

HOUSE OF LORDS

European Union Committee

2nd Report of Session 2015–16

**The United Kingdom
opt-in to the proposed
Council Decision on the
relocation of migrants
within the EU**

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The European Union Committee

The European Union Committee is appointed each session “to scrutinise documents deposited in the House by a Minister, and other matters relating to the European Union”.

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The Members of the Home Affairs Sub-Committee, which conducted this inquiry, are:

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The United Kingdom opt-in to the proposed Council Decision on the relocation of migrants within the EU

Introduction

1. On 27 May 2015 the Commission published a proposal for a Council Decision providing for the relocation over two years of 40,000 third country migrants from Italy and Greece to other Member States.¹ If adopted, the proposal would constitute a temporary and limited departure from the usual rules under the Dublin Regulation,² which determines which Member State has jurisdiction to examine and determine an asylum application.
2. This proposal is part of the Commission's wider European Agenda on Migration,³ which was brought forward as a response to the current crisis unfolding in the Mediterranean. Recent months have seen the largest mass migration of displaced people globally since the Second World War.⁴ Within the Mediterranean in particular, there has been an unprecedented rise in the number of migrants attempting to reach the EU by sea. This has led to catastrophic accidents and significant loss of life.

The Opt-in

3. The legal basis for the Commission's proposal is Article 78(3) of the Treaty on the Functioning of the European Union (TFEU).⁵ Since this article falls within Title V of Part 3 of the Treaty, it will not be binding on the United Kingdom unless the Government notifies the President of the Council that it wishes to participate in its negotiation and adoption—in other words, that it wishes to 'opt in'—before the three-month deadline, which falls on 27 August 2015.⁶ In this report, prepared by the Home Affairs Sub-Committee, we consider whether the Government should do so.

¹ Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece ([COM\(2015\) 286 final](#))

² Regulation (EU) No 604/2013 of the European Parliament and 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), [OJ L 180/31](#) of 29 June 2013

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Migration ([COM\(2015\) 240 final](#))

⁴ United Nations High Commissioner for Refugees, *Global Trend 2013 Report*, (2013): <http://www.unhcr.org/5399a14f9.html> [accessed 2 July 2015]

⁵ Article 78(3): "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

⁶ Protocol (No 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, Article 3

4. Previous Governments have undertaken⁷ that before any opt-in deadline has expired, and before the Government has made a final decision on whether or not to opt into any Title V proposal, reports from the European Committees of either House will be debated and, if necessary, voted on.⁸

The present crisis

5. On 3 October 2013 a boat carrying some 500 migrants from Africa, mostly Eritrean and Somali nationals, caught fire and sank off the coast of Lampedusa with the loss of 366 lives. In response, the Task Force Mediterranean was set up following the Justice and Home Affairs (JHA) Council on 7–8 October 2013, in order to identify means by which the EU could avoid such calamities. It was chaired by the Commission. Until 1 November 2014, the Italian navy hosted a search and rescue operation named Mare Nostrum which received roughly €30m from the European Commission after the Lampedusa incident, and which was estimated to have saved the lives of 150,000 people. It was then replaced by the more limited Operation Triton, which is run by the EU's border agency Frontex⁹ and confined to a 30-mile zone around Italy's coastal waters, with only a third of Mare Nostrum's maritime capacities.
6. Following a more recent series of disasters in the Mediterranean which resulted in the deaths of over 1,700 migrants in the first half of 2015 alone, including 800 in a single incident off the coast of Libya on 19 April 2015, an emergency European Council summit was held on 23 April 2015, at which the Council agreed to consider emergency relocation and resettlement measures intended to assist Member States on the frontline of the migrant crisis.
7. In bringing forward the proposal the Commission argues that Italy and Greece are currently confronted with “exceptional migratory inflows” and therefore meet the high threshold necessary to trigger the emergency response mechanism. In a press release, the Commission states that:

“In 2014, Italy saw 277% more irregular border crossings than in 2013, representing 60% of the total number of irregular border crossings in the EU. A steady increase also occurred in Greece, with an increase of 153% of the number of irregular border crossings in 2014 compared to those in 2013, representing 19% of the total number of irregular border crossings in the EU overall. In both cases, this trend looks set to continue, with unprecedented flows of migrants continuing to reach their shores.”¹⁰

⁷ Written Statement by Baroness Ashton of Upholland, on 9 June 2008, repeated and extended by the Minister for Europe, David Lidington MP, in HL Official report, 20 January 2011 [col WS 20-22](#). The original undertakings are set out in full in Appendix 1 of the European Union Committee *Enhanced scrutiny of EU legislation with a UK opt-in* (2nd Report, Session 2008–09, HL Paper 25).

