements of the Dublin Regulation to be covered in the provision of information including (a) the objectives of the Regulation and the consequences of moving from one Member State to another; (b) the hierarchy of criteria; (c) the personal interview and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member State, including the means by which the applicant can submit such information; (d) the possibility to challenge a transfer decision; (e) the fact that the competent authorities of Member States can exchange data on him or her; and (f) the right of access to data relating to him or her and the right to request that such data be corrected if inaccurate. As part of this study information was gathered on whether these elements were sufficiently covered when information was provided to applicants of international protection. Information pertaining to Article 4(1)(a)(b)(c)(d)(e) is provided in the majority of Member States but not always in a consistent or clear manner. The majority of Member States surveyed provide information to applicants also on the possibility to avail themselves of social or medical assistance.[111] Incomplete or no information appears to be provided in most Member States on the right of the applicant's individual access to his or her data apart from the relevant information provided in the common information leaflet.[112]

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[108] In France, for example, a national court examined the issue of which authority is responsible for issuing relevant and up-to-date information on the Dublin Regulation. The Court held it was a breach of an applicant's right to information when an NGO provided comprehensive information on the Dublin Regulation which was not part of its mandate in accordance with the terms of its contract with the responsible Ministerial department.
Lyon Administrative Court of Appeal, Decision of 2 July 2015, No. 14LY04091, available at: http://goo.gl/tQAVC9.
"The prefect of Rhone further argues that MB […] was referred to the association Forum réfugiés which could provide him with administrative assistance, it is not implied in the agreement signed with the French Office of Immigration and Integration (OFII) that the association should provide asylum-seekers with complete information on the application of the Dublin Regulation; that, therefore, the essential written information enabling him to understand his situation and the exercise of his rights has not been brought to the knowledge of M. B.", para. 6.

[109] For example ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, available at: http://www.refworld.org/docid/4d39bc7f2.html, *Hirsi Jamaa and Others v. Italy* Application no. 27765/09, 23 February 2012, available at: http://www.refworld.org/docid/4f4507942.html and *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014, available at: http://www.refworld.org/docid/544617ad4.html.

[110] Italy, Consiglio di Stato, 7 May 2015, N. 04199/2015REG.PROV.COLL. N. 02655/2015 REG.RIC, available at: https://goo.gl/czDmdS.

[111] As reported in Denmark, France, Greece, Malta, Norway, Poland and the United Kingdom.

[112] Annex A of the Implementing Regulation Part A: Information about the Dublin Regulation for Applicants for International Protection Pursuant to Article 4 of Regulation (EU) No 604/2013. A good practice is reported in Germany where applicants are given a separate information notice on data retention and exchange.

The list of criteria for assigning Member State responsibility for the examination of an application for international protection is provided in the majority of Member States, although in one Member State some criteria are missing.[113] However, the fact that responsibility is assigned on the basis of a hierarchical order of criteria is reportedly not fully explained to applicants in some Member States, with the only information provided on the dependency clause being that contained in the common information leaflets where these are provided.[114] While information is generally provided on the possibility of submitting information on the presence of family members, siblings, relatives or other family relations, clear information is not provided on specifically what information and personal data could be relevant to demonstrate familial links. Sometimes the information is incomplete as shown in one Member State where the preliminary information leaflet just states that that Member State may not be responsible if the applicant has family members in another Member State and does not explain that it is possible to reunite with those family members within the Dublin procedure.[115] There is reportedly a lack of clear information provided in some Member States on the means to submit relevant information for the family reunion rules under the Dublin Regulation following the personal interview.[116]

Information on the right to challenge a transfer decision is generally provided but in some Member States it is only mentioned at the time the transfer decision is issued without clear details on how to assert the right to appeal in practice.[117] Aspects of the Dublin Regulation where there is limited or no information in some Member States' information materials include the following: the possibility to be kept together with family members who are present in the Member State where the applicant for international protection is currently located,[118] the applicability of the discretionary clauses[119] as well as accurate information and clarity on the steps and duration of the Dublin procedure.[120] Failure to provide such information may have important consequences for the assignment of Member State responsibility for applications of international protection as applicants, without the specific knowledge of their rights under the Dublin Regulation, may fail to disclose relevant details for the correct assignment of responsibility; for example, the presence of family members in the current Member State. In addition, the failure to provide indications as to the average duration of the Dublin procedure may result in applicants losing trust in the system and travel onwards themselves, particularly when family members are present in other Member State.

[113] In Poland, no information is provided on the consequences of moving to another Member State or on Article 14 regarding the assignment of Member State responsibility on the grounds of visa waived entry. The hierarchy of criteria is not illustrated orally to applicants also in Italy by the police carrying out personal interviews in the *Questura* offices.

[114] The criteria are reportedly not explained as being by hierarchical order in Greece, Germany (in the provisional information leaflet) and the United Kingdom. Such information is also not provided by the authorities in Malta and Italy although applicants may receive that information instead by UNHCR and NGOs respectively. In Norway, where the common information leaflets are not necessarily provided, this information may be provided by NOAS.

[115] As reported in Germany with regard to the provisional information leaflet.

[116] As reported sometimes in Greece, Italy and the United Kingdom.

[117] As reported in Italy and Malta.

[118] As reported in Germany (with regard to the provisional information leaflet), Poland and the United Kingdom.

[119] As reported in France, Germany (with regard to the provisional information leaflet), Greece (although practice varied on this issue and, where information is provided, it sometimes does not explicitly state that the application of the discretionary clauses is at the discretion of the requested Member State), Malta, Italy, Poland (although reference is made to humanitarian reasons in the information leaflet but not Article 17(1)), and the United Kingdom. It should be noted however for those Member States that use it, that Part B of the common information leaflet provided in Annex X of the Implementing Regulation no. 118/2014 contains some information on the applicability of the dependency clause.

[120] For example, in Germany the current provisional leaflet contains no information on the duration of the Dublin procedure.

Another issue is that applicants are not always accurately informed that it is at the discretion of the requested Member State concerned that family members that fall outside the scope of the definition of the Dublin Regulation are permitted to reunite under the discretionary clauses in the Regulation. The omission of specific information on this important distinction may prevent applicants from successfully being able to invoke the use of the discretionary clauses. One example is provided below.

> *A 19-year-old man who had a family relation in another Member State not falling under the definition of "family members", informed the national authorities concerned that he wanted to reunite with his mother. He was subsequently informed that a take charge request would be submitted to the Member State where his mother was present. However, the applicant indicated that it was not clearly explained to him that it was within the discretion of the Member State where his mother resided, to accept or refuse to take charge of him.*
>
> [Syrian man, interviewed in Greece]

Conclusion

General challenges to the provision of information include the lack of sufficiently qualified and trained staff and interpreters, limited resources and reduced capacity of the competent national authorities. Additionally, budgetary constraints can affect ancillary issues such as interpreter and printing costs. Due to pressures from the increase in the number of applications in 2015 it was observed in one Member State that the authorities had limited time to provide clarifications. As a consequence, they did not always provide sufficient information.[121]

Overall, even where written information materials are provided, there is a marked disparity between the content of information provided and the applicants' understanding of the Dublin system. Without the requisite knowledge, the applicants may not always know what information to raise and its relevance for the purpose of correctly determining responsibility for the examination of their application.

Some applicants even reported that they did not know they were in a Dublin procedure until they were made aware of that by NGOs, legal aid providers, or even fellow applicants.[122] Despite the authorities reporting that information is provided, it appears that the material can be too complex and confusing to be fully understood by applicants. Some applicants interviewed in the course of this research stated that they had received a considerable amount of papers with "*too much*" or "*too complicated*" information. Examples of such difficulties are evidenced by the testimonies below.

> *"I don't know what the problem is, all I know is I have fingerprints in a different country and I will be brought back"*
>
> [Young Somali man, detained, interviewed in Germany]

> *"I did not receive any information on Dublin III when I was applying for international protection. I didn't even know back then what the 'deportation' was. I have lived for my whole life in one small village, in Chechnya, and I knew nothing about European procedures."*
>
> [Russian woman, transferred to Poland from Germany, interviewed in Poland]

[121] This was noted, for example, in Norway. The NOAS information programme, however, contributed to addressing this gap.

[122] This was reported by stakeholders in some administrative detention centres in France, Italy, Malta and the United Kingdom.

The provision of accurate, up-to-date and comprehensive information is of benefit to both applicants and Member States and is essential for the proper functioning of the Dublin system. This is particularly important in a context where applicants may receive peer-to-peer information among their communities which may be inaccurate and/or misleading. The findings, however, show that the information provided to applicants is often insufficient, out-dated or inaccurate in practice. Additionally, it is often not provided at the most optimal time for applicants to seek clarifications as to its content and to enable them to assist in identifying the correct criterion applicable in their case.

RECOMMENDATIONS

In light of the inherent complexities of the system, UNHCR understands the challenges that Member States face in the provision of timely and accessible information to applicants. However, a timely, accessible and accurate provision of information, whilst requiring enhanced investments, would prove beneficial and assist with ensuring swifter determination of responsibility. This, consequently, would save Member States' resources in the long run. Additionally, it would also assist in ensuring applicants' understanding of the system, and thus enhance compliance. UNHCR stands ready to assist Member States in the development and implementation of the following recommendations:

- **Member States should provide the information on the application of the Dublin Regulation as early as possible** to the applicant both orally and in writing, including before an application is lodged. Additionally, Member States should explore **ways to tackle inaccurate or misleading information** circulated amongst refugee communities including through the use of **cultural mediators**.
- **Appropriate identification mechanisms should be in place to identify applicants with specific needs** at the earliest possible stage so that appropriate procedural arrangements can be put in place in a timely manner, including for the purpose of the personal interview.
- **UNHCR encourages Member States to use alternative ways of providing information**, such as audio-visual materials, to ensure that applicants with specific needs receive and understand all the necessary information.
- **Information on the application of the Dublin Regulation should be provided to children in a child-friendly manner by appropriately trained staff.** UNHCR recommends that a suitably **qualified representative** always be appointed as early as possible after the arrival of an unaccompanied child in a Member State and in any case in advance of the personal interview to ensure that unaccompanied children are provided with and understand all the necessary information before the personal interview is carried out.
- Information on the application of the Dublin Regulation should be comprehensive, accurate and accessible, and provided in a language that the applicant understands; **clear and concise information should be provided on the steps and duration of the Dublin procedure** and individual follow-up should be available for applicants to receive **information on the progress of their case**. This, in turn, would reduce onward movement due to the uncertainties surrounding the Dublin procedure and its duration.

2. Personal Interview

Article 5 of the Dublin Regulation provides for the organization of a personal interview to facilitate the process of determining the responsible Member State. This incorporates an important procedural safeguard – the right to be personally interviewed in the course of the Dublin procedure which reflects the right to be heard, as part of the right to good administration, provided for in Article 41(2) of the EU Charter and is again an important principle of procedural fairness. UNHCR is of the view that the holding of a personal interview contributes to a more efficient administration of the Dublin system by ensuring that applicants are heard during the procedure.[123]

In all of the Member States surveyed the infrastructure is in place for the holding of personal interviews for the purposes of the Dublin procedure. However, the increase in applicants for international protection in 2015 and 2016 has impacted upon the functioning of national administrations and in a number of Member States interviews were significantly delayed or are not scheduled at all in light of these increased pressures.[124] Depending on the circumstances this may be contrary to Article 5(3) of the Dublin Regulation, which requires that interviews are conducted "in *a timely manner*". In some instances, interviews were reportedly held after the submission of a take back or take charge request to another Member State.[125] The postponement of personal interviews has lead in one Member State to the holding of "mini-interviews" or preliminary interviews for a certain period of time, which are narrower in scope to that required under the Dublin Regulation[126] where information gathered was limited to basic details (name, nationality, date of birth), photo taken and fingerprints checked against the Eurodac and VIS databases. During that time no information was gathered from applicants in relation to the presence of family in other Member States or other relevant criteria, which could have resulted in requests being submitted to other Member States on erroneous grounds and prolonged procedures as relevant information had to be collected at a later stage, sometimes at the appeals stage.[127]

Scope of the interview

Apart from the impact of the increase in persons applying for international protection in Europe as indicated above, the personal interview is generally held around the time of the registration of an application for international protection either as part of the admissibility interview or the interview to register or lodge

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[123] UNHCR, *UNHCR comments on the European Commission's Proposal for a recast of the 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008)* 825, 3 December 2008), 18 March 2009, available at: http://www.refworld.org/docid/49c0ca922.html.

[124] As reported in Denmark, in France in some locations, Germany and Italy.

[125] For example, in Denmark and Germany, where 1 individual case was observed in each country. In Denmark, a transfer decision is, however, not taken until the personal interview is carried out. In Germany, according to the BAMF, information gathered during such a late interview will be taken into account even after a request has been submitted.

[126] This practice was reported in Norway from September 2015 to December 2015. Mini-registrations no longer occur in Norway. The Norwegian Immigration Police reported that in January 2016 they carried out follow-up interviews for those applicants who originally only underwent mini-registrations.

[127] Although personal interviews are now resumed in Norway the "mini-registrations" were considered to impact the work of the Immigration Appeals Board as they sometimes registered only limited information to assess the appeal grounds properly. In such cases, however, suspensive effect was granted and applicants would remain in the country while the appeal process took place. At this stage, applicants were reportedly provided sufficient information. During that time period the informal conversations that NPIS had with unaccompanied children were also postponed but they have now been resumed.

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the application for international protection,[128] or as a separate interview solely for the purposes of the Dublin procedure.[129] In some Member States, information for the purposes of the Dublin procedure may also be gathered in separate consecutive interviews held after the standard personal interview for Dublin purposes.[130] For example, in one Member State a completely different interview is held on the applicability of the discretionary clauses at a later stage in the procedure.[131]

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[128] As reported in Denmark, Greece, Italy, Malta, Norway, Poland and the United Kingdom. In Greece, when the application for international protection is registered at a Regional Asylum Office (RAO), questions relating to the Dublin procedure are, as a rule, addressed to the applicants in an interview framework. This applies to all applicants for international protection and thus also covers Dublin cases. Thus, in most Dublin cases the personal interview in accordance with Article 5 of the Dublin Regulation takes place at the registration stage (although in the Greek context the registration procedure is not formally referred to as an "interview"). In family reunion cases and cases involving dependency no separate interview for Dublin purposes is conducted in addition to the "registration interview". A separate personal interview for Dublin purposes is carried out by a case officer of the competent RAO if there is a Eurodac hit in another Member State, provided the fingerprints of the applicant were taken in another Member State up to one year before the date of the lodging of the application for international protection in Greece. Lastly, since May 2015, when the Greek authorities consider or intend to submit an outgoing request based on Article 17(2) of the Dublin Regulation, the applicant is invited to a hearing/interview conducted by the officers of the Dublin Unit at the premises of the RAO of Attica. In Malta there can be up to three interviews at different stages of the Dublin procedure (a "preliminary interview", a "preliminary questionnaire (PQ) interview" and an interview specifically for Dublin purposes) but the main one, the preliminary questionnaire interview, takes place at the same time as the registration of the application for international protection.

[129] As reported in France and Germany. In Germany, however, it is often combined with the lodging of the application for international protection or conducted on the same day.

[130] As reported in Greece (in Eurodac cases and in cases concerning the application of Article 17(2) of the Dublin III Regulation) and Malta. In principle, also in Germany, where there is a two-tiered approach and the interview should be divided into two parts conducted by differently qualified staff. The first part focuses on information relevant for the assessment of the criteria to determine the Member State responsible and should be conducted by general asylum secretariat staff, the second part focuses on the medical condition and specific needs of the applicant and on obstacles to transfer and should be conducted by trained staff. However, in practice the two parts of the personal interview are sometimes carried out on the same day by the same staff member, usually from the asylum secretariat.

[131] As reported in Greece. In Malta, an interview is sometimes held with the Dublin Unit to verify and/or gather further information or in relation to the transfer arrangements once a decision to take charge of or take back an applicant has been taken.

If the personal interview is part of the registration/admissibility interview it appears that the applicants in some States are not always aware that the information gathered during the interview is also for the purpose of the Dublin Regulation, and are not informed of this during the interview itself.[132] At times a reference is made to the Dublin Regulation but the importance of providing relevant information such as the presence of family members for the assigning of Member State responsibility is not always clearly indicated to applicants.[133]

> *"Since I did not know what Dublin was, I never thought the interview was a big deal. Had I given to the Prefecture the information I gave to the Court, I think they would have allowed me to stay."*
>
> [Cameroonian man, interviewed in France]

The authorities in most States surveyed use some form of checklist or template to indicate what information must be gathered during the personal interview. Information that is commonly gathered includes biographical data and information concerning the identity of the applicant, his or her travel route, his or her family details and the presence of family in other Member States and in the country of his or her origin, details on any previous applications for international protection and visa and residency information. At times these standardised templates limit the extent to which information is gathered during the interview.[134] Only in a small number of Member States is information gathered on the reasons why a Dublin transfer should not take place[135] and any objections on being transferred to a particular State[136] as well as reasons why the applicant wishes to remain in the current Member State, including whether he or she has family or dependants in the current Member State.[137] How much relevant information is gathered on the applicant's dependency on family relations and vice versa is less apparent from the research and sometimes the concept of 'dependency' itself is not comprehensively explained to applicants.[138] The elements of what constitutes dependency vary among Member States with ambiguity surrounding what establishes dependency for the purposes of the dependency clause.[139] For example, in one Member State dependency is only referred to in economic terms,[140] whilst in another Member State 'moral support' is not always deemed sufficient for the establishment of a relationship of dependency.[141] Additionally, in a number of Member States it was reported by some stakeholders that sometimes the authorities focus mainly on the journey to a Member State including any stays in other Member States. An example reported by an applicant is provided below.

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[132] As reported in Italy and Poland. In Poland, this was prior to November 2015 were only preliminary interviews would take place. The fact that the screening interview in the United Kingdom can also be used for the purposes of the Dublin procedure is not always made clear by the interviewer.

[133] As reported in Denmark, Italy, Poland and the United Kingdom.

[134] For example, in France the electronic template used in the Paris Prefecture does not allow for additional information to be added on the presence of family members in other Member State or previous applications for international protection.

[135] As reported in Germany. In Denmark, it was reported that applicants can be asked questions about whether they have any concerns in relation to being returned to the responsible Member State; however, this practice is not consistent.

[136] As reported in Germany and Greece. In Italy, applicants are asked if they want to remain in Italy, but not if and why they have any objections on being transferred to a particular Member State.

[137] For example, in Germany and Greece. In Denmark, applicants are asked about the presence of family members in Denmark and/or other Member States. In Germany, this specific question is included in the interview template: *"Do you have family members (spouse, children, siblings) and relatives (uncles, aunt, grandparents) in Germany or in a different member state?"* In Italy, interviewing staff sometimes do not record information of family members present in other Member States if clear information as to their location is not provided by the applicant.

[138] For example, in Italy, Norway and the United Kingdom no questions are asked about the dependency clause during the interview.

[139] For further information on the application of the dependency clause see section 5 of chapter II (The dependency clause).

[140] As verified for example in Poland during the observation of some personal interviews.

[141] As reported in Germany.

> *I had the feeling that once in the interview the authorities reached the point of my stay in another Member State, we did not move away from that – they did not ask me how I came to Denmark. It seemed like they had already decided that I was to be returned to the other Member State – they just needed something in writing from the interview."*
>
> [Afghan man, interviewed in Denmark]

In terms of the applicability of the Dublin Regulation in an applicant's own case, it is reported in some Member States that information concerning the existence of a Eurodac hit is not always disclosed to the applicant during the personal interview[142] or is only disclosed late in the course of the interview.[143]

Training and qualifications of interviewers

Article 5(5) requires that personal interviews are conducted by qualified persons under national law. The qualifications required for interviewers vary amongst Member States but mainly they consist of general qualifications to conduct work within the government administration[144] as opposed to specialised qualifications for the purposes of the Dublin procedure and international protection procedure. In some Member States no qualifications are required by law to interview applicants[145] and in one Member State a distinction is made between interviewing general applicants, where no qualifications are required, and interviewing other more vulnerable applicants such as unaccompanied children, where specialised skills are required and therefore additional qualifications are necessary.[146] It should also be noted that in some Member States interviews may be held by unqualified staff rather than by staff at the level where qualification is necessary.[147] A similar issue was noted in relation to the trained interviewing staff, whereby due to the increased pressures on the protection system in some Member States and limited capacity, the staff conducting personal interviews were not the staff who had received the necessary training.[148]

[142] As reported in Germany and the United Kingdom.

[143] As reported in Denmark.

[144] For example, in Malta RefCom caseworkers are required to hold a third-level professional degree and in Denmark staff are subject to safety checks for security measures, whilst in the United Kingdom entry level civil servants have to pass a selection test. Depending on the entry level, when the person joined and their personal experience, the educational requirements are different in the United Kingdom. In Italy, police officers are educated to a degree level.

[145] As reported in Denmark, France and Italy.

[146] As reported in Poland.

[147] In Greece, caseworkers trained in interview techniques (and in some cases caseworkers specialise in work with children) conduct the separate Dublin interview on the basis of a Eurodac hit. However, registration officers who conduct the registration interview, which is used for the purposes of the family reunion and dependency cases, do not receive this training. In Poland, although one staff member in the Dublin unit is qualified for interviewing unaccompanied children in practice, it is the Border Guard officers who interview unaccompanied children and these officers may or may not have those qualifications.

[148] For example, as reported in Germany. In Germany, in principle the interview should be divided into two parts conducted by differently qualified staff. The first part should be conducted by general asylum secretariat staff, while the second part should be conducted by trained staff. However, in practice the two parts of the personal interview are sometimes carried out on the same day by the same staff member, usually from the asylum secretariat.

In most Member States some form of training is provided to interviewers on topics such as interview technique and interviewing children. Only in some Member States interviewing staff receive training on the Dublin Regulation by way of national training material[149] or EASO training modules[150] as well as training in other areas of relevance from EASO, such as interviewing traumatised persons or other applicants with specific needs and on gender-specific issues.

GOOD PRACTICES

In Denmark all caseworkers of the DIS that conduct interviews, including for the purpose of the Dublin procedure, have an introductory training period of two weeks, which includes a session on the Dublin system, and then observe interviews carried out by other staff, which is followed by a period of observation of his or her personal interviews. A Team Coordinator also reviews the decisions of newly trained staff and a new caseworker is under training until it is assessed that he/she can work independently. Caseworkers also receive training on interviewing techniques, ideally three months after being hired.

A positive practice is reported in Norway where only specialised caseworkers who have received training on the best interests of the child conduct the interview with unaccompanied children in the Dublin procedure.

Identifying and interviewing applicants with specific needs

As noted above only a small number of Member States provide training to relevant staff on interviewing applicants with specific needs.[151] Personal interview templates and checklists in a majority of Member States routinely have a general reference to health needs and vulnerabilities but in practice, questions are often not specifically directed to the vulnerability of the applicant. In a few Member States it was reported by stakeholders that interviews do not allow for the identification of specific needs and vulnerabilities[152] whilst in others there is a lack of standardised practice in place. Even if questions are asked regarding an applicant's medical condition it was reported that applicants (or their legal advisors) still need to proactively provide the authorities with supporting documentation or it is not always clear what the objective of the questions is.[153] In one Member State it is reported that applicants are not asked about their individual needs but that they are free to raise any vulnerability that could be addressed in the personal interview.[154] It appears that mental health needs and traumatisation are particularly overlooked as often there is no direct evidence to present during a personal interview. In one audited case file[155] the applicant, who was suffering from a depressive disorder, was asked during the registration of the application for international protection, if she had specific needs, including health problems, and she answered in the negative so it was recorded in that way.[156] Additionally, another

[149] For example in Germany, where training on the Dublin procedure is provided to staff conducting the second part of the personal interview, Norway's KREATIV model for interview techniques and training provided in the United Kingdom.

[150] As reported in Greece (for case workers conducting the separate Dublin interview on the basis of a Eurodac hit), Malta and Norway.

[151] As reported in Greece (for case workers conducting the separate Dublin interview on the basis of a Eurodac hit) and Poland.

[152] As reported by stakeholders in France and Malta.

[153] As reported in Germany and the United Kingdom respectively. In Germany, however, the lack of legal advice at the interview stage can limit in practice applicants' possibilities of providing relevant medical information.

[154] As reported in Malta.

[155] As reported in Greece.

[156] However, when a further interview is arranged by the Greek authorities for the purposes of applying Article 17(2) of the Dublin III Regulation, then more detailed information is gathered on any physical and/or mental health issues and dependency.

Member State requires the applicant to submit medical evidence to demonstrate psychological needs.[157] This can be particularly challenging in cases where the applicant has not yet received any psychological treatment and it may prove difficult for applicants to make the necessary arrangements, including identifying a suitable medical professional and receiving diagnosis/treatment, due to the limited availability of such services for applicants and consequent delays in accessing treatment.[158]

Overall, it appears that in most Member States the issue of specific vulnerabilities and needs is only examined when the applicant raises them herself/himself and this occurs mainly only on the basis of prior independent legal advice and support, so the personal interview is sometimes inadequate to identify the specific needs of applicants. However, in one Member State a further interview is arranged by the authorities for the purposes of applying Article 17(2) and then more detailed information is gathered on any physical and/or mental health issues.[159] In a small number of Member States, no questions are asked about the specific needs of the applicant during the personal interview[160] or if questions are included they often only address the general health of the applicant as opposed to specific vulnerabilities or the disclosure of mental health needs.[161] In one Member State families are interviewed together, which may hinder the disclosure of relevant information regarding violence or trauma.[162] Although some Member States have separate procedures for the identification of specific needs,[163] these are mainly only applied when the applicant's application for international protection is examined in that Member State and not in the Dublin procedure.[164] However, there is a separate interview held directly following the personal interview for the purpose of the Dublin procedure in one Member State specifically aimed at the assessment of any specific needs of the applicant.[165] Two Member States also have

[157] In Germany applicants are able to submit information at any stage of the procedure, including after the personal interview and issuance of the transfer decision, until the transfer takes place. Legal advisors reported that there is no specific mechanism in place outside the context of the interview for that. However, information submitted to the BAMF is included in the file and should be taken into account at any stage of the procedure.

[158] As reported in Germany. It often takes up to several months until long term psychological treatment is initiated.

[159] As reported in Greece.

[160] As reported in France, Italy and Malta. In Italy, there is a checklist in the c/3 template form for interviews, which includes a specific list of vulnerabilities; however, in practice questions are not systematically asked about applicant's vulnerabilities during the interview.

[161] As reported in Greece and Norway. In Germany, also some interviewers consider that specific needs play no role in the Dublin procedure and therefore information is not always systematically gathered on this issue during the interview. In the United Kingdom, as part of the screening interview, applicants are asked whether they have any medical conditions, disabilities, infectious diseases or medication they are/should be taking; if female, they are asked if they may be pregnant. They are provided the opportunity to give details of their physical and mental health. They are explicitly asked about the possibility of actual or potential exploitation.

[162] A reason why applicants may not disclose any vulnerabilities in a registration/interview situation in Norway, is that families are interviewed together and the members of the family may find it difficult to speak of such matters in front of a spouse and/or children.

[163] Only France and Poland have a separate procedure in place, while the United Kingdom has a specific national referral mechanism for possible victims of human trafficking. There is no specific procedure for the identification of persons with specific needs in Denmark (where applicants during the personal interview are however asked about their health situation), Germany, Greece and Norway. However, in Germany a specific instruction is in place for the identification of victims of human trafficking and processing in such cases, whilst Norway has a specific internal instruction for the UDI regulating the identification and follow up of persons who are victims of forced marriage, violence in close relations or possible victims of human trafficking.

[164] For example, in Poland, according to Article 68(1) of the amended Protection Law, identification of vulnerable persons is conducted by the Office for Foreigners during the examination of the application for international protection, but not at the stage of the registration of the application and Dublin personal interview by the Border Guard.

[165] In France, this assessment appears to be for the purpose of ensuring the reception conditions are adapted to the needs of vulnerable applicants. OFII is responsible for conducting a "vulnerability interview" (*entretien de vulnérabilité*). Unlike the personal Dublin interview, the vulnerability interview is confidential and since November 2015 it takes place right after the personal Dublin interview with the Prefecture and is carried out by OFII officers.

internal instructions for caseworkers on follow up arrangements required for vulnerable applicants in the Dublin procedure.[166]

The only category of persons with specific needs who are more carefully considered during the personal interview by interviewing staff in most Member States is unaccompanied children. Often more experienced or specialised interviewing staff interview unaccompanied children in a child friendly manner.[167] However, in one Member State personal interviews in accordance with Article 5 are generally guaranteed, but not always held for unaccompanied children in practice since a written interview procedure is normally provided for and completed with the support of a representative.[168] This measure is considered by the competent national authority to be in the best interests of the child as it is considered that sufficient information is provided in writing for the purposes of the Dublin Regulation but it may, depending on individual circumstances, conflict with the child's own right to be heard in accordance with Article 12 of the CRC.[169] In UNHCR's view, personal interviews should be conducted to respect the child's rights to be heard in line with Article 12 of the CRC unless deemed not to be in their best interests.[170]

The potential detrimental consequences of the failure to accurately record information concerning the specific needs of the applicant is illustrated in the following case.[171]

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[166] In 2014 and 2015 the two internal instructions for the Norwegian UDI regulating the identification and follow up of persons' who are victims of forced marriage, violence in close relations or possible victims of human trafficking were revised to also include special procedures for applicants who are in a Dublin procedure. If the immigration authorities have good reason to believe an applicant is a victim of trafficking, for example, this is followed-up on through an identification interview by UDI and follow-up by a legal advisor and the police. This must take place even if, as a result, the applicant's case is removed from the Dublin procedure if, for example, the deadlines cannot be met. These internal instructions specify when a case shall be taken out of the Dublin procedure and when Norway shall assume responsibility, but also measures to ensure that another responsible Member State follow up their responsibilities towards these vulnerable persons. The two instructions are available (in Norwegian) at: http://goo.gl/GGe6HS and http://goo.gl/C5J6yS. Similarly, in Germany a specific instruction is in place for the identification of victims of human trafficking and processing in such cases, including the application of the sovereignty clause in cases of previous exploitation and related risks in the responsible Member State; for more information see: EMN, *Identification of victims of trafficking in human beings in international protection and forced return procedures, Focussed Study of the German National Contact Point for the European Migration Network (EMN)*, Working Paper 56, Ulrike Hoffmann, available at: https://goo.gl/cQcwvB.

[167] As reported in Denmark, Norway and the United Kingdom.

[168] As reported in Germany.

[169] Article 12 of the CRC states that a child who is capable of forming his or her own views shall have the right to express those views freely in all matters affecting him/her, and that the views of the child shall be given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Whilst in accordance with the UN CRC the child can be heard through a representative, conflicts with the child's right to be heard may arise where the representatives do not have the requisite knowledge or skills to properly represent the child during the Dublin procedure to ensure the respect of the best interests of the child concerned.

[170] See UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html, Box 6 p. 31. "*The child is the main source of information about her/his situation. The degree to which the child is heard and indeed listened to, will not only ensure a more well-rounded and sustainable decision with respect to the child, but will also potentially empower the child in taking ownership of her/his future development into adulthood. The CRC framework establishes the child's right to be heard and to being part of the decision making, the child's views are to be given weight in line with the child's age and maturity.*" The UN Committee on the Rights of the Child General Comment no 12, para. 24 states: *"The Committee emphasizes that a child should not be interviewed more often than necessary, in particular when harmful events are explored. The "hearing" of a child is a difficult process that can have a traumatic impact on the child."*

[171] In Germany applicants must provide proof of pregnancy by way of a 'Mutterpass', which is an expectant mother's record of prenatal and natal care issued by a physician. It should be noted that transfers from Germany are not carried out from six weeks prior to the estimated delivery date until eight weeks after delivery or at any time of the pregnancy if a physician certifies that the applicant concerned is not fit for transfer.

During a personal interview carried out in Germany a female applicant mentioned that she was not feeling well. It was only after the interview that it became apparent that she was eight weeks pregnant. However, she was not asked to provide a certificate proving that she was pregnant ("Mutterpass"). This information thus remained unrecorded on the interview transcript, preventing appropriate follow up.

In addition to the lack of mechanisms or procedures to identify specific needs early on in the procedure, which prevents the possibility to adopt specific arrangements, other reasons why personal interviews in most Member States are not always suitable for the identification of specific needs include the lack of privacy and confidentiality,[172] families sometimes being interviewed together[173] and the environment not being perceived as to be one of trust[174], along with the interview being considered to be too short to be able to inquire about such issues.[175]

Grounds for the omission of the interview

Article 5(2) of the Dublin Regulation requires that the personal interview may only be omitted if a) the applicants has absconded; b) if the applicant has already provided information relevant to the applicability of the Dublin Regulation. In some Member States the personal interview is normally not omitted[176] but in some cases interviews can be omitted on the basis of a variety of grounds. In one Member State separate personal interviews are omitted if criteria linked to family reunion or dependency apply as in such a situation it is considered that the applicant already consents to the transfer.[177] In other Member States interviews may be omitted if Eurodac data is already available,[178] the applicant is an unaccompanied child or detained[179] or the applicant is too ill to be interviewed,[180] in addition to the cases where the applicant has absconded.

Where interviews are omitted, Member States claim that the grounds for omission of a personal interview are in accordance with Article 5(2). However, practice shows that this may not always be the case. Although the Member State's authorities may have sufficient information to take a decision on responsibility without a personal interview, in the case of unaccompanied children and given that the procedure shall revolve around the best interests of the child, factors such as the child's well-being and social development as well as safety and security concerns, such as the risk of the child being a victim of human trafficking, still need to be assessed and this is in principle done best by way of a personal interview. In addition, the interview, for child and adult applicants alike, provides an opportunity where applicants can raise any objections to being sent to a particular Member State or other information which may indicate that the sovereignty clause or Article 3(2) may need to be applied in order to respect human rights obligations. Depending on the individual circumstances of the case the omission of a personal interview, for example on the basis of Eurodac data,[181] overlooks the fact that other criteria may be applicable, including for the purpose of family reunion. Furthermore, this may result in the Member State assessing responsibility in a manner inconsistent with the hierarchy of criteria and risk

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[172] As reported in France, Greece and Italy.

[173] As reported in Italy and Norway.

[174] As reported in Norway.

[175] As reported in France and Italy.

[176] As reported in Denmark, Germany, Italy, Malta and the United Kingdom.

[177] As reported in Greece.

[178] As reported in Italy, where the part of the registration interview for Dublin purposes may not be carried out in such cases.

[179] As reported in Germany where in such cases a written procedure is carried out.

[180] As reported in Denmark.

[181] This was reported for example in Poland, where one of the Border Guard Regional Units conducts personal interviews only when there are grounds for presuming that another Member State may be responsible for examining an applicant's application for international protection, either based on a Eurodac hit or on information provided directly by the applicant during the preliminary asylum interview.

violating the principle of family unity. The interview may be the only space within the Dublin procedure for the applicant to be heard and it can be an opportunity not only for the applicant to seek clarifications on information provided but also for the authorities themselves to further clarify any information provided by the applicant in order to establish which Member State is responsible in an efficient manner.

The interview environment

Article 5(5) requires that the personal interview shall take place under conditions which ensure appropriate confidentiality. In the majority of Member States surveyed, the personal interviews take place at the premises of the point of registration or lodgement of an application for international protection. Appropriate confidentiality is ensured in some Member States[182], whilst in others the personal interviews take place in open rooms with other applicants present. In some Member States the practice varies from office to office.[183] Sometimes other applicants may be requested to translate the interview in some Member States thus undermining confidentiality.[184] Member States provide for the presence of third parties during the interview, including the applicant's representative, or legal advisor, NGO staff for support, legal trainees and persons of trust from the applicants' support system.

The creation of a safe environment is necessary to ensure the trust of the applicant being interviewed and help to disclose sensitive information for the purposes of the Dublin procedure.

> *"Had it been confidential there was a lot of information I wanted to explain but I couldn't."*
>
> [Cameroonian applicant, interviewed in France]

Recording of the interview and access to the interview record

The interview is generally recorded by way of a written summary of the information provided or by the completing of questionnaires, reports or forms. The interview records are only provided in the national language in all the Member States surveyed and the authorities normally do not provide a written translation of the information recorded therein. This interview record is sometimes read back to the applicant[185] in the presence of an interpreter, where possible, to check if the contents are accurate or not and then the applicant often has to sign a declaration confirming that it is true. No general statements of practice could be made as it varies across the Member States surveyed[186] but it is apparent that in some Member States the read-back

[182] As reported in Denmark, Germany, Norway, Poland and the United Kingdom.

[183] As reported in France, Greece and Italy.

[184] This reportedly happens on occasion in France and Italy. In Malta, this happens frequently during the personal interview with the Dublin Unit.

[185] In Denmark, the information on the interview record is translated orally to the applicant at the end of the interview, and the applicant signs the interview record thereby confirming its accuracy. In Norway, it is the duty of the legal advisor to provide an interpreter for the purpose of explaining the transfer decision to the applicant. The record is also read back to the applicant in Poland. In Germany, applicants are asked if they want the interview record read back to them. In Italy, the interview record usually is not read back to the applicant.

[186] For example, in Malta the information collected during the second preliminary questionnaire interview for the purposes of the Dublin procedure is recorded and the applicant is asked to review some personal information and to sign. If asked, the interpreter can translate the document to the applicant but in practice it is not read back to the applicant either in English or the language of the applicant. In Greece there is always a read-back with applicants to ensure that the information is recorded accurately. In the United Kingdom, applicants are asked to sign the interview record to confirm that all personal details are correct, that they understand it is a criminal offence to seek to obtain leave to remain in the United Kingdom by deception, that they have understood all of the questions asked and have received a copy of the interview record; however, the information is not necessarily read back to them or verified beforehand.

of the interview record is in practice just a formality and applicants do not have a real opportunity to make corrections.[187] For example, while in one Member State the content of the transcript should be verified with the applicant, several stakeholders reported that due to the limited time available in practice, applicants are frequently unable to correct mistakes or contradictions in personal interview records[188], as illustrated in the following case.

> *"We were not able to verify the information in the transcript. We were only asked to sign without being able to read, without understanding. The interpreter said "this is the information you just gave us, please sign." Some of the things are not true. The transcript is wrong in some cases […]"*
>
> [Syrian man, interviewed in Germany]

In one Member State, important information such as the presence of family in other Member States is reportedly omitted from the interview record if applicants do not provide precise details on contact information of those family members or relatives.[189] Similarly, sometimes the nature of online drop-down information forms used during the personal interview did not allow for additional information beyond what was necessary in the questionnaire or template provided, whilst in another Member State insufficient information is recorded on file compared to what is stated during the interview. [190]

Access to the interview record

Article 5(6) provides that the Member State conducting the personal interview shall make a written summary of it and ensure that the applicant or his or her legal advisor have timely access to such summary. Access to the interview record is generally possible across all the Member States surveyed for applicants and their legal advisors. In some Member States, interview records are regularly accessible straight after the interview[191] or after a formal decision on Member State responsibility is made[192], whilst in other Member States the record is available at any stage of the procedure upon request by the applicant.[193] Whilst in the majority of Member States access to the interview record is deemed sufficient for the purposes of challenging a transfer decision, in other Member States access is not always available in practice.[194] Whether or not access to the interview record is possible also depends on the applicant's circumstances and knowledge of the right to access the record. For example, in one Member State access to the interview record is restricted when the applicant is

[187] For example, in France, a summary of the interview is read back only if interpreters are available. However, the applicant must then tick a box: "*The information about me in this form is true*" and signs the form. However, in Evry, Lyon and Metz it was observed that applicants signed the form and written materials without effectively checking what information the Prefecture officer had recorded or which boxes were ticked.

[188] As reported in Germany.

[189] This is reported for example in the Rome *Questura* in Italy.

[190] For example, in France and Norway.

[191] As reported in Denmark, France, Germany, Italy and the United Kingdom.

[192] As reported in Norway.

[193] In Poland, if the applicant requests it but this is not always effective as some applicants are not aware of their right to access the interview record.

[194] For example, in Malta access is reported to be difficult for NGOs and only legal advisors can access it for the purpose of appeals but even that presents challenges in practice. In Poland, access to the interview record is dependent on whether the applicant knows about the possibility to request it in practice. Applicants are informed about this possibility in writing before a transfer decision is issued in their language. However, despite receiving this information, case files are rarely accessed in practice.

detained.[195] At times, the assistance of third parties such as NGOs is reported to ensure access to the interview record when this would otherwise not be possible for the applicant him or herself.[196]

Use of interpreters

In most Member States surveyed, interpreters are available in person to facilitate communication during the personal interview, with the exception of rare languages, apart from two Member States.[197] The interpreters often work on a free-lance basis with the relevant national authority or are employed directly by the competent authority or an NGO. In a majority of Member States, it is reported that interpreters are available in sufficient numbers for the needs required. However, in two Member States surveyed budgetary constraints were raised as a reason as to why there are sometimes not enough interpreters available and phone interpretation may be used during interviews.[198] Sometimes informally other applicants step in to translate for applicants during the personal interview due to the lack of a sufficient number of interpreters.[199]

> *One of the applicants interviewed during the course of this research, an Uzbek national, indicated that despite the fact that he declared a very basic knowledge of Russian to the competent authorities, the registration process of his application for international protection was conducted entirely in that language because no Uzbek interpreter was available at that time. Written information was provided to the applicant in Russian and therefore he was unable to understand it.* [200]

Applicants appear to be able to request a different interpreter for personal reasons (for example gender specific violence) in the majority of Member States but sometimes in practice this depends on whether the reason for the request is considered valid by the authorities[201] or the threshold for establishing the need for a different interpreter may be set high.[202]

Training requirements for interpreters

The training requirement for interpreters varies significantly among the Member States surveyed with some Member States requiring specific training to work within the international protection procedure[203], whilst in other Member States no training is required or no common standards for training are provided. The lack of training in Member States for interpreters also affects the quality of interpretation provided, which can have an unintended impact on the assignment of Member State responsibility under the Dublin procedure, especially as in some instances their duties go beyond mere interpretation. For example, in one Member State an interview was observed for the purpose of this study where the questions relating to the Dublin

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[195] In Poland, only the applicant's legal advisor can request access to the case file when an applicant is detained. The applicant can have access to a copy of the interview record upon request.

[196] As reported in Malta and Poland.

[197] In Germany approximately 400 languages and dialects are covered in the BAMF pool of interpreters, including rare languages. In the United Kingdom, rare languages may result in a delay in the convening of the interview; however, interpreters are normally available also for rare languages.

[198] As reported in France and Italy.

[199] As reported in France and Italy.

[200] As reported in Poland.

[201] As reported in Denmark but reportedly more flexibility is granted to unaccompanied children interviewed.

[202] As reported in Germany where according to legal advisors, the pressure to carry out the interview on the scheduled date in view of the delays that a rescheduling may entail means that applicants may not feel comfortable to request a different interpreter in practice.

[203] As reported in Greece.

interview were formulated directly by the interpreter in the presence of the police staff.[204] Insufficient quality of interpretation and issues related to the professionalism of interpreters can not only affect the quality of information exchanged, but it can also lead to anxiety and confusion for the applicant concerned, as shown in this case:

> *"Upon arrival in Malta I applied for asylum but since my visa was expired, I was taken directly from the airport to the Immigration Police in Floriana. I spent three hours at the police and they advised me to go back to Sweden or to Libya. Also the interpreter advised me to do so. I had the impression that the interpreter was working for the government and he wasn't doing his job professionally by advising me to go back to my country rather than translate."*
>
> [Libyan man, interviewed in Malta]

A positive practice is reported in some Member States where codes of conduct and guidelines are applied to interpreters.[205]

It is common practice that the interpreter also only directly translates the information provided by the interviewer, although in some Member States the interpreter assists the applicant in completing the questionnaire form provided and only seeks assistance from the interviewer where clarifications are required.[206] In one Member State it was noted that sometimes in practice more experienced interpreters might collaborate with interviewers and in such cases the responsibility for providing information appears to slowly shift on to the interpreter over time.[207]

GOOD PRACTICES

Interpreters in the United Kingdom must follow the standards outlined in the Central Interpreter Unit's, "Code of conduct for the Home Office registered interpreters", which addresses the following aspects: duty to treat people equally, impartiality, confidentiality, accurate and precise interpretation, personal limitations, personal advantage- including favours and gratuities, professional conduct, bookings, payment, dress code and use of mobile telephones.

With regards to children in the UK, there is also a two-page document, entitled "Best Practice for Interpreting in Minors Interviews", which aims to make interpreters aware of particular factors which need to be considered when interpreting during a child's asylum interview.

[204] This was reported at an observed interview in the Rome *Questura* in Italy.

[205] As reported for example in Germany, where these were developed by the BAMF quality assurance department with the support of UNHCR and are in place since May 2015 (Advice for interpreting in asylum procedures – *Hinweise für den erfolgreichen Dolmetschereinsatz*) and the United Kingdom. The UK Visas and Immigration (UKVI) Central Interpreters Unit (CIU), *Code of Conduct for the Home Office Registered Interpreters*, available at: https://goo.gl/H6gCUZ.

[206] As reported in Malta.

[207] As reported in Germany.

The NGO "METAction" provides training to interpreters in Greece. The "METAction" Interpreters' Training Seminar consists of a ten-day training of approximately fifty hours, during which the candidates attend lectures/presentations on the following topics:

- interpretation techniques for consecutive interpreting in the community context;
- the role of the interpreter (Code of Ethics, do's and don'ts, practical issues);
- legal terminology and explanation of the first reception and asylum procedures and the role of the civil society in Greece. According to information provided in writing by a representative of the NGO "METAction", the presentation describes the Dublin procedure, but does not cover in extent/in detail the terminology of the Dublin procedure linked to the procedures between Member States;
- induction on the Greek legislation on Human Trafficking, Asylum and unaccompanied children, provided by a UNHCR representative;
- specialised course on medical terminology and other medical issues (including a session on the certification of victims of torture);
- interpreting during escorting of children and during meetings with the specialized members of METAction's Guardianship Network;
- induction on note taking, provided by Conference interpreters.

Conclusion

The personal interview in accordance with Article 5 of the Dublin Regulation is an essential component of the Dublin procedure. Conducted by trained professionals in a suitable environment and with quality interpretation, it has the potential to serve multiple purposes: a) it allows authorities to provide oral information on the application of the Dublin Regulation; b) it enables applicants to seek clarifications on any aspects of the operation of the Dublin Regulation that they do not understand; c) it enables applicants to provide the information necessary for a correct determination of responsibility including the presence of family members in a Member State; d) it permits authorities to directly clarify aspects of the information provided by the applicant in an efficient manner. Yet, the findings show that in practice the interview is not being utilised as efficiently as it could be with wide grounds for omission being used in some Member States which appear to go beyond the grounds allowed under Article 5. Furthermore, especially where the personal interview for Dublin purposes is combined with the registration or admissibility interview, it appears that sufficient focus is not then placed on gathering evidence relevant for a correct application of the responsibility criteria under Chapter III of the Dublin Regulation beyond certain criteria for which Eurodac evidence is relevant. Additionally, the personal interview is often not used to assess if there are any objections of the applicant to being transferred to a particular Member State.

RECOMMENDATIONS

UNHCR is aware of the challenges faced by Member States in ensuring timely and systematic personal interviews in the Dublin procedure. However, in a context where significant discrepancies persist in reception conditions and procedures among Member States, and where in certain Member States the conditions may amount to a violation of applicants' human rights, personal interviews remain a fundamental safeguard and a duty that cannot be discharged without proper consideration.

In this context, UNHCR believes that with the appropriate investments, procedures and mechanisms in place, personal interviews could effectively serve the purpose of expediting procedures by ensuring that relevant information for the correct determination of responsibility under the Dublin Regulation is provided at an early stage of the procedure. This would also prevent unwanted shifts of responsibility as well as lengthy and costly appeal procedures where deficiencies in the gathering of information lead to an erroneous determination of responsibility or to a transfer where this is unsuitable in the specific circumstances of the applicant. UNHCR therefore recommends the following:

- **The personal interview should take place as soon as possible after the applicant has lodged an asylum application and has received adequate information on the application of the Dublin Regulation; Member States should also ensure that the applicant is enabled to produce any necessary documentation and/or evidence during the interview**; the interview should be used as an occasion to clarify and/or supplement the information previously provided to the applicant.
- Where it is believed that an applicant has already provided the information relevant to determine the Member State responsible by other means and the interview is omitted, **the applicant concerned should always be given the possibility to raise circumstances that may amount to a situation that requires preclusion of transfer** due to human rights concerns and/or concerns related to the possible transfer to a third country due to the application of the safe third country concepts by the Member State presumed responsible.
- **Information on the presence of family relations in a Member State and on dependency issues should be proactively sought by the authorities during the personal interview**; this would assist the correct determination of responsibility in the interest of Member States and applicants alike. For the same reason, where such information is not available at the interview stage, applicants should be given an effective opportunity to provide further evidence for the determination of responsibility in accordance with Article 7(3).
- **Appropriate training** on the Dublin Regulation as well as on interviewing techniques should be provided to all interviewing personnel to ensure that personal interviews serve the purpose of (a) ensuring that applicants fully understand the Dublin Regulation, including its purpose and its consequences; (b) effectively facilitating the gathering of information for determining responsibility under the Dublin Regulation.
- **The personal interview should take place in an environment which is conducive to confidentiality** and enables applicants to feel they are in a place of trust to allow for the disclosure of all the relevant information.
- **Interpreters should always be used whenever necessary** to ensure the appropriate communication between the applicant and the authorities; Member States should have a sufficient pool of interpreters who have the requisite skills and knowledge to carry out their role in order to avoid delays in the procedure.

- **UNHCR recommends that quality legal advice free of charge be provided as early as possible to applicants** to ensure that applicants receive the necessary assistance also before the appeals stage including during the personal interview. This would assist in ensuring appropriate understanding of the procedure and that the applicant is properly assisted from an early stage of the procedure enabling him or her to provide all necessary information.
- **Applicants should be given an effective opportunity to verify that the information provided during the interview is comprehensive as well as correct and to make amendments if necessary.**
- UNHCR is of the view that **a personal interview should always be conducted for unaccompanied children in the presence of their representative** in order to guarantee their right to be heard, unless this is not in their best interests due, for example, to a risk of re-traumatisation; in certain circumstances, the best interests of the child may require that children have a separate interview in accordance with their right to be heard even where they are accompanied by their parents or primary caregiver.
- **Appropriate mechanisms should be established to identify applicants with specific needs as early as possible in the procedure.** Interviews should be conducted by appropriately trained staff to ensure proper identification. Tools for the identification of persons with specific needs such as the tool developed by EASO[208] and appropriate SOPs should be implemented and developed respectively. Specific procedural arrangements during the entire procedure, including transfer, should be put in place as appropriate for applicants with specific needs. UNHCR stands ready to assist Member States in the development and implementation of such mechanisms.

3. Guarantees for children

Article 78 of the Treaty on the Functioning of the European Union (TFEU) requires Member States to develop a policy on international protection in accordance with the Refugee Convention and its Protocol of 1967[209] (Refugee Convention) and other relevant Treaties. Therefore, the EU asylum acquis including the Dublin Regulation must be in compliance with, not only the Refugee Convention, but also the CRC and other relevant treaties.[210] This means that a child-sensitive approach must be taken for both unaccompanied and accompanied children subject to the Dublin procedure. Furthermore, Article 24 of the EU Charter states that children have the right to such protection and care as is necessary for their well-being and in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

The recast Dublin III Regulation introduced new procedural guarantees for children in accordance with Member States' obligations under the CRC and the EU Charter on account of their specific vulnerability. Recital 13 and Article 6 affirm that the best interests of the child is a primary consideration in applying the Dublin Regulation and an overarching principle applying to all aspects of the Dublin system for both unaccompanied and accompanied children. This is a recognition of the responsibility of Member States to ensure that children's best interests are respected when assigning Member State responsibility for the examination of their applications for international protection. This is a substantive right and a rule of procedure as well as a

[208] EASO, EASO *Tool for identification of persons with special needs*, available at: https://goo.gl/vjVq7a

[209] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html and *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html

[210] Recital 32 of the Dublin Regulation affirms this in declaring that Member States are bound by their obligations under instruments of international law, including the relevant case law of the ECtHR.

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principle as stated by the UN Committee on the Rights of the Child.[211] Special safeguards are necessary for both unaccompanied and accompanied children "*bearing in mind that the child's extreme vulnerability is the decisive factor [and that] [c]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.*"[212]

Article 6(3) requires that Member States should closely cooperate with each other in the assessment of the best interests of the child and provides a non-exhaustive list of factors to be taken into consideration, including family reunification possibilities, the child's well-being and social development, safety and security considerations, and the views of the child, in accordance with his or her age and maturity.

The best interests assessment (BIA) describes a simple, ongoing procedure for making decisions about what immediate actions are in an individual child's best interests, for example, protection and care interventions. BIAs can take place at various points whenever an action is planned or taken which may affect the child. They involve interviews or consultations with the child, as well as additional information gathering as needed, by professionals with the required expertise, knowledge and skills in child protection and, as appropriate, the weighing of elements of the child's circumstances. This process may be termed differently in different child protection systems, including for example child protection and care assessments. The key characteristics of these are that they are holistic and conducted by staff with relevant professional expertise.[213] In the context of unaccompanied children, a BIA tries to support children in making the best informed decisions on their immediate future, taking into consideration their rights, their views and the existing opportunities. UNHCR is of the view that assessing the best interests of these children is fundamental in order to efficiently address their needs and to avoid their departure from the reception centres and the consequent abuse, violence and

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[211] UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1)*, 29 May 2013, CRC/C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html.

[212] ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014, para. 99, available at: http://www.refworld.org/docid/5458abfd4.html.

