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12. Responsibility-Allocation in the Common European Asylum System

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1. Introduction

Responsibility-sharing has been a fixture of EU-level negotiations on asylum for the past thirty years. Not infrequently, despite a clear prohibition to take the law in their own hands,[1] Member States have also resorted to unilateral 'distributive' measures in violation of EU Law: push-backs, 'waving through', etc.

The reasons for this are structural. In spite of its name, the 'Common' European asylum system (CEAS) is a collection of national systems, each with its budget, administration and judiciary. In the perspective of national governments, each protection seeker shipped off to another Member State is a liability avoided. The absence of EU solidarity measures offsetting reception and protection costs sustains this zero sum game.

In this context, measures that would have subordinate importance or not occur in a truly 'common' system end up absorbing considerable resources: 'criteria' to apportion protection responsibilities, 'transfers' of protection seekers, measures to counter 'secondary movements' etcetera. The fact that such measures severely impact the rights and interests of Europe's refugee population adds to their salience.

In this chapter, I will examine the Treaty provisions relating to responsibility-allocation in the CEAS. I will then turn to the 'Dublin system' allocating protection-seekers among the Member States. Brief attention will be devoted to the relocation programmes established at the height of the 'refugee crisis' of 2015. To conclude, I will consider the perspectives for a reform of responsibility-allocation as they stand at the close of 2018.

2. The Treaty provisions on responsibility-allocation

2.1 Historical background

Responsibility-allocation was on the agenda long before the expression 'Common European Asylum System' was coined.

In the late 70s, UNHCR first called for regional arrangements to apportion responsibility for asylum applicants. This was in response to the proliferation of unilateral 'safe country' rules and the phenomenon of 'refugees in orbit'.[2] Negotiations started within the Council of Europe and resulted in a draft Agreement that, foreshadowing the Dublin Convention, chose 'irregular entry' as the main responsibility criterion. Mediterranean States predictably blocked its adoption.[3]

At this point both the venue and the finalities of the negotiations changed. Work resumed among the EEC Twelve and the Schengen Five and resulted in the adoption, in June 1990, of the Schengen II[4] and Dublin Conventions.[5] Responsibility-sharing in asylum matters

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1 Joined Cases 90 and 91/63 *Commission v Luxembourg and Belgium* EU:C:1964:80.

2 UNHCR Executive Committee, Conclusions on Refugees without an Asylum Country, No. 15 (XXX) EXCOM Conclusions, 16 October 1979. See Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 17-30.

3 ibid 26ff.

4 Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders of 19 June 1990 [2000] OJ L239/19.

became a ‘compensatory’ measure to the abolition of controls at the ‘internal’ borders, as it was meant to prevent applicants from choosing their destination and pursuing multiple applications, while retaining the humanitarian objective of preventing ‘orbit’ situations.

Little progress was otherwise accomplished in establishing a European asylum policy. Given their common international obligations, the Member States saw no need for binding harmonization measures. Despite (or because of) the eruption of the Yugoslav wars, they also could not agree on binding solidarity mechanisms to face mass influx situations.

The 1997 Amsterdam Treaty took the important step of making asylum a Community competence. In terms or responsibility allocation, it referred to the establishment of ‘criteria and mechanism’ in the Dublin tradition and to measures ‘promoting a balance of efforts between Member States’. These legal foundations were further developed with the Lisbon Treaty.

2.2 Legal foundations

Several provisions of the Treaty on the Functioning of the European Union (TFEU) provide for responsibility-allocation in asylum matters (2.2.1) or prescribe relevant principles (2.2.2).

2.2.1 Legal bases

The most relevant legal basis in the subject-area is Article 78(2)(e). Thereunder, the CEAS must comprise ‘criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection’.

Article 78(2)(e) requires that *one* Member State be responsible for every application lodged in the EU by a third-country national. In principle, therefore, applicants should not be able to pursue their claim with another State, and any system established under Article 78 should include something akin to the ‘take back’ rules of the Dublin system (see below). For the rest, Article 78 does not ‘constitutionalize’ Dublin. To the contrary, the legislator is free to adopt ‘criteria’ diverging from the current ones, eg based on free choice of the responsible State by the applicant.[6]

Two more provisions in Article 78 have a bearing on the allocation of protective responsibilities. Article 78(2)(a) foresees the establishment of a uniform asylum status ‘valid throughout the Union’. According to authoritative commentators, this does not mandate free movement for refugees.[7] Even so, it strongly suggests ‘self-allocation’ as an organizing principle for distributing protection beneficiaries. Article 78(3) furthermore foresees the adoption of ‘provisional measures’ for the benefit of Member States confronted to a ‘sudden inflow’ of third-country nationals, and has been applied to establish the relocation mechanism discussed in section 4.

2.2.2 Governing principles

Measures adopted under Article 78 must respect several principles. These are examined elsewhere in this book but bear recalling here.

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[5] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1990] OJ C254/1.

[6] ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (ECRE, March 2008) 29 <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Sharing-Responsibility-for-Refugee-Protection-in-Europe-Dublin-Reconsidered_March-2008.pdf> accessed 5 February 2019.

[7] Steve Peers, *EU Justice and Home Affairs Law, Volume I* (4th edn, OUP 2016) 244; Kay Hailbronner, Daniel Thym, ‘Legal Framework for EU Asylum Policy’ in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law* (2nd edn, CH Beck/Hart/Nomos 2016) 1032.

As foreseen by Articles 6 TEU and 78(1) TFEU, CEAS law must respect the EU Charter of Fundamental Rights (CFR) and other relevant treaties, including the ECHR and the UN Covenants. Several human rights are directly impacted by mechanisms relying on involuntary transfers and deserve heightened attention, eg the rights to family life and personal liberty as well as the prohibitions of ill-treatment and *refoulement* (see below 3.3.3).

Article 78(1) also requires CEAS law to respect the 1951 Geneva Convention. This rules out certain allocation mechanisms. In particular, refugees 'lawfully present' in a Member State per Article 32 of the Convention may only be removed on grounds of national security or public order. Therefore, they may not be subjected to involuntary 'transfers' on other grounds.[8] The duty to respect the Geneva Convention also implies a duty to take into account authoritative guidance from UNHCR,[9] including the principle that persons seeking protection in a State should only be referred to another State if there is already a 'connection or close links'.[10]

In addition to protection-related principles, Article 80 TFEU lays down the principle of solidarity and fair-sharing of responsibilities.[11] This provision seeks to address the deeply unbalanced distribution of protection seekers and beneficiaries among the Member States,[12] which may in turn undermine the Member States' commitment to faithfully implement EU law.[13] The connection with responsibility-allocation is of course strong: absent adequate 'fair-sharing' schemes, no responsibility-allocation mechanism can be efficient or sustainable in the long term. This doesn't mean that Article 80 must necessarily be implemented *via* responsibility-allocation, ie the physical redistribution of protection applicants or beneficiaries. As its wording makes clear, the legislator has wide discretion so long as he adopts 'appropriate' measures whenever 'necessary'.

