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Witnesses: Vincenzo Scarpetta and Helen-Marie Fraher

Dr Violeta Moreno-Lax and Professor Steve Peers

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Members present

Baroness Prashar (Chairman)
 Baroness Browning
 Lord Condon
 Lord Cormack
 Baroness Janke
 Lord O'Neill of Clackmannan
 Baroness Pinnock
 Lord Ribeiro
 Lord Soley

Examination of Witnesses

Vincenzo Scarpetta, Policy Analyst, Open Europe, and **Helen-Marie Fraher**, Senior Protection Associate, UNHCR

Q1 The Chairman: Good morning. Thank you very much for your time this morning. As you are aware, this is a public session. A webcast will go out live, and in a few days' time you will receive a copy of the transcript. Please check it for accuracy. If you wish to supplement it with any information, please feel free to do so. Before we start, it would be helpful if you could introduce yourselves and say a bit about your roles. If you would like to make any introductory comments, please do so.

Helen-Marie Fraher: My name is Helen-Marie Fraher. I am a senior protection associate at the UNHCR UK London office. I work on a quality integration project with the UK Government, and I also work in areas related to the common European asylum system, including the UNHCR's current study on how member states have implemented Dublin III.

Vincenzo Scarpetta: Good morning. My name is Vincenzo Scarpetta. I am a policy analyst at the Open Europe think tank specialising in EU affairs and policies. My areas of expertise cover the politics and economics of southern Europe. I am from Italy, which interestingly is one of the countries most touched by the current crisis. I also cover EU asylum policy, so it is an honour for me to be here. Thank you very much for inviting me.

The Chairman: I will start with a more general question. The Commission has rejected some of the more radical options for the reform of the Dublin system, yet it describes the Dublin system as a "cornerstone" of the common EU asylum system. Do you agree with that assessment, and does the latest proposal go far enough in addressing the fundamental difficulties identified in the Commission's evaluation of Dublin III?

Vicenzo Scarpetta: I think it is fair to say that the Dublin regulation is the centrepiece of EU asylum policy. In many ways I have always seen it as a necessary complement to Schengen, the border-free travel area of which the UK is not part. However, the idea of a passport-free travel area where you essentially deconstruct internal borders has to go hand in hand with a strong definition of responsibility for the surveillance of external borders, because once a person enters a country that is a member of the Schengen area they can essentially move across the area without further border checks. Therefore I have always seen Dublin as a complement, as two pieces of EU law that go hand in hand.

On the question of whether the Commission proposal addresses all the shortcomings, I think it goes in the right direction. We are at the very early stages, and the proposal could well change, because this is just the start of a long, and I suspect difficult, negotiating process with all member countries and the European Parliament, but we can return to that in more detail later.

Helen-Marie Fraher: Acknowledging that it is in the very early stages, in order to address the difficulties of Dublin III, which are well known, it is important to recognise that the Dublin regulation is currently the only regional instrument that governs intra-EU family reunion. Family unity is supposed to be a key principle of the regulation, particularly to ensure applicants' rights to continue to enjoy family life. The regulation was intended to identify the member state that is responsible and to prevent asylum seekers from being left in what is considered to be orbit—the possibility of someone remaining for a long time without a decision being made. In the end, the efficacy of the proposal depends on the extent to which it manages to mitigate these concerns.

Dublin III was never really seen as a mechanism for burden sharing or responsibility, but recent events have clearly demonstrated the need for EU solidarity and for there to be a more equal distribution of asylum seekers among member states of the Union. However, this distribution should take into account the needs of those seeking protection as well as the needs of the member states.

The Chairman: I recognise that we are at a very early stage, but do you think these proposals address the fundamental difficulties?

Vicenzo Scarpetta: The first big element of novelty is the burden-sharing mechanism. That has emerged as the key shortcoming of the Dublin regulation. As Helen-Marie said, the Dublin system was conceived very much as a fair-weather system that has clearly shown, especially as regards countries such as Italy or Greece, that the system is not designed to deal with huge influxes of migrants. Therefore, if we recognise, as the Commission has said, the

lack of a burden-sharing mechanism, which is a necessary complement to the core principle of responsibility of the first country of entry, we must also recognise that the proposal goes in that direction.

Of course, the burden-sharing element is a big element of novelty and will ultimately come down to an important political decision, because we cannot underestimate the important transfer of responsibility and power from national capitals to the EU; what we are talking about with this proposal is an automatic mechanism that will be triggered by a big automated system into which member states are supposed to feed data on the number of asylum applications, so it will be activated automatically every time we see a huge and disproportionate inflow of asylum seekers into a specific member state.

Helen-Marie Fraher: It is important to identify the fundamental difficulties at the moment of Dublin III. We have already identified the lack of burden sharing or common agreement on distribution among member states. Another key concern is perhaps secondary movement, for member states at least, and how a number of proposals in the recast look to remedy that. The question is how effective they will be in practice. For instance, we need to have a better understanding of why people feel it necessary to move from the country in which they first arrive to others. This is often referred to as asylum shopping, and it is assumed to be because of higher standards in one member state than in another. But there are other reasons. Often it is because of integration possibilities, family members or connections, language connections, or other historical ties that the individual may have to that country.

On the family reunion measures, it is therefore welcome that there has been a slight extension of the criteria for who is considered to be a family member, notably for adults, in that siblings are now considered. There has also been the removal of the requirement that the family group must already have been established in the country of origin. It is recognised that due to the nature of displacement, the family unit could in fact be established on the migratory route but before the country of arrival. These things are to be welcomed and encouraged. It is interesting that the Commission noted that the reason for this was the importance of family in helping applicants to integrate and become members of the community of the member state that they arrive in. If you are integrated, once you have been recognised or otherwise you are less likely to take part in secondary migration. For that reason, we would also encourage more flexible thinking about who is a family member. Perhaps it should be widened to parents of adult children or other adult relatives who have a strong connection, recognising that family structures in countries outside western Europe are often rather different from how we know them.

Q2 Lord Condon: Good morning. We are trying to understand the consequences of the some of the choices facing the UK Government between opting in or not opting in to these new proposals. The Commission has publicly stated that the UK would be able to continue to operate Dublin III rules without having to opt in to the new proposals. Other commentators are more sceptical. Could you give us your views? Would UK participation in Dublin III be rendered inoperable were the new proposals to be adopted, or do you share the Commission's view that the UK could still operate Dublin III without opting into the new proposals?

Vicenzo Scarpetta: Again, I would caveat this by saying that we should see what the proposal looks like at the end of the negotiation. The corrective allocation mechanism in particular will be very controversial among a number of member states. We have already seen that with the emergency relocation mechanisms that were proposed last year. As far as I can see, nothing in the current proposal suggests that the UK could not continue to use the old Dublin system if it decided to opt out of this one. Article 60 of the Commission proposal says that the regulation "is repealed for the Member States bound by this Regulation as concerns their obligations in their relations between themselves". That means that, at least initially, the Commission is working on the assumption that the UK can opt out of the Dublin recast and continue to operate under the old system. This is also the view expressed by the Immigration Minister, James Brokenshire. Logically, based on my understanding of the proposal, the main operational implication of opting out of this proposal would be that the UK would not take part in this big automated system, this big database. However, the purpose of the database is essentially to activate the corrective allocation mechanism, in which the UK will not take part. Generally speaking, I do not think that will impede the UK opting out of the new regulation and continuing to apply the old one.

Lord Condon: I am not asking you to advise the UK Government, but I am reading into your answer that the UK Government could best influence the outcome of the negotiations by being part of those negotiations, even if they do not opt in at the outset. Do you feel that they should be at the table seeking to influence the final proposals?

Vicenzo Scarpetta: As I said before, this is a decision for the UK Government, particularly because we should not forget that the regulation as currently proposed would imply an important transfer of sovereignty from the UK to Brussels if the UK decided to opt in. We should also bear in mind that at the moment the UK enjoys the best of both worlds in asylum policy, because it is not in Schengen so it has border controls in place but it is part of the Dublin system whereby you can return asylum seekers to the first country of entry. So, given that the Commission proposal maintains the core principle that the first country of entry

should be responsible for examining an asylum application, I see nothing to suggest that if the UK were to opt out, the system would become inoperable.