[213] UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html p.20.

exploitation they may suffer continuing their journey.[214] Within the context of the Dublin procedure, the purpose of a BIA based on the key factors set out in Article 6(3), is to not only ensure that children have prompt access to an international protection procedure[215] but also to ensure that they have full and effective enjoyment of their rights under the CRC and that any decisions taken on transfers respect their best interests.[216] A core principle of the CRC and the EU Charter's Article 24, the right of the child to be heard in accordance with their age and maturity, must also be respected as part of this process.[217] The obligation to conduct a personal interview as per Article 5 of the Dublin Regulation is also in conformity with the right to be heard.

Best interests assessment

UNHCR is of the view that a BIA must be carried out for all actions affecting children in the asylum procedure as part of a continuous process, including during the Dublin procedure.[218] All the Member States surveyed reportedly conduct assessments for unaccompanied children in the Dublin procedure.[219] However, BIAs are not systematically conducted: only 8 case files out of 17 audited case files concerning completed cases pertaining to unaccompanied children indicated that any form of assessment was conducted as to the best interests of the child. When carried out, these assessments are referred to as BIAs by national authorities yet in most of the Member States the content of these assessments indicates that the key factors outlined in Article 6(3) are not always taken as a minimum into account, or it is unclear from the reasoning provided, what constitutes the best interests of the child concerned in the Dublin procedure and thus the weight placed upon those factors. There is no standardized approach on the conduct of such assessments, including on which Member State is responsible for the assessment or the modalities, as well as whether child protection experts are involved. Frequently, the outcome is limited to a brief reference to the best interests of the child in transfer decisions.[220] This is also demonstrated by the case files audited for the purpose of this study, which show that BIAs are often implicitly conducted and reference is made in the decision to certain factors "being in the best interests of the child" with little or no clarity as to how that decision is reached, for example, reuniting with a family member or relative in another Member State. The failure to motivate such decisions makes it difficult to ascertain why certain conclusions are reached in the best interests of the child. The UN Committee of the Rights of the Child has held that in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained.[221]

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[214] UNHCR, *Protecting children on the move*, July 2012, available at: http://www.refworld.org/docid/522852c34.html.

[215] CJEU, Case C-648/11, *MA, BT, DA v. Secretary of State for the Home Department*, 6 June 2013, available at: http://www.refworld.org/docid/51b0785e4.html.

[216] UNHCR, *Safe and Sound*, p.43.

[217] See CRC, Article 12, EU Charter, Article 24, UN Committee on the Rights of the Child, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: http://www.refworld.org/docid/4ae562c52.html.

[218] UNHCR, *Safe and Sound*.

[219] It should be noted, however, that France and Poland have limited experience of conducting BIAs due to the lack of unaccompanied children applying for international protection there and limited experience is also reported in Norway as most unaccompanied children wish to remain there as their destination country and so do not disclose the presence of family members elsewhere.

[220] In some case files audited concerning accompanied children no details regarding the conduct of a BIA were mentioned in the transfer decision. For example, in Denmark, one of the authorities stated that an assessment had been conducted even if in the transfer decision no mention was made of a BIA.

[221] The UN Committee on the Rights of the Child General Comment 14 requires a reasoned decision; CRC, General Comment No. 14, para. 98: *"In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests."*

Given the deficiencies in these assessments, they cannot always be considered as a fully-fledged BIA, though for the purposes of this report they are referred to as 'BIA'. Despite this, just one Member State of the nine surveyed reported not having a BIA procedure on the basis that there are no legal provisions establishing a BIA procedure and relevant authorities at the national level designated to carry out such an assessment.[222]

Some Member States have specific provisions in their national law referencing the best interests of the child principle.[223]

GOOD PRACTICES

In Norway, S.17-1A Immigration Regulation states that "decisions that affect children shall specify what assessments have been made of the child's situation, including how the best interests of the child have been given weight, unless this is deemed unnecessary".[224]

Similarly, in the United Kingdom there is a statutory duty on national authorities including the Dublin unit to make arrangements to "safeguard and promote the welfare of children" in accordance with their best interests.[225]

Nature of the assessment

A lack of uniformity in procedure as well as a lack of clarity and guidance as to the modalities of the BIA are a common feature across the surveyed Member States. Although there is no explicit definition of the best interests of the child, Article 6(3) includes an illustrative list of key factors to be taken into consideration, including (a) family reunification possibilities; (b) the child's well-being and social development; (c) safety and security considerations, in particular where there is a risk of the child being a victim of human trafficking and (d) the views of the child, in accordance with his or her age and maturity. Despite this guidance, it appears in most Member States that there is no consistency in approach to these assessments and ambiguity exists surrounding what elements are relevant for such assessments and the appropriate weight to be placed on each element. From the audited case files it appears that the requesting and receiving Member State may place different weight on different factors of the assessment.[226] Whilst family reunion possibilities for unaccompanied children appears to be given precedence over other factors,[227] there appears to be no formal and systematic collection of the views of the child and the weight to be placed on such views in accordance

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[222] In Greece, Presidential Decree 113/2013 mentions (in relation to the asylum procedure) that the safeguard of the best interests of the child shall be a primary obligation. However, there is no legislative instrument establishing procedures for the assessment of the best interests of the child which designates the competent authorities. As a consequence, a BIA procedure is not in place.

[223] As reported in Norway and the United Kingdom. In Germany, relevant factors for the best interests of the child are set out in the 8th Social Act (*Sozialgesetzbuch VIII*) and include encouraging young people in their individual and social development and helping to prevent or reduce discrimination, advising and supporting parents and guardians in the education of children and protecting children from threats to their well-being and supporting positive living conditions for young people and their families, as well as creating a child- and family-friendly environment.

[224] *Regulations of 15 October 2009 on the entry of foreign nationals into the Kingdom of Norway and their stay in the Realm (Immigration Regulations), S.17-1A, 15 October 2009*, available at: http://www.udiregelverk.no/no/rettskilder/sentrale/Immgration_Regulations/.

[225] *Borders, Citizenship and Immigration Act 2009* [United Kingdom of Great Britain and Northern Ireland], 21 July 2009, Chapter 11, section 55, available at: http://www.refworld.org/docid/4a681f372.html.

[226] For example, the requesting Member State may focus on the consent of the family member, sibling or relative and views of the child whilst the receiving Member State may focus more on the ability of the family member, sibling or relative to take care of the child in practice.

[227] As reported in Germany, Italy and Poland.

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with the age and maturity of the child, particularly with respect to accompanied children.[228] The personal interview may be used as an opportunity to gather the views of unaccompanied children but the weight placed on such views varies across the Members States surveyed depending on the individual circumstances of the applicant's case. Also in some Member State the authorities conducting the BIA are not involved in the personal interview and do not have a personal hearing with the child concerned, which affects the quality of the BIA conducted.[229] The views of accompanied children, as dependents on their family members' applications,[230] are

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[228] The weight to be placed on the views of unaccompanied children is unclear in some Member States. This was raised as an issue as part of UNHCR, *Considering the Best Interests of a Child within a Family Seeking Asylum*, December 2013, available at: http://www.refworld.org/docid/52c284654.html. Accompanied children are generally not heard in Denmark and although unaccompanied children are heard during the personal interview it has been reported that they are sometimes not asked sufficient questions and their views are not elicited to a sufficient extent to enable the decision maker to conduct a fully-fledged BIA. Accompanied children in Greece under the age of 14 and to a certain extent older children, are not heard during the Dublin procedure. Accompanied children are not always heard in practice in Germany and Norway but in practice their views are taken into account via their parents and if there are individual concerns then a separate interview may be held with the child. Accompanied children in the United Kingdom do not always have a screening interview, part of which comprises the personal interview for the purposes of the Dublin procedure, particularly if they are registered as dependents on an adult's application for international protection. In the United Kingdom, it is possible to be a dependent on someone's claim and also to make an independent application, at the point of registration or at another point (For more information see instruction on *"Processing an asylum application from a child"*, section 3.2: https://goo.gl/GgTV9H). In such cases there would be a screening interview, for children aged over 12. Children who are solely dependent on their parents' claim do not usually have a screening interview. For instance, an audit of family asylum cases in the United Kingdom undertaken by UNHCR in 2013 also identified that there was no formal or systematic collection or recording of information relevant to a best interests considerations, including a lack of a mechanism for obtaining the views of the child; for more information see: UKVI, Enforcement instructions and guidance: Chapter 55, section 55.8, available at: http://www.unhcr.org/uk/57600cabb. Accompanied children are not heard in Poland.

[229] In Italy, the Dublin Unit does not hold hearings with applicants for international protection and their contacts with them are mediated through the *Questura* offices, social services, reception centres and other actors involved in the Dublin system. The BIA is conducted on the basis of the data collected in the C/3 template, in the Dublin interview template and in the documentation provided by the representative of the child, social services and reception centre in practice.
In Poland, the BIA is conducted by the Dublin Unit on the basis of documentation and information gathered during the Border Guards interview with the unaccompanied child. They can schedule an additional interview with the applicant if more information is required but this rarely happens in practice.

[230] This is in accordance with Article 20(3) of the Dublin III Regulation according to which the situation of a child who is accompanying the applicant and meets the definition of a family member is indissociable from that of his or her family member.

rarely gathered.[231] One issue reported in a Member State is that the manner in which Article 6 is applied does not allow for conducting a BIA for children who are indirectly affected by a transfer decision.[232]

Cooperation between Member States

Article 6 of the Dublin Regulation introduced a requirement for Member States to closely cooperate in the assessment of the best interests of the child.[233] Contrary to this requirement, the findings of this study show that there is often limited cooperation between Member States in the assessment of the best interests of the child.[234] It appears that this is due to a lack of a common approach to the BIA, which in turn can result in a lack of clarity between the requesting and requested Member State as to which authority is responsible for carrying out the BIA.[235] Additional challenges involved in conducting a BIA include ensuring good collaboration between the relevant authorities and social service facilities for children in a Member State and the lack of human resources.[236] In order to comprehensively assess and address the best interests of the child an effective BIA requires close collaboration between the different actors involved in both the requesting and requested Member State. As demonstrated by these findings, this cannot be addressed sufficiently in isolation from one or the other.

Noting the centrality of family unity in BIAs, an added difficulty reported is the disparity in documentary and evidential requirements between Member States as regards the proof of family links in the context of family reunion procedures which results in repeat examinations of Member State responsibility for applicants. This results in significant delays in the assignment of Member State responsibility for the examination of children's applications for international protection which in turn impacts upon the child's ability to effectively access a procedure and accordingly his or her right to asylum under Article 18 of the EU Charter.[237]

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[231] An NGO in Denmark also reported that members of the family residing in Denmark are not always heard in relation to the best interests of the child.

[232] This was raised by an NGO in Denmark and in one of the case files audited from Denmark this issue was demonstrated in practice where an applicant in the Dublin procedure in Denmark had two minor siblings residing there. No BIA was carried out for the children residing in Denmark in this case even though this was raised by the legal advisor and documents were available in the case on the relevance of the presence of the brother for the best interests of his minor siblings.

[233] This is also a requirement under Article 12(3) of the Implementing Regulation no 1560/2003 as amended by Implementing Regulation no. 118/2014. European Commission, *Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 30 January 2014, (Implementing Regulation (EU) No 118/2014), Article 12(3), available at: http://www.refworld.org/docid/53c8f3ca4.html.

[234] However, both Italy and the United Kingdom reported that there is cooperation between Dublin Units in different Member States for the purposes of the BIA.

[235] As reported for example in Greece, Germany and the United Kingdom.

[236] For example, in Germany, while it is perceived that cooperation between the BAMF and the youth welfare offices generally functions well, in some municipalities challenges were reported with regards to the allocation of responsibility for the assessment. In Italy, there is a reported lack of coordination between the different actors involved in the BIA. In the United Kingdom, it was reported that there have been some occasions where the Local Authority have resisted carrying out assessments requested by the Home Office, citing a lack of a statutory obligation to do so on the grounds that the child is not yet in the United Kingdom. However, it is not clear what the consequences of such a refusal would be in practice.

[237] This is contrary to the obligation set out in para. 55 of the *MA, BT, DA* CJEU judgment not to prolong more than is strictly necessary the procedure for determining the Member State responsible for the examination of the applicant's application for international protection. CJEU, Case C-648/11, *MA, BT, DA v. Secretary of State for the Home Department*, 6 June 2013, available at : http://www.refworld.org/docid/51b0785e4.html.

Best interests assessment for unaccompanied children

Given the inherent vulnerability of unaccompanied children, special safeguards are necessary when unaccompanied children are in the Dublin procedure. Recital 13 of the Dublin Regulation provides that special procedural guarantees for unaccompanied children should be laid down on account of their vulnerability. The CJEU has also ruled that unaccompanied children form a category of particularly vulnerable persons as a consequence of which *"the child's best interests must be a primary consideration in all decisions"* related to the Dublin procedure.[238]

This section should be prefaced by noting that a minority of Member States surveyed have limited or no experience of conducting BIA for unaccompanied children due to the fact that they do not conduct a BIA,[239] or receive little or no applications for international protection from unaccompanied children or only receive incoming take charge requests concerning children, in a context where in most cases the BIA is considered primarily a duty of the requesting Member State.[240] This section is also strongly interlinked with the application of Article 8 under the hierarchy of criteria as the presence of family links and consequently family reunion possibilities frequently form a main aspect of the assessments conducted by Member States.

Best interests assessment procedures for unaccompanied children

There are no SOPs for conducting BIAs for unaccompanied children in the majority of Member States surveyed.[241]

SOPs have been developed within multilateral projects in some States with the participation of NGOs and international organizations including UNHCR, the IOM and Save the Children but their actual application varies depending on the Member State involved.[242] One example is the PRUMA project which aimed at promoting the efficient and safe family reunion of unaccompanied child asylum-seekers and tried to address procedural gaps by developing SOPs. Originally the PRUMA project intended to draw up common SOPS across all the Member States involved in the study but noting the vast differences in national systems instead specific SOPS were developed for each of the States involved.[243]

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[238] *Ibid*., para. 61.

[239] As reported in Greece.

[240] As reported in France, Poland and the United Kingdom. For example, Poland only receives approximately 10 to 20 applications for international protection from unaccompanied children on an annual basis – for more information see the website of the Office for Foreigners: http://udsc.gov.pl/en/statystyki/raporty-okresowe/zestawienia-roczne/. In 2015, France received only 321 applications from unaccompanied children (compared to 273 in 2014); for more information see OFPRA, *Rapport d'activité 2015*, p. 42, at: https://goo.gl/gEgcZx. The United Kingdom receives incoming take charge requests concerning unaccompanied children but has limited experience in relation to outgoing transfer requests. Furthermore, the United Kingdom has outdated guidance on applying the Dublin Regulation in the Asylum Policy Instruction 'Third Country Cases: Referring and Handling' section 3.2.3 for unaccompanied children', which states "*Unaccompanied children of any age can be removed under the Dublin Regulation if they have claimed asylum in a safe third country, and should be referred to TCU accordingly*", available at: https://goo.gl/rSMnMf.

[241] As reported in Denmark, France, Germany, Greece, Malta and Poland. In Italy, during the time of this research, UNHCR in cooperation with the Italian authorities, IOM and Save the Children developed a document called "*Linee Guida per le strutture di prima accoglienza contenenti procedure operative standard per la valutazione del superiore interesse del minore*", which concerns the actions that have to be undertaken in order to ensure a correct and efficient evaluation of the best interests of the child during his or her permanence in first reception centres. These SOPs were finalized in May 2016.

[242] Projects include *PRUMA – Promoting Family Reunification and transfer of Unaccompanied Minor Asylum Seekers under the Dublin Regulation* in Greece, Germany, the United Kingdom, Malta and Italy. This is due to a variety of reasons including the finite nature of the project or pending final approval to incorporate it into standard national procedures.

[243] Germany, Greece, Italy, Malta and the United Kingdom. In Germany, the BAMF implemented in the regular procedure the national SOPs agreed between the stakeholders involved in the project.

BIAs in the Member States surveyed are predominantly carried out on a case-by-case basis for unaccompanied children with limited or no consistency in approach. As previously mentioned (see *"Best Interests Assessment"*), the best interests of the child is often referenced in transfer decisions concerning unaccompanied children but the reasoning behind it is not always clear in some Member States.[244] This is of particular concern if the applicant effectively wishes to challenge the transfer decision but does not have the necessary information regarding the reasons behind the decision in the individual circumstances of an applicant's case.

Although it is difficult to draw conclusions due to the different Member States' approaches, as indicated above (see "*Cooperation between Member States")* it appears that there is confusion as to which Member State is primarily responsible for conducting a BIA and which Member State has the final say as to the assessment of the best interests of the child. One Member State is of the view that the requested State is best placed to examine living conditions and the ability of family to look after a child and, according to the view of some officials, that State should conduct the BIA.[245] However, this is only one element to a BIA and that approach may be on account of that Member State not having a BIA procedure in place. It is reported in another Member State that take back or take charge requests are accepted from other Member States without always viewing the results of any BIA conducted by other Member States as its own local authorities assess some aspects of the BIA, namely the family's capacity to take care of the child concerned and arrangements for his or her education.[246] Depending on the practice in the requesting Member State such an approach potentially limits the scope of the BIA, omitting other fundamental factors to be assessed as part of a BIA such as the child's well-being and social development and safety and security considerations.

Actors involved in the Best interests assessment

The actors involved in the BIA vary significantly across the Member States surveyed. In some Member States only Dublin units and their responsible national departments are involved in the BIA[247] whilst in other Member States other more specialised government departments such as social services and youth welfare offices are engaged in the process.[248] The involvement of child welfare experts within social services and youth welfare offices is positive as they often have more competency and the necessary skills and qualifications to assess what is in the best interests of the child. Legal advisors, reception centre staff and representatives are

[244] As reported in Denmark, Germany and Italy.

[245] As reported in Greece.

[246] As reported in the United Kingdom. Only in one audited case file were the results of the BIA undertaken in the requesting Member State shared with the authorities. There was no evidence on the case audit files or in policy or guidance to suggest that the United Kingdom Home Office would seek details of the BIA undertaken with the child in the requesting Member State. Significant delays, including months in some cases, were also reported in the British authorities accepting taking charge requests of unaccompanied children as they awaited the outcome of the local authority's assessment. In some local authorities there has been resistance to undertake assessments of whether a family or relative can take care of a child when the child is not in the country. However, the practice continues to evolve and is not consistent throughout the country.

[247] For example, France. In Norway, different units at UDI are involved; the Arrival Unit, which is specialised in interviewing children, conducts a conversation with unaccompanied children while the decision at first instance is taken by the Dublin Unit. NOAS, the representative and the legal advisor may also provide additional information to UDI on elements of importance to the BIA.

[248] In the United Kingdom, local authorities are involved in one aspect of the BIA in that they assess whether family members can take care of unaccompanied children in relation to incoming transfer requests. In Germany, the local Youth Welfare Offices performs the BIA. Non-governmental actors are not involved in the BIA on account of this being the sole responsibility of the public administration which cannot be conducted by private actors in accordance with the constitutional rights of the child stipulated in Article 6 Basic Law (German Constitution). However, it should be noted that applicants themselves can request other actors in Germany to be engaged in family tracing such as the International Social Services (ISS) and the German Red Cross. Furthermore, unaccompanied children are often taken into care in accommodation centres by social workers who have direct daily contact with those children and are involved in such procedures.

sometimes involved in the assessment in some Member States[249] and depending on individual circumstances one Member State reported that child psychologists may be engaged.[250] UNHCR and IOM may also contribute to assessments in some Member States and NGOs such as the ISS may be involved owing to their child specific expertise.[251] An audited case file in one Member State revealed that a Member State who received a request under Article 8 requested information on whether a child care organization was involved in assessing the best interests of the child.[252] From the audit of case files in one Member State it seems that very detailed reports are submitted by NGOs to the authorities in order for them to be able to take an informed decision.[253] Sometimes NGOs are in a better position in consideration of their expertise to make a home assessment including an evaluation of the current living condition of the family member or relative in the Member State. The findings show in one Member State, that the weight the authorities place on NGOs' home assessments depends on how much information they are able to collect on their own and on whether the assessment is requested by the authorities or just submitted spontaneously by an NGO.[254]

Often the Dublin units have the final responsibility in determining what is considered to be in the best interests of the child but in some Member States other national authorities that are more specialised to work with children may conduct the actual assessment:

GOOD PRACTICES

The local Youth Welfare Offices in Germany and the Agency for the Welfare of Asylum Seekers (AWAS) in Malta conduct the BIA in Germany and Malta respectively, while in Denmark a procedure was established in the fall of 2015 where representatives are specifically asked to contribute to the BIA in relation to the children in their care. Where a representative is not present during the personal interview, a transfer decision will not be taken before the representative is given the possibility to submit relevant information for the BIA. The final decision on what is in the best interests of the child on the basis of the BIA continues to lie with the authorities.

The way the BIA is conducted and the quality of the assessment itself also highly depends on the assistance and legal knowledge of other relevant actors supporting the procedure and varies across the Member States surveyed. For example, in some Member States the limited knowledge and lack of expertise of social workers and representatives assisting children with respect to refugee law and the possibility to use the Dublin Regulation for the purposes of family reunion, means they may not always act in the best interests of the child and even

[249] Representatives contribute to the BIA in Denmark, where a transfer decision will not be taken before a representative is given the possibility to submit relevant information in accordance with a new procedure introduced in the fall of 2015. Representatives for unaccompanied children younger than 14 years of age must sign a consent form in order for Greece to request another Member State to take over responsibility of the child in accordance with Article 8. From the audit of case files, it appears that the input of the representative of the unaccompanied child as to the best interests of the child is a decisive factor in some cases. The views of representatives are taken in account in conducting the BIA in Italy as well as information from the social services responsible for taking care of unaccompanied children. The representatives in AWAS in Malta play a key role in conducting the BIA. As reported by an NGO in Poland, the Legal Intervention Association, whose staff are sometimes appointed as representatives, the Dublin Unit in some cases informally cooperates with them as regards the best interests of the child.

[250] As reported in Poland.

[251] As reported in Germany, Italy and Malta. In addition, some NGOs in Poland stated that there is good cooperation between NGOs and the Border Guards and Dublin Unit in assessing the best interests of the child concerning unaccompanied children. In practice, however, there are few cases of unaccompanied children in Poland so the authorities have limited experience in conducting BIAs.

[252] An audited case file in Denmark showed that in one case the Netherlands requested information on whether a child care organization was involved in the BIA in Denmark.

[253] As reported in Malta.

[254] This was reported in Malta.

misadvise the child to not enter the asylum procedure.[255] Furthermore, the limited staffing resources in some cases affect the quality of the BIA.[256] Social workers in one Member State surveyed, involved in assessing the best interests of the child in relation to incoming take charge requests for unaccompanied children, are reportedly not given specific guidance as to the content of these assessments and focus on the accommodation and financial means of family members or relatives to take care of children above other factors.[257] In addition, in this Member State social workers from smaller local authorities, who have limited experience as they come across less cases, may not be aware of their duties or understand the type of assessment required. As a consequence, the quality varies depending on the area within the Member State where family members or relatives are present.[258] Whether or not the person conducting the assessment has the relevant knowledge and training to work with children also impacts upon the quality of the assessment.[259]

Elements of the Best interests assessment

The factors taken into consideration in the BIA vary significantly depending on the weight placed upon certain factors in a given Member State and on the individual circumstances of the case and may or may not include all the factors enumerated in Article 6(3) of the Dublin Regulation. As indicated above, overall there is no clarity on the weight placed on each of these different elements among the Member States surveyed and much depends on the individual circumstances of the case. It appears in a majority of Member States that greater weight is placed on family unity and reunion possibilities.[260] Sometimes aspects of the assessment form part of other preliminary procedures in the national protection system such as a clearing procedure in one Member State[261] where the child's well-being and social development is taken into consideration and the screening interview in another Member State[262] with respect to safety and security considerations. From the findings it appears that the factors enumerated in Article 6(3) are to some extent considered in the assessment in most States though practice in this area is unclear. The audit of case files in two Member States, for example,

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[255] For example, as reported in France and Germany. In France, the diversity of stakeholders in the administrative and judicial process makes entering the asylum procedure also complicated for unaccompanied children. In Germany, the Federal Association for Unaccompanied children (BUMF) conducts training for representatives, including on the Dublin procedure, but these trainings are not mandatory. According to one NGO in Malta, the staff in AWAS who conduct the BIA sometimes have a limited understanding of their role which may impact negatively on their capacity to appropriately assist a child within the Dublin procedure.

[256] According to an NGO in Malta sometimes the fact that AWAS staff are overburdened adversely impacts on the quality of BIAs in practice.

[257] The NGO Children and Families Across Borders (CFAB) in the United Kingdom has stated that the assessments, as they are currently, should not be called BIAs as the views and participation of the child are not included in such assessments, which instead only focus on the capacity of an individual to take care of a child.

[258] As reported by the NGO CFAB in the context of incoming requests to reunite unaccompanied children with family members present in the United Kingdom.

[259] For example, in Poland the BIA is conducted only based on written information by the Dublin Unit staff as they do not have the requisite qualifications to interview children. However, this information is then only based on what is gathered during the Border Guard interview with the child who, however, does not have the necessary qualifications to interview children.

[260] As reported in Germany, Italy and Poland.

[261] As reported in Germany where the competent Youth Welfare Office ("*Jugendamt*") undertakes the so called clearing procedure. This includes an assessment of the child's health, an age assessment (if necessary), the child's developmental and educational background, family reunion possibilities and any legal actions on behalf of the child including an assessment as to whether it is beneficial for the child to submit an application for international protection. The clearing procedure is conducted in accordance with Section 42 Social Act VIII, available (in German) at: http://www.gesetze-im-internet.de/sgb_8/__42.html.

[262] As reported in the United Kingdom.

indicates that the child's well-being and social development as well as safety and security considerations are not systematically and explicitly assessed as part of the BIA.[263]

GOOD PRACTICES

A good practice is noted in Norway whereby the following factors are taken into consideration in addition to the factors outlined in Article 6(3):

- the age of the child;
- the need for stability and continuity;
- physical and psychological health;
- the time spent in Norway and connection to Norway, including activities from the Child Welfare Services;
- time spent in the responsible country and connection to that country;
- the reception facilities in the responsible country.

This applies to both unaccompanied and accompanied children.

Additional factors taken into consideration in some Member States include: the consent of the child and his or her family member; siblings or relatives under Article 8;[264] the actual affectionate links and quality of the relationship between the child and family member; sibling or relative[265] and any reasons that led to the previous separation of the family;[266] the risk of domestic violence;[267] the need for stability and continuity for the child and the physical and psychological health of the child;[268] the psychological health of the adult family member, sibling or relative;[269] any connections or time spent in the requesting Member State or requested Member State;[270] the risk of human trafficking or other safety and security considerations;[271] reception facilities in the requested Member State, the social development and well-being of the child and the capacity and financial means of the family to look after the child[272] or the long term prospects for family reunification beyond the Dublin procedure[273] and the prospect of regularising the stay in the present Member State.[274] Overall, it can be seen that family reunion and unity is the main element of BIAs in the majority of Member States surveyed.

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[263] As reported from the audit of a limited number of case files in Poland. Similarly, the child's well-being and social development appears to not be systematically considered by other Member States in relation to take charge requests to the United Kingdom. In Denmark, the child's well-being and social development as well as safety and security considerations were not explicitly referenced in any of the case files audited.

[264] In Denmark, the consent of the child is taken into account but this is not by itself decisive in assigning Member State responsibility for an unaccompanied child. In Greece (if the unaccompanied child is 14 or older) and France the consent of the child must be provided in writing. In Greece, if the unaccompanied child is under 14, the consent is provided through the representative of the child. In Italy, the willingness of the family member or relative to take care of the child is taken into consideration as well as the views of the child himself or herself. In the United Kingdom, written and signed consent of the child and the family member is required in all cases.

[265] As reported in Denmark and Italy.

[266] As reported in Italy.

[267] As reported in Italy.

[268] As reported in Norway.

[269] As reported in Italy.

[270] As reported in Norway.

[271] As reported in Malta and Germany.

[272] As reported in France (for incoming take charge requests), Malta and the United Kingdom. As part of this the socio-economic assessment, employment of the family member or relative is taken into consideration in Italy.

[273] As reported in Malta.

[274] As reported by an NGO in Poland.

Views of the child

As part of the assessment the views of the child are taken into account in some Member States[275] but it is not always clear to what extent this element is taken into account and weighted against other factors in the overall assessment. UNHCR has always advocated that the views of the child form part of every BIA.[276] An additional challenge reported in one Member State is the lack of systematic and comprehensive follow up questions during the personal interview to thoroughly consider the applicant's views.[277]

GOOD PRACTICES

In Germany there is a national legal provision enshrining the right of the child to be heard according to Section 8 Social Act VIII, the law pertaining to children and youths. This stipulates that "children and adolescents are to be involved in all relevant decision of public youth welfare according to their level of development. They must be informed in an appropriate manner of their rights during the administrative procedure and in proceedings before the Family Court and the Administrative Court."

Conclusion

There are many divergent approaches to the BIA across the Member States surveyed for unaccompanied children during the Dublin procedure. There is also a lack of clarity as to whether it fully respects the best interests of the child in all cases as required by Article 6(3) of the Dublin Regulation due to the manner in which it is conducted and the ambiguous approach to such assessments by Member States. The findings illustrate a lack of guidance on how to conduct such assessments and ensure that all actors involved have the necessary skills, qualifications and expertise required to conduct such assessments in practice and final decision making.

Best interests assessment for accompanied children

Article 6 (1) is unequivocal in stating that the best interests of the child apply to all children subject to the Dublin procedure, including accompanied children. Such an approach is in line with States' obligations under Article 24 of the EU Charter and the CRC.

The findings show that despite general references made to the best interests of the child, in practice in the majority of Member States surveyed a BIA is not systematically conducted for accompanied children.[278] The reasons for not conducting a BIA for accompanied children include pressure on the protection system

[275] As reported in Denmark, Germany, Greece, Italy and Malta. In Denmark it was, however, reported by an NGO that the views of the child do not always carry sufficient weight; additionally, the child's opposition to a transfer appears not to lead to another outcome from the case files audited. Whilst Greece does not have a formal BIA procedure in place, reportedly the views of the child are taken into account when assigning Member State responsibility under Article 8 of the Dublin Regulation either in person or via the representative, but practice appears inconsistent in this regard. Stakeholders in Malta report that the desire of the child to be reunited with his or her family member is taken into account as part of the BIA.

[276] See for example UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: http://www.refworld.org/docid/48480c342.html; *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html.

[277] This was revealed from the auditing of case files in Denmark.

[278] For example, in Denmark, France, Germany, Greece, Poland and the United Kingdom. In Germany, although the Dublin Unit stated that a BIA is conducted for children travelling with family members, NGOs, legal advisors and representatives stated that it is not conducted in practice. In Greece, there is no BIA procedure for accompanied or unaccompanied children. An audit of family asylum cases in the United Kingdom undertaken by UNHCR in 2013 also identified that there was no formal or systematic collection or recording of information relevant to a best interests consideration , including a lack of a mechanism for obtaining the views of the child; for more information see: http://goo.gl/ZTzRZs.

and therefore limited capacity to conduct a BIA,[279] the best interest of the child being part of parental responsibility[280] and the fact that the child's application is indissociable from his or her parents under Article 20(3) of the Dublin Regulation.[281]

In one Member State where BIAs in the case of accompanied children are not systematically carried out, these would normally be carried out only where the available information in the particular case highlights a need for such an assessment, for example on the basis of the statements of the parents of the child.[282] The existence of a difficult relationship between the parents is a reason why a BIA may be carried out in one Member State.[283]

GOOD PRACTICES

A positive practice is noted in Malta whereby an assessment of the best interests of the child is always conducted for accompanied children and the child's views are heard as part of this assessment.[284]

The best interest of the child is also considered for children travelling with family members in Norway and a separate interview may be held with such children if there is a need to investigate any concerns.[285]

No SOPs or guidance are provided in relation to carrying out BIAs for accompanied children in the majority of Member States surveyed.[286] Nevertheless, in some Member States the best interests of the child principle is implicit from the practice of not transferring families with small children to other Member States on the basis of reception conditions concerns or of preventing transfers on the basis of the medical needs of the child.[287] Whilst this is not labelled as a BIA, this practice could be considered to be implicitly considering the best interests of the child when assessing Member State responsibility under the Dublin Regulation. Despite the lack of clarity as to what factors are taken into account for the assessment of the best interests of accompanied children it appears from Member States' practice that the conditions in the responsible Member State is the dominant factor in considering whether a transfer should be carried out or not under the Dublin procedure. At

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[279] The limited resources in the Dublin Unit and the gaps in the child protection mechanisms in Greece were reported as reasons why BIAs are not always carried out.

[280] For example, this is reported in Germany and Poland.

[281] As reported in Poland.

[282] As reported in Denmark.

[283] As reported in Italy where the behaviour of parents may impact negatively on the psychosocial development of the child. This may emerge from the documents included in the case file which show that the parents have been separated for a long time and/or the family relationships have been effected by violent behaviour.

[284] This assessment is conducted by AWAS and involves establishing firstly if the family links are genuine and then undertaking an assessment as to whether the family members have capacity to take care of the child both emotionally and financially. According to the Dublin Unit in Italy an assessment is also undertaken for accompanied children in specific cases such as when the parents appear to have a difficult relationship.

[285] All children travelling in a family in Norway also receive individual decisions in relation to transfers in the Dublin procedure.

[286] With the exception of Norway.

[287] For example, this is reported in Germany, Norway and the United Kingdom. In Germany, after the *Tarakhel v. Switzerland* ECtHR judgment and similar decisions of the Federal Constitutional Court, the BAMF follows a policy of non-transfer of families with small children to Italy since concrete individual guarantees cannot be obtained from Italy. In Norway, UDI has issued policy instructions for the transfer of families with small children to Italy in light of the same judgment and held that due to improvements in conditions in Italy, there is no longer a need to seek individual guarantees that families will be accommodated upon arrival in Italy. However, according to those policy instructions in Norway there still must be an assessment in each individual case in order to ensure that children/families with minor children who are to be accommodated in a reception centre in Italy, are accommodated in a reception centre adapted to families and that family unity is maintained. For more information see (in Norwegian): http://goo.gl/NPXQH4. In Germany, the best interest of the child is also considered when transfers are cancelled due to the ill-health of the child. In the United Kingdom, in one case observed the decision was taken not to return the family to another Member State due to the specific medical needs of the children. For further information, see section 1 of Chapter III.

times, additional factors such as the availability of medical services in the responsible Member State are also taken into consideration.[288]

Views of accompanied children

Regardless of whether a BIA is carried out or not with respect to accompanied children, it is also reported in many of the Member States surveyed that the child may not be directly heard and their views are not considered when travelling with family members or another adult responsible for them as accompanied children.[289] Two Member States reported that although the child specifically is not heard, his or her parents are asked questions about the health and well-being of the child.[290]

GOOD PRACTICES

In terms of taking into account the views of the child for accompanied children, internal guidance for applications for international protection in the United Kingdom states the following:

"1.4 Involving children in decisions that impact on them: Case Owners must take account of the views of any children likely to be affected by a decision of the UK Border Agency (UKBA). Provided they are able and willing to do so properly, the role of representing those views to UKBA should be performed by the child's parent(s), or any other accompanying adult who has parental responsibility for the child. However, the (UKBA) should not assume that the best interests of a child, on the one hand, and those of its parents (or any adult with parental responsibility for the child), on the other, will be the same. Where those interests are not aligned, appropriate steps must be taken to elicit and assess the child's views, as well as those of the parent(s) or any other adult with parental responsibility for the child."[291]

In Norway the views of the accompanied child may be heard if NGOs, legal advisors or staff at reception centres contact the UDI indicating that further investigations are required. Then the UDI will arrange an interview with the child's parents and/or the child to assess his or her best interests.

Safety and security considerations for accompanied children

The issue of safety and security considerations is not systematically assessed in practice in one Member State with respect to children who are accompanied by extended family members, where in cases of so-called "covert accompanied minors" a security assessment is not systematically conducted, including on whether there is a risk of child trafficking.[292] A representative interviewed as part of this study reported a case in that State where the child stayed with his alleged relatives until the youth welfare office was informed that this

[288] For example, a personal interview in the United Kingdom was observed of a family with two dependent children where another Member State was responsible in accordance with the hierarchy of criteria but the Home Office permitted the family to pursue an application for international protection in the United Kingdom on the grounds that it was accepted that both children had extremely rare illnesses which could not be treated in the responsible Member State and for which the United Kingdom was one of the few places where medical treatment was available for that condition. In taking this decision, however, the Home Office made no reference to the best interests of the child nor that the family had already been granted international protection.

[289] For example, this is reported in Denmark, France, Germany, Greece (especially for children under 14), Poland and the United Kingdom.

[290] As reported in the United Kingdom; however, this is reportedly not done in a consistent manner in practice. In Denmark, parents are reportedly also asked questions concerning their children, for example about their health.

[291] UK Asylum Policy Instruction (API), Processing Cases, p. 4, available at: https://goo.gl/3685uV.

[292] As reported in Germany where children arrive with extended family members. In individual cases, family links may not be checked due to the limited capacity of the authorities to carry out such assessments.

could be a case of trafficking. The failure to adequately assess the best interests of a child in such situations is particularly concerning given the implications for safety considerations, such as trafficking and other forms of exploitation.[293]

Children in one Member State who are travelling with extended family or adults who are not their parents taking responsibility for them, are invited to a personal interview, thus the same approach as for unaccompanied children.[294] The interview also serves the purpose to determine whether the child is unaccompanied or separated.[295]

Overall, the findings show that the best interests of the child principle is not an integrated part of States' assessment of responsibility for the examination of applications for international protection of accompanied children. The BIA should form a central part of the holistic examination of States' responsibility for families across the Member States as required by States' legal obligations. Furthermore, UNHCR is of the view that BIAs should form part of national child protection systems accessible to all children, including those within the Dublin procedure.[296] This requires identifying the best interests of the child as part of a comprehensive child protection system to strengthen the protection of children at risk.

Age assessment

The Dublin Regulation is silent on the subject of age assessments but the outcome of any such assessment forms part of the relevant information exchanged between Member States before a transfer is carried out between States under Article 31(2).[297] It is of relevance for this study as it also impacts upon whether or not an age disputed applicant can access the procedural guarantees for children under the Regulation and assignment of Member State responsibility for the examination of an applicant's claim for international protection under Article 8. Whilst acknowledging that some Member States perceive that applicants may misrepresent their age during the asylum procedure, UNHCR has previously cautioned against the excessive reliance on age assessment techniques, which should only be used where there is a clear dispute as to the age of the applicant,

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[293] A representative is reportedly appointed in Norway when a child is travelling with adults who do not have parental custody of the child.

[294] As reported in Denmark.

[295] In Denmark, a separated child (*ledsaget*) is a child who is not travelling with his or her parents, but where it has been assessed that one or more adults are responsible for the child, for example siblings above 18 or grandparents. An observer or representative will also be present during the interview (an observer is present at the personal interview if a representative has not yet been appointed for an unaccompanied child in Denmark). If the child is in the Dublin procedure, he or she will be asked about his or her views concerning a potential transfer. A BIA will then in principle be conducted in relation to his or her transfer. However, case files audited in Denmark confirmed the information gathered from stakeholders interviewed that a BIA is not systematically conducted in such cases.

[296] UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, available at: http://www.refworld.org/docid/48480c342.html; UNHCR/Unicef, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html; UNHCR, *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, A UK briefing on the UNHCR/Unicef publication Safe & Sound, May 2016, available at: http://goo.gl/1x4u3q.

[297] The information on the age assessment method and results is also exchanged between Member States using Annex VIII of Commission Implementing Regulation (EU) No 118/2014 "*Standard form for the exchange of information on the family, siblings or relatives of an unaccompanied child in a Dublin procedure pursuant to Article 6(5) of Regulation (EU) No 604/2013*".

bearing in mind the acknowledged margin of error in such techniques.[298] This is further complicated by the fact that children sometimes misrepresent their age and claim to be adults due to fear and mistrust of authorities and to enable them to continue their onward journey rather then being taken into care by child protection services in the States of transit. With respect to the conduct of age assessments, the UN Committee on the Rights of the Child has called for any age assessments to be objective and fair, child and gender-sensitive and to avoid any risk of violating the individual's physical integrity, giving due respect to his or her human dignity.[299]

Age assessment procedure

Although a comprehensive analysis of the methods of age assessment is beyond the scope of this study, the findings of this research show that there is no uniform standardised procedure for age assessment across the Member States surveyed.[300] Different methods are used to establish the age of applicants, including psychosocial assessments,[301] dental examinations,[302] wrist/hand (x-ray) examinations[303] and bone density testing[304] as well as other methods.[305]

Inconsistencies in the registration of the age of a child among various regional departments is reported as a related issue in one Member State where unaccompanied children who are first registerated as adults at the first reception centres may find it difficult to have their registered age changed for the purposes of the Dublin procedure.[306] This, in effect, means they may be denied the right to family reunion and family unity under Article 8 of the Dublin Regulation and continue to be separated from their families.[307]

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[298] UNHCR, UNHCR *Comments on the European Commission Proposal for a recast of the 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*, 18 March 2009, available at: http://www.refworld.org/docid/49c0ca922.html; UNHCR/Unicef, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html.

[299] UN Committee on the Rights of the Child, General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, September 2005, available at: http://www.refworld.org/docid/42dd174b4.html.

[300] For further information on methods of age assessment see EASO, *EASO Age assessment practice in Europe*, December 2013, available at: http://www.refworld.org/docid/532191894.html.

[301] As reported in France, Germany, Greece, Norway and the United Kingdom.

[302] As reported in Denmark, Greece, Germany, Norway and Poland.

[303] As reported in Denmark, France, Germany, Greece, Italy, Norway and Poland. However, at the time of writing this report, in Italy a new procedure aimed at identifying a multidisciplinary procedure for age assessment in Italy is under consideration.

[304] As reported in France and Germany.

[305] As reported in Denmark, Norway and the United Kingdom.

[306] As reported in Greece.

[307] This was reported in Greece. For further information, see UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, available at: http://www.refworld.org/docid/54cb3af34.html.

Consent of the child for the purpose of an age assessment

In four Member States surveyed the applicant's consent[308] is required to conduct an age assessment and failure to provide such consent may result in the applicant being treated as an adult for the purposes of their application for international protection in two of those States.[309] Although requesting the consent of the applicant to conduct an age assessment is welcomed, the negative consequences for failing to agree[310] can be far-reaching as regards the assignment of Member State responsibility in the Dublin procedure. This is of particular concern as UNHCR is aware that unaccompanied children may incorrectly claim to be adults on the basis of misleading information from smuggling networks and communities particularly if they perceive the Member State to be a transit country for the purposes of their application for international protection and therefore seek to avoid being identified as children not to be taken into child care. Failure to correctly identify such applicants as unaccompanied children once they lodge an application for international protection and are placed in the Dublin procedure means that such persons will not have access to the child-specific procedural safeguards in the Dublin procedure.

Benefit of the doubt

It is UNHCR's position that children should be given the benefit of the doubt if their exact age is uncertain.[311] In this context, it is positive to note that almost all Member States reported giving the benefit of the doubt to applicants where age assessment results are uncertain.[312] Despite this, it is reported in some Member

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[308] As reported in Denmark, France, Norway and Poland. In France, Article 43 of the law on the protection of children adopted on 14 March 2016 states the following: "[…] *x-ray bone tests for the purpose of age assessment, in the absence of valid identity documents and whenever the alleged age is not plausible, may only be performed upon decision of the judicial authority and with the person's consent. The results of these tests, which must indicate the margin of error, cannot determine whether the person is a child by themselves. The concerned person is given the benefit of the doubt. Where there is a doubt as to the person's minority, age cannot be assessed on the basis of a puberty exam* […]", available (in French only) at: https://goo.gl/QuLHA8. In Greece, a multidisciplinary approach to age assessment techniques is reported in Greece. However, until February 2016 the age assessment mechanism established by the national legislation was only applicable in the context of the first reception procedures and not in the context of the asylum and the Dublin procedure. In February 2016 a Ministerial Decision MD 1982/2016 was adopted which established an age assessment procedure applicable in the context of the asylum and the Dublin procedure. For more information on the use of radiological age assessment procedures for unaccompanied children see: G. Noll, *Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, International Journal of Refugee Law (2016), Volume 28, pp. 234-250.

[309] As reported in Denmark, Poland and Norway.

[310] If an applicant is incorrectly determined to be an adult when he or she is a child, then he or she will not receive the procedural safeguards under Article 6 of the Dublin III Regulation and the Member State responsible for the examination of his or her application for international protection will not be determined under Article 8 of the Dublin III Regulation.

[311] UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: http://www.refworld.org/docid/3ae6b3360.html; UNHCR/Unicef, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: http://www.refworld.org/docid/5423da264.html.

[312] As reported in Denmark (where, however, an NGO indicated that it should be applied to a greater extent), France, Germany, Greece, Italy, Norway, Poland and the United Kingdom. Sometimes in practice, however, the principle of the benefit of the doubt does not always seem to be applied in practice in France, Germany and Italy. In Denmark, if there is a small probability of the applicant being under the age of eighteen, the applicant will be considered as a child where there are also other elements in the case beyond the declaration of the applicant as to his or her stated age that indicate that he or she is most likely a child. In the absence of other elements, the applicant is considered as an adult. In the United Kingdom, this only applies to applicants whose age is disputed who are not considered to be significantly over the age of eighteen.

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States that children can still be considered as adults by some national authorities in practice in such circumstances.[313]

Related to this is whether the applicant is treated as a child pending the age assessment. In the majority of Member States surveyed applicants are treated as a child pending the outcome of an age assessment[314] except where it is very clear from their appearance that they may be older than 18 years of age.[315] Therefore, applicants whose age is disputed usually have access to the same reception services as unaccompanied children pending

[313] For example, some Border Guards in Poland for the purposes of the detention of the applicant and some Prefectures in France for the purposes of the Dublin procedure. In Malta and Poland, despite the Immigration Police and Border Guards respectively stating that an applicant whose age is disputed is treated as a child pending an age assessment, cases were reported where children were detained pending the outcome of the age assessment procedure. In Poland, although the Dublin Unit considered the applicant to be an unaccompanied child for the purposes of Article 8 of the Dublin III Regulation, the applicant continued to be treated as an adult for the purposes of detention and was still detained the day of transfer to be reunited with his mother in Germany. In the United Kingdom there is the possibility that individuals who claim to be children will be treated as an adult if their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age. These assessments are undertaken by border guards or immigration officials without specific expertise in age assessment. For more information see: https://goo.gl/UzE5sy. Several stakeholders in France also reported that some Prefectures treat children as adults and at times this is due to the fact that the child may have stated they were an adult in a previous Member State in order to transit it to reach their final destination.

[314] As reported in Denmark (as a rule only at the first instance of the age assessment procedure), France, Germany, Greece, Italy, Norway, Malta and the United Kingdom. In Poland, national law does not specify the status of a person pending the results of the age assessment. There are no specific guarantees for such persons related to their reception or the appointment of a representative. However, the Polish authorities indicated that in practice a person is treated as a child pending the results of the age assessment. The audit of case files showed, however, that in some cases applicants were detained during the age assessment procedure, which indicates they were instead treated as adults as Polish law prohibits detention of unaccompanied children seeking protection.

[315] As reported for example in Norway and the United Kingdom. In the United Kingdom there is the possibility that individuals who claim to be children will be treated as an adult if their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age. In practical terms in Malta though they are not treated as a child pending the age assessment as representatives are only appointed after the age assessment procedure.

the outcome of the age assessment.[316] Although in some Member States there are instances of children whose age is disputed being placed in accommodation facilities for adults[317] or detention.[318] Stakeholders in one Member State reported that children are sometimes treated as adults in the Dublin procedure despite being recognised as children.[319] The impact of that is illustrated in the case below, taken from a case file audited in France.

GOOD PRACTICES

An alleged unaccompanied child who had been arrested in his home in France together with approximately fifty other undocumented third country nationals and taken to an administrative detention centre prior to his removal applied for international protection. Following a Eurodac hit, he was placed under the Dublin procedure and the Prefecture issued and notified a transfer decision to Italy. Whilst the first decision mentioned his alleged age as seventeen, the Prefecture took another one to rectify a "factual error" according to which the applicant's actual date of birth was amended to make him twenty-seven years old. The applicant claimed he was a child from the moment he was arrested but no age assessment was ever carried out and he was eventually transferred to Italy.[320]

Age assessment and the Dublin procedure

One aspect of assistance for unaccompanied children, which is frequently not granted pending the outcome of the age assessment, is that of representation. A representative is generally not appointed until the age assessment is completed in the majority of Member States surveyed.[321] Linked to this is the issue of whether the Dublin procedure itself is initiated, suspended,[322] or continues with or without the appointment of a representative pending the results of an age assessment. The findings show that in most Member States the Dublin procedure is suspended or does not start at all pending the outcome of the age assessment.[323] It is reported in most Member States that this is on account of the fact that an unaccompanied child cannot

[316] As reported in Denmark (as a rule only at the first instance of the age assessment procedure), France, Germany, Greece, Italy, Malta, Norway and the United Kingdom.

[317] This sometimes occurs in Italy and Malta.

[318] As reported in Malta and Poland.

[319] Sometimes, even when applicants have been recognised as children by the social services (ASE) and the guardianship or children's judge in France under the benefit of the doubt, some Prefectures still consider them as adults.

[320] This is from an audited case file in France. The transfer decision was issued the day before a bank holiday, which did not leave sufficient time for the applicant to lodge an appeal.

[321] As reported in France, Italy, Malta, Poland and the United Kingdom. In Denmark, if on the basis of the information available it is assumed that the applicant is an adult, reportedly the representative will be appointed after the age assessment confirms that the applicant is a child. An observer will, however, be available until the appointment of a representative. In Norway, representatives are appointed at registration; however, if the authorities are almost certain that an applicant is over 18, they may wait until the age assessment confirms minority before appointing a representative and in the meantime the applicant is treated as an adult. In Germany, sometimes the authorities await the outcome of the age assessment before appointing a representative for the child but in some cases representatives are appointed before the age assessment is completed or a fast age assessment is conducted. Although Polish authorities indicated that a person is treated as a child pending the assessment the practice shows that representatives are not appointed until the age of a person is established.

[322] The policy in the United Kingdom is that applicants whose age is disputed are separated into two different categories: the applicant should be treated as an adult if their physical appearance/demeanour very strongly suggests that they are significantly over eighteen years of age, while all other applicants should be afforded the benefit of the doubt and treated as children. In the United Kingdom, only applicants who fall into the second category may have a representative appointed pending the outcome of the age assessment.

[323] As reported in France, Germany, Italy, Norway and Poland.

submit an application for international protection without the assistance of a representative[324] who in turn is generally not appointed until the age of the child is confirmed by the age assessment. In three Member States the Dublin procedure is not suspended pending the outcome of the age assessment but this appears to be because the child has alternative support during the determination of Member State responsiblity for the examination of his or her application in two of these Member States.[325]

The findings show that the results of age assessments concerning the applicant conducted in other Member States are taken into account by most Member States but the extent to which they are deemed to be decisive is unclear.[326] More weight seems to be placed on the results of an age assessment in some Member States if they use similar methods of assessment.[327] If the applicant was previously considered to be an adult in another Member State this is more easily accepted according the practice in most Member States.[328] Overall it appears that in the majority of States surveyed age assessments conducted elsewhere are not automatically accepted and if there are any doubts concerning the age of the child this will be reassessed.

Length of time of the age assessment

The length of time the age assessment procedure takes also significanly impacts the child's right to family unity and asylum. Although practice varies depending on the individual circumstances of the case and the method of age assessment used by a State, the time reported for the age assessment ranges from 1 day[329] to a few weeks[330]. In some Member States the length of time reportedly results in unaccompanied children dissappearing before the end of the Dublin procedure.[331]

Although age assessment is not a central feature of the Dublin Regulation it is apparent from these findings that it can have a detrimental impact on unaccompanied children accessing their procedural guarantees under

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[324] As reported in France, Germany, Greece (for children under 14 years of age), Italy and Poland (since November 2015). However, in Greece, according to the law the person is treated as a child until the completion of the age assessment procedure. Therefore, a representative should be appointed pending the outcome of the age assessment.

[325] In Denmark, an independent observer attends the personal interview for the purposes of the Dublin procedure with the applicant. It should be noted that the observer has a more limited role in Denmark compared to the representative and cannot fully represent the child and although aspects of the Dublin procedure continue pending the age assessment results, the authorities, in accordance with a procedure introduced in the fall of 2015, do not issue a transfer decision before the appointment of a representative. In the United Kingdom, a social worker assists the unaccompanied child during the Dublin procedure. In Malta, most of the steps of the Dublin procedure continue if the appointment of a representative is postponed pending the outcome of the age assessment but a representative is normally in place by the time the BIA is conducted.

[326] As reported in Germany, Italy, Norway, Malta, Poland and the United Kingdom. In Denmark, conflicting information was collected on whether or not the results of age assessments carried out in other Member States are taken into account in Denmark.

[327] As reported in Denmark and Norway.

[328] As reported in France.

[329] As reported in Germany (unless age is disputed) and Poland but it should be noted that the procedure leading up to the assessment in Germany, which includes distribution within the German territory, may take up to six months.

[330] For example, in Greece, Italy, Norway and the United Kingdom.

[331] It is difficult to draw conclusions as to whether this is due to the length of time for the age assessment process or the whole Dublin procedure. However, delays in the age assessments reflect on the duration of the whole Dublin procedure, thus adding to its overall duration. The issue of children disappearing is reported in Germany, Greece, Italy, Malta, Poland, Norway and United Kingdom. For example, according to the Italian Ministry of the Interior, as to 31 January 2015, there were roughly 3,500 unaccompanied children who disappeared after their arrival in Italy (roughly 1 out of 4 for the period 1 January 2014 to 31 January 2015). See *Protocollo d'Intesa tra il Ministero dell'Interno, l' Ufficio del Commissario Straordinario per le Persone Scomparse, la Prefettura di Roma*, 27 October 2015, available at: http://goo.gl/hSgRVK.
The Norwegian newspaper *Dagsavisen* reported in January 2016 based on UDI's statistics that 480 children were reported missing from the reception centres in 2013 and 2014. 105 of these children were unaccompanied children. For more information see (in Norwegian): http://goo.gl/Kv1fR2.

