

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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The Reform of the Dublin III Regulation

STUDY FOR THE LIBE COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The Reform of the Dublin III Regulation

STUDY

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. It examines the performance of Dublin and of relocation schemes, and assesses the Commission's "Dublin IV" Proposal in this light. It argues that by retaining the Dublin philosophy and betting on more coercion, Dublin IV is unlikely to achieve its objectives while raising human rights concerns. It advocates re-centring EU responsibility allocation schemes on one key objective – quick access to asylum procedures. This requires taking protection seekers' preferences seriously and de-bureaucratising the process. Such a reform would need to be accompanied by (a) stepping up the enforcement of refugee rights across the EU, (b) moving solidarity schemes from a logic of capacity-building to one of compensation, and (c) granting protected persons real mobility rights.

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LIST OF ABBREVIATIONS

- ACVZ** Adviescommissie voor Vreemdelingenzaken
- AI** Amnesty International
- AMIF** Asylum, Migration and Integration Fund
- APD** Asylum Procedures Directive
- CEAS** Common European Asylum System
- CFR** EU Charter of Fundamental Rights
- CIMADE** Comité inter-mouvements auprès des évacués
- CJEU** Court of Justice of the European Union
- CRC** UN Committee on the Rights of the Child
- DIVP** Dublin IV Proposal
- DRIII** Dublin III Regulation
- EASO** European Asylum and Support Office
- ECHR** European Convention on Human Rights
- ECRE** European Council on Refugees and Exiles
- ECTHR** European Court of Human Rights
- EFTA** European Free Trade Association
- EUAA** (proposed) European Union Agency for Asylum
- EUREMA** Pilot Project for Intra-EU Relocation from Malta
- EURODAC** European Dactyloscopy database
- FRA** Fundamental Rights Agency of the European Union
- FRONTEX** European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

GDP Gross Domestic Product

HRW Human Rights Watch

ICFi ICF International

JRS Jesuit Refugee Service

TFEU Treaty on the Functioning of the European Union

UNHCR United Nations High Commissioner for Refugees

EXECUTIVE SUMMARY

"A number of Member States and representatives of the European Commission are highly resistant to the idea that asylum seekers might be better placed to know where their best chances of integration are than any officials, and that this knowledge might be helpful for everyone in both the short and long term. Yet in practice, it seems that it is asylum seekers who move to seek asylum and Member States that determine their applications."

(Elspeth Guild and Sergio Carrera, 2016)

If the Common European Asylum System (CEAS) is to become "sustainable and fair", it needs a fundamental reform of its responsibility allocation system.

The Dublin system is ineffective and inefficient, inflicts hardship on protection seekers and damages the efficiency of the CEAS. Until now, the Relocation schemes established in September 2015 have also failed to produce appreciable results.

These negative results can be traced back essentially to three structural factors: (a) the unattractiveness of EU allocation schemes to protection seekers, due in particular to their strict "no choice of destination" philosophy; (b) the fact that, in the absence of effective solidarity schemes, Member States tend to engage in defensive rather than cooperative behaviour; (c) a heavily bureaucratic approach, producing complexity and delays, compounded by the intergovernmental nature of responsibility allocation procedures.

Going from Dublin to "Dublin plus", as proposed by the Commission in May 2016 (COM(2016) 270 final), is unlikely to solve any of these problems. In its normal operation, the system would remain essentially unchanged. It would thus be as unattractive as it now is for protection seekers. The response to applicants' avoidance strategies would be essentially repressive, and judging from past experience this is unlikely to elicit widespread compliance. At the same time, the Commission's proposals cut back significantly on applicants' rights. They are at variance with key human rights guarantees on several points, and would downgrade protection standards in the CEAS. The proposal to restrict significantly Member States' discretion under the Dublin system is also likely to set the Dublin system on a collision course with the European Convention on Human Rights.

Dublin IV would probably aggravate current imbalances in responsibilities among Member States. In addition to retaining and expanding the "irregular entry" criterion, it would (a) concentrate extensive "gatekeeper" responsibilities on application States – in theory the border States; (b) concentrate on application States the responsibilities to examine most applications, including through shortened "take charge" deadlines; and (c) cement such responsibilities through the repeal of all clauses foreseeing the cessation of transfer of responsibilities among the Member States. The proposed "corrective" mechanism would leave the aforementioned "gatekeeper" responsibilities on application States, while probably being too cumbersome to re-allocate the other responsibilities more effectively than on-going relocation schemes do.

This last observation can be applied to the Dublin IV Proposal as a whole. While simplifying Dublin procedures in several respects, the proposal fails to address the main causes of delays and complexity: reliance on intergovernmental procedures and on involuntary transfers, liable to give rise to extensive litigation. Even the allocation procedure under the “corrective” mechanism – purportedly designed to relieve “overburdened” States – epitomises administrative complexity by accumulating procedural stages before the applicant is placed in a status determination procedure.

If Dublin IV is to conform to human rights standards, many of the Commission’s proposals will require several amendments, detailed below. If it is to bring improvements, further amendments will be required.

If the EU is to have an effective responsibility allocation mechanism, a fundamental change of direction is required. Experience indicates that attempting to “allocate” persons without their consent, according to pre-determined criteria, is unworkable and comes at the expense of ensuring effective and swift access to status determination.

In order to have a workable system, it is necessary to forgo ambitions of producing predetermined allocative results – fair or unfair – and focus instead on minimising the time, effort and coercion required to place the applicant in an asylum procedure. In this perspective, the allocation system – alone or in conjunction with other CEAS instruments – should: (a) elicit the cooperation of protection seekers; (b) defuse Member States’ incentive to engage in defensive behaviour; and (c) drastically reduce bureaucratic complexity and coercion. Within this general template, three models are examined here.

“Free choice” is the ideal-type of the “light” allocation system. It presents so many advantages (including preventing irregular movement and smugglers’ activities in Europe) that it should not be discarded without serious consideration.

Should “free choice” be considered infeasible, a “limited choice” model could be progressively constructed starting from a stripped-down Dublin system (“Dublin minus”).

“Dublin minus” – i.e. the current system, without the criteria based on residence and entry – would entail a radical simplification while producing nearly identical distributive results to the current system. It would already constitute a distinct improvement. Just like the current system, however, it would incite applicants to avoid identification and engage in irregular movements, and States to engage in defensive behaviour. To reduce these effects, the system could be amended so as to give a range of politically approved choices to applicants, based on much-expanded “meaningful link” criteria and on the permanent offer of reception places from “under-burdened” States.

As the experience of the 1999 Humanitarian Evacuation Programme suggests, such a consent-based system might perform far better than strictly “no choice” systems such as the September relocation schemes.

“Light” allocation systems would facilitate early identification, reduce irregular movements within the EU, and liberate resources for the really important tasks of the asylum system: to provide dignified reception, to identify persons in need of protection in fair and effective procedures, and to return in dignity those found not to be in need. Like any responsibility allocation system, they would of course need accompanying measures. Indeed, there are three types of reform that the EU should engage in regardless of what responsibility-allocation system it chooses.

First, it is indispensable to guarantee to protection seekers and beneficiaries in every Member State the full enjoyment of the rights recognised by international and EU law. In this respect, monitoring the existing standards seems more urgent than reforming them. In addition to renewed activism on the part of the Commission, the Proposal for an EU Asylum Agency (COM(2016) 271 final) might bring an important contribution in the form of enhanced monitoring and capacity assessment. The progressive centralisation of services supporting status determination might also improve convergence and constitute an effective way of pooling resources.

Second, financial solidarity should be considerably strengthened. Indeed, there is a strong case for placing on the EU budget, suitably expanded, asylum-related expenses that are currently placed on national budgets – identification, registration, screening, reception and processing of the claim. Such costs are distributed asymmetrically and are incurred by Member States in the provision of a collective good benefitting, to some extent at least, all others. Their centralisation might prevent under-provision, defuse incentives to engage in defensive behaviour, and contribute to raising reception and protection standards where this is most needed, contributing to reducing secondary movements. The progressive centralisation of costs would not preclude maintaining EU funding in a capacity-building perspective, as under the Asylum, Migration and Integration Fund (AMIF), nor introducing financial incentives in support of e.g. EU-sponsored allocation or relocation schemes.

Third, introducing real mobility rights for protection beneficiaries would make responsibility allocation more sustainable – especially under systems not granting full free choice to applicants. It would facilitate acceptance of a less than ideal initial allocation, improve integration prospects and self-reliance for beneficiaries of protection, and possibly defuse the fears of some States of first application of facing, over time, unsustainable responsibilities.

1. INTRODUCTION

In 2015, the arrival on European shores of over one million persons seeking protection threw the Common European Asylum System (CEAS) and the Schengen Area into jeopardy. Vast “secondary movements” from the States of first arrival have prompted unilateral measures from transit and destination States. In the ensuing race to dissuasion and closure, thousands of refugees have been left without protection or dignified reception¹.

Each of the pillars on which the CEAS rests according to Art. 78 and 80 TFEU has been affected: guaranteed access to protection for those in need, respect for international and EU protection standards, coordinated responses in a spirit of solidarity, and the orderly and fair distribution of responsibilities among the Member States.

Three years after the 2013 recast of EU asylum legislation, the reform of the CEAS is thus again high on the agenda. According to the Commission Communication “Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe” (hereafter the “April 2016 Communication”), a revision of the existing *acquis* is needed in order to build a “robust and sustainable Common Asylum Policy”, including a “sustainable and fair system” for the allocation of responsibilities among the Member States². In this context, priority is being given to the reform of the Dublin system, which has “by design or poor implementation” placed “a disproportionate burden on certain Member States” and “encourage[d] uncontrolled and irregular migratory flows”³.

The present study focuses on this last aspect. Since the stated objective of the reform is to build a “sustainable” system, the study adopts a long-term perspective: analysis and recommendations focus on the longstanding weaknesses of the Dublin system and on structural solutions, rather than on short-term solutions for the on-going crisis.

Several topical issues fall outside the remit of the study. It will not examine the debate surrounding EU efforts to confine refugees in neighbouring countries⁴. We will assume as the Commission does in its Dublin IV Proposal (“DIVP”) that spontaneous arrivals will continue and that arrivals in relatively high numbers as in 2015 will remain possible⁵.

Detailed consideration of the other constituent elements of the CEAS, such as EU standards and EU funding, also lies outside of the scope of the study. Reform needs and initiatives in these areas will however be pointed out and discussed as far as relevant.

¹ See ECRE (2016). Wrong counts and closing doors – The reception of refugees and asylum seekers in Europe, March 2016, Brussels, especially at p. 31 ff. Available from: <http://www.refworld.org/docid/571dd50d4.html>. See also European Parliament (2015). Resolution of 10 September 2015 on migration and refugees in Europe((2015/2833(RSP)), recital J. Available from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2015-0317%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

² European Commission (2016). Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM (2016) 197 final, 6 April 2016, p. 3 and 6. Available from: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52016DC0197>.

³ *Ibidem*, p. 2.

⁴ On this issue see European Parliament (2015). Enhancing the Common European Asylum System and Alternatives to Dublin; Study written by Guild, E; Costello, C; Garlick, M; Moreno-Lax, V; Carrera, S for the LIBE Committee, p. 18 ff. Available from: [http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU\(2015\)519234](http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU(2015)519234).

⁵ European Commission (2016). Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2016) 270 final, 4 May 2016, p. 2. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465212426716&uri=CELEX:52016PC0270>.

The study is based on desk research. It draws on scholarly work, reports and policy documents, with a particular emphasis on recent publications. It takes special account of studies prepared in past years for the LIBE Committee⁶.

The study consists of two main parts. The first part examines the practical functioning of responsibility-allocation mechanisms already established under EU Law, i.e. the Dublin system and the relocation schemes established for the benefit of Italy and Greece. Based on the available evidence, it then seeks to explain why such mechanisms have failed to achieve their objectives. On this basis, the second parts discusses possible avenues for reform of the Dublin system. First, the Dublin IV Proposal is analysed and critically assessed. The focus will be on whether its adoption could solve the problems documented in the first part of the study, and whether it is compatible with fundamental rights. Alternative models for responsibility allocation – “light” models, relying less on coercion and more on cooperation – are then explored. The final section of the study sets out general conclusions and recommendations.

⁶ European Parliament (2014). New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection; Study written by Guild, E; Costello, C; Garlick, M; Moreno-Lax, V; Mouzourakis, M; with the participation of Carrera, S for the LIBE Committee. Available from: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2014\)509989](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2014)509989); European Parliament (2015). Enhancing the CEAS (footnote 4); European Parliament (2010). What System of Burden Sharing between Member States for the reception of asylum seekers? Study written by Matrix Insight Ltd; Thielemann, E; Williams, R; Boswell, C for the LIBE Committee. Available from: [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2010/419620/IPOL-LIBE_ET\(2010\)419620_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2010/419620/IPOL-LIBE_ET(2010)419620_EN.pdf); European Parliament (2010). Setting Up a Common European Asylum System Study written by De Bruycker, Ph; Jaillard, M; Maiani, F; Jakuleciviene, L; Bieksa, L; de Bauche, L; Jaumotte, J; Saroléa, S; Moreno-Lax, V; Labayle, H; in cooperation with Vevstad, V; Hailbronner, K for the LIBE Committee. Available from: [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2010/425622/IPOL-LIBE_ET\(2010\)425622_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2010/425622/IPOL-LIBE_ET(2010)425622_EN.pdf).

2. THE EXISTING ACQUIS AND ITS IMPLEMENTATION

KEY FINDINGS

- The Dublin system is demonstrably ineffective and inefficient. It inflicts severe hardship for protection seekers, and it damages the functioning of the Common European Asylum System
- The relocation schemes established in September 2015 have also failed, until now, to produce appreciable results
- EU allocation-schemes fail, in the first place, because they do not elicit cooperation from protection seekers. Their strict “no-choice” policy, and the limited account they take of applicants’ circumstances, make them starkly unattractive. The problem is compounded by falling reception and protection standards in some Member States. In the face of the wholesale prohibition of secondary movements as “abusive”, and of widespread coercion, protection seekers (successfully) exercise a considerable degree of agency in the choice of their destination even at high costs and risks to themselves
- Insufficient cooperation among the Member States is a second key factor. The CEAS is a collection of discrete national systems, each with its own administration and budget. Member States approach responsibility-allocation defensively, i.e. in the perspective of minimising incoming transfers and maximising outgoing transfers. Solidarity schemes compensating fully asylum-related costs, or even awarding a premium to States incurring them, would defuse such incentives. The insufficiency of current solidarity schemes, by contrast, sustains them, and the fact that the Dublin criteria unfairly disadvantage certain Member States exacerbates the problem
- A third cause of inefficiency is the bureaucratic approach of EU allocation schemes. Responsibility determination is made in procedures requiring complex fact-finding, intergovernmental decision-making, frequent litigation, and coercive transfers. This inherently defeats the objective of placing applicants swiftly and economically in a status determination procedure

2.1. The Dublin System

2.1.1. The basic features of the Dublin system

The Dublin system is in operation since March 1995. It is currently based on the Dublin III Regulation (hereafter “DRIII”)⁷ and governs responsibility-allocation among 32 States – the 28 EU Member States plus the four EFTA “associate” States. While its legal foundations and geographical scope have changed over time, it has remained essentially the same.

⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), [2013] OJ L180/31.

Its basic features are well known⁸. The principal aim of the system is to guarantee that every third country national seeking asylum in the Dublin area has swift access to status determination, while preventing him from pursuing multiple claims in several Member States, with the overarching aim of speeding up and rationalising the treatment of asylum claims (recitals 4 and 5 DRIII)⁹. To this effect, the system establishes the rule that every application presented in the Dublin area is to be examined by in principle only one “responsible State” (Art. 3(1) DRIII). That State is to be determined by agreement between the States concerned, based on a hierarchy of “objective criteria” (recital 5 and Art. 7(1) DRIII). These are based on family ties, on the circumstances surrounding entry or stay in the Dublin area or, if no other criterion is applicable, on the place where the first application has been lodged (see Arts. 3(2) and 8-16 DRIII). Under the “sovereignty clause” of Art. 17(1) DRIII, each Member State may examine any applications lodged with it, especially but not exclusively on human rights or compassionate grounds (recital 17 DRIII)¹⁰. Under the “humanitarian clause” of Art. 17(2) Member States may agree to derogate from the criteria to protect family unity.

2.1.2. The Dublin system in practice

The literature on the practical functioning of the Dublin system is extensive. It is widely accepted that the system does not work as expected and never has¹¹. In short: it achieves

⁸ For a detailed legal analysis see Filzwieser, C, Sprung, A (2014). Dublin III-Verordnung. Das Europäische Asylzuständigkeitssystem. Stand: 1.2.2014, Berliner Wissenschafts-Verlag/Neuer Wissenschaftlicher Verlag; Hruschka, C, Maiani, F (2016). Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), in: Hailbronner, K, Thym, D (eds.). EU Immigration and Asylum Law – A Commentary, 2nd edition, Hart/Beck, p. 1478-1604.

⁹ See also CJEU, joined cases C-411/10 and C-493/10, *NS and ME*, ECLI:EU:C:2011:865, para. 79; CJEU, Case C-648/11, *MA*, ECLI:EU:C:2013:367, para. 54.

¹⁰ See also CJEU, Case C-528/11, *Halaf*, EU:C:2013:342, paras 36-37.

¹¹ The enumeration of the main problems of the system has remained consistent since the first evaluations. See European Commission (2000). Staff Working Document: Revisiting the Dublin Convention, SEC (2000) 522, 21 March 2000, para. 53; European Commission (2001). Staff Working Document: Evaluation of the Dublin Convention, SEC (2001) 756, 13 June 2001, especially at p. 18; European Commission (2008), Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), Impact assessment, SEC (2008) 2962, especially at p. 9 and 23. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465226747309&uri=CELEX:52008SC2962>; European Commission (2015). A European Agenda on Migration, COM (2015) 240, 13 May 2015, p. 13. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465226633867&uri=CELEX:52015DC0240>; European Commission (2016). Dublin IV Proposal (footnote 5), especially at p. 10 f. See also European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 157 ff; European Parliament (2014). New Approaches (footnote 6), p. 50 f; Fratzke, S (2015). Not Adding Up – The Fading Promise of Europe’s Dublin System, MPI Europe, March 2015. Available from: <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>; Goodwin-Gill, G S (2015). The Mediterranean Papers – Athens, Naples and Istanbul, September 2015, p. 9 ff. Available from: http://www.blackstonechambers.com/news/publications/the_mediterranean.html; Hruschka, C (2016). Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission, EU Immigration and Asylum Law and Policy Blog, 17 May 2016. Available from: <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>; Maiani, F (2016). The Dublin III Regulation: a New Legal Framework for a More Humane System?, in: Chetail, V, De Bruycker, Ph, Maiani, F (eds). Reforming the Common European Asylum System: The New European Refugee Law, Brill, p. 101-142, at p. 105 ff; Den Heijer, M, Rijpma, J, Spijkerboer, T (2016). Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System, Common Market Law Review, vol. 53, p. 607-642, at p. 611; European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 34. Available from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0102+0+DOC+XML+V0//EN>. On the favourable evaluation by the Commission in 2007 (European Commission (2007). Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System, COM (2007) 299 final, 6 June 2007, p. 6. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465407679741&uri=CELEX:52007DC0299>), see ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, March 2008, Brussels, p. 9 ff. Available from:

very little at very high costs both for protection seekers and for the functioning of the Common European Asylum System.

To begin with, the Dublin system fulfils its core functions to a limited extent.

As noted, the main goal of the system is to **ensure access to status determination** for every third-country national applying for protection in one of the Member States.

In law, the system guarantees this. First, the Regulation identifies a responsible State for each application – as would any system including a “catch-all” default criterion¹². Second, subject to the optional application of the “safe third country” concept¹³, Art. 18(2) DRIII obliges the responsible State to complete the examination of the application and to afford a remedy in every case. It outlaws the “interruption” practices observed in certain Member States under the Dublin II Regulation, which exposed applicants to a risk of *refoulement*¹⁴.

In practice, there are nonetheless two significant and related problems. First, whenever status determination procedures in the responsible State fall below the relevant EU and international standards, the applicant is left without access to a *fair* procedure¹⁵. Protection against transfers to the responsible State¹⁶ affords relief to those who manage to move to another Member State, but does not address the problems of those left stranded in the responsible State¹⁷. Second, the system is reportedly discouraging *bona fide* refugees from applying for protection in some States out of fear of being “stuck” there¹⁸. This was the case e.g. of the refugees disembarked in Greece in 2015, who chose *en masse* the hard road to further destinations, and even of those stuck in desperate conditions at the Greek-Macedonian border. In providing applicants with incentives to stay or to go “underground” (see below 2.3.2), the system is working against key objectives of the CEAS and of EU

<http://www.refworld.org/docid/47f1edc92.html>; Maiani, F, Vevstad, V (2009). Reflection note on the Evaluation of the Dublin System and on the Dublin III Proposal, Briefing Note Prepared for the European Parliament, March 2009. Available from: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_NT\(2009\)410690](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_NT(2009)410690).

¹² “Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it” (Art. 3(2), 1st indent, DRIII).

¹³ See Art. 3(3) DRIII and Art. 38-39 APD. See also CJEU Case C-695/15 PPU, *Mirza*, ECLI:EU:C:2016:188.