Lord Condon: Helen-Marie, do you wish to add anything to that?

Helen-Marie Fraher: No.

Baroness Janke: The Commission says that the principle underlying the Dublin system has basically been preserved. Do you believe that to be correct, or has the addition of the relocation mechanism fundamentally changed the basis of the Dublin system?

Helen-Marie Fraher: To some extent, this remains to be seen, because we do not yet know what impact the relocation mechanism will have, noting that it comes into play once a member state is considered to be receiving over 150% of its allocated number, based on its wealth and size. So we do not really know what that calculation will mean for changing the rate at which countries will be considered as having met that allocation. But it is true that the starting point is still considered in the regulation to be that the first country of entry into the EU will normally be the one responsible, unless, for instance, family unit provisions kick in. We also need to consider the impact that increased resettlement will have, because that is the other thing that will be taken into account when deciding whether the member states have reached their perceived allocation. Some member states may choose to increase their resettlement quotas as a result of this. We do not know yet.

The other thing that plays a role is the new proposal relating to an admissibility consideration as to whether the individual already has a first country of asylum or whether it is considered that they come from a safe third country. This, too, will have an impact on determining whether the first country of entry in the EU is ultimately the country that is responsible. A number of factors play into the extent to which this remains the guiding provision.

Q3 Lord Ribeiro: We are going to carry on with the Dublin III proposals. The suggestion is that there should be a relocation scheme added to it, running in parallel. Is that actually going to work? How are you going to get a scheme running in parallel but not actually be part of it?

Vicenzo Scarpetta: The emergency relocation mechanism last year was proposed as an amendment to the existing Dublin regulation. The fundamental issue to bear in mind here is that the European Commission clearly believes that Dublin and the relocation mechanism are at least politically intertwined. If the Dublin system were working properly, we would not need a relocation mechanism. Looking at it from a strictly legal point of view, there is nothing stopping the European Commission proposing the database and the relocation mechanism as separate pieces of legislation. There would be no legal issue there, but there is clearly a political consideration here, because every Commission proposal has to be seen as a bit of a

balancing act. On the one hand the message that the European Commission wants to send to the front-line member states, the southern European member states, is, “We are heeding your call and we are showing with the relocation mechanism that we are supplementing the existing Dublin system with a burden-sharing mechanism”, but on the other hand it wants to reassure the northern member states that the basic principle—the basic hierarchy of criteria—stays in place.

We often forget that when you look at the hierarchy of criteria in the regulation, family reunification comes before the country of first entry. In theory, according to the regulation that is more important, but the problem is that it is more difficult to find and provide evidence for that, so the first country of entry principle ends up being the main criterion for establishing which member state is responsible for an asylum application.

Coming back to your question, my short answer is that, legally speaking, I see nothing that would stop the European Commission proposing the database and the relocation system as separate pieces of legislation. I just think that the Commission clearly believes that the two have to go hand in hand. They are politically linked. That is why this recast regulation has been proposed. The relocation mechanism is included in the recast Dublin regulation.

Lord Ribeiro: Do you have anything to add to that?

Helen-Marie Fraher: I would just reiterate the point that, according to the regulation, the principle of family unity should be first, but according to the communication the Commission released, it is in fact the illegal entry or stay in a member state that is currently the criterion that is most often used. Looking at this in the context of how a relocation scheme works in connection with the regulation, it should be seen that the starting point is the Dublin regulation, because there is a possibility for applicants to benefit from this, noting the fact that a lot of the recast proposals focus on a no-choice situation. When there is a limitation of choice, where there is a possibility that the applicant can benefit, they should do so. The starting point should be the regulation, and where it is not possible to benefit under that, relocation is an alternative. I suppose what I am trying to say is that relocation should not occur at the cost of family unity principles or some other benefit that the applicant might otherwise receive.

Lord Ribeiro: Can you point to any specific areas where there is an interface between Dublin III and the relocation mechanism?

Helen-Marie Fraher: For member states it is seen as another solidarity measure, but, again, it links to secondary movement, given that relocation would also occur on a no-choice basis. If you are to be successful in overcoming this challenge of secondary movement, you need to

look at the reasons why people are moving onwards. This also goes to reception, accommodation and integration benefits for individuals. For relocation to work, member states need to have similar adequate standards of reception and accommodation. Perhaps some work remains to be done on that in the member states.

Lord Ribeiro: My final question is: what lessons are there to be learned from the adoption of the relocation mechanism in 2015? Have we learned anything from that?

Vicenzo Scarpetta: The key political lesson, which can also be applied the mechanism that is now being proposed, is that this kind of burden-sharing can work only if all member states believe that it is the right thing to do.

Lord Ribeiro: You pointed to a north/south divide in the thinking here.

Vicenzo Scarpetta: It is, in a way, although the staunchest resistance to relocation came from the east because member states such as Poland, the Czech Republic and Slovakia have been most opposed to the emergency relocation mechanism. Of course, the political implication of signing up to such a mechanism, especially in this case—a mechanism that is automatically activated by a machine—are huge. Therefore, the political decision down the line is a big one for member states. So the lesson is that these kinds of mechanisms, even on a voluntary basis, are controversial. On a mandatory basis, such as we are seeing in the proposal, it can be even harder to pass through.

Q4 Lord O'Neill of Clackmannan: To continue with this, last year's proposals on relocation were billed as a crisis response. The present proposals refer only to disproportionate burdens calculated automatically and by reference to predetermined formulae. Are we to say that what was a crisis last year is today a commonplace?

Vicenzo Scarpetta: This is not necessarily a change of emphasis. From the European Commission's point of view, this is the logical next step. As far as I understand it, the European Commission's idea has always been to move from what was a crisis response mechanism, such as the relocation mechanism that was adopted last year, to something permanent—a system that can be automatically triggered every time there is a disproportionate inflow of migrants. I do not necessarily agree that the European Commission is putting less emphasis on this or is underestimating the current status of things. It is very much still a crisis. With this proposal the European Commission is trying to move from an ad hoc, one-off emergency relocation mechanism to something that would be permanent and stay in place and would be activated every time the need arose.

Lord O'Neill of Clackmannan: Given the 150% threshold for triggering the corrective allocation mechanism, would it come into play occasionally in crisis situations, or would it be more or less continuously in use?

Vicenzo Scarpetta: This question is very hard to answer, because the reference numbers, according to the mechanism envisaged here, will be calculated on a rolling basis. At any point in time, this big database will calculate the share using the previous 12 months as a reference period. So I am not in a position to give answer on this at this stage, because ultimately it will depend on the number of asylum applications that are lodged every year in every member state. For obvious reasons, that is impossible to predict, because, given the way the system works, the calculation for the share and the 150% threshold will be deemed as obtained on a rolling basis based on the previous 12 months.

Helen-Marie Fraher: Resettlement figures are included in that number, so if member states choose to resettle more individuals they can change the numbers considered to be under their remit. In that way, it is quite hard to see at this stage the extent to which this mechanism will come into play. I also see it as a compromise perhaps between the decision that the first member state of entry is normally the member state responsible, and a concession to the member states on the border to which it therefore typically falls to consider the largest number of applicants, such as Greece and Italy. This is a way of regularising the temporary mechanism there and to provide the support that was not otherwise in place.

The problem this summer was that the Dublin regulation was not intended for this purpose; it did not foresee the response in cases of mass influx, so there was nothing in place to help there to be an orderly way of processing claims when large numbers come into the EU. The result is member states responding in their own way, with some opening their borders and others closing their borders. I see the proposal as the Commission's way of trying to provide structure and a coherent way of managing that within the region.