Article 6 particularly with respect to having the support of a representative during the Dublin procedure. Failure to correctly identify the age of a child also has negative consequences in terms of a child's family reunion possibilities, including the application of the hierarchy of criteria, as an applicant may not be able to benefit from the more favourable family reunion possibilities for children under Article 8 of the Dublin Regulation. Delays in carrying out age assessments can also mean that the time limits required for take back and take charge requests may elapse in the meantime. The lack of uniformity between age assessment methods used in different Member States and the absence of clarity on how other Member States's age assessments are taken on board shows the need for a coherent approach to avoid inconsistent procedures and outcomes across the Member States.

The representative for unaccompanied children

Article 6(2) requires Member States to ensure that a representative represents and/or assists an unaccompanied child with respect to all procedural aspects of the Dublin Regulation.[332] The representative shall have the required qualifications and expertise to ensure that the best interests of the child are taken into consideration during the Dublin procedure. Furthermore, Article 12(3) of the Implementing Regulation No 1560/2003 as amended by Implementing Regulation No 118/2014 requires national authorities carrying out the process of establishing the Member State responsible for the examination of the application of an unaccompanied child to involve the representative in this process to the greatest extent possible.

The majority of Member States surveyed appoint a representative for unaccompanied children[333] during the Dublin procedure but the national arrangements in place for representatives are extremely varied amongst the Member States. For example, in one Member State the guardianship role, as representation is referred to there, is divided between a number of different representatives with varied competencies,[334] whilst in two other other Member States no representation system is in place as caseworkers from the agency in charge of welfare for applicants and the local authorities respectively undertake this role in practice.[335] Employees of

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[332] Article 25 of the recast Asylum Procedures Directive also envisages a representative for the purposes of the asylum procedure for unaccompanied children as does Article 24 of the recast Reception Conditions Directive for the purposes of ensuring the best interests of the child are respected and exercising legal capacity on their behalf where necessary. Council of the European Union, *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 (recast)*, 26 June 2013, OJ L. 180/60 -180/95 (recast Asylum procedures Directive), available at: http://goo.gl/XkSJLK and *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 26 June 2013, OJ L. 180/96 -105/32 (recast Reception Conditions Directive), available at: http://www.refworld.org/docid/51d29db54.html.

[333] As reported in Denmark, France, Germany, Greece, Italy, Norway and Poland. It is not always clear from the findings whether the representative appointed is the same representative as that required under the recast Asylum Procedures Directive and Reception Conditions Directive but it appears so in France, Poland, Italy and Greece. It should be noted that Denmark, Norway and the United Kingdom are not bound by the recast Asylum Procedures Directive and recast Reception Conditions Directive. There is no provision in Maltese law for representatives so in practice staff of AWAS act as representatives. In Germany, challenges have been reported in some *Bundesländer* where a representative may not be appointed if the unaccompanied child is in regular contact with the parents, including if they are still residing in the country of origin, as it is considered that the parents still hold parental responsibility in such cases. Issues exist with the guardianship/representation system for unaccompanied children in Greece, as the Public Prosecutors, who are by law the temporary representatives of unaccompanied children, only assume responsibility in theory. They do not have the necessary resources to handle the large number of cases referred to them and there is no institution in place that prosecutors can refer to in order to appoint permanent representatives in Greece. Therefore, in Dublin cases NGO legal advisors or other counsellors of NGOs, who wish to assist in the Dublin procedure, request the Public Prosecutor for Minors to provide them with an *ad hoc* authorisation to act as representatives for the unaccompanied children specifically in administrative proceedings related to the Dublin procedure. They are not, however, entrusted with the full guardianship of unaccompanied children.

[334] Germany has a system of different types of representatives in place depending on a number of factors including the procedure the child is subject to, the qualifications and skills of the representative, and the region.

[335] AWAS in Malta and local authority social workers in the United Kingdom.

NGOs who provide legal assistance for applicants in another Member State are appointed as representatives for unaccompanied children in practice.[336]

Representatives are generally formally appointed upon registration of the child's application[337] for international protection but delays are reported to occur in practice.[338]

GOOD PRACTICES

A positive practice is reported in Germany where if representatives become aware that a child may have family links in another Member State before the official procedure starts then they contact the **Federal Office for Migration and Refugees** (BAMF) directly to initiate family tracing in advance[339]

Role of the representative

From the outset it should be noted that a representative is necessary for unaccompanied children to submit applications for international protection, and thus initiate the Dublin procedure in a number of Member States.[340] While the key role of the representative in the Dublin procedure is to ensure that the child's best interests are safeguarded, their role in practice varies from Member State to Member State and includes, but is not limited to:

- assisting the child in submitting their application for international protection;[341]
- providing information on the Dublin procedure itself;[342]

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[336] As reported in Poland and Greece. In Greece, the Public Prosecutors for Minors, who are by law the temporary representatives of unaccompanied children, only assume responsibility in theory, since they do not have the necessary resources to handle the large number of cases referred to them. To fill this gap, in practice NGO legal advisors or other counsellors act as representatives for unaccompanied children upon authorization of the Public Prosecutor for Minors. An NGO established a guardianship programme for this group of children. However, most of the NGOs interviewed in Greece stressed that limited funding and human resources impact negatively on their capacity to adequately meet the representation needs of all unaccompanied children in the Dublin procedure. The NGO METAction established a guardianship programme for this group of children. However, due to their limited capacity they cannot assist all unaccompanied children and they prioritise children under the age of 15, unaccompanied girls and other particularly vulnerable unaccompanied children. Another limiting factor is that their support is provided to unaccompanied children residing in the geographical areas where the NGO's personnel are deployed.

[337] For example, Norway, Malta and the United Kingdom. In France, the representative is appointed before the child lodges the application for international protection but note that in France very few unaccompanied children seek international protection. In Italy, a representative should be appointed within forty-eight hours of the child being discovered but delays often occur in practice. In Malta, although it is reported that representatives are appointed immediately, practice shows that it is normally after the Preliminary Questionnaire Interview (i.e. the interview where information relevant for the assessment of responsibility under the Dublin Regulation is collected). In Poland, representatives are appointed within three days after the Border Guard requests the Family Court to appoint the representative for an unaccompanied child who expressed the wish to apply for international protection. In practice the appointment usually occurs a few days after the lodging of the application for international protection.

[338] See below under *"Delays in the appointment of the representative"* for further information on the impact of delayed appointments of representatives.

[339] This may also occur if the child is particularly vulnerable or in detention. In the interim period an observer is appointed to be present during the personal interview wih the child. However, the role of the observer is limited as they cannot intervene during the interview and normally do not meet with the child before the interview.

[340] In France, Germany, Italy and Poland. In Greece, it is also necessary for children under the age of 14. In Germany, youth welfare authorities can submit an application for international protection on behalf of a child prior to a representative being appointed – if this is necessary in accordance with the best interests of the child. However, this does not appear to occur frequently in practice.

[341] As reported in, France, Germany, Greece (for children below the age of 14), Italy and Poland.

[342] As reported in Germany, Italy (even if not explicitly foreseen by the law) and the United Kingdom.

- assisting the child during the personal interview if appointed by that stage;[343]
- contributing to the BIA[344] and submitting relevant supporting documentation;[345]
- contributing on the question of the maturity of the child;[346]
- providing supportive statements on behalf of the child;[347]
- cooperating in facilitating family reunion;[348]
- commenting on the interview transcript;[349]
- requesting files on behalf of the child;[350]
- consulting with legal advisors;[351]
- assisting with the reception of the child;[352] and
- cooperating in the transfer arrangements for the child.[353]

As regards family reunion under the Dublin Regulation, in some Member States the representative often has a central part supporting family unity in a number of ways such as informing the child of the possibility to reunite with his or her family within the Dublin procedure,[354] obtaining relevant documentation on behalf of the child to verify family links,[355] facilitating communication with government departments or independent family tracing services such as the ISS or Red Cross,[356] and contributing to the assessment of family conditions in the requested Member State.[357] Audited case files in one Member State indicate that representatives there may also be requested to sign a consent form for the transfer of the child to another Member State under

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[343] For example, in Denmark, France, Greece, Italy, Norway, Poland and the United Kingdom. In Denmark, if the representative is not appointed at this stage of the Dublin procedure an observer will be present during the interview but their role is more limited and they cannot for example act on behalf of the child. In Germany, the representative will also support the child in the completion of the questionnaire which replaces the personal interview there. In Malta, the representative is not present during the preliminary questionnaire interview but is present during the final interview with the Maltese immigration police for the purposes of arranging the transfer. In Greece, the representative must be present at the interview for unaccompanied children below the age of 14. A representative, a legal advisor or other counsellor may be present at the interview for unaccompanied children above that age in Greece. In the United Kingdom, the personal interview cannot take place unless a Local Authority social worker or other 'responsible adult' is present.

[344] As reported in Denmark, Germany, Italy, Malta, Norway, Poland and the United Kingdom. In Poland, representatives only have an informal role as part of this process. In Denmark, a new procedure was introduced in the fall of 2015 whereby the representative is heard on the best interests of the child in relation to a potential transfer. The responsibility for the final decision on the BIA however continues to lie with the authorities.

[345] As reported in Denmark, France, Germany, Italy, Norway, Poland and the United Kingdom. In the United Kingdom, this may be done by either the Local Authority social worker or the legal advisor.

[346] For example, in Denmark.

[347] As reported in Germany, Greece and Norway. In the United Kingdom, this is done by the legal advisor.

[348] As reported in Denmark, Germany, Greece, Italy, Malta, Norway and the United Kingdom.

[349] As reported in Denmark, Greece and Norway. In the United Kingdom, this may be done by either the local authority social worker or the legal advisor.

[350] As reported in Germany, Greece, Norway and Poland. In the United Kingdom, this is done by the legal advisor.

[351] As reported in Germany, Greece and Norway. It is noted in Malta and Poland that the representative also submits appeals on behalf of the applicants.

[352] As reported in Malta and the United Kingdom. In Malta, this involves the representative setting out an individual care plan for the child which promotes the well-being and best interests of the child.

[353] As reported in Denmark, Greece, Italy and Norway.

[354] As reported in Germany, Italy, Malta and the United Kingdom.

[355] As reported in Denmark, Germany, Greece and the United Kingdom.

[356] As reported in Denmark, Germany, Greece and the United Kingdom.

[357] As reported in the United Kingdom.

Article 8 if the child does not consent.[358] This research also found that whilst representatives appear to have a formal role in the process of family tracing in some of the Member States surveyed,[359] in other Member States they have a largely informal role in this process.[360]

Delays in the appointment of the representative

Stakeholders, including authorities and NGOs, in some Member States surveyed consider the appointment of representatives to not be timely in practice as delays occur, which might have an impact on the Dublin procedure.[361] No conclusions can be drawn on the reasons behind such delays but these include the appointment of a representative being overlooked on occasions due to the fact that staff of the competent authorities are overburdened[362] or having insufficient human resources in place to effectively carry out the function for all children concerned.[363] Delays in one Member State are attributed, among other reasons, to the assessment by national Courts of whether or not there is a suspension of parental care in order to access representation.[364] Some Courts in the State concerned apply differing thresholds for suspension of parental care and in some cases contact by telephone with parents residing in countries of origin is deemed sufficient to disprove the absence of parental care, which results in the child not being appointed any representative.[365]

Delays in the appointment of a representative can have a detrimental impact on the assignment of Member State responsibility due to the lack of guidance for the child concerned during the Dublin procedure or support during the personal interview as well as access to the asylum procedure itself in those Member States where the Dublin procedure can start without the appointment of the representative. In some Member States

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[358] This arose from audited case files in Denmark but this is not considered a standard practice there. This practice is also reported in Greece for unaccompanied children below the age of 14. From the audit of a few case files in Italy it emerged that legal representatives request the juvenile court ("*giudice tutelare*") to authorise the transfer in the case of children.

[359] As reported in Germany and Norway. Supporting family reunion is part of the representative's role in Germany and the representative may be in contact with the authorities or NGOs in order to support the procedure. In Norway, the representative has an explicit role to make sure that the authorities safeguard the child´s right to family unity in accordance with the Immigration Act Section 98d.

[360] For example, Greece, Italy and Poland. In Poland, the representative is not formally involved but informally sometimes NGO staff working as representatives are contacted to assist with the BIA in relation to family reunion possibilities in practice. Representatives are not legally obliged to trace or identify family members in these cases, but representatives sometimes gather information for this purpose which is passed on to the Dublin Unit.

[361] As reported in France, Germany, Italy and Malta. For example in France, according to an *ad hoc* administrator in Paris, children may have to wait for a representative to be appointed for up to 6-9 months. In Germany, all stakeholders interviewed consider the appointment late as it could take up to several months until family Courts order the appointment. The length of time for the appointment of a representative in Italy varies from two weeks in Bologna to several months depending on the competent Court.

[362] As reported by an NGO in Denmark and Greece. In Denmark, an observer is made available until a representative is appointed. After the introduction in the fall of 2015 of a procedure which made the hearing of the representative mandatory before a transfer decision is taken, representatives are to be appointed before a transfer decision is taken.

[363] For example, in France, Germany and Italy. Stakeholders in Germany stated that there is an insufficient number of representatives to meet the needs of unaccompanied children arriving there, while in Norway a representative reported that sometimes up to 50 children may be in the care of one person.

[364] As reported in Germany.

[365] In Germany two conditions exist for the appointment of a representative: 1) minority of the child; 2) suspension of parental care. Based on Section 1674 (1) Civil Act and Articles 1, 5, 11, 15 of the Convention on the Jurisdiction and Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, family Courts are responsible for determining the suspension of parental care. This is disputed by some Courts in practice when the unaccompanied child is still in contact with his or her parents even if only by telephone. The German Federal Supreme Court ruled in 2004 that the mere physical absence of the parents is not sufficient to confirm the absence of parental care if the parent is able through other means to ensure the child's well-being and with the help of modern means of communication or travel can influence parental care from afar. See BGH , Beschluss vom 6. Oktober 2004, Az. XII ZB 80/04, available (in German) at: https://openjur.de/u/345020.html. In practice different thresholds apply to different Courts of the *Bundesländer.*

unaccompanied children cannot lodge an application for international protection without a representative[366] and delays frequently lead to unaccompanied children disappearing and no longer pursuing their application for international protection in that Member State.[367] The failure to appoint a representative promptly where the child cannot lodge an application pending the appointment of the representative may also affect the assignment of Member State responsibility and the procedural guarantees for children, as he or she will not be able to have a representative or benefit from family reunion for children under Article 8 of the Dublin Regulation if he or she turns eighteen in the interim period.

The knowledge and qualifications of representatives

Other challenges encountered with respect to representatives of unaccompanied children in the Dublin procedure include representatives not having the necessary qualifications, knowledge or expertise to properly represent the child during the Dublin procedure.[368] A lack of knowledge in refugee law and the Dublin Regulation is cited as one reason why sometimes representatives in one of the Member States researched advise children not to lodge an application for international protection if they incorrectly believe that the child could be subject to a manifestly unfounded procedure.[369] In addition, in that Member State some representatives wrongly believe that if the child has no family members in other Member States that he or she will be transferred to the Member State where the child first entered and incorrectly advise children not to claim asylum on that basis.[370]

Given the necessary support and guidance that representatives provide to unaccompanied children during the Dublin procedure it is essential that they are promptly appointed and equipped with the necessary qualifications, knowledge and resources in order to fully safeguard the best interests of the child. Guidance as to the role of representatives is provided in the Fundamental Rights Agency (FRA) Handbook on guardianship for child victims of trafficking[371]

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[366] For example, this is reported in France, Germany, Greece (if the child is under 14), Italy and Poland. In Germany, a recent legal reform permits youth welfare offices to submit applications for international protection on behalf of unaccompanied children in the interim period but this appears to occur rarely in practice.

[367] As reported in particular in France, Greece, Italy, Malta and Poland. In Poland, delays with the appointment of the representative are not reported; however, children often disappear during the Dublin or asylum procedures.

[368] As reported for example in Greece. In Greece, the role of the Prosecutor as representative is only formal in nature and cannot be fully carried out due to the lack of necessary resources. To fill this gap in practice representation is provided by legal advisors and NGO counsellors.

[369] In Germany unaccompanied children are exempt from the manifestly unfounded procedure but not all representatives are aware of that in practice. Unaccompanied children can only be subject to those procedures in German law in cases where the child is from a "*safe country of origin*" and under the conditions laid out in Section 60 (8) 1 of the Residence Act (security concerns, criminal offences).

[370] In accordance with the *MA, BT, DA* CJEU judgment, German authorities do not transfer unaccompanied children to other Member States unless for family reunion purposes. In Germany, however, children are reportedly often advised to refrain from lodging an application for international protection in order to prevent a Dublin transfer. Little knowledge seems to exist among representatives regarding the possibility that the application of children who do not have any family in a different Member State will be examined in Germany. No specific qualifications are required for representatives and targeted training is only provided by an NGO on a voluntary basis and not systematically.

[371] FRA, *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, ISBN 978-92-9239-464-6, available at: http://www.refworld.org/docid/53b14fd34.html.

Family tracing

Article 6(4) of the Dublin Regulation requires Member States, for the purpose of applying Article 8, to take appropriate action to identify the family members, siblings or relatives of unaccompanied children as soon as possible upon the lodging of an application for international protection in that Member State, whilst protecting the best interests of the child. In pursuing that objective Member States may call upon the assistance of international or other relevant organizations and may facilitate the child's access to the tracing services of such organizations. Article 12(3) of the Implementing Regulation No 1560/2003 as amended by Implementing Regulation No 118/2014 also requires that Member States shall, after holding the personal interview, search for and/or take into account any information provided by the child or coming from any other credible source familiar with the personal situation or the route followed by the child or a member of his or her family, sibling or relative for the purposes of family tracing.

Family tracing procedures

Most Member States do not have SOP's for conducting family tracing or clear procedures for the identification of family members, siblings and relatives present in other Member States.[372] SOPs exist in two Member States as part of the PRUMA project.[373] The objective of the PRUMA project was to speed up the reunion of family members within the Dublin procedure and involved the development of SOPs for family reunion under the Dublin procedure within the following Member States: Italy, the United Kingdom, Malta, Greece, France and Germany.[374]

GOOD PRACTICES

A positive practice was identified in Italy as part of the Praesidium project.[375] Vulnerable groups such as unaccompanied children were identified after disembarkation and interviewed in order to reduce the possibility of mistakes in the age assessment and to facilitate prompt family tracing and reunion. Basic orientation as well as legal information was provided as part of the project through child-friendly modalities based on 45-minute game sessions. Similarly, children were invited as part of the project to draw a genealogical tree for the purpose of family tracing and reunification. These projects illustrate the different ways that family tracing can be facilitated with the participation of the child.

Despite the lack of SOPs it appears that Article 34 of the Dublin Regulation on administrative cooperation and information sharing is used by the majority of Member States surveyed along with Annex VIII of the Implementing Regulation 118/2014 to facilitate the exchange of information between Member States for the purposes of family reunion.[376] These are reported to be the only documents that Member States use to

[372] As reported in France, Greece, Malta, Norway Poland and the United Kingdom. In Denmark there are no SOPs for conducting family tracing; however, during the personal interview unaccompanied children are asked if they have family relations in Denmark or another Member State, and they are provided guidance on family tracing possibilities, for example through the Danish Red Cross.

[373] Italy and Germany.

[374] *PRUMA – Promoting Family Reunification and transfer of Unaccompanied Minor Asylum Seekers under the Dublin Regulation*. It seems that in most of the Member States involved in the project the application of the final SOPs on a continuing basis at national level has not been finalised. In Germany, the national SOPs agreed by all stakeholders involved in the project are implemented at the national level.

[375] The Praesidium project was carried out by the Italian Ministry of the Interior, Save the Children, IOM, UNHCR and the Italian Red Cross. Further information about the project can be found at Praesidium Project, *Recommendations and Good Practices in the management of mixed migration flows from the sea*, 2009. Italy still cooperates with IOM on an ad hoc basis with regards to family tracing.

[376] As reported for example in Denmark, France, Germany, Norway, Poland and the United Kingdom.

cooperate between one another for the purposes of family tracing. The lack of a clear procedure between Member States on how to communicate effectively between one another is at times an obstacle to successful family reunion under the Dublin procedure. In one Member State it is reported that good communication often depends on additional factors such as the familiarity of the contact points with one another in the corresponding Dublin units and the workload and capacity of all parties involved.[377] The presence of liaison officers from other Member States also reportedly facilitates swift procedures.[378]

National Dublin Units normally undertake the family tracing but in some Member States other government departments may carry out this function completely or in part depending on the circumstances of the case.[379]

Given the primacy of the principle of family unity, it is imperative that family members, siblings and relatives are located quickly and efficiently. In accordance with that objective Article 6(4) requires Member States to take appropriate action to identify family members, siblings or relatives of unaccompanied children as soon as possible following the lodging of an application for international protection by the child. Despite this requirement few Member States take a proactive approach to the tracing of family members, siblings and relatives. Frequently, any action taken to trace family is only on the basis that the child provides some information on the identity of his or her family members and their location in the territories of the Member States following the personal interview.[380] Therefore, the practice in the majority of Member States is that family tracing is initatied primarily on the basis that the unaccompanied child himself or herself declares the presence of family members in other Member States.[381] Informal requests from NGOs acting on behalf of unaccompanied children also reportedly start family tracing in one Member State.[382] In the same Member State, children can submit information in writing to the authorities to initiate family tracing.[383]

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[377] For example, this is reported in Italy.

[378] For example, Germany, Italy and the United Kingdom. Liaison officers assist the German authorities in relation to outgoing transfer requests. Germany currently has liaison officers in France, Greece, Hungary, Italy, the Netherlands, Poland and the United Kingdom. For further information, see http://goo.gl/pEofeb. The United Kingdom has liaison officers in France, Germany and Italy.

[379] For example, in Germany family tracing is part of the representative's role in the Youth Welfare Office and often the German Red Cross is contacted for support. However, the Dublin Unit submits information requests to other Member States in accordance with Article 34 of the Dublin III Regulation to trace family members and checks the Central Foreigner's Registry (*Ausländerzentralregister, AZR*) if family members are presumed to be present in Germany. The Dublin Unit in Italy reportedly does not have the facilities to undertake family tracing itself but relies upon contributions from other actors such as the SPRAR, IOM and UNHCR. In Denmark, the staff undertaking family tracing are not necessarily that of the Dublin Unit, but it could also be staff of DIS. In Denmark the Ministry of Foreign Affairs can be engaged in family tracing at the request of the child but this rarely happens in practice in Dublin cases. Due to the fact that few unaccompanied children lodge an application for international protection in France, the French authorities have limited experience of conducting family tracing. One staff member of a Prefecture interviewed as part of this study stated that they do not have the means or resources to conduct family tracing; in the particular context of Calais, when unaccompanied children who have family members or relatives in the United Kingdom are placed under the Dublin procedure, family tracing is often undertaken by NGOs and legal advisors prior to the lodging of their application for international protection. In Malta, AWAS conducts the family tracing. In the United Kingdom, the Local Authority may be approached by the authorities to verify information or undertake a family visit.

[380] For example, this is reported in Denmark, Greece and Poland.

[381] As reported in Denmark, France, Germany, Greece, Malta, Norway, Poland and the United Kingdom. In Denmark, during the personal interview the child is asked questions about family relations in Denmark or another Member State, on which basis tracing is initiated, even where only limited information is available. In Greece, any action to initiate the Dublin procedure (and to identify the family of an unaccompanied child) is, as a rule, undertaken on the basis that the child submits to the authorities documents certifying the presence of family members, siblings or relatives in another Member State. Only a limited number of cases were reported where a child had some contact details of family members, siblings or relatives in another Member State but did not have any documents on their legal status, and the Dublin Unit submitted an information request to that Member State.

[382] As reported in Poland.

[383] *Ibid.*

Member States' practice indicates that no family tracing is conducted if the child concerned does not know the current whererabouts of his or her family.[384] This is extremely problematic as it leaves children deprived of their family members, siblings or relatives who may be present in the territories of the Member States and is contrary to the obligation set out in Article 6(3) to identify family members irrespective of the child's knowledge as to their whereabouts. Such an approach also overlooks the fact that national authorities are better equipped and resourced to adequately locate family members present in other Member States than unaccompanied children or other actors supporting them who may, however, not have the networks or resources to carry out family tracing.

GOOD PRACTICES

A positive practice exists in Italy whereby if the child is unable to provide the contact details of a family member, sibling or relative organizations such as UNHCR, Save the Children and IOM and other NGOs contact the public authorities and NGOs working with applicants in the other Member State to carry out the tracing of family members on behalf of the child.

Actors involved in family tracing

Article 6(4) permits Member States as part of family tracing to call for the assistance of international or other relevant organizations and facilitate the child's access to the tracing services of such organizations. Most Member States reportedly cooperate with national Red Cross societies given their expertise in the identification of family members but the Red Cross societies' formal engagement in this procedure is normally with the applicant and not with the authorities.[385] The findings also show that other NGOs and relevant organizations such as UNHCR, IOM and the ISS may be engaged by Member States as part of the family tracing services.[386] The engagement of external organizations in the family tracing procedure appears to be formalised in some of the Member States surveyed.[387] In other Member States the authorities may facilitate a child's access to the tracing services of such organizations through referral or the provision of information on relevant organizations. Some organizations only engage in family tracing on the basis of the individual child's

[384] Limited information was explicitly provided on this aspect of family tracing with the exception of Greece where authorities stated that they do not conduct family tracing in such circumstances. However, conclusions can be drawn on the basis of the fact that the majority of Member States surveyed only conduct family tracing on the basis of some form of information provided by the unaccompanied child on the location of his or her family members, siblings or relatives.

[385] For example, Denmark, Germany, Greece, Norway, Poland and the United Kingdom. In Germany, the applicant may also be referred to the German Red Cross by the Dublin Unit. For further information on the German Red Cross's role in family tracing see *"Positioning of the GRC Tracing Service regarding the Tracing of Family Members of Unaccompanied Minor Refugees within the Framework of the Dublin III Regulation"*, available at: https://goo.gl/JSaFvz.

[386] For example, in Italy SPRAR, IOM, UNHCR, NGOs and the liaison officers of other Member States may be contacted for assistance in family tracing. In Malta, IOM and UNHCR as well as NGOs if they have the necessary expertise, may participate in family tracing.

[387] For example, this is reported in Italy with regards to IOM as part of the PRUMA project and in Malta IOM is also involved in conducting family tracing. Referrals to IOM from the Maltese authorities, due to the cost of such service, are prioritised according to the prospect of success and available documentation. Malta took part in the PRUMA project but has not yet implemented the SOPs on family tracing due to limited human and financial resources at the time of writing this report. In Poland there is an agreement between the Polish Red Cross and the Polish Ministry of Administration and Digitalization for family tracing purposes but the Polish Red Cross stated that they have never received any request from the Dublin Unit. However, sometimes applicants themselves ask for such assistance.

request.[388] As a consequence of the limited resources and capacity national Dublin Units do not undertake family tracing themselves in some Member States, thus the involvement of different actors who facilitate family tracing in practice.[389] One Member State reportedly frequently asks for the assistance of UNHCR in the requested Member State in order to speed up the process of family reunion.[390] Other actors involved in the process of family tracing include national NGOs and other relevant authorities at the national level including UNHCR, social services for children and local authorities[391] and Dublin liaison officers.[392] As reported above in section 3 of Chapter 1, representatives of unaccompanied children may also play an important role in facilitating family tracing.[393]

GOOD PRACTICES

A positive practice is reported in Denmark whereby unaccompanied children are provided with information on the family tracing services of the Red Cross and the Ministry of Foreign Affairs. Even if family tracing does not appear to be directly applicable to the circumstances of the child, applicants are still provided with the Red Cross family tracing form.

A positive practice is present in Germany – the initiative "Trace the Face" launched by the Restoring Family Links Network and managed by the International Committee of the Red Cross in cooperation with the National Red Cross and Red Crescent Societies. Persons looking for a family member, sibling or relative can upload their pictures and these can be displayed in reception facilities. In some instances, this has proven to be a good practice. However, in order to be successful the initiative needs to gain more international traction. An effective system for identifying family members for incoming requests to take charge of separated children is also reported in Germany whereby the authorities check the Central Registrar for Foreigners, which includes data on all third-country nationals and family members, siblings or relatives present in Germany are often found that way.[394]

Evidence of family links

List A and B of Annex II of the Implementing Regulation (EU) No 118/2014 on establishing the presence of family members in another Member State by way of probative and circumstantial evidence provide guidance to Member States as to the means of proof and circumstantial evidence, which can be used to assess the

[388] For example, the German Red Cross only assists in family tracing at the request of the individual child or when their consent is provided via referrals from the Dublin Unit or the Youth Welfare System. In Denmark, information is provided during the personal interview on the family tracing services of the Ministry of Foreign Affairs and the Danish Red Cross. Family tracing under the Dublin Regulation can be carried out without the explicit consent of the child, but the child signs a general consent form at the beginning of the personal interview. In Greece, information is reportedly provided by the authorities during the interview with the unaccompanied child on the services of the Hellenic Red Cross. The Hellenic Red Cross does not assist the authorities in conducting family tracing (including in the context of the Dublin Regulation) but assists individual applicants to be reunited with their family in cases where the applicants themselves turn to the Red Cross for assistance. In Norway, the Ministry of Children, Equality and Social Inclusion published a manual in 2012 for the use of municipalities in order to help them receive, settle and integrate unaccompanied children, which provides contact information on the services of the Red Cross in relation to family tracing. The United Kingdom and France have limited or no experience of conducting family tracing for family members and relations in other Member States.

[389] For example, this is reported in France, Germany and Italy.

[390] As reported in Malta.

[391] For example, in Germany, Greece, Malta and the United Kingdom.

[392] As reported in Germany, Italy and the United Kingdom.

[393] For example, in Norway it is the role of the representative to contact the Red Cross on behalf of unaccompanied children in his or her care.

[394] For more information see http://familylinks.icrc.org/europe/en/Pages/search-persons.aspx.

existence of family links in the Dublin procedure.[395] The findings show that there is inconsistent practice across the Member States surveyed and no standardised list of elements required, which appear to vary on a case-by-case basis. The audited case files for some Member States also did not show clearly how family members or relatives were identifed in practice. However, from the information gathered the following elements are cited:

- information gathered during interviews,[396] including statements of the child;[397]
- statements of the family member, sibling or relative;[398]
- family books and other identity documents including marriage certificates and birth certificates and other supporting documentary evidence such as photographs of family members confirming the relationship or previous visa/entry clearance applications.[399]

If there is doubt concerning the relationship between the family member and unaccompanied child sometimes DNA tests are used in a few Member States.[400] However, DNA tests are reported to not be frequently required as a means of proof in some Member States.[401] This appears to be in line with UNHCR's position that DNA testing to verify family relationships may be resorted to only where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud.[402]

One Member State takes a strict approach to the identification of family members, which applies also for children travelling with family in that State where the parents have no official documents confirming the family relationship.[403] [404]

GOOD PRACTICES

A positive practice is reported in Denmark, Malta and Poland where only minimal information from the child is required in order to initiate family tracing.

[395] Greece, Italy, Germany, Norway, Poland and the United Kingdom explicitly mentioned this Annex as guidance as to the evidence required for family links. It also appears from case files audited that these lists are used in France. It is not clear whether these lists are used in Malta.

[396] As reported in Denmark, France, Germany, Italy, Malta, Poland and the United Kingdom. In the United Kingdom, this included information gathered during the screening interview of family members.

[397] As reported in Denmark, France, Germany, Greece, Italy, Malta, Norway, Poland and the United Kingdom.

[398] As reported in France and Germany.

[399] As reported in Denmark, France, Germany, Greece, Italy, Malta, Poland and the United Kingdom.

[400] For example, Germany, Italy Norway and the United Kingdom but in Germany this is only on the basis that it is a matter of last resort and it is hardly requested in practice. In Greece, a DNA test is normally only carried out if the requested Member State doubts the existence of family links. In Norway, DNA tests are only used if there are doubts as to the existence of a family relationship. It should be noted that UDI was in September 2015 instructed by the Ministry of Justice and Public Security to increase the use of DNA testing. For further information, see: GI 11/2015 Instruction from the Ministry of Justice and Public Security, 18.9.2015, available (in Norwegian) at: https://goo.gl/K12p1u. In Italy, DNA tests are only used as a last resort and if there is no other available information. No information was available on the use of DNA tests in France.

[401] As reported in Malta, Poland and the United Kingdom.

[402] UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, p. 4, available at: http://www.refworld.org/docid/48620c2d2.html.

[403] In Italy, it is not automatically accepted by the authorities that children accompanied by adults are related and when parents travelling with children have no documents proving their relationship. In some cases, DNA tests are used.

[404] However, in Malta unaccompanied children are not always kept informed of the progress of any family tracing efforts and only receive information on the outcome.

The lack of guidance as to what evidence the authorities require to prove family links is reported to be an issue in most Member States with different standards of evidence required acting as an impediment to family reunion in practice as this creates delays in the verification of family links. This, added to the limited flexibility of certain Member States as to the evidence or proof required to prove family links, sometimes generates multiple requests for re-examination and further exchanges between Member States before a transfer can be carried out, thus prolonging procedures, while in others it can even result in a refusal by the requested Member State to proceed with family reunion. The existence of family relationships is a matter of fact to be established by evidence. However, in regard to the situation of refugees, it should be recognized that they are often obliged to flee without personal documents.[405] Moreover, in many instances, the relevant civil status documents are simply not issued to begin with. Hence there may be situations in which relationships can be proved only through oral evidence on the part of the applicant concerned.[406] UNHCR is of the view that interviewing family members should normally be undertaken as the primary means of establishing family links.[407]

Length of time of family tracing procedures

The length of time for tracing family members is difficult to estimate and often depends on how much information is provided to correctly identify the family member and on the proactiveness and active engagement of the relevant authorities and can range from a few days, weeks, to over a year.[408] While it cannot be concluded that the time taken solely to trace family links can result in children moving on, cases were reported where the process took so long that unaccompanied children disappeared before the family tracing procedure could be completed.

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[405] See further, para. 196 at UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html. In the United Kingdom, a case determined in the Upper Tribunal in May 2016 looked at the investigative and evidence gathering obligations on the part of the United Kingdom in the context of a procedure under the Dublin Regulation. It found that there was a requirement, incumbent upon the Secretary of State, to proactively and expeditiously undertake steps to verify familial links. Passiveness in this regard would lead to an unlawful decision-making procedure. *MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) (IJR)*, JR/2471/2016, United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 29 April 2016, available at: http://www.refworld.org/docid/582096654.html.

[406] UNHCR: *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, p. 4

[407] *Ibid*, p. 4.

[408] In Denmark, it was reported that family tracing (not necessarily specific to the Dublin procedure) by the Danish Red Cross can take from a few days up to a year; in Germany it could take several weeks or over a year; Malta reported it taking a few weeks but it depends on different factors.

Obstacles to swift family tracing

Based on the research conducted and the audit of cases the following can be listed as obstacles to the swift tracing of family members in practice:

- Pressure on national protection systems so that there are delays in the registration of applicants;[409]
- The lack of suitably qualified personnel to undertake proactive family tracing;[410]
- The absence of national centralised databases for all third-country nationals;[411]
- Insufficient information provided by the children themselves due to, for example, fear of being transferred to another Member State or mistrust of the authorities;[412]
- Lack of or insufficient and/or timely information to children on the Dublin family provisions and their rights, which impacts on children's possibilities to provide relevant information;[413]
- Different evidential requirements among Member States such as some States requiring DNA tests over and above other evidence documenting family links;[414]
- The disappearance of family members and unaccompanied children who continue their onward journeys outside of the Dublin procedure;[415]
- Limited or no coordination among the different actors involved both at national and transnational level;[416]
- Different transcriptions, translitterations or spellings of family names;[417]
- The lack of a proper referral system and SOP for the exchange of information in family tracing between all the relevant actors;[418]
- Lack of BIAs, which fulfil the required safeguards and assess and weigh all the relevant criteria;
- Lack of clarity on which Member State (the requesting or requested Member State) takes the final decision on what is in a child's best interests and how differences in opinion between the concerned Member States are resolved.

Overall, there appears to be no coherent approach to family tracing with the onus primarily on the unaccompanied child concerned to raise relevant information to establish the presence of family members.

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[409] The current scenario in light of the current influx and the sizable backlog in the registration of applicants for international protection in Germany may present impediments to the effective and timely identification of family members in Germany who have not yet been registered.

[410] As reported in Greece.

[411] This is reported as a challenge by Germany; but Germany has such a system but it is not present in other Member States to facilitate family reunion under the Dublin Regulation.

[412] As reported in Denmark, Germany, Italy and Norway.

[413] It should, however, be noted that whilst this issue has been identified also in relation to children, it is even more relevant in the case of adults, as representatives and actors supporting children during the Dublin procedure can complement the information provided to them and provide counselling and support.

[414] As reported in Denmark, Italy and Malta.

[415] This is reported as a challenge in Denmark, Greece, Italy and Malta.

[416] As reported in Italy and the United Kingdom. This was also reported by IOM in Malta.

[417] As reported in Denmark, Germany and Norway.

[418] As reported in Malta.

Conclusion

The findings show that the procedural guarantees for children as established in Article 6 of the Dublin Regulation are not effectively applied in practice across the Member States surveyed. Guidance and adequate training on conducting BIAs generally appear to be lacking. At the same time, the lack of a standardized approach in areas such as age assessment, representation and family tracing create significant delays in family reunion procedures concerning children, with inconsistent approaches across the Member States. Cooperation between Member States appears to be limited in places, with little or no coordination existing in particular between the actors involved in BIA procedures in the different Member States.

RECOMMENDATIONS

Efficient and quality Dublin procedures would assist in ensuring swift access to the asylum procedure for child asylum-seekers and could address one of the main causes of irregular onward movement. At the same time, from a Member State's perspective, swift Dublin procedures and appropriate cooperation between Member States would serve the double purpose of: a) ensuring that resources in the frontline Member States are used efficiently so that sufficient child care resources are available for new arrivals and, b) in the longer term, reducing the amount of resources necessary to carry out Dublin procedures concerning children.

UNHCR considers that the following is needed to achieve the objective of streamlining Dublin procedures concerning children:

- **A representative should be appointed as early as possible after a child's arrival in a Member State** to support the child from the beginning of the Dublin procedure, including during the lodging of the application. The establishment of a **European guardianship network** with a clear mandate *inter alia* to provide representation to children in Dublin procedures and participate in BIAs should be considered; this has the potential to enhance cooperation on BIAs as well as assist with the timely exchange of relevant information.
- **Effective cooperation between Member States in the assessment of the best interests of children in Dublin procedures are essential.** To this end, **appropriate SOPs should be put in place**. Whilst in the interim EASO's existing guidance and Network of Dublin Units could be utilised and built upon to enhance common understanding and inter-state cooperation, depending on the recast of the Dublin Regulation, the new EU Agency for Asylum (EUAA), should be entrusted with providing appropriate guidance to be applied in all Member States to ensure a consistent and effective implementation of the provisions of the Dublin Regulation. Additionally, further guidance could be provided in the Implementing Regulation and Delegated Acts.
- **The BIA should start as soon as possible** and involve interviews and/or consultations with the child, as well as additional information gathering as needed by **professionals with the required expertise, knowledge and skills in child protection, including the child's representative**. The BIA should include, as a minimum, the elements listed in Article 6(3) of the Dublin Regulation, supplemented by other elements as relevant on the basis of the child's circumstance. *General Comment No. 14 of the Committee on the Rights of the Child* provides relevant guidance.[419]

[419] For more information see: *Committee on the Right of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Adopted by the Committee at its sixty-second session (14 January – 1 February 2013)*, 29 May 2013, available at: http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

- Member States should ensure the **prioritisation of cases involving unaccompanied children** for smooth family reunion; Member States must ensure the proactive tracing and identification of family members, siblings and relatives for the purpose of the Dublin procedure, provided that it is in the best interests of the child concerned.
- To assist in ensuring swift family tracing in the interest of children and Member States alike, **Member States should closely cooperate in the tracing and identification of family members, siblings and relatives and in the assessment of family links. Appropriate guidance and common standards as to the proof or evidence to be taken into account should be developed** to ensure common understanding. The new EUAA could have a role in providing guidance to be applied in all Member States to ensure a consistent and effective implementation of the provisions of the Dublin Regulation; UNHCR stands ready to assist. In the interim, EASO's existing guidance and Network of Dublin Units could assist Member States. Where the tracing and identification of family members is conducted with the support of external organizations, appropriate SOPs, outlining roles and responsibilities should be put in place with the aim to ensure effective cooperation and swift procedures.
- In order not to delay transfers in the best interests of the child, a mechanism or SOPs should be developed to foster mutual acceptance of age assessment outcomes to avoid duplication. UNHCR stands ready to support EASO's ongoing work in this regard. The new EUAA could have a role in providing relevant guidance to be applied in all Member States to ensure a consistent and effective implementation of the provisions of the Dublin Regulation.

II.
DETERMINING MEMBER STATE RESPONSIBILITY FOR EXAMINING AN APPLICATION FOR INTERNATIONAL PROTECTION

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The Dublin Regulation provides for a series of criteria on the basis of which responsibility for the examination of an application for international protection is to be determined. The criteria are based on respect for the principles of family unity and the best interests of the child. Article 7 of the Dublin Regulation obliges Member States to apply the criteria for determining the Member State responsible in the order set out in Chapter III of the Regulation ("hierarchy of criteria"). Nevertheless, this obligation must be interpreted in light of Member States' obligations under other relevant instruments, in particular human rights instruments.

The assessment of relevant criteria is determined from the point in time when an applicant first lodges his or her application for international protection with a Member State. Article 7(3), in relation to the application of criteria under Articles 8 (Minors), 10 (Family members who are applicants for international protection) and Article 16 (Dependent Persons), requires Member States to take into consideration any available evidence regarding the presence of family members, relatives or any other family relations of the applicant on the territory of a Member State, on condition that such evidence is produced before a take back or take charge request is accepted by another Member State and the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

1. Respect for the hierarchy of criteria

On the basis of the information provided by national authorities, the application of the hierarchy of criteria is formally in accordance with Chapter III of the Regulation in most Member States but the findings show that this is not always reflected in practice. No SOPs or guidance are in place for conducting the assessment of the hierarchy of criteria in the majority of Member States surveyed[420] and national guidelines for the application of the Dublin Regulation in one Member State are limited to confirming that the criteria should be assessed in a hierarchical manner.[421]

GOOD PRACTICES

In Norway national guidelines (Circular letter RS 2014-001-) assist caseworkers in the UDI in the application of the hierarchy of criteria. The guidelines state that the principle of non-refoulement and the best interests of the child are a fundamental consideration in each case. Articles 3, 10, 12, 22 of the Convention of the Rights of the Child are also declared to be part of the assessment along with the principle of family unity.

The findings show that respect for the hierarchy of criteria is inextricably linked to the quality and timeliness of information provided to the applicant in order to enable him or her to provide the necessary information to determine the applicable criterion in his or her case.[422] For example, the research found in some Member States that the manner in which information is collected prioritises certain criteria (most frequently Article 13 on irregular entry or stay) over others indicating that the hierarchy of criteria may not always be respected in practice due to shortcomings in the provision and collection of information.[423] Whether the hierarchy of criteria is respected in practice is also connected to the assessment of the best interests of the child where relevant, the evidence required to prove family links and the provision of quality early legal advice in the Dublin procedure.[424] Furthermore, respect for the hierarchy of criteria depends on whether the late disclosure of information on the presence of family links in a Member State after a first request is submitted results in a re-evaluation of the applicable criteria.[425] Other external factors such as the recent higher influx of applicants in certain Member States also seems to have adversely affected respect for the hierarchy of criteria in some

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[420] As reported in France, Greece, Italy, Malta and Poland. In Denmark, the national guidelines list most of the criteria and state that they apply in hierarchical order, while in Germany BAMF guidance provides that the criteria should be applied in hierarchical order. There is a lack of up-to-date guidance published in the United Kingdom, including in relation to the hierarchy of criteria.

[421] Guidelines RS 2014-001 in Norway, available (in Norwegian) at: http://www.udiregelverk.no/en/documents/udi-circulars/rs-2014-001/.

[422] As reported in France, Italy and Malta. For further information on the provision of information to applicants on the Dublin Regulation see section 1 of Chapter I.

[423] As reported in France, Italy and Malta. For further information on the provision and gathering of information see section 1 of Chapter I.

[424] As reported in Germany. Without legal advice in advance of the personal interview applicants may not proactively provide the correct information to determine the responsible Member State.

[425] As reported in Germany and due to this reason it is often the Article 13 (irregular entry) of the Dublin III Regulation criterion linked to Eurodac hits which is the most dominant criterion applied in practice in that State. It should be noted that Article 7(3) of the Dublin III Regulation is applicable in such situations in that applicants can provide information to national authorities on the presence of family members, relatives or any other family relations on the territory of another Member State up until another Member State accepts a request to take charge of or take back the applicant concerned and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

cases as sometimes information determining responsibility cannot be submitted in practice within the required timeframes due to delays in the processing of applications.[426]

Findings in several Member States indicate that the hierarchy of criteria may not always be respected in practice for a variety of other reasons. Newly recruited police officers in one Member State reportedly may not be familiar with the requirement to follow the hierarchy of criteria.[427] National guidelines in another Member State appear to prioritise cases on the basis of whether an applicant can be transferred back to another Member State due to previous applications there under Article 18, before assessing the application of other criteria under the hierarchy.[428] The use of outdated guidelines in another Member State means that there is no reference to family unity provisions,[429] or how the hierarchy of criteria should be applied. One national official in a Member State explained that even if an applicant mentions the presence of family links in another State during the personal interview, a request will first be sent to the Member State responsible according to Article 12 (Issue of residence documents or visas) or 13 (Entry and/or stay).[430] Family links are subsequently checked but the first request is still submitted on the basis of other criteria further down the hierarchy. As a consequence, reportedly applicants have to at times resort to appeals to ensure that the correct criterion is applied.[431]

Article 7(3) enables applicants to provide information on the presence of family members (including siblings and relatives for the purposes of the application of Article 8) or any information relating to the application of the dependency clause up until a take back or take charge request is accepted by another Member State. The findings show that a majority of national authorities have limited experience of the operation of this article and no SOPs are in place for its application.[432] However, although to a limited extent, it is reportedly used in two Member States where late information is disclosed which requires a reassessment of the hierarchy of criteria, irrespective of a request already being submitted to another Member State.[433] It seems that applicants are not informed of the requirement to submit information before a request is accepted by another Member State as all applicants interviewed to whom this question was specifically asked were unfamiliar with the application of Article 7(3).

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[426] As reported for example in Germany, where cases were reported where the Dublin procedure was not initiated or interviews were omitted due to the elapsing of time limits. However, if information on family members is subsequently provided this may be taken into account even after the time limits have elapsed, including through the use of the discretionary clauses. For further information on State practice regarding the time limits see section 2 of Chapter IV.

[427] As reported in Norway. Newly recruited police officers seem to rely on Eurodac hits without fully checking whether other criteria may be applicable. Additionally, the Norwegian immigration authorities sometimes have a restrictive interpretation of certain provisions restricting their application in practice. For example, the requirement under Article 9 of the Dublin III Regulation to consider family members *"regardless of whether the family was previously formed in the country of origin"* may reportedly be disregarded.

[428] It appears that take back requests are the rule in the guidelines in Denmark with the hierarchy of criteria being considered as the exception to the rule. It was reported that this reflects the most frequently occurring practice, but that the criteria under Chapter III of the Dublin III Regulation are applied in practice if relevant.

[429] In the United Kingdom, the Asylum Instruction on "*Safe third country cases*" was last updated in 2009, while the Asylum Instruction on "*Safe country cases: handling and referring*" was last updated in 2011. Asylum Instruction on safe third country cases , available at: https://goo.gl/qe1utq; Asylum Instruction on Safe country cases: handling and referring, available at: https://goo.gl/uNsv2h.

[430] This is reportedly the practice in some Prefectures in France.

[431] Depending on the Prefecture this is reported in France where legal advisors have to closely monitor the situation at the Prefecture and submit correspondence to request that certain information is taken into account on behalf of their clients.

[432] There are no SOPs for the application of Article 7(3) in Denmark, Greece, Italy, Norway, Poland and the United Kingdom. This provision is reportedly not applied in France and Germany.

[433] As reported in Malta and Norway. In Malta, information can be provided also after the Member State (Malta or another Member State) accepts responsibility. However, in case Malta accepts responsibility, additional evidence of another Member State's responsibility must be submitted to the Maltese authorities before the examination of the application for international protection on the merits starts taking place in Malta. Unofficial statistics provided by the Norwegian Immigration Appeals Board indicate that Article 7(3) of the Dublin III Regulation was applied in an estimated 25 cases in 2014 and 35 cases in 2015. It is also used on a case-by-case basis in Denmark and Poland.

In a limited number of Member States national authorities seek the guidance of other actors such as UNHCR and NGOs in relation to the application of criteria in individual cases.[434] For example, in particularly complex cases legal advisors from NGOs in one Member State can submit suggestions as to the applicability of certain criteria.[435]

2. Proof and evidence required

List A and B of Annex II of the Implementing Regulation (EU) No. 118/2014 provide guidance on the means of proof and circumstantial evidence for determining the Member State responsible. These lists were cited as being used in four Member States.[436] Overall, there does not appear to be an exhaustive list of evidence at the national level and much depends on the individual circumstances of the case.[437] However, the following proof and/or circumstantial evidence is normally considered when assessing which Member State is responsible under the Dublin Regulation:

- Eurodac[438] and VIS results;[439]
- identity documents and other documentary evidence concerning the presence of family members, siblings or relatives in a Member State,[440] including residency permits verifying the regular presence of the person concerned in a Member State;[441]
- family books;[442]
- the questionnaire or forms completed by the applicant;[443]
- the applicant's personal statements;[444]
- DNA tests;[445]
- other related evidence can also be taken into account.[446]

Eurodac is systematically checked in all of the Member States surveyed to identify if another Member State may be responsible under the Dublin Regulation when an applicant lodges an application for international protection.[447] Some proof or evidence appears more easily accepted than others for example objective

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[434] As reported in Italy and Malta. In Malta there is an informal practice to sometimes contact UNHCR or NGOs for advice on the applicability of certain criteria. Similarly, in Italy there is an informal practice to sometimes receive guidance from IOM and UNHCR and sometimes reception centre staff and Save the Children may be involved in assessing the criteria if the case involves children.

[435] As reported in Greece but the government does not actively seek such input from external stakeholders.

[436] As reported in Germany, Italy, Poland and the United Kingdom. It is overall unclear from the findings to what extent and/whether at all these lists are relied upon by the other Member States surveyed.

[437] Practice can also vary within Member States as noted in France where despite the Ministry of Interior's efforts to harmonise the practice surrounding the Dublin Regulation among Prefectures much depends on the individual Prefecture officer.

[438] This is applicable in all the Member States surveyed.

[439] All Member States surveyed with the exception of the United Kingdom, which is not part of the VIS system, as it is an element of the Schengen *acquis*, which the United Kingdom does not participate in.

[440] For example, this is the practice in Denmark, France, Greece, Italy, Norway, Poland and the United Kingdom.

[441] As reported in Greece, Malta, Poland and the United Kingdom.

[442] As reported in France, Malta and the United Kingdom.

[443] As reported in Poland and the United Kingdom.

[444] As reported in Denmark, France, Greece, Malta and the United Kingdom.

[445] As reported in Italy in one case and Norway.

[446] Findings from the audited case files in the United Kingdom show that some refusals for the United Kingdom to take over responsibility of an application for international protection are based on previous immigration decisions on resettlement, visit visas or other entry clearance decisions taken by decision makers or members of the tribunal, which are given significant weight over and above documents submitted by the applicant in support of a take charge request.

[447] All Member States surveyed check the fingerprints of all applicants above the age of 14 against the Eurodac system.

evidence of a fingerprint hit under Eurodac is more readily accepted compared to personal documents certifying a family relationship and the presence of family members in another Member State.[448] Generally, it appears that Eurodac and VIS evidence takes precedence and more weight is placed on it in evidentiary terms than other information provided by the applicant in relation to his or her journey.[449] DNA tests are reportedly not used in some Member States as a means of proof unless as a measure of last resort.[450] One NGO in a Member State surveyed reported that the criteria are applied too automatically by national authorities: if there is a Eurodac or VIS hit then the personal interview appears to focus on that instead of the presence of family links or the applicability of other criteria under Chapter III of the Regulation.[451]An NGO in another Member State reported that as the personal interview is generally conducted in a superficial way in the State concerned and some elements for applying certain criteria of the Dublin Regulation might not emerge during it, then Eurodac or VIS hits prevail in practice prompting the application of certain criteria over others.[452] All applicants interviewed during the course of this study in one Member State expressed the view that the authorities prioritised fingerprints or the willingness of another Member State to take charge over and above any other forms of evidence.[453]

It was reported in one Member State that due to the late provision of information to applicants, outgoing requests may first be submitted on the basis of Eurodac hits as applicants may not be aware of what information they should provide at the stage of the personal interview and information relevant for the application of other criteria is not gathered in a proactive manner.[454] In certain Member States, the increase in applicants for international protection resulted in personal interviews held sometimes only after a request is submitted to another Member State on the basis of a Eurodac or VIS hit.[455] This occurs despite the fact that more relevant criteria may be identified during the personal interview and can at best result in procedural delays and extra administrative work as transfer decisions are not taken in one Member State until the personal interview is carried out[456] and requests may be amended in another upon gathering of information relevant for the application of other criteria.[457]

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[448] This is noted, for example, in the United Kingdom.