⁸ Most debates concerning Committee reports are motions to take note, but debates on Opt-in reports are on motions “That this House agrees the recommendation of the European Union Committee.” Such motions are amendable.

⁹ The United Kingdom does not participate in Frontex.

¹⁰ European Commission Factsheet, ‘First measures under the European Agenda on Migration: Questions and Answers’ (27 May 2015): http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm [accessed 2 July 2015]

8. These Member States have long been overburdened with asylum applications. Under the Dublin system, the default rule is that asylum applications should be processed in the country of arrival to the EU.¹¹ The geographical position of Greece and Italy means that they have been faced by large numbers of asylum applications by migrants who have crossed the Mediterranean. Meanwhile the economic difficulties faced by both countries have restricted their ability to care for these migrants or to process their applications.
9. Greece in particular has been under acute pressure, and the reception conditions for asylum seekers and the system in place for processing applications for international protection are notoriously poor. The European Court of Human Rights has held that states that return asylum seekers to Greece are in breach of the prohibition against torture and inhuman or degrading treatment.¹² The Court of Justice of the European Union confirmed the systemic deficiencies in the asylum procedure and reception conditions of asylum seekers in Greece in *N.S. v UK*,¹³ and Member States have since ceased carrying out Dublin transfers in cases where Greece was the country of arrival.

The views of the European Council and the Commission

10. On 23 April the European Council, made up of the Heads of Government of the 28 Member States, held a special meeting to discuss the migrant crisis. The Statement released following the meeting pledged to “consider options for organising emergency relocation between all Member States on a voluntary basis”.
11. Notwithstanding the clearly-expressed views of the European Council, the proposal published by the Commission a month later sought to introduce a mandatory relocation scheme, not a voluntary one. In the words of the Government’s explanatory memorandum, “The mandatory relocation proposal ... contravenes the position agreed by the April EU Council which clearly stated that any relocation mechanism should be voluntary.” The proposal would introduce a system designed to relocate a total of 40,000 migrants—24,000 from Italy and 16,000 from Greece—to other Member States based on a distribution key set out in the Annex to the Agenda on Migration. The distribution key allocates responsibility for relocated persons based on a Member State’s GDP, size of population, unemployment rate and voluntary measures previously taken to assist frontline Member States.
12. The percentage of migrants to be relocated to individual Member States ranges from 0.39% for Cyprus, to 18.42% for Germany. France (14.17%), Spain (9.10%), Poland (5.64%) and the Netherlands (4.35%) would also be

¹¹ Article 3(2)

¹² In *M.S.S. v Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 see <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050> [accessed 2 July 2015]. The European Court of Human Rights held that both the Greek and the Belgian governments had violated Article 3 of the European Convention on Human Rights (the prohibition against torture and inhumane or degrading treatment) by applying the Dublin rules. Belgium had returned asylum seekers to Greece, where they faced inhumane living conditions and the risk of being returned to Afghanistan without any serious examination of the merits of their asylum application and without any access to an effective remedy.

¹³ *N.S. v UK (Secretary of State for the Home Department)* (C-411/10): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0411:EN:HTML> [accessed 2 July 2015]

required to assume responsibility for a significant percentage of applications. As the proposed Decision would have a Title V legal base, Denmark, Ireland and the United Kingdom are not at present included in the distribution key. The United Kingdom and Ireland's participation would reduce the percentage and therefore overall number of migrants allocated to Member States currently included in the scheme.