One last aspect that is connected to responsibility-allocation is the harmonization of asylum standards across the EU. Looking at Article 78(2) TFEU, one might argue that responsibility-allocation under letter (e) presupposes a 'level playing field of protection' under letters (a), (b) and (d). This, however, is not a legally necessary connection. Other parts of EU primary law explicitly allow some Member States to selectively participate in CEAS legislation – conceivably, to responsibility-allocation only.[14] The EU legislator has itself associated four non-EU States to the Dublin system without requesting that they also respect EU asylum standards,[15] nor has the EU Court of Justice (ECJ) demurred.[16] Of course, as a matter of practice, a reasonably 'level' playing field is a precondition for fair and efficient responsibility-allocation (see below, 3.3.2 and 3.3.3).

3. The Dublin system

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8 For a stimulating discussion of the terms 'lawfully present' see James C. Hathaway, Michelle Foster, *Law of Refugee Status* (2nd edn, CUP 2014) 33ff.

9 Case C-528/11 *Halaf* EU:C:2013:342, para 44.

10 UNHCR Executive Committee Conclusions (n 2).

11 See chapter **[…]**. See also Daniel Thym, Lilian Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions', (2017) 24(5) MJECL 605.

12 European Parliament, 'Evolution of the Number of Asylum Seekers and Refugees in the EU' <http://www.europarl.europa.eu/external/html/welcomingeurope/default_en.htm> accessed 5 February 2019.

13 For the full argument, see Roland Bieber, Francesco Maiani, 'Sans solidarité point d'Union européenne' (2012) 2 RTDeur 295.

14 See eg Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C202/295.

15 See eg Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2001] OJ L93/40.

16 Joined Cases C-411/10 and C-492/10 *N.S. and Others* EU:C:2011:865, para 78.

3.1 Basic tenets and evolution

First established under the abovementioned Schengen and Dublin Conventions, the Dublin system was ‘communautarized’ with the 2003 ‘Dublin II Regulation’ (DRII),[17] then recast in 2013 with the current ‘Dublin Regulation’ (DRIII).[18] The approach followed throughout these transformations has been ‘to confirm the principles underlying’ the system ‘while making the necessary improvements in the light of experience’ (see Recitals 5 DRII and 9 DRIII). The ‘principles’ are encapsulated in Article 3(1) DRIII.

1. Every application lodged by a third-country national in the ‘Dublin area’ must be examined by one of the Member States. This reflects the ‘main objective’ of the system according to the ECJ: ‘to guarantee effective access to an assessment of the applicant’s [protection needs]’.[19]
2. In line with Article 78 TFEU, each application must, in principle, be examined ‘by a single Member State’. Preventing the examination of multiple applications should, in turn, reduce the aggregate effort required of Member State for processing asylum claims.
3. The responsible State ‘shall be the one which the criteria set out [in the Regulation] indicate is responsible’. Such criteria are ‘objective’ (Recital 4 DRIII) in that they apply independently from the applicant’s consent or preferences.[20]

Recital 5 DRIII also notes that responsibility determination must be ‘rapid’ and must not ‘compromise the objective of the rapid processing of applications for international protection’. More generally, the ECJ has observed that the Dublin system has been adopted

> ‘in order to rationalise the treatment of asylum claims […] it being the principal objective […] to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.’[21]

While continuity has characterized the history of Dublin, two important evolutions must be mentioned. First, in 2000 the Dublin system has been complemented with the Eurodac database.[22] This allows Member States to swiftly ascertain whether the person before them has lodged an application in another Member State, and whether she has irregularly crossed an external border into another Member State (see below, 3.2.2 and 3.2.3).

Secondly, in the passage between Dublin II and Dublin III, the ‘spirit’ of the Regulation has changed. Recital 9 DRIII states that the aim of the 2013 recast was to strengthen ‘the effectiveness of the Dublin system *and the protection granted to applicants*’ (emphasis added). Other Recitals substantiate the point (see Recitals 13-19, 21, 24, 27, 32 and

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[17] Council Regulation No. 343/2003 of 18 February 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 [2003] OJ L50/1.

[18] 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) [2013] OJ L180/31. For in-depth analysis, see Constantin Hruschka, Francesco Maiani, ‘Dublin III Regulation (EU) No 604/2013’, in Hailbronner and Thym (n 7), 1478.

[19] Case C-648/11 *MA and Others* EU:C:2013:367, para 54.

[20] Only the application of three criteria based on family ties is conditional upon the consent of the concerned persons: see arts 9, 10, 16 and 17(2) DRIII.

[21] See *N.S. and Others* (n 16), para 79 (emphasis added).

[22] See now Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints [2013] L180/1 (‘Eurodac Regulation’).

39).[23] While Member State practice fails to live up to the lofty principles affirmed in the preamble (see below, 3.3.2), this new 'spirit' has had a profound impact on the interpretation of the Regulation by the ECJ. Whereas the infamous *Abdullahi* judgment described Dublin II as a set of 'organisational rules governing the relations between the Member States', and deduced from this draconian limitations to appeal rights,[24] the *Ghezelbash* judgment noted the new focus on applicants' rights, stressed 'significant' differences between the two Regulations, and fully reversed the position on appeal rights (see below, 3.2.3).[25]

3.2 Key elements

3.2.1 Subject-matter and scope of application

The Regulation lays down the criteria to determine which 'Member State' is 'responsible' for examining an application for protection presented in the Dublin area by a third-country national (see Articles 1, 2(a)-(c) and 3(1) DRIII).