[449] As reported in Denmark, France, Germany and the United Kingdom, Eurodac is perceived to present the most reliable evidence ensuring responsibility will be accepted by the requested Member State. Eurodac and VIS results are more commonly used in Malta when other evidence is not available and in Italy, Denmark and France it appears that Eurodac hits prevail over other evidence. Also in Germany if the applicant's statements are considered not credible or are not supported by documentary evidence then Eurodac prevails. In Greece, the authorities also take into account, in addition to Eurodac evidence, any information provided by the applicants on their journey to Greece with the purpose of establishing how long the applicant stayed in other Member States and whether the applicant left the territory for more than three months for its responsibility to cease under Article 19(2) of the Dublin III Regulation. In Italy, the applicant must submit evidence in order to establish whether other criteria apply in his or her case as otherwise the Eurodac hit prevails in assigning Member State responsibility. In Poland, Eurodac is the primary evidence accepted, which prevails over other information provided by the applicant concerning his or her journey. The United Kingdom also reported difficulties in applying the Article 13 of the Dublin III Regulation criterion for irregular entry on the grounds of other circumstantial evidence when no Eurodac hit is registered. However, in Greece findings show that certain types of evidence do not appear to prevail over other types and all evidence provided appears to be equally weighted.

[450] As reported in Germany, Italy and the United Kingdom. For further information, see 6.1 and 6.2 in relation to the application of Article 8 (Minors), Article 9 (Family members who are beneficiaries of international protection) and Article 10 (Family members who are applicants for international protection) of the Dublin III Regulation respectively.

[451] As reported in Denmark.

[452] As reported by an NGO in Italy.

[453] As reported in the United Kingdom by the twelve applicants interviewed.

[454] As reported in France where information is provided to applicants in many cases only at the end of the personal interview; however, even when this information is provided at a later stage it is not always taken into account depending on the Prefecture concerned and on the capacity to process such information.

[455] This is reported to occur at times for example in Denmark and Germany. Sometimes interviews are significantly delayed or not held at all due to increased pressure on protection systems from the increase in applicants as reported in Norway, France, Italy and Germany.

[456] As reported in Denmark.

[457] As reported in Germany.

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Although the practice varies depending on whether the Member State is predominantly a receiving or requesting Member State, it is clear from the findings above that the most frequently used criteria in the majority of Member States surveyed for outgoing requests are irregular entry or stay (Article 13)[458] linked to Eurodac results and the issue of residence documents or visas (Article 12). Those Member States who are mainly receiving Member States also submit more outgoing take charge requests in proportion to other States on the basis of family links.[459]

Due to the lack of detailed guidance or lists of evidence or proof required to prove family links, inconsistent practice as regards the proof taken into account to prove family links is reported in several Member States[460] and there appears to be a flexible approach in some Member States as to what is taken into account as evidence of such links.[461]

A related issue to the assessment of evidence is whether Member States provide each other with all the relevant information in order to enable a correct determination of responsibility in accordance with the hierarchy of criteria. UNHCR's audit of case files also showed that sometimes requests to take charge are submitted prior to gathering all the necessary documentation to motivate the request. This may be due to national authorities trying to meet the time limits for submitting a request; however, frequently additional information is required for the receiving Member State to accept the request resulting in further administrative delays.[462]

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[458] As reported in France, Germany, Malta and Norway.

[459] It is difficult to draw inferences as to which Member State is a receiving or requesting Member State but it appears that family links are more common as a ground for outgoing requests in Member States such as Malta, Italy and Greece. This can be explained in consideration of the fact that for most applicants those are the countries of first entry in the EU, and therefore criteria such as Article 13 (Entry and/or stay) of the Dublin III Regulation are less likely to be applicable.

[460] As reported in France, Germany, Italy and Malta.

[461] As reported for example in Germany, Greece and Malta.

[462] It appears from the audited case files that sometimes this lead to multiple requests being made when the first one is initially refused by the receiving Member State.

3. Assigning Member State responsibility on the basis of selected criteria

Unaccompanied children (Article 8)

Definitions of 'family members' and 'relatives'

The Dublin Regulation under Article 2(j) defines an unaccompanied child as *"a minor who arrives on the territories of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States."*

According to Article 2(g) "family members" means, insofar as the family already existed in the country of origin, the following family members present on the territories of the Member States: a) the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals; b) the minor children of couples, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law; c) where the applicant is an unmarried child, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present. "Relative" is also defined under Article 2(h) as the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law.

The findings show that the definition of "family members" for the purposes of Article 8 in most Member States is interpreted in accordance with Article 2(g) of the Regulation as is the definition of relative in accordance with Article 2(h).[463] In most of the Member States surveyed stakeholders held that the inclusion of the definition of "relative" in the Regulation has been beneficial for unaccompanied children in ensuring family reunion for broader family members. For example, one guardian interviewed as part of this study noted that many unaccompanied children have uncles and aunts already residing in other Member States therefore they are able to benefit from the inclusion of this new provision.[464] There is an extended definition of family members reported in two Member States but its application in practice depends on whether the requested Member State will accept responsibility for the unaccompanied child in such circumstances.[465] Reportedly, two Member States interpret Article 2(g) to take into account family that was established outside the country of origin,[466] accommodating family ties which may have formed during flight.

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[463] As reported in Denmark, Germany, Norway, Poland and the United Kingdom. In Malta, depending on the individual circumstances of the case the definition may go beyond that in Article 2(g) of the Dublin III Regulation. However, in Germany, although the asylum law definition is in accordance with Article 2(g), the German civil law definition is broader and includes attachment figures or so-called "*social parents*" and this may be applicable when the BIA is conducted by the youth welfare system. The Dublin unit in Italy stated that they adopt a more extensive interpretation of family members under Article 2(g) for applicants to reunite with relatives beyond that definition. The *Questura* staff in Rome and Border Police interviewed at Fiumicino airport stated that the definition under Article 2(g) is strictly adhered to with a view to protect children against possible cases of smuggling and trafficking. The audited case files did not reveal that Italy adopts a more extensive definition of family. In France, the limited number of unaccompanied children applying for international protection did not allow for the gathering of conclusive information on this aspect.

[464] As reported by a guardian in Germany.

[465] As reported in Greece and Malta. Greece considers family members even if they were only established in transit and did not exist in the country of origin for the purposes of Article 8 of the Dublin III Regulation. In Greece, it was noted that when the authorities submit an outgoing request with this extended definition it is usually accepted by receiving Member States. However, the findings show there is no consistent practice in the extended definition of family members in Malta, which depends on the individual circumstances of the case and the consent of the applicant concerned.

[466] As reported in Germany and Greece and it appears that most of the Member States requested on this basis accept responsibility.

The definitions of "family members" and "relatives" for the purpose of applying Article 8 appear in principle to sometimes prevent children from reuniting with members of the family outside the scope of the definitions.[467] In practice, however, in some Member States the discretionary clauses, and in particular the humanitarian clause (Article 17(2)), may be applied in order to ensure family unity in such circumstances, although it should be noted that these clauses are only used to a very limited extent in practice for such purposes.[468]

Application of Article 8

Article 8 assigns Member State responsibility for unaccompanied children on a number of grounds: (1) where a family member or a sibling of the unaccompanied child is legally present and if the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the responsible Member State shall be that where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present; (2) where a relative is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her; (3) where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied child; (4) in the absence of a family member, sibling or relative, the Member State responsible shall be that where the unaccompanied child has lodged his or her application for international protection, provided that it is in the best interests of the minor. Negotiations between EU institutions as to the review of Article 8(4) were resumed following the CJEU judgment of *M.A. and Others v. Secretary of State for the Home Department*[469] but an agreement between the co-legislators could not be reached before the presentation of a proposal for a recast Dublin Regulation on 4 May 2016.[470] In view of the presentation of the legislative proposal, separate negotiations on Article 8(4) are not expected to resume.

Article 8 is based on the condition that Member State responsibility is only assigned in accordance with the best interests of the child as required under Article 6 and that this principle is interpreted in accordance with the CRC. Respect for family life is a primary consideration in applying the Dublin Regulation as stated in Recital 14 of the Dublin Regulation and required under Article 8 of the ECHR and Article 7 of the EU Charter. Article

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[467] As reported in Greece, Italy, Malta, Poland and the United Kingdom. In response to this restriction in Greece the authorities adopt a broader interpretation of family. There is no information available on this as part of the research in France and in Malta it depends upon each case. No relevant cases have been recorded during the course of this research in Poland and the United Kingdom.

[468] As reported in Denmark, Germany and Norway. In Denmark, it was reported that in principle the discretionary clauses could be applied, and that the relevant factors to applying the discretionary clauses in such a situation would include the prior relationship between the persons concerned and the prior knowledge of each other. In Norway, the definition does not in practice affect family reunion as unaccompanied children view Norway as a destination country and therefore do not often raise information on the presence of family members elsewhere. Also it should be noted that the Norwegian UDI is reluctant to apply the humanitarian clause in this manner as it is seen as a way to circumvent family reunion rules. In Greece, the humanitarian clause is used to reunite unaccompanied children with members of the family in other Member States, when family reunion is not possible on the basis of Article 8 of the Dublin III Regulation. However, the outcome of such requests depends on the requested Member State, who can exercise its flexibility in this context. Further details on the application of the humanitarian clause in practice are provided in section 2 of Chapter III.

[469] CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013, available at: http://goo.gl/Cs1mBn; COM(2014) 382 final, European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in another Member State*, 26 June 2014; UNHCR, *Protecting the best interests of the child in Dublin procedures – UNHCR's comments on the European Commission's proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*, February 2015.

[470] European Commission, *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)*, 4 may 2016, available at: http://goo.gl/B54myd.

8 of the Dublin Regulation must also be interpreted in light of the objective of the Regulation as stated in Recitals 4 and 5 to guarantee effective access to an assessment of the applicant's application for international protection.[471] Recital 16 affirms that when the applicant is an unaccompanied child, the presence of a family member, sibling or relative on the territory of a Member State who can take care of him or her is a binding responsibility criterion.

The application of Article 8 of the Dublin Regulation is interconnected with the practice concerning the BIA and family tracing and should be read in light of the findings with respect to those aspects of the Dublin Regulation.[472] In general, the findings show that Member States have varied experience in applying Article 8 due to their position as either a predominantly receiving or requesting Member State under the Dublin system.[473] Therefore, the findings in relation to some Member States focus mainly on practice surrounding incoming take charge requests on the basis of Article 8.[474] It appears that most Member States surveyed have limited or no experience of applying Article 8(3) but no conclusion can be reached as to why this is from the information gathered as part of the study.[475]

Definition of "legally present"

Both Article 8(1) and (2) require that the family member or relative is "legally present" in the territories of the Member States subject to the Dublin system. There is no definition of "legally present" in the Dublin Regulation and its interpretation depends on national law. "Legally present" is interpreted in a wide manner in most Member States to include all aspects of legal stay, including humanitarian permission to reside and permission to remain pending the examination of a family member or relative's application for international protection.[476] It is unclear from the information gathered how decisive this is in refusing a request to take charge of an unaccompanied child under Article 8 in practice.

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[471] This objective is affirmed in CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013, para. 54.

[472] It is important to note that only 8 out of 17 audited case files concerning the application of Article 8 of the Dublin III Regulation include some form of BIA. There also appears to be ambiguity surrounding how the BIA feeds into Article 8 and given that in a number of Member States family reunion possibilities is the main aspect of the BIA, clear links to Article 8 can be identified. Although most Member States qualify such assessments as BIA's, in certain Member States surveyed the assessments conducted do not take into consideration all the factors enumerated under Article 6(3) of the Dublin III Regulation, and cannot therefore be qualified as fully fledged BIAs in practice.

[473] For example, Greece and Poland have more experience submitting outgoing take charge requests to other Member States, whilst the United Kingdom has more experience receiving incoming take charge requests. Norway and Poland reportedly have limited experience of applying Article 8(2) of the Dublin III Regulation in practice.

[474] As reported, for example, in France and the United Kingdom. Although France has limited experience in receiving incoming requests as well.

[475] No audited case files fell within the scope of Article 8(3) of the Dublin III Regulation as part of this study.

[476] "*Legally present*" includes stay as an applicant for international protection in Denmark, Germany, Greece, Norway, and Poland. Documentations are checked in this regard in the United Kingdom, France, Greece and Norway but there is no standardised practice in place. In Malta, a valid residence permit is sufficient and in Germany it also includes tolerated stay.

Application of Article 8(1)

There is a diverse approach as to the requirements to apply Article 8(1) across the Member States surveyed. The consent of the unaccompanied child is required in some Member States[477], whilst in others the views of the child are taken into account[478] but there is an inconsistent approach as to the weight placed on those views.[479] From the audited case files, it is clear that BIAs are not always conducted for the application of Article 8(1), or only limited assessments are conducted, which do not take into account all the elements of the BIA provided under Article 6(3).[480]

Family reunion is a priority within the BIA across the Member States surveyed and this is also reflected within the practice of applying Article 8. Proof of a family link appears to be the main requirement across the Member States surveyed[481] but other factors are also taken into consideration in some Member States, including safety and security considerations[482] and the ability of the family member or sibling under Article 8(1) to take care of the child in both a material and emotional manner.[483] In two Member States the requirement to take care of the unaccompanied child is viewed as a requirement though, *sensu stricto*, this is not a condition in order to apply Article 8(1).[484] The ability of the family member to take care of the child may, however, form part of the BIA depending on the individual circumstances of the case. In relation to incoming take charge requests some Member States consult the local municipality or authority to undertake an assessment as to the family member's or sibling's accommodation and financial income in order to ensure that they have capacity and means to effectively look after the child.[485] Such a requirement overlooks the fact that even in circumstances where family members or siblings do not have the housing facilities or material capacity to take care of the child it may be in the best interests of the child concerned to still be reunited with family and receive support from social services.[486] In light of the primacy of the principle of family unity, considerations as to the financial capacity and the available accommodation of a family member or sibling should not prevail over family reunion possibilities where this is in the best interests of the child concerned. Such considerations should also not prevail over key factors to be considered when assessing the best interests of a child in accordance with Article 6(3) of the Regulation, namely the views of the child as well as his or her well-being and social development.

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[477] As reported in Greece and the United Kingdom. The consent of the applicant is required if Malta submits a take charge request to another Member State on the basis of an extended family definition.

[478] As reported in Denmark and Germany.

[479] As reported in Denmark. For example, an NGO noted that even if an unaccompanied child is considered sufficiently mature to undergo the asylum procedure, this does not appear to affect the weight placed on his or her views for the purposes of applying Article 8 of the Dublin III Regulation as compared to the cases of those children who are not considered sufficiently mature to undergo the asylum procedure. When assessing whether the child is sufficiently mature to undergo the asylum procedure, an assessment is conducted on the basis of the information available, including information obtained from a personal interview with the child. If it is assessed that the child is not sufficiently mature for undergoing the asylum procedure, other provisions of the Danish Aliens Act will be applied to assess whether the child can be granted a residence permit.

[480] Out of 17 audited case files concerning completed cases where Article 8 of the Dublin III Regulation was applied, only 8 included some form of BIA.

[481] As reported in Denmark, France, Germany, Malta Norway, Poland and the United Kingdom.

[482] As reported in Germany and Malta.

[483] In terms of a material manner, as reported in France, Italy and the United Kingdom.

[484] This is a requirement in Norway and the United Kingdom, whilst other Member States noted that the ability to take care of the child is not necessary under Article 8(1) of the Dublin III Regulation, so there are different interpretations amongst Member States as to the requirements under this provision.

[485] As reported in Malta and the United Kingdom. For incoming requests this also occurs in Germany where the social welfare authorities verify the capacity of family members and siblings to take care of the child concerned.

[486] For example, this occurs in France and Germany where unaccompanied children have family members present there and such children are located in social welfare accommodation facilities near their families if they are unable to accommodate them. It is important to ensure family unity in such cases particularly bearing in mind that circumstances may change over time as to whether family members and siblings have the capacity to look after a child in practice.

Application of Article 8(2)

The findings show that there is no uniform set of standards across the Member States surveyed on evaluating the ability of a relative to take care of a child as required under Article 8(2). Sometimes the practice varies as to what elements are necessary both across the Member States and the relevant offices within Member States themselves.[487] There appears to be no consistent approach and all depends on the individual circumstances of the case, and at times the relatives' statements as to their willingness and ability to take care of the child appears to be considered sufficient by some Member States to satisfy this requirement. The findings show that this lack of uniformity in approach across the Member States sometimes results in re-examination requests being submitted with further evidence and/or information until the Member State accepts the request, if at all.

The authority to undertake the assessment as to whether a relative can take care of a child when incoming requests are received is delegated to different government administrations at the local level in some Member States such as the local authority or municipality where the relatives reside.[488] In some Member States these assessments take the form of home assessments and visits.[489] This can sometimes result in delays in processing the case and responding to incoming take charge requests as the Member State may defer the acceptance of such requests until the assessment is undertaken by the relevant local authority.[490] Some Member States also reportedly schedule interviews with the relatives concerned to establish their capacity and means to take care of a child.[491]

Personal statements as to the relatives' willingness and ability to take care of the child are required in most Member States including their explicit consent to be reunited with the child.[492] As mentioned above, UNHCR's audit of case files revealed that at times a statement from the relative as to his or her willingness to take care and accommodate the child is sufficient to reunite the child with him/her under Article 8(2).

In some Member States the ability to take care of the child often focuses on whether the relative can accommodate the child[493] whilst in one Member State a representative stated that different factors may play a role in determining whether the relative has the capacity to take in the child, including his or her living space, the duration of stay in the Member State, the language spoken and his or her level of integration.[494] The age of the relative[495] and the personal relationship with the child[496] is also a consideration in some of the Member States surveyed. An evaluation as to the emotional ability of the relative to take care of the child is part of the

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[487] Given the lack of guidance for conducting assessments as to the applicability of Article 8 of the Dublin III Regulation, this is often done on a case-by-case basis. Discrepancies within the same Member State are reported for example in Italy.

[488] As reported in France, Germany, Malta and the United Kingdom. In Germany, the BAMF requests support from Foreigners' Authorities and the youth welfare offices for the assessment. In Malta, AWAS carries out the assessment and not RefCom. In the United Kingdom, where such assessments are conducted also for the family members and relatives, the same procedures apply to those cases as well.

[489] As reported in France, Malta and the United Kingdom, although in the United Kingdom the Local Authorities may not always conduct a home visit in practice. For instance it was reported that in some cases the Local Authority may refuse to conduct such a visit citing a lack of statutory obligation on the grounds that the child was not yet in the United Kingdom and/or their absence from the United Kingdom meant that they could not observe the child in the family environment.

[490] As reported in the United Kingdom.

[491] As reported in the United Kingdom. In Denmark, the relevant guidelines provide that such interviews can be carried out where necessary.

[492] The written consent of the family member or relative is required in Germany, Italy and the United Kingdom (for incoming requests).

[493] The housing situation of the relative is examined in France, Germany, Italy and the United Kingdom.

[494] Representative interviewed in Germany. The representative also stated that if a relative wishes to become the child's legal guardian he or she must provide a certificate of good conduct to the authorities.

[495] As reported in Norway.

[496] As reported in Germany, Italy, Norway and the United Kingdom.

assessment in a minority of Member States surveyed.[497] In one Member State whether or not the relative can provide suitable arrangements for education is an additional factor considered.[498]

Although it is reported in one Member State that there is close cooperation with other Member States in terms of determining the ability of relatives to take care of a child under Article 8(2) this is not apparent from the practice in the other Member States surveyed.[499] The findings show that there is a lack of clarity as to which Member State should conduct the assessment of the ability of relatives to take care of a child[500], with part of it being conducted in the Member State where the relatives are present and the other part being conducted as part of the BIA of the unaccompanied child in the Member State he or she is present in.

Evidentiary requirements for the application of Article 8

The existence of family links is a matter of fact to be established by evidence. With respect to evidence for establishing family links, including relatives for the purposes of Article 8, Member States reportedly do not have an exhaustive list of elements of proof as much depends on the individual circumstances of the child and his or her best interests.[501] These include personal identity and civil status documents,[502] photographs, and written confirmation of the relationship by the family member, sibling or relative.[503] Although Annex II of the Implementing Regulation (EU) No 118/2014 provides a relevant list of probative and circumstantial evidence, indicating the presence of a family member or relative in the territories of the Member States, no details are provided as to the type of evidence required to establish that the persons are related except if necessary, in the absence of all such evidence, a DNA or blood test.[504] The findings show that in practice all relevant documents submitted by the applicant are taken into consideration along with statements from the family members, sibling or relatives. However, evidence such as the applicant's or family members', siblings' or relatives' statements seem to be only taken into account to a limited extent with some form of hard evidence such as identity documentation and to a more limited extent DNA tests proving family links being required. DNA tests appear to be requested to verify family links mainly when the other Member State has doubts regarding family links based on the prior information received or in the absence of other evidence and are

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[497] As reported in Denmark, Italy and Malta. In Malta, the assessment of the relatives' ability to take care of the child includes an evaluation of the "*mental ability*", i.e. an evaluation as to whether the relative is psychologically fit to take care of the child. The authority involved in such assessment (AWAS) did not elaborate further on how such assessment is undertaken in practice.

[498] As reported in the United Kingdom where the requirement to "*take care of the child*" applies to both Article 8(1) and Article 8(2) of the Dublin III Regulation.

[499] As reported in Malta.

[500] This issue is reported for example in Denmark, Germany, Italy and the United Kingdom but the issue of the lack of cooperation between Member States appears to be a broader one from the audited case files. In Greece, it has been reported that in some cases the requested Member State has refused the take charge request submitted by Greece under Article 8 of the Dublin III Regulation because a BIA had not been carried out by the Greek Authorities. Due to the limited number of incoming requests under Article 8, it was not possible to verify this in Poland.

[501] This section should be read in conjunction with section 3 of Chapter I, subsection *"Family tracing"*.

[502] As reported in France, Germany, Italy and the United Kingdom. In Poland, it appears that official documentation is the main element assessed and no consideration is given to other element, whilst in Germany a flexible approach is adopted and civil status documents are taken into account where available but not strictly required, as the applicants' statements and any other available evidence are also taken into consideration.

[503] As reported in France, Germany, Italy, Norway and the United Kingdom.

[504] ANNEX II of Implementing Regulation (EU) No 118/2014 List A – Means of Proof 1) *Probative evidence on the presence of a family member, relative or relations (father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for the child, guardian) of an applicant who is an unaccompanied minor* (Article 8).

not utilized by all Member States.[505] UNHCR is of the view that DNA testing to verify family relationships may be resorted to only where serious doubts remain after all other types of proof have been examined, or where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud considering that applicants may not be in possession of personal documents and thus only oral evidence may be available and should be relied upon.[506] The lack of clarity as to the evidence required amongst Member States sometimes results in delays in identifying the State responsible for an unaccompanied child.[507]

The case described below, taken from an audited case file, illustrates how a flexible approach to evidence of family links can facilitate and speed up family reunion.

GOOD PRACTICES

A 14 year old Syrian boy who was accompanied by his sister and her fiancé travelled from Egypt to Greece where they expressed their wish to be reunited with an uncle, aunt (Austrian citizens) and grandmother (applicant for international protection) who were residing in Austria. The child left Greece before receiving a response and moved on to Norway with his sister and her fiancé and applied for international protection there. During his personal interview he requested to go to Austria if he was permitted to go with his sister. The Norwegian authorities held that the fact that he talked to his grandmother regularly and had a close relationship with her and that his sister had their telephone numbers was sufficient to prove family ties. Norway requested Austria to take charge of the applicant in accordance with Article 8(2) and the applicant was transferred. The whole procedure from the day he lodged an application for international protection until he was transferred to Austria took approximately 130 days.

[505] It is reported that this is sometimes requested of Greece from some other Member States. In Germany, DNA tests are only requested in exceptional cases as a measure of last resort. DNA tests are resorted to in Norway if there are doubts as to the family links. In Italy, policy officers interviewed as part of this study declared that in case no other evidence is available to prove the family link of adults and children applying together for international protection in Italy, DNA tests are used. However, the Italian Dublin Unit has declared that it is not in favour of using DNA tests as their results are not always conclusive with regard to siblings, and it is considered intrusive and expensive. Denmark, Poland and the United Kingdom reported of other Member States requiring DNA tests for evidence of family links. In Poland, the law does not specify which national authority should cover the costs of such tests, which are expensive in Poland. According to the Polish Dublin Unit, DNA tests are therefore not conducted in Poland for financial reasons. In this regard, the UK Upper Tribunal, Immigration and Asylum Chamber, in the case of *The Queen on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK)* JR/2471/2016, has confirmed that the duty of enquiry requires that national authorities take reasonable steps to investigate family links including, where necessary, by undertaking DNA tests as otherwise they may be in breach of their obligations under the ECHR. In particular, the court stated at para. 38: "*We consider that duties of enquiry, investigation and evidence gathering course through the veins of the Dublin Regulation and its sister instrument, the 2003 Regulation as amended. In some of the provisions of the Dublin Regulation, these duties are explicit: see for example Article 6(4) and Article 8(2)* […]." In holding that the decision of the Secretary of State for the Home Department was in breach of Article 8 ECHR the court stated at para. 45 "*The absence of DNA evidence establishing the requisite biological familial link was the crucial feature of the Secretary of State's decision […] The Applicants were unable to provide such evidence for a variety of reasons, including in particular lack of resources and uncertainties relating to French law. The Secretary of State was at all material times in a position to proactively take steps to at least attempt to overcome this impasse. […] Relying upon a mistaken assessment that she was entitled, in law, to be purely passive and a further erroneous view of onus of proof the Secretary of State proceeded to make a decision adverse to the Applicants of fundamental significance to their lives. We consider these failures to be incompatible with the progressively strengthening mechanisms and provisions contained in the current incarnation of the Dublin Regulation, reflected particularly in the investigative and evidence gathering duties identified above and the new (and welcome) emphasis on protecting children and families.*"

[506] UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context, June 2008*, available at: http://www.refworld.org/docid/48620c2d2.html.

[507] The lack of clarity as to what information is required by other Member States to apply Article 8 of the Dublin III Regulation was cited as a challenge in Denmark but appears to be a wider challenge for more Member States in practice as well.

Lengthy family reunion procedures

One striking aspect of the practice surrounding Article 8(1) and (2) is the significant delays in reuniting unaccompanied children with relatives and family members under this provision. These cases, which in principle may take up to eleven months to process before the unaccompanied child is reunited with family members or relatives, are the reason why many children abscond and make their own journey to unite with family outside of the Dublin system.[508] In practice, however, the study found that family reunion for children can last even longer than the maximum time frames provided in principle under the Dublin Regulation. This is particularly concerning in view of the inherent vulnerability of these children and the exploitation risks associated with such irregular means of travel. UNHCR has previously called for the prompt expedition of cases involving unaccompanied children for smooth family reunion within the Dublin procedure.[509]

Upon analysing the length of time spent in the Dublin procedure by unaccompanied children in 17 case files gathered as part of this study, it is clear that the procedure for assigning Member State responsibility for such children may be long and such applications are not prioritised in practice. Over 200 days appears to be the average time in the Dublin procedure for unaccompanied children between the lodging of the application for international protection and the effective transfer of the child with some Member State practice showing excessive delays in the procedure.[510] The findings show that in only 10 out of the 17 examined case files the family reunion procedure lasted less than six months. In this context it is important to note that there may already be significant delays before an unaccompanied child is even able to lodge an application and so access the Dublin procedure for family reunion purposes. This may be due to various factors including lengthy and complicated procedures for the appointment of a representative, which may be necessary to submit an application for international protection in certain Member States[511] and the conduct of age assessments. Therefore, the average time periods indicated above may not take into account these delays.

Among the reasons for the lengthy procedures concerning the application of Article 8 the following were identified from the information gathered during the research and the case files audited:

- lengthy family tracing procedures;
- delays in conducting age assessments;
- lack of or limited resources to conduct the required assessments, which resulted in delays;
- different documentary and evidential requirements for establishing family links among Member States, including the conduct of DNA tests;
- BIA or assessments linked to the ability of the relative or family member to take care of the child;

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[508] As reported in France, Greece, Italy and to a certain extent Malta. Although Poland has limited experience of applying Article 8 of the Dublin III Regulation, the issue of applicants moving onward before the end of the Dublin procedure is prevalent there. In Malta there was diverging information from different stakeholders as to how much of a problem this is in practice. Unaccompanied children are supervised in reception centres in Malta by their representatives but sometimes due to fact that they are overburdened and have limited capacity representatives cannot effectively supervise all unaccompanied children.

[509] *UNHCR, Updated Recommendations to The Netherlands for its Presidency of the Council of the EU*, January 2016, available at: http://www.unhcr.org/56bc94719.pdf.

[510] This is from the time of lodging the application for international protection and the actual undertaking of the transfer. On average from the audited case files in total it takes 202 days. For example, transfers of unaccompanied children from Greece to other Member States took on average 252 days, with two cases in particular lasting over 450 days. While due to the limited number of cases it is not possible to draw conclusions on the underlying reasons, it is nevertheless interesting to note that cases concerning children under 14 years old appear to be swifter than those concerning children aged 14 and above (153 vs. 216 days on average from the moment the application is lodged to the transfer).

[511] As reported in France, Germany, Greece (for children under 14 years of age) and Poland (since November 2015).

- limited information and/or insufficient documentation attached to a take charge request resulting in re-examination requests and further correspondence for the submission of more information; and
- the late disclosure of information from the unaccompanied child on the presence of family members or relatives present in another Member State.[512]

The audited case files also show that aspects which contribute to much speedier family reunion procedures under Article 8 include representatives actively providing supporting documentation for the BIA and evidence of family links and the unaccompanied child having the contact details and location of family members, sibling or relatives in advance. Sometimes the existence of an added vulnerability, such as if the child has any health problems, also speeded up the procedure where this was indicated in the request to the Member State deemed responsible. The trust of the Member State authorities as to the veracity of the statements of the child and his or her family members, siblings or relatives as to the child's age[513] and their relationship, as wells as the cooperation between Member States in terms of determining what is in the best interests of the child and the trust in the assessments conducted by the other Member State concerned appear to be other relevant factors in facilitating swift family reunion under Article 8.

Application of Article 8(4)

With respect to the application of Article 8(4) if no family members are present in a Member State, the majority of Member States surveyed take over responsibility for the examination of an unaccompanied child's application for international protection. Such an approach is in accordance with the CJEU case of *M.A. v. Others* which requires that when no family members or relatives are present in the territories of the Member States then the responsible Member State for the examination of the child's application for international protection is that where he or she is present, having lodged an application there.[514] However, in two Member States unaccompanied children are transferred to another Member State if their initial application for international protection was examined there and a final decision was made.[515] In interpreting the Dublin Regulation, it is necessary to consider not only its wording but also the objectives pursued under the hierarchy of criteria, in particular that of ensuring prompt access to the asylum procedure. As unaccompanied children are extremely vulnerable, deprived of care and protection by their parents or previous caregiver, it is important not to prolong, more than is strictly necessary, the procedure for determining the Member State responsible to ensure that unaccompanied children have prompt access to an asylum procedure. Accordingly, it is UNHCR's view that the Member State responsible when no family members or relatives are present in the territories of the Member States should be that where the child is present, provided that is in their best interests, with the aim to avoid unnecessary transfers and ensure prompt access to the asylum procedure.[516]

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[512] This may be on account of the fact that such information may arise only at a later stage of proceedings or that the child may not have received sufficient information on family reunion possibilities under the Dublin procedure in a timely manner.

[513] Therefore, no age assessment is required as there is no doubt regarding the age of the child. However, age assessments are more systematically conducted in other Member States. For more information on age assessment procedures see section 3 of Chapter I, subsection on *"Age assessment"*.

[514] CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013.

[515] As reported in Denmark and Norway. In Denmark, transfers to other Member States in accordance with the Dublin Regulation are carried out if the application for international protection lodged by an unaccompanied child already received a final negative decision there.

[516] UNHCR, *Protecting the best interests of the child in Dublin Procedures, UNHCR's comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*, February, 2015, available at: http://www.refworld.org/pdfid/54e1c2924.pdf.

Family Members

Recital 14 requires Member States to respect family life as a primary consideration when applying the Dublin Regulation. Such an approach is in accordance with Member States' obligations under Article 8 of the ECHR and Article 7 of the EU Charter. As part of this study information was gathered on the application of the two provisions linked to family life for adult applicants, Articles 9 and 10. Article 9 assigns Member State responsibility on the basis that the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who is allowed to reside as a beneficiary of international protection in a Member State, provided that the persons concerned expressed their desire to be reunited in writing. Article 10 assigns Member State responsibility to the Member State where a family member has submitted an application for international protection, which has not yet been the subject of a first decision regarding the substance, provided that the persons concerned expressed their desire to be reunited in writing.

Application of Articles 9 and 10

Stakeholders interviewed as part of this study reported that the amendment to Article 9 as part of the recast of the Dublin Regulation to extend the possibility of its application to family members regardless of whether the family was previously formed in the country of origin has proven beneficial for applicants in most of the Member States surveyed.[517] However, it is reported in one Member State that at times the requirement to consider the family regardless of whether it is formed in the country of origin under Article 9 is disregarded in practice.[518] One Member State reported an informal practice, which occurs between Member States that cooperate with each other regularly, whereby Article 9 and 10 are both applied even for extended family members instead of the humanitarian clause (Article 17(2)).[519]

GOOD PRACTICES

In cases within the scope of Article 10, Greece adopts a broader interpretation of family members than provided in Article 2(g) and submits take charge requests to other Member States even if the family is formed outside the country of origin. Whether or not these take charge requests are accepted depends on the practice of the receiving Member State.

The humanitarian clause is sometimes used if the definition of family members prevents applicants in practice from reuniting with members of the extended family under Articles 9 and 10 in some Member States.[520] In three Member States this is reported to occur when the deadlines imposed by the Dublin Regulation have

[517] As reported in Germany, Greece, Italy, Malta, Poland and the United Kingdom. However, note that in Italy its impact is limited as the number of relevant cases is low. As reported by the Dublin Unit, more cases have been noted under this provision since the amendment in Germany.

[518] In Norway, a strict application is reportedly given to Articles 9 and 10 of the Dublin III Regulation insofar as for example the provision that Article 9 should be applied "*regardless of whether the family was previously formed in the country of origin*" seems to be disregarded in practice. In one referenced case in the United Kingdom, a judicial review application was made on the basis that an applicant was placed in the Dublin procedure despite her husband being in the United Kingdom, which was then subsequently withdrawn when the authorities permitted her application to be examined there.

[519] As reported in Malta with respect to Italy.

[520] As reported in Denmark (where also the sovereignty clause may be applied in such cases where relevant), France, Germany, Greece and Poland. In Denmark, for example, the discretionary clauses may be applied where a couple is unmarried and has a child; however, it was reported that this does not always occur in practice. In France, this decision lies in most cases with the Prefecture caseworker. One caseworker interviewed reported that application of the humanitarian clause may be considered in cases of siblings having followed a similar itinerary to reach Europe and who have a similar background. In Poland there were few cases reported in which a request under the humanitarian clause was submitted to another Member State in order to preserve the unity of the family beyond the family definitions in the Dublin Regulation (for example, a 19-years-old daughter with her parents).

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expired in order to preserve family unity.[521] Sometimes the fact that information on the presence of family members in a Member State is only disclosed at a later stage in the Dublin procedure, which can occur for a variety of reasons such as poor provision of information to the applicant or impossibility to provide that information before, can also create challenges in relation to submitting take charge requests on the basis of Articles 9 and 10 within the required time limits.[522]

One finding was that delays in the application of Articles 9 and 10 may mean that sometimes applicants disappear before the procedure is terminated as applicants may be waiting for months to be united with family members.[523] The delays mean that many applicants decide to move onward outside of the Dublin system to reunite with their family members. From the audited case files it is evident that the issue of delays is a prominent one with, on average, 145 days taken in order to transfer an applicant under Article 9 from the time of lodging his or her application for international protection.[524] Furthermore, despite Article 10 involving family members who are also in the asylum procedure in another Member State it appears that the time taken may be even longer with on average 230 days taken to transfer an applicant on this basis to the responsible Member State from the lodging of the application.[525] This practice, although in line with the required time limits under the Dublin Regulation, appears to be contrary to the objective of ensuring swift access to an asylum procedure in accordance with Article 18 of the EU Charter and recital 5 of the Dublin Regulation.

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[521] As reported in Germany, Greece and Italy.

[522] For further information, see section 1 of Chapter II above in relation to the application of the hierarchy of criteria and section 2 of Chapter IV on the adequacy of time limits.

[523] As reported in the practice in Denmark, Greece and Malta. It should be noted that applicants may have to wait for months before succeeding in lodging an application at the RAOs in Greece thus creating delays in the family reunion procedure. Poland is also often treated by applicants as a "*transit country*" since about 80 per cent of all asylum proceedings are being discontinued, mostly because of the applicant's disappearance during the procedure.

[524] It should be noted that this statistical analysis is from a small number of case files (9).

[525] It should be noted that this statistical analysis is from a small number of case files (15).

The definition of family members under Articles 9 and 10

As explained above, "family members" are defined under Article 2(g) of the Regulation and generally the Member States surveyed adhere to that wording for the purposes of applying Articles 9 and 10 of the Dublin Regulation. It should be noted that the definition of "relative" does not apply with respect to adult applicants under Articles 9 and 10 of the Dublin Regulation.

Throughout the Member States surveyed examples of family members denied family reunion on the basis of the restrictive interpretation of family for the purposes of Articles 9 and 10 were reported. Examples of family members who fall outside the scope of Article 2(g) and who are refused family reunion on this basis identified in the course of this research include:

- adult siblings, one of which is an applicant or beneficiary of international protection in the territory of a Member State;[526]
- applicants with adult children legally present in another Member State;[527]
- adult applicants whose parents are legally present in another Member State;[528]
- applicants whose marriage to their spouse is not recognised under the law and customs of the country in which the marriage took place and thus do not hold the necessary proof of marriage, for example religious marriages that have not been registered as required by the authorities where the marriage took place;[529]
- applicants whose family members in another Member State are no longer refugees due to being naturalised or gaining citizenship;[530]
- applicants whose family members reside in another Member State on the basis of different residence permits such as, for example, humanitarian permits;[531] and
- couples who only marry after an application for international protection is lodged.[532]

In accordance with Article 7(2), who constitutes a family member within the individual circumstances of a case is determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection within a Member State. Therefore, relationships formed after the Dublin procedure is initiated are generally not recognised unless authorities apply the discretionary clauses. In addition, it should be noted that the situation of a child, who is accompanying the applicant and meets the definition of family member, is indissociable from that of his or her family member.[533]

In this context, it should be noted that despite the limits to family reunion possibilities of adult applicants by virtue of the definition of "family members" in the Dublin Regulation, in certain circumstances family reunion may be an obligation on the side of a Member States on the basis of Article 8 of the ECHR.[534]

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[526] As reported in France, Greece (concerning outgoing requests), Italy, Malta, Poland and the United Kingdom. In Greece, in such cases, a take charge request is usually submitted on the basis of the humanitarian clause. As a consequence, the outcome of the request is dependent on the discretion and flexibility of the requested Member State.

[527] As reported in Greece (concerning outgoing requests).

[528] As reported in Denmark, France, Greece (concerning outgoing requests), Italy and Poland.

[529] As reported in Denmark and the United Kingdom. In Denmark, in such instances the applicants may in principle be recognised as partners instead, depending on the circumstances of the case, but it has been reported by an NGO as a challenge that a number of applicants also do not fall under that definition and are therefore separated.

[530] As reported in Denmark, Greece (concerning outgoing requests) and the United Kingdom.

[531] As reported in Denmark.

[532] As reported in Denmark.

[533] Article 20(3) of the Dublin III Regulation. The same treatment shall also be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

[534] For information on the use of the discretionary clauses see Chapter III (*"Discretionary clauses"*).

The cases below illustrate the impact that restrictive interpretations of family have on families which can lead to their separation in practice:

An applicant from Afghanistan was placed under the Dublin procedure in Paris to be sent to another Member State despite the fact his brother had been granted refugee status many years before in France and had acquired French nationality. The applicant expressed his lack of understanding in these terms:

> *"How can my brother not be my family?"*[535]
>
> [20 years old Afghan man, interviewed in France]

An applicant from Russia (Chechnya) whose mother and sister were granted international protection in France was also placed under the Dublin procedure. During the interview his elderly mother seemed very affected by the decision to place him in the Dublin procedure:

> *"Why would they want to send him back to Poland after all we have been through, when his mother and sisters are refugees here? We want to stick together."*[536]
>
> [Russian woman, interviewed in France]

The following case example is based on a casefile audit and interview with the applicant concerned in the United Kingdom.

An applicant from Syria was placed under the Dublin procedure and detained upon screening in the United Kingdom to be sent to another Member State, despite the fact that her husband had been granted refugee status in the United Kingdom and had acquired British citizenship. However, the United Kingdom did not recognise their marriage and did not consider she had the necessary proof of marriage, as they had been married in Turkey and registered it by proxy in Syria. She was detained for two months and one week, and her legal advisor had to apply for judicial review to prevent her removal to another Member State. Eventually the Home Office accepted they were married, released her from detention and agreed to examine her application for international protection.

The following case example is based on an interview with an NGO representative in Greece.

A Somali woman could not be reunited with her husband who was allowed to reside as a beneficiary of international protection in another Member State because the requested Member State did not recognise the marriage performed in a traditional Muslim ceremony before an imam in Greece. The requested Member State therefore did not consider the applicants as "spouses" or "unmarried partners in a stable relationship", within the meaning of Art 2(g) of the Dublin Regulation. In this case the woman was pregnant and both she and her husband claimed that he was the father of the child. However, the requested Member State did not request a DNA test to be performed once the child was born in order to establish the family links, refusing to take charge of the applicant on the ground that the existence of a child is no proof of a stable relationship between a couple.

[535] In this applicants case a transfer decision to Bulgaria was issued but the transfer was not executed by the French authorities and the applicant was finally able to lodge an international protection claim after the six-month time limit expired.

[536] The applicant in this case waited six months for the time limit to carry out the transfer to expire to have his application examined in France.

The following case example, based on a case file audited in Poland, illustrates that applicant's individual circumstances can change over time and that flexibility should be displayed by Member States to ensure that respect for family life is kept as a primary consideration in the application of the Dublin Regulation.

> *A young woman who applied for international protection in another Member State was transferred to Poland under the Dublin Regulation due to the fact that she had a Polish visa. She applied for protection in Poland but after a few years, during the ongoing procedure, she moved back to the other Member State. She got married there and had a child. The authorities of that Member State requested Poland to take back the applicant again and the Polish authorities agreed. After her transfer, the applicant informed the Polish authorities that she had a husband in the other Member State who was a beneficiary of international protection and that they had a child together. The Polish authorities requested the authorities of the other Member State to take charge of the applicant due to family reasons and indicated they were not aware the applicant had family in that Member State when they agreed to take her back. The authorities of the other Member State refused, indicating that since the marriage was concluded after her first application for international protection, according to Article 7(2) of the Dublin Regulation they were not responsible for the applicant. The Polish authorities submitted several requests to that Member State to take charge on the basis of the humanitarian clause due to humanitarian reasons based on family considerations, indicating that family unity should be a priority and that it would be in accordance with the best interests of the applicant's child. The other Member State kept responding in the negative and eventually the family could not be reunited.*

Identification of family members

Similarly to family tracing in the case of children, there are no SOPs for the identification of family members for adult applicants in the majority of the Member States concerned[537] and it appears that generally no exhaustive list of probative of evidentiary elements exists. In one Member State there are SOPs for conducting DNA testing but not for other ways of identifying family members.[538] Family members are identified on the basis of information, such as identity documents, including passport, birth certificates,[539] statements from the family member[540] and residency documents regarding a family member's legal presence,[541] among other information. DNA tests are only used as a last resort in some Member States.[542] Limited information is reported in relation to family tracing for adults as compared to children and this may be due to the fact that the Dublin Regulation does not have a specific provision for such tracing. The most common practice in all the Member States surveyed is that family tracing only starts on the basis of information received from the applicant.[543] Then some Member States submit Article 34 information requests to other Member States on that basis.[544] Some Member States appear to have more organized procedures in place if applicants claim that they have family members in the Member State they are presently in, as it is more straightforward for those Member

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[537] As reported in Denmark, France, Greece, Italy, Malta, Poland and the United Kingdom.

[538] As reported in Norway.

[539] As reported in France, Italy, Poland and the United Kingdom.

[540] As reported in France, Germany and the United Kingdom.

[541] As reported in Greece, Italy and the United Kingdom.

[542] As reported in Germany and the United Kingdom. In Norway, DNA tests may be required if doubt exists as to the family link and in September 2015 UDI in Norway was instructed by the Ministry of Justice and Public Security to increase the use of DNA testing.

[543] For example, Germany, Italy, Malta and the United Kingdom. In the United Kingdom, concerns were raised by stakeholders as to the nature of the relationship not being explored by the Home Office during the personal interview.

[544] As reported in Denmark, Greece and Norway.

States to check their own registries of applicants in that regard.[545] Two Member States noted that applicants usually know the whereabouts, have the contact details of their family members and are in the possession of documents verifying the legal presence of family members.[546] If the applicant has lost all contact details and does not know the whereabouts of his or her family members, no active family tracing is undertaken in one Member State.[547] The Dublin Unit in one Member State also does not conduct family tracing for adult applicants at all and such persons have to resort to the Red Cross for assistance.[548]

In terms of the involvement and cooperation of other actors for family tracing, some Member States reported the involvement of the Red Cross.[549] In other Member States UNHCR and IOM,[550] reception centres' staff[551] and NGOs may participate in the tracing process for adults as well.[552] The *Trace the Face* initiative by the Red Cross is a positive initiative but it is not yet systematically used by Member States.[553]

Challenges to the effective identification of family members in practice are linked in some Member States to the current influx of applicants for international protection and backlog, which means that there are delays in the registration of applicants.[554] The use of forged documents and the fact that often little information is provided by applicants with no way to corroborate it are also reported as obstacles by the authorities in the correct identification of family members in one Member State.[555] A lack of cooperation by the applicants and the absence of a standardised approach to documentary evidence across the Member States surveyed are further reported difficulties.[556] In addition, the transcription and different composition of names can be challenging in trying to locate family.[557]

[545] For example, France and Germany. A photo identity document seems to sometimes be required in France to prove family links and if an applicant has a family member in France and cannot provide such a document then the family link would not always be considered as having been established and a transfer decision is issued. The consultation of official registries in Germany could be seen as a positive practice.

[546] As reported in Greece and Poland.

[547] As reported in Greece.

[548] As reported in Poland.

[549] In Germany this occurs once no information is provided via the official registries. In France there is no engagement with other actors. In Norway, the Red Cross can assist with family tracing and in Greece there is no formal cooperation but applicants can also get assistance from the Red Cross. Applicants in Poland can contact the Red Cross society for assistance in family tracing but the Polish Dublin Unit does not work in coordination with the Red Cross. The Red Cross Family Tracing services are also available for applicants over the age of 18 in Denmark.

[550] As reported in Italy and Malta.

[551] SPRAR reception centre staff may also be involved in the tracing procedure in Italy.

[552] As reported in Greece and Italy.

[553] The *Trace the Face* initiative is a campaign whereby National Red Cross Societies in Europe can publish on the dedicated portal photos of people looking for their missing relatives in the hope of reconnecting families. For more information see: http://familylinks.icrc.org/europe/en/Pages/Home.aspx#sthash.qQazvzHx.dpuf.

[554] As reported in Germany and evident from practice in other Member States such as Norway where mini-registrations/interviews were carried out between September and December 2015. This means that insufficient information was at the time gathered at an early stage on the presence of family members, siblings or relatives in other Member States. Since January 2016, ordinary registration/interviews should allow for the possibility of providing relevant information.

[555] As reported in France.

[556] As reported in Italy and Malta. It is difficult to draw conclusions on the reasons why applicants may not always cooperate but this may be due to misinformation provided by other actors, such as community members and smugglers, and the fact that they are not always properly informed of how the Dublin procedure works in practice. If the Dublin procedure is subject to delay, frequently applicants move on in Italy and Malta. Furthermore, in Malta, the lack of cooperation may be more linked to applicants not always having an effective opportunity to submit relevant information if it arises at a later stage without the assistance of an NGO.

[557] As reported in Germany and Norway.

4. Taking over responsibility for the examination of an application for international protection

Limited information is available on national practices regarding taking over responsibility for the examination of an application for international protection where another Member State is considered responsible under Chapter III of the Dublin Regulation. There are reportedly different practices concerning different categories of applicants in some Member States[558] and this is linked to the application of the sovereignty clause (Article 17(1)) which is analysed in detail in section 1 of Chapter III. Most Member States surveyed assess firstly whether another Member State is responsible in accordance with the Dublin Regulation before deciding to take over responsibility for examining an application. Irrespective of whether or not the responsibility of another Member State is assessed firstly, it appears that the decision to take over responsibility for the examination of an application is often an implicit one in the majority of the Member States surveyed. Therefore, it is difficult to draw conclusions on the practice of taking over responsibility for the examination of an application for international protection. The use of broader discretion by the Member States to take responsibility without relying on the Dublin Regulation begs fundamental questions, such as when, and to what extent, Member States make use of such residual discretion. However, this study did not delve further into this issue.

The findings show also that sometimes an applicant may not be placed in the Dublin procedure even if it is relevant in his or her case. For example, the appeal authorities in one Member State noted that at times they receive cases where it would have been appropriate to apply the Dublin procedure but it was omitted[559] and in another Member State previous practice indicates that applicants in detention were not always subject to the Dublin procedure.[560]

In view of the above, it is difficult to draw conclusions on whether the assessment of Member State responsibility is compliant in practice with the guarantees and criteria under the Dublin Regulation and human rights obligations, such as family unity, throughout all the Member States surveyed given its interconnectedness to other aspects of the Dublin procedure, including the quality of information provided to applicants, the conduct of the personal interview and the gathering of relevant information and evidence from the applicant as well as the conduct of the assessments required, such as the BIA. The fact that applicants are not properly informed that available evidence regarding the presence of family links for the application of Articles 8, 9 and 16 can only be taken into account on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned,[561] is particularly concerning. Without that knowledge, applicants may not always be aware of the importance of providing information as early as possible on the presence of family links in a Member State. This can have negative consequences on the correct application of the hierarchy of criteria. Similarly, disagreements between Member States as to the evidence required to determine the applicability of certain criteria, the dependency and the discretionary clauses can result in lengthy delays in determining the responsible Member States and at times can lead to the incorrect criterion being applied in practice.

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[558] For example, in Greece, Malta and Poland responsibility may be taken over if the applicant has serious health concerns. In Greece, this occurs only on the basis that continuous medical treatment is required or the illness will hamper any transfer. In Greece and Malta responsibility may also be taken over if the applicant has extended family members present there.

[559] As reported in Poland. According to the interviewed staff member of the Appeal Authority this practice results from the awareness of the low efficiency of transfers to certain Member States or the negligence of the authorities.

[560] As reported in France prior to January 2015. Currently persons in administrative detention in France may be placed under the Dublin procedure when they lodge an application for international protection.

[561] Another condition under Article 7(3) of the Dublin III Regulation is that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

5. The dependency clause (Article 16)

The dependency clause should normally be used to keep or bring together applicants with their children, siblings or parents where on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of those persons or vice versa one of those persons is dependent on the applicant. This is provided that family ties existed in the country of origin, that the child, sibling, parent or applicant is able to take care of the dependent person and the child, sibling or parent is legally resident in one of the Member States, and that the persons concerned express their desire in writing. This provision should be interpreted in light of the CJEU's examination of its predecessor, Article 15(2) of the Dublin II Regulation, where it held in *K. v. Bundesasylamt* that the humanitarian nature of the provision means that the family members encompassed within it are not delimited by the definition of family under Article 2 and that where the family members are present together in the current Member State there is no requirement for the responsible Member State under the hierarchy of criteria to submit a request for that Member State to take over responsibility on the grounds of dependency as the current Member State shall normally keep together such persons on that basis.[562]

Article 11 of Implementing Regulation (EC) No 1560/2003 requires, among other conditions, that situations of dependency are assessed, as far as possible, on the basis of objective evidence, such as medical certificates.[563] Article 11 also states that the following points shall be taken into account in assessing the necessity and appropriateness of bringing together the persons concerned: a) the family situation which existed in the country of origin; b) the circumstances in which the persons concerned were separated; c) the status of the various asylum procedures or procedures under the legislation on aliens under way in the Member State. In addition, Implementing Regulation (EU) No. 118/2014 obliges Member States to consult with each other and exchange information in order to establish: a) the proven family links between the applicant and the child, sibling or parent; b) the dependency link between the applicant and the child, sibling or parent, c) the capacity of the person concerned to take care of the dependent person; d) where necessary, the elements to be taken into account in order to assess the inability to travel for a significant period of time.

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[562] The Court also clearly indicated that the dependency clause should normally result in keeping or bringing together family members when a relationship of dependency exists except where an exceptional situation arises [para. 46] "*With regard, more precisely, to the obligation 'normally' to keep together the asylum seeker and the 'other' family member within the meaning of Article 15(2) of Regulation No 343/2003, this must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen.*" CJEU, Case C-245/11, *K. v. Bundesasylamt*, judgment of 6 November 2012, available at: http://www.refworld.org/docid/50a0cd8e2.html. It should be noted that the information gathered in this study only focused on the application of Article 16 of the Dublin III Regulation as part of an outgoing take charge request and not when Article 16 is used to take over responsibility for the examination of an application for international protection in the same Member State.
For more information on UNHCR's understanding of 'dependency' see for example UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: http://www.refworld.org/docid/4ae9aca12.html:
"*13. While there is no internationally recognized definition of dependency, UNHCR uses an operational definition to assist field staff in the work with individual cases:*
– Dependent persons should be understood as persons who depend for their existence substantially and directly on any other person, in particular because of economic reasons, but also taking emotional dependency into consideration.
– Dependency should be assumed when a person is under the age of 18, and when that person relies on others for financial support. Dependency should also be recognized if a person is disabled not capable of supporting him/herself.
– The dependency principle considers that, in most circumstances, the family unit is composed of more that the customary notion of a nuclear family (husband, wife and minor children). This principle recognizes that familial relationships are sometimes broader than blood lineage, and that in many societies extended family members such as parents, brothers and sisters, adult children, grandparents, uncles, aunts, nieces and nephews, etc., are financially and emotionally tied to the principal breadwinner or head of the family unit.
[…] 25. The concept of dependency encompasses also individuals who may not be related by blood lineage, but nevertheless have been taken into care by the refugee family either in the country of origin or the country of refuge, including close family friends, foster children and other social relations."