13. The relocation scheme, as proposed by the Commission, is subject to the following limitations:
 - It applies only to those applicants for international protection entering the EU via Italy or Greece and for whose asylum applications these Member States would therefore usually be responsible according to the Dublin rules.
 - It applies only to applicants belonging to nationalities for which international protection is on average granted in at least 75% of cases. According to Eurostat data from the first quarter of 2015 this condition would be met only in respect of Syrian, Eritrean and Iraqi migrants.
 - It is provisional in nature, and would run for a period of 24 months.
14. While the Commission has presented the current proposal as a temporary measure, it intends that it should be a precursor to a permanent and mandatory scheme, which will be brought forward by the end of 2015.
15. The proposal also requires Member States to offer Italy and Greece other operational support, such as providing national experts to assist with the screening of migrants and the initial processing of asylum applications. In turn, Italy and Greece will be required to present the Commission with proposals to improve the functioning of their asylum systems within a month of the entry into force of the Decision, and report on the implementation of these measures every three months.
16. Member States would receive €6,000 for each migrant relocated to their territory, and an additional €240,000,000 in funding for the scheme has been allocated within the EU budget.

Member States' Response to the Proposal

17. The Commission's proposal was from the start controversial. The Government publicly condemned the mandatory nature of the scheme even before its publication. On 11 May 2015, the Home Office issued the following statement: "When a new piece of legislation in the area of justice and home affairs—including asylum policy—is proposed, the UK can choose whether or not to participate in it. We will not participate in any legislation imposing a mandatory system of resettlement or relocation." Manuel Valls and Viktor Orban, the Prime Ministers of France and Hungary respectively, also spoke out against the relocation scheme. Other Member States opposing the introduction of mandatory relocation quotas include the Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia.
18. It was perhaps not surprising therefore that discussion on the proposal in the European Council, on 25 June 2015, was long and heated. The Council Conclusions state:

“The European Council agreed on the following interlinked measures to help 60.000 people:

- (1) the temporary and exceptional relocation over two years from the frontline Member States Italy and Greece to other Member States of 40.000 persons in clear need of international protection, in which all Member States* will participate; and
 - (2) the rapid adoption by the Council of a Decision to this effect; to that end, all Member States* will agree by consensus by the end of July on the distribution of such persons, reflecting the specific situations of Member States.”
19. A footnote inserted at the points asterisked reserved the position of the UK, Ireland and Denmark: “Without prejudice to the specific situation of the United Kingdom, Ireland and Denmark pursuant to Protocols 21 and 22 to the Treaties. The UK will not participate.”
 20. The way in which the Conclusions are expressed is confusing. The word ‘voluntary’ is not used, yet the reference to agreeing the distribution of persons among the participating states ‘by consensus’ implies that the mandatory scheme proposed by the Commission (which would be subject to agreement by Qualified Majority Voting) has been rejected. Indeed, we understand that Hungary and Bulgaria will not participate, in recognition of the large numbers of asylum seekers that reach them by other routes, even though they would be legally bound by the Commission’s proposal. On the other hand, the European Council has agreed that the Council of Ministers should adopt a binding Decision to relocate a fixed number of 40,000 migrants from Italy and Greece, so whatever calculation is made over distribution, and whichever Member States actually accept migrants, it must be assumed that the numbers will add up to 40,000.
 21. The impact of the European Council Conclusions on the other EU institutions remains unclear. At the time of writing we do not know whether the Decision giving effect to these Conclusions will be an amended version of the present proposal, or a wholly new proposal. The Minister for Europe, giving evidence to the Select Committee on 30 June, confirmed that this was a matter for the Commission, which has the right of legislative initiative, to resolve. But it does appear that any Decision reflecting the European Council Conclusions will necessarily have a Title V legal base to which the United Kingdom’s opt-in will apply. It is on that basis that we put forward this report.
 22. **The process that led to the publication of the Commission’s proposed Council Decision, and to the conflicting Conclusions of the European Council, agreed on 25 June, has been unsatisfactory. We are not in a position to express a view on the relative merits of a voluntary and a mandatory scheme, but we do not understand why the Commission, despite the clearly expressed view of the European Council, should have persisted in proposing a mandatory scheme, which it must have known was unlikely to be accepted by the Member States.**
 23. **The resulting confusion leaves the destiny of the Commission’s proposal, which we hold under scrutiny, unclear: we do not know whether the proposal will be withdrawn, amended, or whether the**

Commission will proceed with the existing proposal, thereby setting itself against the will of the European Council. The underlying issues are of such importance that we have decided to make a report to the House, in order to facilitate a timely debate, in accordance with the procedure adopted for opt-in reports.