The expression 'Member State' includes the EU States as well as the four associated EFTA States.[26] The 'responsibility' allocated by the Regulation is outlined in Article 18, whereby the responsible State must 'take charge' of the applicant, 'take' her 'back' if she subsequently moves to another Member State, and examine her application.[27] Other aspects of responsibility are not explicitly spelled out. As long as the applicant is on their territory, both the responsible and the determining States must provide her with reception conditions in line with EU standards,[28] if applicable.[29] After status determination, the responsible State must host those to whom it grants protection, who enjoy only delayed and conditional mobility rights under EU law,[30] and remove, in principle, those whose claims it rejects. Should beneficiaries of protection move to another State without authorization they may be returned to the responsible State – not on the basis of the Dublin system, which is inapplicable to them,[31] but rather on the basis of Article 6(2) of the Return Directive.

Responsibility only ceases if another Member State issues a residence document to the applicant, if she leaves the Dublin area for three months or more, or if she leaves the Dublin area in compliance with a removal order following the rejection or withdrawal of her application (Articles 19 and 20(5) DRIII). In the last two cases, if the applicant returns to the Dublin area and lodges a new application, responsibility-determination starts afresh.

3.2.2 Responsibility criteria and discretionary clauses

The responsibility criteria established by the Regulation are for the most part located in Chapter III of the Regulation. 'Chapter III criteria' must be applied in the order in which they are set out (Article 7(1) DRIII): before even considering eg the Article 13(1) criterion, the determining authority should examine – in the right order – the criteria listed in Articles 8 to

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23 For an overview see Constantin Hruschka, 'The (reformed) Dublin III Regulation' (2014) 15 ERA Forum, 469.

24 Case C-394/12 *Abdullahi* EU:C:2013:813, paras 56ff.

25 Case C-63/15 *Ghezelbash* EU:C:2016:186, paras 45ff. See also Case C-528/15 *Al Chodor* EU:C:2017:213, paras 33 ff; Case C-670/16 *Mengesteab* EU:C:2017:587, paras 45ff.

26 See above n 15.

27 This does not necessarily entail an examination on the merits: see art 3(3) DRIII and Case C-695/15 PPU *Mirza* EU:C:2016:188, paras 37 ff.

28 Case C-179/11 *Cimade and Gisti* EU:C:2012:594.

29 As explained, not all Dublin Member States are bound by EU standards.

30 See chapter **[…]**.

31 Case C-36/17 *Muse Ahmed* EU:C:2017:273 (Order).

12 and exclude their applicability. Chapter III criteria are furthermore subject to the 'freezing rule' of Article 7(2), whereby they apply on the basis of the factual situation that existed at the date when the first application protection has been lodged with a Member State.

Topping the hierarchy is a self-contained set of criteria applicable to unaccompanied minor applicants (Article 8). Under Article 8(1)-(3), responsibility is assigned to the Member State where family members or broadly defined relatives are 'legally present' (see Articles 1(g)-(j) DRIII). Failing this, the responsible State is the one where the minor has lodged his application and is present.[32] The application of these criteria is subject to a best interest determination.

Articles 9-15 list the criteria applicable to adult applicants and accompanying minors.[33] The criteria based on family links come first (Articles 9-11). They are however restrictively framed. To begin with, Article 1(g) DRIII confines the notion of 'family member' to the spouse or partner, unmarried minor children and – if the applicant is an unmarried minor – the father, mother, or adult responsible.[34] Furthermore, the family tie must already have existed in the country of origin – a problematic requirement[35] that may have perverse effects in cases where the family link is formed in transit. Additional conditions must be fulfilled under each criterion: under Articles 9 and 10, the family member must have held the 'right' status at the time of the first application.[36] Under Article 11, the family members must all be applicants having lodged their claims in the same State simultaneously or at close dates.

Articles 12-15 lay down the criteria based on documentation, entry and stay. Responsibility falls first on the Member State that has issued a residence document or visa to the applicant.[37] The subsequent criterion – Article 13(1) – assigns responsibility to the Member State whose external borders the applicant has irregularly crossed to enter the Dublin area.[38] As most applicants enter the Dublin area without a residence document or a visa, and given the restrictive formulation of the family criteria, this is meant to be the key criterion in the hierarchy. However, its practical application depends on whether persons irregularly crossing the external borders are systematically identified and their fingerprints stored in Eurodac.[39] As this does not always occur, the 'irregular entry' criterion is frequently invoked but less frequently applied than one might expect (see below 3.3.1). The remaining Chapter III criteria assign responsibility on the basis of irregular stay in a Member State, of visa-waived entry, and of making an application in the transit area of an airport.

A few more responsibility criteria are located outside of Chapter III. Article 16 lays down a 'binding responsibility criterion' (see Recital 16) based on dependency from a family relation or *vice versa*. Article 3(2) stipulates that '[w]here 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 […] was lodged [is] responsible'. These criteria are not subject to Article 7, as established by the latter's wording. Therefore, the 'freezing rule' is inapplicable to them, and their rank is not determined by position but rather by wording and purpose. Accordingly, Article 16 takes precedence over any criterion that would lead to separating dependent family relations, while Article 3(2) is worded as a 'default' criterion.

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32 *MA and Others* (n 19).

33 See art 20(3) DRIII.

34 Individual criteria relax some of these limitations: see arts 9 and 11(1) DRIII.

35 *Hode and Abdi v the United Kingdom* App no 22341/09 (ECHR, 6 November 2012).

36 The concerned persons must also express their consent.

37 Responsibility arises for documents that are valid or have been expired for less than two years. On the role of the Visa Information System (VIS), see recital 31 DRIII.

38 The criterion only applies if the asylum request is lodged within 12 months of the crossing: Case C-490/16 *A.S.* EU:C:2017:443, paras 44ff.

39 See Art 14 Eurodac Regulation.

Taken together, the criteria are the expression of a political bargain among the Member States in the context of the 'progressive creation of an area without internal frontiers' (Recital 25 DR III). In the words of the Commission, they are based on the idea that

> 'responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity.'[40]

The applicants' intentions are relegated to an ancillary role and, contrary to authoritative UNHCR guidance, their 'close links' are not the controlling consideration (see above, 2.2.2). Indeed, in the view of UNHCR, only the criteria based on family ties and on possession of a residence document conform to the 'close links' guideline, while it is 'wholly inappropriate' to derive responsibility from irregular border-crossing.[41]

For these reasons, and for others explained below, the mechanical application of the criteria may cause undue hardship to applicants or even give rise to human rights violations. The Regulation therefore includes two 'discretionary clauses' in Article 17, which Member States are encouraged to apply on compassionate grounds (see Recital 17). The first and most important is the so-called 'sovereignty clause'. According to it, Member States may at any time decide to examine a claim that is submitted to them and thus assume responsibility for it.[42] The 'humanitarian clause', by contrast, allows the determining or the responsible State to ask another State to take charge of the applicant in order to reunite her with 'any family relations'.