[563] Article 11 states that where such evidence is not available or cannot be supplied, humanitarian grounds shall be taken as proven only on the basis of convincing information supplied by the persons concerned.

Apart from the Implementing Regulation, the findings show that most of the Member States surveyed do not have any national guidance on the assessment of dependency.[564] One Member State has guidelines which regulate the assessment of the relation of dependency and are reportedly followed in practice[565], while case law developments in the wider immigration sphere guides the process of applying the dependency clause in another Member State.[566] Therefore, the assessment of the applicability of the dependency clause in most Member States often depends on the individual circumstances of the case.[567]

Limited information is available on whether or not "dependency" as a concept is applied more broadly than that provided in the Dublin Regulation in some Member States. The findings show it is not assessed more broadly in some Member States[568] but the sovereignty clause will be considered as to its applicability instead in situations extending beyond the conditions of dependency outlined under the dependency clause.[569] One Member State reportedly does apply the dependency clause more broadly but the success of that or not depends on the cooperation of the requested Member State and whether that Member State accepts such a request.[570] It is also assessed more broadly in some Member States which submit take charge requests even if family ties were formed outside the country of origin, which in line with the humanitarian objective of the provision, constitutes a positive practice.[571] A positive practice is noted in that in some Member States the humanitarian clause may be used for cases where the dependency clause cannot be applied.[572] Although it is difficult to draw a conclusion based on the fact that this provision is rarely applied in practice, it appears that Annex VII of the Implementing Regulation No 118/2014, i.e. the standard form for exchange of information on the child, sibling or parent of an applicant in situations of dependency pursuant to Article 16(4), is seldom used for the exchange of information between Member States.[573]

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[564] As reported in Denmark, France, Greece, Italy, Malta, Poland and the United Kingdom. In Germany there are binding internal instructions on the Dublin Regulation but the researcher did not have access to them.

[565] Norway's UDI Guidelines 2014-001 of 31 July 2015, *New guidelines regarding processing of cases in accordance with the Dublin III Regulation*, available (in Norwegian) at: http://goo.gl/oj7Jo2. According to these guidelines it is mandatory to apply Article 16 of the Dublin III Regulation if the following criteria are established:
– The family tie existed in the home country;
– The dependency is caused by one of the reasons in Article 16 of the Regulation (serious illness, disability, old age, pregnancy or a new-born child);
– The dependent person has a real need for help and the family member is capable of providing relevant help; and
– Both the dependent and the family member agree in writing to be reunited.

[566] As reported in the United Kingdom.

[567] As reported in Denmark, France, Germany, Greece, Italy, Norway, Poland and the United Kingdom. The Danish Refugee Appeals Board stated that they carry out an overall assessment of the case based on the information related to the applicant's personal health, personal circumstances, family situation and the background country information on the conditions in the relevant Member State. In Germany, in cases of illness a medical certificate is required.

[568] As reported in Norway, Poland and the United Kingdom. The United Kingdom interprets the wording of "*shall normally keep or bring together*" under Article 16(1) of the Dublin III Regulation as not entailing an absolute obligation to keep or bring family together under Article 16. The United Kingdom makes reference to the CJEU case of K. v. Bundesasylamt in that regard and in particular para. 46 which states that "*With regard, more precisely, to the obligation 'normally' to keep together the asylum seeker and the 'other' family member within the meaning of Article 15(2) of Regulation No 343/2003, this must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen.*"

[569] As reported in Denmark. This approach was reported also in Germany; however, this occurs rarely in practice.

[570] As reported in Italy.

[571] As reported in Greece and Malta and also sometimes the Greek authorities interpret the term "legally resident" in a broad manner.

[572] This is reported in principle in France and Poland as well but it is only rarely applied in practice.

[573] As reported in Greece where the authorities noted that other Member States rarely communicate using this form with respect to the dependency clause. This was also noted in Denmark by the staff from DIS interviewed for the purposes of this study. It appears that the standard form is used in Italy for the exchange of information for the purposes of the dependency clause but the Italian authorities also communicate with liaison officers from other Member States present in Italy in relation to the dependency clause.

The findings show that the following factors are taken into account when assessing the applicability of the dependency clause: a) whether family ties existed in the country of origin,[574] b) whether a person is able to take care of the dependent person,[575] c) whether the health state of a person prevents him or her from travelling to another Member State.[576] In some Member States the following additional factors are also taken into consideration: the housing and economic situation[577]and employment as well as the will of the person taking care of the dependant person.[578] Factors taken into account in one Member State are statements submitted by the family members and applicant and the reasons why the applicant and family member parted in the first place and why the persons are considered to have a relationship of dependency. The authorities in one Member State stated that they would, when there is objective evidence such as a medical certificate, submit a take charge request under the dependency clause when there is a *prima facie* relationship of dependence on account of a relatively serious illness or disability as well as on account of pregnancy, old age, or new born child.[579] The authorities in one Member State reported, in terms of assessing whether a relationship of dependency exists or not in accordance with Article 16(1) that they would expect to see evidence from an independent, suitably qualified doctor/medical expert, establishing both the needs of the applicant and the level of the claimed dependency.[580]

In terms of the threshold for establishing dependency, there is ambiguity surrounding what constitutes a sufficient level of dependency in order to apply the dependency clause. The threshold is considered to be too high for some stakeholders in some Member States, which means that this provision is rarely applied in practice.[581] In one Member State it was noted that the threshold as to whether someone is seriously ill for the dependency clause to apply is very unclear and medical certificates are not always considered sufficient in practice.[582] Reportedly, the lack of common criteria on whether a person is "seriously ill" or "severely disabled" and dependent on another person creates problems between Member States in the implementation of this provision.[583]

[574] As reported in Germany, Italy, Norway and the United Kingdom. This is not considered in Greece but it is required that both parties submit consent in writing as to the relationship.

[575] In France, it appears that often applicants have to resort to administrative or judicial appeals to have the health of the applicant taken into account. Limited information is available on this in Germany. In Greece, the authorities do not request specific documents/evidence to verify the possibility of the applicant or parent/child to take care of the dependent person when submitting outgoing requests. However, it is required that both parties submit a written consent that they wish to be reunited. In Poland, the housing, income and health state of a person is taken into account to verify if they could take care of a dependent person. In the United Kingdom, accommodation of the dependent person is also taken into account.

[576] As reported in Norway. Depending on the case this might apply in Germany.

[577] This is taken into consideration in France, Poland and the United Kingdom.

[578] As reported in Italy. In Poland and the United Kingdom the authorities also consider the financial income of the family member or applicant taking care of the dependent person. In the United Kingdom, this includes evidence to demonstrate that the "*sponsor*" has sufficient funds generally to ensure that individuals do not become a burden on public funds once admitted into the State.

[579] As reported in Greece. Illnesses would include HIV, cancer and blindness. If the other Member State refused to accept responsibility under the dependency clause then the Greek authorities would submit a take charge or re-examination request under the humanitarian clause.

[580] As reported in the United Kingdom.

[581] As reported in Denmark, France and Greece. In Denmark, it appears that the threshold is set very high. A Danish NGO noted that a person cannot simply be ill for example, as it is required that they are "very ill". DIS stated that they do not require cumulative criteria in dependency cases but in practice they reject cases because they do not find the dependency requirement to be satisfied and this is required regardless of the circumstances of the case. In Greece, outgoing requests to take charge are reportedly frequently refused even if the dependent person suffers from serious illnesses such as cancer.

[582] As reported in France. Generally, psychological problems are not considered as preventing transfers and it is considered that all Member States can provide applicants with the care they need.

[583] As reported for example in Greece.

An applicant who had been diagnosed with anxiety disorder and depression and was on medication reported that he could not be reunited with his parents and siblings legally residing in another Member State as the requested Member State refused to take charge of the applicant under the dependency clause on the grounds that the threshold of dependence was not met.

[19 year old Syrian applicant, interviewed in Greece]

Reportedly, the scope of the dependency clause does prevent in practice applicants from reuniting with dependent persons who may belong to the extended family with regard to the family relations covered and the restrictive enumeration of the grounds of dependence.[584] The CJEU case of *K v. Bundesasylamt* should be noted in this respect as the Court held that given its humanitarian purpose, the definition of family should not be limited to that under Article 2(g).[585]

A related problem is that Member States can have different conceptions as to what constitutes dependency, which also affects the way it is addressed at the personal interview under Article 5 of the Dublin Regulation and whether or not related information is recorded. For example, in one Member State[586] dependency is only referred to in economic terms for the purposes of the interview, whilst in another Member State[587] the mentioning of a need for "moral support" is in practice not always considered to be indicative of a relationship of dependency as such. In practice, this could result in not further assessing all relevant aspects of an individual case such as whether the dependency is linked to any of the grounds laid down in the dependency clause and what kind of assistance is needed.

From the audit of case files concerning the dependency clause[588] it appears that, when applied, this clause is acted upon quickly by the authorities concerned with transfers effected on this clause being carried out within approximately 2.5 months of the lodging of an application for international protection. The particular vulnerability of the applicant also appears to accelerate the transfer procedure once a request is accepted.[589] Overall, the provision appears to be applied more frequently when the basis of dependency concerns physical disabilities and severe ill health, such as people in the final stages of a chronic illness.

Several challenges relating to the application of the dependency clause were raised as part of this study including the lack of a definition of what constitutes a relationship of dependency,[590] the different thresholds among Member States for identifying dependency,[591] and the fact that the standard of proof for establishing dependency can be set too high.[592] In one Member State a request was refused due to a lack of evidence to support the claimed familial relationship. The applicant expressed a willingness to undergo a DNA test, which the Member State agreed to consider, however it would appear from the case file that neither Member State involved proactively followed-up on this, nor did they arrange to facilitate the testing.[593] Some Member States

[584] For example, this is evident in Greece.

[585] The Court in that case was referring to Article 16's predecessor in the Dublin II Regulation, Article 15(2) and the Court stated "T*aking into account its humanitarian purpose, Article 15(2) of Regulation No 343/2003 delimits, on the basis of a criterion of dependence on account of, inter alia, an illness or serious handicap, a group of members of the family of the asylum seeker which is necessarily wider than that defined by Article 2(i) of that regulation.*" CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012, available at: http://www.refworld.org/docid/50a0cd8e2.html.

[586] As verified in Poland during the observation of some personal interviews.

[587] As reported in Germany.

[588] Due to the limited use of this provision in practice only a limited number of such case files (11) could be audited.

[589] For example, one audited case file involves a particularly vulnerable 107 year old mentally disabled woman and the transfer to the responsible Member State took place within 13 days of the request being accepted by the responsible Member State.

[590] As reported in Germany, Greece and Poland.

[591] As reported in Greece and Italy.

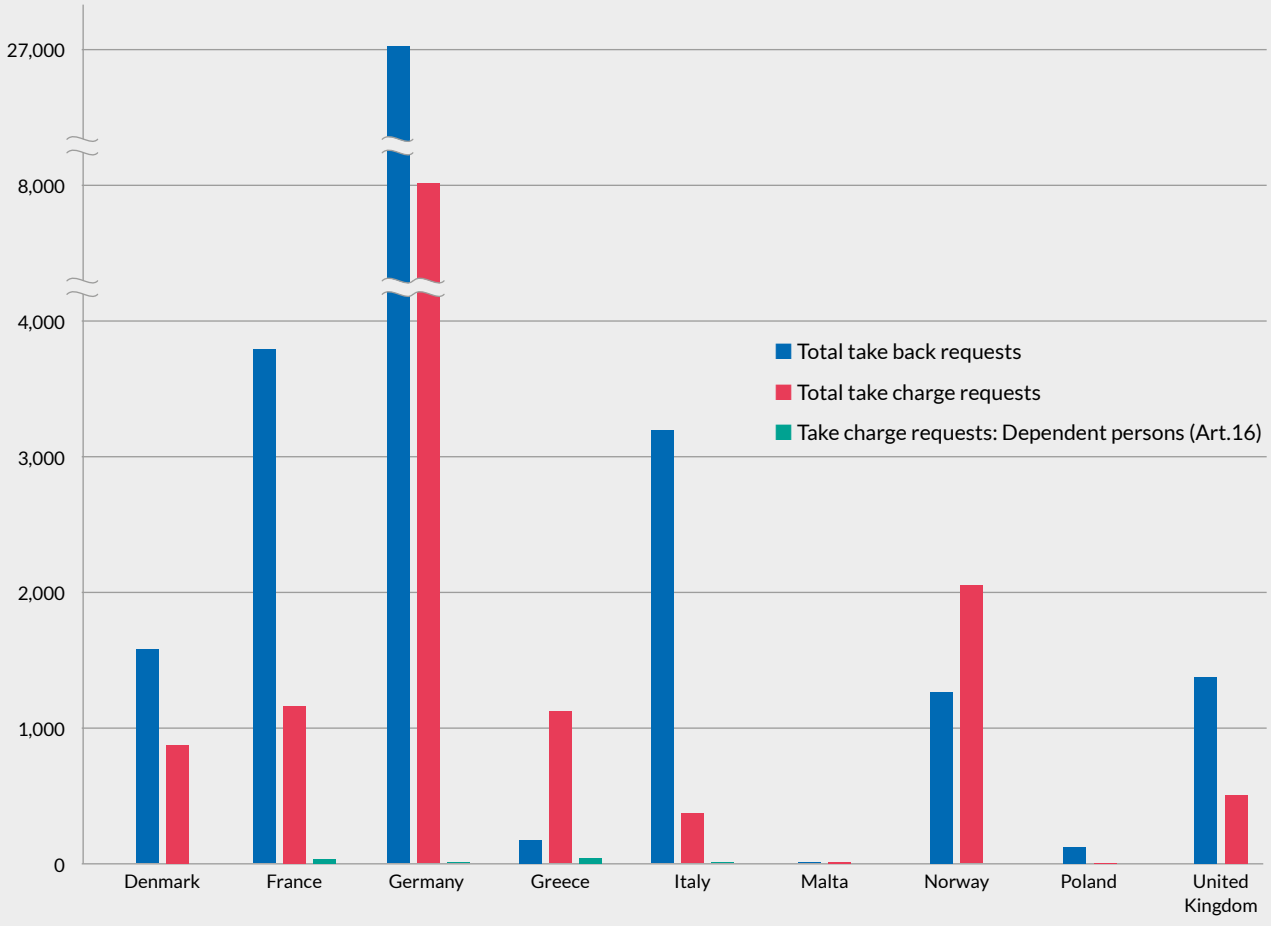
[592] As noted in Denmark, Greece and the United Kingdom.

[593] As identified in a case file audit undertaken in the United Kingdom. At the time of the study it remained unclear whether the test had taken place.

have a very restrictive interpretation of this provision, which means that it is not often applied in practice.[594] Another difficulty is related to the lack of information provided to applicants on this provision, which holds applicants back from sharing information necessary for its application.[595] Furthermore, the way information is collected during the personal interview can impact whether the authorities even consider the applicability of the dependency clause; for example, it is sometimes not mentioned in interview records if the applicant has been asked whether they are dependent on someone or vice versa, and due to the general lack of appropriate information the applicant may not know the importance of providing such information.[596] It was noted by stakeholders in one Member State that once an applicant raises the issue of dependency, follow up questions are not always received. As a consequence, the decision maker, after the interview, may not have sufficient information on which to base the decision.[597]

Statistical data regarding the application of the dependency clause shows how little it is applied in practice. The following charts report data on its use in 2014, 2015 and 2016[598] in the countries surveyed.

Outgoing requests based on Article 16 in proportion to outgoing take charge and take back requests by Member State (2014)



[594] This is reported as a problem in Denmark, Malta and the United Kingdom.

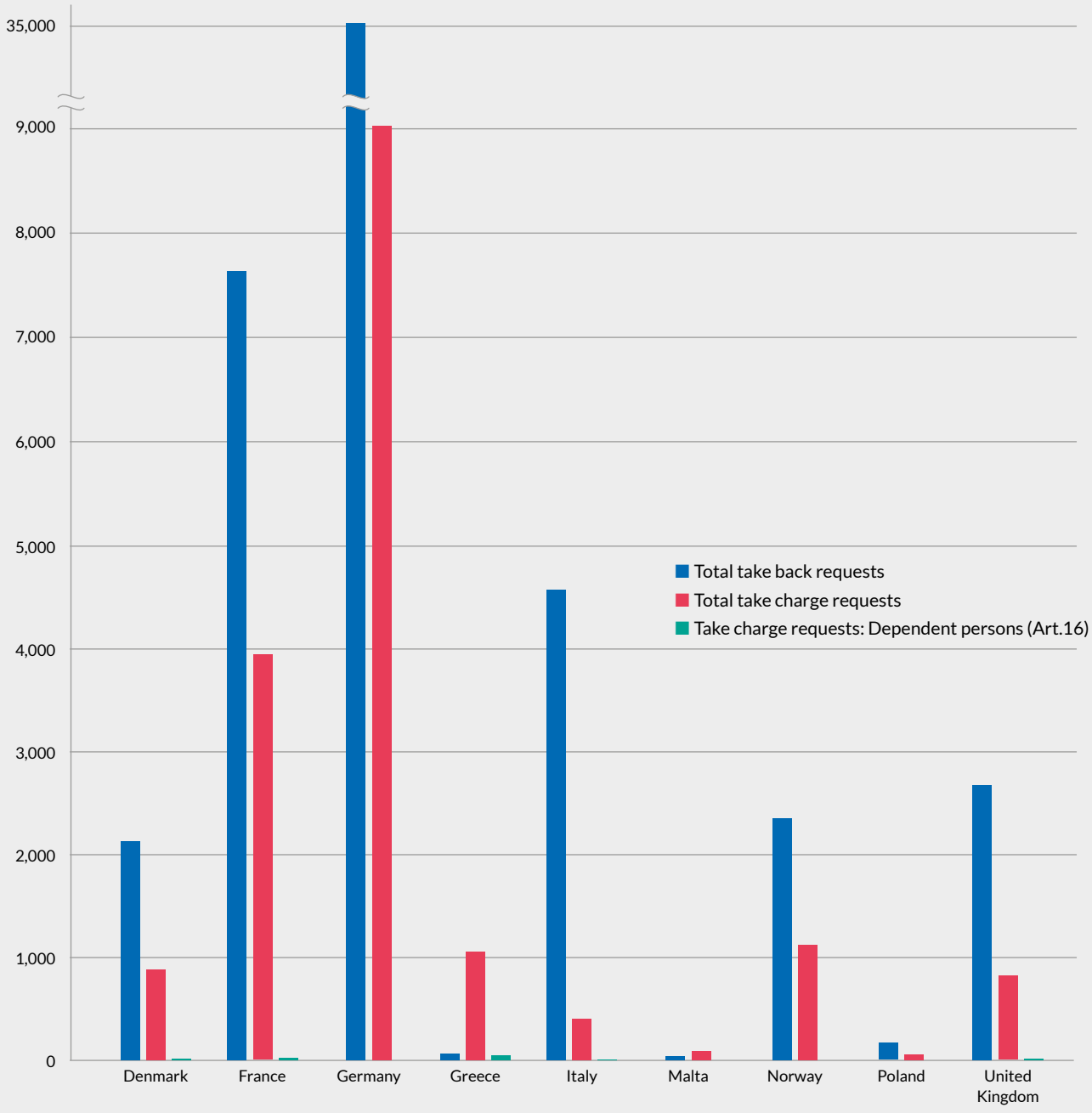
[595] For further information on the provision of information to applicants under the Dublin Regulation see section 1 of Chapter I.

[596] As reported in Denmark where applicants are asked about their own health and family relations but are not asked systematically about the health or dependency of other family members.

[597] As reported in Germany.

[598] Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro]. Data extracted on 31 July 2017. Data for Greece for 2016 was not available at the time of extraction.

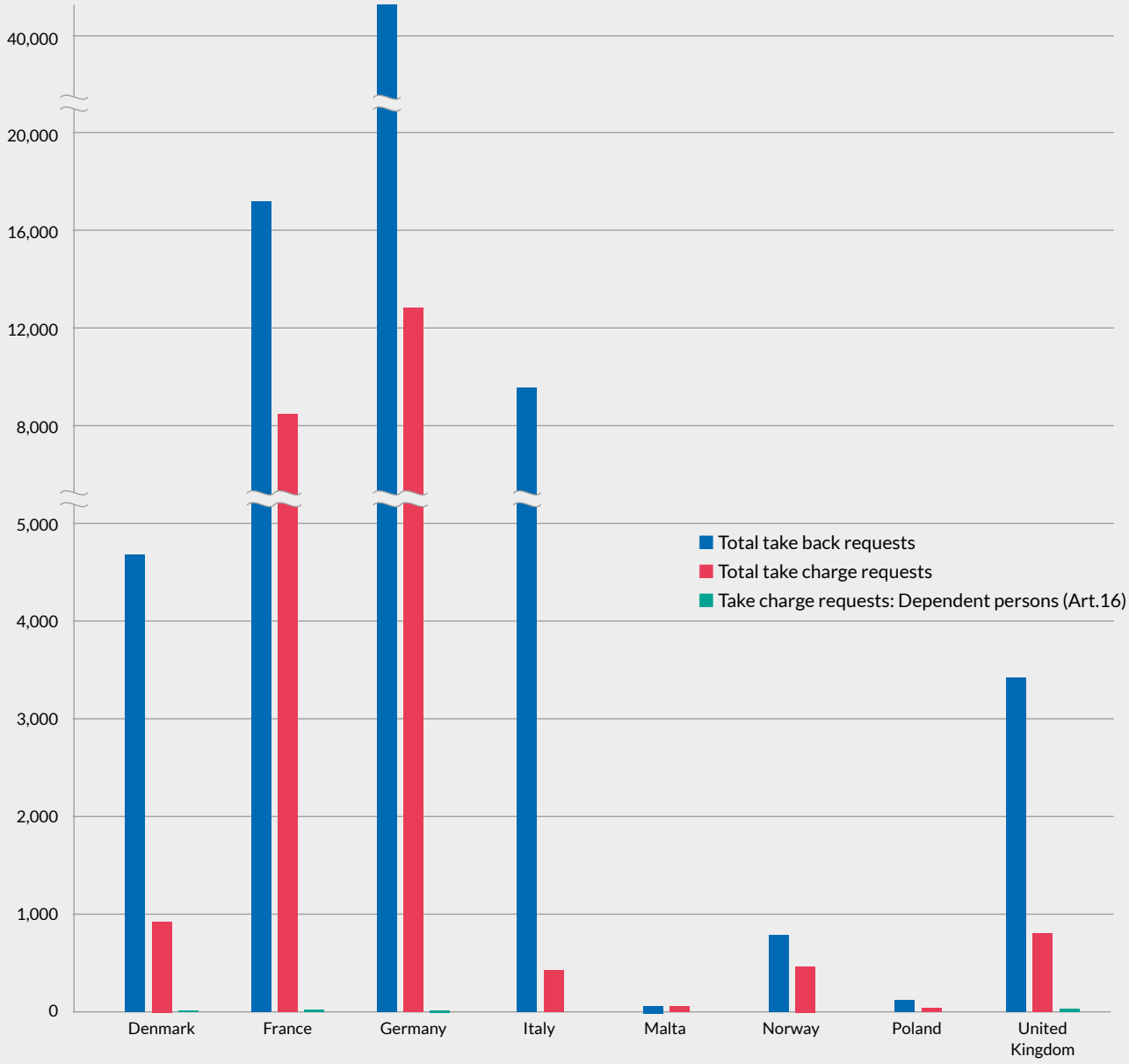
Outgoing requests based on Article 16 in proportion to the total amount of take back and take charge requests by Member State (2015)



For example, according to available Eurostat data, in 2014 no requests on the basis of the dependency clause were submitted to other Member States by the majority of Member States surveyed. France (29 cases), Germany (5 cases), Greece (35 cases) and Italy (5 cases) applied it in a limited number of cases. In 2015, the clause was applied in even less cases by the countries surveyed in this study (26 cases overall), which is particularly significant in consideration of the fact that the overall number of take charge and take back requests was higher in 2015. Similar considerations can be made for 2016 (27 cases overall).

The findings indicate that a restrictive interpretation of the dependency clause means that it is rarely applied in practice. Member State practice illustrates that the threshold for dependency is often set too high in practice, thereby preventing family reunion under this clause.

Outgoing requests based on Article 16 in proportion to the total amount of take back and take charge requests by Member State (2016)



Determining Member State responsibility for examining an application for international protectionThe findings of this study show that significant delays occur in reuniting unaccompanied children with family members, siblings and relatives under Article 8 of the Dublin Regulation. These delays, which can lead in practice to family reunion procedures concerning children lasting even longer than the maximum time frames provided in principle under the Dublin Regulation (11 months), are one of the key reasons why many children move on and make their own journey to reunite with their family outside of the Dublin system.

As regards adult applicants, family tracing is not actively conducted in most of the Member States surveyed. Furthermore, differing evidential requirements and time limits also affect whether or not applicants are able to benefit from the criteria under Articles 9 and 10 of the Dublin Regulation for family reunion purposes. Overall, delays in the processing of family reunion cases concerning adults are a common feature among all the

Member States surveyed. In this context it should be noted that the right to good administration as affirmed in Article 41 of the EU Charter requires i.a. that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time. In the context of Dublin procedures it is crucial that decisions are reached within a reasonable period of time to ensure that applicants have effective access to the asylum procedure in accordance with both Article 18 and Article 41 of the EU Charter.

Finally, concerns emerge in relation to the application of the dependency clause. Despite its humanitarian purpose, a lack of clarity exists in relation to the criteria for its application. This often leads to restrictive interpretations of the clause, thereby limiting its application in practice.

RECOMMENDATIONS

UNHCR is aware of the difficulties faced by Member States in the implementation of the Dublin Regulation and is of the opinion that a re-think of the system is needed to overcome some of the inherent challenges of the current system. To that end, UNHCR has formulated a set of proposals in its paper "Better Protecting Refugees in the EU and Globally" of December 2016.2[599] However, until an agreement is reached on a new, more efficient system, a common understanding is needed to make the current Dublin system work to the best of its ability. Swift procedures, supported by common standards and enhanced cooperation between Member States, are in the interest of Member States and applicants alike. To this end, Member States are encouraged to implement the following recommendations:

- **National authorities involved in the Dublin procedure, namely the Dublin Units, should be sufficiently capacitated and equipped** to ensure that appropriate resources are made available for the effective functioning of the system, to ensure that procedures can be carried out within the prescribed time limits in the interest of Member States and applicants alike.
- **Evidentiary requirements for establishing family links should be reasonable** to ensure that Articles 8, 9, 10 and the dependency clause (Article 16) guarantee family unity in practice. All available information and evidence, including applicants' statements, should be given due consideration to ensure a correct determination of responsibility. Refugees may often be obliged to flee without their personal documents, or relevant civil status documents may not be issued in the country of origin. Hence, there may be situations in which relationships can be proved only through oral evidence.
- UNHCR encourages Member States to **assess the possibility of applying the family reunion criteria in a proactive manner and without additional requirements** beyond those foreseen under the Dublin Regulation; such additional requirementscreate delays which contribute to impairing the correct functioning of the system.
- In light of its humanitarian purpose, **the dependency clause (Article 16) should be applied in a flexible and inclusive manner** to keep or bring together family members and other family relations who are dependent on one another; clear and common thresholds and guidance to establish dependency would ensure a common understanding between Member States and an enhanced and effective use of the dependency clause in line with European standards. UNHCR stands ready to support the development of such guidance.
- **The presence of liaison officers in other Member States' Dublin Units should be enhanced**; this could assist in enhancing common understanding and speeding up procedures, in particular in relation to specific caseloads, such as children, or at times of particular pressure on a Member State.

[599] UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: http://www.refworld.org/docid/58385d4e4.html

III. DISCRETIONARY CLAUSES

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Under Chapter IV of the Dublin Regulation, Article 17 comprises two clauses permitting Member States to take over responsibility for the examination of an application for international protection notwithstanding the hierarchy of criteria under Chapter III of the Regulation.[600] Article 17(1) (the sovereignty clause), by way of derogation from Article 3(1), allows Member States to take over responsibility for the examination of an application for international protection, even if such examination is not its responsibility under the criteria laid down in the Regulation. The CJEU has affirmed that the exercise of this clause is not subject to any particular condition and can be applied at the discretion of the Member State concerned.[601] Article 17(2) (the humanitarian clause) also allows the Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the responsible Member State, at any time before a first decision regarding the substance is taken, to request another Member

[600] It should be recalled here that Member States must apply national law in a manner consistent with the general principles of international law. In some cases, this may entail an obligation on the part of a Member State to take responsibility for the examination of an application for international protection through the use of a discretionary clause. For more information see above: Introduction section 5: *"The Dublin system and European Human Rights law: an overview"*.

[601] CJEU, Case C-528/11, *Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, judgment of 30 May 2013, para. 36, available at: http://www.refworld.org/docid/51a85c224.html.

State to take charge of any applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. For the purpose of applying the humanitarian clause the persons concerned must express their consent in writing. There is no similar requirement for the consent of the applicant under the sovereignty clause. According to the CJEU, the discretionary clauses should be interpreted widely in light of their humanitarian purpose and to maintain their effectiveness and the overall objective of ensuring effective access to the asylum procedure.[602] Previous studies have reported that these clauses and their predecessors under the Dublin II Regulation were rarely applied in practice.[603] This is also reflected in the present findings.

There is divergent, but overall quite restrictive practice in applying the discretionary clauses across the Member States surveyed. The discretionary clauses are seldom applied in practice as demonstrated by the statistical charts below with respect to the humanitarian clause.[604] As shown in the charts below, in 2014,[605] 2015[606] and 2016[607] take charge requests based on the humanitarian clause made up only a miniscule proportion of take charge requests and formed an even smaller amount of the total number of combined outgoing take back and take charge requests. Overall, Greece submitted a significantly higher amount of take charge requests based on the humanitarian clause in comparison to other Member States followed by Germany to a lesser extent in 2014 (37 requests) and Poland (21 requests) in 2015.[608] While data for Greece is not available for 2016, Denmark submitted 146 requests based on the humanitarian clause in 2016, which represents a sharp increase compared to previous years, followed by Germany with 48 requests. Despite this, the prevailing trend is one of the humanitarian clause almost never being applied, with the majority of the other Member States surveyed submitting no or up to 5 requests based on this provision in 2014 and 2015 a. In 2016, Italy and France submitted 6 and 8 requests respectively, while Norway and Poland submitted 12 and 15 requests respectively. This restrictive application is amplified by the fact that even if such requests are accepted by the receiving Member State this may not always result in successful transfers in practice.[609] A flexible, more liberal application of the discretionary clauses is necessary to ensure their scope and purpose is respected and to guarantee the rights of applicants, including maintaining family unity. UNHCR reiterated a number of times

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[602] CJEU, Case C-245/11, *K. v. Bundesasylamt*, C 245/11, judgment of 6 November 2012, para. 35, 40, 48, 54, available at: http://www.refworld.org/docid/50a0cd8e2.html.

[603] See for example UNHCR, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2016; ECRE, *Dublin II Regulation – Lives on Hold, European Comparative Report*, February 2013.

[604] These charts do not include data on the application of the humanitarian clause in the Member State where an applicant is present, which the case of *K. v. Bundesasylamt* permits where the issue is one of "k*eeping together family members*" in that Member State (paras 50-53).

[605] Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro]. Data extracted on 31 July 2017.

[606] Data for Denmark and the United Kingdom for 2015 was not available on Eurostat at the time of extraction. Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro]. Data extracted on 10 November 2016.

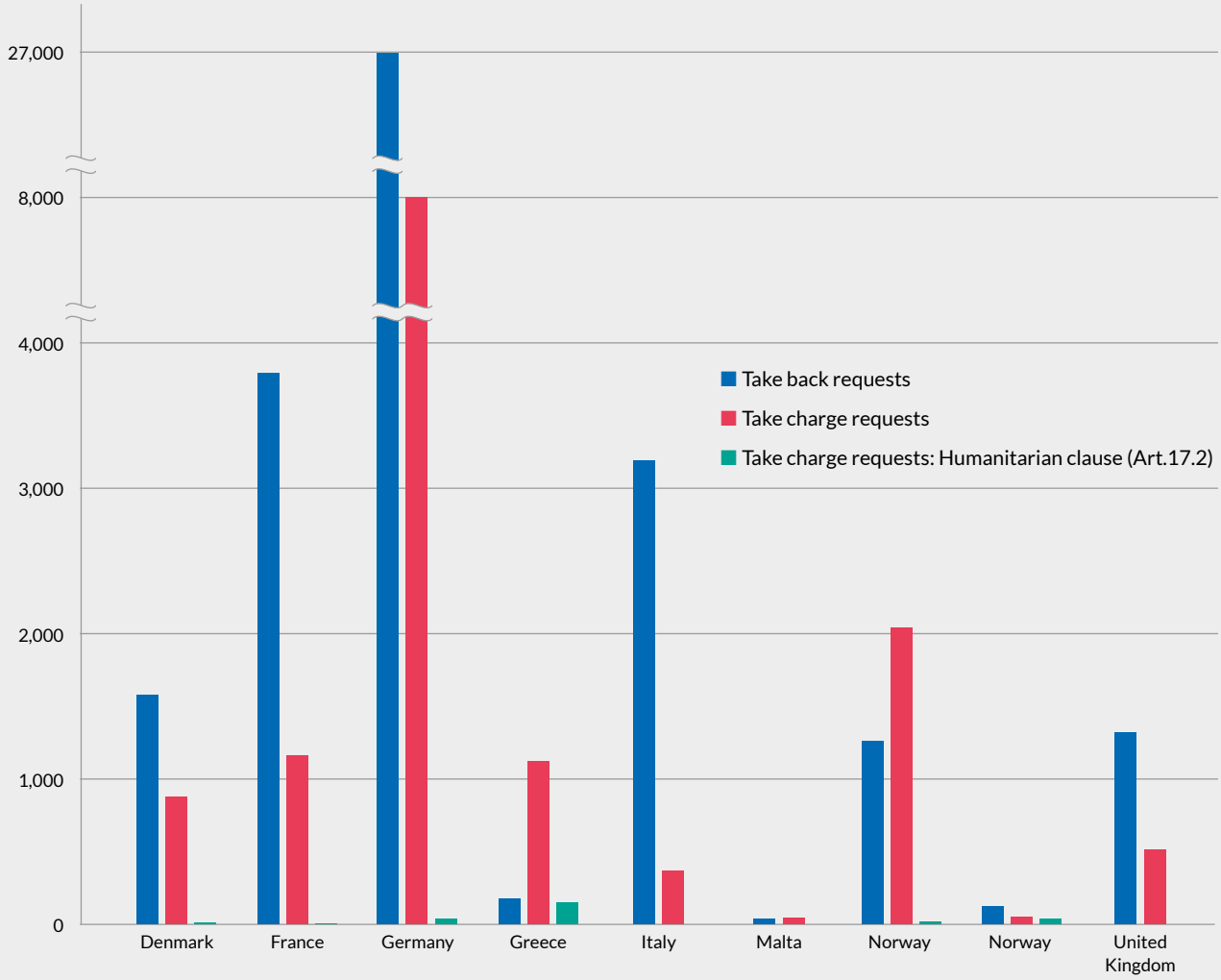
[607] Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro]. Data extracted on 31 July 2017. Data for Greece was not available on Eurostat at the time of extraction.

[608] In Greece, a separate interview is arranged by the authorities if Article 17(2) of the Dublin III Regulation is being considered for an outgoing take charge request so that further information can be gathered. This may be a relevant factor as to why Greece applies this clause more frequently in practice.

[609] By way of example, in 2014 Greece carried out 118 transfers on the basis of the humanitarian clause and 121 in 2015. However, Germany carried out only 3 transfers in 2014 and Poland did not carry out any in 2015, whilst Denmark carried out 96 in 2016. Eurostat, Outgoing 'Dublin' transfers by receiving countries (PARTNER), legal provision and duration of transfer [migr_dubro]. Data extracted on 31 July 2017. For further information on transfers see Chapter IV.

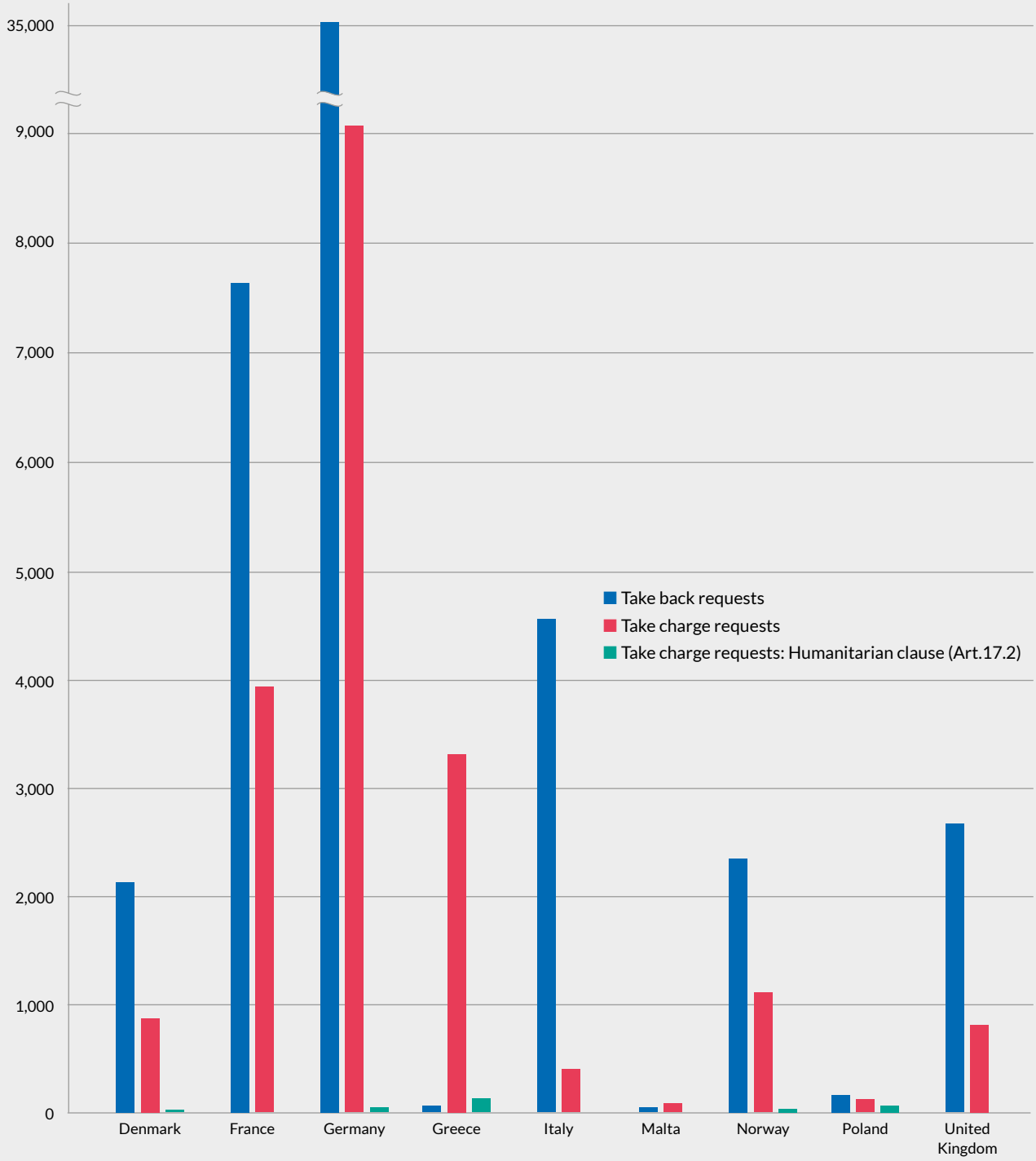
its call for the proactive and flexible use of the discretionary clauses, and in particular of the humanitarian clause.[610]

Outgoing requests based on Article 17(2) in proportion to outgoing take charge and take back requests by Member State (2014)

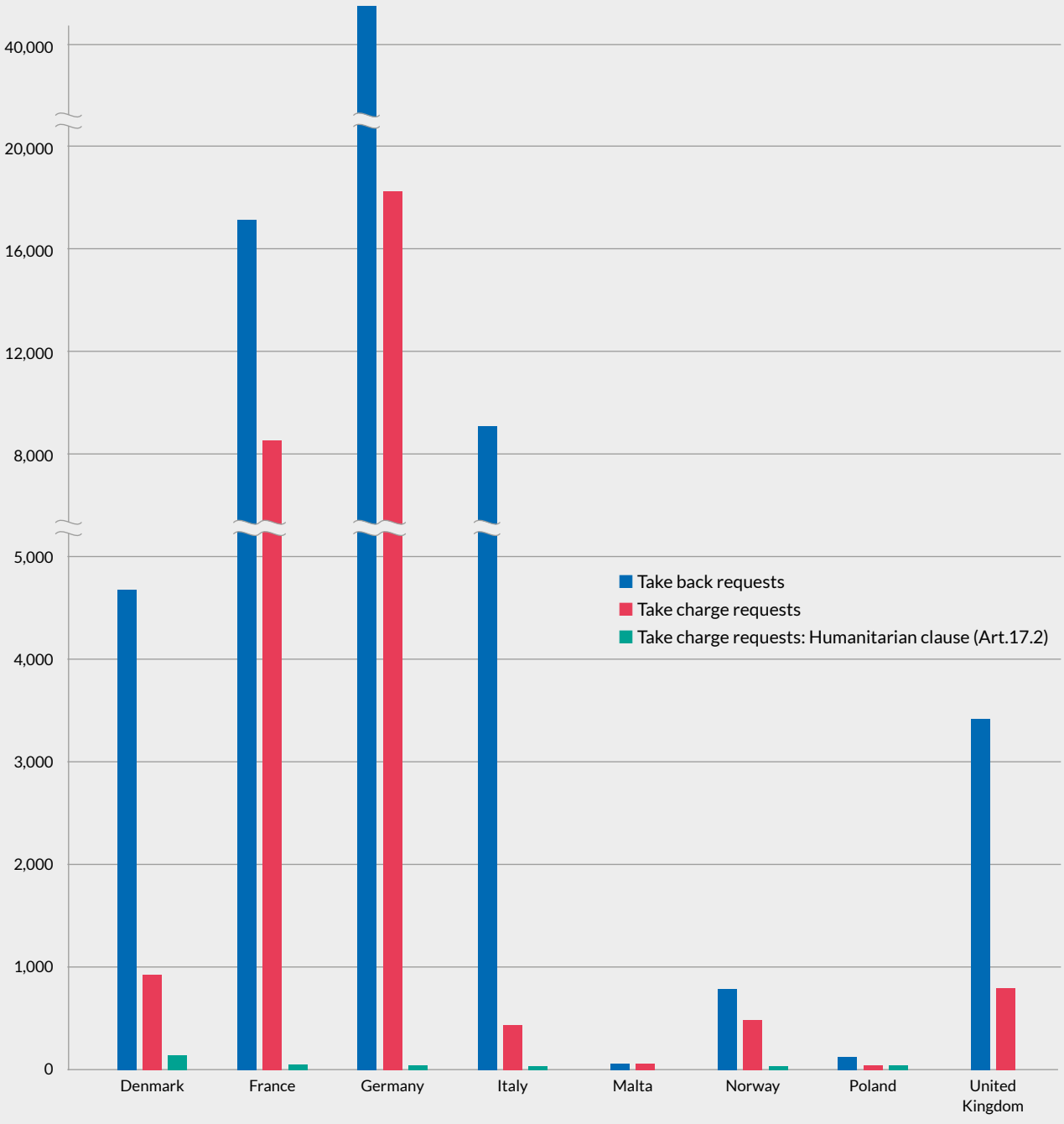


[610] For example, UNHCR, *UNHCR Central Mediterranean Sea initiative (CMSI) Proposal for a 'Response Package for Protection at Sea,'* 2 October 2014, available at: http://www.refworld.org/docid/5506a6ae4.html; UNHCR, UNHCR proposals to address current and future arrivals of asylum-seekers, refugees and migrants by sea to Europe, March 2015, available at: http://www.refworld.org/docid/55016ba14.html; UNHCR, *UNHCR Statement on the European Commission's Migration Agenda Commission's Migration Agenda*, 13 May 2015, available at: http://www.refworld.org/docid/555eeac14.html; UNHCR, *The CEAS at a crossroads: Consolidation and implementation at a time of new challenges. UNHCR's recommendations to Latvia for the EU Presidency January – June 2015*, January 2015, available at: http://www.refworld.org/docid/54afbee34.html.

Outgoing requests based on Article 17(2) in proportion to the total amount of take charge and take back requests by Member State (2015)



Outgoing requests based on Article 17(2) in proportion to the total amount of take charge and take back requests by Member State (2016)



The findings show that there is limited or no transparency in some Member States around the use of these clauses as they are frequently only applied on an implicit basis.[611] The lack of explicit reasoning and decisions concerning the sovereignty clause limits the analysis that can be made on the information gathered as part of this study. The reasons behind this restrictive application are somewhat unclear but includes the nature of the Dublin Regulation where exemptions are viewed as exceptional, the fear of establishing a precedent for future similar cases and perceived political nature of such decisions,[612] as well as an inconsistent approach to decision-making at times. Nevertheless, the table to the left provides quantitative information of the application of the sovereignty clause.[613]

	2014	2015
Denmark	220	:
Germany	2,225	10,495
Greece	0	0
France	122	339
Italy	1,133	:
Malta	0	0
Poland	8	13
United Kingdom	:	0
Norway	:	534

Most Member States do not have guidance for the application of the discretionary clauses.[614] Even if there are SOPs in place they may be limited in nature.[615] This is in contrast to the practice in one Member State where there are eight instructions issued to caseworkers on the operation of the sovereignty clause.[616] Despite this guidance the sovereignty clause is regularly applied only in a limited number of cases in practice in that Member State.[617]

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[611] If the authorities decide to take over responsibility for the examination of an application for international protection in Germany, France, Italy, Norway and Poland, no explicit decision is issued to that effect but it is assumed that the sovereignty clause is applied in those circumstances in practice. For example, in France decisions are unmotivated and implicit so it is difficult to determine what factors are influential in applying this clause. In Denmark, the applicant receives a letter stating that his or her application will be examined in Denmark, but the letter provides no reasoning or reference to the provision applied, although the specific article applied, since March 2015, is registered in DIS' systems. In Greece it appears that the decision to apply Article 17(1) of the Dublin III Regulation is not issued in writing.

[612] In cases where the use of the discretionary clause might bind the Member State for the future, or may imply a negative evaluation of the reception/human rights standards of another Member State, the Italian Dublin Unit reportedly prefers triggering the Italian competence by the expiration of time limits under the Dublin procedure.

[613] Eurostat, Unilateral 'Dublin' decisions by partner country and type of decision [migr_dubduni]. Data extracted on 31 July 2017. Data for 2016 was not yet available at the time of finalizing this report.

[614] For example, no guidance exists in Denmark, France, Italy, Poland and the United Kingdom. Comprehensive SOPs exist in Norway. In Malta there is a quasi-general practice of applying the sovereignty clause under certain circumstances but no guidance exists. In Malta, this quasi-general rule applies where there is no answer to a take back or take charge request within three months. In these cases, the application is examined in Malta with the consent of the applicant. In the United Kingdom, the policy and guidance is yet to be updated and it is unclear what guidance is being received by caseworkers in the interim period. France is proposing to provide new guidance on the application of the discretionary clauses in 2016. It is unclear from the information gathered if there are internal instructions in use in Germany on the application of the discretionary clauses.

[615] There is a limited SOP in Greece for the application of Article 17(2) of the Dublin III Regulation but it is not detailed and is used by the registration officers at the Asylum Service for identifying *prima facie* Dublin cases as opposed to the Dublin Unit staff who actually determine whether the discretionary clause should be applied or not in practice.

[616] In Norway, SOPs for the discretionary clauses are governed by Section 32(2) of the Immigration Act and Section 7-4 of the Immigration Regulation. Section 32(2) enables the Norwegian authorities to take over responsibility for an application for international protection when the applicant concerned has a connection to Norway. Currently there are eight instructions from the Norwegian Ministry of Justice on the application of the sovereignty clause (Article 17(1) of the Dublin III Regulation) in force: 1-2) Two instructions on the examination on the merits and prioritisation of applications for international protection where Greece is the responsible Member State; 3) Exemptions from the Dublin procedure for reasons of cost and efficiency; 4) Instruction on the interpretation of Section 32(2) of the Immigration Act for persons who have previously been employed by the Norwegian forces/authorities in Afghanistan and who seek protection in Norway; 5) Instruction on the practice of Section 32(2) of the Immigration Act concerning the transfer of applicants for international protection to Bulgaria; 6) Treatment of cases in accordance with the Dublin II Regulation when information in regard to human trafficking is revealed; 7) Instruction on the practice of Section 32(2) of the Immigration Act concerning the transfer of children and families seeking international protection to Italy; 8) Instruction on the handling of cases where an unaccompanied child has previously applied for protection in another Member State. The guidelines can be found at: http://www.udiregelverk.no/no/sok/?q=dublin.

[617] The provisions of the Immigration Act and Immigration Regulations in Norway restrict the scope of discretionary clauses. Case workers have no discretion to apply Article 17 outside of those instructions in practice, and a restrictive interpretation of the sovereignty clause is applied by the authorities as a result.

Factors which influence the application of the discretionary clauses

Factors which influence the application of the discretionary clauses, in particular the sovereignty clause, include, but are not limited to the following: the conditions in the receiving Member State based on country information[618] and jurisprudence from national Courts as well as judgments of the ECtHR and CJEU,[619] the health needs of the applicant[620] and/or his or her vulnerability,[621] and the presence of extended family members amongst others. Whether or not the application of the discretionary clauses is considered as a matter of general policy can be influenced also by the advocacy of NGOs or government petitions, whilst in individual cases litigation and interventions by legal advisors and other relevant stakeholders in support of a case can influence their application in practice. The considerations of UNHCR[622] and other relevant stakeholders on national protection systems can also be influential in the application of the sovereignty clause.

It appears that policy decisions only apply in relation to the application of the sovereignty clause, whilst the humanitarian clause applies within the framework of its own stipulated conditions. Policy decisions in relation to the application of the discretionary clauses are normally taken at a high government level given their broader ramifications on the number of applications for international protection examined in a Member State.[623]

Overall, there is varying practice across the Member States on whether the application of these clauses can be triggered by the applicant or only at the initiative of the Member State itself. In the majority of Member States surveyed it is a combination of both depending on whether Article 17 is applied on the basis of individual circumstances or broader policy considerations. For example, the application of the sovereignty clause on grounds of policy reasons is at the initiative of the Member State only. However, in some Member States, applicants are able to request the authorities to consider the application of the discretionary clauses.[624] In this context the provision of relevant information and support of a legal advisor or NGO is often key to enable applicants to make and support such a request, especially as in some Member States clear and thorough information on the applicability of the discretionary clauses is not systematically provided.[625]

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[618] As reported in Denmark, Germany and Norway.

[619] As reported in Denmark (where decisions at the national level are rendered by the Danish Refugee Appeals Board, an independent quasi-judicial body), Germany, Italy, Poland, Norway and decisions from the Tribunal in the United Kingdom.

[620] As reported in Greece, Malta and Norway.

[621] As reported in Norway. The sovereignty clause is applied in Germany since 2009 where the applicant is particularly vulnerable and the Member State responsible according to the hierarchy of criteria in Chapter III of the Dublin Regulation would be Malta, and since 2014 on a case-by-case basis where the applicant is to be returned to Bulgaria.

[622] UNHCR is mandated to monitor the implementation of the Refugee Convention by virtue of its Statute in conjunction with Article 35 of the Refugee Convention and Article II of its 1967 Protocol. Relevant domestic law, regulations, decrees, instructions, administrative decisions and other related administrative measures are regularly measured by UNHCR against the international refugee instruments.

[623] For example, this is apparent from the practice in Germany, Norway and the United Kingdom.

[624] For example, Denmark, Germany, Greece, Malta and Poland. Applicants in France and the United Kingdom often need to resort to litigation in order for the authorities to apply the sovereignty clause. The applicant's consent is necessary to apply the sovereignty clause in Malta despite not being a requirement under the Dublin Regulation.

[625] This should be read in conjunction with sections 1 and 2 of Chapter I on provision of information and the personal interview. In Germany, the present information leaflet does not contain information on the discretionary clauses. No oral information is systematically provided on the discretionary clauses in Greece and sometimes the fact that reuniting family members under Article 17(2) of the Dublin III Regulation is at the discretion of receiving Member States is not always clearly explained by the Greek authorities. In Malta, clear information on discretionary clauses is only provided by NGOs and UNHCR. Similarly, in Italy there is no systematic information provided on Article 17 and only NGOs provide information on this provision in practice. No information is provided on the sovereignty clause in Poland, although some information is provided by the authorities on the humanitarian clause.