Lord O'Neill of Clackmannan: But the structure and the coherence to which you have referred implies a degree of automaticity that takes it out of the hands of the member states, and it ends up in the adding machine, you might say. Do you envisage the need for some kind of monitoring? The initial formula was to take it out of that context, but the change of circumstances since this rather simplistic approach was adopted means that people are now more sensitive to the changes in numbers and we want better scrutiny and analysis of the component parts. Do you not agree?

Helen-Marie Fraher: I agree that there is a difference between the hypothetical presentation and how it will work in reality. It is interesting to see how, in the end, EU agencies will be

able to adapt and to implement these changes. This comes down to making sure that agencies are properly supported, capacitated and resourced to do so. It remains to be seen how they can do this, and it is a big challenge as to whether it will work.

Lord O'Neill of Clackmannan: Given the sensitivity of the issue, the word “interesting” is not very appropriate, is it?

Helen-Marie Fraher: It is hard to know how—

Lord O'Neill of Clackmannan: What was initially anticipated as a critical one-off situation is now becoming the norm, and we have not yet moved from accommodating a crisis to accommodating what is a critical norm.

Helen-Marie Fraher: It is interesting that you consider that it will be the norm, because the extent to which it will be used at all is unknown. That is part of the challenge at the moment. It remains to be seen how often countries will reach the 150% to trigger this mechanism. I think you are right that, because of the impact, it requires further reflection, not just because of the questions that it raises about the autonomy of the member states but because of the implications for those seeking protection and what it might mean for them.

Q5 Baroness Browning: Just assuming for a moment that the UK will participate in this proposal, what is your ball-park figure as to how many asylum seekers you would expect to be allocated to the UK? What would the costs associated with that be? In particular, would the costs each year of accepting X number under this allocation system be mitigated by a distribution of EU funds, or would the cost fall solely on the national Governments?

Vincenzo Scarpetta: The figure, as I said before, will depend on asylum applications and the numbers of resettled people, so it is difficult to say. However, having done a very quick back-of-the-envelope calculation, given that in 2015 the UK was nearly 13% of the total population of the EU and nearly 18% of the total GDP of the EU, and that according to the formula each factor—share of population and share of GDP—would have 50%, the reference key would be around 15% for the UK, assuming that all 28 member states opt in. It is virtually impossible to know the number at this stage—

Baroness Browning: Go on, have a guess.

Vincenzo Scarpetta: —so I will not give one.

Baroness Browning: Would we be too shocked to hear this figure?

Vincenzo Scarpetta: No, it is just that if I were to give you a figure it would not be at all reliable. It is also a question of the way the mechanism works. It does not mean that the UK will automatically have to take in X number of people. The reference key, as it is called in the regulation, is used as a reference so that if the mechanism is activated and the UK is receiving

a number of applications that is below the reference key, the UK would have to take part in the relocation by taking some asylum seekers relocating from the country for which the mechanism is being activated. As I said, the share will change pretty much every day.

Baroness Browning: So the formula is based on GDP and population.

Vicenzo Scarpetta: Yes.

Baroness Browning: The geographic spread and size of country does not come into it.

Vicenzo Scarpetta: No, but you raise a very important point. The criteria for the emergency relocation mechanism that we saw last year were a bit more complex, because they included other factors. I personally think that basing it only on the size of GDP and size of population could be seen as simplistic, because other factors need to be considered. GDP growth should also be taken into account, because you can be a bigger economy but be in a recession and therefore have less capacity to absorb asylum seekers, a point that was raised last year by countries such as Spain and Portugal. The rate of unemployment should also be taken into account, because if a country is experiencing high levels of unemployment one would assume that it has less capacity to take in and absorb asylum seekers.

The formula that is used could be made a bit more elaborate, a bit more complex, to take account of other factors that are important, but I am not in a position to put a figure on it.

Baroness Browning: And what about cost? Will that be mitigated against in any way?

Vicenzo Scarpetta: The cost based on the proposal will be covered by the general EU budget.

Baroness Browning: The money will follow the numbers. Is that right?

Vicenzo Scarpetta: Yes, so there would be compensation for the countries that are relocating to cover the cost of transferring the people. The European Commission has provided a cost estimate, which I think is €1.8 billion over four years. That money will come from the general EU budget. There is a second element to it, which is slightly separate. It will be possible for a country to opt out temporarily of the automatic relocation mechanism. In that case, though, for every person the country is essentially refusing to relocate, there is a solidarity contribution of €250,000.

Baroness Browning: You mentioned relatives, and I take that point. It is difficult in many of these cases to identify the country of origin either because people are deliberately trying to obscure it or because they have no proof. Is there any danger that those difficult cases will come to the top of the pile and that these will be the people who will be relocated?

Helen-Marie Fraher: I guess in some cases they are similar to persons who are considered stateless. I do not think they would necessarily be prioritised in that way. This has been given no attention in the regulation. It is not clear how such cases would be progressed.

The Chairman: We need to move on, because it is 11.15 am and we have a number of questions to get through. Perhaps we can be a bit more brisk in our questions and answers.

Q6 Baroness Pinnock: I have some questions on the rights of asylum seekers. Article 6 of the proposals suggests that the right to apply for asylum does not include the right to choose which member state examines the application. What do you think about that, and about the consequences of it?

Vicenzo Scarpetta: I think Helen-Marie is better placed to answer this question. What I can say very quickly is that the proposed wording is stronger than in the previous version, but the underlying principle is essentially the same. Even under the existing Dublin system the country responsible for examining an asylum application is decided by EU law. The new wording reflects what several European leaders have been saying. In March, Angela Merkel said that there was no right for a refugee to say, “I want to receive asylum in this specific state”. The same consideration was made in the conclusions of a meeting of the Council of Ministers at the end of last year. There is stronger wording but my impression is that the underlying principle is the same as under the current system.

Helen-Marie Fraher: I have already spoken on this a bit, so I will try not to repeat myself. It is interesting to note that Article 6 looks at the right to information. One of the key things to consider is that if there is going to be a no-choice basis it is very important that the applicant understands this at the earliest stage of the procedure, upon entry when they first make their application. We also need to understand the consequences of the no-choice basis should they then move on to another member state or make another application elsewhere. In addition to understanding the obligations or consequences they must face, it is also incredibly important that they understand the possibility to benefit under some of the provisions. For instance, it is important to highlight at the earliest possible stage that they may have family members they could be reunited with.

It is particularly important in this case, because under Dublin III it is foreseen that in some cases you will have a personal interview. There has now been a slight amendment to this and the interview may not take place in all circumstances, particularly where the member state considers it already has enough information to take the decision. It is possible for applicants to provide information only before a decision has been taken to make a transfer. So there is only a very limited time for them to provide information that may assist in identifying the right member state to take responsibility.

The other implications of no choice are for secondary movement and how to reduce this. I suppose there is a concern that strengthening the first country of entry or application may be a

disincentive for some people to register. It is important to look at the reasons for this and how they can be mitigated. Of course, it would always be helpful to include objective criteria such as previous study or work in a country, or knowledge of a language, in addition to family links in helping to identify which member state is best placed to consider an application.

Q7 Lord Soley: What is your view of the simplification of the system of transfers, in particular the right of an asylum seeker to appeal on the grounds of human rights and family reunion being withdrawn or limited? Is that against the fundamental rights? Will it bring this into conflict with fundamental rights?

Helen-Marie Fraher: That is a very interesting question. First, the simplification of the system, as I understand it, is the reference to the shortening of the timeframes and perhaps also the move from take-back requests to just notifying the member state that it is now responsible. While a shortening of the timeframe should be welcomed if it means quicker facilitation and identification of the responsible member state, timeframes need to be adequate so that there is sufficient time for individuals, first, to provide information about family members or about their circumstances and, secondly, to undertake family tracing, which can often be quite a difficult and lengthy procedure. How you balance the two remains to be seen. There are also concerns about the lack of consequence as a result of simplifying this procedure or shortening the timeframes for member states that do not comply with the time limits. This might result in the unintended consequence of people being left in orbit again.

Lord Soley: Is your view similar, Mr Scarpetta?