3.2.3 Dublin procedures

There are essentially two kinds of Dublin procedures: 'take charge' and 'take back'.

'Take charge' procedures aim to determine which Member State is responsible under the criteria and, if necessary, to transfer the applicant there. The procedure begins when the applicant first lodges her asylum claim with a Member State (the 'determining State').[43] Within 72 hours, her personal data must be stored in Eurodac.[44] This enables the other Member States to send the applicant back should she move without authorization to their territory or lodge a new application there while responsibility determination is still on-going.[45] It also makes it possible to determine responsibility under the default criterion of Article 3(2).

After registration, the determining State ascertains the relevant facts (eg family ties). The Regulation grants the applicant extensive information and participation rights (Articles 4-5).[46] The criteria may designate the determining State as responsible, or the latter may decide to apply the sovereignty clause. In both cases, responsibility-attribution may (and does) occur implicitly.[47]

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[40] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM (2008) 820, 3 December 2008, 5ff.

[41] UNHCR, Revisiting the Dublin Convention, January 2001.

[42] *Halaf* (n 8), para 36.

[43] On the concept of 'lodging' see *Mengesteab* (n 25).

[44] Eurodac Regulation, art 9(1).

[45] Art 20(5) only refers to cases where the first application has been withdrawn, but this does not appear to be decisive: *Mengesteab* (n 25), paras 93, 95.

[46] Additional guarantees apply for minors: art 6 DRIII.

[47] Case C-56/17 *Fathi* EU:C:2018:803, paras 42ff.

If, to the contrary, the determining State considers that another State is responsible, it may send a 'take charge' request including relevant proof or circumstantial evidence.[48] This must be done within three months of the lodging of the application,[49] failing which the determining State becomes automatically responsible.[50] The requested State has, in turn, two months to accept or decline. Failure to reply amounts to acceptance. When the requested State explicitly or implicitly accepts, it becomes the responsible State.

At this point, the determining State issues a decision declaring the application lodged with it inadmissible and orders the transfer of the applicant to the responsible State. This 'transfer decision' must include the information listed in Article 26 DRIII and be notified to the applicant. The State must then execute the transfer within six months[51] from the date of the acceptance. If a suspensive appeal is lodged, the time-limit runs from the date of the final judicial decision.[52] Failure to meet the deadline automatically transfers responsibility back to the determining State.[53]

Once the applicant is in the responsible State, status determination proper begins. If the applicant moves without authorization to another State or lodges a new application there, this second State may initiate a 'take back' procedure. The procedure is *mutatis mutandis* like the 'take charge' procedure except that it does not focus on applying the responsibility criteria, but rather on enforcing responsibility that has already been established, or ascertaining whether such responsibility has ceased (see above, 3.2.1). Responsibility may shift also in take back procedures. Thus, if one of the States involved misses the deadlines to submit or reply to a request, or to execute the transfer, it becomes itself responsible.

Persons subject to a transfer decision have the right to an effective judicial remedy. They must be allowed a reasonable period of time to appeal, and the appeal must be suspensive per Article 27(3)-(4). They also have the right to legal assistance – free of charge, if they cannot afford the costs, subject to limitations that Member States may introduce such as a merits test. In light of Recital 19 DRIII, the Court of justice has dismissed arguments to the effect that the grounds of review against Dublin transfers should be limited. To the contrary, it has affirmed that applicants may invoke the full range of their fundamental rights as well as the incorrect application of the criteria or time-limits to have a transfer decision annulled.[54]

Article 27 does not foresee the right to appeal 'non-transfer' decisions, ie decisions whereby the determining State assumes responsibility,[55] even though these may be in violation of the Regulation or of fundamental rights. Proposals have been made to address the situation *de lege ferenda*.[56] As the law stands already, Member States must make available to applicants an effective remedy against *any* decision affecting their EU or ECHR rights under Articles 47 CFR and 13 ECHR.[57]

The Regulation includes specific safeguards against detention. Under Article 28, Member States may detain a persons subject to Dublin procedures only if it is determined, on a case-by-case basis, that there is a significant risk of absconding, and only if this is strictly

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48 The evidentiary rules are laid down in art 22 DRIII.

49 If the request is based on a Eurodac 'hit', it must also respect a two-months deadline from the 'hit': see *Mengesteab* (n 25), paras 63ff.

50 See *mutatis mutandis* Case C-201/16 *Shiri* EU:C:2017:805, paras 29ff.

51 The deadline is longer in case of detention and if the applicant absconds.

52 Case C-19/08 *Petrosian* EU:C:2009:41.

53 *Shiri* (n 50), paras 29ff.

54 *Ghezelbash* (n 25), para 57ff; Case C-155/15 *Karim* EU:C:2016:410; *A.S.* (n 38); *Mengesteab* (n 25); Case C-360/16 *Hasan* EU:C:2018:35.

55 See also *Fathi* (n 47), paras 57ff.

56 See European Commission, Proposal for a Regulation of the European Parliament and of the Council, COM(2016) 270 final, art 28(5).

57 See, in this regard, Meijers Committee, *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) 5.

necessary to secure the transfer. National legislation must define objective criteria to evaluate the risk of absconding. Failing this, detention is illegal.[58] Article 28 furthermore lays down maximum time-limits, as well as accelerated deadlines for Dublin procedures concerning persons in detention.

Under Article 36 DRIII, Member States may conclude administrative arrangements to simplify procedures or shorten deadlines. Such arrangements may not otherwise deviate from the Regulation, and may not in particular curtail individual rights and guarantees. In order to avoid violations, Article 36(3)-(6) foresees a preventive monitoring procedure before the Commission.[59]

3.3 The Dublin system in action: narratives and problems

3.3.1 Dublin in figures[60]

In 2017, 166'000 Dublin requests were sent out and 23'700 persons were transferred. It was a record year, and these figures evoke a vast administrative effort and a powerful impact on the lives of thousands. At the same time, when considered against the number of applications lodged in the Member States, they underscore the continuing irrelevance of Dublin as a responsibility-allocation mechanism.