¹⁴ On interruption practices, see Garlick, M (2016). The Dublin system, Solidarity and Individual Rights, in: Chetail, V, De Bruycker, Ph, Maiani, F (eds). Reforming the Common European Asylum System: The New European Refugee Law, Brill, p. 159-194, at p. 175 f. In at least one documented case, such practices occasioned the death of the applicant: see ECRE (2007). The Dublin Regulation: Twenty Voices – Twenty Reasons for Change, 2007, Brussels, p.2 (case of Ali). Available from: http://www.dublin-project.eu/dublin/content/download/205/1421/version/2/file/Dublin_20_voices_ECRE.pdf. On Art. 18(2)DRIII see Hruschka, C, Maiani, F (2016). Regulation N° 604/2013 (footnote 8), commentary *ad* Art. 18, para. 7 ff. See also also CJEU Case C-695/15 PPU, *Mirza*, ECLI:EU:C:2016:188, para. 65 ff.

¹⁵ See e.g. UNHCR (2008). Position on the return of asylum-seekers to Greece under the “Dublin Regulation”, 15 April 2008, Geneva. Available from: <http://www.refworld.org/docid/4805bde42.html>; UNHCR (2014). Observations on the Current Situation of Asylum in Bulgaria, 2 January 2014, Geneva. Available from: http://www.refworld.org/country_COI_UNHCR,,BGR,,52c598354,0.html; UNHCR (2016). Hungary as a Country of Asylum – Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016, May 2016, Geneva. Available from: <http://www.refworld.org/country,,,HUN,,57319d514,0.html>.

¹⁶ See e.g. Art. 3(2) DRIII, which prohibits transfers to Member States where “systemic flaws” in the asylum system entail in a risk of inhuman or degrading treatment.

¹⁷ European Parliament (2015). Enhancing the CEAS (footnote 4), p. 63.

¹⁸ See European Commission (2001). Evaluation of the Dublin Convention (footnote 11), p. 18; ECRE (2008). Dublin Reconsidered (footnote 11), p. 16. ECRE (2013). Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System, January 2013, Brussels, p. 25. Available from: http://www.emnbelgium.be/sites/default/files/publications/intra-eu_solidarity_-_full_paper1.pdf; European Parliament (2014). New Approaches (footnote 6), p. 51, 89; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 54 f.; ECRE (2016). Wrong counts (footnote 1), p. 24; Dublin IV Proposal (footnote 5), p. 9.

migration policies, particularly the goals of offering appropriate status to third country nationals needing protection, and of preventing irregular stay and movements in the EU.

As for the objective of **ensuring swift access to status determination**, Dublin procedures tend to take a long time¹⁹. The official information given to applicants is that “under normal circumstances”, the procedure may last 11 months, i.e. almost twice the maximum duration of first instance asylum procedures under Art. 31(3) APD²⁰. By delaying significantly the handling of claims, the Dublin system also delays the outcome of the procedure, thereby increasing reception costs and prolonging the applicants’ uncertainty.

Another key objective of the system is to **prevent the examination of multiple applications**. There is no data showing the exact extent to which the system fulfils this objective. However multiple applications are still frequent²¹, and “take back” transfers²² are largely prevalent²³ over “take charge” transfers²⁴. This means that preventing the examination of multiple applications (as opposed to allocating responsibility) is *de facto* the main function of the system so far – whether effectively fulfilled or no.

This is especially so since the **hierarchy of Dublin criteria** has no demonstrable impact on the allocation of responsibility for asylum claims among Member States²⁵. The most frequently applied criteria as a ground for take charge transfers are those based on documentation and entry²⁶. The important point, however, is that effected “take charge” transfers are extremely rare – they happen for less than 1% of applications lodged in the Dublin area²⁷. This means that for one reason or another, more than 99% of applications are examined by the State where they are first lodged²⁸. The result would almost be the

¹⁹ See e.g. Dublin IV Proposal (footnote 5), p. 9; ECRE (2008). Dublin Reconsidered (footnote 11), p. 11 f.

²⁰ See Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2014] OJ L39/1, Annex X.

²¹ See Dublin IV Proposal (footnote 5), p. 11 f.

²² I.e. transfers “back” to the responsible State after the applicant has moved irregularly to another Member State or lodged a second application there (Art. 18(1)(b)-(d) DRIII).

²³ See EASO (2014). Situation of Asylum in the European Union 2013, July 2014, Luxembourg, para. 2.6. Available from: <http://reliefweb.int/sites/reliefweb.int/files/resources/EASO-AR-final.pdf>. See also ICFi (2016). Evaluation of the Dublin III Regulation – Final Report, Study for the European Commission, p. 21. Available from: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf. These data are roughly in line with older data:

see European Commission (2007). Staff Working Paper accompanying the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin system, SEC (2007) 742, 6 June 2007, p. 16 and 49. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465328019285&uri=CELEX:52007SC0742>. Published data for 2014 and 2015 is unfortunately too incomplete to be entirely reliable: see ICFi (2016). *Op. cit.*, Figure A1.1; EASO (2015). Situation of Asylum in the European Union 2014, July 2015, Luxembourg, p. 32. Available from: <https://www.easo.europa.eu/sites/default/files/public/EASO-Annual-Report-2014.pdf>.

²⁴ I.e. transfers from the State of first application to a Member State that has accepted its responsibility under the Dublin criteria, so the examination of the claim can start (Art. 18(1)(a) DRIII).

²⁵ See also Dublin IV Proposal (footnote 5), p. 12.

²⁶ See Dublin IV Proposal (footnote 5), p. 9.

²⁷ Own computation based on EASO figures (footnote 23) to the effect that: (a) in 2008-2012 the number of effected Dublin transfers corresponded to approximately 3% of all asylum applications, and (b) 70%-80% of such transfers are “take backs”.

²⁸ Setting Up a Common European Asylum System (footnote 6), p. 158 f; European Parliament (2014). New Approaches (footnote 6), p. 9. The first State where an application is lodged may be responsible for a variety of reasons: because no other criterion is applicable (see above footnote 12); because a higher-ranking criterion makes that State responsible; because the State in question decides to apply the “sovereignty clause” of Article 17(1) DRIII; or because it subsequently becomes responsible, e.g. for missing the deadlines set out by Art. 29 DRIII for the implementation of transfers. The frequency of these occurrences varies, with the application of the “default” criterion reproduced above at footnote 12 being seemingly the most frequent. See ICFi (2016). Evaluation of the Implementation of the Dublin III Regulation – Final Report, Study for the European Commission, p. 21, 26, 34 and 59. Available from: <http://ec.europa.eu/dgs/home-affairs/what-we->

same with just one criterion – “applications are examined where they are first lodged” – and no take charge procedures (see also below, section 3.3.2).

Of course, while statistically irrelevant, the criteria may make all the difference in individual cases. The **responsibility criteria protecting family unity** (Arts. 8-11 and 16 DRIII), which are at the top of the hierarchy and should be broadly applied (see recitals 13-16 DRIII), are hardly ever used. This is due in part to their restrictive wording. Another key cause, however, is that Member States, when requested to take responsibility on their account, routinely refuse to accept evidence of family ties²⁹. *De facto*, the hierarchical order of the criteria is subverted by evidentiary rules and practices: lower-ranking criteria take precedence because they are assisted by “hard” evidence (e.g. Eurodac “hits”) while theoretically higher-ranking criteria remain a dead letter because they are not³⁰. The **scant application of the discretionary clauses** for humanitarian purposes compounds the problem³¹, further aggravating the impact of the Dublin system on family unity.

Another salient criterion is **irregular entry** (Art. 13 DRIII). Its effective operation would shift responsibility to States located at the Southern and Eastern borders of the Union – to an unmanageable extent in Greece in 2015. This has not happened owing to the extreme inefficiency of the Dublin system (see below). Also, as acknowledged by the Commission, the fear of incurring overwhelming responsibilities has motivated border States not to register arriving persons – before, and more visibly during the “crisis” of 2015 – undermining the effective operation of the criterion³².

Taken as a whole, the system is not only ineffective as just seen but also **extremely inefficient**. While it may be assumed that a Dublin procedure is run for every application filed with a Member State³³, only a small percentage of the tens of thousands of procedures gives rise to a transfer request ($\approx 12\%$). While most requests are accepted ($\approx 70\text{-}80\%$), only a minority of agreed transfers are eventually carried out ($\approx 30\text{-}40\%$)³⁴. All in all, Dublin transfers are made for approximately 3-4% of all applications lodged in the Dublin

[do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf](https://ec.europa.eu/asylum/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf).

²⁹ See Dublin IV Proposal (footnote 5), p. 9-10; ICFI (2016). Dublin III Implementation Report (footnote 28), p. 17-18, 23, 24, 26 f. The problem is far from new: see European Commission (2007). Dublin II Evaluation (footnote 11), p. 8. For a more in-depth analysis see Brandl, U (2016). Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?, in: Chetail, V, De Bruycker, Ph, Maiani, F (eds). Reforming the Common European Asylum System: The New European Refugee Law, Brill, p. 143-158; Maiani, F (2015). L'unité de la famille sous le Règlement Dublin III: du vin nouveau dans de vieilles outres, in: Breitenmoser, S; Gless, S; Lagodny, O (eds). Schengen et Dublin en pratique – questions actuelles. Dike/Nomos, 2015, p. 277-303.

³⁰ See in particular ICFI (2016). Dublin III Implementation Report (footnote 28), p. 24 f. and especially 26.

³¹ This problem has been reported throughout Dublin history: see e.g. Dublin IV Proposal (footnote 5), p. 10.

³² See in particular April 2016 Communication (footnote 2), p. 4. See also European Commission (2007). Dublin II Evaluation (footnote 11), p. 9. The Commission has launched infringement proceedings against i.a. Italy and Greece for their alleged failure to systematically fingerprint irregular arrivals: see European Commission (2015). Managing the refugee crisis: State of play of the implementation of the priority actions under the European Agenda on Migration, COM (2015) 510, 14 October 2015, p. 11 and Annex 6. Available from: <http://www.refworld.org/docid/563201fc4.html>.

³³ Art. 20(1) DRIII: “The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State”.

³⁴ See, for the 2003-2005 period, European Commission (2007). Staff Working Paper (footnote 23), p. 18; for the 2008-2012 period: EASO (2014). Situation of Asylum in the European Union 2013 (footnote 23), p. 30. The available figure for effected transfers in 2014 is 8% of all agreed transfers (see ICFI (2016). Dublin III Evaluation Report (footnote 23), p. 6). As noted in footnote 22, however, it is based on incomplete data. Furthermore, being based on data from only one year, it might also be biased by the statistical effect described in the ICFI Evaluation report, p. 6, and in the Dublin IV Proposal (footnote 5), p. 10. See also European Parliament (2012). Resolution of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)), para. 33. Available from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2bTA%2bP7-TA-2012-0310%2b0%2bDOC%2bXML%2bV0%2F%2FEN&language=EN>.

area³⁵. Furthermore, transfers effected between Member States offset one another to a large extent so that “net transfers are close to zero”³⁶, and applicants frequently travel back to their point of departure after having been transferred³⁷.

The amount of the financial and administrative resources thus wasted³⁸ is yet to be determined reliably³⁹. The categorical statement that “the absence of [a mechanism such as the Dublin system] would generate even higher costs”⁴⁰ appears to be founded exclusively on stakeholders’ impressions, and possibly on stakeholders’ misconception that the only alternative to Dublin is no responsibility-allocation system at all⁴¹.

The meagre results of the system are bought at the expense of great **hardship** for many applicants and their families. Interferences with fundamental rights – *non-refoulement*, family life, liberty and integrity, due process, and the rights of the child – are commonplace⁴² as also evidenced by the amount of litigation generated by the system⁴³. Legal considerations aside, Dublin practice is rife with poignant cases, disclosing at times a surprising insensitivity on the part of the competent authorities. For example, a 7 year old child from Syria, severely traumatised after having been separated from her mother, having lost her father in the crossing of the Mediterranean, and having experienced harsh conditions in Europe accompanied by her young aunt, was nonetheless subjected to the additional trauma and uncertainty of a “take charge” procedure instead of being admitted to the asylum procedure in the country where she had sought protection – *nota bene*, the “take charge” procedure has taken 1,5 years at the time of writing and the final decision is still outstanding⁴⁴.

While “hardship” is an important keyword to capture the effects of the system on applicants, “**arbitrariness**” is key to understanding the applicants’ perception of it⁴⁵. The system chooses their destination for them based on criteria that in most cases have nothing to do with their personal circumstances⁴⁶. It backs this choice with coercion even when – due to vast disparities and to seriously failing standards in some Member States – such choice entails a stark reduction of their living conditions, protection chances and integration prospects. Unsurprisingly, applicants resist the system and avoid its application (see below 2.3.2).

³⁵ See documents quoted in the previous note; European Parliament (2014). *New Approaches* (footnote 6), p. 9.

³⁶ See Dublin IV Proposal (footnote 5), p. 12.

³⁷ JRS Europe (2013). *Protection Interrupted – The Dublin Regulation’s Impact on Asylum Seekers’ Protection*, June 2013, Brussels, p. 56. Available from: http://www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf. ICFi (2016). *Dublin III Implementation Report* (footnote 28), p. 24 ff.

³⁸ The term comes from European Commission (2008). *Dublin III Impact Assessment* (footnote 11), p. 9. See also ECRE (2008). *Dublin Reconsidered* (footnote 11), p. 10 f.

³⁹ For a very tentative estimate, see ICFi (2016). *Dublin III Evaluation Report* (footnote 23), p. 11-13.

⁴⁰ Dublin IV Proposal (footnote 5), p. 12.

⁴¹ ICFi (2016). *Dublin III Evaluation Report* (footnote 23), p. 14. For alternative systems, see below section 3.3.

⁴² For excellent overviews and examples, see ECRE (2006). *Report on the Application of the Dublin II Regulation in Europe*, March 2006, Brussels. Available from: <http://www.refworld.org/docid/47fdfacdd.html>; ECRE (2008). *Dublin Reconsidered* (footnote 11), p. 14 ff; ECRE (2013). *Dublin II Regulation – Lives on Hold*, February 2013, Brussels. Available from: <http://www.refworld.org/docid/513ef9632.html>.

⁴³ The point is vigorously expressed in European Parliament (2014). *New Approaches* (footnote 6), p. 17.

⁴⁴ Basic information on the case can be found in *Rechtbank den Haag*, Judgment of 3 March 2016, case numbers AWB 16/ 1627, 16/1628, 16/1629 and 16/1630; additional information has been provided to the author by the legal guardian of the child, Germa Lourens of the organisation Nidos (Utrecht, NL). For more examples, see ECRE (2013). *Lives on Hold* (footnote 42), p. 34, the facts of CJEU Case C-245/11, *K*, ECLI:EU:C:2012:695, as well as the surprisingly harsh judgment of the ECtHR, *A.S. v. Switzerland*, Appl. No. 39350/13, 30 June 2015.

⁴⁵ JRS Europe (2013). *Protection Interrupted* (footnote 37), p. 50.

⁴⁶ *Ibidem*, p. 8 and 55.

2.2. EU Relocation Schemes

2.2.1. The basic features of EU relocation schemes

Over the years, the EU has sought to complement the Dublin system with mechanisms intended to afford relief to Member States subject to particular pressure.

The first noteworthy initiative of this kind was EUREMA, a project for the relocation of beneficiaries of protection from Malta. EUREMA was based on double voluntarism, i.e. every relocation was subject to the consent of the concerned persons and States. The EU supported it through funding and the assistance of EASO. Very few persons were relocated in light of the challenges then faced by Malta – indeed, fewer than were relocated to the USA in the same period, and matched by the number of Dublin transfers back to Malta⁴⁷.

This experience showed that programmes based on voluntary pledges by Member States can only have symbolic significance⁴⁸. The most obvious difficulty was that relocation States offered few places, and formulated extensive lists of conditions. Other interesting points emerged as well: the difficulties and delays of seeking agreement between Member States on each relocation, and the unwillingness of beneficiaries of protection to relocate to some Member States, based in particular on the absence of personal or community ties there⁴⁹.

The on-going relocation schemes in favour of Greece and Italy are more immediately relevant to this study. Established as temporary emergency measures under Art. 78(3) TFEU⁵⁰, they constitute a derogation from Dublin rules. Until September 2017, the responsibility for a number of applicants is to be transferred from Greece (66,400) and from Italy (39,500) to other Member States. Applicants may only be relocated after applying for protection, being fingerprinted, and undergoing a Dublin procedure establishing the responsibility of Italy or Greece (see Arts. 3(1) and 5(5) of the relocation Decisions). Furthermore, only applicants “in clear need of international protection” are eligible, i.e. those who possess a nationality for which the EU-wide recognition rate at 1st instance is 75% or higher (see Art. 3(2) of the relocation Decisions). Arts. 7 and 8 of the relocation Decisions make explicit the policy link with the “hotspot approach”: relocation is to be accompanied by “increased operational support”, and may be suspended should the beneficiary State fail to comply with its “hotspot roadmap”⁵¹.

The relocation schemes differ from EUREMA in that they concern protection seekers rather than recognised beneficiaries and in that they break away from double voluntarism. On the

⁴⁷ Bieber, R, Maiani, F (2012). Sans solidarité point d’Union européenne, *Revue trimestrielle de droit européen*, 2012, p. 295-328, at p. 319; European Parliament (2014). *New Approaches* (footnote 6), p. 56 f.

⁴⁸ European Parliament (2010). *What System of Burden Sharing* (footnote 6), p. 46; FRA (2011). *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner*, January 2011, Vienna, p. 39. Available from: http://fra.europa.eu/sites/default/files/fra_uploads/1500-Greek-border-situation-report2011_EN.pdf.

⁴⁹ EASO (2012). *Fact-Finding Report on intra-EU Relocation Activities from Malta*, July 2012, especially at p. 9 and 13. Available from: <http://www.refworld.org/pdfid/52aef8094.pdf>. See also European Parliament (2014). *New Approaches* (footnote 6), p. 56.

⁵⁰ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L248/80. See also Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L74/36.

⁵¹ On the hotspot approach see European Parliament (2016). *On the frontline: the hotspot approach to managing migration*; Study written by Neville, D; Sy, S; Rigon, A; for the LIBE Committee, Available from: [http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU\(2016\)556942](http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU(2016)556942).

one hand, relocation States have an obligation to meet pre-defined quotas and may not unilaterally impose conditions, being only entitled to reject individual relocations for reasons of national security or public order (see Arts. 4 and 5 of the relocation Decisions). On the other hand, notwithstanding a laudable commitment to select destination States according to the applicants' individual circumstances, the persons to be relocated have no right to choose the relocation State or even to refuse relocation (see Decision 2015/1601 of 22 September 2015, recitals 34 and 35)⁵².

2.2.2. The September 2015 relocation schemes in practice

Until now, the relocation programmes have failed to attain their objectives or to produce appreciable results. In order to relocate 105,900 applicants in two years as foreseen, more than 4,400 persons should have been relocated per month. As of 18 June 2016, i.e. 9 months into the programme, approximately 2,280 persons have been relocated in total⁵³: 1,503 from Greece, where more than 157,000 persons have arrived in the first half of 2016⁵⁴, and which hosts more than 57,000 protection seekers in an "urgent humanitarian situation"⁵⁵; 777 from Italy, where more than 52,000 persons have arrived by sea in the first half of 2016 and which is expecting a surge of arrivals *via* the Central Mediterranean Route⁵⁶.

Much of the blame for the lack of results was initially placed on the beneficiary States' delays in setting up hotspots⁵⁷. However, while substantial progress has been made in the implementation of hotspots and fingerprinting⁵⁸, the pace of relocations still falls vastly short of the targets set by the Commission⁵⁹. Reports produced thus far point to a number of explanatory factors:

- First, the Member States of relocation are reluctantly (if at all) fulfilling their duties under the scheme. The places made available are limited; unilateral conditions and criteria are imposed in violation of the relocation Decisions, as well as extensive security checks; responses to relocation applications take a long time – more than two months – in addition to approximately three weeks in Greece to have relocation

⁵² For an early critique: European Parliament (2015). Enhancing the CEAS (footnote 4), p. 64.

⁵³ European Commission (2016). Fourth report on relocation and resettlement, COM (2016) 416 final, 15 June 2016, p. 2. Available from: <http://eur-lex.europa.eu/legal-content/FR/TXT/?qid=1466245057361&uri=COM:2016:416:FIN>.

⁵⁴ See <http://data.unhcr.org/mediterranean/country.php?id=83> (last visited on 18 June 2016).

⁵⁵ European Commission (2016). Second report on relocation and resettlement, COM (2016) 222 final, 12 April 2016, p. 2 and 8. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465507515679&uri=CELEX:52016DC0222>. The figure of more than 57,000 applicants is given in European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 2, 12.

⁵⁶ See <http://data.unhcr.org/mediterranean/country.php?id=105> (last visited on 18 June 2016).

⁵⁷ For further references see Maiani, F (2016). Hotspots and Relocation Schemes: the Right Therapy for the Common European Asylum System?, EU Immigration and Asylum Law and Policy Blog, 3 February 2016. Available from: <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

⁵⁸ European Commission (2016). Second report on relocation and resettlement (footnote 55), p. 4-5; European Commission (2016). Third report on relocation and resettlement, COM (2016) 360 final, 18 May 2016, especially at p. 4 and 6. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465508606937&uri=CELEX:52016DC0360>; European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 5 and 8; European Parliament (2016). On the frontline (footnote 51), p. 36.