Vincenzo Scarpetta: I do not have much to add. Generally speaking, the shorter deadlines can be seen a positive, in a way, because they mean that the asylum seeker will have quicker access to the asylum system of the member state that is determined to have responsibility. But I absolutely agree that there is a need to balance the two things, especially when it comes to the remedies part. There are legitimate questions around whether seven days from the day of notification is enough for an asylum seeker to appeal against a transfer decision. The seven days to appeal and then a maximum 15 days for a court to make a decision on the appeal are not too ambitious, especially given that there can be circumstances where the judicial and administrative system is under pressure because of the big inflow of people.

Lord Soley: Is it not possible for a person to pursue the appeal in the country they have been removed to? Are you able to say? It is a legal question, in a sense. Do you see what I mean?

Vincenzo Scarpetta: I am not sure.

Lord Soley: The proposal seeks to make it easier to apply Dublin rules on reunification with family members in other states. Do you think it will succeed in that respect?

Helen-Marie Fraher: I have spoken about this throughout this session. It is a key theme of importance to UNHCR. Of course, we welcome the extension of the criteria. However, we would welcome further extension of those criteria, particularly consideration being given to including other definitions of family, including parents who might be dependent on their adult children, and grandparents and suchlike. To have respect for family unity, there needs to be close consideration of the individual's understanding of family life, which is often quite different from western concepts, and we would welcome a more flexible, wider consideration of that. In this regard, it is noted that what is currently Article 17 but is more widely known as the humanitarian or discretionary clauses has been curtailed or limited in its application. This might have an impact on the possibility of family members who do not meet the other criteria to meet those under a discretionary clause.

Lord Condon: Vincenzo, you said earlier that burden-sharing will work only if all the countries agree. If we look at implementation, under Dublin III member states enjoy discretion over whether or not to make take-back requests and, similarly, whether to accept them. As we understand it, the latest proposal makes such notifications mandatory. Do you think this reduction in member state autonomy can be justified and is it likely to survive the negotiation process?

Vincenzo Scarpetta: As I said, it works if all the member states participating believe that it is the right thing to do. This kind of question is particularly tricky to answer. There is a rationale. I can understand where the Commission is coming from. Given that we have in this proposal an automated system into which member states would be putting all the information, in theory the margin of error under this system would be basically zero. From that point of view, there is a rationale. But we are not talking about IT, we are talking about politics, and this will ultimately be a major political decision, because every member state that participates in this regulation will have to assess whether or not the trade-off is worth it.

The overarching political point is that this regulation will ultimately be adopted by QMV. There may be some member states, as was already the case in September 2015, that do not think this is the right thing to do but can be outvoted in the Council of Ministers. This is a very important political point that links to the point I made before. If, as happened last year, with some countries—the Czech Republic, Slovakia, Romania and Hungary—being outvoted on such a sensitive issue, the issue will become even more politically toxic and would therefore undermine the functioning of the system as a whole. Ultimately, everything boils down to a major political decision. Reading the proposal, I can understand where the Commission is coming from and the rationale for saying, “We have this automated system in

place, so we can make the notification automatic because the system will eliminate every possible margin of error”.

The Chairman: On the practical side, it will be supported by a database, to be set up by EU agencies for managing these systems. Do you think they have the skills and resources to set up and operate such a complex database?

Vicenzo Scarpetta: I am not an IT expert, but instinctively I would say that they do, because the EU is 28 developed countries. But this goes beyond my knowledge, so I had better not speculate on it.

Helen-Marie Fraher: I would also say that it is not really for us to address this question, but I will say that as part of the UNHCR study, we tried to obtain reliable, up-to-date data on the Dublin system and this was often quite difficult to do. Currently the only commonly available data are often given to Eurostat. This is another challenge that will need to be overcome for this to work.

On the last question, it is also not for us to pronounce on the reduction of member state autonomy, but it was interesting to note from Eurostat the number of take-back requests that were refused in the past year. Perhaps the intention here was to try to remedy that. It is also worth noting that even in cases where the request was accepted, in a number of cases the transfer still failed. While it is clear that the legislation is looking to remedy the lack of uptake of take-back requests, whether this will flow through in actual transfers really determines whether or not this is effective.

The Chairman: But do you think that the proposal as described is robust enough to rule out areas of disagreement or error?

Helen-Marie Fraher: Errors on the member state side or the individual's side?

The Chairman: The member state side.

Helen-Marie Fraher: It is hard to say.

The Chairman: It is difficult to say. Indeed. Lord Ribeiro.

Q8 Lord Ribeiro: You have already touched on the solidarity contribution—the €250,000 a member state would have to pay if it withdrew from this. First, I would like your view on that. Secondly, is this contribution a fair reflection of the costs imposed in making these transfers? How do you see this from the point of view of fairness? Clearly, within the EU there are rich nations that would like to salve their consciences by paying out the €250,000—and it is off their book—and the poorer nations that will struggle to meet this cost. Is this a punitive thing and will it actually be beneficial?

Vicenzo Scarpetta: You raise a very important point here. The negotiations have yet to start, but I am sure this is going to be one of the most controversial points. I do not have the instruments to back or dismiss the figure, to say whether or not it accurately reflects the costs that could be incurred by a member state. I can point out, however, that last year when the emergency relocation mechanism for Italy and Greece was proposed, the Commission offered member states €6,000 per asylum seeker relocated from either Italy or Greece, and now we are talking about €250,000 per asylum seeker who is refused relocation. This might suggest that there is a punitive element, although I do not have the instruments to assess whether or not the figure accurately reflects the costs. My point is more that the big disparity between the two figures might suggest that the Commission is also putting a punitive element into it.

Lord Ribeiro: That is a very helpful observation and puts the true costs into context.

The Chairman: On first reading, the sum appeared exorbitant, and I thought it had a punitive element to it. I think that is all from us this morning. Thank you very much indeed for your very comprehensive answers. If, on reflection, there is anything you wish to send us in writing, please do so. You will receive the transcript, and if you wish to make any corrections, please do. Thank you very much indeed.

Examination of Witnesses

Dr Violeta Moreno-Lax, Director LLM in Immigration Law, Queen Mary University of London, and **Professor Steve Peers**, Professor of Law, University of Essex

Q9 The Chairman: Good morning and thank you for your time. As you know, this is a public session. It is being recorded. A transcript will be sent to you for correction. If you wish to correct anything, please feel free to do so, and if there is any supplementary information that you want to send us after you have seen the transcript, please also feel free to do so. Could we start by your briefly introducing yourselves and saying a bit about what you do, please?

Professor Steve Peers: I am Professor Steve Peers of the Human Rights Centre and the School of Law at the University of Essex. I have been following EU immigration and asylum for a long time.

Dr Violeta Moreno-Lax: I am Dr Violeta Moreno-Lax. I am the director of the immigration law programme and the co-director of the Centre for European and International Legal Affairs at the University of Queen Mary.

The Chairman: Thank you very much indeed. I will start with a rather broad question. The Commission, having rejected some of the more radical options for reform of the Dublin system, describes it yet as a “cornerstone” of the common EU asylum system. Do you agree with that assessment, and do the latest proposals go far enough in addressing the fundamental difficulties identified in the evaluation?

Dr Violeta Moreno-Lax: Thank you for the question. I think the assertion that Dublin constitutes the cornerstone of the common European asylum system relies on the historical acknowledgement of such an affirmation. This has been so since the 1990s. All subsequent Dublin reforms have stated in preambles or statements that the regulation constitutes the cornerstone of the common European asylum system. However, that is not really how things should go if one sticks to the wording of Article 78 of the TFEU whereby Dublin should be the vehicle for the common European asylum system to work so that the substantive pieces of the system—namely, the reception conditions directive, the qualification directive, the asylum procedures directive—should be the cornerstone of the system, with Dublin introducing mechanisms to enable its functioning overall. I think that behind the claim that it should be the cornerstone lies some sort of political assertion that it should constitute the ultimate objective, because otherwise, politically again, it would not be palatable for the member states to play according to the rules of the common European asylum system. However, legally speaking it is not correct to say so, at least under the wording of Article 78 of the TFEU.