On average, over the past ten years, the number of applicants transferred under the system has corresponded to 3% of all applications made in the Dublin area. Most transfers (60-80% yearly) have been 'take backs'. 'Take charges', ie transfers made because the criteria indicated as responsible a State other than the State of application, were effected on average for less than 1% of all applications. If this is true, then asylum claims were examined where they were first lodged in more than 99% of the cases, leaving one to wonder about the utility of the Dublin criteria and the administrative effort for applying them.

On top of being ineffectual, the system is notoriously inefficient. In 2008-2017, only about 20% of all the Dublin requests, and 30% of all transfer decisions, have led to a transfer. Most of the tens of thousands of Dublin procedures carried out yearly achieve no tangible result, even when a transfer decision is adopted. To add insult to injury, 'net' flows of transfers between States are often – though not always – 'close to zero'.[61]

In light of the above, one cannot but agree with Steve Peers' statement 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'.[62]

Other than 'inefficiency' and 'ineffectiveness', 'distributive unfairness' is a key theme in the debates surrounding Dublin. In *theory*, by virtue of the 'irregular entry' criterion, the system should shift massively, unsustainably and unjustifiably asylum responsibilities on border States. However, as shown above, the actual redistributive effects of the Dublin criteria are minuscule. In reality, as Dublin mostly functions as 'take back' system, its effect is to lock-in the responsibilities incurred by the few Member States that receive large numbers of

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[58] *Al Chodor* (n 25).

[59] See also below 3.3.2.

[60] The figures provided are elaborated from Eurostat data ('outgoing' dataset): <https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database> accessed 5 February 2019. See also Eurostat, Dublin statistics on countries responsible for asylum application (2018) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application> accessed 8 February 2019.

[61] European Commission (n 56), 12.

[62] Peers (n 7) 300.

applications – 'first entry', 'transit' and 'destination' States. Indeed, the main recipients of Dublin transfers for the past four years have been Italy and Germany ie the top recipients of asylum applications.[63]

Lastly, we look at what (little) role each criterion plays in practice, we are again reminded of the gulf existing between theory and practice. In theory, 'irregular entry' should be the dominant criterion by far. But while many outgoing take charge requests are based on it,[64] most effected transfers have been based on documentation in past years. More recently, Greece has proactively applied the family criteria vis-à-vis Germany – again defying predefined ideas about 'winners' and 'losers' – and this has determined their ascent from symbolic window-dressing (eg 101 transfers in the whole of 2010) to dominant criteria in 2017 (4'550 transfers, ie 47% of all take charge transfers). The 'irregular entry' criterion, for which statistics are incomplete, has apparently played a minor role.

3.3.2 Perverse incentives, side-effects and the escape from Dublin

A more qualitative look at Dublin practice uncovers a number of persistent problems providing useful context to the figures given above.

First and foremost, the system has proved incapable of eliciting sufficient cooperation from those to whom it applies, with dire consequences for its efficiency and cost-effectiveness.[65] In policy discussions, this translates in the mistaken claim that the system is undermined by 'abuse and asylum shopping'.[66] While there may be individual cases of bad faith, the long-standing and widespread resistance opposed by applicants, often at great personal cost, reflects above all the arbitrariness of the Dublin system itself and the shortcomings of the CEAS.

- As noted, the responsibility criteria do not take sufficiently into account the personal connections, needs and aspirations of applicants. Member States have on the whole exacerbated this shortcoming (see below). Confronted to drawn-out processes, prolonged uncertainty, generally inimical and at times genuinely Kafkaesque decisions,[67] applicants opt *en masse* for litigation or evasion (eg absconding and engaging in secondary movements).
- The persistent lack of a level playing field of protection between the Member States, and the substandard conditions prevailing in many of them, further accentuate the unfairness of the system and fuel applicants' resistance.

Important and deep-seated as it is, lack of cooperation from the *'Dublinés'* is also not the sole factor behind its failure. Transfer ratios for family transfers provide a good illustration. These are by definition consensual, and if applicants' cooperation was the only determinant for system efficiency they should be close to 100%. However, (incomplete) Eurostat data place that figure at 56% over the past ten years. This is almost double the average transfer ratio, showing that applicants' cooperation *is* important. But it's far from 100%: other factors are at play – factors that pertain to Member States.

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63 For a broader analysis of the issue see Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum* (Brill Nijhoff 2016); Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) NJIL (forthcoming).

64 UNHCR, *Left in limbo* (UNHCR 2017) 90.

65 ibid 151ff.

66 See European Commission (n 57), 3, 4, and 97. For a sustained critique of the expression 'asylum shopping' see Minos Mouzourakis, 'We need to talk about Dublin' Working Paper Series no. 105 (2014) RSC University of Oxford, 20ff.

67 Eg UNHCR (n 64) 104.

National self-interest, ie the overarching desire to minimize own responsibilities, is another powerful explanation for system ineffectiveness and inefficiency. Border States have long been accused of avoiding the identification and fingerprinting of applicants for just this purpose. At the height of the 2015 crisis, 'transit' States have been known to do the same and to 'wave' protection seekers 'through' to neighbouring States.[68] Responsibility-shirking is however a game in which all Member States partake. For instance, some 'inland' States have been particularly creative in inventing abstruse interpretations whose sole purpose is to make transfers to border States possible beyond the stipulations of the Regulation.[69]

The victims of this antagonistic approach are mainly the applicants. Hell-bent on minimizing responsibilities, States are disinclined to accept requests based on the 'dependency' or 'humanitarian' clauses of the Regulation, which have remained a dead letter.[70] In order to submit requests backed by strong evidence, well within the deadline, some 'Dublin units' tend to send take charge requests as soon as they have a Eurodac 'hit'.[71] In doing so, they often forego the interview with the applicant and omit to consider the family criteria. In one fell stroke, they bypass key guarantees and upend the hierarchy established by the Regulation to the detriment of the family criteria. Last but not least, in order to secure as many transfers as possible, some Member States resort routinely to coercion.[72]

The latest trend in the imposition of national self-interest over the correct application of the Regulation is – quite simply – the latter's bypassing. An ever-larger number of States is engaging in formal and informal push-back practices at the border.[73] Adopted in the name of countering secondary movements, such practices violate the prohibition of collective expulsion,[74] deny the right recognized by EU Law to every migrant to lodge an asylum application and, more to our point, ride roughshod over the substantive and procedural guarantees enshrined in the Regulation. Much in the same vein, although purportedly in line with article 36 DRIII, some Member States have concluded 'administrative arrangements' whose compatibility with the Dublin procedure is more than dubious.[75]

Lack of resources or bureaucratic complexity also account for a number of problems observed in the implementation of the system. Again, it is more often than not the *'Dublinés'* who have suffered for such bureaucratic inefficiencies. For instance, interpretation services have been unavailable in several States, and family tracing obligations under Article 6 have been routinely left unfulfilled, or activated only when the applicant could provide the whereabouts of family members – a practice that defeats the very purpose of tracing.[76] Greece has gone so far as to request transferees to pay for their transfer to other Member States – a practice that blatantly violates Article 30 DRIII, strips applicants of their rights under the Regulation, and is likely the key reason why many 'family transfers' are eventually not carried out.[77]

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68 Case C-646/16 *Jafari* EU:C:2017:586.