The Government's view

24. In its explanatory memorandum, the Government states that it supports many elements of the European Agenda on Migration, and gives examples of practical support the United Kingdom is providing to other Member States and third countries in order to reduce migratory pressures on frontline Member States. However, the Government opposes the relocation scheme for three reasons:
- First, it believes that “The relocation proposal is unlikely to prove effective in stopping dangerous journeys across the Mediterranean and could even act as a pull factor and encourage further illegal migration to the EU.”
 - Secondly, it notes that the proposal contravenes “the position agreed by the April EU Council which clearly stated that any relocation mechanism should be voluntary.”
 - Finally, it opposes the introduction of mandatory relocation and resettlement quotas on principle, as this “fundamentally changes the EU approach to asylum” by reducing national control over immigration.
25. Taking these factors into account, in the Government's explanatory memorandum the Minister of State for Immigration, Mr James Brokenshire MP, states:
- “As the Government does not support mandatory relocation and has concerns over the principle and unintended consequences of any form of relocation of asylum cases within the EU, I am minded not to opt in to this proposal.”
26. Nevertheless, the explanatory memorandum leaves open the possibility that this position may be reviewed before the deadline of 27 August, subject to the following factors:
- Whether the Commission and Council intend to amend this proposal so it is in line with the Conclusions of the April European Council, which supported a voluntary scheme.
 - Consideration of how best to implement an effective and sustainable response to the situation in the Mediterranean.
 - Consideration of the extent to which the United Kingdom can contribute to an effective response to migratory pressures on some Member States without opting in.
27. The proposed Decision raises a number of profound questions for the United Kingdom and the EU. It is the first ever use of the emergency provisions in Article 78(3) TFEU by the EU's institutions, which underlines the gravity of the situation currently unfolding in the Mediterranean and the pressure being

placed on the governments of Italy and Greece on a daily basis. In addition, recourse to this provision also highlights the urgency of adopting measures to alleviate the human suffering arising from the crisis.

28. Time constraints have made it impossible for us to gather formal evidence on the Government's reasoning. We did, though, hold an informal seminar on 1 July, at which a number of academics and practitioners in the field¹⁴ commented on the current crisis, and on that basis we offer some observations on the Government's reasoning.
29. First, we acknowledge the Government's reliance, in its third objection, upon the principle that Member States should have control over asylum and immigration. We note, however, that this should be set against the fact that the proposed Decision would be exceptional and temporary. Moreover, the Government's objections could be met in large part were a voluntary scheme to be put in place.
30. We are not convinced by some of the Government's objections. The Government's explanatory memorandum itself states that:

“The objective of the Council Decision is to introduce a temporary distribution scheme for persons in clear need of international protection. This aims to ensure ‘fair and balanced participation of all Member States’ in relieving pressure on Italy and Greece’s asylum systems as frontline states while the EU is facing increased migratory pressures.”

The proposal therefore has a limited, specific objective, to relieve a current humanitarian crisis. It has no direct bearing on wider objectives such as stopping migration across the Mediterranean, or reducing the flow of migrants from countries of origin.
31. Moreover, at our seminar we heard arguments that the Government's concern that the proposal could act as a “pull factor”, which would encourage further migration to the EU, was not supported by evidence. The migrants affected by the present proposal are those belonging to nationalities for which international protection is on average granted in at least 75% of cases—at present, those from Syria, Eritrea and Iraq. The situation in each of these countries is dire: it is clear that the vast majority of those leaving these countries are fleeing civil war or the imminent threat of persecution. This is underlined, for instance, by the presence of millions of Syrian refugees in camps in Jordan and Lebanon. The Government's argument that the relocation of 40,000 migrants who have reached Greece or Italy will somehow encourage more to leave their countries of origin is therefore unconvincing.
32. The Government's approach will do little to help the response to a humanitarian crisis within the EU's borders. The Government has written in its explanatory memorandum that: “The Government shares the Commission's desire to prevent further loss of life at sea and for an effective and sustainable response to current migratory pressures.” So far, however,

¹⁴ The speakers at this seminar on the migrant relocation proposal were: Professor Valsamis Mitsilegas, Head of the Department of Law at Queen Mary University of London; Dr Violeta Moreno-Lax, Lecturer in Law at Queen Mary University of London; Mr Chai Patel, a policy lead at the Migrants Rights Network; and, Professor Steve Peers, Professor of EU Law & Human Rights Law at Essex University.

the contributions of United Kingdom (and other Member States) have proved insufficient to avert or alleviate the migrant crisis. Italy and Greece have been unable to cope with the influx of migrants. Instead of taking on a substantial part of the burden in dealing with them, the Government has chosen to limit itself to specific measures such as targeting people smugglers. By picking out individual measures, which have minimum impact upon the United Kingdom domestically, the Government risks undermining the EU's ability to develop a coherent or adequate approach to this humanitarian crisis.