Other external factors, which may impact upon the extent to which the discretionary clauses are applied, include the quality of the personal interview[626] and the knowledge of the staff in the national authorities.[627]

1. Application of the sovereignty clause (Article 17(1))

From the outset, it should be noted that some of the grounds for applying the sovereignty clause are a continuation of practices related to its predecessor, Article 3(2) in Council Regulation (EU) No 343/2003.[628] Additionally, although the current Article 3(2)[629] falls outside the scope of this study the two Articles are interlinked and it appears that sometimes the sovereignty clause is applied in situations when the current Article 3(2) may also be appropriate, for example, when systemic deficiencies exist in the reception conditions and asylum systems in particular Member States.[630] The sovereignty clause is not frequently applied in practice and the reasons as to why the sovereignty clause is invoked are not always clear and appear varied and inconsistent across the Member States surveyed.[631] There are no time limits for applying the sovereignty clause so it can also be invoked after a transfer decision has been issued. This may occur for example when national Courts overturn the decision of the Dublin authority to transfer an applicant to a particular Member State.[632] Therefore, these findings overlap to a certain extent with the section *"Challenges related to effecting transfers"*

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[626] In this respect the lack of appropriate follow-on questions when information of relevance for the application of the discretionary clauses is raised and the lack of an accurate record of the information gathered during the personal interview, can have an adverse impact on the possibility to make use of such provisions in practice. In Denmark, for example, the reasons why certain questions are asked are not always clearly explained by interviewing officers, which can mean that applicants may not necessarily provide relevant information for the application of Article 17 of the Dublin III Regulation. In the United Kingdom, no systematic information is provided on Article 17.

[627] For example, stakeholders in Germany noted that some BAMF caseworkers were not aware of the application of the discretionary clauses.

[628] Article 3(2) of Council Regulation (EU) No 343/2003 stated the following: "*By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.*" Some of the policies surrounding the application of Article 17(1) of the Dublin III Regulation relate to the previous Article 3(2) by virtue of the fact that some of these policies were applied prior to the current Dublin Regulation in relation to CJEU rulings such as Case C-411/10 and C-493/10, *N. S. (C 411/10) v. Secretary of State for the Home Department* and *M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* , judgment of 21 December 2011, available at: http://www.refworld.org/docid/4ef1ed702.html.

[629] Article 3(2) of the Dublin Regulation states "[…] *Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible. […]*"

[630] For further information on the previous application of Article 3(2) under Council Regulation (EU) No 343/2003 see UNHCR, *Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, 31 January 2011, available at: http://www.refworld.org/docid/4d7610d92.html.

[631] For example, the practice concerning the sovereignty clause is reportedly particularly restrictive in France, Norway and Poland. In Germany, stakeholders reported that the sovereignty clause is applied in an inconsistent manner in practice except for cases in which binding instructions (e.g. for victims of human trafficking) or general policy decisions are in place as indicated above.

[632] The scope of the appeal is beyond the remit of this study but depending on the Court's powers it may not only cancel a transfer decision but also order the application of the sovereignty clause itself or send the cases back to the relevant national authority to be reconsidered under the Dublin Regulation.

(Chapter IV, section 3)[633] and they should be read in conjunction with one another. Given its discretionary nature, in certain Member States permission or approval to apply the sovereignty clause is required from designated and/or senior staff in national authorities.[634] This may be an indication of the sensitivity in the application of this provision.

Two approaches to applying the sovereignty clause are visible from the findings: 1) based on policy considerations and other established practices; 2) based on the individual circumstances of the applicant concerned. The policy decisions and established practices include approaches pertaining to certain nationalities or categories of cases such as persons with specific health requirements, or based on the transfer of applicants to certain Member States. As regards the approach to applying the sovereignty clause based on the individual circumstances of a case, this appears to be exceptional in nature[635] and is frequently not based on clear assessment criteria but may involve personal, health, humanitarian and family reasons. It mainly rests on the discretion of individual caseworkers and their supervisor's or more senior staff's approval and the applicability appears to be mostly dependent on the circumstances of the individual case. A stakeholder in one Member State noted that the sovereignty clause is more commonly applied for administrative and policy reasons than considerations concerning individual applicants.[636]

The limited number of case files surveyed concerning the sovereignty clause indicate that the sovereignty clause may be applied in individual cases, for example, when the requested Member State refuses a request to assume responsibility on the basis of the criteria in Chapter III of the Dublin Regulation[637] and for humanitarian reasons and human rights considerations, such as the risk of human trafficking. The findings below focus on the application of the sovereignty clause on the basis of policy decisions and established practices. [638]

Application of the sovereignty clause on the basis of policy decisions and established practice

In applying the sovereignty clause, policy decisions and practices are often based on political decisions or on account of national and regional Court rulings concerning transfers to certain Member States, both of which are based on human rights obligations or humanitarian considerations.

[633] This is due to the fact that the sovereignty clause is sometimes applied on an implicit basis.

[634] For example, Denmark and Germany. In Denmark, where decisions concerning the application of the Dublin Regulation are taken by DIS caseworkers, when considering applying one of the discretionary clauses DIS caseworkers as a rule have to bring the case to the attention of the Dublin Unit (also part of DIS). When caseworkers are considering applying Article 17(1) of the Dublin III Regulation in Germany they must first seek approval from higher officials, such as the Heads of BAMF branch offices or the Head of the Dublin Unit before applying it. One caseworker in Germany noted that sometimes they wait until the time limits elapse to have Germany examine the application for international protection, rather than seek approval from their superiors to apply Article 17(1). In contentious cases the Italian authorities also prefer to wait for the lapsing of time-limits under the Dublin procedure rather than applying Article 17(1).

[635] For example, decisions issued from the German authorities where other criteria are applied often state that "*extraordinary humanitarian reasons triggering the Federal Republic of Germany to apply the discretionary clause (Article 17(1)) are not apparent*" – "*Außergewöhnliche humanitäre Gründe, die die Bundesrepublik Deutschland veranlassen könnten, ihr Selbsteintrittsrecht gemäß Article 17 Abs. 1 Dublin III- VO auszuüben, sind nicht ersichtlich.*"

[636] As reported by an NGO in Denmark.

[637] For example, due to the expiration of time limits where this is not done as a matter of practice or to a lack of the required element to apply one of the criteria. From the case files audited it is not always explicitly mentioned that the sovereignty clause was applied but it appears that is has from the circumstances of the case.

[638] The established practices may be formal or informal in nature and the applicability of the sovereignty clause under such categories of established practices may primarily depend on the applicants' circumstances.

From the findings of this research, the sovereignty clause appears to be or have been applied on the basis of the following policies and practices:

- The "suspension" of the Dublin procedure for applications for international protection lodged by Syrian nationals in one Member State from 21 August 2015 to 22 October 2015 by way of application of the sovereignty clause;[639]
- The suspension of Dublin transfers to Greece in most Member States on the basis of the systemic deficiencies in the asylum procedure and reception conditions there, following the ruling in ECtHR, *M.S.S. v. Belgium* and Greece in January 2011 where not done on the basis of Article 3(2);[640]
- Risk of inhuman and degrading treatment in the responsible Member State due to the individual circumstances of the applicant/for certain categories of applicants;[641]
- Risk of human trafficking;[642]

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[639] As reported in Germany. The German authorities announced that Dublin procedures had been suspended for Syrian nationals "*to the greatest extent*" in August 2015. On 21 October 2015, "regular" Dublin procedures were resumed for applicants from Syria. The practice constituted a general application of Article 17(1) for Syrian nationals for a limited period of time. Article 17(1) also appears to have been previously applied for a certain period of time in relation to applicants from Western Balkans countries who were usually subject to accelerated procedures for the examination of their applications for international protection in Germany. In this context, a quick negative decision was preferred to first spending time and efforts on the assessment of responsibilities under the Dublin procedures.

[640] For example, France, Germany, Malta, Norway, Poland and the United Kingdom. ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, judgment of 21 January 2011, available at: http://www.refworld.org/docid/4d39bc7f2.html. This policy was also applied on the basis of CJEU, Case C-411/10 and C-493/10, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, available at: http://www.refworld.org/docid/4ef1ed702.html. However, past practice in Poland shows that sometimes applicants were returned to Greece under a readmission agreement despite the decision to suspend transfers there under the Dublin Regulation. See the Report of Helsinki Foundation for Human Rights, Warsaw 2014, available (in Polish) at: http://www.hfhr.pl/wp-content/uploads/2014/12/HFPC_w_poszukiwaniu_ochrony.pdf. Also in Poland this is not an explicit use of the sovereignty clause and in such circumstances the Dublin procedure is just not initiated. Whilst in Norway such decisions can be taken on the basis of the sovereignty clause, in other cases a decision to suspend a transfer to Greece can be taken on the basis of national legislation (Immigration Act Section 32 para. 2). In the United Kingdom, this suspension is in place since September 2010. Whilst it is unclear based on the research conducted for the purpose of this report which provision is applied in such cases in Denmark, it should be noted that no Dublin transfers to Greece from Denmark occur in practice but the Danish authorities check through an Article 34 of the Dublin III Regulation information request if there is a category-1-hit (Eurodac Article 9 hit) for the applicant in Greece and if he or she is from Syria, Eritrea and Iran. In these cases, the Article 34 information request is sent in order to later assess if the applicant should be returned to Greece on the basis that he or she has already received protection there. Therefore, the application would be inadmissible in Denmark in accordance with section 29 b of the Aliens Act because the applicant already received international protection in another Member State under the Dublin Regulation. There is a Norwegian policy instruction on the application of the sovereignty clause on this basis: *Instruction on examination on the merits and prioritization of applications for asylum where Greece is responsible Dublin-country*, available (in Norwegian) at: http://goo.gl/bYxnKN; Italy has never adopted an official position regarding transfers to Greece. The suspension of transfers to Greece from Italy, which immediately followed the ruling in ECtHR, *M.S.S. v. Belgium and Greece* in January 2011, is based on Article 3(2) of the Dublin III Regulation. In Germany, transfers to Greece are suspended on the basis of Article 3(2).

[641] As reported in Germany, Norway and Poland. In Denmark it is unclear based on the research conducted for the purpose of this report whether this is done by way of applying Article 3(2) or the sovereignty clause of the Dublin III Regulation. Certain appeal committees in Greece also take over responsibility for the examination of applications for international protection if the responsible Member State is Bulgaria due to the conditions there; however, this is done by applying Article 3(2) of the Dublin III Regulation as opposed to the sovereignty clause.

[642] This is reported in Germany and Norway.

- Vulnerability due to illnesses and other serious health concerns, including mental health concerns and trauma;[643]
- Humanitarian reasons;[644]
- To keep together family relations, including extended family, in the Member State where the applicant is present;[645]
- Integration opportunities and connection to the Member State;[646]

[643] As reported in Denmark, Germany, Greece, Germany, Malta, Norway and the United Kingdom. In Germany, illnesses normally do not result in the use of the sovereignty clause as it is considered that all Member States have similar medical reception conditions. However, Article 17(1) of the Dublin III Regulation may be applied in Germany if the applicant is at risk of suicide or other psychological concerns related to previous trauma. Pregnancy and motherhood protection time limits lead to non-transfer and to the application of the sovereignty clause in cases in which the time limits would elapse. Firstly, in Greece there is a *prima facie* assessment of the Dublin criteria to verify which other Member State is responsible as that may influence the applicability of the sovereignty clause. In Norway, this is interpreted very narrowly so the applicant must have a very serious or life-threatening illness in order to suspend a Dublin transfer. In Italy, the sovereignty clause is applied if the applicant experienced serious hardships in the past and presents serious protection risks if returned to his or her country of origin.

[644] As reported in Denmark but no further information was gathered as part of this research as to what constitutes humanitarian reasons in practice. Also in Germany in exceptional humanitarian cases, including family reasons.

[645] As reported in Denmark, France, Germany, Greece, Malta, the United Kingdom and to a limited extent Poland. In Germany, core family members are generally not separated and in cases in which the criteria under Chapter III of the Dublin III Regulation or the dependency clause are not applicable, the sovereignty clause can be applied. Cases concerning other family links are decided on a case by case basis. Poland only applies Article 17(1) of the Dublin III Regulation in exceptional cases if the applicant establishes a family life after his or her arrival in Poland and in France Article 17(1) is only applied in limited circumstances on this basis depending on the Prefecture. In contrast to this, in Norway the sovereignty clause is never used to keep family members together whether the family falls outside the definition of Article 2(g) of the Dublin III Regulation as the Norwegian authorities apply the definition of family in a strict manner.

[646] In Malta and to a certain extent in Norway, connections to the State are considered in applying the sovereignty clause. A legal advisor in Germany also referred to an individual case where the sovereignty clause was applied to keep the family together in Germany as the children had already integrated well in school there. In contrast to this Poland is reluctant to apply the sovereignty clause on this ground as demonstrated in an audited case of a Ukrainian single mother with minor children who applied for protection in Poland and with the help of the local community managed to integrate well into Polish society. The Polish authorities decided to transfer her to the United Kingdom due to the fact she was in possession of British visa when arriving to Poland. Her long-term visa to the United Kingdom was issued years before when she visited some relatives there for a couple of days. According to articles which appeared in Polish newspapers, she requested Polish authorities to let her stay in Poland due to humanitarian reasons as her children managed to learn the Polish language and were well integrated in school but her request was rejected. In November 2015, an administrative court upheld the government decision of the Refugee Board on the applicant's transfer to the United Kingdom. Recently, however, as a result of the Polish Ombudsman's intervention the Refugee Board decided to reopen the case and reconsider it once again. For more information, see Wyborcza.pl, *Galina escaped from Crimea and found her new home in Szczecin. Why cannot she stay in Poland?*, from 24 December 2015, available (in Polish) at: http://goo.gl/YgpHsG.

- Expediency purposes depending on the nationality/country of origin of the applicant;[647]
- The expiration of time limits concerning the criteria under Chapter III of the Regulation.[648]

A quasi-general practice also exists in one Member State whereby the sovereignty clause is applied if the authorities of the requested Member State fail to respond to a take charge or take back request within three months of receiving such a request from the national authorities of the requesting Member State.[649] According to the authorities in the Member State concerned, the sovereignty clause is applied on this basis only with the applicant's consent.[650] Although not an established practice, the sovereignty clause may apply when there are

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[647] As reported in Denmark, Germany and Norway. In Denmark, this may be on the basis that the applicant's claim is to be examined in the expedited manifestly unfounded procedure. In such cases the Danish authorities do not first assess if another Member State is responsible but just place the applicant in the expedited manifestly unfounded procedure and the Denmark takes responsibility. The "*Manifestly unfounded procedure*" is a procedure where the DIS, upon submission to and the agreement of the Danish Refugee Council, may determine that the decision to reject the application for international protection cannot be appealed to the Danish Refugee Appeals Board (section 53 b of the Danish Aliens Act). The expedited version of the manifestly unfounded procedure has been established for asylum-seekers from certain countries where there is an advanced presumption that the application will be rejected as manifestly unfounded. For more information see: https://goo.gl/7RnPMz. The list of countries in the expedited version of the manifestly unfounded procedure was most recently updated on 21 November 2011 and includes, among others, applicants from the EU Member States, Norway, Switzerland, Iceland, Albania, Australia, Bosnia-Herzegovina, Canada, Japan, Kosovo (all reference to Kosovo should be understood in full compliance with United Nations Security Council Resolution 1244), Macedonia, Moldova, Mongolia, Montenegro, New Zealand, Serbia and the United States of America. The list also includes Russia, but only after a concrete assessment and exceptions apply.
In Italy, the opposite occurs, whereby the expiration of time limits is one of the grounds to take over responsibility for the examination of an application for international protection.
In Norway, the sovereignty clause may be applied for resource and cost efficiency purposes where an applicant's claim can be examined in their accelerated 48-hour procedure. Placement in the 48-hour procedure depends on the applicant's country of origin. The 48-hour procedure list consists of countries about which the Norwegian UDI has sufficient information on the general security and human rights situation to assume that citizens of these countries, on a general basis, are not in need of international protection, neither under the Refugee Convention nor under other international or national obligations prohibiting *refoulement*. Applicants coming from one of the countries on this list will as a main rule have their application assessed within 48 hours. But if the individual examination during these 48 hours reveals that there is a need for protection, the case will be transferred to a normal asylum procedure. The countries included in this list are variable and changed over time.

[648] In Germany this also appears to apply generally when time limits expire (in cases of expiration, the sovereignty clause does not have to be applied due to automatic transfer of responsibility; this is only relevant in cases in which it can be foreseen that a transfer is hindered before the time limits elapse, e.g. in cases of pregnancy, other medical obstacles; in such cases, either the sovereignty clause is applied or the time limits elapse and Germany becomes responsible) and in relation to "*church asylum*", where applicants subject to transfers under the Dublin Regulation are sometimes given sanctuary in churches in Germany. In December 2015, some 278 Protestant and Catholic churches were providing sanctuary to 453 people, 102 of which were children, according to the German Ecumenical Committee on Church Asylum. 244 of these applicants were in the Dublin procedure. Church asylum may be granted if the person is to be transferred to a Member State where there are concerns related to the asylum procedure and reception conditions. However, according to a BAMF policy decision, church asylum may extend the time limit applicable for a take charge request to 18 months as church asylum may be interpreted as absconding in some cases provided that BAMF does not assume responsibility in the interim period (for example based on Article 17(1) of the Dublin III Regulation). In practice "*church asylum*" cases are often resolved by either applying Article 17(1) or by the expiration of time limits. For more information see: http://www.kirchenasyl.de.

[649] As reported in Malta.

[650] This quasi-general practice is reportedly used when the applicant appears to have better integration opportunities in Malta compared to the responsible Member State. Some stakeholders in Malta, however, believe that the RefCom's use of discretion to decide to examine the asylum application of applicants still awaiting an answer on their possible transfer to another Member State and to therefore assume the responsibility, might preclude them from ever being transferred to the other Member State that might be responsible for them in terms of the Dublin III Regulation, if the examination takes place without their consent. For further information, see: Jesuit Refugee Service Europe, *Protection Interrupted. The Dublin's Regulation Impact on Asylum Seekers Protection*, 2013, available at: https://goo.gl/1kD14V; AIDA, Asylum Information Database Country Report Malta, February 2015, http://www.asylumineurope.org/reports/country/malta.

disputes between a requesting and a requested Member State as to the interpretation of the criteria under Chapter III of the Regulation.[651]

As regards applying the sovereignty clause on the basis of a risk of inhuman and degrading treatment due to systemic deficiencies in the reception conditions and/or asylum procedure in the responsible Member State, it is not possible to conclude with certainty from the findings whether it is Article 17(1) that is applied or Article 3(2) in practice. This is due to the fact that such decisions are frequently taken on an implicit basis and national practice evolves on account of jurisprudential developments and as the conditions change in the responsible Member State. Apart from transfers to Greece, it appears that Member States are reluctant to take similar decisions concerning other Member States on explicit grounds that there are systemic deficiencies in the asylum procedure and reception conditions there.[652]

Linked to the issue of the conditions in the responsible Member State, the sovereignty clause is sometimes applied for different categories of applicants, for example, based on their vulnerability, such as families with young children being transferred to certain Member States. Applicants may face inhuman or degrading treatment on account of their own vulnerabilities[653] and this forms part of the principle of *non-refoulement* under international law.[654] In the context of the application of the sovereignty clause, this primarily occurs due to the ECtHR ruling in the case of *Tarakhel v. Switzerland* where the ECtHR held that the Swiss authorities must obtain assurances from their Italian counterparts that on the applicant's arrival in Italy (family with young children) they will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together in order to ensure that their human rights would not be violated.[655] Families with young children, depending on their individual circumstances, may not be transferred to Italy by some Member States following this judgment.[656] Similar considerations apply with respect to transfers to Bulgaria,

[651] As reported for example in Norway, where stakeholders indicated that the sovereignty clause seems to be applied where outgoing take charge requests are rejected by the requested Member State. From the audit of case files it should be noted that the application of the sovereignty clause is not always explicitly mentioned in the case file in such circumstances.

[652] It should, however, be noted that the sovereignty clause is applied by the Polish authorities to suspend transfers to Hungary on the basis of systemic deficiencies only of applicants who have sought international protection in Poland (i.e. the suspension does not apply if a person subject to a take back procedure to Hungary has not lodged an application in Poland). However, there was one case reported during the study where despite lodging an application for international protection in Poland, an applicant was transferred to Hungary, therefore the practice is not consistent. Similarly, although not a clear application of the sovereignty clause, the Danish Refugee Appeals Board has suspended transfers to Hungary on the same basis.

[653] ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

[654] Article 33(1) of the Refugee Convention; Article 19(2) of the EU Charter; Article 3 of the ECHR.

[655] ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

[656] In Denmark, the Danish Refugee Appeals Board's Coordination Committee (*Flygtningenævnets Koordineringsudvalg*) reversed the previous practice of suspending transfers of families with young children to Italy and recently ruled on the applicability of the *Tarakhel* decision regarding transfers to Italy holding, by way of majority, that transfers of families can be carried out without obtaining individual guarantees due to the changed conditions in Italy since the Court decision. For further information (in Danish) see: http://goo.gl/bkvfjS.
In Germany, families with small children are not transferred to Italy following the *Tarakhel* judgment as well as similar decisions of the German Federal Constitutional Court due to the fact that the German authorities did not succeed in obtaining specific guarantees from Italy in individual cases.
Previously Norway would request individual guarantees for the reception of families in Italy. However, since July 2015 the guidelines in Norway no longer require such guarantees from the Italian authorities and the Norwegian authorities consider that the risk of families with children returned to Italy under the Dublin Regulation being split or receiving inadequate reception conditions, has been greatly reduced. *Instructions on the interpretation of the Immigration Act section 32-Transfer of children and families to Italy under the Dublin III Regulation*, 1 July 2015, available (in Norwegian) at: https://goo.gl/Ynqchx. In Poland, families with young children are also generally not transferred to Italy and the sovereignty clause is applied.

where vulnerable groups, including families, are exempt from Dublin transfers from some Member States to Bulgaria.[657]

As indicated previously in the introduction to this section, the application of the sovereignty clause in accordance with the Dublin Regulation does not require the consent of the applicant. The findings show that in the majority of Member States the applicant's consent is not required with the exception of one Member State.[658]

Conclusion

The sovereignty clause is applied both for human rights related concerns and administrative reasons. UNHCR considers that the sovereignty clause should not be used by Member States solely for administrative and cost related and efficiency reasons due to its humanitarian objective and accordingly should also be applied for humanitarian and compassionate reasons.[659] In relation to human rights concerns, it is influenced by both national and regional Courts' jurisprudence as to the respect of human rights obligations in the responsible Member States as well as other humanitarian reasons. Nevertheless, Member States continue to restrictively apply this clause in practice and there is a significant lack of clarity as to how Member States assess the applicability of the sovereignty clause in individual cases. Although established practices are listed above, very few Member States have formal policies in place. This, added with the lack of statistical information, makes it difficult to determine whether the sovereignty clause is utilised in a fair or adequate manner or in conformity with Member State's human rights obligations.

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[657] As reported in Norway and Poland. In Norway, this is governed by a policy instruction: "[...] *UDI addresses in the guidelines that available information indicates that conditions in Bulgaria have been significantly improved in recent months, and are now within legal standards. However, there are still challenges related to the situation of vulnerable groups and children. UDI therefore recommends that return of asylum seekers back to Bulgaria in accordance with the Dublin Regulation can continue, but that certain vulnerable groups are to be exempted from the Dublin procedure. The Ministry also refers to a report by the UNHCR from April 2014. Here, it is concluded that in view of the improvements made in the asylum system in Bulgaria, there is no longer a basis for recommending a general cessation of return to the country. UNHCR, however, shows that there are still challenges related to vulnerable groups and children, and it is recommended that there be specific, individual assessments made in each individual case. [...]". Instruction on practice of the Immigration Act Section 32 first paragraph subsection b – transfer of asylum-seekers to Bulgaria*, available at: http://goo.gl/yUWzRA.

[658] The consent of the applicant is not necessary in Denmark, France, Germany, Norway, Poland and the United Kingdom. The formal consent of the applicant is not required in Greece and Italy but his or her views will be taken into account. In Germany, the applicant's views are considered but their consent is not necessary for the application of the sovereignty clause. According to the RefCom in Malta, the authorities always seek the consent of the applicant to apply the sovereignty clause. Nevertheless, some stakeholders in Malta are of the opinion this is not the practice in all cases (see above footnote 650).

[659] UNHCR, *UNHCR comments on the European Commission's Proposal for a recast of the 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*, 18 March 2009, available at: http://www.refworld.org/docid/49c0ca922.html; The application of the sovereignty clause for humanitarian and compassionate reasons is in line with the European Commission's intended purpose of this clause in the recast proposal of the Dublin Regulation: Explanatory Memorandum attached to the European Commission's *"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), 2008/0243 (COD), p. 9, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF.

2. Application of the humanitarian clause (Article 17(2))

Similar to the sovereignty clause, the humanitarian clause is rarely applied in practice across all the Member States surveyed as shown in the statistical chart above (pages 117-119).[660] Whilst noting the overall restrictive practice surrounding this clause, the findings of this study and audited case files indicate that the humanitarian clause may be applied in particular in the following circumstances:

- for family reunion purposes for applicants who could not benefit from family reunion under Articles 8-10 because the family relationship falls outside the family definitions under Articles 2(g) and (h) of the Dublin Regulation;[661]
- for family reunion purposes for applicants who could not benefit from Article 16 because the dependency relationship is not sufficiently proven to meet the dependency threshold thereof of family relations are outside the scope of the provision;[662]
- in cases that fall under the scope of Articles 8-10 or Article 16 when the time limits for submitting a take charge request under these Articles have elapsed;[663] and
- where the spouse of an applicant is a citizen of a Member State.[664]

From the case files audited it seems that the humanitarian clause is sometimes applied after take charge requests under Articles 8-10 or Article 16 are refused by the receiving Member State. It is not possible to ascertain the full reasons why the previous requests were refused but it appears that the humanitarian clause

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[660] In Norway, the humanitarian clause is rarely applied due to the fact that applicants are reluctant to give their consent to outgoing requests to take charge on this basis as Norway is commonly viewed as a destination country. According to stakeholders in Germany proactive legal support is required to apply this clause in practice.

[661] As reported in Denmark, Germany, Greece, Italy, Malta, Poland and the United Kingdom. Greece applies the humanitarian clause so as to encompass parents or siblings or uncles and aunts of adult applicants, cousins, parents in law and brothers/sisters in law. However, stakeholders in Greece reported that unless they are very close family members such as spouses, a relationship of dependency is required or the applicant must be especially vulnerable in order to justify the triggering of the humanitarian clause. Stakeholders stated that this is often due to the narrow interpretation of the humanitarian clause by the receiving Member State where such requests are frequently refused as the threshold of dependency has not been met. It should be noted that there is no requirement for dependency under the humanitarian clause but it appears that some Member States require that in practice. An audited case file revealed such a case:
"Denmark was requested by Greece to take charge of an applicant, whose parents and two siblings resided in Denmark. Several medical statements as to the vulnerability of the applicant were sent to the Danish authorities by the Greek Dublin Unit. On three occasions Denmark refused the requests on the basis of Articles 16 and 17(2) and requested more information on the applicant and his stay in Greece, including when he entered Greece and where and with whom he entered until he applied for international protection. Any additional information on the person's whereabouts and application in Greece, including personal situation, family and family ties, were also requested. In one of the refusals the Danish authorities argued that the applicant as an adult, almost 20 years old, in general cannot be considered to be heavily dependent on his parents and siblings and later again stated that it has not been substantiated that the applicant is dependent on the assistance of his family members in Denmark. The applicant subsequently travelled by his own means to Denmark after the repeated refusals."
In the United Kingdom, the health of the applicant or his or her family relations is a relevant consideration in applying this clause.

[662] The humanitarian clause was applied on the grounds of the lack of sufficient proof of dependency to apply Article 16 of the Dublin III Regulation in at least 4 out of the 29 audited case files concerning the humanitarian clause. It should be noted that in 2 cases the reply by the requested Member State was negative and that some case files did not contain enough information to be able to ascertain the reasons why it was eventually decided to apply the humanitarian clause.

[663] For example, as reported in Denmark, Germany, Greece, Italy and Malta. Sometimes this also occurs in France but there is no consistent practice in this regard. This also applies in Denmark, Italy and Poland for unaccompanied children specifically when the time limits under Article 8 of the Dublin III Regulation expire. The humanitarian clause was applied on the grounds of the time limits expiring in at least 4 out of the 29 audited case files concerning the humanitarian clause. It should be noted that in 1 case the reply was negative and that some case files did not contain enough information to be able to ascertain the reasons why it was eventually decided to apply the humanitarian clause.

[664] As reported in Greece and the United Kingdom.

may be applied after there are multiple re-examination requests and/or disputes (or differing interpretations) between the Member States as to the requirements for the application of the criteria in Chapter III of the Dublin Regulation. An additional factor appears to be the vulnerability of the applicant concerned with the clause being more frequently invoked when the applicant has special needs or is particularly vulnerable.[665] The humanitarian clause also appears to be applied mostly after a significant amount of time in the Dublin procedure. For example, the audited case files show that it takes on average approximately 8 months from the time of lodging an application to the actual transfer of the applicant to another Member State under the humanitarian clause.[666] This is an inordinate amount of time and contrary to the Dublin Regulation's objective of providing swift access to an asylum procedure.

Cultural considerations are rarely, if at all taken into account[667] when considering the application of the humanitarian clause and it is only applied on a very limited basis on that ground.[668] The following is one example where the clause was applied for cultural reasons.

GOOD PRACTICES

A positive practice was reported in Germany whereby the BAMF accepted an incoming request to take charge and applied Article 17(2) to reunite Mandean people who were present in Spain with fellow members of their community in Germany as there is a larger community of Mandean people present in Germany.

The main reason why requests for applying the humanitarian clause are refused is reportedly linked to the different evidentiary requirements among Member States to establish, for example, family links and/or a relationship of dependency. It should be noted, though, that a relationship of dependency is not a requirement for the application of this clause under the Dublin Regulation. Disputes regarding the applicability of the humanitarian clause can at times lead to lengthy negotiations between the Member States concerned before an applicant's application for international protection is examined.

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[665] The humanitarian clause was applied in circumstances where the applicant was particularly vulnerable or had certain health issues in 6 out of 14 case files audited where a request based on the humanitarian clause was successful.

[666] The audited case files also show that it takes on average over three months from the time of lodging an application to the submission of a take charge request under Article 17(2) of the Dublin III Regulation to another Member State and over two months for the other Member State, to accept the take charge request. From the time of the acceptance of the request to the actual transfer of the applicant it takes another three months and one week on average. This is longer than the average time needed, for example, to apply Articles 9 and 10 of the Dublin III Regulation (approximately four months and three weeks and seven months and a half respectively from the lodging of the application to the transfer on the basis of the case files audited). It should be considered that the time taken to apply the humanitarian clause may be prolonged due to the fact that in many cases a request on the basis of a criteria under Chapter III of the Dublin III Regulation is submitted, and only after a negative reply a Member State would consider the application of the humanitarian clause.

[667] Cultural considerations are not taken into account in Denmark, Italy, Poland and the United Kingdom. According to the French authorities, a strong link to the Member State is also a relevant factor in applying the humanitarian clause for example if the applicant is fluent in the language of the country or previously studied there; however, France submitted only one request on the basis of the humanitarian clause in 2014 and none in 2015. In the United Kingdom, the authorities strongly reject any suggestion that the wording in Article 17(2) of the Dublin III Regulation is to be interpreted as requiring alleged links to a Member State to result in having a responsibility for examining an applicant's claim.

[668] It is reportedly applied on a very limited basis in Germany and in Greece but even then it is often linked to other humanitarian reasons. In Greece, for example, it is used to reunite Somali women whose husbands are not present on the territories of the Member States with other extended family members as Somali women without their partners or social network/family support may be left in a vulnerable situation. The other Member States surveyed reported the humanitarian clause never being applied for cultural reasons.

Despite the reframing of the humanitarian clause in the recast of the Dublin Regulation to improve its applicability,[669] it appears that Member States continue to interpret it in a narrow and restrictive manner.[670] This is reflected in the statistics gathered, which indicate that the majority of Member States rarely, if ever, apply this clause in practice.

GOOD PRACTICES

Although most Member States apply the humanitarian clause on a limited basis and rarely in practice, in Germany the BAMF applies the humanitarian clause where core family members or unaccompanied children are concerned if the case falls outside the scope of the criteria or if time limits have elapsed in order to ensure family unity.

In Greece, the authorities appear to submit outgoing requests on this basis relatively frequently. However, the outcome in such cases depends on the flexibility of the requested Member State.

[669] As part of the recast procedure, the scope of the humanitarian clause was widened to include "*any family relations*" while its predecessor, Article 15 of Council Regulation (EU) No 343/2003 confined this clause to "*family members, as well as other dependent relatives*" and the recast Dublin Regulation clarifies that take charge requests under Article 17(2) can be submitted "*at any time before a first decision regarding the substance is taken*".

[670] The restrictive application of this provision was also reported in UNHCR's previous study UNHCR, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006, available at: http://www.refworld.org/docid/4445fe344.html.

3. Conclusion

Overall, the findings show that the discretionary clauses are under-utilised despite most Member States having both formal and *de facto* policies and established practices as to when they should be applied. It seems that political sensitivities play a role in why these clauses are rarely applied in practice. Most Member States do not have specific guidance on the applicability of these clauses and decisions to apply them often require approval from senior staff, adding to the obstacles to an effective and proactive application of these clauses in practice.

RECOMMENDATIONS

The discretionary clauses provide Member States with a mechanism to address humanitarian or compassionate considerations or other exceptional situations of need within the Dublin system and they should be applied in light of the underlying humanitarian objective of these provisions. In order to enhance the application of the discretionary clauses, UNHCR recommends the following:

- **UNHCR urges Member States to make a proactive and flexible use of the discretionary clauses to ensure family unity** in accordance with the right to family life as set out in Article 8 of the ECHR and Article 7 of the EU Charter. Where family relations fall outside the scope of the family criteria leading to family separation, Member States should make use of the discretionary clauses (Article 17) to keep or bring together families, ensure respect for the principle of family unity and reduce onward movement. Family separation has significant adverse effects on applicants' and refugees' ability to plan, work, and integrate in the host society; it is therefore of utmost importance that Member States ensure family unity to the greatest extent possible, including where necessary through the exercise of their discretion under the Dublin Regulation
- **UNHCR encourages Member States to apply the sovereignty clause where the transfer may result in hardship for the applicant**, for instance due to medical or humanitarian reasons. In line with its humanitarian objective, the sovereignty clause should be flexibly interpreted and applied by Member States in light of their observance of the fundamental rights of applicants under European and International law.
- Due to the particular circumstances of a case, family tracing or the BIA may at times take longer than the time limits under the Dublin Regulation allow. Member States are encouraged to make use of the humanitarian clause with the purpose of ensuring family reunion in such situations.
- With a view to foster a consistent and more effective use of the discretionary clauses, **EASO (or the new EUAA) could offer guidance on their application by compiling best practices on their use across the Member States**. UNHCR stands ready to assist EASO (or the new EUAA) and the Member States in this regard.

IV. IMPLEMENTING TRANSFER DECISIONS

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1. Take back and take charge requests and time limits for carrying out the Dublin procedure

Section II of the Dublin Regulation provides rules and modalities in relation to submitting take back and take charge requests to another Member State. A limited amount of statistical information on take back and take charge requests under the Dublin Regulation was analysed as part of this study. The research was confined to the adequacy of time limits and whether certain take charge requests took precedence over others[671] in practice as part of the general functioning and efficiency of the Dublin system. In order to submit take back and take charge requests Members States must provide justifications as to why a particular Member State may be responsible. As the issue of application of the hierarchy of criteria and evidence required is addressed

[671] No information on this was gathered in Italy, Norway and the United Kingdom. In Malta, the authorities stated that all relevant information is considered, whilst in Denmark the authorities stated that there is no difference in the consideration of different take charge requests over other take charge requests.

in Chapter II,[672] this section focuses primarily on the proportion of take back and take charge requests per Member State surveyed and the adequacy of the time limits set out in the Dublin Regulation.

Outgoing take back and take charge requests per Member State: statistical data

The charts below are drawn from Eurostat data for 2014, 2015 and 2016[673] and indicate the general trends across the Member States surveyed as to the distribution of outgoing take back and take charge requests. One prevailing trend across the majority of Member States is that most outgoing requests are take back requests based on Article 18(1)(b)(c)(d)[674] and Article 20(5).[675] Requests based on these provisions make up the biggest proportion of all outgoing requests across all the Member States, with the exception of Greece, Malta and Norway in 2014 and Greece and Malta in 2015.[676] The fact that Greece has a significantly lower proportion of take back requests based on this ground may be due to its geographical position as a main entry point to the territories of the Member States.

The charts also show that only a small proportion of outgoing take charge requests are based on criteria related to family (Articles 8-10) in most Member States surveyed, except for Greece where more than two thirds of all outgoing requests both in 2014 and 2015 were based on Articles 8, 9, 10 and 16. Requests on the basis of the humanitarian clause also make up a significant proportion of requests submitted by Greece to other Member States both in 2014 and 2015.

Overall, it is clear that in most Member States the majority of outgoing requests after take back requests under Articles 18 and 20(5) are requests linked to the irregular entry and/or stay criterion (Article 13) and to the documentation and legal entry criteria (Articles 12 and 14). Outgoing take charge requests are rarely based on the dependency clause (Article 16), if at all in certain Member States, and the humanitarian clause (Article 17(2)), with the exception of Greece.

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[672] This section should be read in conjunction with Section II and in particular the sub-section on the proof and evidence required when applying the criteria under Chapter III of the Dublin III Regulation.

[673] Data on outgoing requests based on documentation and legal entry reasons in 2015 and for Greece in 2016 was not available on Eurostat at the time of extraction. Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro]. Data extracted on 31 July 2017.

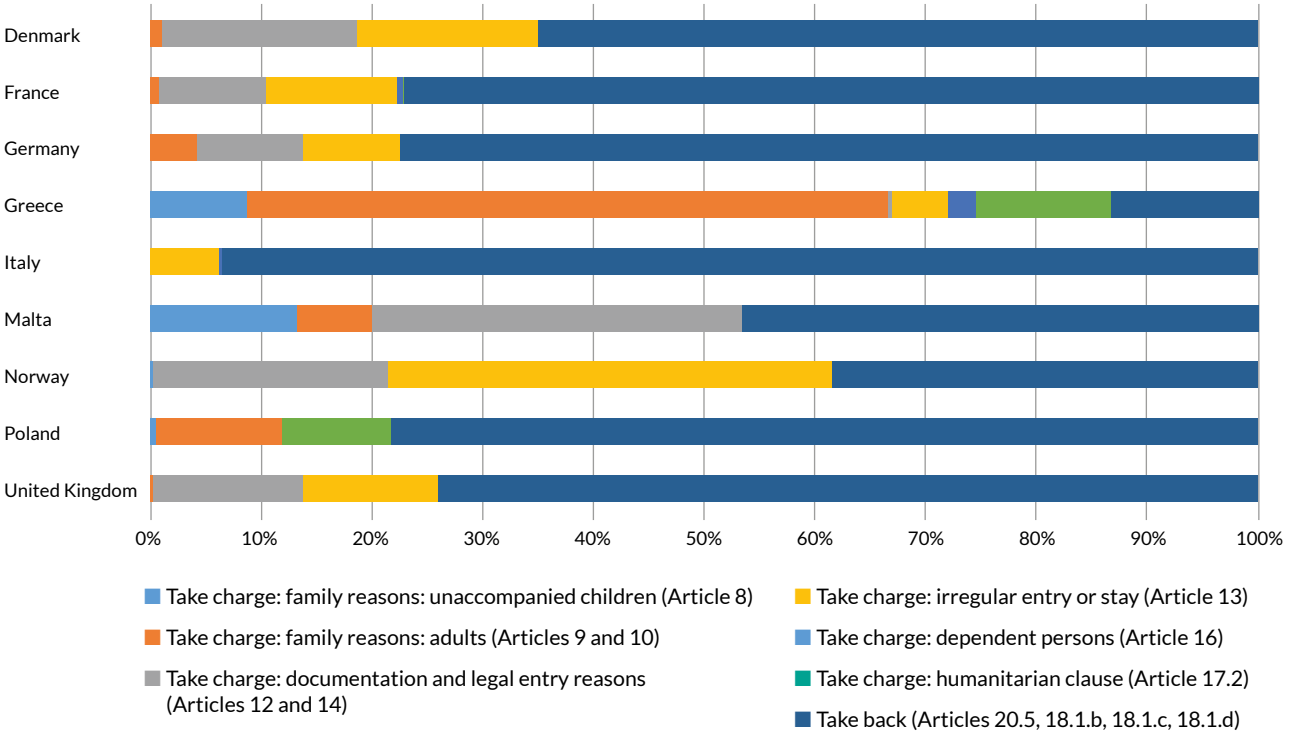
[674] Article 18(1) of the Dublin III Regulation states that the "Obligations of the Member State Responsible" are: "*1. The Member State responsible under this Regulation shall be obliged to: […]; (b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document; (c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document; (d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.*"

[675] Article 20(5) of the Dublin III Regulation: "*5. An applicant who is present in another Member State without a residence document or who there lodges an application for international protection after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was first lodged, with a view to completing the process of determining the Member State responsible.*"

[676] However, as indicated above, this does not consider data on outgoing requests based on documentation and legal entry reasons, which was not available on Eurostat at the time of extraction.

The chart below shows the proportion of outgoing take charge and take back requests in the Member States surveyed in 2014.

Proportion of outgoing take charge and take back requests in the Member States surveyed (2014)

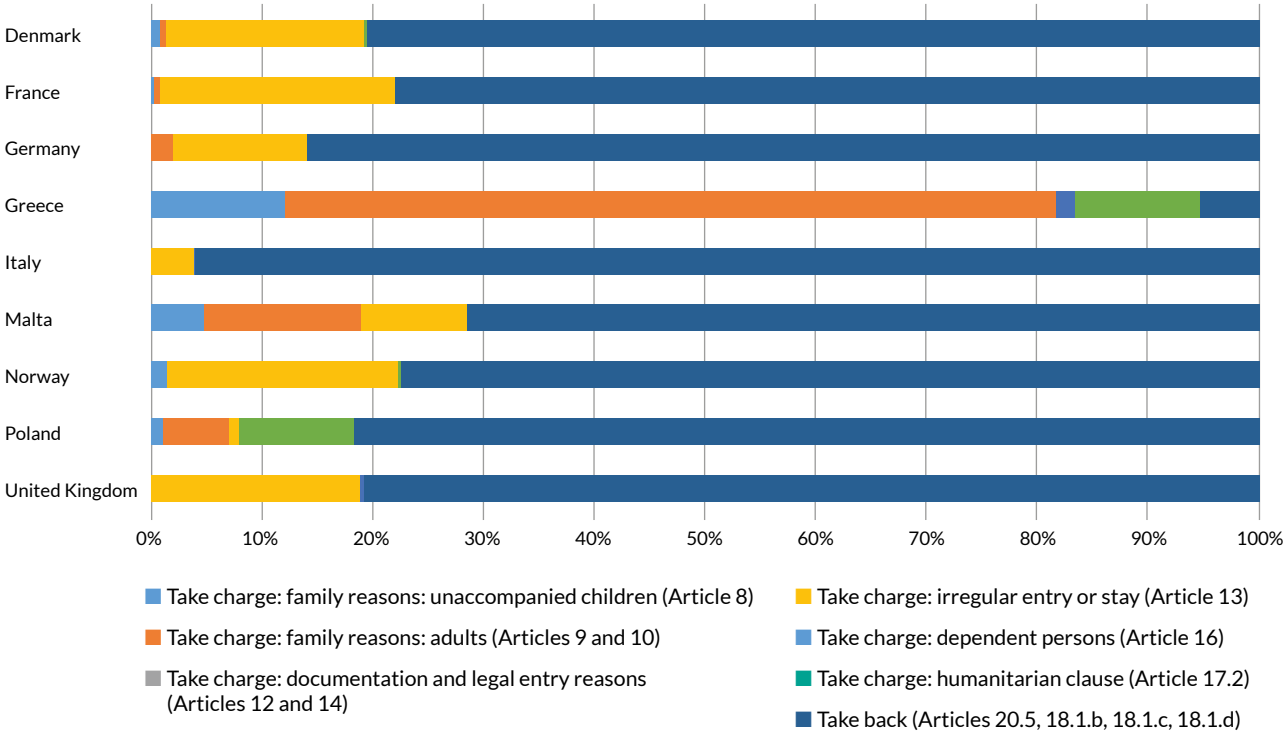


The corresponding table below shows the number of outgoing take charge and take back requests in the Member States surveyed in 2014.

Member State	Take charge requests						Take back requests
	Family reasons: unaccompanied children (Article 8)	Family reasons: adults (Articles 9 and 10)	Documentation and legal entry reasons (Articles 12 and 14)	Irregular entry or stay (Article 13)	Dependent persons (Article 16)	Humanitarian clause (Article 17.2)	Articles 20.5, 18.1.b, 18.1.c, 18.1.d
Denmark	3	21	429	397	0	2	1,576
France	4	32	471	587	29	1	3,788
Germany	10	1,424	3,420	3,014	5	37	27,047
Greece	114	749	2	65	35	154	173
Italy	2	1	:	211	5	0	3,189
Malta	2	1	5	0	0	0	7
Norway	10	2	696	1,323	0	3	1,263
Poland	1	17	:	0	0	15	118
United Kingdom	2	1	243	218	0	0	1,321

The chart below shows the proportion of outgoing take charge and take back requests in the Member States surveyed in 2015.

Proportion of outgoing take charge and take back requests in the Member States surveyed (2015)

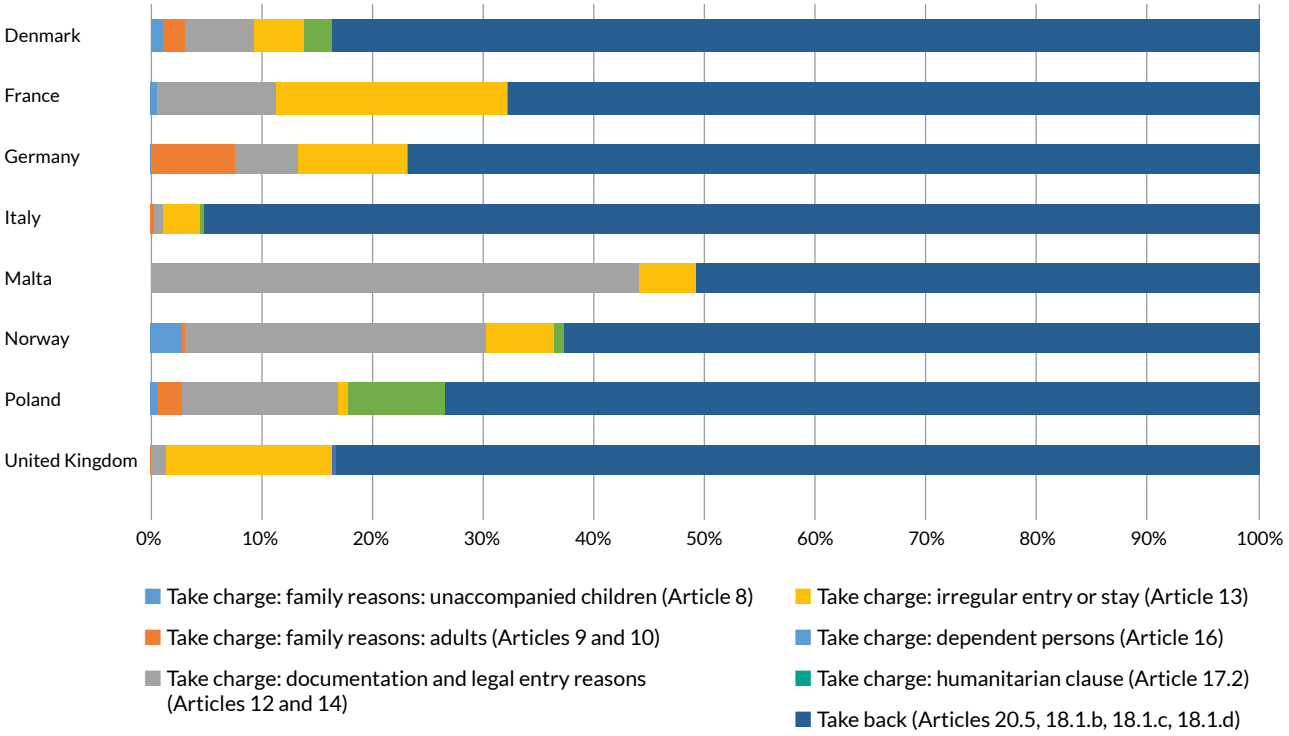


The corresponding table below shows the number of outgoing take charge and take back requests in the Member States surveyed in 2015.

Member State	Take charge requests						Take back requests
	Family reasons: unaccompanied children (Article 8)	Family reasons: adults (Articles 9 and 10)	Documentation and legal entry reasons (Articles 12 and 14)	Irregular entry or stay (Article 13)	Dependent persons (Article 16)	Humanitarian clause (Article 17.2)	Articles 20.5, 18.1.b, 18.1.c, 18.1.d
Denmark	24	10	:	474	2	3	2,133
France	30	56	:	2,097	3	0	7,715
Germany	9	766	:	4,955	0	14	35,134
Greece	133	771	:	0	18	124	60
Italy	0	0	:	187	1	0	4,575
Malta	1	3	:	2	0	0	15
Norway	43	0	:	634	0	5	2,353
Poland	2	12	:	2	0	21	165
United Kingdom	1	1	:	627	2	0	2,672

The chart below shows the proportion of outgoing take charge and take back requests in the Member States surveyed in 2016.

Proportion of outgoing take charge and take back requests in the Member States surveyed (2016)



The corresponding table below shows the number of outgoing take charge and take back requests in the Member States surveyed in 2016.

Member State	Take charge requests						Take back requests
	Family reasons: unaccompanied children (Article 8)	Family reasons: adults (Articles 9 and 10)	Documentation and legal entry reasons (Articles 12 and 14)	Irregular entry or stay (Article 13)	Dependent persons (Article 16)	Humanitarian clause (Article 17.2)	Articles 20.5, 18.1.b, 18.1.c, 18.1.d
Denmark	70	104	349	250	1	146	4,688
France	109	56	2,671	5,270	5	8	17,041
Germany	14	4,083	2,949	5,318	4	48	41,262
Italy	0	26	77	329	0	6	8,902
Malta	0	0	53	6	0	0	61
Norway	35	4	343	77	0	12	793
Poland	1	4	24	1	0	15	125
United Kingdom	2	1	59	613	17	0	3,428

2. Adequacy of time limits for carrying out the Dublin procedure

According to the Dublin Regulation the time limits for submitting a take charge request under Article 21 vary depending on whether the take charge request is on the basis of a Eurodac hit or other evidence. Take charge requests must be submitted within three months of the date on which the applicant's application for international protection was lodged or, in the case of a Eurodac hit, within two months of receiving the Eurodac hit.[677] The time limits for submitting a take back request are governed by Article 23 when a new application has been lodged in the responsible Member State and Article 24 when no new application has been lodged in the requesting Member State.[678]

Overall, stakeholders interviewed in the surveyed Member States find the time limits for submitting and responding to a request adequate. Despite this, challenges related to the short time limits for submitting requests were reported in some Member States due to the limited capacity of Dublin Units on account of the recent increase in applicants.[679] The influx of applicants seeking protection also has meant in one Member State that there were significant delays between the lodging of an application and the scheduling of a personal interview under Article 5 of the Dublin Regulation. As the time limits run from the time the application is lodged, the authorities in these circumstances submitted outgoing take back requests on the basis of Eurodac hits to other Member States before the personal interview. In certain circumstances where the time limits for submitting a request had elapsed, this may have had indirect consequences on the correct application of the hierarchy of criteria if information came to light during the personal interview indicating that another Member State was responsible on the basis of a different criterion.[680] This is due to the fact that the Member State concerned, in order to meet the time limits under the Dublin Regulation, sent out requests on the basis of Eurodac hits in advance of the interview before the applicant was given the opportunity to provide information which could indicate that another Member State was responsible under the criteria in Chapter III of the Regulation. In other cases, in order to respect the time limits Member States may submit take charge requests before gathering all the necessary evidence to justify the request[681] and after its refusal, it may be challenging for the authorities in requesting Member States to submit a request for re-examination within the same required time limits.

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[677] The requirement to submit the Eurodac hit within two months of receiving that hit is pursuant to Article 21(1) of the Dublin III Regulation.

[678] Under Article 23 of the Dublin III Regulation "*Submitting a take back request when a new application has been lodged in the requesting Member State*", authorities must submit a take back request as quickly as possible and in any event within two months of receiving a Eurodac hit. If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged. According to Article 24 of the Dublin III Regulation "*Submitting a take back request when no new application has been lodged in the requesting Member State*", where a Member State on whose territory a person is staying without a residence document decides to search the Eurodac system in accordance with Article 17 of Regulation (EU) no 603/2013, the request to take back a person as referred to in Article 18(1)(b) or (c) of the Dublin III Regulation, or a person as referred to in Article 18(1)(d) whose application for international protection has not been rejected by a final decision, shall be made as quickly as possible and in any event within two months of receipt of the Eurodac hit. If the take back request is based on evidence other than the data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.

[679] As reported in Greece and the United Kingdom. In Greece, the authorities reported that it is challenging to submit take charge or take back requests under the shorter timeframes required when the evidence is based on a Eurodac hit. This is reported by the Home Office in the United Kingdom due to a 60 per cent increase in the incoming requests in the Dublin Unit in the United Kingdom.

[680] As reported in Denmark. However, a transfer decision is not made until after the personal interview to ensure that the decision is correct. If the applicant during the personal interview provides information for example on the presence of family members elsewhere and the time limit for submitting a take charge request on this ground has expired, a request will be submitted on the basis of the humanitarian clause if the applicant expresses the desire to be reunited with the family member concerned. The outcome of such a request, however, is at the discretion of the requested Member State.

[681] As reported for example in Denmark and Greece. This was also evident from the audit of case files in the United Kingdom.