69 See Case *Abdullahi* EU:C:2013:473 Opinion of AG Villalon, paras 56-65.

70 UNHCR (n 64) 112.

71 ibid 43.

72 ibid 148ff and 160ff.

73 See ECRE, AIDA, 'Access to Protection in Europe: Borders and Entry into the Territory', (2018), 9ff <https://www.asylumineurope.org/sites/default/files/shadow-reports/aida_accessi_territory.pdf> accessed 5 February 2019.

74 *Sharifi v Italy* App no 16643/09 (ECHR, 21 October 2014).

75 See ECRE, 'Bilateral agreements: Implementing or bypassing the Dublin Regulation?' (December 2018) Policy paper 5 <https://www.ecre.org/wp-content/uploads/2018/12/Policy-Papers-05.pdf> accessed 5 February 2019.

76 UNHCR (n 64) 35, 76ff, 98ff.

77 ibid footnote 750. Note that nearly all 'family transfers' ordered under the Regulation are from Greece.

3.3.3 Human rights, mutual trust and effective protection under Dublin

Many of these issues translate into human rights problems frequently giving raise to litigation: the insufficiency of the family criteria and their imperfect application, combined with the scant use of the discretionary and dependency clauses, result in frequent interferences in the applicants' family lives; recourse to detention raises issues of personal liberty, human dignity, and child protection; the inclination of States to transfer even persons in ill health has its *pendant* in the frequent invocation of the prohibition of inhuman and degrading treatment; transfers to Member States where reception conditions or protection standards are problematic routinely raise 'safety' concerns.[78] European case-law has evolved unevenly on these various issues.

Concerning family unity, the approach of the Strasbourg Court has so far been disappointingly unprincipled and dismissive.[79] In *K,*[80] the ECJ has adopted a more protective stance by relying on the Regulation provisions rather than on fundamental rights stipulations. The potentialities of Article 8 ECHR remain thus unexploited in a Dublin context,[81] with family considerations playing all in all a more prominent role in the separate arena of protection against *refoulement* (see below).

Concerning pre-transfer detention, the general jurisprudence on Articles 3 and 5 ECHR applies, and it has been especially protective of minors.[82] As noted, the Regulation adds further guarantees concerning the legality, necessity and maximum time-limits of detention which the ECJ seems intentioned to apply strictly.[83]

The most interesting case-law has developed around situations where the applicant argues that a transfer would expose her to ill-treatment or onward *refoulement* in the responsible State. Under both ECHR and EU Law, the initial presumption is that the responsible State will abide by international[84] and EU standards, if applicable,[85] but this 'presumption of safety' is rebuttable.[86] The two Courts have long diverged on the conditions of such rebuttal. The Strasbourg Court has consistently applied its traditional 'real risk' test under Article 3 ECHR. The ECJ, while accepting that Article 4 CFR may prohibit a transfer, has relied heavily on 'mutual trust' and improperly insisted that transfers should only be prohibited in 'exceptional circumstances'.[87] In *Abdullahi*, it has gone so far as to apparently hold that only risks stemming from 'systemic deficiencies' in the asylum system of the responsible State could bar transfers.[88] The Strasbourg Court has explicitly disagreed on the good ground that once a

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[78] These problems are typical of coercive 'asylum sharing' agreements: see Tom Clark, François Crépeau, 'Human Rights in Asylum Sharing and other Human Transfer Agreements' (2004) Vol. 22/2 NQHR 217.

[79] See particularly *A.S. v Switzerland* App no 39350/13 (ECHR, 30 June 2015). See also *Z.H. and R.H. v Switzerland* App no 60119/12 (ECHR, 8 December 2015).

[80] Case C-245/11, *K* EU:C:2012:685.

[81] See, however, Joined Cases C-582/17 and C-583/17 EC:C:2018:975, Opinion of AG Sharpston, paras 59ff. See further: Ulrike Brandl, 'Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?' in Chetail, De Bruycker and Maiani (n 63); Bernard McCloskey, 'Third-Country Refugees: The Dublin Regulation/Article 8 ECHR Interface and Judicial Remedies' (2017) 29 4 IJRL 641.

[82] See eg *A.B. and Others v France* App no 11593/12 (ECHR, 12 July 2016).

[83] *Al Chodor* (n 25).

[84] See also Recital 3 DRIII.

[85] See Case C-578/16 *C.K. and Others* EU:C:2017:127, para 70.

[86] *M.S.S. v Belgium and Greece* App no 30696 (ECHR, 21 January 2011); *N.S. and Others* (n 16).

[87] *N.S. and Others* (n 16), paras 80-86 and Opinion 2/13 EU:C:2014:2454, para 191. It is improper to squeeze a 'rule/exception' element in reasonings based on Art 4 CFR because once a relevant risk is established, the transfer is barred regardless of whether this is a frequent or rare occurrence.

[88] *Abdullahi* (n 24), para 60.

real risk of ill-treatment is shown, its source is immaterial.[89] This rift has culminated in Opinion 2/13 of the ECJ.[90]

Fortunately, the ECJ appears to have retraced its steps and adhered to the position of the ECHR.[91] For both Courts, it would now appear that 'mutual trust' merely establishes a starting presumption of safety in Dublin matters. Contrary to previous *dicta* of the ECJ,[92] the authorities of the sending State may (and must) fully assess the situation in the responsible State. Indeed, according to both Courts, when the applicant presents elements sufficient to cast a doubt on the 'safety' of the transfer it will be for the authorities of the transferring State to dispel it by taking into account both the general situation in the responsible State and individual circumstances.[93] All in all, there is no deviation from the structure of reasoning ordinarily applicable to Article 3 ECHR claims.