⁵⁹ E.g. the target of bringing relocations from 1,145 to 20,000 between April 11 and May 16, with only 355 additional relocations being carried out in this period, or the target of carrying out 6,000 additional relocations monthly, with 780 being carried out between May 13 and June 14. See European Commission (2016). Second report on relocation and resettlement (footnote 55), p. 3 and 9, European Commission (2016). Third report on relocation and resettlement (footnote 58), p. 2, and European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 2.

applications registered⁶⁰. Lack of political will is thus certainly an important factor, as are bureaucratic complexities and delays in State-to-State interaction⁶¹.

- Second, the scheme is not attractive enough for applicants, although some improvements have been observed over time. Low number of applications have been reported, as well as cases where the applications were withdrawn or the beneficiaries absconded once the relocation destination was known⁶². Lack of information on the scheme itself and on potential destinations was indicated as an important contributing factor, and corrective measures are being taken⁶³. Other factors cited may prove more difficult to correct: the applicants' wish to retain control over their destination, as well as their lack of trust in the process, exacerbated by long delays and last-minute cancellations⁶⁴.
- Third, some stark limitations are built into the scheme. On the one hand, the scheme is of limited use to States that are confronted to arrivals exceeding their ability to process applications, as it only applies to applications that are duly registered and for which a Dublin procedure has already been run. The situation of Greece in 2015 – with arrivals exceeding 850,000 and a registration capacity below 40,000-45,000 per year⁶⁵ – illustrates the point. On the other hand, the scheme is of limited assistance to a State experiencing arrivals of persons not holding the "right" nationalities⁶⁶. Furthermore, applying the scheme to only selected nationalities of persons "in clear need of international protection" is problematic from both a solidarity and a protection standpoint. First, it leaves the beneficiary States to handle most presumptively unfounded cases and return obligations. Second, it may result in discriminatory practices that violate the right of every person to lodge an application for protection as well as the prohibition of discrimination laid down in Article 3 of the Geneva Convention⁶⁷.

⁶⁰ See in particular European Commission (2016). First report on relocation and resettlement, COM (2016) 165 final, 16 March 2016, p. 8 ff and 12. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465509436290&uri=CELEX:52016DC0165>; European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 3 f.

⁶¹ *Ibidem*; European Commission (2016). Third report on relocation and resettlement (footnote 58), p. 5.

⁶² European Commission (2016). First report on relocation and resettlement (footnote 60), p. 6, 9, 10-12, 14. See however European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 9 f.

⁶³ AI (2016). Trapped in Greece – An Avoidable Refugee Crisis, April 2016, London, p. 13. Available from: http://www.amnesty.eu/content/assets/Docs_2016/ReportsBriefings/Trapped_in_Greece_final_140416.pdf;

European Commission (2016). First report on relocation and resettlement (footnote 60), p. 14 f; European Commission (2016). Second report on relocation and resettlement (footnote 55), p. 4 and 6; Third report on relocation and resettlement (footnote 58), p. 4.

⁶⁴ AI (2016). Trapped in Greece (footnote 63), p. 13; Tavolo Nazionale Asilo (2016). Hotspot: Luoghi di Illegalità, 1 March 2016, Rome. Available from: <http://centroastalli.it/wp-content/uploads/2016/02/Documento-Tavolo-Asilo-1.3.2016.pdf>. European Commission (2016). Fourth report on relocation and resettlement (footnote 53), p. 10. See also Maiani, F (2016). Hotspots and Relocation Schemes (footnote 57). Similarly: Den Heijer, M, Rijpma, J, Spijkerboer, T (2016). Coercion, Prohibition, and Great Expectations (footnote 11), p. 628.

⁶⁵ This was the registration capacity to be attained according to Commission recommendations: see European Commission (2016). First report on relocation and resettlement (footnote 60), annex 3, p. 7.

⁶⁶ See European Commission (2015). Progress Report on the implementation of the Hotspots in Italy, COM (2015) 679 final, 15 December 2015, p. 6. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453828433025&uri=CELEX:52015DC0679>.

⁶⁷ European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), paras. 17, 36 and 85. See also European Parliament (2015). Enhancing the CEAS (footnote 4), p. 62 f. See also Tavolo Nazionale Asilo (2016). Hotspot: Luoghi di Illegalità (footnote 64).

2.3. Investigating the Causes of Past Failures

2.3.1. Introductory remarks

The data reported above bear out Steve Peers' comment that the Dublin system is an "expensive waste of time, ultimately [...] applying to only a small percentage of asylum seekers and imposing an extra cost on top of the cost of considering each asylum application"⁶⁸. So far, much the same can be said of the relocation schemes.

If new responsibility-allocation mechanisms are to perform significantly better, the main causes of past failures must be identified and addressed. While legal or technical details may have contributed to the observed problems⁶⁹, three structural factors appear to be prevalent: neglect for protection seekers' motives and agency, conflicting national interests, and a heavily bureaucratic approach to responsibility allocation⁷⁰.

2.3.2. Root cause #1: neglect for protection seekers' motives and agency

The harshness and perceived arbitrariness of the Dublin system render it singularly unattractive for protection seekers. The attractiveness of the relocation schemes is also adversely affected by their strict "no choice" policy, as well as by delays, lack of information and mistrust⁷¹. This has a high cost in terms of efficiency: **lack of cooperation and mistrust on the part of protection seekers** have been consistently reported as key impediments to the smooth operation of the Dublin system, and are damaging relocation schemes as well⁷².

As suggested by the general literature on the choice of destination States in refugee movements, and confirmed by the studies on the Dublin system reporting the point of view of protection seekers, such resistance may be traced principally to two factors:

- First, **personal and social networks, i.e. family connections and the presence of communities of co-nationals**, constitute an important factor in the choice of destination by protection seekers, providing emotional comfort, information and material assistance⁷³. Instead of letting this natural attraction play out – optimising

⁶⁸ Peers, S (2011). *EU Justice and Home Affairs Law*, 3rd Edition, Oxford University Press, p. 362. The very few States who draw significant advantages from the system – in 2013, Switzerland and Germany – may of course have a different view: see EASO (2014). *Dublin and EASO*, 18 December 2014, slide 6. Available from: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=20036&no=4>.

⁶⁹ See e.g. European Commission (2007). *Staff Working Paper* (footnote 23), p. 7-20. For an interesting example: in Greece, since mid-2014, applicants were reportedly expected to purchase their own ticket in order to be transferred: ICFi (2016). *Dublin III Implementation Report* (footnote 28), p. 58.

⁷⁰ For earlier formulations of the argument see Maiani, F, Vevstad, V (2009). *Reflection note* (footnote 11); European Parliament (2010). *Setting Up a Common European Asylum System* (footnote 6), p. 159 ff and 467 f. For a similar analysis: European Parliament (2014). *New Approaches* (footnote 6), p. 80; ACVZ (2015). *Sharing Responsibility – A Proposal for a European Asylum System based on Solidarity*, December 2015, The Hague, p. 35. Available from: <https://acvz.org/en/pubs/delen-in-verantwoordelijkheid/>; Den Heijer, M, Rijpma, J, Spijkerboer, T (2016). *Coercion, Prohibition, and Great Expectations* (footnote 11), p. 610 ff and 614.

⁷¹ See above footnote 64.

⁷² On Dublin, see e.g. European Commission (2001). *Evaluation of the Dublin Convention* (footnote 11), p. 18; European Commission (2008). *Dublin III Impact Assessment* (footnote 11), p. 10; ICFi (2016). *Dublin III Implementation Report* (footnote 28), especially p. 60 f., 70 and 76; Dublin IV Proposal (footnote 5), p. 3 and 10-11; ACVZ (2015). *Sharing Responsibility* (footnote 70), p. 37. On relocations, see above footnotes 62-64.

⁷³ see Efionayi-Mader, D, Chimienti, M, Dahinden, J, Piguët, E (2001). *Asyldestination Europa – Eine Geographie der Asylbewegungen*, 2001, Seismo, p. 154 f; Neumayer, E (2005). *Asylum Destination Choice – What Makes Some West European Countries More Attractive Than Others?*, 5 *European Union Politics*, p. 155-180, especially at p. 175 f; European Parliament (2010). *What System of Burden Sharing* (footnote 6), p. 155 (under "historical ties"); JRS Europe (2013). *Protection Interrupted* (footnote 37), p. 56; AI (2016). *Trapped in Greece* (footnote 63), p. 8. See also European Parliament (2015). *Enhancing the CEAS* (footnote 4), p. 54.

integration chances and potentially reducing the public costs of reception⁷⁴ – the Dublin system (unsuccessfully) seeks to repress it. In a clear departure from the recommendations of the Executive Committee of UNHCR, the system disregards “the intentions of the asylum-seeker as regards the country in which he wishes to request asylum” and takes limited account of “meaningful links” with particular States⁷⁵. The same applies to the “no choice” policy of relocation schemes.

- Second, there are **wide disparities between the asylum systems** of the Member States⁷⁶, which turn the Dublin system into an “asylum lottery”⁷⁷. It is debatable whether this generates *per se* significant pull or push factors. Specialised literature suggests that structural factors such as social or historical ties, reputation, and wage differentials are the main drivers, while changes in asylum policies are a subordinate factor, although they may affect the intra-regional distribution of protection seekers in the short term⁷⁸. Sub-standard reception conditions and protection practices in some of the Member States have nonetheless been convincingly indicated as “a major reason for people’s secondary or tertiary movements”⁷⁹, in addition to constituting legal impediment to transfer to those States⁸⁰.

The wholesale condemnation of secondary movements and avoidance strategies as “abuse” and “asylum shopping”⁸¹ misses the fact that their motivations may be legitimate and relate more to the failings of the CEAS than to abusive behaviour⁸². Terms such as “asylum shopping” also mislead policy-makers by confusing existential needs with frivolous personal convenience.

⁷⁴ See Noll, G (2003). Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field, 16 Journal of Refugee Studies, p. 236-252, at p. 244; ECRE (2008). Dublin Reconsidered (footnote 11), p. 26 f.

⁷⁵ UNHCR Executive Committee (1979). Conclusion No 15 (XXX) 1979 Refugees Without an Asylum Country, para. (h)(iii) and (iv). Available from: <http://www.refworld.org/docid/3ae68c960.html>. See also UNHCR (2001). Revisiting the Dublin Convention, January 2001, Geneva, p. 5. Available from: <http://www.refworld.org/docid/3ae6b34c0.html>; ICFI (2016). Dublin III Evaluation Report (footnote 23), p. 5.

⁷⁶ For a recent analysis, see Lerkes, A (2015). How (un)restrictive are we?, Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministerie van Veiligheid en Justitie, Cahier 2015-10. Available from: <https://www.wodc.nl/onderzoeksdatabase/2615-inwilligingspercentages-van-asielverzoekers-in-nederland-vergeleken-met-de-percentages-in-andere-europese-lidstaten.aspx?cp=44&cs=6799>. Varying recognition rates are only one aspect of the problem, others being e.g. the level of entitlements that beneficiaries of protection enjoy in various Member States. See e.g. UNHCR (2013). Recommendations on Important Aspects of Refugee Protection in Italy, July 2013, Geneva, p.12 ff. Available from: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=522f0efe4&skip=0&query=Recommendations%20on%20Important%20Aspects%20of%20Refugee%20Protection%20in%20Italy>.

⁷⁷ See e.g. ECRE (2008). Dublin Reconsidered (footnote 11), p. 14.

⁷⁸ See Neumayer, E (2005). Asylum Destination Choice (footnote 73), p. 171 ff; European Parliament (2010). What System of Burden Sharing (footnote 6), p. 155; Williams, R (2015). Beyond Dublin – A Discussion paper for the Green/EFA in the European Parliament, 18 March 2015, p. 7. Available from: http://www.greens-efa.eu/fileadmin/dam/Documents/Policy_papers/Beyond_Dublin_paper_final.pdf. On policy-related intra-regional pull-factors, see Efonayi-Mader, D, Chimienti, M, Dahinden, J, Piguët, E (2001). Asylumdestination Europa (footnote 73), p. 72 f and 154.

⁷⁹ JRS Europe (2013). Protection Interrupted (footnote 37), p. 56. See also European Parliament (2015). Enhancing the CEAS (footnote 4), p. 50; ECRE (2016). Observations on the Commission Discussion Paper on the reform of the Asylum Directives, 20 May 2016, Brussels, p. 11; AI (2016). Trapped in Greece (footnote 63), p. 8.

⁸⁰ See CJEU, joined cases C-411/10 and C-493/10, *NS and ME*, ECLI:EU:C:2011:865; ECtHR, *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, 21 January 2011; ECtHR, *Tarakhel v Switzerland*, Appl. No. 29217/12, 2 November 2014; ECRE (2016). Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary, January 2016, Brussels. Available from: <http://www.refworld.org/docid/56af051e4.html>.

⁸¹ See April 2016 Communication (footnote 2), p. 6; Dublin IV Proposal (footnote 5), p. 3, 4, 97 and recital 27.

⁸² On protection grounds to move: UNHCR Executive Committee (1989). Conclusion No 58 (XL) 1989 Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in which They had Already Found Protection, paras f) and g). Available from: <http://www.refworld.org/docid/3ae68c4380.html>; ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 11; Meijers Committee (2016). Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final), CM1609, p. 6. Available from: <http://www.commissie-meijers.nl/en/comments/411>. Also on family reasons: European Parliament (2015). Enhancing the CEAS (footnote 4), p. 54.

Protection seekers *de facto* “exercise a considerable degree of agency over their country of destination”⁸³. To do so, they are ready to invest what resources they have and to face considerable risk and privations – to seek legal assistance and appeal⁸⁴; to avoid identification, abscond, and resort to smugglers, renouncing any benefits accruing to them as seekers or beneficiaries of protection⁸⁵; to resort to self-harm and to self-mutilation⁸⁶; to travel back after having been transferred, several times and at risk of life and limb⁸⁷.

To counter these strategies, coercion has been widely used⁸⁸ or recommended⁸⁹ in the form of detention, escorted transfers or forced identification. Several Member States have also implemented questionable “interruption” rules, punishing secondary movements with exclusion from a full and fair asylum procedure in case of return⁹⁰. As seen in section 2.1.2, this has failed to make the Dublin system more effective or to curb secondary movements. It has, however, multiplied interferences – in human rights, boosted the human and financial costs of the system, generated additional litigation, and further eroded applicants’ trust in the authorities of the Member States⁹¹.

2.3.3. Root cause #2: unmitigated conflict of national interests

The second major cause of the poor performance of the distributive systems established under EU law appears to be **insufficient cooperation from the Member States**. To write off this problem as one of “incorrect implementation”⁹² may be technically correct, but it misses a central point. The problems that have been detailed so far have been consistently observed for twenty years across a number of Member States. If nothing else, it would seem that the system invites “incorrect implementation”.

To understand why, it is well to start from the fact that the Common European Asylum System is a collection of discrete national systems – each with its own regulations, administration, judicature, and budgets – operating within the framework of harmonised EU norms and of weak EU solidarity arrangements (more on this below). In this context, the Dublin system does not only allocate “responsibilities”. It is perceived by national administrations as shifting costs from one national system to another. The cooperative

⁸³ European Parliament (2014). New Approaches (footnote 6), p. 24.

⁸⁴ See ICFI (2016). Dublin III Implementation Report (footnote 28), p. 76.

⁸⁵ CIMADE (2008). Les gens de “Dublin II” – Rapport d’expérience, December 2008, Paris, p. 22 f. Available from: <http://www.lacimade.org/wp-content/uploads/2008/12/dublin21.pdf>; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 57; Fratzke, S (2015). Not Adding Up (footnote 11), p. 12. Note however that according to JRS Europe (2013). Protection Interrupted (footnote 37), p. 48, 70% of the interviewed persons denied having absconded.

⁸⁶ Van Selm, J (2005). European Refugee Policy: is there such a thing?, New Issues in Refugee Research, Working Paper No. 115, Geneva, p. 14. Available from: <http://www.unhcr.org/42943ce02.pdf>; UNHCR (2006). The Dublin II Regulation – A UNHCR Discussion Paper, April 2006, Brussels, p. 22. Available from: <http://www.refworld.org/docid/4445fe344.html>; Garlick, M (2016). The Dublin system, Solidarity and Individual Rights (footnote 14), p. 178.

⁸⁷ See above footnote 37. See also HRW (2013). Turned Away – Summary Returns of Unaccompanied Migrant Children and Adult Asylum Seekers from Italy to Greece, January 2013, p. 16 f. Available from: <http://www.refworld.org/docid/51026b892.html>.

⁸⁸ Especially through detention and escorted transfers: see e.g. ICFI (2016). Dublin III Implementation Report (footnote 28), p. 58 f. and 68.

⁸⁹ European Commission (2015). Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, SWD (2015) 150 final, 27 May 2015. Available from: <http://www.refworld.org/docid/55688b174.html>. Controversially, this document contemplates the use of “some degree of coercion” even on vulnerable persons such as minors or pregnant women (p. 5).

⁹⁰ See above, at footnote 14.

⁹¹ See European Parliament (2010). What System of Burden Sharing (footnote 6), p. 146; European Parliament (2010). Setting up a Common European Asylum System (footnote 6), p. 468 f; European Parliament (2014). New Approaches (footnote 6), p. 18 and 50; Fratzke, S (2015). Not Adding Up (footnote 11), p. 15 f.; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 57.

game of making Dublin work is thus closely entwined with a competitive game in which each Member State seeks to outplay the others by minimizing incoming transfers and maximizing outgoing transfers⁹³. Seen through the lens of national interest, seemingly arcane divergences of interpretation⁹⁴ and instances of faulty implementation become clear.

The alleged failure of border States to systematically take fingerprints so as to escape part of their responsibilities is just such an instance⁹⁵. It is not the only one, however. The systematic refusal to accept evidence of family ties and to apply the discretionary clauses even in cases having a strong humanitarian dimension are also significant⁹⁶. They are all the more significant in light of preambular statements to the effect that family life and the best interest of the child should be a “primary consideration” (recitals 13 ff DRIII), or the recommendation to apply the discretionary clauses “on humanitarian and compassionate grounds” (recital 17 DRIII), or calls to “proactively and consistently apply the clauses related to family reunification, and make a broader and regular use of the discretionary clauses”⁹⁷. The well-documented practice of piling requests on patently failed national asylum systems, disregarding the rights of applicants and the functioning of the CEAS as a whole, provides further evidence⁹⁸, as does the failure of most States to cooperate fully in relocation schemes⁹⁹.

Solidarity schemes compensating fully asylum-related costs, or even awarding a premium to States incurring them, would defuse the incentives Member States have to engage in this kind of defensive behaviour. The absence of such schemes, by contrast, sustains this tendency. The fact that the Dublin criteria disadvantage certain Member States further exacerbates it. Both aspects deserve closer examination:

- As a rule, Member States bear the costs relating to the implementation of EU Law on their territory. In the field of asylum, Member States are required to finance registration, screening, reception, the processing of claims and the return of unsuccessful applicants¹⁰⁰. These costs fall asymmetrically on Member States and are at least in part incurred for the provision of public goods to other Member States¹⁰¹. EU solidarity mechanisms do not compensate them, however. EU funding is designed, in normal circumstances, to co-finance projects to strengthen national capacities, not to compensate operating costs¹⁰². The scale of EU funding would in

⁹² European Commission (2015). European Agenda on Migration (footnote 11), p. 13; Dublin IV Proposal (footnote 5), p. 9 (“lack of consistent or correct implementation”).

⁹³ For a telling example see: Swiss Federal Office of Migration, Accord de Dublin: Bilan positif pour la Suisse, Press Release, 7 April 2009. Available from: <https://www.news.admin.ch/message/?lang=fr&msg-id=26339>.

⁹⁴ E.g. divergences on the “humanitarian clause” of Art. 17(2) DRIII (see ICFi (2016). Dublin III Implementation Report, footnote 28, p. 35 f.), or the Austrian interpretation of the “irregular entry” criterion discussed in Hruschka, C, Maiani, F (2016). Regulation N° 604/2013 (footnote 8), commentary *ad* Art. 13, para. 4.

⁹⁵ See above footnote 32. See also ACVZ (2015). Sharing Responsibility (footnote 70), p. 36; Den Heijer, M, Rijpma, J, Spijkerboer, T (2016). Coercion, Prohibition, and Great Expectations (footnote 11), p. 612.

⁹⁶ See above text at footnotes 29-31 and at footnote 44. See also ACVZ (2015). Sharing Responsibility (footnote 70), p. 36.

⁹⁷ European Commission (2015). European Agenda on Migration (footnote 11), p. 13. See also European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), para. 51.

⁹⁸ On transfers to Greece, see Bieber, R, Maiani, F (2012). Sans solidarité point d’Union européenne (footnote 47), p. 321; CJEU, joined cases C-411/10 and C-493/10, *NS and ME*, ECLI:EU:C:2011:865, para. 87. On transfers to Bulgaria, see Garlick, M (2016). The Dublin system, Solidarity and Individual Rights (footnote 14), p. 172 f.

⁹⁹ See above footnote 60.

¹⁰⁰ CJEU, Case C-179/11, *Cimade and GISTI*, EU:C:2012:594, para. 59

¹⁰¹ See Bieber, R, Maiani, F (2012). Sans solidarité point d’Union européenne (footnote 47), p. 312-316.

¹⁰² See Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, [2014] OJ 150/112, Arts. 3(1) and 16.

any case be inadequate for this, as it is estimated to represent a small fraction of national expenditure in the area¹⁰³. AMIF emergency funding might come closer to “full compensation” logic. It may fund 100% of national actions and, while of limited scale in absolute terms, it may cover costs to a significant extent when concentrated on a small State¹⁰⁴. Such funding can also be reinforced by other mechanisms such as humanitarian “emergency support”¹⁰⁵ and the EU Civil Protection Mechanism¹⁰⁶. Still, even when deployed to their full extent, these tools fall well short of providing Member States with comprehensive support in case of mass influx¹⁰⁷. As far as technical support is concerned, EASO assistance has not yet had a strong impact in operational terms, including because of the Agency’s limited resources and reduced scale of operations¹⁰⁸. Relocation schemes have until now been ineffectual, as seen above in section 2.2.2. In total, EU solidarity arrangements fall well short of defusing Member States’ incentives to avoid or shift costs unilaterally.