The time limits are reported to sometimes be inadequate by one authority in one Member State when written consent to family reunion is required from both the applicant and his or her family member.[682] According to the same authorities, late disclosure of the presence of family members in another Member State may also mean that the time limits cannot always be respected in practice.[683]

Another difficulty reported in relation to the time limits and the overall duration of procedures relates to requests for re-examination, which can be submitted when the initial take charge request is refused,[684] for example due to insufficient evidence.[685] Different evidentiary requirements among Member States can sometimes lead to several requests with the aim of obtaining further evidence or documentation. Stakeholders in some Member States reported that frequently the time limits expire in such circumstances, thus having an impact on the determination of responsibility and on the possibility to proceed with family reunion.[686] Furthermore, authorities in one Member State reported that sometimes other Member States take too much time to respond to information requests under Article 34, which also impacts the ability of authorities to respect the time limits for submitting take charge and take back requests.[687]

The findings show that under certain circumstances Member States derogate from the time limits provided in the Dublin Regulation. It is interesting to note that a number of Member States are flexible with the time limits in this regard and accept take charge requests where the time limits have elapsed to reunite family members.[688] The main reasons for the derogations from the time limits are familial and humanitarian considerations.[689] The reasoning behind such an approach can be drawn from a Federal Administrative Court in one Member State where it was stated **obiter dictum** with respect to the Dublin Regulation time limits that "*the provisions on responsibility for asylum applications lodged by unaccompanied minors – unlike, for example, the rules governing setting deadlines for making a request to take charge under Article 17(1) of the Dublin II Regulation… are protective of the individual, and consequently confer a subjective right on the person concerned.*"[690] Therefore, the Court held that the application of the Dublin Regulation must be in light of the obligation under Article 24(2) of the EU Charter according to which in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration. Accordingly, strict adherence to the time limits must not infringe the fundamental rights of the applicant concerned. Other times, when the time limits expire some Member States apply the humanitarian clause and request other Member States on this

[682] As reported by in Denmark.

[683] As reported in Denmark.

[684] As reported in Denmark and Greece. It should be noted that the Dublin Regulation does not provide any specific guidance on the issue of the time limits for requests for re-examination; as a consequence, Member States reportedly have different interpretations of this provision, with some applying the time limits provided to submit requests to another Member State also to requests for re-examination and others considering that these do not apply in such cases, thus possibly leading to significant procedural delays.

[685] As reported in Greece.

[686] This is reported as a challenge in Denmark as well as in Greece. The Home Office in the United Kingdom reported that it can be challenging when some Member States have differing views on the evidence required and some Member States will question the evidence provided or simply refuse the take charge or take back request altogether.

[687] This is noted in Germany. In accordance with Article 34(5) of the Dublin III Regulation the requested Member State is obliged to reply within five weeks. However, the German authorities reported that for the requesting Member State this may be too long in order for them to respect the time limits for submitting take charge and take back requests, yet for the requested Member State it may be considered too short if, for example, family tracing is required.

[688] As reported in Germany, Greece, Italy and Malta in relation to submitting outgoing take charge requests and reported in Germany and France in relation to incoming take charge requests.

[689] As reported in Denmark, France, Germany, Greece, Italy and Malta. In Poland, the transfer time limit may also be extended for incoming take charge or take back requests based on humanitarian reasons if the applicant is severely ill or pregnant. In France, this happens for family unity reasons for unaccompanied children or for dependent persons under the dependency clause for incoming take back or take charge requests. Derogations were reported in relation to Article 8 of the Dublin III Regulation in particular to ensure that unaccompanied children could be reunited with their family members.

[690] The German Court case concerned the interpretation of Articles 6 and 8 of the Dublin Regulation concerning unaccompanied children; *BVerwG, Az. 1 C 4.15*, 16 November 2015, available at: http://goo.gl/XpCEZb.

basis to take over responsibility for the applicant concerned.[691] In one Member State it is reported that when the time limits expire, the choice of legal basis for take charge requests depends on how recently the time limit expired and the practice of the receiving Member State.[692]

Although most Member States report that the time limits for submitting take charge and take back requests are adequate, it is evident from the findings that this is not always the case. Time limits can enable authorities to achieve the objective of determining swiftly the State responsible for an application for international protection under Recital 5, which is in the interest of both applicants and Member States. Nevertheless, such time limits may be inadequate depending on the individual circumstances of the case and on account of differing requirements for establishing Member State responsibility across the Member States surveyed. The findings show that derogations may be necessary particularly for ensuring family reunion. A delicate balance must be struck between ensuring that there is sufficient time to collect the necessary information and evidence to justify a take charge request in family reunion cases, and ensuring that Dublin procedures are efficient so that applicants have swift access to an asylum procedure in the responsible Member State.

3. Transfers and transfer modalities

Notification of a transfer decision

When the requested Member State accepts to take charge of or take back an applicant or other person as referred to in Article 18(1)(c) or (d), Article 26 of the Dublin Regulation requires the requesting Member State to notify the applicant of the decision to transfer him or her to the Member State responsible, and where applicable, of not examining his or her application for international protection. The transfer decision must include information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits for seeking such remedies and for carrying out the transfer. Member States must also ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the applicant together with the transfer decision when that information has not been already communicated. In addition, when an applicant is not assisted or represented by a legal advisor, Member States have a duty to inform him or her of the main elements of the transfer decision, which should always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.

[691] For example, this is reported in Denmark, Germany and Greece.

[692] This is the reported practice in Greece. The outgoing take charge request may be based on the Article that would be applicable if the time limits had not elapsed (for example Article 8, 9-10, or 16 of the Dublin III Regulation) and/or, on a subsidiary basis, under the humanitarian clause, or exclusively on the basis of Article 17(2) of the Dublin III Regulation. The choice of the legal basis of the request depends on the circumstances of each case, for example how long before the time limits elapsed or the practice of the Member State deemed responsible. However, it should be noted that the time limits are not systematically derogated from in Greece according to stakeholders interviewed as part of this study.

Method of notification

The transfer decision is notified in writing to the applicant concerned in the majority of Member States surveyed.[693] This may either be delivered in person or in the post.[694] As regards the language of the decision, the transfer decision in some Member States is only provided in English or the national language of the Member State concerned. Where the decision is delivered in person, the findings show that whether or not the decision is translated orally to the applicants depends on the availability of interpreters.[695]

GOOD PRACTICES

A positive practice is reported in Greece where the applicant is notified of the transfer decision in person by an officer of the RAO in the presence of an interpreter. [696]

An unusual practice occurs in one Member State whereby applicants are informed of the initial decision to request another Member State to take responsibility for the examination of their application for international

[693] As reported in Denmark, France, Germany, Greece, Italy, Malta, Poland and the United Kingdom. In Greece, the decision is notified in writing in the presence of an interpreted who translates the decision in a language that the applicant understands. The written notification is a requirement in Poland under Article 14 § 1 of the Code of Administrative Proceedings. In Malta, the transfer decision may also be communicated orally by the Immigration Police officers in English.

[694] In France, applicants are either notified in person when they have an appointment at the Prefecture or the transfer decision is issued to them by post. In the United Kingdom, the decision is either delivered in person or sent by the Dublin Unit to staff at detention centres to serve it to applicants and explain it to them orally. In Denmark, the decision to submit a request to another Member State is provided in writing and, where such decision is taken immediately at the end of the personal interview, it is served orally to the applicant in the presence of an interpreter. If the decision is taken after the personal interview, it is communicated to the applicant by post. In this case it is not provided orally, which is also the case for illiterate applicants in this regard. The decision is communicated by post in Germany. However, reportedly sometimes applicants may not receive the decision or may receive the decision late if the mail is not appropriately sorted in their reception facility. In Poland, decisions are sent by post.

[695] In Germany the transfer decision is issued in German, with the operative part translated in the language of the applicant. In Greece, the decision is issued in Greek, but the operative part of the decision is also translated into English. The decision is, as a rule, notified to applicants in person in the presence of an interpreter. According to a legal advisor interviewed as part of this study, in Italy sometimes the transfer decision is only translated into English despite the applicant coming from a non-English speaking country of origin. In the United Kingdom, the transfer decision is always provided in English but if the applicant's first language is not English a telephone translating service is available to translate the decision in the language of the applicant. In Malta, the transfer decision is communicated orally in English by Immigration Police officers, which includes information on the right to appeal within three days. Due to the lack of interpreters present when issuing the decision, applicants who understand English have to translate the decision to applicants who do not speak English in practice. In Norway, transfer decisions are in Norwegian and it is the duty of the legal advisor to, if necessary, seek assistance from interpreters in order to convey the content to the applicant. In Poland, the decision is issued in Polish in writing with the main elements of the decision, including information on the remedies, translated in writing into the applicant's language. The justification for the decision is not translated nor is it explained orally in Poland to the applicant concerned. In Germany, the transfer decision is issued in writing in German with the operative part of the decision issued in the language of the applicant. The transfer decision is sent by registered post. If the applicant has a legal advisor in Germany, the decision may then also be translated orally to the applicant by his/her legal advisor. In France, the transfer decision is issued in French only and an interpreter must be present only if the applicant is notified of a placement under house arrest or in administrative detention at the same time as the transfer decision. If the applicant is notified by post, then there is no translation and the decision is only issued in French. In the United Kingdom, the decision is served in writing in English only. If the decision is served in person, then a translating service may be available by phone.

[696] In Greece, the applicant is also informed that he or she can submit a statement to the authorities that he or she does not want to challenge the transfer decision. This possibility is aimed at accelerating transfer procedures, and is particularly relevant in family reunion cases.

protection.[697] This is followed by a notification of acceptance of the request where the requested Member State decides to take responsibility. A fully fledged transfer decision is only issued if the responsible Member State accepts responsibility on a different ground than that in the request, if as an exception an initial decision to submit a request to another Member State has not been taken, or if there was a mistake in the original request.

According to Article 26 of the Dublin Regulation, Member States may choose to notify the applicant's legal advisor or other counsellor of the transfer decision if they are representing the applicant and, where applicable, communicate the decision to the person concerned. The findings show that when an applicant is legally represented his or her legal advisor is also notified of the transfer decision in most Member States.[698] However, in three Member States only the applicant is notified despite having a legal advisor legally representing him or her in the Dublin procedure.[699] In two Member States only the legal advisor is informed of the transfer decision and it is their responsibility to inform the applicant.[700]

The transfer decision is normally notified directly after the responsible Member State accepts the take back or take charge request or within a few days of such acceptance.[701] Depending on the method of delivery, this may be immediately after the requested Member State accepts responsibility or at a later stage.[702] A challenge exists in one Member State whereby legal advisors are sometimes informed at a later stage than the applicants they represent which affects the ability of the applicant to submit an appeal in practice.[703] This practice has

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[697] This occurs in Denmark. This is referred to as a "*provisional transfer decision*" for the purposes of this report, as the time limits for the appeal start running from the issuance of this decision. The applicant is as a rule informed of this decision at the end of the personal interview. As a rule, this occurs at the end of the personal interview under Article 5 of the Dublin III Regulation when sufficient information is available to determine that another Member State may be responsible under the Dublin Regulation. The applicant is also given the opportunity to immediately appeal the decision to submit a request to another Member State by using a template provided by the DIS. In addition, the applicant is informed of the possibility of obtaining free legal advice from the Danish Refugee Council and if the applicant consents, DIS will, on behalf of the Danish Refugee Council, give a notice to the applicant for a future appointment with the Danish Refugee Council to receive legal assistance on his or her case and the case files will be sent automatically to the Danish Refugee Council.

[698] As reported in Denmark, Germany, Malta and the United Kingdom. If the applicant is not represented by a legal advisor in these Member States, the decision is sent directly to the applicant. In Germany, an additional challenge is that there may be severe delays in relation to the legal advisor receiving a copy of the transfer decision.

[699] As reported in France, Greece and Italy. With the exception of the legal advisor who acts as a representative of the child being notified in Greece if the applicant is a child under 14.

[700] As reported in Norway and Poland. At this stage of the Dublin procedure in Norway the applicant always has a legal advisor and it is their duty to inform the applicant concerned of his or her transfer decision, which is communicated to the legal advisor by the authorities.

[701] As reported in Germany, Greece, France, Malta and Poland. In Malta, the applicant is normally informed of the transfer decision by the Immigration Police a few days after a request to take charge or take back is accepted by the responsible Member State. Stakeholders in Malta stated that most of the times the applicant is not informed in writing of the transfer decision but only orally and in English. Applicants are informed in writing (only in English) when they intend to appeal the transfer decision. In France, if the applicants are notified in person, this occurs when the applicant has a follow-up appointment at the Prefecture after the issuance of the transfer decision, if not it is sent in the post on that same day. In Greece, the transfer decision (which is issued contextually with an inadmissibility decision) is usually notified to the applicant shortly after it is taken (usually within a couple of days), but is some cases, due to the workload of the authorities, delays can occur. In Italy, when the applicant is informed of the transfer decision depends on the practice of each *Questura*. The legal advisor is informed at the time of the decision in Norway.

[702] In Italy, the Dublin Unit stated that the applicant should be informed as soon as possible but the practice depends on each *Questura* where the decision is sent to before being notified to the applicant concerned. Applicants in Italy have a 60-days deadline from the notification of the decision to lodge an appeal. In the United Kingdom, the notification of the transfer decision and notice of removal, including the service of removal directions, usually occurs at the same time. In the case of adults, this is at least five days before the transfer is due to occur and in the case of unaccompanied children 72 hours before the transfer is due to occur. In the United Kingdom there is also a special process in relation to the transfer of families with young children where there is a 28 day restriction on removal of family cases from the day that any unsuccessful appeal is completed. It is reported that sometimes there are delays in Germany as to when the legal advisor receives a copy of the transfer decision.

[703] As reported in Germany.

been described as extremely problematic by NGOs and legal advisors due to the fact that it has implications for the applicant's effective access to justice.[704]

If the applicant is an unaccompanied child, the representative of the child is notified of the transfer decision in most Member States surveyed.[705] It is reported in only one Member State that only the legal advisor is informed of the transfer decision when the applicant is an unaccompanied child.[706] In one Member State a distinction is made between applicants under and above the age of 14,[707] whereby legal advisors or other counsellors acting as representatives of the child are notified of the transfer decision if the applicant is under 14 years of age, whilst older children are informed directly about the transfer decision by the national authorities because they may not have a legal advisor or other counsellor appointed to act on behalf of the child by the Public Prosecutor for Minors.[708]

Practical obstacles in notifying the applicant

Varied practices exist across the Member States surveyed when the current address of the applicant is unknown.[709] In some Member States the applicant is considered to have absconded for the purposes of the Dublin Regulation,[710] whilst in others it is recorded in their national databases as a legal fiction that the

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[704] Whilst noting that appeals are outside the scope of this report, it should be noted that if the applicant's legal advisor receives the transfer decision out of time for the deadline to appeal, no application for appeal can be submitted and recourse to the Courts is necessary. However, reportedly there is a minimal chance that a late submission is accepted by the Court and usually the appeal is not heard in such circumstances. Nevertheless, the Dublin Unit in Germany does not consider this a problem in practice as over 80 per cent of transfer decisions in Germany are appealed by the applicant.

[705] As reported in Denmark, France, Germany, Malta and Poland, where the representative then must inform the child of the transfer decision. The practice is unclear in the United Kingdom as no case arose during the course of this study involving unaccompanied children, however, in theory the representative should be informed. In Denmark, the unaccompanied child, the representative and the Danish Refugee Council -if they are the legal advisors for the child- are notified of the decision. However, an NGO reported that with respect to appeal decisions from the Danish Refugee Appeals Board, the representative is sometimes not informed of the decision of the Appeals Board and are sometimes only notified when the police arrange the child's transfer in practice. The child's legal advisor is also informed in Germany. In family cases involving children in the United Kingdom the third country unit notifies the local enforcement team who are responsible for arranging the "*family returns conference*" where the option of returns is discussed.

[706] As reported in Norway.

[707] As reported in Greece.

[708] For further information on representatives in Greece see section 3 of Chapter I ("*The representative for unaccompanied children*") above.

[709] In France, the transfer decision is not notified to the applicant if their current address is unknown. The decision is just notified to the last known address of the applicant in Germany. In Greece, in family reunion cases applicants are usually invited by phone to appear at the RAO in order to be notified of the transfer decision. If the applicant does not show up to the appointed RAO to receive the transfer decision, the decision is provided to him/her the next time he or she appears at the RAO to renew his or her asylum-seekers card. If the applicant also does not appear at the RAO to renew his or her card, then on the next working date after the expiry of his or her card it is deemed that he or she has been notified of his or her transfer decision. In Norway, the Immigration Police either registers in their central database that the person has not been notified due to him or her being reported missing and send the case file to the UDI or registers that the transfer has been effected if the police has reliable information that the applicant is no longer in Norway. In Poland, according to national law (Article 44 of the Code of Administrative Proceedings) the decision is sent to the last known address of the person concerned. If it is not received within 14 days, then the decision notice is sent back to the Polish authorities and it is considered to be effectively delivered.

[710] In Italy, Norway and the United Kingdom, the applicant is considered to have absconded if he or she does not reside at his or her last known address. In such a situation, Norway will notify the responsible Member State in order to request that the time limit for transferring the applicant is extended to 18 months. In Denmark, France, Germany, Greece, Malta and Poland the time limit for the transfer may be extended up to 18 months if the applicant is considered to have absconded.

applicant has received the transfer decision.[711] In one Member State a tracing procedure is conducted to locate the applicant.[712]

The method in which the transfer decision is issued to an applicant can affect his or her effective access to an appeal procedure and other remedies. For example, in one Member State, if the notification of the transfer decision is by post it can be challenging for homeless applicants to lodge an appeal within the 15-day time limit as most homeless applicants can usually only check their mail once a week at an NGO's office.[713] Similarly, the reported delays in notifying legal advisors of the transfer decisions affects the applicants' ability to submit an appeal within the required timeframe in another Member State.[714] The general increase in applications for international protection has also had a knock-on effect on the issuing of transfer decisions in some Member States,[715] where the issuance and notification of transfer decisions can be severely delayed. This has implications for effective access to an asylum procedure as well as family unity when applicants are waiting to reunify with family members under the Dublin rules.

Procedures for transfer

Articles 29 to 32 of the Dublin Regulation inclusively contain certain modalities and rules in relation to the transfer of applicants to the responsible Member State. In accordance with the Regulation, transfers may be carried out on a voluntary basis, by supervised departure or under escort. Recital 24 requires that Member States promote voluntary transfers by providing adequate information to the applicant on this option. It also requires that supervised or escorted transfers are carried out by Member States in a humane manner, in full compliance with fundamental rights and human dignity[716] as well as the best interests of the child and taking utmost account of developments in the relevant case law, in particular as regards transfers on humanitarian grounds.

The authorities responsible for carrying out transfers may vary. In most Member States the responsible authorities are immigration authorities and/or border guards or police.[717] However, in some Member States it is the Dublin Unit that is primarily responsible for exchanging information with the responsible Member States regarding the travel arrangements for the transfer of applicants. In these cases, the relevant information is then transmitted to the competent authorities carrying out the transfer.[718]

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[711] As reported in Germany, Greece and Poland.

[712] As reported in Malta. Where the person's current address is not known or the person is no longer residing at his or her last known address, a tracing procedure will be undertaken and if the applicant cannot be found within "*a reasonable time*" (no further details provided by the authorities), the applicants is considered to be absconding.

[713] As reported in France.

[714] In Germany severe delays may occur in the notification of a copy of the applicant's transfer decision to the legal advisor of the applicant. This is exacerbated by the fact that the relevant time limit for submitting an appeal starts from the applicant's receipt of the transfer decision. It is thus crucial for the applicant to inform his other legal advisor as soon as possible when he or she receives a transfer decision.

[715] As reported in Germany and to a limited extent in Greece, according to stakeholders.

[716] Article 29 of the Dublin III Regulation reiterates that requirement.

[717] In Denmark, as of 1 April 2016 transfers of applicants to the responsible Member State are carried out by the Aliens Centre in the North Zealands Police District (*Udlændingecenter i Nordsjællands Politi*) (until 31 March 2016 this task was carried out by the National Aliens Centre (*Nationalt Udlændingecenter*)). Similarly, in Poland the Border Guards are involved in the execution of transfers. In Germany, the Foreign Authorities are responsible for the execution of transfers and the Federal Police are involved if the applicant is detained. The NPIS in Norway is in charge of Dublin transfers which consists of teams of police officers and civil servants.

[718] For example, in the United Kingdom the Dublin Unit is responsible for arranging the transfer but it liaises with colleagues in the Immigration Enforcement to arrange detention for the purposes of transfer and with colleagues in the Border Force and the Escorting Company to ensure that arrangements are in place for the applicant to be taken to the airport on the day of transfer. In other Member States national police officers normally transfer the applicant to the responsible Member State when the transfer is carried out under escort.

Exchange of relevant information

Article 31 of the Dublin Regulation requires the Member States carrying out the transfer of an applicant to communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities in the responsible Member State are in a position to provide the person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by the Dublin Regulation and by other relevant asylum legal instruments.

In accordance with Article 31 of the Dublin Regulation, all the Member States surveyed exchange relevant information between them in advance of an applicant's transfer. Annex VI of the Implementing Regulation (EU) No 118/2014 *Standard form for the transfer of data prior to a transfer pursuant to Article 31(4) of Regulation (EU) No 604/2013 is utilised for this purpose by some Member States*[719] and information is exchanged via DubliNet. Most Member States provide the relevant information within a week before the transfer in order to ensure that the competent authorities in the responsible Member State have sufficient time to take the necessary measures for the arrival of the applicant concerned.[720]

Article 32 of the Dublin Regulation provides certain rules on the exchange of health data before a transfer is carried out for the sole purpose of the provision of medical care or treatment in the responsible Member State. The findings show that if the applicant is particularly vulnerable or has particular health concerns then this information is also communicated to the responsible Member State to ensure that his or her specific needs are met upon arrival.[721] However, it is unclear from the information gathered if this information is exchanged by using Annex IX of the Implementing Regulation (EU) No. 118/2014 *Standard form for the exchange of health data prior to a Dublin transfer pursuant to Article 32(1) of Regulation (EU) No 604/2013 (Common Health Certificate).*[722]

Stakeholders in two Member States reported isolated instances of incoming transfers where the applicants had special health needs, which were not communicated in advance by the transferring Member State.[723] This could be detrimental with respect to transfers concerning applicants with specific health care requirements. In this regard, Article 15(a) of Council Regulation (EC) No. 1560/2003 as amended by Implementing Regulation No 118/2014 requires the Member State carrying out the transfer of an applicant and the responsible Member State to endeavour to agree, prior to the transmission of the health certificate, on the language to be used in order to complete that certificate, taking into account the circumstances of the case, in particular the need for any urgent action upon arrival.

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[719] Standard Form for the Transfer of Data Prior to a Transfer pursuant to Article 31(4) of Regulation (EU) No 604/2013. This standard form is reportedly used in France, Germany, Greece and Norway. However, the German Dublin Unit also sends an additional document, which reports all relevant information in a short and concise manner. No information on the use of this form is available for Malta.

[720] For example, the Immigration Police in Malta provides the necessary information concerning the applicant to be transferred to the responsible Member State five days before departure. The relevant authority in Denmark reported that they as well as most other Member States they transfer applicants to, require at least three days prior notification before transfer. In Germany, this requires that information concerning the applicant, such as any medical needs, is exchanged between different national authorities before a transfer is carried out.

[721] As reported in Denmark, France, Germany, Greece, Italy and Poland. This also applies to Norway if vulnerability is identified; however, this is not always the case as no specific identification procedures are in place.

[722] This form is reportedly used in France, Germany, Greece, Italy and Norway. No information on the use of this form is available for Malta.

[723] IOM reported in Poland that there were some previous cases of applicants transferred to Poland from other Member States where they required special medical assistance, which was not provided to the Polish authorities in advance of the transfer. NGOs in Italy also reported of applicants with particular health needs, such as being in an advanced stage of pregnancy, arriving in Italy from other Member States with no prior information on their particular health needs and requirements.

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Sometimes information also needs to be exchanged with other actors involved in the transfer. If the applicant is being transferred by air, airline companies also need to be contacted in advance in relation to the number of reserved seats per flight for applicants under the Dublin procedure, which can create logistical challenges in practice for escorted transfers, due to restrictions on the number of persons who can board a flight for such purposes.[724]

The practice of exchanging information within a required number of days is positive as it enables Member States to prepare for the arrival of the applicant concerned, especially where advance notification is necessary due to an applicant's requirements in order to allow the time for the responsible Member State to set up any specific arrangements. However, occasions where this has not occurred have been identified during the audit of case files within this study, showing the need for more standardised and predictable procedures in the interest of applicants and receiving Member States alike.

Timeframes for the transfer

In accordance with Article 29 of the Dublin Regulation, the transfer of an applicant must be carried out, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge of or take back the person concerned or of the final decision on an appeal or review where there is suspensive effect in accordance with Article 27(3). All Member States reportedly transfer applicants within the prescribed six-month time limit unless the applicant absconds.[725] However, the time generally taken within that time limit from the notification

[724] In France, for example, it is reported that aeroplane companies only allocate up to four seats per flight for enforced removal of applicants including for escorting personnel. This can create logistical challenges when, for example, a family of four is being transferred under escort. Similarly in Greece, only certain airline companies (i.e. Lufthansa and Aegean Airlines) reserve seats for applicants subject to a transfer under the Dublin Regulation.

[725] Sometimes, however, in Greece delays occur and the six-month time limit for transfers is exceeded. Reasons behind such delays include shortage of qualified staff. For example, NGO representatives in Greece reported that due to the severe shortage of staff to escort unaccompanied children under 14 on flights to the responsible Member State, significant delays may occur before staff are available and a transfer can be carried out.

of the transfer decision to the execution of the decision varies widely amongst the Member States surveyed.[726] From the case files audited as part of this study the time taken on average from the time of acceptance of the request[727] to the actual transfer is 83 days when transferring unaccompanied children under Article 8 of the Dublin Regulation. As regards the transfer of adult applicants under Articles 9 and 10 of the Dublin Regulation, this is longer and the audited case files show that it takes on average 103 days between the time of acceptance of the request to the actual transfer of the applicant across the Member States surveyed. It should be noted that the time taken to effect transfers under Article 10 is considerably longer than the time taken to transfer applicants on the basis of Article 9.[728]

The findings show that in some Member States the time taken to transfer applicants depends on the individual circumstances and/or profile of the applicant. For example, some Member States expedite the transfer if the applicant is an unaccompanied child or particularly vulnerable.[729] The practice of prioritising transfers for unaccompanied children is evident from the case files audited. In contrast to that, in two Member States transfers are delayed if the applicant has specific health concerns.[730] In the case of families including children in one Member State, the policy is that there is a 28-day restriction on removal of such applicants, starting from the time that the case becomes "appeal rights exhausted".[731]

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[726] In the preparatory works to the 2013 Bill amending the Danish Aliens Act in order to implement the recast Dublin Regulation in Denmark, it is stated that to the extent possible, the police should carry out the transfer within ten days of the final transfer decision. For further information (in Danish) see: https://www.retsinformation.dk/Forms/R0710.aspx?id=158389. In practice, the time taken to carry out a transfer depends on the circumstances of the case and it is influenced by whether or not the applicant appears as summoned or resists transfer. In a number of cases audited, the timeframe for a transfer exceeds ten days.
In Germany, according to the authorities the time taken to carry out the transfer depends on the Foreigners' Authority carrying out the transfer and it may take up to several months after the transfer decision is notified to the applicant. The BAMF normally waits for the one-week time limit to lodge an appeal against the transfer decision to elapse and then waits another week for the applicant to be notified of the transfer details before proceeding to carry out a transfer. If the Federal Police is involved, reportedly in Germany transfers occur within four to six weeks because of the good coordination between the Federal Police and Foreign Authorities. According to the authorities, in Greece in the past it would usually take up to four to five months for a transfer to take place. However, from December 2015 until February 2016, transfers would take place within two months as the Greek Dublin Unit have more capacity to undertake the necessary arrangements for transfer due to the large numbers of applicants who moved onward before the end of the procedure in 2015. In Italy, some *Questura* offices suspend the transfer for 60 days until the deadline for lodging an appeal elapses, whilst other offices reportedly seek to transfer the applicant immediately. According to the Rome *Questura*, transfers take place within 15 days after notifying the applicant. During 2014 the Norwegian UDI worked together with the Police Immigration Service and the Immigration Appeals Board in the project "Dublin A-Z" where the goal was to achieve a more effective case flow from start to finish. The project focused on how the three administrations could work to reduce the time and resources used internally to process a Dublin case and how their work could save time and resources at the other administrations. The result was that the Dublin procedure from registration of the applicant until transfer to another Member State was reduced from six to two months. The time of transfer from the date of the transfer decision was also reduced under this project. The Dublin Unit in Poland stated that on average, it takes three to five weeks to conduct a transfer in practice.

[727] Due to the lack of information in the case files audited concerning the time of notification of the decision, the analysis focuses on the time taken to effect a transfer from the acceptance of the responsible Member State.

[728] 66 days on average in Article 9 of Dublin III Regulation cases and 129 days on average in Article 10 of Dublin III Regulation cases. From the information gathered in the case files audited it is, however, difficult to ascertain the reasons why transfer cases involving Article 10 take much longer than those involving Article 9. It should also be noted that the sample analysed is small: 9 cases under Article 9 and 15 cases under Article 10.

[729] Reasons for prioritising a transfer in Greece include if the applicant is seeking to be reunited with his or her minor children who are unaccompanied in the responsible Member State or if the applicant is in the early stages of pregnancy. However, from the audit of case files, even if the applicant is an unaccompanied child their case is not always prioritised in practice.

[730] In Germany and Norway if the applicant is particularly vulnerable this may delay the transfer. Also, in Greece, if the applicant suffers from health problems, then he or she is required to submit a medical report certifying that he or she is fit to travel. This requirement may in some cases delay the transfer.

[731] As reported in the United Kingdom. For more information see Chapter 8.4 Family Removals https://goo.gl/C41TaQ; Home Office Enforcement Instructions and Guidance, Chapter 45 Families & Children Section (b) Family Returns process & operational guidance; section 1.1.1 28 day restriction on removal is currently being updated. However, in practice in the United Kingdom it appears that transfers do not always occur within this timeframe. According to the authorities, on average, it takes 117 days to transfer an applicant from the date of acceptance of the request by the responsible Member State.

As a method of shortening the timeframe in cases where applicants wish to be transferred to another Member States, two Member States provide the applicant an opportunity to sign a waiver to an appeal so that the transfer can take place immediately.[732]

Methods of transfer and transfer of responsibility for the applicant

The findings show that most Member States conduct transfers by air and land transfers are only conducted when the responsible Member State is in close proximity to the transferring Member State. The three methods provided in the Dublin Regulation -voluntary transfers, supervised transfers and transfers under escort- are utilised, although not all are used in all the Member States surveyed. If the responsible Member State is considered to have implicitly accepted responsibility, transfers are not arranged differently in most Member States surveyed.[733]

The findings show that voluntary transfers are not available in some Member States nor is there any promotion of availing of this option in practice.[734] In one of those Member States, according to the Federal Administrative Court there, a person subject to a Dublin transfer does not have a general right to a voluntary departure.[735] However, voluntary transfers are possible in some Member States if the applicant cooperates with the transfer.[736]

GOOD PRACTICES

A positive practice is reported in the Paris Prefecture in France where applicants, upon receiving their transfer decision, are given an appointment with the OFII at the Paris Prefecture in order to seek financial help to arrange a voluntary transfer.

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[732] As reported in Germany and Greece. It expedites the transfer in Germany, although in Greece delays may still occur in practice.

[733] As reported in Denmark, France, Germany, Greece, Italy, Norway and Poland. In Norway, when a Member State has accepted responsibility for an applicant by default, the immigration police arranging the transfer rely on information given in other acceptances from the same Member State and transfer the applicant to the main airport in the responsible Member State. The United Kingdom uses Article 10 of the Commission Implementing Regulation (EC) 1560/2003 in such situations.

[734] As reported in Denmark, Germany and Greece. In Germany, this is not accepted, even if applicants offer to leave voluntarily. German Federal Police officers interviewed as part of this study stated that voluntary transfers are doomed to fail because applicants are prone to abscond and there is a risk of a failure of evidence that the applicant transferred to the responsible Member State in practice. In Germany, police need evidence that the applicant has been transferred and this is more difficult if the applicant travels to the responsible Member State on a voluntary basis. Reportedly, some Dublin decisions contain a general indication that voluntary transfer is possible if agreed with all involved parties but in practice this is not possible. In France, transfers can be voluntary, supervised or escorted. Voluntary transfers are permitted in Italy if the applicant declares that they agree with the transfer but in practice they are rare as the large majority of applicants subject to transfer move onward before the end of the procedure.

[735] As reported in Germany. More generally the Court observed that the Dublin Regulation does not entail a hierarchy regarding the different transfer modalities foreseen in the Dublin Regulation. Therefore, every Dublin transfer is an official removal of the applicant to another Member State even if it happens to be based on the applicant's request and without the use of force. It therefore needs to be organized by the authorities as regards the time and place of transfer. According to the court, there is no obligation on Germany to facilitate departures without the use of force. *BVerwG 1 C 26.14*, available (in German) at http://goo.gl/JnVwDr.

[736] As reported in France, Norway and Poland. In Denmark, this option is not promoted and if the applicant concerned claims to have transferred by his or her own means the police will not register the applicant as transferred unless they receive documentation to that effect, for example from the authorities in the responsible Member State, confirming the presence of the person on its territory. In Norway, when voluntary transfers are carried out, applicants are requested to go to another Member State by a certain deadline.

Nevertheless, in the majority of Member States surveyed applicants are normally supervised by police or immigration authorities and brought to the place of departure to ensure that they effectively leave the Member State.[737]

Escorted transfers appear to occur mainly when the applicant opposes the transfer and/or is assessed by the authorities to potentially act in a violent manner when being transferred.[738] A small number of Member States also use escorted transfers for particularly vulnerable applicants, including unaccompanied children or vulnerable families with young children.[739] When it comes to the transference of the guardianship of unaccompanied children the findings show that most Member States do not verify in advance with the competent authorities whether the applicant concerned will have a representative in place or will be received by the concerned parent, sibling or relative upon arrival at the responsible Member State.[740] On the other hand, in two Member States the authorities reported that transfers will not take place if a representative or other responsible person will not be available to meet the child upon arrival.[741]

[737] For example, in Denmark, Germany, Greece, Norway and the United Kingdom most transfers are supervised. In France and the United Kingdom supervised transfers are carried out if the applicant is in administrative detention.

[738] As reported in Denmark, France, Germany, Italy, Malta, Poland and the United Kingdom. This only occurs in exceptional cases in Norway. In France, escorted transfers are only carried out following a previous failed attempt to transfer the applicant. In the United Kingdom, an Airline Risk Assessment Form must be completed and provided to the relevant air carrier in all cases where directions have been served on an airline to remove a person from the United Kingdom and the person has been detained in an Immigration Removal Centre or police cells or prison immediately prior to removal or the person has not been detained prior to removal but one of the risk indicators listed on the notification form has been identified. The form provides an exhaustive list of "*key risk indicators*", which includes *inter alia* the existence of criminal convictions for violent or sexual offences and evidence of prior disruptive or violent behaviour, including on board an aircraft that has led to their removal being cancelled. Which type of transfer method is used is established on a case-by-case basis depending on the analysis of the Airline Risk Assessment and other circumstances of the individual.

[739] For example, in Germany escorted transfers can be carried out if a whole family needs to be transferred or in the case of a medical condition, pregnancy, or if the person is suicidal. The BAMF branch office usually requests that the reasons why the transfer needs to be escorted are proven. The form used by the Foreigner's Authority and submitted to BAMF prior to transfers includes the following indications for the necessity of a supervised or escorted transfer: infectious diseases; medication; inability to be transported in an aircraft; suicidal tendency, but also violence.
Escorted transfers are carried out in Greece for unaccompanied children below the age of 14 and seriously ill persons who need to be escorted by medical personnel. However, NGO legal advisors or counsellors, acting on the *ad hoc* authorisation of the Public Prosecutor for Minors, play the role of representative in escorting unaccompanied children during the flight at their own expenses as the Greek authorities usually do not cover the travel costs of the escort. Other Member States where transfers of children are escorted are, Italy (by the representative), Malta and the United Kingdom.
In addition to reasons concerning the cooperation of the applicant and upon the request of the airline or the receiving Member State, escorted transfers in Denmark can be carried out also due to the vulnerability of the applicant, for example due to his or her health needs.
In the United Kingdom, existence of a risk of self-harm, existence of health issues requiring mitigating action, and pregnancy are included in the list of "*key risk indicators*" in the Airline Risk Assessment Form.

[740] No information was available on this in Greece. A recent practice in the United Kingdom is that family members or relatives with children or other family members in Calais, France, receive undertaking letters from the Home Office confirming that they will meet the applicants upon arrival in the United Kingdom and take care of them. The letter states *"I, the undersigned XX make the following undertaking in order for the Home Office to assist with the transfer of my [insert family member] XX. By signing I confirm that I have read the below stipulations: I confirm that I will meet XX upon his arrival in the UK, regardless of which port or airport he arrives at and I will provide subsequent transport and care for him. I consent for the Home Office/UKVI to share this declaration with any local authority children's service or local police child protection units, should they request a copy."*

[741] France and Malta. However, as mentioned above France rarely requests other Member State to take over responsibility for the examination of the application for international protection of unaccompanied children due to the low number of unaccompanied children applying for international protection there. In Malta, if the representative in the responsible Member State has not been appointed or a relative cannot meet the child upon arrival the transfer is reportedly not executed. In Malta, this practice has been reported by the authorities but it could not be verified with other stakeholders.

GOOD PRACTICES

A positive practice is reported in the United Kingdom where a family returns conference is held by the local enforcement team and attended by adult family members, immigration officials and the applicant's friend or legal representative on advance request by the applicant. At the conference the situation and various options of voluntary, assisted and ensured (escorted) transfer are explained to the individuals along with the potential consequences. Within this period, families will be expected to begin preparing for their transfer or utilising the time to raise any further issues relating to their claim or to seek legal redress. After this reflection period, the family will be invited to a pre-departure meeting to follow up the discussion about their options of transfer.[742]

As regards how the shift of responsibility from the requesting Member State to the receiving Member State takes place in practice, this occurs once the transfer deems to have been effected. However, Member States have different understandings of this as in practice this may be intended as the moment when the applicant leaves the territory of the sending Member State or the moment when they actually arrive in the receiving Member State.[743] In some Member States this depends on whether the transfer is supervised or escorted in that responsibility shifts for supervised transfers at the time of embarkation and, for escorted transfers, responsibility shifts at a later stage when the applicant arrives in the responsible Member State.[744]

Limited information is available on the notification by Member States of the arrival of an applicant but it appears that this information is not usually communicated between Member States. [745]

Article 29 of the Dublin Regulation requires that the Member State responsible inform the sending Member State as to the safe arrival of the person concerned or of the fact that he or she did not appear within the set time limit. The findings show that if an applicant disappears prior to or during transfer the responsible Member State commonly notifies the requesting Member State of the disappearance of the applicant concerned in the majority of Member States surveyed.[746] In contrast to this, some Member States do not systematically notify the other Member State when the applicant disappears in practice. [747]

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[742] In such a scenario if the family does not want to voluntarily depart then self-check-in removal directions will be served on the family or if they refuse to comply it will lead to escorted transfers to the responsible Member State.

[743] For example, responsibility shifts in France, Italy and Norway when the applicant arrives in the responsible Member State. Differently, in Poland responsibility is considered to have shifted as soon as the applicant leaves the territory of Poland.

[744] In most situations in Germany responsibility seems to shift when the person arrives in the responsible Member State and this can be proven for example if the applicant is handed over to the competent authorities upon arrival. However, in case of land transfers from Germany to other Member State the applicant is usually handed a certificate of border crossing by the police at the point when they leave German territory. In Greece, this occurs when the Dublin Unit is notified by the Greek airport where the applicant's flight was scheduled from to state that he or she has departed the State. In Malta, if the applicant is not escorted, the moment responsibility is transferred is at the point of embarkation. However, if the applicant is escorted it is at the moment that the applicant arrives in the responsible Member State and is taken into custody by the competent authorities there.

[745] For example, according to the audited case files in Germany and Greece, it appears that Member States do not inform each other of the arrival of the applicant in the responsible Member State. Norway does not notify the sending Member State upon arrival of the applicant there but sometimes this occurs in practice. In the United Kingdom, the authorities do not inform the sending Member State of the safe arrival of an applicant.

[746] In France, the Dublin Unit does systematically inform the responsible Member State of the disappearance of an applicant and in relation to incoming transfers asks the sending Member State to provide such information at least seven days before the transfer of the applicant concerned. If the applicant disappears in Malta the authorities inform the responsible Member State. In Germany, the BAMF will notify the other Member State of an applicant's absconding shortly prior to the transfer. Similarly, in Norway the NPIS also notifies the responsible Member State if the applicant disappears before the transfer. A similar practice exists in Italy and the United Kingdom.

[747] As reported in Greece and Poland.

Challenges related to effecting transfers

It is evident from the statistical information gathered as part of this study that there is a significantly low rate of transfers effected in proportion to the number of requests accepted across all the Member States surveyed. This can occur for a myriad of reasons, including factors external to Member States' administration of transfers, such as applicants absconding and jurisprudential developments.

Reportedly, the main challenges in practice to effectively carry out the transfer of applicants to the responsible Member States are as follows (in no particular order):

- applicants absconding;[748]
- lack of staff to carry out the transfers;[749]
- budgetary constraints;[750]
- administrative requirements;[751]
- logistical challenges related to restrictive requirements for incoming transfers in some Member States;[752]
- the vulnerability or health concerns of the applicant making them unfit to travel;[753]
- humanitarian reasons including family considerations;[754] and

[748] As reported in Denmark, France, Germany, Greece, Italy, Malta, Norway and Poland and in the United Kingdom. In France, the applicant's refusal to embark the airplane is also raised as a further challenge in practice.

[749] In Germany limited capacities in the Foreigners' Authorities can sometimes lead to delays. In Greece, delays may occur in transfers of unaccompanied children under 14 as there is not a sufficient number of representatives to escort them.

[750] As reported by stakeholders in Greece where applicants have to pay their own travel costs since 2014 up until the time of research with the exception of a few months from late 2014 to early 2015 were the Greek Asylum Service financed their travel. NGO representatives in Greece have stated that in many cases it is extremely difficult for the applicants to find the necessary finance to cover travel to the responsible Member State.

[751] Administrative requirements can include having the requisite documentation, such as medical certificates for ill persons and certain requirements regarding the number of police officers required for escorted transfers. If the applicant suffers from health problems in Greece he or she is required to submit a medical certificate in advance, certifying that he or she is fit to travel. It is unclear why this is the responsibility of the applicant concerned to submit such documentation as Article 32 of the Dublin III Regulation requires Member States themselves to exchange health data before the transfer is carried out. In Greece, a medical report containing the following information is required: a) whether he or she is fit to travel, b) whether he or she should be accompanied by medical staff during the flight, c) whether he or she may require medical care during the flight. This report needs to be submitted to the Greek authorities before the transfer is carried out. Therefore, the lack of a referral procedure for applicants with health problems to medical institutions in Greece for the issuance of medical certificates is problematic as without such certificates applicants cannot be transferred. Logistical challenges in relation to escorted transfers are also cited as an obstacle to effecting transfers in France as border police officers have to travel with the applicants and therefore more flight seats need to be reserved. The practice in France for escorted transfers is that there are two police officers for every adult applicant and one police officer per child.

[752] The low allocation of time slots for transfers in Hungary and the caps on the numbers of people who can arrive per day, i.e. 12 persons from Monday to Thursday, was reported as a problem in France, Germany, Italy and Norway. According to the authorities in Germany, Italy also has very specific requirements as regards the timing and location of transfers, which can make it restrictive in practice.

[753] As reported in Norway and Greece.

[754] In Denmark, "*humanitarian reasons*" includes new information after the decision was made in relation to the presence of family or health considerations. In Norway, family and health related considerations may also prevent a transfer being undertaken in practice.

- legal challenges related to the risk of inhuman and degrading treatment or other human rights violations in the responsible Member State.[755]

According to the authorities interviewed, the most prevalent reason for failed transfers is the fact that applicants abscond.[756] As mentioned above, another reason cited is restrictions in place by the receiving Member State as to its capacity to receive transfers. Article 8 of the Commission Implementing Regulation 1560/2003 permits Member States to coordinate on the date and time of arrival in the responsible Member State.[757] This can sometimes be an impediment to transfers if there are announced closures or restrictions in terms of dates for transfer.

At times transfers are also cancelled due to information coming to light after the transfer decision is issued, including the risk of inhuman and degrading treatment or other human rights violations due to conditions in

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[755] This is reported as a reason for cancelling transfers in Denmark, France, Germany, Greece, Norway and the United Kingdom. In France, this can happen for example if the authorities have not carried out a thorough review or assessment of the individual circumstances of the applicant if transferred to the responsible Member State. Although appeals against transfer decisions in accordance with the Dublin Regulation are beyond the scope of this study, some examples are provided below where Court decisions in France have resulted in transfers being cancelled. In Nantes, the administrative judge ruled in a case that the situation in the requested Member State, i.e. Italy, commanded careful examination of the situation, which was not performed by the Prefecture. The Prefecture had not carried out a "*comprehensive and thorough examination of the consequences the transfer could have had on the applicant*". For further information see: Nantes Administrative Tribunal, 28 December 2015, No. 1510637, para. 3: "*due to the sensitive and evolving situation currently prevailing in Italy in the reception of foreigners, these provisions (Article 3§2) imply that decisions relating to cases for which a transfer to that country in accordance with the Dublin III Regulation is considered, must be taken with great caution, after a full and rigorous examination of the consequences of readmission for the person concerned.*", at : http://goo.gl/9gqznB. See also a similar judgment by the same Administrative Tribunal: 22 June 2015, No. 1505089, available at: http://goo.gl/KVjE8v. Similarly, in Lyon, the Administrative Tribunal annulled a transfer decision to Hungary on the grounds that, due to their transit via Serbia, which was considered a safe country of origin by Hungary, the applicants' application was likely to be deemed inadmissible and therefore the couple were likely to be deprived effective access to the asylum procedure if transferred there. Lyon Administrative Tribunal, 30 November 2015, No. 159957, para. 6, "*It can be foreseen that his asylum application would be considered inadmissible in Hungary since the H. couple has previously transited through Serbia, a country considered by the Hungarian authorities as a safe country of origin, and Mr. H. would thus be deprived of an effective access to the asylum procedure; the transfer decision to Hungary must be regarded in this case as a serious and unlawful violation of his right, constitutionally guaranteed, to apply for refugee status.*" (decision not publicly available). In Greece, transfers may be cancelled after the transfer decision is issued by the first instance authorities if the Appeal Committees consider that there are deficiencies in the asylum procedure and the reception conditions in another Member State. This should also be read in light of the findings in section 1 of Chapter III on the application of the sovereignty clause.

[756] For example, in Greece this is particularly noted since September 2015 in the period covered by this research (until February 2016) where large numbers of applicants abscond and move on to other Member States by themselves. This was noted also in France and Norway. In some Member States this has meant that authorities resort more frequently to detention to effect transfers as reported in the United Kingdom. This should also be read in light of the findings in Chapter V on detention.

[757] Article 8 of the Commission Implementing Regulation 1560/2003 on cooperation on transfers states the following: "*1. It is the obligation of the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way. That Member State shall determine, where appropriate, the location on its territory to which the asylum seeker will be transferred or handed over to the competent authorities, taking account of geographical constraints and modes of transport available to the Member State making the transfer. In no case may a requirement be imposed that the escort accompany the asylum seeker beyond the point of arrival of the international means of transport used or that the Member State making the transfer meet the costs of transport beyond that point. 2. The Member State organising the transfer shall arrange the transport for the asylum seeker and his escort and decide, in consultation with the Member State responsible, on the time of arrival and, where necessary, on the details of the handover to the competent authorities. The Member State responsible may require that three working days' notice be given.*"

the responsible Member State.[758] This may be on account of the evolving situation in the reception conditions and asylum procedure in the responsible Member State, including developments in jurisprudence suspending transfers to certain Member States.[759] Related humanitarian considerations such as new information on the presence of family members or the deterioration in health of the applicant may also mean that a transfer cannot be carried out in practice.[760] This should also be read in light of the information on the application of the sovereignty clause in section 1 of Chapter III.

Provision of reception conditions pending transfers

The CJEU in its ruling in the case of *Cimade and GISTI* declared that the reception conditions for applicants of international protection as laid down by the Reception Conditions Directive apply to all applicants, irrespective of whether they are in the Member State responsible for the examination of their application under the Dublin Regulation.[761] The Court also affirmed that in view of the general scheme and purpose of the Reception Conditions Directive and the requirement to observe fundamental rights, in particular the right to dignity under the EU Charter, applicants in the Dublin procedure may not be deprived, even for a temporary period of time of the protection of the minimum standards granted under that Directive.[762] This responsibility only ceases when the applicant is transferred to the responsible Member State.

The findings of the study show that applicants continue to benefit from the provision of material reception conditions in the requesting Member State until the time of transfer in the majority of Member States

[758] For example, in Denmark the Danish National Police, as a result of a statement of 22 January 2015 from the Danish Refugee Appeals Board on the *Tarakhel v. Switzerland* judgment, on 13 February 2015 decided that transfers to Italy, Malta, Bulgaria and Hungary were to be presented to DIS in order to re-assess the question on their transfer after a transfer decision was issued. This was noted in a Court order regarding detention of applicants at that time. Following the *Tarakhel v. Switzerland* judgment the Danish Refugee Appeals Board also had a number of test cases in order to examine the consequences of that ruling: The Danish Refugee Appeals Board, Press Release, 18 June 2015, available (in Danish) at: http://goo.gl/tEPXjR; On 3 Feb 2016, the Danish Refugee Appeals Board's Coordination Committee (*Flygtningenævnets Koordineringsudvalg*) decided on four cases regarding of transfers of families with minor children to Italy without a preceding individual guarantee i.e. on the implementation of the *Tarakhel v. Switzerland* judgment. The decision to transfer the applicants were upheld, and only a minority dissented. The premise of one of the decisions is available on the website of the Danish Refugee Appeals Board, '*Familier med mindreårige børn kan overføres til Italien efter Dublinforordningen uden en forudgående individuel garanti – udmøntning af Tarakhel-dommen*': 5 Feb 2016, http://goo.gl/N4r84a. The Danish Refugee Appeals Board, due to the ongoing situation in Hungary, on 9 October 2015 decided to request information from DIS on whether or not Hungary still received Dublin returnees from other Member States and if Hungary still complies with their international obligations. As a result of this request, the board decided on 9 October 2015 to suspend all cases regarding transfer to Hungary in accordance with the Dublin Regulation and to suspend the transfer of persons to Hungary following a transfer decision.

[759] For example, in Germany a significant number of administrative Courts have suspended individual transfers to Hungary on the basis of the reception and detention conditions there as well as the Hungarian asylum procedure. See for example Administrative Court Düsseldorf, Decision No 22 L 2944/15.A of 3 September 2015 and Administrative Court Minden, Decision No 10 L 285/15.A of 1 September 2015. There have also been individual administrative Court decisions in Germany suspending Dublin transfers to Bulgaria, for example Administrative Court Cologne, Decision No 19 K 517/14.A of 17 September 2015 sand Administrative Court Oldenburg, Decision No 12 A 181/15 of 20 October 2015. As mentioned above, in Lyon, France, the Administrative Tribunal cancelled a decision to transfer an applicant to Hungary – Lyon Administrative Tribunal, 30 November 2015, No. 159957.

[760] In Denmark, transfers may be cancelled if new information arises concerning the health of the applicant or information concerning his or her family.

[761] CJEU, Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, judgment of 27 September 2012, paras 40-44, available at: http://www.refworld.org/docid/506425c32.html.

[762] *Ibid*, para. 56.

surveyed.[763] However, in some Member States, applicants in the Dublin procedure may not always access reception benefits on the same basis as other applicants in the asylum procedure and in some instances may be denied accommodation.[764] This can have repercussions beyond the Dublin procedure and adds to the uncertainty and precariousness of applicants' situations in this context, and has particularly severe negative effects on children, including in families, and other vulnerable applicants. This is illustrated in the testimony of an applicant:

> *"During the Dublin procedure, our children could not go to school because we did not have stable housing. The Dublin procedure makes people suffer. All the problems we had during our exile were because of Dublin. It was like being suspended in the air. We lived through all this because we had no choice. I cannot go back to my country."*
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> [Russian man, father of three children, interviewed in France]

Consequences of unsuccessful transfers

Whilst overall the findings show that there is a low rate of effective transfers across the Member States surveyed, it should be noted that quantitative data alone does not permit conclusions to be drawn on the success rate of transfers and cannot provide an overall indication of the efficiency of the Dublin system. In fact, whether or not a transfer is effectively carried out can depend on a number of factors; not least, a decision to take responsibility on a discretionary basis despite the responsibility allocation criteria. From statistical data gathered from Eurostat, on average only 30 per cent of take charge requests resulted in transfers in 2014, 24 per cent in 2015, and 29 per cent in 2016 across the Member States surveyed.[765] In Germany, only 5 per

[763] As reported in Denmark, Germany, Greece, Italy, Norway, Poland and the United Kingdom. In Malta, applicants placed under the Dublin procedure are entitled to the same rights as other applicants, including accommodation and a stipend for residents of open reception centres. Although access to education and healthcare are guaranteed indefinitely, accommodation and the associated stipend are available for up to one year from the lodging of their application for international protection in Malta. Malta provides an extension of such period only for vulnerable persons; whilst this limited extension is not in-line with the CJEU *Cimade and GISTI* judgment, it should be noted that the one year time limit has been observed to be flexible.