The concept of 'systemic flaw' remains relevant in some respects. First, once a 'systemic deficiency' entailing a relevant risk is established, it is no longer necessary for the applicant to adduce individual circumstances.[94] Secondly, the finding that a transfer is impossible owing to a 'systemic flaw' triggers the application of Article 3(2) DR. Thereunder, the determining State may 'continue to examine the criteria' to ascertain whether another Member State could be responsible.[95] In all other cases, by contrast, the determining Member States will have to stay the transfer and assume responsibility once the deadline expires, with the option of applying the sovereignty clause forthwith.[96]

Until now, 'systemic deficiencies' of such a magnitude as to bar all transfers to a Member State have been found only in the case of Greece.[97] Under the *Tarakhel* case-law, systemic problems of lesser magnitude, such as insufficient reception capacities, trigger heightened requirements of individualized scrutiny.[98] When vulnerable persons (eg children) are at issue, this further translates in an obligation to obtain individual assurances capable of dispelling all risks.[99]

Somewhat surprisingly, in *A.S.*, the Strasbourg Court has refused to apply *Tarakhel* to torture victims suffering from severe post-traumatic stress disorder.[100] This judgment is worth examining as it illustrates the tensions and inconsistencies that traverse Dublin case-law.

In *A.S.*, the applicant was being transferred against medical advice from Switzerland, where he had a supportive care and family environment, to Italy, where no family support was forthcoming and where per the assessment made in *Tarakhel* he ran the risk of being left without suitable accommodation.[101]

A claim based on an interference with family life was raised, which the Court dismissed without probing the applicant's dependency from his sisters living in Switzerland. As for Article 3 ECHR, the Court held that the applicant was not 'critically ill', and added that the case did not 'disclose very exceptional circumstances, such as in *D v. the United Kingdom*'.

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89 *Tarakhel v Switzerland* App no 29217/12 (ECHR, 4 November 2014), para 101ff
90 Opinion 2/13 (n 87).
91 *C.K. and Others* (n 85), para 65; see also paras 91ff.
92 See by contrast Opinion 2/13 (n 87), para 192.
93 ibid 75ff.
94 *M.S.S.* (n 86); *N.S. and Others* (n 16).
95 See also *N.S. and Others* (n 16) which art 3(2) 'codifies' and *C.K. and Others* (n 85), para 63.
96 *C.K. and Others* (n 85), paras 88ff.
97 *M.S.S.* (n 86); *N.S. and Others* (n 16) and European Commission, 'Evaluation of the Implementation of the Dublin III Regulation', Final report, 18 March 2016.
98 *Tarakhel* (n 89).
99 ibid. On the current challenges confronting transferees in Italy, see OSAR, DRC, 'Mutual Trust is not Enough' (DRC, 2018) <https://drc.ngo/media/5015811/mutual-trust.pdf> accessed 5 February 2019.
100 *A.S. v Switzerland* (n 79).
101 *Tarakhel* (n 89), para 120.

Furthermore, the Court stated that there was 'no indication that the applicant, if returned to Italy, would not receive appropriate psychological treatment'.[102]

Leaving aside the contestable application of *D* to Dublin situations, two aspects of this reasoning stand out. First, the Court chose to focus its assessment entirely on medical aspects and to disregard entirely the deprivation of family support and the uncertain availability of accommodation suitable to a torture victim. Secondly, while purporting to apply *Tarakhel*, it in fact applied an entirely different test. In *Tarakhel*, given the shortcomings of the Italian reception system, the Court considered that the Swiss authorities needed 'detailed and reliable information' to satisfy themselves that the applicants would be taken charge of adequately. In *A.S.*, the Court based itself on the same assessment of reception conditions in Italy[103] but contented itself of noting that there was 'no indication' that anything was amiss. In other words: in *Tarakhel* country reports had effectively rebutted the 'safety presumption' while leaving room for a transfer predicated on 'individual assurances'; in *A.S.*, the very same reports had left the 'safety presumption' intact, so that it was for the applicant to provide for contrary 'indications'. Such covert changes of approach are not uncommon in Dublin case-law and they explain many of its fluctuations.

Meanwhile, further developments have arguably rendered *A.S.* obsolete. In *C.K.*, the ECJ has held that transfers resulting in a 'real and proven risk of a significant and permanent deterioration' of the applicant's state of health would constitute *per se* inhuman and degrading treatment.[104] Furthermore, in a case practically identical to *A.S.*, the UN Committee Against Torture has found against Switzerland,[105] stressing the need for individualized assurances and for an in-depth assessment of the applicant's special needs, including his emotional dependency on family support, whenever medical evidence casts doubts on a proposed transfer. In many ways, this is a more faithful continuation of *Tarakhel* than *A.S.* was. And whatever the position under Article 3 ECHR, it stands as authority under the UN Convention Against Torture.

4. Allocation in times of crisis: the 2015-2017 relocation programme

As recalled above, Article 78(3) TFEU foresees the adoption of 'provisional measures' for the benefit of Member States 'confronted by an emergency situation characterized by a sudden inflow' of third-country nationals. This clause was applied for the first time during the 'refugee crisis' of 2015. As arrivals to Greece intensified, the Schengen area and Dublin system appeared to founder in chaos.[106] The EU adopted a package of measures to restore a semblance of order. Most prominent were the introduction of the 'hotspot approach' and of relocation measures for the benefit of two 'frontline States', Greece and Italy.[107] Only relocation is examined here, but the link with hotspots must be stressed: relief was offered to the 'frontline States' on condition that arriving migrants be fingerprinted and contained there.[108]

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102 ibid para 36.

103 *A.S.* (n 79), para 14.

104 *C.K. and Others* (n 85), para 74.

105 UN CAT, *A.N.* CAT/C/64/D/742/2016, 21 September 2018, para 9.

106 For interesting readings of the crisis, see Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: the Continuing Failure of the Common European Asylum System' (2016) 53 CMLR, 607; Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 CMLR, 1545.

107 European Council, Conclusions, EUCO 22/15, 25-26 June 2015, para 4.

108 See Articles 7 and 8 of the 'relocation Decisions' (Council Decisions (EU) 2015/1523 of 14 September 2015, [2015] L239/146, and (EU) 2015/1601 of 22 September 2015, [2015] L248/80, establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

The relocation programme, established under two Council Decisions adopted in September 2015, was a partial and temporary derogation to Dublin.[109] The Decisions foresaw the transfer of 160'000 applicants from Greece and Italy over two years (later reduced to 98'255)[110]. Only applicants identified and subjected to the Dublin process in the frontline States, and found to fall under their responsibility, were eligible. Eligibility was further restricted to applicants having arrived between specified dates, and possessing a nationality for which the EU-wide recognition rate at 1st instance was 75% or higher. The latter condition aimed to ensure swift access to protection to those 'in clear need of international protection', and to prevent the relocation of persons likely to receive a negative decision.