- For some Member States, the stakes may be higher and the incentives to defect stronger. As already noted, an effective implementation of the criterion of irregular entry (Art. 13 DRIII) would entail massive distributive imbalances to the detriment of the States located at the Southern and Eastern borders. Absent credible solidarity schemes, this has created a powerful incentive *not* to identify protection seekers arriving irregularly, discouraging effective border control¹⁰⁹. Strong political pressure in the context of the hotspot approach may have counteracted this incentive temporarily¹¹⁰, but it is doubtful whether this is a sustainable solution. It is worth noting that the irregular entry is not only counter-productive, but also unjustified. The rationale usually given for it – that it penalises a “failure” in “respect[ing] [...] obligations in terms of protection of the external border”¹¹¹ – is unsustainable.

¹⁰³ See Noll, G (2013). Risky Games (footnote 74), p. 245; European Parliament (2010). What System of Burden Sharing (footnote 6), p. 139 f; Bieber, R, Maiani, F (2012). Sans solidarité point d’Union européenne (footnote 47), p. 319. The conclusions of these studies remain valid, *mutatis mutandis*, even though EU funding has been increased with the adoption of AMIF: see Tsourdi, L, De Bruycker, Ph (2015). EU Asylum Policy: In Search of Solidarity and Access to Protection, EUI Migration Policy Centre, Policy Brief 2015/06, May 2015, S. Domenico di Fiesole, p. 5. Available from: <http://cadmus.eui.eu/handle/1814/35742>.

¹⁰⁴ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, [2014] OJ L50/168, Art. 2 (k), 14 (6)(b), and 21; See Regulation (EU) No 514/2014 (footnote 102), Art. 7.

¹⁰⁵ Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, [2016] OJ L70/1.

¹⁰⁶ Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, [2013] OJ L347/924.

¹⁰⁷ It is instructive to read the figures provided by the European Commission in light of information provided by the beneficiary State: European Commission (2016). Managing the Refugee Crisis – EU Financial Support to Greece, 24 May 2016. Available from: http://ec.europa.eu/dqs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160412/factsheet_managing_refugee_crisis_eu_financial_support_greece_-_latest_update_en.pdf; Hellenic Republic General Secretariat for Media & Communication (2016). Refugee Crisis Fact Sheet, 11 April 2016, p. 7 f. Available from: http://www.greeknewsagenda.gr/images/pdf/fact_sheet_refugee_April2016.pdf. For useful caveats on how to read the figures on EU funding see Den Hertog, L (2016). EU Budgetary Responses to the ‘Refugee Crisis’ – Reconfiguring the Funding Landscape, CEPS Paper in Liberty and Security in Europe No. 93, May 2016, para. 2. Available from: <https://www.ceps.eu/publications/eu-budgetary-responses-‘refugee-crisis’-reconfiguring-funding-landscape>.

¹⁰⁸ Garlick, M (2016). The Dublin system, Solidarity and Individual Rights (footnote 14), p. 187 ff; Tsourdi, L, De Bruycker, Ph (2015). In Search of Solidarity (footnote 103), p. 5; European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), paras. 68 f.

¹⁰⁹ See above at footnote 32. See also European Parliament (2012). Resolution of 11 September 2012 on enhanced intra-EU solidarity (footnote 34), paras. 5 and 33; Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 1 f.

¹¹⁰ See above at footnote 58.

¹¹¹ April 2016 Communication (footnote 2), p. 4; Dublin IV Proposal (footnote 5), p. 14.

Whenever refugee movements or “mixed flows” hit a section of the Schengen external border, international and EU law leave only one legitimate course to the concerned State: to refrain from “pushing back” arriving persons, to disembark on national soil those who have been rescued or intercepted at sea, and to allow the lodging of protection claims¹¹². No “failure” is imputable to the State of first entry for the presence of the applicants on European soil. Allocating responsibility on this basis amounts to allocating it on the basis of geographical position. This is contrary to the notion of “fair sharing of responsibilities”, whatever its precise meaning¹¹³. Needless to say, the irregular entry criterion is also unjustified from the standpoint of protection. As UNHCR observed, it is “wholly inappropriate” to allocate responsibility on that basis, as irregular border-crossing does not reflect or create a “meaningful link” between the person and State concerned¹¹⁴.

2.3.4. Root cause #3: cumbersome intergovernmental procedures

As noted above, one shortcoming of the Dublin system and of the relocation schemes is that they substantially delay the start of status determination. This runs against the rationale of speeding up the treatment of claims, multiplies reception costs, and leaves applicants in protracted uncertainty, providing them with additional incentives to take matters in their own hands and move on to their preferred destination¹¹⁵.

Delays may be due to a range of factors, some linked to the conflicts of interest examined so far: litigation, dilatory tactics,¹¹⁶ disagreements between the Member States, etc. In part, however, they appear to be a consequence of the bureaucratic approach that constitutes the hallmark of the distributive mechanisms devised so far.

In essence, the approach followed is “bureaucratic” in that it takes the choice of destination completely from the concerned person and places it in the hands of officials acting on the basis of politically agreed criteria in administrative procedures. Far from being incidental, complexity and delays are inherent in this approach.

When seen against their modest function – deciding which State is to examine an application, and putting the applicant in a status determination procedure there – Dublin procedures are indeed extraordinarily complex. They entail potentially difficult fact-finding, frequent litigation, and the organization of (mostly coercive) transfers¹¹⁷. The intergovernmental character of Dublin procedures is an aggravating factor, “unavoidably delaying access to [asylum] procedures” to the extent that “within such a system

¹¹² See in particular ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012. See also Moreno-Lax, V (2012). *Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?, 12 Human Rights Law Review, p. 574-598, at p. 598; Epiney, A, Egbuna-Joss, A (2016). Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), in: Hailbronner, K, Thym, D (eds.). *EU Immigration and Asylum Law – A Commentary*, 2nd edition, Hart/Beck, p. 52-115, Commentary *ad* Art. 1, para. 12 ff. This understanding is reflected in European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), para. 61.

¹¹³ See also European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), para. 33-34.

¹¹⁴ UNHCR (2001). Revisiting the Dublin Convention (footnote 75), p. 5.

¹¹⁵ See above at footnotes 19 and 61-64.

¹¹⁶ See ICFi (2016). Dublin III Implementation Report (footnote 28), p. 26, suggesting that delays in responding to Dublin requests may be at times a conscious attempt to “draw out procedures”.

¹¹⁷ On litigation rates and coercive transfers, see See ICFi (2016). Dublin III Implementation Report (footnote 28), p. 58 f and 76.

procedures cannot realistically be shortened"¹¹⁸.

Much the same goes for relocations. These are also complicated intergovernmental procedures, weighed down by relocation States' requests for in-depth security checks, and piled on top of previously conducted Dublin procedures¹¹⁹. Even with full cooperation from applicants and Member States, sheer procedural complexity would seem to place the stated objective of several thousand relocations per month out of reach¹²⁰.

2.3.5. Lessons to be drawn for the reform of Dublin III

Lessons drawn from the more than twenty years' application of the Dublin system can provide valuable guidance in devising systems capable of promoting the objectives of Articles 78 and 80 TFEU – full respect for fundamental and refugee rights, access to protection for those needing it, solidarity and fair sharing of responsibilities – as well as objectives that are desirable for any responsibility allocation method: placing protection seekers quickly and economically in status determination procedures, while encouraging them to remain in the formal reception system rather than going “underground” and engaging in costly and risky secondary movements.

A system capable of achieving these goals – or at least doing so to a greater extent than the current system – should be built on the following ideas:

- The cooperation of protection seekers should be actively sought, in particular by taking into account their aspirations and personal circumstances as recommended by the Executive Committee of UNHCR in 1979¹²¹.
- Respect for refugee rights under EU and international standards should be ensured across the Dublin area, and systemic infringements putting them in danger should be pursued as a matter of priority; this would ensure the integrity of the CEAS, and reduce the incentives for applicants to avoid registration in some States and engage in potentially risky irregular movements.
- Solidarity measures should be strengthened considerably in a logic of compensation (as opposed to capacity-building); this would increase the fairness of the CEAS, contribute to securing refugee rights across the Dublin area, and defuse incentives for Member States to engage in defensive behaviour.
- Irregular entry should no longer constitute a criterion for the attribution of responsibility: it lacks justification, is capable of generating severe imbalances particularly in case of mass influx, and undermines effective border controls and identification of protection seekers.
- Every effort should be made towards a drastic simplification of responsibility-allocation procedures, avoiding if possible intergovernmental procedures and reducing involuntary transfers, coercion and the attendant litigation.

¹¹⁸ ICFi (2016). Dublin III Evaluation Report (footnote 23), p. 4 and 8.

¹¹⁹ See the flowchart set out in European Commission (2016). First report on relocation and resettlement (footnote 60), Annex 5. See also above, section 2.2.1.

¹²⁰ On these quantitative objectives, see above section 2.2.2. and footnote 37.

¹²¹ See above footnote 75. See also European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), para. 19.

While there is a strong consensus among experts on the points made above¹²², the Commission has embraced an entirely different approach in its Dublin IV Proposal.

¹²² See above footnote 70. See also Williams, R (2015). *Beyond Dublin* (footnote 78), p. 23; European Parliament (2015). *Enhancing the CEAS* (footnote 4), p. 72.

3. AVENUES FOR REFORMING THE DUBLIN SYSTEM

3.1. The Commission's "Dublin Plus" Approach

KEY FINDINGS

- The Dublin IV Proposal of the Commission follows the current Dublin system with a more coercive twist, and it is unlikely that its approval would result in fairer and more efficient responsibility-allocation
- The proposed "sanctions" against irregular movements have been tried in the past at national level without appreciable results. Their outcome might well be a Dublin system that is as inefficient as the current one, accompanied however by a significant downgrading of protection standards in the CEAS
- The proposal maintains the irregular entry criterion and concentrates further responsibilities on the States of application. Most of these ("gatekeeper responsibilities") are not affected by the "corrective" mechanism
- The proposal foresees a number of simplifications to accelerate Dublin procedures. Some may backfire, however. For instance, depriving "take back" and transfer deadlines of their legal effects would likely result in applicants being left "in orbit" for longer. Most of all, the proposed simplifications do not modify the features of the Dublin procedure that make it so cumbersome. The same remark applies to the "corrective" mechanism, whose operating procedure has been characterised by other commentators as "administratively unworkable", and which might therefore encounter the same problem as the current relocation schemes
- The Dublin IV Proposal cuts back significantly on the level of rights attained with the Dublin III Regulation and foresees new sanctions for irregular movements. Several of the proposed reforms are problematic from a human rights standpoint, including proposals concerning minors, the withdrawal of reception conditions, and remedies. Should the Dublin IV Proposal be accepted, it would need to be amended on these points as detailed in Section 4 below (Conclusions and Recommendations)
- All in all, the Proposal fails to acknowledge that "allocating" persons without their consent is unworkable and that in order to have a more efficient system, a truly new and alternative approach is needed as detailed below in section 3.3

3.1.1. Context and philosophy of the Dublin IV proposal

The Dublin IV Proposal, presented in May 2016, is part of a package with proposals to develop EASO into a European Union Agency for Asylum (hereafter "EUAA Proposal")¹²³ and to recast the EURODAC Regulation (hereafter "EURODAC Proposal")¹²⁴. A second package is expected, including proposals for "a new Regulation establishing a single common asylum procedure in the EU and replacing the Asylum Procedures Directive, a new Qualification Regulation replacing the Qualification Directive and targeted modifications of the Reception Conditions Directive"¹²⁵.

These proposals are based on the acknowledgment of some of the problems examined above: the Dublin system places excessive burdens on some States "by design or poor implementation"¹²⁶, it encourages secondary movements, and it was ineffective and inefficient even before the crisis¹²⁷.

As a solution to those problems, the Commission proposes to go from Dublin to "Dublin plus": retaining the existing Dublin system, making an even more uncompromising application of its basic principles, and adding a "corrective fairness mechanism"¹²⁸.

These proposals must be seen in the broader policy context sketched out in the April 2016 Communication, whose core ideas are:

- To reaffirm that applicants for and beneficiaries of protection do not have the choice of their destination State and to counteract their irregular secondary movements, most prominently through new obligations and penalties¹²⁹;
- To streamline the Dublin system, expand its scope of application and strengthen some of its criteria (family and irregular entry) while introducing the "corrective" mechanism to counter significant imbalances;
- In parallel, to achieve greater convergence in the Union through a reform of EU standards as well as through increased monitoring and operational assistance¹³⁰. For the long term, the Commission also raises the possibility of centralised adjudication of asylum claims¹³¹.

¹²³ European Commission (2016). Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM (2016) 271 final, 4 May 2015. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465666797218&uri=CELEX:52016PC0271>.

¹²⁴ European Commission (2016). Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM (2016) 272 final, 4 May 2015. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465666809166&uri=CELEX:52016PC0272>.

¹²⁵ April 2016 Communication (footnote 2), p. 6.

¹²⁶ This may refer to both the irregular entry criterion, placing by design excessive burdens on border States, and to the ineffectiveness of the criteria, leaving a handful of States to deal with the majority of applications.

¹²⁷ *Ibidem*, p. 2 and 4.

¹²⁸ See Remarks by First Vice-President Timmermans and Commissioner Avramopoulos at the Readout of the College Meeting, 6 April 2016, SPEECH/16/1289. Available from: http://europa.eu/rapid/press-release_SPEECH-16-1289_en.htm?locale=en.

¹²⁹ April 2016 Communication (footnote 2), p. 3.

¹³⁰ April 2016 Communication (footnote 2), p. 10 f. See also EUAA Proposal (footnote 123), p. 7-9.

¹³¹ April 2016 Communication (footnote 2), p. 8 f. and

Sections 3.1.2 and 3.1.3 examine the Commission's proposals, first the "streamlined" rules for normal operation then the corrective mechanism. These are critically assessed in section 3.2. The other elements of the CEAS reform envisaged by the Commission are touched upon in section 3.3 setting out alternative ways forward for the distribution of applicants in the Union¹³².

3.1.2. Proposals to "streamline" the Dublin system

The first overarching aim of the Dublin IV Proposal (hereafter "DIVP") is to make the system more effective in its normal operation.

This is to be achieved, first, by "ensur[ing] that the functioning of the system is not disrupted by **secondary movements** of asylum applicants and beneficiaries of international protection"¹³³.

- To this effect, Art. 4 DIVP stipulates new obligations for applicants, which Art. 6 DIVP requires that they be informed about, and about the consequences of non-compliance, as soon as they lodge their claim.
- Under Art. 4(1) DIVP applicants having irregularly entered the Dublin area – i.e. most applicants¹³⁴ – would have to lodge their claim in the first Member State they enter. Failure to do so would not entail a transfer to that State. Instead, the applicant would be "sanctioned" by having his claim examined in an accelerated procedure under Art. 31(8) APD (Art. 5(1) DIVP). Such accelerated procedures must in any event respect relevant international standards as well as the basic principles and guarantees set by the APD¹³⁵.
- Art. 4 DIVP also foresees obligations to comply with transfer decisions and to be present and available to the authorities of the State of application, or of the State where the applicant is transferred. During the Dublin procedure, material reception conditions would be available only in the State where the applicant "is required to be present", except for emergency health care (Art. 5(3) DIVP).
- In case of "take back" to the responsible State after a secondary movement, Art. 20(3)-(5) DIVP would introduce "consequences": should the application still be pending, the responsible State would examine it in an accelerated procedure according to Art. 31(8) APD; in case of withdrawal of the application, a new application would have to be lodged and would be treated as a "subsequent application" – i.e. one that may normally be declared inadmissible unless new facts and circumstances are disclosed (see Art. 40 and 41 APD); in case of rejection of the application at first instance, remedies against the negative decision would be unavailable to the applicant on return to the responsible State.
- Art. 8(2) DIVP would recognise unaccompanied minors' right to a representative only in the State where they are "obliged to be present".

¹³² The restrictive orientation inspiring the Commission's proposals will not be commented upon in detail. For first comments, see ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79); Peers, S (2016). The Organisation of EU asylum law: the latest EU asylum proposals, EU Law Analysis Blog, 6 May 2016. Available from: <http://eulawanalysis.blogspot.it/2016/05/the-organisation-of-eu-asylum-law.html>.

¹³³ April 2016 Communication (footnote 2), p. 11.

¹³⁴ It must be noted that "in the absence of safe legal means of access to the EU, [asylum seekers] will usually be irregular entrants" (European Parliament (2014). New Approaches, footnote 6, p. 9).

¹³⁵ See Vedsted-Hansen, J (2016). Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), in: Hailbronner, K, Thym, D (eds.). EU Immigration and Asylum Law – A Commentary, 2nd edition, Hart/Beck, p. 1284-1380, Commentary *ad* Art. 31, para. 8.

- Finally, Art. 20(1)(e) DIVP would subject beneficiaries of protection to “take back” procedures whenever they applied in another Member State or moved there without authorization¹³⁶. Further “sanctions” would be included in the upcoming proposals to amend other CEAS instruments¹³⁷.

In close connection with these rules, the Dublin IV Proposal seeks to place **new and extensive duties on the Member State where the application is first lodged (“State of application”)**¹³⁸.

- Under Art. 3(3) DIVP, the State of application would have to run admissibility screening based on the “first country of asylum” and “safe third country” concepts. It would also have to check whether the applicant came from a “safe country of origin” or posed a security threat. If so, accelerated procedures would apply. These steps would precede the Dublin procedure. Responsibility would lie with the State of application for all claims found inadmissible¹³⁹ or subject to accelerated procedures.
- The underlying idea is to prevent applicants whose claim is likely to be rejected from being transferred between Member States (see recital 17 DIVP). In contrast to Art. 3(3) DRIII on safe third countries¹⁴⁰, the new rule would prioritise removal to a first country of asylum or to a safe third country over protection in the EU (see Art. 21(1) DIVP)¹⁴¹. In the process, currently optional “safe country” concepts (see Art. 35-39 APD) would become mandatory for the Member States¹⁴².
- The proposal does not state explicitly whether other Member States would be precluded from declaring an application inadmissible on “safe third country” or “first country of asylum” grounds, once declared admissible by the State of application. This would be desirable on grounds of procedural economy and access to protection, but would have to be spelled out clearly if intended.

The proposal includes amendments to the **Dublin criteria** and significant changes to the **discretionary clauses**:

- The definition of “family member” would be enlarged to include siblings, as well as family relations formed “before the applicant arrived on the territory of the Member States” instead of in the country of origin (Art. 2 lit. g DIVP).
- Absent family members or relatives, unaccompanied minors would be allocated to the State of first application rather than to the State where the last application has been lodged and the minor is present. The *MA* judgment would therefore be overruled¹⁴³, and “take charge” transfers of minors to States of first application

¹³⁶ Beneficiaries of protection are not subject to the Dublin system: Hruschka, C, Maiani, F (2016). Regulation N° 604/2013 (footnote 8), commentary *ad* Art. 3, para. 3.

¹³⁷ April 2016 Communication (footnote 2), p. 12. For a critical comment, see ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 15.

¹³⁸ As just noted, this would normally be the State first entered (see above at footnote 134) – at least on paper.

¹³⁹ In such cases, responsibility would amount essentially to responsibility to carry out return procedures.

¹⁴⁰ CJEU Case C-695/15 PPU, *Mirza*, ECLI:EU:C:2016:188, para. 39.

¹⁴¹ See also April 2016 Communication (footnote 2), p. 10.

¹⁴² This will likely be reflected in the upcoming proposal for a Regulation replacing the APD: see April 2016 Communication (footnote 2), p. 10.

¹⁴³ CJEU, Case C-648/11, *MA*, ECLI:EU:C:2013:367. The European Commission intends to withdraw a pending proposal aiming to codify the judgment (Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, COM (2014) 382 final, 26 June 2014. Available from: http://eur-lex.europa.eu/search.html?DD_YEAR=2014&DTN=0382&qid=1465684330812&DB_TYPE_OF_ACT=com&type=

would resume. Relatedly, the EURODAC Proposal foresees the fingerprinting of minors from age 6 instead of 14 (Art. 10(6) DIVP). These proposals are purportedly intended to better protect children by discouraging irregular secondary movements, by guaranteeing early identification, and by ensuring quick access to determination procedures (see recital 20 DIVP and recitals 23 ff EURODAC Proposal).

- The irregular entry criterion would be enlarged by deleting the rule that makes it inapplicable 12 months after the crossing of the border (see Art. 15 DIVP)¹⁴⁴.
- Art. 19 DIVP would add far-reaching restrictions on the application of the discretionary clauses described above in section 2.1.1 (Art. 17 DRIII). First, both the "humanitarian" and the "sovereignty" clauses would become inapplicable after the responsibility determination (see Art. 19(1) and (2) DIVP). Second and more importantly, the sovereignty clause would become applicable only on "family grounds in relation to wider family not covered by [the family definition given by the Regulation]" (Art. 19(2) DIVP)¹⁴⁵.

The proposed strengthening of the criteria at the expense of derogations would be matched by a **stabilisation of responsibility** once established.