The Chairman: So you are saying that the wording is political, and that that is not what it is in reality.

Dr Violeta Moreno-Lax: That is what I would say.

Professor Steve Peers: The idea that this is about trying to make the Dublin system work is problematic, because the only reasonable attempt at making it work would be to depart to some extent from the original principles and to introduce at least some degree more of applicants’ choice, or at least perhaps applicants’ preference. The problem that has plagued the system since the beginning is that people are supposed to stay in one member state but do not want to be there, so they try to find a way to get to another member state, which is reasonably easy as long as the Schengen system is fully applied. Once we have large numbers, as we have now, on a scale that upsets public opinion—as the scale that they were at did—it becomes very difficult to maintain the Schengen system along with Dublin, at least for the countries involved. The only way forward, it seems to me, is to ask at least some of the people concerned, “Can you express a preference and we will take account of it? What are the reasons for your preference? Do you have family, do you have friends?”, and so on. If you are

moving people to a state where they have a preference for going—you could give them several preferences; one, two, three, four—they are of course less likely to stray from that state once they get there, because it is a place they chose. Otherwise you are in a position of trying to do what the Commission is trying to do here: trying to keep the first-country rule applied, partly by detaining everyone and treating them very badly, and partly by simply trying to remove them to a supposedly safe country nearby, so that you never even get into a situation where they travel further than the European Union.

The Commission's choice to try to double down on the original Dublin principles rather than try to rethink them to a modest degree is a fundamental problem underlying this proposal.

The Chairman: Essentially, the Dublin system is really a mechanism for assigning responsibility but not for responsibility sharing. Does the latest proposal change that basic principle?

Dr Violeta Moreno-Lax: It does lead, to a limited extent, to what I think one could call patchwork solidarity. It introduces a corrective allocation mechanism that kicks in only once, according to a predetermined share that the new to-come European asylum agency would configure and calculate annually for all participating Dublin member states, which are 31, on the total GDP and total population of each participating member state. The corrective allocation mechanism kicks in only once the capacities according to that reconfigured share have been exceeded by 50%, which is quite considerable. However, the automatic triggering relates only to the activation of the mechanism. The running of the mechanism and how it would work in practice is heavily bureaucratised, and if anything just adds more complexity to the current complexity in the current heavy and costly administrative system that we see already in the Dublin system. It would not replace or suspend the Dublin assessment; it would just superimpose a further assessment before the Dublin assessment, so the benefiting member state would have to assess whether it had exceeded its capacities. If so, the system would automatically send a signal, and it would have to be the one taking, first, an admissibility decision. That falls within its responsibilities even if its capacities to fingerprint, record and register applications have been far exceeded. Greece, for example, has apparently exceeded its capacity by 200%, if not 300%, according to the latest estimates. None the less, it would still have to undergo an admissibility check. The relocation transfer would then be for it to shoulder, and after that relocation transfer occurred the receiving member state would undertake the Dublin assessment, which presumably could lead to the applicant being transferred a second time somewhere else, thereby increasing the overall costs in time,

resources and suffering of the applicants if the patchwork solidarity mechanism were activated.

Professor Steve Peers: The fundamental question is whether this relocation system, or however they would describe it, would work, because the current relocation system is not really working. In nine months, it has moved 2,000 people fewer out of 160,000. Even though there are lots of people in desperate conditions, it has not been very effective at moving them. Furthermore, member states do not seem interested in having a new one. They had already in effect rejected a proposal from September, so why would they be keen on this one? A number of member states immediately said that they were opposed to the idea. So there are both practical and political problems in trying to shift it into a new type of system.

Dr Violeta Moreno-Lax: There is one way out of the obligatoriness of the corrective allocation mechanism; the Commission proposes that member states can choose, for a temporary period of up to 12 months, not to participate in the sharing of physical transfers of applicants and instead choose to pay a solidarity fee to the otherwise-benefiting member state or the member state assuming responsibility. The European Commission has indicated no limit on how many times this “pay instead of solidarity” rule could be applied in time, and by how many member states this mechanism could be invoked. We could reach a point at which, if all the member states consent or are targeted by the corrective allocation mechanism and decide to bail out, Greece and Italy would find themselves in the exact same situation that we are witnessing today.

Professor Steve Peers: Except they would have more money for their budgets.

The Chairman: Yes, quite.

Q10 Lord Condon: We are trying to assess the theoretical consequences of the UK either opting in or opting out of the European proposal. On the one hand the Commission has publicly stated that the UK will be able to continue to operate Dublin III rules without having to opt into the new proposals. On the other hand, some in government have shown a fairly healthy level of scepticism towards that. We would welcome your views. Do you think UK participation Dublin III will be rendered inoperable if the new proposal is adopted? We sent you some hypotheticals on that. In essence, can the UK have the best of both worlds in that event?

Professor Steve Peers: Obviously it depends on the final text, and I imagine that things might change in the final text of this proposal. First, there is a procedural element to consider. It cannot be considered inoperable in practice unless the Commission makes a proposal to say that it is inoperable and the Council approves it by a qualified majority. So as long as the

Commission sticks to its position that the final text would not be inoperable, it will not be found inoperable. It is not an objective rule that no member state or whoever can go to the court if Justice argues that it is inoperable. So there is that procedural and political element to consider.

I think it would be difficult to run this alongside Dublin III, at least in some cases, but there are several points to keep in mind. The drafting of this proposal is designed to stop people getting past Greece; it is designed to designate Turkey—and who knows, perhaps in the future Libya—as safe third countries. There are other plans afoot to stop people even making it across the Mediterranean and to return them to the southern shores. If that occurs, it is irrelevant as regards inoperability, because that would be the crucial feature if that EU-Turkey agreement continues to function in the way it has. In the first three months or so that will be the crucial element, unless vast numbers of people now try to cross the Mediterranean in the numbers we saw going into Greece last year or find some other route that is not then blocked off in turn. Those are the factors to take into account.

Ultimately, however, if we have a Dublin IV, which at least has some of the elements here, there are other international treaties, which work in different ways, because they have optional protocols or have loads of reservations to them. The Council of Europe convention on extradition involves 40-plus states, but you can have a reservation to any provision, the four protocols are all optional, and there is a whole mix of countries that have ratified one or the other. Among those countries, leaving aside the EU where we have the European arrest warrant, you have quite a complex, heterodox approach to extradition, yet it functions in practice, although perhaps not as smoothly as the European arrest warrant system, which has more uniform rules. Nevertheless, it functions. Some people are still extradited—it is possible to apply the rules—and there are many other examples of fragmentation in international law where you can find legal systems in place with lots of options, opt-outs, optional protocols, reservations, and so on, which somehow the states make work, even though of course it will be more difficult than a uniform system. It is operable in the most basic sense; it is like a car with lots of bits added on to it, but you can still drive it, and as long as that is the fundamental criteria it could still be operable.

Dr Violeta Moreno-Lax: I do not know whether I would agree that such a car would be driveable in practice. If we stick to what the European Commission has proposed, both the preamble recitals and the derogation clause at the end of the proposal theoretically leave it open for the UK to opt in or opt out, and it is the same for Ireland. Therefore in theory the option is contemplated.

However, I think a number of practical issues would render that highly unworkable in practice. First, there are new competencies that are taking away from member states which presumably it would be very hard for the UK to keep within its own sovereignty. For example, there will be a new automatic system, whereby similar identification numbers will have to be allotted to all applicants. That will be run by the eu-LISA, the large IT systems agency, so if the UK is out of the system it will be hard for it to play by the rules that all other member states will be following instead. The new asylum agency is going to be in charge of the early warning mechanism that has been taken away from the Dublin regulations and now extends in a separate proposal to expand the powers of EASO, and it will be in charge of the corrective allocation mechanism. So I do not know how one thing would play out with another on the competences plane.