33. We note that while the United Kingdom has the right to opt in to individual Title V measures, it is party to the general principles underlying the EU's policies on asylum. According to Article 80 TFEU, such policies shall be underpinned by the principle of solidarity:

“The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

We do not suggest that Article 80 is in itself legally enforceable in respect of a specific proposal, but we are concerned that, by failing to opt in, the Government would fail to live up to its duty of solidarity and burden-sharing between the Member States during an “emergency situation”.

34. Finally, we recognise the international and domestic political implications of failing to opt in. The EU's delayed response to the crisis has significantly weakened its credibility as an international actor and has attracted global criticism from refugee and human rights organisations including the British Refugee Council, Refugee Action and Amnesty International. Some 1,700 migrants have already died this year while attempting to cross the Mediterranean, and it is thought that the crisis is likely to worsen during the second half of 2015. The EU's ability to act swiftly as one on this issue is crucial not only to the immediate safeguarding of human lives, but also to its ability to find a sustainable, long-term solution. The reputational risk of a continued failure to act, to individual Member States as well as to the EU as a whole, is great.

Conclusion

35. The Prime Minister has clearly stated that the United Kingdom will not opt into this proposal, and his statement is referred to in the European Council Conclusions of 25 June. As we have described, the process which led to that outcome was deeply unsatisfactory, and has led to considerable uncertainty over the status of the proposal, and the feasibility of effective action to alleviate the current humanitarian crisis. Whatever the relative merits of a voluntary or a mandatory approach, the views of the 28 Heads of Government, expressed at the April European Council, were clear, and we see no realistic prospect that a mandatory scheme will be adopted without so many exclusions as to undermine its core purpose.

36. We therefore believe that the only credible option open to the Commission is to table either an amended proposal, or a new proposal, giving effect to a voluntary scheme.
37. We also note that the Government's formal position, as set out in the explanatory memorandum, leaves open the possibility that it may review its stance, should the Commission bring forward an amended proposal reflecting the Conclusions of the April European Council, which supported a voluntary relocation scheme. We believe the United Kingdom has a responsibility to play its part in relieving the suffering of the 40,000 migrants currently held in Greece and Italy, the vast majority of whom have fled civil wars and persecution in their native countries of Syria, Iraq and Eritrea.
38. **We understand that the Government is minded not to opt into the proposed Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Nevertheless, we believe that it is in the United Kingdom's interest to take part in the negotiation of this proposal, and that, should an amended or a new proposal be brought forward giving effect to the European Council's Conclusions in April and June 2015, the Government should reconsider its position and opt in.**
39. **We recommend this report to the House for debate. We retain the proposed Council Decision under scrutiny.**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Condon
Lord Cormack
Lord Faulkner of Worcester
Baroness Janke
Lord Jay of Ewelme
Baroness Massey of Darwen
Lord Morris of Handsworth
Baroness Pinnock
Baroness Prashar (Chairman)
Lord Ribeiro
Lord Soley
Lord Wasserman

No interests relevant to the subject-matter of the report were declared by Members of the Sub-Committee.

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top
Lord Blair of Boughton
Lord Boswell of Aynho (Chairman)
The Earl of Caithness
Lord Davies of Stamford
Lord Liddle
Lord Mawson
Baroness Prashar
Baroness Scott of Needham Market
Baroness Suttie
Lord Trees
Lord Tugendhat
Baroness Wilcox

During consideration of the report the following Member declared an interest:

Baroness Suttie

Associate with Global Partners Governance Limited in respect of their Foreign and Commonwealth Office contract to provide mentoring and training for parliamentarians and their staff in Jordan

A full list of Members' interests can be found in the Register of Lords Interests <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>.