- The proposal foresees the repeal of the "cessation clauses", whereby the responsibility of a Member State for an applicant ceases whenever the applicant leaves the Dublin area following return or removal, or for a period of at least three months (see Art. 19 and 20(5) DRIII). Under the new rules, the responsibility link would be established without time limits (see Art. 3(5) DIVP) unless another Member State would issue a residence document (Art. 20(6) DIVP).
- Responsibility would no longer shift from one State to another as a consequence of missing deadlines for submitting take back requests or for effecting transfers (see Art. 26 and 30 DIVP; see also current Art. 23(3), 24(3) and 29(2) DRIII). This is intended, in particular, to remove any incentive applicants may have to abscond in order to forestall a transfer (see recital 25 DIVP).
- Take back procedures would be reduced to the bare essentials. There would be no more requests and acceptances, but merely notifications and confirmations (Art. 26 DIVP). The notified State would retain no formal right to object.

These proposals are part of a broader package of **simplifications** based on the idea that the efficiency of the system is slowed by a "set of complex and disputable rules [...] as well as lengthy procedures"¹⁴⁶. Some other simplifications are relatively minor, such as the repeal of the evidentiary rule of Art. 7(3) DRIII¹⁴⁷, or the elimination of the conciliation procedure foreseen by Art. 37 DRIII (and never used). Other proposed changes would have greater significance.

[advanced&typeOfActStatus=COM&SUBDOM_INIT=PRE_ACTS&DTS_SUBDOM=PRE_ACTS](#)). See Dublin IV Proposal (footnote 5), p. 5.

¹⁴⁴ The new obligation to apply in the first State irregularly entered (Art. 4(1) DIVP), coupled with the default criterion that the State responsible is the one where the application is first lodged (Art. 3(2) DIVP), would render the irregular entry criterion largely redundant. Its continued presence in the hierarchy may indicate that the Commission does not anticipate widespread compliance with the new obligation of Art. 4(1) DIVP.

¹⁴⁵ Member States may now entertain a claim that is lodged with them for any reason: see above footnote 10.

¹⁴⁶ Dublin IV Proposal (footnote 5), p. 3.

¹⁴⁷ According to this rule, evidence of family ties must be taken into consideration if produced before another State accepts a take charge request (for analysis see Hruschka, C, Maiani, F (2016). Regulation N° 604/2013, footnote 8, commentary *ad* Art. 7, para. 6 ff). This rule, designed to protect family unity, would be replaced by the sterner rule obliging authorities to take into account only the elements submitted at the latest during the interview foreseen by Art. 7 DIVP (see Art. 5(4) DIVP).

- To accelerate the procedure, the time limits to submit or reply to take charge requests would be considerably shortened (Art. 24, 25 and 29(3) DIVP). Breaching these limits would still entail the allocation of responsibility to the defaulting State (see Art. 24(1) and 25(7) DIVP; see also Art. 21(1) and 22(7) DRIII).
- The Regulation would no longer guarantee the applicant's right to present relevant information when the personal interview is omitted (see Art. 7 DIVP)¹⁴⁸.
- Art. 28 DIVP would entail several changes to Art. 27 DRIII on Remedies.
 - The new rule would be less open to varying interpretations. Instead of vague expression ("reasonable period of time") and optional provisions, it would foresee a 7-day deadline to appeal transfer decisions, automatic suspension, and a 15-day deadline for the court or tribunal to rule on the appeal.
 - In what appears to be an attempt to codify the *Abdullahi* ruling¹⁴⁹, the scope of the remedies would be restricted to two grounds (Art. 28(4) DIVP): the assessment of whether the transfer would be impermissible on account of systemic flaws entailing a risk of inhuman or degrading treatment in the responsible State (Art. 3(2) DIVP), and the violation of the criteria based on family ties (Art. 10-13 and 18 DIVP).
 - An effective remedy would be guaranteed explicitly also against the omission of a transfer, when the applicant believes that the family criteria should have been applied (Art. 28(5) DIVP). Given that decisions not to transfer an applicant are often taken implicitly, it is not entirely clear how and within what deadline this right to a remedy should be exercised.

3.1.3. The "corrective mechanism"

As already noted, the Dublin IV Proposal includes a "corrective" allocation mechanism to ensure "a fair sharing of responsibility between Member States and a swift access of applicants to [status determination procedures] when a Member State is confronted to a disproportionate number of applications" (recital 31).

The "early warning and preparedness mechanism" of Art. 33 DRIII would be developed into the permanent monitoring and assessment mechanism foreseen by the EUAA Proposal (see Art. 13-15, 16 and 22 of the EUAA Proposal). The new corrective mechanism would have the same function as the current relocation schemes (see above section 2.2) and as the "crisis relocation mechanism" proposed by the Commission in September¹⁵⁰ – transferring applicants from an overburdened Member State so their applications can be examined by other Member States.

¹⁴⁸ This right flows from EU primary law, however, and would have to be secured in any event: see CJEU Case C-166/13, *Mukarubega*, EU:C:2014:2336, paras 42–47.

¹⁴⁹ CJEU Case C-394/12, *Abdullahi*, ECLI:EU:C:2013:813. This case law has been superseded (see below text at footnote 180).

¹⁵⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM (2015) 450 final, 9 September 2015. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466493781946&uri=CELEX:52015PC0450>. This proposal might be withdrawn depending on the discussions on the Dublin IV Proposal: Dublin IV Proposal (footnote 5), p. 5.

The most characteristic feature of the corrective mechanism is its automatic trigger. The Dublin IV Proposal foresees the introduction of an “automated system for registration, monitoring and the allocation mechanism” (Art. 44 DIVP) which would assign “unique application numbers” to each application for international protection lodged with a Member State. It would also be capable of indicating in real time the total number of applications lodged in the Union, the number lodged in each Member State, the number of third country nationals resettled by each Member State, the number of applications to be examined by each Member State as Member State responsible, and the share of each Member State pursuant to its “reference key” (see Art. 22 and 23 DIVP).

The proposed EUAA would establish the reference key based on the population (50% weighting) and the GDP (50%) of each Member State (Art. 35 DIVP), and constitute the basis for the calculation of a “reference number” for each Member State. As soon as the automated system indicated that the number of applications falling under the responsibility of a Member State, plus the number of persons effectively resettled exceeded 150% of the reference number, the mechanism would be triggered (Art. 34). Based on a tentative calculation, it seems this would not be an exceptional occurrence¹⁵¹.

So long as the mechanism would be activated, i.e. until the number of applications for which the State is responsible would drop again below the 150% threshold (Art. 43 DIVP), the allocation of applicants would take place according to these rules:

- The “benefitting Member State” – i.e. the State of first application, carrying out the allocation process (Art. 2(o) DIVP) – would perform admissibility screening, and would retain responsibility for inadmissible applications and applications subject to accelerated procedures under Art. 3(3) DIVP (see Art. 36(3) DIVP).
- The automated system would allocate applicants to States that are below their reference number. The “Member State of allocation” would then (a) run a Dublin procedure to determine if another Member State is responsible based on selected criteria, including family ties, and if not (b) examine the application (see Arts. 36(1) (2) and (4), 39 (c)-(h) DIVP).
- The Member State of allocation would only be entitled to refuse the transfer on grounds of national security and public security, pursuant to a verification. In this case, responsibility would remain with the benefitting State, and the application would have to be examined in an accelerated procedure (Art. 40).
- Member States could “pay not to play”. After every 12-month period, they could declare themselves unavailable as Member States of allocation for the next 12 months. During this period, each application that would have been allocated to them would be counted. Thereafter a “solidarity contribution” of 250,000€ per application would have to be paid to the Member States that took responsibility in their stead (Art. 37 DIVP). While the decision to pay not to play is styled as “temporary”, the proposal does not limit the number of times a Member State may make it, so that

¹⁵¹ The figure obtained through this calculation is more than 30 times over the 2010-2014 period, in favour of 5 to 7 States yearly. Methodology: (1) shares of GDP and population of each Member State were summed and divided by two, to obtain the reference key of Art. 35 DIVP; (2) shares were multiplied by 150% to obtain the threshold of Art. 34(2) DIVP (expressed in percentages rather than absolute numbers as foreseen by the Proposal); (3) the key and threshold obtained were applied to EASO data on the share of applications received by each Member State in 2010-2014. This relies on two approximations: (a) the number of resettled persons is not factored in, but this should be an acceptable approximation given that it is very low compared to the number of applications (Eurostat data: <http://appsso.eurostat.ec.europa.eu/nui/show.do>); (b) the number of applications registered in each Member State was used as proxy for the number of application for which each State was responsible – a figure that is not available to the author’s knowledge.

States wishing to remain outside of the system permanently would apparently be entitled to do so for as long as they accept the financial implications.

- Family members would have to be allocated and transferred together (Art. 41(2) DIVP). Furthermore, the benefitting Member State would remain responsible for applications falling to it under the ordinary family criteria (Art. 38(a) DIVP). Otherwise, the automated system of allocating applicants would not set any particular criteria. The transfer decision would formally be taken by the benefitting State, on the “indication” of the automated system (Art. 38(a) DIVP). The rules applicable to the ordinary Dublin procedure included in Chapter VI of the Regulation would apply *mutatis mutandis*, including the rules on notifications and remedies (Art. 41 DIVP). It is unclear whether the “General Principles and Safeguards” of Chapter II, which are not explicitly recalled and which include the right to information and the right to an interview, would also apply.
- A lump-sum compensation of 500€ would be paid from AMIF to the benefitting State for each transfer effected pursuant to the allocation mechanism (Art. 42 DIVP).

There are a number of differences between this mechanism and the relocation schemes, or the crisis relocation mechanism the Commission proposed in September. The Dublin IV corrective mechanism would have as unique features the automatic trigger, random allocation followed by a partial Dublin procedure in the allocation State, and the “pay-not-to-play” option.

In other respects, there are similarities. The current relocation schemes and the proposed crisis relocation mechanism both limit relocation to applicants “in clear need of international protection” (see above sections 2.2.1 and, for a critique, 2.2.2). That is not true of the corrective mechanism. However, under the Dublin IV Proposal, the benefitting Member State would still have to verify the admissibility of the claim in relation to the first country of asylum and safe third country, and examine in accelerated procedures applications made by applicants coming from a safe country of origin designated on the EU list, as well as by applicants presenting security concerns.

Another point in common between all the relocation schemes proposed or in force is that applicants do not have a say on whether they intend to be relocated and, if so, on their destination.

3.2. Dublin IV: a Critical Appraisal

3.2.1. The Dublin IV approach: fair, sustainable and efficient?

The April 2016 Communication and the Dublin IV Proposal correctly identify some major weaknesses of the Dublin system. The remedies devised by the Commission are more questionable. Apart from the legal issues considered below in section 3.2.2, the approach chosen with the Dublin IV proposal does not adequately take into account past experiences (see above, in particular section 2.3.5).

First, **the response** chosen by the Commission **to the applicants’ resistance to Dublin is purely repressive**. Applicants will face a “Dublin plus” system at least as unattractive as the current system: new constraints, essentially the same responsibility criteria¹⁵², or

¹⁵² On the enlargement of family criteria, see below section 3.2.2.

random allocation, reduced rights and less scope to consider humanitarian needs¹⁵³. The system will furthermore operate in a context where disparities between Member States and “protection gaps” will predictably endure, at least in the short to medium term.

The Commission seems to believe that applicants will nonetheless fall in line out of fear of punishment if they move irregularly. As discussed below, some of the “sanctions” proposed raise serious human rights concerns, while the scope to apply others is extremely limited. But the key point is that the recipe has been tried in the past and has failed. As noted above, applicants have (successfully, though at a high price) striven to retain a measure of self-determination even in the face of systematic coercion, national “interruption” practices as harsh as those foreseen by Art. 20 DIVEP (see above 2.3.2) and extreme deprivation¹⁵⁴. The proposal does not clarify why the codification of the same practices in EU Law would produce different results.

Should applicants *not* fall in line, Dublin IV will be as inefficient and disruptive to the functioning of the CEAS as its predecessors – with the aggravating factor that a systematic application of the “sanctions” will make accelerated procedures and State-enforced destitution commonplace in the CEAS¹⁵⁵.

The second problem with the Proposal is that it would make the Dublin system **even more unbalanced**. In the EU, applications for protection have always been concentrated in a few Member States¹⁵⁶. Under Dublin IV, first applications would remain concentrated in the border States and in the States constituting the most desirable destinations, in proportions varying according to the applicants’ degree of compliance with the obligation to lodge the application in the first State irregularly entered (Art. 4(1) DIVEP).

In this context, Dublin IV purports to place new and extensive responsibilities on States of first application, turning them into the “gatekeepers” of the CEAS. “Gatekeeper” obligations would include identifying applicants, registering their claims, carrying out admissibility screening, and taking responsibility for inadmissible applications, security cases and presumptively unfounded claims, therefore dealing with a sizeable share of the returns of rejected asylum seekers. Technical assistance, such as currently provided in hotspots, may alleviate some of these costs (e.g. screening and registration) but not entirely, and not the most significant (e.g. reception during admissibility and accelerated procedures).

It may be logical to concentrate these operations at the “point of entry” into the system – i.e. where applications are first lodged. Still, more tasks are going to be placed on a handful of States, for the benefit of all the States of the Dublin area, without a significant scaling up of the (limited) solidarity tools available (see above section 2.3.3). The “corrective

¹⁵³ These problems are to some extent common to the approach proposed by ACVZ (2015). Sharing Responsibility (footnote 70). The study recognises that protection seekers may not agree to random allocation, and react by stalling the process or engaging in secondary movements. It nonetheless proposes a coercive mechanism based on random allocation, with as sole – welcome – element to convince applicants to comply the promise of free movement post-recognition (*ibidem*, p. 37-39; see also below, footnote 270).

¹⁵⁴ See e.g. on the situation in the informal camp at Idomeni (GR) AI (2016). Trapped in Greece (footnote 63), p. 20 ff.

¹⁵⁵ See also Peers (2016). Orbanisation (footnote 130); Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 2 and 4.

¹⁵⁶ See, for 2010-2014, UNHCR (2015). Asylum Trends 2014 – Levels and Trends in Industrialized Countries, 2015, Geneva, p. 20. Available from: <http://www.refworld.org/docid/5513bd3b4.html>. See also Eurostat (2016). Number of (non-EU) asylum seekers in the EU and EFTA Member States, 2014 and 2015 (thousands of first applicants), table available from: [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_\(non-EU\)_asylum_seekers_in_the_EU_and_EFTA_Member_States,_2014_and_2015_\(thousands_of_first_time_applicants\)_YB16.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_(non-EU)_asylum_seekers_in_the_EU_and_EFTA_Member_States,_2014_and_2015_(thousands_of_first_time_applicants)_YB16.png) (last consulted 14 June 2016).

mechanism” will do nothing to solve the problem, since its “beneficiary” States – no matter how “overburdened” – will still have to assume gatekeeper tasks¹⁵⁷. Nor is the lump-sum foreseen in Art. 42 related to the costs incurred in executing these tasks.

The allocation of the responsibilities to examine applications for protection is also likely to become more, not less unbalanced. The shortened deadlines for “take charge” requests are likely to further concentrate responsibilities on the first application States. Under penalty of becoming responsible, they will have to complete within one month (or two weeks) a range of procedural steps – e.g. admissibility screening, screening for accelerated procedure, and the steps leading to submitting a take charge request (see Art. 24(1) DIVP). It is reasonable to assume that this time limit will be frequently missed¹⁵⁸. Border States will also continue to be disadvantaged by the irregular entry criterion¹⁵⁹. The responsibilities thus concentrated on a few States will be further cemented through the abolition of all clauses relating to the cessation or the shifting of responsibilities – a reform that is also liable to leave protection seekers “in orbit” and to defeat the objective of giving swift access to asylum procedures¹⁶⁰.

All hopes of compensating these unbalances are placed on the “correction mechanism”. As argued below, however, the mechanism appears to be too cumbersome and coercive to fulfil its promises.

In light of the foregoing, it may be seriously doubted that Dublin IV would be “sustainable and fair”, and it is unlikely that the correction mechanism would “comprehensively reflect the efforts of each Member State”¹⁶¹. The arrangement of “gatekeeper” responsibilities is also likely to provide application States with incentives *not* to register applications or – if they do – *not* to find them inadmissible or subject to accelerated procedures¹⁶², replicating and compounding the incentive border States now have not to take fingerprints.

The Commission’s approach also appears to **prioritise the enforcement of allocation rules, coupled to the prevention and repression of secondary movements, over core CEAS objectives**. This is apparent e.g. in the way in which the Commission frames the problem of systemic deficiencies in national asylum systems: as an impediment to the Dublin system, not as a threat to fundamental rights and to the integrity of the CEAS¹⁶³. It is also apparent in the choice of evoking a resumption of Dublin transfers to Greece¹⁶⁴ at a time when a “very difficult humanitarian situation [...] is [...] developing on the ground”¹⁶⁵, and efforts are being made to relocate protection seekers *from* that Member State. Most

¹⁵⁷ See also Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 2.

¹⁵⁸ In several Member States, the average time to submit a take charge request is 3 weeks or more, and most Member States indicated that the timeframes for submitting take charge requests should not be shortened further: see ICFi (2016). Dublin III Implementation Report (footnote 28), p. 41.

¹⁵⁹ In theory, first application States and border States would be the same in most cases.

¹⁶⁰ Hruschka, C (2016). Dublin is dead! Long live Dublin! (footnote 11); Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 5.

¹⁶¹ April 2016 Communication (footnote 2), p. 7; Dublin IV Proposal (footnote 5), recital 32.

¹⁶² See also Hruschka, C (2016). Dublin is dead! Long live Dublin! (footnote 11) (making the application State responsible for inadmissible claims and claims subject to accelerated procedures “will hamper the practical relevance of the inadmissibility and accelerated procedures as Member States – as e.g. highlighted by the 2007 evaluation – are generally reluctant to assume responsibility outside the order of criteria”).

¹⁶³ April 2016 Communication (footnote 2), p. 4.

¹⁶⁴ *Ibidem*; European Commission (2016). Recommendation of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013, C(2016) 871 final, [2016] OJ L38/9. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465803107467&uri=CELEX:32016H0193>. For a critique see ECRE (2016). Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece – C(2016) 871, February 2016, Brussels. Available from: http://www.ecre.org/wp-content/uploads/2016/02/ECRE-Comments_RecDublinGreece.pdf.

¹⁶⁵ European Commission (2016). First report on relocation and resettlement (footnote 60), p. 2.

conspicuously, it is apparent in the provisions of the Dublin IV Proposal penalizing secondary movements.

These fail to acknowledge that, as noted above, secondary movements may be prompted by the failure of certain Member States to respect EU standards, and thus constitute emergency strategies to secure the very rights that constitute the *raison d'être* of the CEAS according to Art. 78 TFEU. While it is legitimate and desirable to pursue orderly and well-regulated movements to and within the Union¹⁶⁶, the idea that the “criteria and mechanisms” mentioned in Art. 78(2)(e) TFEU should be enforced at the expense of the protection principles enshrined in Art. 78(1) TFEU and of fundamental rights subverts the hierarchy of values on which the CEAS is founded according to the Treaty. If there are to be any priorities in the EU Asylum Policy, precedence should be given to redressing failing standards rather than to repressing secondary movements – including because this might be a more effective way to attain the latter objective¹⁶⁷.

The fourth problem of the Commission’s approach is that it fails to acknowledge that insisting on pre-determined allocative schemes denying applicants all choice as to their destination comes **at the expense of ensuring effective and swift access to status determination procedures**, notwithstanding all statements to the contrary¹⁶⁸.

Experience indicates that “allocating” applicants without their consent cannot be done on a scale significant enough to impact their distribution among Member States. Between 2008 and 2015, the highest number of yearly Dublin transfers has been 16,841 (in 2013), despite a much higher number of agreed transfers and best efforts on the part of Member States to implement them¹⁶⁹. This figure is dwarfed by the number of applications lodged in the Union in the same year (almost 435,000)¹⁷⁰. It is also dwarfed by the numbers of relocations/evacuations conducted in the past based on the consent of the beneficiaries (see below, section 3.3.2). The results produced by on-going relocation efforts – also based on a strict “no choice” policy – speak for themselves.

This cost in terms of effectiveness is compounded by the cost in terms of efficiency. Schemes based on politically agreed allocative criteria and involuntary transfers invariably rely on “heavy” administration and are therefore unfit to quickly and economically place applicants in a procedure. To speed procedures, the Dublin IV Proposal suggests a number of simplifications and accelerations. Some may help, some may backfire¹⁷¹, others might be

¹⁶⁶ For the protection dimension, see European Parliament (2014). *New Approaches* (footnote 6), p. 63 f and 78.

¹⁶⁷ See above, text at footnote 79. See also European Parliament (2014). *New Approaches* (footnote 6), p. 81 f; Meijers Committee (2016). *Note on the proposed reforms* (footnote 82), p. 4, questioning the legality of punishing irregular movements without exception.

¹⁶⁸ See e.g. Dublin IV Proposal (footnote 5), e.g. p. 5, 8 f, 17 f.

¹⁶⁹ Total outgoing transfers in 2013 according to Eurostat: <http://appsso.eurostat.ec.europa.eu/nui/show.do>. The number of outgoing agreed transfers for the same year was 58,029, i.e. nearly 3.5 times as much: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

¹⁷⁰ Eurostat (2014). *Asylum applicants and first instance decisions on asylum applications: 2013*, Data in Focus 3/2014. Available from: <http://ec.europa.eu/eurostat/documents/4168041/5948933/KS-QA-14-003-EN.PDF/3309ae42-431c-42d7-99a3-534ed5b93294>.