[764] Some stakeholders in France reported that some applicants placed under the Dublin procedure have faced practical obstacles to continue to benefit from their daily financial allowance once their transfer decision is notified to them. In practice, until November 2015, those applicants stopped receiving their daily allowance because they did not have the required document any more, i.e. the "*convocation Dublin*" (Dublin summons), which indicates the appointments when the applicant must report to the Prefecture while the Dublin procedure is ongoing. The Prefecture usually kept this document when the transfer decision was notified in person. Even if it did not, because no forthcoming appointments appeared on the document, the institution in charge of paying the daily allowance (*Pôle Emploi)* sometimes stopped paying it. Sometimes, the Prefecture refused to deliver the summons to applicants, thus preventing access to reception conditions. In this regard see the following jurisprudence from the Paris Administrative Court of Appeal, 26 May 2015, No. 14PA04679, and 30 September 2015, No. 14PA04676, in which the Court ruled that the applicant could not claim his rights under the Reception Conditions Directive. Whether the new law has brought change in this regard remains to be seen. Since 1 November 2015, applicants placed under the Dublin procedure are provided an "asylum-seekers certification" (*attestation de demande d'asile*) alongside other applicants. This document should be sufficient for them to continue to benefit from the daily allowance once the transfer decision is notified. No difficulties have been reported since in practice. Applicants placed under the Dublin procedure in France, however, at the time of writing this report do not benefit from the same housing provisions as other applicants. They could only benefit from emergency housing for asylum seekers (*hébergement d'urgence pour demandeurs d'asile*, HUDA). Applicants placed under the Dublin procedure also do not have access to reception centres normally used for applicants in the protection procedure in France (*centres d'accueil pour demandeurs d'asile, CADA*). In Germany, the new law for the Acceleration of Asylum Procedures (*Asylverfahrensbeschleunigungsgesetz*), in force since 24 October 2015, means that applicants from safe countries of origin will be accommodated in special reception facilities.

[765] Comparable data on the amount of take charge requests resulting in transfers was not available on Eurostat for Germany and Greece for 2016 at the time of extraction. Eurostat, Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision [migr_dubro] and Eurostat, Outgoing 'Dublin' transfers by receiving country (PARTNER), legal provision and duration of transfer [migr_dubro]. Data extracted on 31 July 2017.

cent of take charge requests resulted in transfers in 2015. Similarly, in France only 4 per cent of such requests resulted in transfers over the same time period, whilst in Italy only 1 per cent. By contrast, the data shows that Denmark, Norway and Greece recorded higher transfer rates: 26, 28 and 80 per cent respectively. Similarly, 5 per cent of requests resulted in transfers in France and 8 per cent in the United Kingdom in 2016. In the same year, Denmark and Norway recorded higher transfer rates: 41 and 55 per cent respectively.

If a transfer is not carried out within the prescribed timeframe the authorities of the requesting Member State reportedly examine the application for international protection of the applicant in all the Member States surveyed. This is in line with the obligation under Article 29(2) of the Dublin Regulation whereby the responsibility then lies with the requesting Member State. While most Member States seek an extension of the time limit up to 18 months if the applicant has absconded to effect a transfer at a later date when the applicant is located, one Member State[766] seeks an extension of the time limit sometimes even if the applicant does not abscond, which is reportedly frequently granted by the receiving Member State.

These delays can be further complicated by the fact that in some Member States there may be difficulties accessing the procedure on account of conditions linked to the treatment of subsequent applications. When a transfer is not carried out the practice varies across the Member States surveyed as to whether the application is examined in the present Member State as a new one[767] or treated as a subsequent application.[768] The approach taken in one Member State also depends on whether the applicant has had his or her case examined and/or decided upon in any of the territories of the Member States with cases where the applicant's application has been previously examined and/or decided upon in another Member State being treated as subsequent applications.[769] Even if the application is treated as a new one, difficulties are reported in one Member State, where such applications may be channelled into a fast-track procedure with reduced procedural guarantees

[766] If the transfer is not carried out the Greek authorities have no established practice as to whether the application would be resumed in Greece or whether it would be considered as a subsequent application. In practice, when the transfer cannot be carried out within the prescribed timeframe, the Greek authorities ask the responsible Member State for an extension of the time limits and this request is frequently granted by the receiving Member State concerned.

[767] This is the practice in France, Italy, Norway and the United Kingdom. The examination of the applicant's application is reopened automatically in Italy. In Germany, it depends on whether or not the applicant's case was previously examined in another Member State. Further information on the practice in Germany is provided further in footnote 769 below.

[768] This is the practice in Poland and it has implications for the applicant as they can be subject to a return process during the examination of the subsequent application. In Malta, the application is also treated as a subsequent one but the applicant receives the same entitlements and guarantees as if it were a first application.

[769] In Germany the application is only examined as a new one if the applicant did not have his or her asylum application examined in another Member State previously. If the applicant did have his or her asylum application examined in another Member State previously then Germany considers the application a subsequent application under Section 71 of the Asylum Act. Under such circumstances a new procedure is only admissible in Germany if (1) the material or legal situation basis to the decision has subsequently changed in favour of the applicant or (2) new evidence is produced which would have resulted in a more favourable decision for the applicant in the earlier procedure or (3) there are grounds for the resumption of proceedings, for example because of serious errors in the earlier procedure. Information demonstrating this needs to be submitted to the authorities by the applicant to gain access to the asylum procedure in Germany. However, this also depends on what stage of the examination of the previous asylum application was reached before the applicant left the previous Member State. If the application has not been materially examined in the other Member State the situation is unclear as it could be treated as a first or second application in Germany. The German authorities previously treated applications where the applicant left the asylum procedure in another Member State before his or her substantive asylum interview as a subsequent application. However, some German Courts have held that such cases should not be treated as subsequent applications in Germany – see: http://www.asyl.net/fileadmin/user_upload/dokumente/23188.pdf.

depending on which regional office is responsible for the case, although inconsistent practice is reported in this regard.[770]

One aspect evident from the findings is that even if the Member State takes over responsibility there are often significant delays, amounting to months in some cases, before the applicant can have his or her claim examined in the substance.[771] This practice appears to defeat the objective of ensuring swift and efficient access to an asylum procedure in accordance with Article 18 of the EU Charter and with the aims of the Dublin Regulation itself. [772]

4. Conclusion

This section of the report shows that the overall administration of the Dublin system is in many cases failing in its objective to quickly identify a responsible Member State so that applicants can access an asylum procedure in a timely manner.

Only a small percentage of requests result in actual transfers with applicants having limited, if any, opportunities to resort to voluntary transfers. Member States frequently rely on supervised or escorted transfers and many challenges are reported in undertaking successful transfers. It is particularly concerning to note that where transfers are not successful there may be significant delays before applicants can access the asylum procedure in the Member State where they are present.

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[770] This occurs in some Prefectures in France. The Prefecture usually argues that despite the transfer decision, the transfer has not been effected and the applicant persists in remaining in the territory, therefore he or she is placed under the fast-track procedure because they are perceived to be abusing the asylum procedure. The Paris Administrative Court of Appeal in an individual case has upheld this approach, stating that the fact that the applicant had not executed the Dublin transfer voluntarily, remained in the French territory and tried to lodge an application once the transfer time limit had expired constituted an abuse of the asylum procedure. See *inter alia* Paris Administrative Court of Appeal, decision of 1st June 2015, No. 14PA05048, para. 8. Not publicly available. It should be noted that applicants used to have the possibility to appeal the decision to be placed in a fast-track procedure in practice, which is no longer possible since the law on the reform of asylum of 29 July 2015. It is important to note that such applicants do not benefit from housing in reception centres for asylum-seekers in France but have access to emergency housing for asylum-seekers (HUDA) if places are available. They also receive a monthly financial allowance ("Allocation de demandeur d'asile"). However, this practice of channelling such claims in fast-track procedures appears to have stopped since November 2015 at the Paris Prefecture and currently applicants have access to the normal asylum procedure there. In other Prefectures, practices of channelling such claims via fast-track procedures may vary.

[771] For example, in France applicants may have to wait up to 18 months to start the asylum procedure again if they previously absconded. Otherwise they have to wait for six months before they can lodge an application again with OFPRA for it to be examined in France. It is important to note that during the time period waiting to access the asylum procedure, such applicants do not benefit from housing in reception centres for asylum-seekers.

[772] Recital 15 of the Dublin III Regulation clearly requires that the method of assigning Member State responsibility must not compromise the objective of the rapid processing of applications for international protection.

RECOMMENDATIONS

With a view to enhance the efficiency of the system and ensure that applicants have swift access to asylum procedures, including by ensuring that transfers are carried out in the most effective manner, UNHCR recommends the following:

- **Member States should promote voluntary transfers and applicants should always be afforded the opportunity to undertake voluntary transfers to the responsible Member State.** Swifter procedures and appropriate provision of information including on the progress of the procedure would contribute to ensuring applicants' compliance and therefore the success of voluntary transfers. Voluntary transfers would also ensure lighter and more cost-effective transfer procedures.
- **Transfer decisions should be issued as soon as possible to both applicants and their legal advisor and representative in the case of unaccompanied children** to ensure that they have access to an effective remedy in practice as well as in law. Transfer decisions should be issued in a language that the applicant understands and if not, interpretation should be provided to inform the applicant orally of the content of the transfer decision.
- **Once a decision to transfer a child is taken, appropriate capacity to ensure that children are transferred without delay should be put in place**, including where necessary to accompany the child to the responsible Member State. The setting up of a guardianship network could further assist in streamlining transfer procedures involving children.
- **All necessary information concerning the applicant, including on his or her health needs, should be submitted to the receiving Member State with the applicant's consent in a timely manner** to ensure that any specific needs can be accommodated both during transfer and upon arrival. The Dublin Regulation provides for standard forms which should be used in a more systematic manner to enhance efficient communication of such data between Member States whilst protecting the applicant's personal data.
- **Disaggregated data on the use of the provisions under the Dublin Regulation should be systematically collected and made available in a timely manner** in order to increase transparency and accountability, allowing also for the monitoring of the functioning of the Dublin system.

V.
USE OF DETENTION WITHIN THE DUBLIN PROCEDURE

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Article 28 of the Dublin Regulation sets out rules in relation to the use of detention for the purpose of securing the transfer of an applicant to the responsible Member State. Its overarching principle is that Member States shall not hold a person in detention for the sole reason that he or she is subject to the Dublin procedure. Member States may detain the person concerned when there is a significant risk of absconding in order to secure their transfer on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.[773] Such detention must be for as short a period as possible. Article 28 also sets out certain shortened time limits for take back and take charge requests for detained applicants as compared to applicants who are not detained along with an obligation that the transfer occurs as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of a request to take charge of or take back the applicant by the responsible Member State or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3). Recital 20 also declares that such detention is subject to the principles of necessity and proportionality and must

[773] Article 2(n) of the Dublin III Regulation defines "*risk of absconding*" as the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond. A "significant" risk of absconding, as required under Article 28(2) of the Dublin III Regulation, would appear to indicate a more heightened risk of absconding.

be in accordance with Article 31 of the Refugee Convention.[774] As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of the recast Reception Conditions Directive also to persons detained on the basis of Article 28 of the Dublin Regulation.[775]

Freedom from arbitrary detention is a fundamental human right of the liberty and security of the person under Article 5 of the ECHR, Article 9 of the International Covenant on Civil and Political Rights and Article 6 of the EU Charter. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.[776] UNHCR recalls that Article 31 of the Refugee Convention provides that penalties, including detention, shall not be applied to refugees (and asylum-seekers) for unauthorized entry or stay, provided they present themselves without delay and show good cause for their irregular entry or presence, save in exceptional circumstances.[777]

1. Use of detention

Detention is used to secure transfers in accordance with the Dublin Regulation in the majority of Member States surveyed.[778] Whilst two Member States do not apply detention to secure transfers for the purposes of the Dublin Regulation,[779] the findings show that in those Member States where detention can be used in principle to secure transfers under the Dublin Regulation, the frequency of Member States' reliance on detention to effect transfers varies considerably. As regards the estimated percentage of cases in which detention is used in the Dublin procedure in other Member States there are inconclusive findings due to the fact that this information is not accurately recorded at the national level.[780] Practice varies in different regions of one Member State

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[774] Article 31 of the Refugee Convention states: "*1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees' restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*"

[775] Article 28(4) of the Dublin III Regulation provides that Articles 9 (Guarantees for detained applicants), 10 (Conditions of Detention) and 11 (Detention of vulnerable persons and of applicants with special reception needs) of the recast Reception Conditions Directive apply.

[776] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 27, available at: http://www.refworld.org/docid/503489533b8.htm.

[777] *Ibid*., supra no. 2 Article 31 of the Refugee Convention.

[778] As reported in Denmark, France, Germany, Norway, Poland and the United Kingdom. However, in Poland, according to the authorities, detention is not frequently relied upon to carry out transfers as most applicants are willing to be transferred to the responsible Member State. Also in Germany detention is not regularly applied for securing transfers but only in exceptional cases.

[779] As reported in Greece and Italy. In Italy, there is no law permitting detention of applicants for the purposes of the Dublin Regulation on account of Article 13 of the Italian Constitution, which establishes a statutory limitation regarding restriction of personal freedom.

[780] For example, in France and the United Kingdom statistical information is not gathered specifically on detention for applicants in the Dublin procedure. From 1 January 2015 until 30 November 2015, the Danish National Police reported that out of 1,161 cases 221 persons who had applied for international protection and received a transfer decision under the Dublin Regulation, were detained. In the remaining cases it was individually assessed that detention was not necessary. According to the national authorities in Germany and Poland, detention is not frequently used during the Dublin procedure. However, the number of persons detained whilst in the Dublin procedure, as compared to other applicants, is not known. Despite this, NGOs in Poland cited several cases of applicants, particularly Syrians, being detained to secure transfers to Hungary in the period covered by this research. In Germany, detention for the purpose of removal is nowadays applied in exceptional cases and the figures are at a historic low. However, according to NGO estimates out of the small number of persons in detention for the purpose of removal, between 80 and 90 per cent of them are awaiting a transfer under the Dublin Regulation. Detention is more frequently applied in Norway where there is a risk that the applicant may abscond.

as to how frequently detention is used in the Dublin procedure.[781] Another Member State also reportedly uses detention in rare cases to secure a transfer as most applicants are willing to travel to the responsible Member State.[782] Unofficial statistics gathered from one Member State indicate that approximately 40 per cent of applicants who are in the Dublin procedure are detained.[783] National jurisprudence has also led to a halt to detention for some time due to the lack of a legal basis in accordance with the Dublin Regulation and to a consequent reduction in the use of detention in recent times in one Member State.[784]

Although outside the scope of this study, it is reported in one Member State that detention is frequently applied for applicants returned there under the Dublin Regulation.[785] An issue reported in some Member States is that applicants are detained on other immigration grounds during the Dublin procedure and it is not clear in such circumstances whether such applicants avail of the guarantees provided under Article 28 of the Dublin Regulation.[786]

The moment at which applicants are detained varies across the Member States surveyed but mostly detention is resorted to only after the transfer decision has been issued.[787]

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[781] The practice of detaining applicants varies across different Prefectures in France. For example, in Paris and Bobigny it appears that administrative detention is not used as much as transfers are rarely executed, whilst in other Prefectures detention is used to enforce transfers. In practice applicants in France are notified of the transfer decision and decision to detain at the same time and applicants are either detained when they are summoned to the Prefecture or sometimes at their reception centre. According to the French Ministry of Interior in 2015, out of the number of outgoing requests accepted by other Member States, 5 per cent of applicants were placed in administrative detention and 21 per cent under house arrest.

[782] As reported in Poland.

[783] Unofficial information gathered from the United Kingdom Home Office Third Country Unit in May 2015. Other stakeholders interviewed in the United Kingdom stated that in practice most applicants get detained as irregular entry into the United Kingdom and/or onward movement is considered as indicative of the risk of absconding.

[784] In Germany, the Federal Supreme Court found in June 2014 that there was no legal basis for detention within the Dublin procedure based on an alleged risk of absconding. In a landmark ruling from 26 June 2014, the Supreme Court held that a significant risk of absconding needs to be legally defined based on objective criteria according to Article 2n) Dublin Regulation. Since objective criteria were only stipulated in August 2015, most cases of detention in the Dublin procedure prior to the legal reform were therefore based on an unlawful detention order and the decision led to a stop of Dublin detention until the legal reform. *BGH V ZB 31/14*, issued on 23 July 2014, available (in German) at: http://goo.gl/Wyb7hv; press release of the MOI available at: http://goo.gl/es4FzU. Additionally, following the CJEU ruling from 17 July 2014 in Joined Cases C-473/13 and C-514/13 *Bero v Regierungspraesidium Kassel & Bouzalmane v Kreisverwaltung Kleve*, Judgment of 17 July 2014, regarding specialized detention centres, the practice of carrying out detention for the purpose of removal in Germany in regular prisons came to an end in the second half of 2014. This has since been codified in Section 62a Residence Act, available (in German) at: http://www.gesetze-im-internet.de/aufenthg_2004/__62a.html.

[785] As reported in Poland. This is mainly due to the fact that the applicants irregularly moved to another Member State.

[786] As reported in Greece, Malta and the United Kingdom. This may also be an issue in other Member States as most States have provisions in national law to detain applicants on other immigration grounds. In Greece, administrative detention may be applied to third-country nationals who do not hold valid residence permits. Accordingly, a third country national who lodges an application for international protection within the meaning of Article 20(2) of the Dublin III Regulation while in detention remains in detention on one of the following three grounds: a) to determine his/her identity or nationality; b) where he or she presents a threat to national security or public order; c) where detention is deemed necessary for a rapid and complete examination of his or her application for international protection. Therefore, in Greece applicants in the Dublin procedure, who at the time of lodging their application were in detention, may continue to be detained until their transfer on one of the grounds listed above, which are outside the grounds listed under Article 28(2) of the Dublin III Regulation.
In Malta, applicants may be detained on other immigration-related grounds for entering into Malta in an irregular manner.

[787] In France and Norway applicants may be detained following the notification of a transfer decision and this appears to be the practice in Germany as well. Before a transfer decision, applicants are not detained in France unless the applicant is detained for reasons other than to secure a transfer under the Dublin III Regulation. In the United Kingdom, applicants subject to the Dublin procedure may also be detained prior to the notification of a transfer decision.

2. Rules and safeguards surrounding detention

Article 28(4) of the Dublin Regulation requires that the detention conditions and guarantees in Articles 9, 10 and 11 of the recast Reception Conditions Directive apply for applicants detained under this provision. This applies irrespective of whether or not the Member State concerned has opted into the recast Reception Conditions Directive. Article 9 of the recast Reception Conditions Directive sets out guarantees for detained applicants, including that detention should be reviewed by a judicial authority at reasonable intervals of time and that the applicant should be detained for as short a time period as possible. Where detention is ordered by administrative authorities, Article 9(3) requires that Member States provide for a speedy judicial review of the lawfulness of the detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review must occur as speedily as possible from the beginning of detention and when conducted at the request of the applicant it should be decided as speedily as possible after the launch of relevant proceedings. Under Article 9(5) detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of the detention. Article 10 sets out the conditions for detention and Article 11 provides rules in relation to the detention of vulnerable persons and of applicants with specific reception needs.[788]

Judicial review

Applicants can challenge the detention decision in all of the Member States surveyed either by submitting an appeal themselves or by way of an *ex officio* automatic review by national Courts. In one Member State automatic reviews are conducted by the executive (immigration officials) rather than national Courts.[789] In some Member States the police or immigration authorities can detain the applicant and then refer the applicant's case to Court for a review of the detention in a short period of time.[790] In two Member States only the Court is competent to order the detention itself.[791] Court reviews of detention occur in a periodical manner in accordance with Article 9 of the recast Reception Conditions Directive with most initial *ex officio* reviews occurring within three to seven days of the decision to detain the applicant in most of the Member States surveyed.[792] This would appear to be in compliance with Article 9(3) though it is preferable that reviews are conducted as speedily as possible. According to UNHCR's Detention Guidelines, the review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the applicant.[793] In one Member State bail hearings must be raised by the applicant themselves and there are limitations on

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[788] According to Article 2(k) of the recast Reception Conditions Directive *"applicants with special needs"* means a vulnerable person, in accordance with Article 21 of the recast Reception Conditions Directive, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in the recast Reception Conditions Directive.

[789] As reported in the United Kingdom.

[790] For example, Denmark.

[791] As reported in Germany and Poland. In Poland, the Court rules on detention upon the request of Border Guards.

[792] The automatic review of detention in France occurs on the fifth day and the second time it is on the 25th day if the person is still detained. A review occurs in Malta on the seventh day of detention which may be extended by another seven working days by the Immigration Appeals Board for duly justified reasons. If the applicant is still detained after that in Malta a review is held every two months thereafter. In Denmark and Norway the applicant must be brought before a judge within three days of being detained. Detention reviews in the United Kingdom by immigration officials occur after 24 hours, 7, 14 and 21 days and every 2 months thereafter, and applicants may apply for bail to the court. For more information see: https://goo.gl/ZzgN8b

[793] NHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, p. 27, available at: http://www.refworld.org/docid/503489533b8.htm.
In Malta, it is reported that the provisions concerning the delay for the review of detention, which refer to 7 working days, may prolong applicants' detention more than is strictly required. For more information see UNHCR, UNHCR's Observations on Malta's Revised Legislative and Policy Framework for the Reception of Asylum-Seekers, 25 February 2016, available at: http://www.refworld.org/docid/56e963824.html.

making subsequent bail applications if no new circumstances exist in relation to the applicant's detention.[794] The influx of applicants in one Member State in 2015 has led to a law reform whereby the Minister can suspend the automatic review of the Court in special circumstances.[795] Such reform is aimed at acute situations where the large number of applicants makes it impossible in practice to bring a detained person before the Court and for the Court to review the decision within three days.[796]

Challenges concerning access to appeals

Practical difficulties reported in relation to access to appeals include restricted access to legal assistance and swift removals both of which hinder the applicant's effective access to a judicial remedy.[797] Applicants reportedly only have 48 hours in one Member State to submit an appeal before the administrative court from the time of notification of the decision to detain them.[798] This severely restricts their access to Court in practice.

As regards legal assistance, in one Member State applicants are reportedly not properly informed of their right to request a legal advisor and in another Member State there is no legal basis permitting access to free legal assistance whilst in detention.[799] In one Member State concerns were raised as to the quality of legal aid and the availability of interpretation services to facilitate meetings between the legal advisor and the applicant concerned.[800]

GOOD PRACTICES

A positive practice is reported in Denmark whereby the Court automatically assigns a lawyer to the applicant for the review of his or her detention case.

[794] As reported in the United Kingdom.

[795] As reported in Denmark.

[796] In November 2015, in Denmark the Aliens Act's regulation on detainees being brought before a court within three days was amended, so the Minister on Immigration, Integration and Housing (*Udlændinge-, Integrations- og Boligministeren*) can decide to suspend this right. The amendment was done in order to ensure that the police in situations with special circumstances was not required to release detainees because it was not possible to bring them before a court within three days. The suspension is only to be used in special circumstances, aiming at acute situations with a heavy increase of asylum-seekers and other migrants which makes it impossible for the police in practice to bring a detained person before a court and for the Courts to administrate the situation within three days. If the right to automatically be brought before a court after three days is suspended, the case will be brought before a court as soon as possible and only on the request of the detainee. The Act is Act No 1273 of 20 Nov 2015 on amending the Aliens Act (Handling the refugee and migration situation) (*Lov nr. 1273 af 20. november 2015 om ændring af udlændingeloven (Håndtering af flygtninge- og migrantsituationen*) and Bill no. 62 of 18 Nov 2015 on amending the Aliens Act (Handling the refugee and migration situation) (*Lovforslag nr. 62 af 18. november 2015 om ændring af udlændingeloven (Håndtering af flygtninge- og migrantsituationen*), para. 2.3, available (in Danish) at: https://www.retsinformation.dk/Forms/R0710.aspx?id=175367.

[797] The issue of restricted access to legal assistance is reported in Poland. Most NGOs in Poland stated that it is almost impossible to effectively challenge the detention decision without the assistance of legal advisor due to the short time limit for appeal (7 days) and the fact that detained foreigners generally do not attend the appeal hearing in the Court. In France sometimes administrative detention occurs within the 48-hour period before removal which makes it very difficult for applicants to access the Court.

[798] This is reported in France and then the Court must issue a ruling within 72 hours.

[799] In Greece there is no legislative basis for providing applicants with free legal assistance in detention as the recast Reception Conditions Directive has not been transposed yet on that provision but in practice NGOs provide legal assistance depending on their capacity. In Poland, applicants are reportedly not properly informed of their right to request a legal advisor.

[800] See UNHCR, *UNHCR's Observations on Malta's Revised Legislative and Policy Framework for the Reception of Asylum-Seekers*, 25 February 2016, available at: http://www.refworld.org/docid/56e963824.html.

Necessity and proportionality

Recital 20 of the Dublin Regulation clarifies that detention should be subject to necessity and proportionality. This is in line with UNHCR's Detention Guidelines according to which the necessity and proportionality of detention are to be assessed in each individual case, initially as well as over time.[801]

The findings show that in most Member States there is an assessment as to the necessity and proportionality of detention as part of the Court's review of detention.[802] However, it appears that this does not always occur in practice and that whilst the scope of the necessity and proportionality test seems to vary across the Member States, in some cases it can be rather narrow.[803] In one Member State the assessment of necessity and proportionality of detention is limited to checking whether the prospect of removal is reasonable and whether the applicant can provide guarantees to prevent the risk of absconding.[804] Detention can be applied in another Member State if alternatives to detention are not sufficient in the individual circumstances of the applicant's case if there is a significant risk that the applicant will abscond.[805] When assessing the proportionality of a continuance of detention, in one Member State the Court considers the advancement of the Dublin procedure.[806] In another Member State the requirement to carry out a necessity and proportionality test is necessary under constitutional law but alternatives to detention appear to be rarely considered in practice.[807] Despite these limitations, most Member States appear to take into consideration whether the applicant is particularly vulnerable or an unaccompanied child as part of their assessment as to whether detention should be applied or not.[808] Categories of applicants for whom detention in some Member States should only occur

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[801] See UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention: Guideline 4.2*, available at: http://www.refworld.org/docid/503489533b8.htm. According to the Guidelines, detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate response.

[802] In Malta, since the introduction of the *Reception of Asylum Seekers Regulation* in November 2015, the necessity and proportionality test takes place at the beginning of detention. Yet, in practice it seems that the evaluation of alternatives to detention along with the necessity and proportionality test, will apply only after it has been decided that the applicant shall not be detained. Hence, in practice, other measures restricting personal liberty and movement are applied instead of detention that cannot, however, be considered as alternatives to detention, as it has been assessed that the grounds for detention do not exist in the particular case and hence the applicant shall be released. In the United Kingdom, the regular detention reviews should provide for a sufficient proportionality and necessity test. Although detention reviews happen in practice in the United Kingdom, the effectiveness and quality of such assessments is sometimes questionable as applicants who were interviewed as part of the study were detained even though it was inappropriate in their individual circumstances (torture survivors).

[803] For example, as reported by a legal advisor in Denmark (it should, however, be noted that this observation concerns administrative detention in general and is not limited to administrative detention for the purposes of the Dublin procedure) and NGOs in Poland. According to Border Guards in Poland necessity and proportionality of administrative detention are assessed in every case, including alternatives to detention but some NGOs stated that in practice Courts usually automatically issue detention decisions without a thorough examination of applicant's individual circumstances.

[804] As reported in France. The outcome of the necessity and proportionality assessment must appear on the detention notice to justify detention.

[805] As reported in Denmark. Applicable alternative measures are those under Section 34(1) of the Aliens Act.

[806] As reported in Denmark, where the Court looks at whether there have been developments in the assessment of responsibility in the individual case, including if a request for re-examination has been submitted.

[807] As reported in Germany.

[808] The information gathered in the course of this research regarding the detention of vulnerable applicants does not refer to Member States where detention is imposed on other immigration grounds and not for the purpose of securing Dublin transfers.

in exceptional circumstances include, for example, potential victims of trafficking[809] and torture survivors,[810] unaccompanied children,[811] and families with young children.[812]

[809] As reported in the United Kingdom, according to Chapter 55.10 of the Enforcement Instruction and Guidance both potential victims of trafficking and individuals who have been tortured should only be detained in very exceptional circumstances. In Malta, under the 2015 Reception Regulations, applicants who are identified as vulnerable, such as trafficking victims, should not be detained, and if a detention decision has already been issued this should be revoked with immediate effect. In Poland, Article 88(a)(3) of the amended Protection law prohibits the detention of persons who have experienced violence, which may include victims of trafficking and torture survivors; however, in practice instances where such applicants are detained were reported.

[810] As reported in the United Kingdom under Chapter 55.10 of the Enforcement Instruction and Guidance; however, some stakeholders report that detention of such applicants does occur in practice. In Poland, under the amended Protection Law, foreigners whose psychophysical state creates an assumption that they were victims of violence should not be detained. However, as reported by NGOs, the effectiveness of the mechanisms in place to identify victims of violence is questionable. As a consequence, they are sometimes detained. Additionally, Border Guards rarely take the initiative to release from detention a person who has been identified as being vulnerable. It is usually an NGO or a legal advisor who files a request to the Border Guard to release such a person. In Malta, the 2015 Reception Regulations exclude from detention also applicants who are identified as vulnerable because they are torture survivors. If a detention decision has already been issued this should be revoked with immediate effect.

[811] As reported in Denmark, France, Germany, Malta, Poland and the United Kingdom. By law, unaccompanied children are not to be detained in prisons in Denmark and detention of unaccompanied children shall in general be applied as a last resort; it can occur only if special circumstances apply and for as short a time as possible. The Danish National Police (the National Aliens Centre) reported that although the Danish Aliens Act provides the legal basis for detaining unaccompanied children, including in cases under the Dublin Regulation, there are currently some challenges regarding placement of unaccompanied children because of the requirement that they should not be detained in regular prisons and that, unless in the best interest of the child, they are not to be placed with adults. See Danish National Police, '*Strategi om varetægtsfængsling og frihedsberøvelse efter udlændingeloven*', 25 Aug 1009 (updated 12 Oct 2012), J. no.: 2009-5200-23. In Germany, unaccompanied children and families with children may be taken into detention awaiting deportation only in exceptional cases and only for as long as it is adequate considering the wellbeing of the child under Section 62 (1) Residence Act. In the United Kingdom, children can only be detained in exceptional circumstances under Chapter 55.9.3 Enforcement and Instructions Guidance. Unaccompanied children are only to be detained until a place in a special facility for children is found. In practice, however, access to such facilities may be delayed due to the reduced capacity of shelters for children. In Norway, unaccompanied children may be detained under exceptional circumstances and only as a measure of last resort if no other alternative measures to detention are available, such as reporting to the police, or residency requirements and where considerations concerning the risk of absconding prevail. Accompanied children may be detained together with their parents in detention facilities for foreigners in the pre-departure/pre-removal/pre-transfer phase if no other alternative measures are available and considerations concerning the risk of absconding prevail. Children must always be separated from other detainees. For more information see the report and conclusions adopted by the Norwegian National Preventive Mechanism against Torture and Ill-Treatment on 8 December 2015, available at: https://goo.gl/Zx9VSq. Administrative detention of unaccompanied children is not prohibited under French law as such but rarely happens in practice since children cannot be obliged to leave the territory (*obligation de quitter le territoire français*, OQTF) and are not transferred to another Member State under the Dublin Regulation against their will. Therefore, they cannot be placed in administrative detention for these purposes in France. The detention of unaccompanied children is prohibited in Poland under Article 88(a)(3) of the amended Protection law but instances where children are held in detention were reported.

[812] As reported in Denmark, France, Germany, Malta and the United Kingdom. Instructions in France are to avoid detaining families but in practice it happens that families with small children are detained. Families will typically not be detained in Denmark except for short periods of time. If the detention is longer than three days, there are no facilities for accompanied children, but if a shorter detention is foreseen the family as an exception can be detained in an administrative detention centre only if the children are under the age of attending compulsory education. If it is still considered necessary to make use of detention in order to advance the case, one of the adults can be detained and the other can therefore take care of the children. According to Section 62(1) of the Residence Act, in Germany this can occur only in exceptional cases. In Germany there are no legal provisions excluding detention of particularly vulnerable persons such as unaccompanied children, torture survivors and families with young children but in practice such cases have not been reported during the study and are not known. In the United Kingdom, the government in 2010 made a commitment to end child detention for immigration purposes which also extended to children in families, which means that in practice children in families going through the asylum procedure will not be subject to detention. However, in accordance with Chapter 45 and 55.9.4 of the Enforcement Instructions and Guidance, those subject to the returns procedure may as a last resort be detained in "*pre-departure accommodation*" for a period of 72 hours which, in "*exceptional circumstances*", and subject to Ministerial authority, can be extended up to a total of seven days. In Norway, under national law, there are no exceptions to the detention of vulnerable persons. However, as a matter of practice, vulnerable persons are detained only in exceptional circumstances if no alternatives to detention are available.

GOOD PRACTICES

A positive practice is reported in Denmark where the police has drafted a strategy for the use of detention in accordance with the Aliens Act. The strategy includes elements that should be taken into consideration when assessing if the person should be detained, such as the situation and personal circumstances of the applicant concerned and the prospects of removal. The strategy further states that an individual assessment is to be carried out both when initiating detention and when assessing if detention should be upheld.[813]

This is largely in line with UNHCR policy, which states that victims of torture and other serious physical, psychological or sexual violence need special attention and should generally not be detained,[814] while children should never be detained.[815] As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained.[816] The same is true for asylum-seekers with long-term physical, mental, intellectual and sensory impairments, who should not be detained.[817] Measures need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to a risk of violence, ill-treatment or physical, mental or sexual abuse.[818] Finally, special care and assistance should be available for older applicants.[819] Vulnerability factors need to be weighed in the assessment of the necessity to detain.[820]

Alternatives to detention

Article 28(2) of the Dublin Regulation only permits detention if it is necessary, proportional and in the event other less coercive alternative measures cannot be applied effectively.[821] This consideration of alternatives to detention is in line with the UNHCR Detention Guidelines and part of an overall assessment of the necessity, reasonableness and proportionality of detention. Such consideration ensures that detention of applicants for international protection is a measure of last, rather than first, resort. Alternatives which restrict the liberty and movement of the person concerned are also subject to human rights standards, including periodic review by an independent body.[822]

Alternatives to detention are used in all the Member States surveyed that apply detention for the purpose of securing transfers in accordance with the Dublin Regulation, but the extent to which they are used depends

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[813] Danish National Police, *Strategi om varetægtsfængsling og frihedsberøvelse efter udlændingeloven*, 25 Aug 1009 (updated 12 October 2012), J. no.: 2009-5200-23.

[814] See UNHCR Detention Guidelines, Guideline 9.1.

[815] See UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: http://www.refworld.org/docid/5885c2434.html

[816] *See UNHCR Detention Guidelines*, Guideline 9.3.

[817] *Ibid*., Guideline 9.5.

[818] *Ibid*., Guideline 9.6.

[819] *Ibid*., Guideline 9.4.

[820] *Ibid*., Guideline 4.

[821] "*Alternatives to detention*" is not a legal term but is used to refer to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. As some alternatives to detention also involve various restrictions on movement or liberty (and some can be classified as forms of detention), they are also subject to human rights standards, *UNHCR Detention Guidelines*, para. 8, p. 10.

[822] See *UNHCR Detention Guidelines, 4.3 Alternatives to detention* need to be considered.

on variable factors and is often left to the consideration of the individual authority with the competence to apply detention.[823] The findings show that alternatives are rarely used in practice in some Member States.[824]

Alternatives to detention that may be used across the Member States surveyed include:

- bail/financial guarantees[825]
- guarantor/surety;[826]
- "house arrest" or reporting obligations;[827]
- residency requirements;[828]
- surrendering personal documents;[829] and
- "representation guarantees."[830]

[823] Practice varies in Poland depending on which authority is considering detention, whilst in Germany stakeholders report that alternatives to detention are rarely considered in practice. In France, practice varies in different areas of the country.

[824] Stakeholders in Germany reported that alternatives to detention are rarely considered in practice. Although border guards report that alternatives to detention are used in Poland, NGOs report that they are rarely considered in practice. Also it is reported in Malta that the way the new legislation has formulated alternatives to detention are not fully compliant with Article 8 of the recast Reception Conditions Directive. See UNHCR, *UNHCR's Observations on Malta's Revised Legislative and Policy Framework for the Reception of Asylum-Seekers*, 25 February 2016, available at: http://www.refworld.org/docid/56e963824.html.

[825] In Poland, applicants sometimes need to submit a security deposit and in the United Kingdom bail is used.

[826] As reported in Denmark, Germany, Malta and the United Kingdom.

[827] As reported in Denmark, France, Germany, Malta, Poland, Norway and the United Kingdom. In Malta, applicants may be asked to report on a weekly basis at the local police station. In France, applicants placed under house arrest are summoned, usually to the police station, from once per week to every day of the week depending on the Prefecture. The law provides that the Prefecture determines the area in which the person is allowed to circulate and how often the person must report, up to once per day. Whether this applies to Sundays and bank holidays also appears in the order. *Article R561-2 Ceseda*, available (in French) at: https://goo.gl/XXQfh3. Under the new law, which entered into force on 1 November 2015, applicants can be placed under house arrest from the very beginning of the Dublin procedure as soon as a Eurodac hit has been observed. Previously it was only possible once the transfer decision had been notified. Applicants can be placed under house arrest for a maximum period of six months, renewable once for the same period of time. In Bordeaux and Lyon the practice has been to systematically place all applicants under the Dublin procedure under house arrest from the moment the transfer decision is notified. How often applicants are placed under house arrest are summoned also varies from one Prefecture to another, from once per week to every day of the week. According to the Ministry of Interior in 2015, out of the number of outgoing requests accepted by other Member States, 5 per cent of applicants were placed in administrative detention and 21 per cent under house arrest. In Denmark, however, reporting obligations, other than the obligation to appear when summoned by the authorities, for example for interview purposes, are hardly ever used in cases concerning the Dublin procedure.

[828] As reported in Denmark, Germany and Poland. In Germany there are residency requirements for all applicants who have to stay in initial reception centres during the first months of the asylum procedure. In Poland, applicants may be required to reside at a specified location. Whether alternatives apply in Poland depends on the Border Guard Unit that apprehends the applicant.

[829] As reported in Denmark and Germany. In Denmark, applicants may also be requested, as an alternative, to deposit their passport, travel documents or ticket with the police.

[830] As reported in France. Representation guarantees are written documents proving that a person is not going to abscond. They include identification documents, proof of address and proof of a regular income. Applicants are not necessarily always put under house arrest or in administrative detention in France, when it is the case the Prefecture's order is usually drafted in the following terms *"provided that he does not provide effective representation guarantees preventing the risk of absconding that would otherwise allow to place him under house arrest for the following reasons: absence of passport, absence of stable housing, absence of legal financial resources"*; in practice most applicants placed under the Dublin procedure in France cannot provide these "*representation guarantees*" as very few of them have stable housing.

Defining the significant risk of absconding

Article 28(2) of the Dublin Regulation clarifies that detention should only be considered for an applicant when there is a "significant risk of absconding". This should be read in conjunction with Article 2(n), which defines the risk of absconding as *"the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond"*. The Member States' national law should therefore provide for such objective criteria enabling decision-makers to determine if the person is indeed at risk of absconding and detention is necessary.

The findings show that in a number of Member States the risk of absconding is not defined under national law.[831] The Courts have in some instances bridged this gap and provided jurisprudence to guide the authorities when considering detention.[832] For those Member States that have incorporated a definition of the risk of absconding in their national legislation there appear to be a few common grounds in practice:

- failure to comply with a removal decision in the past;[833]
- entry into the Member States in an irregular manner;[834]
- failure to cooperate in establishing his/ her identity;[835]
- failure to comply with reporting obligations;[836]

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[831] As reported in France and the United Kingdom. In Malta, the risk of absconding is only referenced in a strategy document, whilst in Denmark it is referenced in the preparatory works to Bill no. 7 of 2 October 2013 on amending the Aliens Act (*Lovforslag nr. 7 af 2. oktober 2013 om ændring af udlændingeloven (Gennemførelse af den reviderede Dublinforordning af 26. juni 2013)* and in a relevant information note to the police.

[832] For example, in the United Kingdom the Court of Appeal addressed the issue of risk of absconding in a 2015 case, *Mustafa Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 (25 August 2015), available at: http://goo.gl/Ts3ksh; and the *Hardial Singh* principles, as reformulated in *R(I) v Secretary of State for the Home Department*, [2003] INLR 196, available at: http://www.refworld.org/docid/3ae6b6ce1c.html.

[833] As reported in Denmark, Germany, Malta and Norway. In Malta, this is referred to as not complying with any provisions of the Immigration Act and subsidiary protection thereunder.

[834] As reported in Malta and Poland. In Malta, in the Strategy Document the risk of absconding is defined as a ground for detention, but there is no clear definition of the term "*risk of absconding*". Nevertheless, it is possible to reconstruct it through the document when it addresses the legal grounds for detention. In this regard at point (b) of Annex A of the document and in accordance with Article 6(1) of the Reception Regulations it is evidenced that a legitimate ground for detention is: *"In order to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant."* The Strategy Document elaborates that this ground for detention shall apply "*whenever there is a risk of absconding, in particular whenever an asylum seeker is documented, but entered Malta irregularly*". Thus the irregular entry seems to be a legitimate ground to assess the risk of absconding, and as a consequence a legitimate ground for detention. Also in the Reception of Asylum Seekers Regulations at point (c) it is stressed that a legitimate ground for detention is: *"In order to decide, in the context of a procedure, in terms of the Immigration Act, on the applicant's right to enter Maltese territory."* In this regard it is specified that "if the person has no right of entry, he or she may be detained in terms of the above criterion. Access to the territory shall be granted in the event that the asylum application does not fall under the responsibility of another Member State". This would appear to suggest that whoever falls under the responsibility of another Member State under the Dublin Regulation having entered Maltese territory in an irregular manner can be placed in detention. For further information, see Ministry for Home Affairs and National Security, Strategy Document: Strategy for the Reception of Asylum Seekers and Irregular Migrants, 23 November 2015, available at: http://goo.gl/QtHHxi.
In Poland, a reason to detain is that the applicant attempted or carried out an actual illegal border crossing except where this took place directly from an "unsafe territory".

[835] As reported in Germany (section 2(15), 2(14) Nr. 2, Nr. 3 Residence Act), Malta, Norway and Poland. In Poland, this is when applicants do not have documents confirming their identity, which overlooks the fact that many applicants may not have such documents in practice due to the nature of their flight.

[836] As reported in Denmark, Germany (section 2(15), 2(14) Nr. 1 Residence Act) and Norway.

- security risks;[837] and
- indications that the applicant does not wish to comply with a transfer decision.[838]

Other factors include the absence of "representation guarantees" that the person will not abscond in one Member State,[839] whether the applicant has applied for international protection in more than one Member State before applying in the present Member State,[840] that the applicant has left another Member State during a pending Dublin or asylum procedure and the circumstances indicate that the applicant is not willing to return there in the foreseeable future,[841] that the applicant has no permanent address or sufficient resources to sustain himself or herself in the Member State[842] and that the applicant has invested so much money in trying to arrive at the Member State by irregular means that it is considered he or she will likely resist removal[843] among others.

The fact that Article 28(2) refers to a "significant" risk of absconding appears to have no bearing on the assessment of the necessity and proportionality of detention in most of the Member States surveyed, and the required standard of proof appears to be the same as for proving a "risk of absconding" with no heightened requirement of a "significant risk" in practice to justify detention. Article 28(1) does not permit reliance on the mere fact of being subject to the Dublin Regulation for justifying detention yet from the findings it appears that this is considered a significant factor in the assessment in one Member State.[844]

[837] As reported in Malta, Norway and Poland. In Norway, the grounds in Section 106a of the Immigration Act include that "*the foreign national is responsible for serious disturbances of the peace at a residential centre for asylum seekers*" or "*the foreign national has been found to pose a threat to fundamental national interests*". In Poland, this is presented as "*inclusion in the register of foreigners whose stay in the territory of the Republic of Poland is undesirable or in the Schengen Information System for the purpose of refusing entry when arriving to Poland*".

[838] As reported in Denmark, Germany and the United Kingdom. In Germany, this is expressly stated in the definition of risk of absconding in section 2(15), 2(14) Nr, 5 Residence Act as "*the foreigner has expressly stated that he intends to evade removal.*" Furthermore, section 2(15), 2(14) Nr. 6 includes cases in which the foreigner has undertaken concrete preparatory actions of similar weight which direct force cannot overcome.

[839] This occurs in France. Although there is no definition of the risk of absconding in law, Prefectures require that applicants provide certain guarantees, including documents proving that they are not going to abscond, identification documents and proof of address. However, it should be noted that France normally does not detain applicants for the purpose of securing a transfer under the Dublin procedure once the transfer decision has been notified.

[840] This is not an explicit ground for detention in Denmark but the Danish authorities have an obligation to have special consideration for that fact in applying detention.

[841] In Germany, the definition of the risk of absconding for the purposes of detention in accordance with the Dublin Regulation, as defined in section 2(14), 2 (15) of the Residence Act, includes cases in which an applicant has left another Member State during a pending Dublin or asylum procedure and the circumstances indicate that the asylum-seeker is not willing to return there in the foreseeable future.

[842] As reported in Malta.

[843] In Germany, the risk of absconding for the purposes of detention in accordance with Article 28 of the Dublin III Regulation, as defined in section 2 (15), 2(14) of the Residence Act, includes, in section 2(14) Nr. 4, that the case where there is concrete evidence that *"The foreigner paid substantial amounts of money to a third party for services within the meaning of § 96 [smuggling of foreigners] to obtain illegal entry and it can be concluded that he or she will resist the removal so that those expenses were not in vain."*

[844] In Denmark, it is specified that when determining a "*significant risk of absconding*" that special attention is paid to the following situations: a) if the applicant has applied for international protection in more than one other Member State before applying for international protection in Denmark or; b) if the applicant during the stay in Denmark has tried to enter and apply for international protection in another Member State.

Time limits for detention and duration of detention in practice

Article 28 sets out the following time limits for detention in the Dublin procedure: the requesting Member State has a maximum period of one month for submitting a take charge or take back request from the time of lodging of the application, requesting an urgent reply; the requested Member State must provide the urgent reply within two weeks of the receipt of the request; the transfer of the applicant to the responsible Member State must take place maximum within six weeks of the implicit or explicit acceptance of the request or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3). The six-week time limit for transfer is the subject of a pending preliminary reference to the CJEU in the case of C-60/16 *Mohammad Khir Amayry v Migrationsverket*.[845]

As for the adequacy of the time limits there are different opinions between the national authorities interviewed in the Member States surveyed with one Member State reporting challenges in relation to the time limit of one month for submitting a request, as the national law on detention does not distinguish between applicants in the asylum and the Dublin procedure.[846] In one Member State the maximum length of detention is 45 days, i.e. three days longer than the six week time limit for transfer under Article 28; however, it is reported that transfers under the Dublin procedure in that Member State, if they do happen from detention, are usually carried out during the first week of detention hence remaining compliant with the Regulation in practice.[847]

Limited information is available on the average duration of detention for applicants in the Dublin procedure in the Member States surveyed and its duration depends on whether or not the applicant appeals the decision to be transferred to the responsible Member State.[848] Despite the lack of accurately recorded data on detention in the Dublin procedure, the unofficial information gathered appears to indicate that most applicants are detained, on average, for a few days up to a maximum of one month.[849] This is in conformity with the overall

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[845] Pending CJEU preliminary reference case, C-60/16 *Mohammad Khir Amayry v Migrationsverket*, available at: http://goo.gl/UNCXds.
The questions referred are "*If an asylum seeker is not in detention at the time when the Member State responsible agrees to take charge of him but is detained at a later date — on the ground that only then is the assessment made that there is a significant risk that the person will abscond — may the time limit of six weeks in Article 28(3) of Regulation No 604/2013 1 be calculated in such a situation from the day on which the person is detained or is it to be calculated from another time and if so, when? Does Article 28 of the regulation preclude, in a situation where an asylum seeker is not in detention at the time when the Member State responsible agrees to take charge of him, the application of national rules which, in Sweden, mean that an alien may not be kept in detention pending implementation [of a transfer] for longer than two months, if there are no serious reasons for detaining him for a longer period, and if there are such serious reasons, the alien may be kept in detention for a maximum of three months or, if it is probable that implementation will take longer due to a lack of cooperation from the alien or it takes time to obtain the necessary documents, a maximum of twelve months? If an implementation procedure is recommenced when an appeal or a review no longer has suspensive effect (c.f. Article 27(3)), does a new time limit of six weeks for implementation of the transfer start to run or is there a deduction to be made, for example, of the number of days the person has already spent in detention after the Member State responsible agreed to take charge of him or take him back? Is it of any importance whether the asylum seeker who appealed against a transfer decision has not himself applied for the implementation of the transfer decision to be suspended pending the result of the appeal (c.f. Article 27(3)(c) and (4))?"*

[846] As reported in Malta. It should be noted, however, that UNHCR in Malta has not observed any applicants detained for purposes of the Dublin procedure since the adoption of the new legislation in November 2015.

[847] As reported in France. According to the Ministry of the Interior in France, administrative detention is mainly used for organizational purposes, for example, an applicant can be detained the night before an early flight. NGOs and legal advisors in France describe this method of detention as "*comfort administrative detention*" ("*rétention de confort*").

[848] This is due to the fact that the time limits under Article 28(3) of the Dublin III Regulation for carrying out a transfer run from either the date of the implicit or explicit acceptance of the request by another Member State to take charge of or take back the applicant concerned or of the moment when an appeal or review no longer has suspensive effect in accordance with Article 27(3) of the Dublin III Regulation.

[849] In France, the average duration is reportedly a few days before the applicant is transferred to the responsible Member State. In Denmark, the average duration from 1 January 2015 to 30 November 2015 was 39 days until transfer was carried out. In Germany, official figures on the average length of detention are not available but different stakeholders, including the authorities, stated that the average duration is approximately three weeks. In Norway, the average duration of detention is 5-8 days but in most cases applicants are only detained for one night before the transfer.

time permitted under Article 28 and it even appears that Member States detain applicants for less time than the maximum allowed under that Article.

3. Conclusion

Detention is used to secure transfers in accordance with the Dublin Regulation in the majority of Member States surveyed.[850] The findings show that in those Member States where detention can be used in principle to secure transfers under the Dublin Regulation, the frequency of Member States' reliance on detention to effect transfers varies considerably. Whilst the practical duration of detention to secure transfers under the Dublin Regulation varies, it appears that time limits for detention are respected in practice in all of the Member States surveyed that detain applicants in the Dublin procedure.[851]

Challenges have been reported in relation to access to appeals in some cases. Whilst in principle there is an assessment as to the necessity and proportionality of detention as part of the Court's review of detention in most of the Member States surveyed, it appears that this does not always occur in practice and that the scope of the necessity and proportionality test can at times be rather narrow. Additionally, while alternatives to detention are used in all the Member States surveyed applying detention, the extent to which they are used is often left to the discretion of the competent authority. Finally, the findings show that in a number of Member States the risk of absconding is still not defined under national law as required under the Dublin Regulation.

As indicated in the previous chapter in relation to transfers, voluntary transfers, coupled with overall swifter procedures and appropriate provision of information to applicants, including on the progress of their case, would enhance compliance with the system, thus reducing irregular onward movement as well as the costs associated with transfers.

[850] With the exception of Greece and Italy.

[851] With respect to Poland, though, it should be noted that as the legal basis for Article 28 of the Dublin III Regulation was only established in national law in November 2015, there was not established practice there at the time of gathering information for this study.

RECOMMENDATIONS

In order to ensure that the use of detention for the purposes of the Dublin procedure complies with international and European standards, UNHCR recommends the following:

- In accordance with the Dublin Regulation, applicants should not be detained for the sole reason that they are subject to a Dublin procedure. **Detention should only be used as a measure of last resort on the basis of an individual assessment of the necessity, proportionality and reasonableness to detain an applicant**, and after assessing that alternatives to detention (less coercive measures) cannot be applied effectively.
- **Vulnerable persons including victims of trauma or torture, victims or potential victims of trafficking, pregnant women and nursing mothers, but also elderly persons, disabled persons, and LBGTI should in principle not be detained and alternatives to detention should be actively explored where detention would otherwise be necessary, in order to secure transfer procedures.** An assessment of specific needs would need to be conducted systematically and take place prior to or as part of the decision whether or not to detain an applicant or to apply alternatives to detention in the individual case. It would also aid the identification of an alternative suitable to the individual.
- **Children should not be detained for immigration related purposes, including for the purpose of carrying out procedures under the Dublin Regulation, irrespective of their legal/migratory status or that of their parents; detention is never in their best interests.**
- **Detention of applicants under the Dublin Regulation should be based on an individual assessment of the "significant risk of absconding" on the basis of objective criteria defined in national law in accordance with the Dublin Regulation (Article 2 (n)).** UNHCR urges the Member States who make use of detention for the purposes of securing transfers under the Dublin Regulation who have not yet adopted national law clearly defining the objective criteria for determining the existence of a "significant risk of absconding" to do so in compliance with their obligations under the Dublin Regulation.
- **Judicial review of detention should be conducted in all cases in a speedy manner**, ideally within 24-48 hours from the initial decision to detain the applicant and thereafter on a weekly basis until the one-month mark.
- **Member States should accurately record their use of detention and the average duration of detention and detention should be subject to independent monitoring and inspection.**

ANNEX 1:
RELEVANT UNHCR POLICY DOCUMENTS[852]

UNHCR commentaries on the Dublin system

Dublin III Regulation recast

- *UNHCR, UNHCR comments on the European Commission 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, 22 December 2016, available at: http://www.refworld.org/docid/585cdb094.html

Dublin III Regulation

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ANNEX 2:
RELEVANT CASE LAW OF THE EUROPEAN REGIONAL COURTS[853]

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UNHCR
The UN Refugee Agency