There is another set of difficulties. It would be quite difficult to have the UK applying different timeframes. For example, the time limits for take-charge requests have been shortened and the take-back procedure has been virtually eliminated. We now have a procedure whereby notifications are issued by the requesting member state, and the requested member state has only to issue an automatic confirmation of receipt. If the UK does not play by these rules, it would be quite difficult to operate as a whole. The cessation of responsibility clauses have been eliminated and the discretion available under the discretionary clauses, including the sovereignty clause, has also been substantially reduced. If we have the UK playing by different rules, I do not see exactly how the different member states could maintain two games at the same time by substantially quite distinct provisions.

The final concern is about the rules and remedies. Remedies have now been clearly established to have an automatic suspensive effect, which is something the UK does not endorse. Again, I do not think that would be sustainable from the perspective of having a harmonised and operable system overall.

Lord Condon: I realise it is probably a political decision, but can the UK do anything to influence the outcome to ensure that Dublin III remains operable? Is there anything more it could and should be doing?

Professor Steve Peers: There have been several occasions, usually in the areas of civil and criminal law, when the UK has opted out of a proposal that the Commission has made but has indicated in principle that it is broadly in favour of the proposal, subject perhaps to one or two key things that it would like to change. It then made a later decision on when to opt in. The Rome I proposal on conflict in law in contracts followed that approach. There were a couple of other occasions as well. There have also been a few times when it decided not to then opt

in. I think a decision is pending, which may be made after the referendum, on whether we will opt into Europol, having got some of the changes that the Home Secretary wanted because other member states agreed to them. Obviously, that is an informal process—it is not formally written down in the treaties that we can do that—but it has worked out in practice that MEPs and Governments work together. You have to try to convince people, although sometimes they share the same views. I suspect some member states would share some of our concerns about this, as they did about Europol for instance. We then make a decision. The process is that you decide after the legislation is adopted whether you want to opt into it or not. You still have the freedom to act, which you exercise at the end of the process, whenever that might be.

Dr Violeta Moreno-Lax: Briefly, I think the UK would be better off opting in, and I will give reasons for that. The political consequences are quite minor, precisely because of what Professor Peers has mentioned already. The two key pillars of Dublin are not being revised, so the no-choice rule and the lack of consideration of applicants' preferences are maintained. If anything, this proposal, if adopted, would increase the amount of coercion that can be utilised against applicants, in a way that might not even comply with some basic human rights protections inscribed in the Charter of Fundamental Rights and the ECHR. That is one thing. Secondly, the key rule on the attribution of responsibility and the one most often invoked is that the member state that was entered first is the one responsible for examining the asylum application. That member state is normally, in 90% of cases, the state of irregular entry. That is being maintained, so presumably the pressure will continue to be on the external border member states, and the situation will not change radically or in any perceptible way for the UK. The big change is the corrective allocation mechanism, and, as I said, there is a clause whereby member states can opt out from that scheme without opting out of the whole Dublin IV recast. I do not really see any interest in maintaining an overly complex mechanism whereby uncertainty and delays will if anything be radicalised, to very little benefit for the UK.

Q11 Lord Soley: My question follows on from that, in a way, because I am still not quite clear about the legal options here if the two systems are deemed to be incompatible. One state could presumably say, "We want you to take this person back," and the other state could say, "No, we are not going to," and then there could be a legal challenge by the state or by the individual, could there not?

Professor Steve Peers: Legally speaking, as I said, the process for deciding whether Dublin IV would be incompatible with applying Dublin III at the same time for one member state, like the UK, would be that the Commission makes a proposal and the Council adopts it. There

is no other process for deeming it incompatible. There is no general abstract rule that incompatible texts cannot be applied at the same time. If the Commission and the Council do not go through that process, whatever objective incompatibility there might be there is no legal incompatibility within the meaning of the treaties unless you go through that process. You just have to try to figure out what happens in the event of a conflict. I suppose the classic conflict would be that we say that Germany is responsible under one set of rules, but Germany says, “Oh no we are not. We’re looking at Dublin IV here, and Dublin IV makes Greece responsible, so do not send your request to us.” I think the answer would have to be that it depends on whether the UK is involved in the process. If the UK is sending a request or, less likely, receiving a request to transfer someone, the existence of the system that allows Dublin III and Dublin IV to co-exist at the same time must mean that the Dublin III rules, as far as the UK is concerned, take precedence. But this is speculative, of course; we have not had a scenario like this.

Lord Soley: There could also be other legal agreements, either between two states or international agreements.

Professor Steve Peers: We might come to some informal arrangement. There is some provision at the end of Dublin III for informal arrangements between member states. We might want to use that or we might want to negotiate some informal Council declaration as to how to deal with any incompatibilities, and that would then be guidance. Perhaps you would want to add to the text something that would in effect be negotiated with us that we are happy with about how to deal with cases of potential conflict between Dublin III and Dublin IV. That would probably be the most legally secure and sensible way to do it. Perhaps we could think about that, if necessary, towards the end of the process.

Lord Soley: What about the rights of the individual, particularly bearing in mind the fundamental rights of the European Union? Suppose that individual said, “I really do not want to go to country A. I want to stay here”. He might give reasons of family, or fear of some form of abuse in the other country. Those are both factors in the fundamental-rights basis of the European Union. Would they not have a legal right to challenge in the UK?

Professor Steve Peers: They would have an argument towards the UK based on the Human Rights Act, as long as it is with us, and based on the ECHR, as long as we are party, I suppose. Also, of course, if we are part of the European Union you would also be able to make your argument based on the EU Charter of Fundamental Rights. So I suppose it is possible that you would have a human rights argument, but you would have to look into the details of how it would work and whether it might be successful.

Lord Soley: I am asking you a slightly different question. If you are the lawyer and I send this person along to see you and say, “Look, fight his case, will you?”, would you have a case that you thought could be fought?

Professor Steve Peers: If, let us say, we have this wider definition of family member and somebody says, “Well, it ought to apply also to the UK, whereas the UK is still bound by the narrow definition of family member and I have one of those wider family members in the UK, therefore my right to family life should entitle me to be with that person rather than sitting in the mud in Idomeni in Greece,” that, I suppose, could be a charter argument that might be successful.

Lord Soley: So you might take the case.

Professor Steve Peers: Lawyers take all sorts of cases. There are lawyers suing to say the EU Turkey statement is illegal, and that is a clearly inadmissible case.

Lord Soley: It is not difficult to think of ones, is it, where maybe a person is claiming that they want to stay here because of a distant family member.

Professor Steve Peers: Of course people are going to make cases, but they will not necessarily succeed. There are always going to be people making claims as to what they think their legal arguments are. As I said, they may not get very far.

Dr Violeta Moreno-Lax: On the question of what to do if you wanted to stick to Dublin III by any means, I think there are three things that can be done. Article 36 of the Dublin III regulation, as Professor Peers has mentioned, allows for bilateral and multilateral arrangements of an administrative nature that can be established on a bilateral or multilateral basis between the 31 member states of the Dublin system. Another thing that could happen is that perhaps the UK could ask to participate in some capacity—as an observer, for example—in the new to-be-established network of Dublin units that the newly converted EASO will be running periodically.

Another thing that could be done is a negotiation of detailed text that could be appended to the opt-in or opt-out decision adopted by the UK ex ante, anticipating possible places in which such conflicts could occur and trying to formulate commonly agreed solutions, because otherwise, I suppose, member states accepting Dublin IV, which presumably will encompass the 30 out of the 31 current members, will have a hard time accepting unilaterally the position of the UK if only formulated ex post. What leverage would the UK have on a political level ex post, instead of ex ante, in negotiating possible solutions to conflicts such as that?

In relation to appeal rights, I do not think that the scenario has radically changed from Dublin III to Dublin IV. Dublin III already introduced provisional remedies, which echo—they could

not do otherwise—Article 47 of the Charter of Fundamental Rights, which is primary law, in contradistinction to the Dublin regulation, which is secondary law. Secondary law always has to be interpreted in line with and in conformity with primary law. Therefore, even if there are slight changes in the formulation of the provisions of Dublin IV, the subordination between secondary rules to primary law makes effective remedy provisions prevail via Article 47 of the Charter of Fundamental Rights, or, in the case of UK domestic rules, via Article 13 of the Human Rights Act, which coincides with Article 13 of the ECHR.