¹⁷¹ E.g. the weakening of time limits for take back and transfers, would remove incentives for Member States to comply with the time limits and leave protection seeker “in orbit” for longer (see above, footnote 160). Ironically, the Commission proposed the introduction of deadlines for take back requests to “ensure that the responsibility determination procedure [...] become more efficient and rapid”. See European Commission (2008). *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, COM (2008) 820 final, 3 December 2008, p. 7. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465767206640&uri=CELEX:52008PC0820>.

unenforceable¹⁷². But the main factors that make the Dublin process cumbersome would remain untouched. Determining responsibility will still require intergovernmental agreement based on complex fact-finding and transactions – a key cause of delays under the current system¹⁷³. Furthermore, since transfers will usually be decided without the consent of the persons concerned and may have far-reaching impacts their rights, extensive procedural guarantees will still have to be secured, and proceedings are likely to become mired in litigation.

The same observations apply to the Dublin IV “corrective” mechanism. The procedure would entail, before the applicant can start status determination: (a) admissibility screening, and screening for accelerated procedures, in the benefitting Member State; (b) a Dublin check to make sure that the family criteria do not indicate the benefitting State as responsible; (c) a computer-generated “indication” of the allocation State, followed by the adoption and notification of the transfer decision, potentially followed by litigation; (d) a security check carried out before the transfer at the behest of the allocation State; (e) another Dublin procedure in the benefitting State, potentially followed by another transfer plus attendant litigation. If one considers the whole process, little remains of the swiftness and modernity suggested by recourse to computer-generated allocation. Indeed, there is no reason to believe that the pace of relocation would be faster under this system than under the on-going schemes¹⁷⁴.

3.2.2. The Conformity of Dublin IV to Human Rights

While the Dublin III Regulation sought to improve both efficiency and the “protection granted to applicants under the system” (recital 9), the Dublin IV Proposal pursues efficiency through sanctions and a reduction of rights, which some Member States contended “could be misused to frustrate the entire system”¹⁷⁵. For the first time since the 1990 Schengen and Dublin Conventions, the proposed new Dublin instrument would therefore cut back on individual rights – in some cases, to an impermissible extent.

This is true of the new **rules on remedies**. Article 28 DIVP includes some improvements, such as a fully automatic suspensive effect or the rule making explicit the right to appeal “non-transfers” on grounds of family unity¹⁷⁶. It also includes rules that, while questionable from the standpoint of the right to an effective remedy, and regressive in respect of the standards applied in some Member States, would improve the situation in the Member States with the lowest standards, such as the introduction of a 7-day deadline to appeal¹⁷⁷.

Art. 28(4) DIVP foresees a drastic restriction of the scope of appeals, however. Applicants would only be entitled to appeal against transfers to a Member State where systemic flaws entail a risk of inhuman or degrading treatment (Art. 3(2) DIVP), or transfers in breach of

¹⁷² E.g. the proposed 15-day limit for judges to decide appeals. See ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 9.

¹⁷³ See above section 2.3.4.

¹⁷⁴ See also Hruschka, C (2016). Dublin is dead! Long live Dublin! (footnote 11), who styles the corrective mechanism “administratively unworkable”.

¹⁷⁵ Dublin IV Proposal (footnote 5), p. 13

¹⁷⁶ On the issue, see e.g. Meijers Committee (2014). Note on the proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation), 2 December 2014, Utrecht, p. 5. Available from: <http://www.asylumlawdatabase.eu/en/content/meijers-committee-note-proposal-european-commission-26-june-2014-amend-regulation-eu-6042013>. This right already exists whenever the omission of a transfer decision arguably infringes Art. 8 ECHR (see Maiani, F (2016). New Legal Framework, footnote 11, p. 127), but the new wording would make this explicit and expand the right to appeal to alleged infringements of the family-related Dublin criteria.

¹⁷⁷ On current practice see ICFI (2016). Dublin III Implementation Report (footnote 28), p. 76 ff. For a critique of the new rule, Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 3.

the family criteria laid down in the Regulation. In this context the Commission's suggestion that "specifying the scope of the appeal" would increase "the effectiveness of the right to a judicial remedy"¹⁷⁸ is unconvincing.

Art. 28(4) DIVP is inspired by (a restrictive reading of) the *Abdullahi* judgment, rendered on the interpretation of the Dublin II Regulation¹⁷⁹. The Court has in the meantime overruled *Abdullahi*. In *Ghezelbash*, it has ruled that under the Dublin III Regulation applicants have the right appeal against transfers on grounds that the criteria have been misapplied – the right to appeal against alleged violations of fundamental rights being implied¹⁸⁰. In this light, Art. 28(4) DIVP would constitute a distinct regression.

Worse, it would violate Art. 13 ECHR on the right to an effective remedy. This provision requires the availability of a remedy against *any* decision arguably breaching *any* Convention right. In a Dublin context, this includes the availability of remedies against e.g. transfers exposing an applicant to inhuman or degrading treatment (whether or not there are "systemic flaws"), interfering with family life within the meaning of Art. 8 ECHR (irrespective of whether the criteria are respected), or raising an issue under Art. 3 or 8 ECHR due to the illness of the applicant¹⁸¹. Art. 28(4) DIVP falls well below this standard.

The proposed restrictions on the **sovereignty clause** also raise problems of compatibility with the ECHR. Although little-used, the sovereignty clause is a key element of the Dublin system that allows Member States to renounce a transfer if it would breach fundamental rights. The limitations flowing from recital 21 and Art. 19(2) DIVP would make this impossible, and would place EU Law on a collision course with the ECHR¹⁸².

Even in the small province that would be left to the sovereignty clause – protecting family unity – the wording of Art. 19 would be too narrow to allow a Member State to fully respect Art. 8 ECHR: experience shows that the protection afforded by the criteria to "family [...] covered by Art. 2(g)" is precarious and fragmentary, and recourse to the sovereignty clause may be necessary to protect even nuclear family relations¹⁸³.

Human rights issues aside, it is hard to understand why the Commission has proposed this reform. The ostensible justification is that the use of the discretionary clauses "may undermine the effectiveness and sustainability of the system" (recital 21). Empirically, this claim is groundless. If anything, Member States have applied the clauses too sparingly – to the extent that one year ago the Commission called for their "broader and regular use"¹⁸⁴. Furthermore, the very idea that the use of the sovereignty clause may "undermine the effectiveness of the system" is questionable. Indeed, the most efficient way to put an applicant in the procedure is to examine his claim where he is¹⁸⁵.

¹⁷⁸ Dublin IV Proposal (footnote 5), p. 13.

¹⁷⁹ CJEU Case C-394/12, *Abdullahi*, ECLI:EU:C:2013:813. On the possible readings of this judgment, see e.g. Maiani, F (2016). *New Legal Framework* (footnote 11), p. 127 ff.

¹⁸⁰ CJEU Case C-63/15, *Ghezelbash*, ECLI:EU:C:2016:409. See also CJEU Case C-155/15, *Karim*, ECLI:EU:C:2016:410.

¹⁸¹ See ECtHR, *Tarakhel v Switzerland*, Appl. No. 29217/12, 2 November 2014 (inhuman or degrading treatment); ECtHR, *L.H. v Belgium*, Appl. No. 67492/10, 7 May 2013, paras. 73 and 80 (requirement to afford effective remedy for alleged violations of Art. 8 ECHR); ECtHR, *A.S. v. Switzerland*, Appl. No. 39350/13, 30 June 2015, para. 31 ff (potential obstacles to transfers deriving from illness of the applicant).

¹⁸² For an analysis of cases where the application of the sovereignty clause is mandatory under human rights law, see Hruschka, C, Maiani, F (2016). Regulation N° 604/2013 (footnote 8), commentary *ad* Art. 17, para. 5 ff.

¹⁸³ For a more detailed analyses and further references, see Maiani, F (2015). *L'unité de la famille* (footnote 29), p. 286 ff and further references.

¹⁸⁴ See above text at footnotes 96-97.

¹⁸⁵ See *mutatis mutandis* CJEU, Case C-648/11, *MA*, ECLI:EU:C:2013:367, paras. 54 f. and 61.

For the same reason, the proposed new criterion for **unaccompanied minors** who have no relatives in a Member State is problematic. As noted, the Commission proposes to subject them to take charge transfers to the State of application, subject to a best interest determination, overruling the CJEU judgment in *MA*¹⁸⁶. The stated objectives are to “allow a quick determination of the Member State responsible and thus allow swift access to the procedure for this vulnerable group of applicants”, and to “discourage secondary movements of unaccompanied minors, which are not in their best interest”¹⁸⁷. The first justification is counter-intuitive. If anything, access to status determination will be swifter if the application is examined where it is lodged and the child is present, rather than after a Dublin procedure.

Precisely for this reason, the “best interest” argument advanced by the Commission is also dubious. As the Court observed in *MA*, “unaccompanied minors form a category of particularly vulnerable persons”, and “it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State”¹⁸⁸. This reflects the scientific finding that uncertainty and delays in migration-related procedures, as well as involuntary transfers, may have adverse psychological effects especially for children¹⁸⁹.

The proposed rule is also inherently contradictory. In *MA*, the Court ruled that “[the] taking into account of the child’s best interests requires, in principle, [...] designating as responsible the Member State in which the minor is present after having lodged an application there”¹⁹⁰. If so, then take charge transfers decided on the basis of the new criterion would frequently have to be set aside based on a case-by-case best interest determination (Art. 8(4) DIVP), with the net result not of more transfers, but of longer procedures and inherently harmful uncertainty and delays¹⁹¹.

Two other proposals concerning children are *per se* problematic from a human rights perspective: subjecting children to fingerprinting from age six, without ruling out completely the possibility of sanctions and coercion for non-compliance¹⁹², and depriving unaccompanied minors of the right to a representative if they are not in the Member State where they are “obliged to be present” (Art. 8(2) DIVP). The latter proposal, in particular, appears to run counter to the principles established by the UN Committee for the Rights of the Child¹⁹³, and to compromise the effectiveness of the other rights of minors under the Regulation, e.g. the right to appeal under Art. 28 DIVP.

¹⁸⁶ See above, text at footnote 143.

¹⁸⁷ Dublin IV Proposal (footnote 5), p. 5 and 17 and recital 20.

¹⁸⁸ CJEU, Case C-648/11, *MA*, ECLI:EU:C:2013:367, para. 55.

¹⁸⁹ See in particular Bean, T, Eurelings-Bontekoe, E, Spinhoven, P (2007). Course and predictors of mental health of unaccompanied refugee minors in the Netherlands: One year follow-up, 64 *Social Science and Medicine*, p. 1204-1215; Nielsen, S S, Norredam, M, Christiansen, K L, Obel, C, Hilden, J, Krasnik, A (2008). Mental health among children seeking asylum in Denmark – The effect of length of stay and number of relocations: A cross-sectional study. 8 *BMC Public Health*, p. 293-301.

¹⁹⁰ CJEU, Case C-648/11, *MA*, ECLI:EU:C:2013:367, para. 60.

¹⁹¹ See also Hruschka, C (2016). Dublin is dead! Long live Dublin! (footnote 11), who foresees the reappearance of “significantly diverging approaches” among the Member States.

¹⁹² EURODAC proposal (footnote 124), p. 10, recital 30 and Art. 2(4). See FRA (2015). Fundamental rights implications of the obligation to provide fingerprints for Eurodac, October 2015, Vienna, p. 2 and 9. Available from: <http://fra.europa.eu/en/publication/2015/fundamental-rights-implications-obligation-provide-fingerprints-eurodac>.

¹⁹³ CRC (2005). General Comment No. 6 – Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 33. Available from: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiQql8gX5Zxh0cQgS Rzx6ZfXmRo9mdg35%2bm8BvAjgxjOPXPQUmY0uSjJNwpdL6bFpoGpLuvbcgcDlo7z%2f0aEMFhpJekVWbTemndi HLEWvnZQ>. See also ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 13.

The proposed **“penalties” for applicants that engage in irregular secondary movements** are generally problematic. Member States may penalise irregular entry and stay on their territory, including irregular secondary movements. This also applies to persons claiming refugee status, within the limits set by Article 31 of the Geneva Convention on non-penalisation of refugees for irregular entry¹⁹⁴. The kind of “penalties” selected by the Commission raise however human rights concerns.

The first such penalty is **stripping the applicant of his right to material reception conditions**, save for emergency health care, whenever he is irregularly in a State other than the one where he is “required to be present” (Art. 5(3) DIVP). Recital 22 DIVP adds that “[i]n line with the Charter [...], the Member State where such an applicant is present should in any case ensure that the immediate material needs of that person are covered”. This reflects core human rights obligations – the right to dignity and the prohibition of degrading treatment¹⁹⁵. Article 20(5) of the Reception Conditions Directive (RCD) on the “reduction or withdrawal of material reception conditions” includes similar wording.

By contrast, Art. 5(3) DIVP purports to exclude applicants having moved irregularly from *all* material reception conditions save only emergency health care. In this, it purports to authorise or oblige Member States to engage in actions contrary to the aforementioned human rights standards¹⁹⁶. At a minimum, the wording of the provision should be corrected to reflect recital 22.

Once the absolute minimum required by human rights standards is respected, the scope left for “penalization” appears to be quite restricted. The statements of the CJEU in *Saciri* strongly suggest that the right to dignity (Art. 1 CFR) requires in all circumstances housing, food and clothing “sufficient to ensure a dignified standard of living and adequate for the health of the applicants and capable of ensuring their subsistence”¹⁹⁷. This is not much less than what the Reception Conditions Directive prescribes in normal circumstances – and much more than what some Member States provide¹⁹⁸. Instead of devising sanctions that would be either in breach of core human rights standards or ineffectual in limiting secondary movements, it might be best to concentrate on remedying the failing standards in some Member States. While politically difficult, this would be legally less problematic and more in keeping with the values on which the CEAS is founded according to Art. 78 TFEU.

The second kind of “penalty” contemplated by the Dublin IV Proposal is **“appropriate and proportional procedural consequences”** (recital 22).

- Some such consequences – subjection to an accelerated procedure – are triggered already by the act of lodging the application for protection in the “wrong” Member State. The penalty itself is not legally problematic, provided that basic guarantees are respected as required by Art. 31(8) APD. The procedural fairness of the rule is however questionable: in this case, the applicant cannot have been “duly informed

¹⁹⁴ For detailed analysis of this provision see Noll, G (2011). Article 31, in: Zimmermann, A (ed). The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, 2011, Oxford University Press, p. 1243-1276.

¹⁹⁵ See ECtHR, *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, 21 January 2011, paras. 249 ff; ECtHR, *Amadou v Greece*, Appl. No. 37991/11, 4 February 2016, para. 58 ff.

¹⁹⁶ See also *mutatis mutandis* ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 11 and 18.

¹⁹⁷ CJEU, Case C-79/13, *Saciri*, ECLI:EU:C:2014:103, paras. 35 ff. See also Peek, M, Tsourdi, L (2016). Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), in: Hailbronner, K, Thym, D (eds.). EU Immigration and Asylum Law – A Commentary, 2nd edition, Hart/Beck, p. 1381-1477, Commentary *ad* Art. 20, para. 22 ff.

¹⁹⁸ See ECRE (2016). Wrong counts (footnote 1), p. 30 ff. See also above, footnotes 15 and 79.

in a timely manner” of his obligation, as contended by recital 22, since information must be provided immediately *after* “[the] application [...] is lodged” (Art. 6(1) DIVP).

- Three further kinds of “penalties” are triggered upon being sent back to the responsible State. The first and mildest is an accelerated procedure (Art. 20(3) DIVP). The second penalty, applicable whenever the original application had been withdrawn, consists of treating any new application lodged with the responsible State as a “subsequent application” (Art. 20(4) DIVP; see also Art. 40 APD). The implication is that, unless the applicant has new elements to put forward, she risks having her application rejected without substantive consideration anywhere in the Union. The third penalty consists of depriving the returnee of the possibility to lodge an appeal if her application had been rejected in the responsible State (Art. 20(5) DIVP). Contrary to assurances given in the April 2016 Commission Communication¹⁹⁹, the penalties foreseen in Art. 20(4) and (5) entail a heightened risk of *refoulement*. The penalty in Art. 20(5) is also contrary to the right to an effective remedy, to the extent that it would deprive the applicant of all remedies against removals potentially exposing her to death, torture, or inhuman or degrading treatment²⁰⁰. The Commission itself recently considered that sanctions of the kind it now proposes were at variance with the principle of effective access to the asylum procedure, and it successfully proposed to outlaw them in what has become Art. 18(2) DRIII²⁰¹.

Finally, it is worth considering the proposal of the Commission to **enlarge the definition of “family members” to siblings and to families formed in transit**. The enlargement is modest, and it is unclear on what basis the Commission states that “[r]euniting siblings” – rather than other relatives or family members – “is of particular importance for improving the chances of integration of applicants and hence reducing secondary movements” (recital 19). Still, it is a welcome proposal, and would remove an unjustified distinction between families formed “pre-flight” and “post-flight”²⁰². The problem, however, is that it risks having little to no effect in practice.

- As noted, family criteria are seldom applied because they are restrictively framed, and because Member States systematically refuse to accept evidence of family ties²⁰³. Unless this second problem is tackled (see below section 3.3.2), slight enlargements of the family definition are unlikely to matter.
- The proposed rule obliging the application State to prioritise inadmissibility decisions and accelerated procedures over the application of the responsibility criteria (Art. 3(3) DIVP) further undercuts the proposed amendments²⁰⁴.

3.2.3. A summary of the main points

Based on the same approach as its predecessors, with a more coercive twist, Dublin IV is unlikely to solve any of the problems that plague EU responsibility allocation. It is, in fact, likely to aggravate some of them.

¹⁹⁹ April 2016 Communication (footnote 2), p. 11.

²⁰⁰ ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79), p. 12.

²⁰¹ See European Commission (2008). Dublin III Proposal (footnote 164), p. 12; CJEU, Case C-130/08, *Commission v. Greece*, Action brought on 31 March 2008, [2008] OJ C 128/25, Plea in law No. 4.

²⁰² see Hruschka, C, Maiani, F (2016). Regulation N° 604/2013 (footnote 8), commentary *ad* Art. 2, para. 10.

²⁰³ See above text at footnotes 29-31.

²⁰⁴ See also Peers, S (2016). Orbanisation (footnote 130). Meijers Committee (2016). Note on the proposed reforms (footnote 82), p. 5.

- Its emphasis on repressing secondary movements is unlikely to make protection applicants more cooperative while – along with significant cut-backs in their rights – it raises serious human rights concerns and threatens to downgrade the standards of the CEAS.
- Instead of being more fair and sustainable, the system appears to be even more unbalanced to the detriment of first application States and border States – two categories that in theory should be the same in most cases. It expands the irregular entry criterion, imposes extensive “gatekeeper” responsibilities on application States, subjects them to strict deadlines for submitting take charge requests, and cements the allocative results by abolishing the clauses on the shift or cessation of responsibilities. The proposed “correction mechanism” is not designed to alleviate or compensate the concentration of “gatekeeper” responsibilities, and it appears too cumbersome to efficiently provide relief to States confronting a crisis.
- This last observation applies to the Dublin IV Proposal as a whole. It uncompromisingly adheres to the idea that applicants must not choose their destination State. In doing so, it fails to acknowledge that “heavy” allocation schemes – schemes based on politically agreed criteria, involuntary transfers and extensive administrative procedures – are inherently incapable of achieving the one goal that responsibility allocation systems should aim for: placing applicants in a status determination procedure as efficiently and economically as possible.

3.3. In Search of an Alternative: from “Heavy” to “Light” Systems

KEY FINDINGS

- Moving to a new and workable responsibility-allocation system requires a clear choice of priorities. In this Study, it is assumed that the main function of responsibility-allocation under Art. 78(2)(e) TFEU is to give applicants access to status determination swiftly and economically
- Experience with current and past responsibility-allocation schemes indicates that a workable allocation system should (on its own or with accompanying elements) respect three conditions: (a) provide applicants with positive incentives to cooperate, while negative incentives such as sub-standard reception conditions in certain States should be removed; (b) defuse Member States’ incentives to engage in defensive behaviour or to defect, especially through effective solidarity arrangements; (c) drastically reduce bureaucratic complexity and recourse to coercion
- Within this general template, three models are conceivable – all of them based on consensual take charge transfers: (1) a free choice model, which would present significant advantages under conditions (a) and (c) above as well as numerous positive side-effects; (2) at the other extreme, a stripped-down “Dublin minus” system, which might be politically easier to agree and would simplify proceedings to a great extent, but would leave a number of current problems standing; (3) a more refined “limited choice” model combining “Dublin minus” with greatly expanded family criteria and with the possibility for the applicant to choose between places made available by “under-burdened” States
- Experience with the Humanitarian Evacuation Programme of 1999 suggests that a consent-based system could probably outperform “no choice” systems such as the September relocation schemes also in crisis contexts; it would also need to be accompanied by large-scale financial and technical assistance to the State affected, however
- EU allocation schemes, including the three models presented here, would in any event require flanking measures to function properly: (a) strengthened monitoring and enforcement of EU and international protection standards throughout the Dublin area; (b) greatly scaled-up financial and technical assistance, with financial solidarity moving to a “full compensation” or “premium” logic (as opposed to an “added value” capacity-building logic); (c) real mobility rights for beneficiaries of international protection

3.3.1. "Light" systems: philosophy, virtues and (purported) risks

As Constantin Hruschka has put it in his comments to the Dublin IV Proposal, "looking at alternative ways to allocate responsibility is inevitable for the setup of a real CEAS that actually does what an asylum system should do: providing protection for the person in need of protection"²⁰⁵.