In one concrete possibility of a conflict, imagine that there are siblings in the UK and the UK does not accept the expansion proposed in Dublin IV that siblings pertain to the notion of family members. I do not think that would constitute a huge source of conflict, because siblings are already part of the core family as per the case law of the Strasbourg court according to Article 8 of the ECHR. So one way or the other, presumably the UK would have to comply with its family unity obligations, if not coming from the reformed Dublin system then stemming directly from the ECHR obligations as per the Human Rights Act.

Lord Soley: Really you are saying that if we do not get this right and there is a conflict, there is a danger that the conflict could end up in court. Is that right?

Q12 Baroness Browning: The Commission says that the principle underpinning the Dublin system—that the country of first entry should be responsible for determining the claim—is being preserved. Is that a fair assessment, or has the addition of the relocation mechanism changed the basis of the Dublin system?

Professor Steve Peers: I would describe this as changing the idea of the first entry rule. In fact, the core of this proposal is that responsibility lies outside the European Union altogether, because it says that you must consider admissibility first. If you take that in the context of the EU-Turkey deal, if of course the EU-Turkey deal stays put, that means that people are going to be removed to Turkey. At least that is the intention behind the EU-Turkey deal; it will not necessarily work out that way, because some people are winning appeals, but that is the logic and assumption of how this is going to work. You talk about family members and relocation, but the core of this system, at least in the way it is drafted, is that the context of that deal between the EU and Turkey says in effect that we are focusing on the people who arrive in Greece from Turkey and we are going to send them back to Turkey. To the extent that the majority of people are still using that route—of course, that may change—all those other questions about how Dublin works are immaterial if you are simply sending people back from Greece to Turkey.

Baroness Browning: Once they are back in Turkey, EU rules do not apply.

Professor Steve Peers: Once they are back in Turkey, the EU says that it is going to resettle them, although, of course, if they have made the entry to Greece, they will be at the bottom of the queue of people to be resettled. I think there will be an EU proposal on resettlement in July. At the moment it is the more informal process of resettling people that seems to work more smoothly, oddly enough, than relocating people from within the European Union, from Greece and Italy.

The Chairman: Can we just stop for a minute? I think there is some protest and distraction outside.

The Committee was suspended for one minute.

The Chairman: Sorry about the interruption. Carry on. Somebody is already sabotaging our work.

Dr Violeta Moreno-Lax: No problem. If we look into the detail of the proposal, although the first-entry member state rule is maintained overall, a new set of obligations is placed on member states of application. There is a new admissibility check and a security check, which are front-loaded before the Dublin check takes place. Even before we decide whether the first-entry member state should bear responsibility if the asylum applicant has already moved somewhere else, the country in which the application was lodged for the first time should assess whether a safe third country outside the European Union should bear responsibility and/or whether there are any security concerns that would impede transfer. If there are security concerns as manifested by other, presumably responsible, member states, the person is not transferred further. It will be the state receiving the application that has to undertake the examination according to the accelerated procedure. One thing worth mentioning is that the first country of asylum and safe third country principles in the asylum procedures directive are not conceived of as compulsory provisions. The assumption in Dublin IV is that with the admissibility check that the state receiving the application would undertake, one could argue that these first country of asylum and safe third country clauses have been rendered compulsory. That is another caveat.

Lord Ribeiro: Just for clarification, obviously the UK is not part of Schengen and has an opt-out from significant parts of Dublin, et cetera. But if, as was mentioned earlier by one of you, individuals should have the right to determine where they go and that will actually free up the restrictions on the first port of entry, what happens if the majority of them say, as has happened in this recent crisis, “We want to go to the UK”?

Professor Steve Peers: I do not think there would ever be the prospect of a pure applicants' choice system. I do not think we would ever get to that stage. I am not sure that most of them would say the UK but there would certainly be more than those who manage to get here at the moment if we had a pure applicants' choice system. That is a little bit hypothetical. It would make the whole thing quite simple, but I think it is too hypothetical to answer, because no member state in the north or the west of the European Union is going to go for that.

Lord Ribeiro: With the proposals for a relocation mechanism running in parallel to Dublin rather than being part of it, is this actually practical?

Professor Steve Peers: At the moment you have two relocation decisions that in principle apply in parallel to Dublin III. We are part of Dublin III, but we are not part of the relocation decisions. It is perfectly feasible to have that continue to run. The proposal in September for relocation rules within Dublin itself would also in effect have to run in parallel, because we were not going to opt into that, but it would have applied to the other member states if it had been adopted. I do not think there is a problem with doing that. The problem is that the relocation system seems to be impractical in the way it works, but that has nothing to do with the UK not participating in it.

Lord Ribeiro: The point of my question was not so much about the context of the UK; it was about two parallel systems and whether in fact the EU would have them running in parallel but not part of Dublin.

I do not know whether you want to come in on this, but the second part of the question is: have you identified any key areas where there is an interface between Dublin as it exists now and the relocation process that is proposed?

Dr Violeta Moreno-Lax: I think there is a clear interface in so far as the Dublin rules are suspended for the benefit of the overburdened member states. That has translated into the overall de facto suspension of the application of the Dublin regulation as we know it, and has been reinforced by the suspension of Dublin transfers after several member state courts decided that it would have been in violation of the non-refoulement clauses. So I think there is a clear interface because of the unsustainability of the Dublin rules as we know them. In Dublin III, relocation came as a reaction to that, as a remedy, to sort out the deficiencies of the Dublin system. I think that by unifying the two solutions the European Council is trying to reconcile the two mechanisms in one single formula, so that some of the flaws identified in Dublin III can be remedied in the Dublin-plus—Dublin IV—formula.

Professor Steve Peers: I agree.

Lord Ribeiro: Have we learned any lessons since the relocation measures that were adopted in 2015, and if so, which ones?

Professor Steve Peers: You have to have member states buying into them, not just the member states that rejected them from the outset and brought lawsuits about them but a number of other member states that have not used them that much. I do not know how you overcome that political lack of will, which clearly seems to exist, to run the system. Maybe people are concerned about people still taking advantage of the system and using the Schengen rules to go somewhere else, and the Commission is trying to address some of that concern here by saying that there will be big sanctions against anyone who leaves the state that is responsible for them via the normal route or via relocation. However, I am not sure that that would necessarily convince member states that it is a good idea. No matter what you might say about relocation as a principle that ought to be accepted and applied, certainly for those in the most vulnerable situations it does not seem to be attracting member states enough to make it work. There is nothing inherently infeasible about it; there simply seems to be a political problem in making it work.

Dr Violeta Moreno-Lax: The system is not just not attractive to the member states; it is not attractive to those whom the system is addressed. Many asylum seekers have allegedly absconded when relocation decisions have been adopted on their behalf, especially when the country of destination was revealed and it was not the one they were hoping for.

To unpack what Professor Peers said under the umbrella of unacceptability to the member states, not only does the political unwillingness have to be singled out as a major cause of the underperformance of the system, but the system is heavily bureaucratic in its design. If anything, it reproduces the same Dublin flaws, only in a different context, and it adds the security checks interface that was absent in the Dublin rules and that now emerges in the Dublin IV recast, which I think is arbitrary and allows member states to show a trump card whenever they think it is not convenient for them to relocate this or that particular individual, when they are probably being selective and cherry picking the best applicants according to their own hidden conditions, which are not on the table. The relocation mechanism has shown that coercion does not really work and that, even if we cannot afford politically to go for a completely free-choice mechanism, some degree of agency and voice should be given to the asylum seekers, otherwise they will never comply with the rules. They are open to risking their lives and sacrificing every sort of benefit to join family members who are not captured by the current definition of family in Dublin III or Dublin IV. I do not think that increasing coercion, which is what Dublin IV does and what the relocation system has relied upon in

reproducing the coercive bias of Dublin III, will lead us to any foreseeable solution. The inefficiency observed by the European Commission in the evaluations of Dublin III will just be reproduced if the same coercive bias is maintained. Either we go for a match-making mechanism or some other way of taking the preferences of the asylum seekers into consideration, or we will see a lot of suffering and inefficiency overall.