The alternative to the "heavy" allocation schemes tested by the Union so far are "light" systems. Such systems are based on a clear choice of priorities: they forgo all ambitions of producing predetermined allocative results and focus instead on minimizing the time, effort and coercion required to place the applicant in an asylum procedure and examine the claim.

Free-choice models as put forward by ECRE in 2008, and more recently advocated by the UN Special Rapporteur on the Human Rights of Migrants as well as by a coalition of German NGOs²⁰⁶, are the ideal type of light system: no complex fact-finding, no pre-transfer litigation, maximum cooperation from the applicant, and no incentives to move irregularly. Additional benefits include powerful incentives for applicants to register with the authorities, and a harder blow to intra-EU smugglers' networks than any alternative model could deal.

The other "light" model *par excellence* is the one UNHCR sketched in 2001, whereby applications are examined where they are lodged, subject only to criteria based on applicants' "meaningful links" with other Member States (family ties, cultural links or the possession of a residence document)²⁰⁷. The Commission acknowledged at the time that this could "provide the basis for a clear and workable system in relation to the objectives of speed and certainty, avoiding refugees in orbit, tackling multiple asylum applications and ensuring family unity"²⁰⁸ – more than the Dublin system has ever achieved.

Before discussing more details, it is necessary to address the objections raised in the April 2016 Communication against a "free choice" model, some of which could conceivably be moved against "light" systems as such. According to the Commission,

"to allow asylum seekers to have their applications dealt with by the Member State of their choice [...] would act as a pull factor even if there was a completely level playing field between Member States in terms of reception conditions of asylum seekers and treatment of their claims. It would also not provide for solidarity or a fair sharing of responsibility. The need for such criteria and mechanisms [as those of the Dublin system] is envisaged by the Treaty"²⁰⁹.

The first objection relates to the **risk of pull factors**. It is unclear whether the Commission refers to pull factors *to* the EU or *within* the EU. Be that as it may, research in the field

²⁰⁵ Hruschka, C (2016). Dublin is dead! Long live Dublin! (footnote 11).

²⁰⁶ ECRE (2008). Dublin Reconsidered (footnote 11), p. 29 f; ProAsyl et al. (2013). Memorandum – Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility, March 2013, Frankfurt am Main. Available from: https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum_Dublin_engl.pdf; UN Special Rapporteur on the Human Rights of Migrants (2015). Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, 8 May 2015, A/HRC/29/36 para 66. Available from: <http://www.refworld.org/docid/5576e3ba4.html>. These proposals are explained and quoted, with favourable comment, in European Parliament (2015). Enhancing the CEAS (footnote 4), p. 59 ff. See also Williams, R (2015). Beyond Dublin (footnote 78), p. 21.

²⁰⁷ UNHCR (2001). Revisiting the Dublin Convention (footnote 75), p. 5.

²⁰⁸ European Commission (2000). Revisiting the Dublin Convention (footnote 11), para. 59. See also ECRE (2008). Dublin Reconsidered (footnote 11), p. 29.

²⁰⁹ April 2016 Communication (footnote 2), p. 7.

suggests that refugee movements to Europe are predominantly driven by “push” factors (e.g. conflicts and repressive regimes), while the intra-regional distribution among destination States is mostly influenced by “structural” pull factors, with asylum policy playing a subordinate role²¹⁰. In other words, the idea that replacing Dublin with a more liberal system might attract more protection seekers to Europe, which the Commission presents as an established fact, is actually a dubious hypothesis – one that should not be allowed to rule the EU Asylum Policy without much stronger evidence to support it²¹¹.

Of course a free choice system might concentrate applications in a few “structurally” desirable States, as its proponents acknowledge²¹². This is the Commission’s second objection: **a “free choice” system would not provide for a fair sharing of responsibility**. The important point, however, is that this cannot be an argument in favour of the Dublin system or of “heavy” distribution systems generally. As demonstrated by experience and pointed out above in section 3.2.1, such systems are *de facto* incapable of bringing about a pre-determined distribution of applications, fair or unfair. If this is true, no allocation system can “provide for a fair sharing of responsibility” – the Dublin system certainly has not – and therefore any system would have to be complemented by solidarity tools capable of offsetting an unbalanced distribution of applications²¹³. Furthermore, from a legal standpoint, seeking allocative efficiency through a “light” responsibility-allocation system while offsetting distributive unbalances through scaled-up solidarity measures appears to be in line with Art. 80 TFEU – more so than clinging to a theoretically fair, but practically unfeasible, distribution of applicants.

The third objection implied in the passage quoted above is that the **Art. 78(2)(e) TFEU requires the establishment of criteria and mechanisms for the allocation of responsibility**. This is true. However, the Treaty leaves the choice of the criteria open, and “wherever the applicant chooses” or “wherever the applicant first applies” are valid criteria, as long as they allow designating a responsible State for each application.

This offers the opportunity to make an important clarification: even the least coercive system imaginable – free choice – would not eliminate all coercion. Its function would still be to “determine responsibility” under Art. 78 TFEU, i.e. a situation where one Member State is responsible for examining an application while the others are not. Take back transfers as foreseen by Article 18(1)(b)-(d) DRIII, coercive if necessary, would still be part of the system. Accordingly, attendant guarantees such as protection against *refoulement*, a “sovereignty” clause allowing for human rights mandated exceptions, and effective remedies, would also have to remain part of the rulebook²¹⁴.

²¹⁰ On the prevalence of push factors, see Université de Neuchâtel, Centre de droit des migrations, Swiss Forum for Migration and Population Studies (2013). *Soumettre tous les requérants d’asile au régime de l’aide d’urgence? Données empiriques utiles au débat public*, August 2012, para. II.4. Available from: https://www2.unine.ch/files/content/sites/ius-migration/files/Questions_Réponses.pdf. On intra-regional push and pull factors, see above text at footnotes 73 to 79.

²¹¹ Unfortunately, the unsubstantiated idea that making the CEAS less “attractive” will reduce “undue pull factors” dominates the Commission’s vision for the future CEAS: April 2016 Communication (footnote 2), p. 10-12. For a critique: ECRE (2016). *Observations on the Reform of the Asylum Directives* (footnote 79).

²¹² See e.g. ProAsyl et al. (2013). *Allocation of refugees in the European Union* (footnote 206), p. 6.

²¹³ The Commission itself argued along these lines when replying to the argument that Dublin was “unfair”: see European Commission (2007). *Green Paper on the Future Common European Asylum System*, COM (2007) 301, 6 June 2007, p. 11 (“thought should mainly be given to establishing “corrective” burden-sharing mechanisms that are complementary to the Dublin system”). Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465858542571&uri=CELEX:52007DC0301>.

²¹⁴ See European Parliament (2010). *Setting Up a Common European Asylum System* (footnote 6), p. 473.

3.3.2. Three models: free choice, limited choice, Dublin minus

As summarised above in section 2.3.5, experience with current and past responsibility-allocation schemes indicates that a workable allocation system should – on its own or with accompanying elements – respect at least three conditions: (a) provide applicants with positive incentives to cooperate, while negative incentives such as severely sub-standard reception conditions in certain States should be removed; (b) defuse Member States' incentives to engage in defensive behaviour or to defect; (c) drastically reduce bureaucratic complexity and recourse to coercion.

The present study thus fully subscribes to the central message of the studies prepared by Guild et al. for the European Parliament in 2014 and 2015: "before identifying ways to share the burden, it is [...] desirable to reduce it by avoiding unnecessary coercion and complexity"²¹⁵. An essential ingredient for any model respecting this general orientation is to make all "take charge" transfers subject to the applicant's consent, as currently foreseen for the application of the Dublin family-based criteria (see e.g. Art. 9 DRIII). In addition to being ethically superior and more efficient²¹⁶, a rigorously consent-based system would eliminate the legal complexities associated with the "take charge" phase of the Dublin system²¹⁷ – a *sine qua non* for the attainment of the paramount objective of quick and economical access to status determination.

In this perspective, a system based on the free and informed choice of the applicant is "the most obvious alternative to the Dublin system"²¹⁸. Such a system would, as explained in section 3.3.1, respect conditions (a) and (c) better than any other conceivable system. It would also spontaneously "match" applicants with supportive environments, thereby reducing reception costs and incentives to abscond, while improving integration²¹⁹.

A free choice system would fare less well, however, with condition (b). Today, in a context where free choice is denied in theory but (painfully) exercised by a sizeable share of protection seekers in Europe, Member States are fully engaged in a "race to the bottom"²²⁰. Full free choice – while not altering fundamentally the current situation *de facto*²²¹ – might further incite Member States to be as "unattractive" as possible. To counterbalance this, much stronger financial solidarity and much strengthened control on the observance of the common minimum standards would be needed, as also argued by proponents of the free choice model and as discussed below in Section 3.3.4.

²¹⁵ European Parliament (2014). New Approaches (footnote 6), p. 9. See also p. 13 f and p. 84 ff. See already ECRE (2008). Dublin Reconsidered (footnote 11), p. 27 ff; European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 468 f.

²¹⁶ See in particular European Parliament (2014). New Approaches (footnote 6), p. 17 ff; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 56 f.

²¹⁷ The argument is further developed in European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 468 f.

²¹⁸ European Parliament (2015). Enhancing the CEAS (footnote 4), p. 73.

²¹⁹ On free choice systems and their advantages, see above footnote 206.

²²⁰ See e.g. UNHCR (2016). Hungary as a Country of Asylum (footnote 15); Iben Jensen, U, Vedsted-Hansen, J (2016). The Danish 'Jewellery Law': When the Signal hits the Fan?, EU Immigration and Asylum Law and Policy Blog, 4 March 2016. Available from: <http://eumigrationlawblog.eu/the-danish-jewellery-law-when-the-signal-hits-the-fan/>; Karageorgiou, E (2016). Downgrading Asylum Standards to Coerce Solidarity: Sweden as a Case in Point, EU Immigration and Asylum Law and Policy Blog, 13 May 2016. Available from: <http://eumigrationlawblog.eu/downgrading-asylum-standards-to-coerce-solidarity-sweden-as-a-case-in-point/>; Brandl, U (2016). In Search of a Legal Basis for the Austrian Asylum Caps, 31 May 2016. Available from: <http://eumigrationlawblog.eu/in-search-of-a-legal-basis-for-the-austrian-asylum-caps/>.

²²¹ European Parliament (2015). Enhancing the CEAS (footnote 4), p. 59: "Allowing asylum-seekers to choose their countries of asylum is not a significant departure from current practice. However, it contradicts the official mythology of Dublin".

For all its merits and advantages, “free choice” also appears to be the option Member States are least likely to agree on. Along with the Commission, several Member States seem adamant that protection seekers must not have “excessive room for choosing”²²².

Could they nonetheless be given what Guild et al. call “a reasonable range of options”²²³?

The foundation for doing this could be a stripped-down “Dublin minus”²²⁴. This system would have the same “mechanisms” as the current system but rely on simplified criteria. By default, the application would be examined where it is first lodged (Art. 3(2) DRIII)²²⁵. In order not to constitute a step back in the protection of family life, the system would retain the same (rather ineffectual) family criteria. All in all, “Dublin minus” would simply be Dublin III without the criteria that are based on documentation, entry and stay.

The passage from Dublin to “Dublin minus” would entail already a radical simplification, i.e. fulfil condition (c) above. Take charge procedures would no longer be necessary, or would take place with the full cooperation and consent of the applicants. The system would also be marginally more attractive to applicants, as per condition (a) above. Finally, the distributive results would be practically identical to those actually produced by the current Dublin system²²⁶. In short, Dublin minus would be superior in several respects to the current system while not entailing real (as opposed to theoretical) disadvantages in others.

Some problems associated with the Dublin system would remain. First, applicants would still have strong incentives to avoid identification at their entry point and move irregularly to their preferred destination. Second, Member States would retain their incentives to avoid identifying applicants or receiving applications, to “wave them through”, and to engage in “asylum dumping”²²⁷. Third, today’s distributive imbalances would persist – not necessarily the same as under a true “free choice” model, since not all applicants would reach their desired destination, but rather the familiar picture of applications concentrated in a few destination and border States, and applicants stranded in makeshift camps or moving irregularly along the way²²⁸.

To reiterate: these negative effects would not differ from what we observe today. “Dublin minus” would be superior to Dublin, and an option well worth pursuing absent political support for more elaborate arrangements. Still, refinements capable of partially alleviating these problems and making the system more sustainable, without making it “heavier”, would still be possible.

²²² Dublin IV Proposal (footnote 5), p. 13. The two arguments advanced by some Member States in this passage – that taking into account asylum seekers’ preferences would complicate proceedings, and that refugees should not be given “excessive” room to choose *qua* refugees – are both surprising. All the responsibility-allocation models proposed here are much simpler than the Dublin system. Furthermore, there is strictly nothing in the Geneva Convention to suggest that refugees should by definition be deprived of all choice concerning their place of refuge.

²²³ European Parliament (2015). Enhancing the CEAS (footnote 4), p. 56 f.

²²⁴ See European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 470.

²²⁵ This is conceptually different from free choice, whereby it would be “guaranteed that [the application is made] in the state in which the asylum seeker voluntarily wishes to apply for asylum” (See e.g. ProAsyl et al. (2013). Allocation of refugees in the European Union, footnote 206, p. 5).

²²⁶ See above text at footnotes 25-28.

²²⁷ UN Special Rapporteur on the Human Rights of Migrants (2015). Banking on mobility over a generation (footnote 206), para. 66.

²²⁸ See above, footnote 156.

These refinements would seek to better respect conditions (a) and (b) enumerated above: making the system more attractive to applicants, so as to incite them to apply at the earliest opportunity, while providing reasonable assurances to application/border States that their responsibilities would not become overwhelming. The idea would be to combine several types of criteria so as to expand the options available to the applicant beyond the default criterion of having his claim examined where it is lodged:

- The system would have to include, first, much-expanded criteria based on family unity, and if possible on other “meaningful links” such as previous abode²²⁹. Current Art. 6 DRIII could be a model for the definition of family. In light of past misunderstandings²³⁰, it is worth pointing out that this would not undermine the ordinary rules on family reunification²³¹. Indeed, responsibility criteria based on family do not regulate “family reunification” (lasting admission based on family ties) but only admission for the duration of the asylum procedure²³². They also follow a different logic: they aim to identify the Member State to which the applicant has the strongest link, so as to maximise support during the procedure and integration prospects in case protection is granted. Given this difference in function and logic, definitions may well be different as also demonstrated by the Commission’s proposal to include “siblings” in the Dublin IV family definition (Art. 2 g) DIVP).
- “Meaningful” or “genuine link” criteria could be combined with a quota system²³³. A possible use of this idea could consist of: (a) an automated system similar to that foreseen by Art. 22, 34 and 35 DIVP to track the distribution of responsibilities within the Union in real time, indicating which States are “below quota”; (b) such States would have the obligation to make places available and take charge of applicants accepting them; (c) applicants not qualifying for or not wishing to avail themselves of one of the “meaningful link” criteria would be allowed to choose on a “first-come first-served” basis among the places available at the moment of their application.
- The application States – usually border States, in case the system was successful in attracting applicants – would still have extensive responsibilities. First, they would have to perform a number of duties independently from the eventual responsibility allocation: identification, registration, first reception, responsibility determination and organizing transfers. Second, as Member States responsible “by default”, they would still risk incurring a considerable share of responsibilities. These circumstances would call for greatly strengthened solidarity measures, as detailed immediately below, as well as in section 3.3.4.

²²⁹ For the UNHCR definition, see above text at footnote 204. See also Williams, R (2015). Beyond Dublin (footnote 78), p. 24; Di Filippo, M (2016). From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures, International Institute of Humanitarian Law, Policy Brief, January 2016, p. 8 f. Available from: <http://www.sp.unipi.it/images/Professori/marcello.difilippo/IIHL%20-%20A%20plea%20for%20the%20reform%20of%20the%20Dublin%20system%20-%20policy%20brief%20-%20ENG.pdf>.

²³⁰ See European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 134 f.

²³¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L251/12, especially Art. 4.

²³² Such precarious admission would normally be followed, in case of rejection of the claim, by return.

²³³ See European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 473; Williams, R (2015). Beyond Dublin (footnote 78), p. 25; Di Filippo, M (2016). From Dublin to Athens (footnote 229), p. 8. See also, for calls to establish a “permanent, binding system of distribution of asylum seekers”, European Parliament (2015). Resolution of 10 September 2015 on migration and refugees in Europe (footnote 1), para. 9.

The advantages of such a “limited choice” system over the Dublin system would be considerable.

- Because it would rely on examining the application where lodged, or on voluntary transfers, the system would be faster and more economical. Post-transfer secondary movements, as well as the complexities, litigation and coercion that characterise the Dublin system, would be reduced. As with other “light” models, the time and resources spared might be invested for the main tasks of an asylum system: dignified reception, fair and efficient claim processing, supporting integration of those granted protection, and returning those found not to need protection²³⁴.
- By better taking into account the reasons why applicants choose their destination, and giving them “a reasonable range of options”, it would be significantly more attractive for applicants than current systems, and motivate more of them to undergo identification and apply for protection at the earliest opportunity.
- The use of quotas – binding for Member States but not coercive for applicants – would promote a fairer distribution of applicants, while not ensuring the attainment of a pre-defined distribution of persons. As noted, this objective is in any case unattainable also for coercive systems.

The efficiency, fairness and sustainability of the scheme would depend on several conditions.

- First, the system would need to be attractive for applicants in fact, not just in theory, even though it would not guarantee every applicant the possibility to apply in the desired destination. Therefore, the criteria based on “meaningful links” should be cast as broadly as possible, and be reliably applied. In addition: (a) well-prepared information on the available places in “under-burdened States” should be readily available, in line with current efforts in the context of relocation schemes; (b) the voluntary character of the process plus the range of choices available should be emphasised to prospective applicants, and (c) responsibility determination should be swift and credible²³⁵. In addition, as seen below in section 3.3.4, the system would benefit from strengthened free movement rules for beneficiaries of protection.
- A statistically significant application of the “meaningful link” or “quota”-based criteria would be indispensable to fairness toward first application States, who would otherwise risk being overwhelmed by the responsibilities flowing from the default responsibility criterion.
- In these regards, a critical need would be to prevent the “meaningful links criteria” from remaining a dead letter like the current family criteria. The ideal solution would be to entrust responsibility determination to an EU body, which Art. 78 TFEU authorises. This could make the process swifter and consideration of the evidence impartial. The Commission broached the idea but discarded it²³⁶. It might deserve a second thought, as it would constitute an improvement even in the context of the Dublin system. Admittedly, organising judicial protection against the decisions of EASO/EUAA would raise legal difficulties²³⁷. An EU specialised court would have to be

²³⁴ See European Parliament (2014). *New Approaches* (footnote 6), p. 12.

²³⁵ See European Parliament (2015). *Enhancing the CEAS* (footnote 4), p. 56: “Trust and reliable information are necessary for decisions between [the range of] options [provided] to be meaningful”.

²³⁶ April 2016 Communication (footnote 2), p. 13.

²³⁷ In the system as proposed, applicants would normally only appeal against decisions *not* to apply the “meaningful links” criteria, since all take charge transfers would be taken with the applicant’s consent.

set up under Art. 257 TFEU²³⁸. Alternatively, the legal and practical feasibility of entrusting national courts with the review of EASO/EUAA decisions, assisted by EU Courts *via* preliminary rulings, should be explored. Seriously considering the option of centralising responsibility allocation would have the further, considerable advantage of providing a testing ground for the long term perspective of centralising status determination at EU level (see below 3.3.4).

- As a second best alternative – one that would also benefit the current Dublin system: (a) the rules on evidence should be revised to give stronger weight to the credible statements of applicants; (b) the roles of the requesting or requested State in assessing evidence might also be reviewed. Indeed, entrusting responsibility determination directly to the application State might be an alternative way to promote a generous and swift application of the “meaningful link” criteria²³⁹; (c) as foreseen by Art. 12 and 13 of the EUAA Proposal, EASO/EUAA could monitor the implementation of evidentiary rules and issue guidelines if needed.

3.3.3. “Light” systems and emergency situations

One important question is whether “light”, consensual models such as considered above – “free choice” or “limited choice” – might be successful in a crisis, or whether coercive systems based on involuntary transfers would be more efficient to “evacuate” the affected States. The lesson emerging from e.g. the 1999 “Humanitarian Evacuation Programme” (HEP) appears to be that consensual models outperform coercive models.

While not without doctrinal, legal and practical problems²⁴⁰, HEP moved approximately 96,000 persons from FYROM in under six months²⁴¹ (for a comparison with the results of current EU relocation efforts, see above section 2.2.2). That may have been a one-off experience²⁴². Still, it suggests three points that are relevant in the discussion on emergency schemes for the CEAS:

- Similarly to “Dublin minus” and “limited choice” models presented above, and to the difference of EU relocation/corrective schemes (see above 2.2.1 and 3.1.3), HEP was based on the principle that while not having full choice over their destination, beneficiaries would have to consent to transfer, and personal circumstances would be taken into account in the choice of the destination State²⁴³. As pointed out in the independent evaluation of UNHCR’s response to the Kosovo crisis, “general human rights standards suggest that forced airlift operations to third countries are highly

²³⁸ As a disadvantage, given that the EU has yet to accede to the ECHR, this would mean that the allocation decisions, as well as the decisions taken by EU Courts on appeal, would escape judicial control by the ECtHR.

²³⁹ This is suggested in Di Filippo, M (2016). The Reform of the Dublin System and the First (half) Move of the Commission SIDIBlog, 12 May 2016, para. 3. Available from: <http://www.sidiblog.org/2016/05/12/the-reform-of-the-dublin-system-and-the-first-half-move-of-the-commission/>.

²⁴⁰ See Barutciski, M, Suhrke, A (2001). Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing, 14 Journal of Refugee Studies, p. 95-111.

²⁴¹ UNHCR (2000). The Global Report 1999, 30 June 2000, Geneva, p. 345 f. Available from: <http://www.unhcr.org/en-us/publications/fundraising/4a0d20356/global-report-1999.html>

²⁴² Suhrke, A, Barutciski, M, Sandison, P, Garlock, P (2000). The Kosovo Refugee Crisis – An Independent Evaluation of UNHCR’s Emergency Preparedness and Response, February 2000, Geneva, p. 141. Available from: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ba0bbeb4&query=Kosovo>.

²⁴³ UNCHR (1999). Guidelines for the Humanitarian Evacuation Programme of Kosovar Refugees in the Former Yugoslav Republic of Macedonia, 11 May 1999, paras. 1 and 5. Available from: <http://www.refworld.org/docid/3ae6b31b7b.html>.

dubious in legal terms [and] moreover, involuntary evacuations by aircraft represent a political nightmare in operational terms"²⁴⁴.

- A second key ingredient of HEP was massive humanitarian and technical assistance, decisively supporting first reception and registration²⁴⁵. This would have to be part of CEAS solidarity arrangements and indeed, it is something the EU is starting to develop (see below, 3.3.4).
- A third key element, and the most difficult to secure, was generous offers of relocation places. In HEP, the exceptional response of States was prompted by the politico-military context of the Kosovo crisis²⁴⁶. In the EU context, the legal obligation to offer available places by "sub-quota" States could do likewise, along with monitoring and enforcement by the Commission, and financial incentives (see below, 3.3.4).

In short, it is possible that such a model as presented above, accompanied by enhanced humanitarian and technical assistance, and close monitoring of the Member States' obligations, might outperform current relocation efforts in situations of increased influx.

3.3.4. Accompanying reforms: convergence, solidarity, and free movement

The functioning of any responsibility-allocation model – including the Dublin system and the "light" models sketched above – is "contingent upon the existence of harmonised standards" across the participating States and on the "balance of efforts" among them²⁴⁷. As noted, a strong "surge capacity" in providing assistance to Member States facing increased pressure would also be needed to ensure the integrity of the CEAS at all times.

While detailed consideration of EU measures in these areas is outside the remit of this Study, a few brief observations are in order, in view of their close connection to the topic.

To begin with the "harmonisation" dimension, no responsibility allocation system can produce acceptable results unless all participating States respect EU and international standards. In the Stockholm Programme, the European Council set the bar very high:

"It is essential that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome"²⁴⁸.

Achieving this appears to be out of reach for the current CEAS – as noted, a collection of 28 discrete national systems, each with its own budget, administration, judiciary and strategic direction, only partially committed to common protection standards. Indeed, that vision is

²⁴⁴ Suhrke, A, Barutciski, M, Sandison, P, Garlock, P (2000). The Kosovo Refugee Crisis (footnote 242), para. 461. The authors point out that "within this need to evacuate refugees voluntarily", the effort to inform potential beneficiaries thoroughly of existing options "may impose slight delays on the emergency nature of the programme", but is "a necessary trade-off in order to get refugees to volunteer" (*ibidem*).

²⁴⁵ *Ibidem*, paras. 40-45.

²⁴⁶ *Ibidem*, especially at para. 50.

²⁴⁷ UNHCR (2001). Revisiting the Dublin Convention (footnote 75), p. 5 f.

²⁴⁸ European Council (2009). The Stockholm Programme – An Open and Secure Union Serving and Protecting Citizens, [2010] OJ C115/1, para. 6.2. Available from: [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465917385670&uri=CELEX:52010XG0504\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1465917385670&uri=CELEX:52010XG0504(01)).

probably impossible to realise unless decision-making is fully centralised²⁴⁹.

For the time being, and as a matter of priority, the minimum standards set by international and EU legislation must be fully respected in every Member State, and national systems that systematically fall short must be brought back in line. This is far from the case today²⁵⁰, and this fatally undermines the integrity of the CEAS, exposing applicants and beneficiaries of protection to unacceptable conditions. This also undermines the legitimacy and viability of any responsibility allocation system²⁵¹.

Recasting and strengthening existing standards through regulations, as planned by the Commission, could bring a useful contribution – although the proposed EU uniform standards would need to unquestionably meet the relevant human rights standards²⁵². The priority, however, is to make existing standards effective on the ground. In past years, even blatant violations of EU standards failed to elicit a strong reaction from EU bodies²⁵³. The Commission's renewed activism is welcome, the more so if directed against serious breaches of protection standards rather than against purely formal infringements²⁵⁴.

More instruments should however be placed at the disposal of the EU. The EUAA Proposal opens interesting perspectives in this respect – in particular the new tasks of the Agency in monitoring national practices and capacities, coordinating the production of Country of Origin Information, and issuing guidelines and Country of Origin Assessments (see Art. 8-10 and 12-15 of the Proposal). Art. 78 and 80 TFEU would arguably permit going further and centralising wholly or partly support services such as translation and interpretation (deployed via IT if needed), registration and preparation of files and the provision of COI. This could be done incrementally, and might contribute to both more convergence in national practices and pooling capacities²⁵⁵.

This leads to the second key point, solidarity and fair sharing of responsibilities. Common policies in asylum, immigration and border controls place vastly asymmetrical obligations on Member States. This is not sustainable without robust corrective mechanisms. This is, in essence, why Art. 80 TFEU requires that EU migration policies be “governed by the principle of solidarity and fair sharing of responsibility, including its financial implications”²⁵⁶.

The insufficiency of current solidarity arrangements has been detailed above²⁵⁷. The need to strengthen them can scarcely be doubted. Since “sharing people” without their consent

²⁴⁹ Com April 2016 Communication (footnote 2), p. 8 f; Goodwin-Gill, G S (2015). The Mediterranean Papers (footnote 11) p. 11 ff; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 58 f.

²⁵⁰ See above footnote 15; European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), recital Z and paras. 65 ff.

²⁵¹ See above, text at footnotes 79-82.

²⁵² April 2016 Communication (footnote 2), p. 10 ff. ECRE (2016). Observations on the Reform of the Asylum Directives (footnote 79). The idea of a uniform European Code of Asylum had already been articulated in European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 446 f.

²⁵³ See e.g. Labayle, H (2011). Le droit européen de l'asile devant ses juges : précisions ou remise en question?, *Revue Française de Droit Administratif*, 2011, p. 273-290, at p. 285 and 288.

²⁵⁴ European Commission (2015). Managing the refugee crisis: State of play (footnote 32), Annex 6; European Commission (2015). Commission opens infringement procedure against Hungary concerning its asylum law, Press Release IP 15/6228, 10 December 2015. Available from: http://europa.eu/rapid/press-release_IP-15-6228_en.htm?locale=en. See also, ACVZ (2015). Sharing Responsibility (footnote 70), p. 56 f.

²⁵⁵ See European Parliament (2014). New Approaches (footnote 6), especially at p. 47 ff, 60 ff and 79 ff. See also See also European Parliament (2012). Resolution of 11 September 2012 on enhanced intra-EU solidarity (footnote 34), para. 38. ACVZ (2015). Sharing Responsibility (footnote 70), p. 58 f. On the experiences in the context of hotspots, see European Parliament (2016). On the frontline (footnote 51).

²⁵⁶ For a fuller discussion see Bieber, R, Maiani, F (2012). Sans solidarité point d'Union européenne (footnote 47), p. 314 ff and further references.

²⁵⁷ See above text at footnotes 100-108.

on a meaningful scale is unfeasible²⁵⁸, scaled-up financial and operational solidarity appears to be necessary, without discounting the contribution that well-funded programmes promoting voluntary relocation might make²⁵⁹.

In the scope of this Study, it is possible only to raise two important aspects of this large and complex issue that are not receiving enough attention.

First, there is a need for a principled discussion on how costs should be shared in the CEAS or more broadly in the Area of Freedom Security and Justice.

Currently, a few States are expected to provide a range of services that are indispensable to the functioning of the CEAS, and that benefit all Member States – or, whose faulty provision affects all Member States: identification of arrivals, registration of claims, first reception, responsibility determination and (arguably) transfer to the responsible State. The Dublin IV Proposal adds admissibility screening and accelerated procedures. Status determination procedures and reception pending a decision should be included as well.

In all these cases, Member States provide (for the most part at their own cost) public goods with significant trans-boundary externalities²⁶⁰, in violation of Olson’s principle of fiscal equivalence²⁶¹. This may be an important reason for “under-provision”, i.e. for the tendency of Member States to engage in defensive behaviour or defection. The case for centralisation of these costs would thus seem particularly strong. Placing those expenses on the EU budget would also be a particularly effective way of improving standards in the Member States where such standards are lowest, thus also of reducing incentives to engage in secondary movements²⁶².

The centralisation of asylum-related costs would be without prejudice to a discussion of what financial incentives – positive or negative – should support allocation schemes²⁶³. It would also be without prejudice to “added-value” EU financing of projects to strengthen national capabilities, such as foreseen by AMIF²⁶⁴.

As for solidarity in the face of particular pressures, pooling administrative resources and re-deploying them in the Member State concerned would constitute an important tool – on condition that it is done rapidly, on a sufficient scale, and that regulatory obstacles to

²⁵⁸ See above text at footnotes 33-37 and 169-170.

²⁵⁹ See also European Parliament (2014). New Approaches (footnote 6), p. 80. (“Transferring asylum seekers is in itself a costly process, likely to exacerbate the ‘burden’ rather than distribute it fairly. The options of sharing resources, financial and bureaucratic, are therefore usually preferable”). See also, on voluntary transfer programmes, European Parliament (2015). Enhancing the CEAS (footnote 4), p. 67 f.

²⁶⁰ See above footnotes 101-103 and accompanying text.

²⁶¹ Olson, M (1969). The Principle of ‘Fiscal Equivalence’: The Division of Responsibilities among Different Levels of Government, 59 *The American Economic Review*, p. 479-487. As codified in Art. 43a of the Swiss Federal Constitution: “The collective body that benefits from a public service bears the costs thereof. The collective body that bears the costs of a public service may decide on the nature of that service”.

²⁶² See ECRE (2008). Dublin Reconsidered (footnote 11), p. 31 f, and *mutatis mutandis* the discussion of the optimal level of centralisation in Common Agricultural Policy spending in Grethe, H (2008). *Agriculture Policy: What Roles for the EU and the Member States?*, in: Gelauff, G, Grilo, I, Lejour, A (eds). *Subsidiarity and Economic Reform in Europe*, 2008, Springer, p. 191-218. The Commission seems to have acknowledged this, albeit in dubitative terms (“EU funding in relation to both options may need to be considered”: April 2016 Communication, footnote 2, p. 7). Possible full EU funding for certain tasks is also evoked in European Parliament (2015). Enhancing the CEAS (footnote 4), p. 67. See also, in favour of “proportionate and adequate financial and technical support”, European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), para. 37.

²⁶³ Reference is made here to the controversial “solidarity contribution” foreseen by the Dublin IV Proposal. See also European Parliament (2015). Enhancing the CEAS (footnote 4), p. 60 f.

²⁶⁴ On this aspect see European Parliament (2014). New Approaches (footnote 6), p. 83 f and 91; European Parliament (2015). Enhancing the CEAS (footnote 4), p. 66 f.

effective cooperation are accurately identified and removed. This – along with emergency humanitarian support²⁶⁵ – would be especially important in cases of heightened influx, where “evacuation” from the concerned State would not necessarily need different responsibility allocation mechanisms, as said, but would need additional workforce to register applications, interview applicants and prepare transfers.

The EUAA Proposal includes interesting elements in this respect. For instance, the deployment of a 500-strong “asylum intervention pool”, as foreseen by Art. 18 of the Proposal, might make a difference in helping a State facing a high influx to keep pace with registrations and transfers²⁶⁶.

One last key element in the construction of a sustainable asylum system would be to grant free movement rights for beneficiaries of international protection. This could help applicants to accept a less-than-desired initial allocation, improve their chances of achieving self-reliance and successful integration, and reassure first application States – especially those having special characteristics such as Malta – that their responsibilities “by default” could in time be relieved. The Long Term Residents Directive as currently in force²⁶⁷ is not sufficient to achieve these results²⁶⁸. The case can be made – along the lines traced by Guild et al. in their 2015 Study – for stronger and earlier free movement rights, complemented by the transfer of protection statuses²⁶⁹. This could be coupled with a “waiting time” – shorter than the currently foreseen five years – as a way to reassure the States perceived as being the most desirable destinations²⁷⁰. Unlocking legal free movement might also make subjecting irregularly moving beneficiaries of protection to take back transfers, as foreseen by Art. 20(1)(e) DIVP, more acceptable and sustainable.

²⁶⁵ See above footnotes 105 and 106.

²⁶⁶ By comparison, the number of asylum specialists at the disposal of the Swiss State Secretariat for Migration – capable of processing close to 30,000 asylum cases yearly – should reach 540 in the context of an on-going strengthening programme: see Le Secrétariat d'Etat aux migrations va engager, *Le 24 Heures*, 18 May 2016. Available from: <http://www.24heures.ch/suisse/secretariat-etat-migrations-engager/story/12362131>.

²⁶⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2003] OJ L16/44, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, [2011] OJ L132/1.

²⁶⁸ For analysis of this aspect, see European Parliament (2015). Enhancing the CEAS (footnote 4), p. 39 ff.

²⁶⁹ *Ibidem*, p. 48 ff; ECRE (2008). Dublin Reconsidered (footnote 11), p. 33 ff. European Parliament (2010). Setting Up a Common European Asylum System (footnote 6), p. 462 ff. See also European Parliament (2016). Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (footnote 11), paras. 39 and 46.

²⁷⁰ *Ibidem*; ACVZ (2015). Sharing Responsibility (footnote 70), p. 60 ff; Williams, R (2015). Beyond Dublin (footnote 78), p. 14.

4. CONCLUSIONS AND RECOMMENDATIONS

It is well established that the Dublin system is ineffective and inefficient, inflicts hardship on protection seekers and damages the efficiency of the Common European Asylum System. Until now, the relocation schemes have also failed to produce appreciable results.

Based on the evidence reviewed above, it is argued that these negative results can be traced essentially to three structural factors: (a) the unattractiveness of EU allocation schemes to protection seekers, due in particular to their strict “no choice of destination” philosophy, to their disregard for meaningful links applicants may have with particular Member States and to the lack of basic entitlements pre- or post-recognition in some Member States, contrary to international and EU Law; (b) the fact that, absent sufficient solidarity instruments, EU allocation schemes pit national interests against one another in a “zero sum game” encouraging defensive behaviour – a tendency exacerbated by the unfairness to border States of the politically dominant Dublin criterion (irregular entry); (c) a bureaucratic approach that is inherently a source of complexity and delays, compounded by the intergovernmental nature of responsibility allocation procedures.

The Dublin IV system proposed by the Commission will probably not solve the problems observed, as it seeks to solve them through a “more of the same” philosophy: no choice for protection seekers, a punitive approach to secondary movements, and more charges laid on application States – which, according to the Dublin IV Proposal, should normally be the border States. The “correction mechanism” includes some interesting features, but is far from comprehensive and would probably prove as inefficient as the current relocation mechanism with its “no choice” and bureaucratic approach. While probably incapable of delivering on its core objectives, the Dublin IV Proposal raises serious human rights concerns and backtracks on progress realised with the 2013 recast. The one positive aspect – the extension of the “family member” definition – is likely to remain without concrete effect save in rare individual cases, given that the underlying causes of the non-application of the family criteria for the past twenty years are not addressed.

Should the legislator decide to accept the “Dublin plus” approach proposed by the Commission, it would still be recommended to:

- Bring the proposed rules on remedies (Art. 28 DIVP) in line with Article 13 ECHR on the right to an effective remedy by expanding the scope of review, at a minimum, to any arguable claim that a transfer would violate fundamental rights.
- Leave the sovereignty clause of current Art. 17 DRIII untouched, and thus allow Member States to examine any application lodged with them, or at least define its scope broadly enough to encompass all conceivable humanitarian or human rights related grounds.
- Subject to a strict review the compatibility with the Convention on the rights of the child and with Art. 24 of the Charter of Fundamental Rights of the changes proposed to rules on minors: fingerprinting from age six, potentially through coercive means, withdrawal of the right to a representative in case of secondary movement and the possibility of take charge transfers to the State of first application.
- Expressly impose in Art. 5(4) DIVP the requirement evoked in recital 22, i.e. that the withdrawal of reception conditions in case of secondary movements is without prejudice to covering the immediate material needs of each person.

- Reconsider the curtailment of procedural rights contemplated by Art. 20 DIVP in light of the non-*refoulement* principle, the right to an effective remedy and the need to ensure access to a fair and effective status determination procedure in all cases.
- Review the rules on evidence relating to the criteria based on family ties by giving more weight to the credible statements of the applicant, and endow EASO/EUAA with monitoring tasks on the implementation of these criteria; a better alternative would be to entrust responsibility allocation to EASO/EUAA (see also below).

That said, it is strongly recommended to consider alternatives to the Dublin system. As Carrera and Guild aptly observed, “[a] number of Member States and representatives of the European Commission are highly resistant to the idea that asylum seekers might be better placed to know where their best chances of integration are than any officials, and that this knowledge might be helpful for everyone in both the short and long term. Yet in practice, it seems that it is asylum seekers who move to seek asylum and Member States that determine their applications”²⁷¹.

The sooner these facts are accepted as such, the better. In light of past failures, the idea of pursuing strict adherence to a predetermined distribution of applicants should be abandoned as unfeasible. The focus should be on a system that pursues as a priority the objective of placing applicants in a status determination procedure as quickly and economically as possible. Three alternative models could be considered:

- A “free choice” model. While politically difficult to agree in the current context, it still deserves serious consideration in light of its vast advantages over any other system in terms of simplicity, incentives to early identification, and prevention of irregular movements.
- At the other end of the spectrum, a stripped-down “Dublin minus” system, i.e. Dublin III without the criteria based on entry and stay and therefore without coercive take charge transfers; such a system would be far simpler than the current Dublin system, while producing practically the same allocative results.
- In order to incentivise applicants to identify themselves and apply at the earliest opportunity, and to minimise irregular secondary movements while keeping the procedure simple, the system could be refined through criteria for voluntary “take charge” transfers and thus be turned into a “limited choice” system.
 - Responsibility criteria would be based exclusively on “meaningful links” with Member States (expanded family criteria; previous abode; personal or social networks); in order to be attractive to applicants and to provide assurances to first application States that they will not bear disproportionate responsibilities, they should be defined broadly and effectively applied (see recommendations above on evidentiary rules in Dublin procedures).
 - To promote a more equitable distribution of applicants without compromising the simplicity of the system, applicants would be given a choice among available places in “under-burdened” Member States, identified on an on-going basis through a system similar to that foreseen in the Dublin IV Proposal.

²⁷¹ Guild, E, Carrera, S (2016). Rethinking asylum distribution in the EU: Shall we start with the facts?, CEPS Commentary, 17 June 2016. Available from: <https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts>.

Whatever the approach to responsibility allocation, it is recommended as a matter of necessity to:

- Concentrate all efforts on the goal of preventing and correcting manifest and systemic breaches of applicants' and refugees' rights in the Member States.
- To this effect strengthen EU capacities and powers, including *via* EASO or the EUAA, to monitor deviations from international and EU protection standards, to react thereto, and to provide administrative assistance to Member States whose capacities are not commensurate to the responsibilities falling to them.
- Move toward the full compensation by the EU budget of the services delivered as public goods by a few Member States for the benefit of all, including particularly first identification and registration of the application, first reception, responsibility allocation, transfer or relocation of applicants, as well as the processing of asylum applications. This would make the CEAS fairer, defuse Member States' incentives to engage in defensive behaviour, and contribute towards the objective of securing respect for EU and international minimum standards across the Dublin area.
- Consider centralising in the hands of EASO/EUAA support services for status determination, along with the necessary financial and administrative resources; such services could include e.g. interpretation services and the production of COI.
- Consider, subject to suitable arrangements for judicial protection, conferring on EASO/EUAA the task of determining the Member State responsible, to ensure a swifter process and a more impartial evaluation of the evidence. This recommendation is made without prejudice to the longer-term solution of centralising adjudication on asylum claims at EU level.

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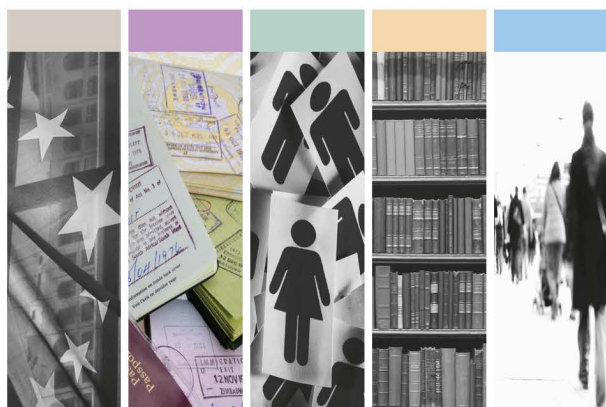
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