Lord Ribeiro: A yes/no answer. There is political will, there is bureaucracy. Is it going to work?

Professor Steve Peers: I do not think there is political will. I think the bureaucracy could be overcome. They have resettled more people from third states in the meantime. Canada has resettled vastly more than that in the same period of time from third states. Is it going to work? I would guess not, but I do not think they are going to accept it anyway.

The Chairman: Briefly, please, Dr Moreno-Lax. We need to move on.

Dr Violeta Moreno-Lax: I agree with my colleague. I think, however, that a very easy change could have been put on the table that would have substantially alleviated some of the flaws that we have identified today. If, instead of the first country of entry, the first country of application was maintained as a rule, that would help to reduce the flaws that we have seen in the Dublin system.

The Chairman: Lord O'Neill, I think your question has been answered.

Lord O'Neill of Clackmannan: Yes, I think it has.

Q13 Lord Soley: I think his mine has been largely answered, with the exception of the part relating to Article 28. The proposal outlines changes to the remedies available for applicants. Do you think those are workable under Article 28?

Dr Violeta Moreno-Lax: The new Article 28 of the proposal is just putting into black and white something that Strasbourg had already been saying for many years, probably since the *Jabari v Turkey* decision in 2001, translated to the Dublin context. The key difference here is that the period is cut down to seven days, which is illusory. I do not think that will meet the effective remedy standards in Article 13 of the ECHR. If we put this into context, for take-charge requests for example, states have much longer than the seven days that are given to the applicant to make an appeal, which is a bit unbalanced if you consider that most of the take-charge requests are accompanied by VIS or Eurodac evidence, which is ultimately incontestable. However, member states are given 15 days to do that, and then another period of time to perform the transfer if that is feasible, whereas the applicant is given only seven days, which I think is rather short and in more than one member state would be impracticable.

The other change is that the applicant can contest a non-transfer decision. This is there to reflect the fact that sometimes the Dublin interview does not take place. It can be omitted when the member state undertaking the Dublin check decides that it has enough evidence to allocate responsibility—for example, when it is presented with Eurodac or VIS information—without giving an opportunity to the applicant to present family links in another country. To give the applicant a chance to contest the non-transfer decision, Article 28 has been reformed. However, there is a problem with this in the sense that non-transfer decisions are normally not materialised. There is no notification of a non-transfer decision. The transfer simply does not take place and the country undertaking the Dublin check assumes responsibility by default. There is no notification to the applicant, so I do not understand how the applicant will be able to reap the benefit of the introduction of the new Article 28.

The other problem with Article 28 is that the scope of the remedies is reduced just to contesting that the transfer decision—when what we are contesting is the transfer decision as such—infringes upon family unity and/or refoulement. I think that is incompatible with Article 13 of the ECHR, which requires a remedy to be available whenever there is a breach or the risk of a breach of any of the provisions in the ECHR—not just Articles 3 and 8, to translate into ECHR numbers.

Professor Steve Peers: In fact, that latter change would overturn judgments of the European Court of Justice last week in two cases.

Lord Soley: Which cases?

Professor Steve Peers: One is called Karim and one is called Ghezelbash. In both those cases the court said, “You are able under Dublin III to challenge any aspect of the interpretation of the responsibility rules as regards an asylum seeker”. They might not win, of course.

Lord Soley: That is a current case? It is not completed?

Professor Steve Peers: There was a judgment last week. There was an opinion in February or March, which I mentioned before, but the judgment came last week. So this would be overturning the judgment. Also, with regard to the seven-day period to bring an application, the EU court has ruled in a slightly different context about fast-tracking the regular asylum process, in a case called Diouf, that 15 days is acceptable, but I wonder whether it would find seven days acceptable. Obviously, that is much shorter than 15 days so I think there is a question mark there.

Q14 The Chairman: I have two final questions. One is about family reunification. Do you think that the proposal will make it easier to apply for family reunification?

Professor Steve Peers: To the extent that it aims to treat everyone as inadmissible as much as possible before they ever get into the EU asylum process, of course that will significantly hinder family reunion. The Commission is being disingenuous, to put it nicely, to say that the proposal improves family reunion because it widens the definition of family members without taking account of that feature of the proposal, which means that the inadmissibility process has to take place before ever considering a family reunion clause. No matter how many family members you have in the EU who would otherwise be covered, and how easily you could prove it, you would never get to that stage; you would simply be sent to Turkey or wherever. In that sense it does not help family reunion. Leaving that aside, however, it would help family reunion by enlarging the definition.

However, that misses the point, because what really happens with the current family reunion clauses is that there is an enormous gap in practice. I am in touch with lots of lawyers and activists who know people in Greece who have tried to get through the process and are sure they have family members in Britain, Germany, Sweden and so on, but no one is interested in looking at those applications and dealing with them, either in Greece or Germany. No matter how strong their claim is, they are having a hard time getting it processed and approved under the current provisions. Changing those provisions does not solve that practical problem. You would need to go further and introduce something like mandatory DNA testing, for instance, although that will not cover all family relationships; it will not cover spouses, and with DNA it is harder to check whether someone is a mother than whether they are a father. I do not know about siblings or cousins, but you need to start going down that road at least to make an effort and to have something additional that tries to make the family reunion process more practically effective. My understanding from a lot of different people is that you have severe practical problems in making it work and having people be with their families, even young children who really ought to be with their families as a priority.

Dr Violeta Moreno-Lax: The approach taken by the European Commission in this proposal misses the key point. The key point is not enlarging the concept of family but, as Professor Peers pointed out, working on evidence rules. There is no agreement about what should be agreed upon as having evidentiary value to prove family links across member states. Some member states will accept only DNA. Others sometimes allow some room for accepting the statements of the applicant in different interviews; others allocate zero weight to those assertions. Where the problem lies is in the lack of a harmonised approach to determining family links and the lack of an obligation to accept and undertake a proactive approach to the determination of those family links.

One further point in this regard is that under the new proposal minors will have a representative appointed only in the member state where they should be. If a minor is going to be afforded legal representation only in a place where they are not physically present, it will be very hard to activate the family unity mechanism and maintain the best interests of the child in any meaningful way.

Q15 The Chairman: The question on implementation is about the take-back requests. At the moment, there is discretion for making a take-back request—the requested member state is able to decide whether or not to accept the request—but under the latest proposals such notifications will be mandatory. Nor does there appear to be any provision for member states to notify that they have declined to accept the transfer. Is this reduction in the autonomy of member states justified?

Dr Violeta Moreno-Lax: We have seen that the take-back provisions, combined with the cessation of responsibility clauses, created an incentive for some member states to elude responsibility by simply allowing time to pass. The European Commission is trying to introduce some efficiency in the system and reduce the amount of discretion that is available to the member states, presuming that the take-back request is always legitimate, which might have no basis. For example, if the take-back request is made in the best interests of the child or because of family links, because the state making the request does not allow the evidence, it is quite worrisome that there is no option for anyone to contest the take-back request. I suppose that that could be remedied by a possible appeal interposed by the applicant who otherwise would be automatically transferred. It reduces to a risky state the amount of discretion allowed, if only for the correction of some possible inadequacies in the decision-making process.

Professor Steve Peers: I think the Commission is aiming to deter people from going into hiding in the first place. I have been in touch with NGOs that know of people in hiding. I do not know the numbers of cases, but there must be a decent number of them. If that option disappears, there is no point going into hiding at all. Perhaps that is their thinking. It is one of a series of things that aim to be tougher on asylum seekers in order to make the responsibility criteria work.

The Chairman: That is all from us. Thank you very much for your time this morning. If, on reflection, there is anything you wish to send us in writing, please do so.