The selection of the State of relocation happened through a process of 'matching'. Member States, who were duty-bound to make places available up to a specified 'quota', could only refuse an individual applicant on grounds of national security or public order. For their part, the persons to be relocated had no right to choose the relocation State or to refuse relocation as such. *De facto*, however, only relocations to which applicants consented were carried out.[111]

The scheme was challenged by two Member States, and this gave the ECJ the opportunity to clarify several aspects of Article 78(3) TFEU.[112] First, the Court found that this provision can support 'temporary' measures not only supplementing legislative acts, but also in derogation thereof so long as their material and temporal scope is circumscribed.[113] Secondly, the Court found that 'temporary' measures may well exceed the foreseeable duration of a legislative procedure, and produce long-lasting effects, without losing their temporary character.[114] Third, the Court found that an 'emergency situation characterized by a sudden inflow' may exist even if the inflow spans several months or years, and is only one of several factors contributing to the 'emergency' on the ground.[115] Lastly, and no less importantly, the Court afforded the Council broad discretion in deciding whether the conditions to apply Article 78(3) are fulfilled, in defining the type of the 'measures' to be adopted including relocation, and in setting their duration.[116]

The ECJ has thus confirmed the legality of the scheme and its availability in case of future crises. A different question is whether relocation has worked – one that can only briefly be evoked here, and calls for nuanced responses.

As noted above, the number of persons to be relocated in two years was just shy of 100'000. A very slow start made it necessary to carry out relocations into 2018. As of May 2018, close to 35'000 persons had been transferred.[117] Delays, bureaucratic difficulties and lack of cooperation from some States[118] have plagued the process.[119] Still, operations have

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109 ibid. For detailed analysis, see Bruno de Witte and Lilian Tsourdi, 'Confrontation on relocation', (2018) 55 CMLR, 1457.

110 See European Commission – Fact Sheet, 2 March 2017 <http://europa.eu/rapid/press-release_MEMO-17-349_en.htm> accessed 5 February 2019.

111 de Witte, Tsourdi (n 109), 1491.

112 Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631; de Witte, Tsourdi (n 109).

113 *Slovakia and Hungary v Council* (n 112), paras 68-81.

114 ibid paras 98-103.

115 ibid paras 113-134.

116 ibid, especially, paras 96, 123ff, 133, 206ff.

117 European Commission, 'Progress Report on the Implementation of the European Agenda on Migration', COM(2018) 301 final, 17.

118 See European Commission – Press release, 'Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice', 7 December 2017 <http://europa.eu/rapid/press-release_IP-17-5002_en.htm> accessed 5 February 2019.

progressively become smoother, indicating that Member States have learned to cooperate, and thousands of persons have been enabled to access better protection conditions.[120] From these perspectives, it was certainly a useful experience. Claiming unqualified 'success', as the Commission does on the argument that 97% of the eligible persons were eventually transferred, appears however excessive.[121] Between September 2015 and May 2018, Greece relocated 21'999 applicants and Italy 12'690.[122] In 2016 and 2017 alone, the two countries have received respectively 109'760 and 251'810 applications[123] and dealt with 213'544 and 308'256 arrivals.[124] While no doubt valuable from the perspective of 'frontline States', relocation was no game-changer. Furthermore, the fact that with 97% of the eligible applicants relocated only one third of the initial commitments were honoured points to the restrictive character of the eligibility criteria and thus the limited scope of the solidarity offered.

5. Conclusions and reform perspectives

Inefficiency, (fears of) distributive unfairness, arbitrariness are problems that bedevil the Dublin system since its very inception. The 'refugee crisis' has merely exposed these flaws. With it, acceptance for the system has decreased among the Member States and the impetus for reform has gained momentum.

The Commission has presented a 'Dublin IV' proposal in May 2016.[125] Its key points are to maintain the current system while introducing sanctions to discourage secondary movements and reinforcing the responsibilities of border and first application States. A 'corrective allocation mechanism' is also proposed to ensure a fair sharing or responsibilities. Commentators have been critical of the proposal, denouncing in particular the risks it entails for fundamental rights and the unworkability of the corrective mechanism.[126] Similarly critical, the European Parliament has endorsed in 2017 a report proposing the deletion of the 'irregular entry' criterion and a system based on the 'real links' of applicants or, as default, on quota-based allocation.[127] Centred on full respect for fundamental rights, 'close links', and a limited recognition of applicants' agency, the EP position is light years away from the

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119 Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece' (2017) Study for the LIBE committee.

120 AIDA, 'Relocation of asylum seekers in Europe: A view from receiving countries' (May 2018) <http://www.asylumineurope.org/sites/default/files/aida_brief_relocation.pdf> accessed 5 February 2019.

121 European Commission (n 117), 17.

122 ibid.

123 Author's calculations based on European Parliament (n 12).

124 Author's calculations based on data available at UNHCR Operational Data Portal: <https://data2.unhcr.org/en/situations/mediterranean/location/5205> accessed 5 February 2019.

125 European Commission (n 56),

126 See eg Vincent Chetail, 'Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System' (2016) EJHR 584; Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24 5 MJECL 622. See also Constantin Hruschka, 'Dublin is Dead! Long Live Dublin!' (*EU Immigration and Asylum Law and Policy*, 17 May 2016) <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission> accessed 8 February 2019; Steve Peers, 'The Orbanisation of EU Asylum Law' (*EU Law Analysis*, 6 May 2016) <http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html> accessed 8 February 2019.

127 European Parliament, 'Report on the 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), A8-0345/2017.

repressive stance of the Commission. Still, to this author's mind, it fatally ignores past experiences made with the concept of 'sharing people' and relies on an ultimately coercive and unrealistic model of 'permanent relocation'.[128]

Be that as it may, the deep rift existing between Member States on distributive issues seems to have effectively stalled the reform of the Dublin system. This is not necessarily bad. As things stand, the chances for a reform leading to better-functioning responsibility-allocation seem slim, while the risk of significant cutbacks on fundamental rights is high.

Arguably, the immediate way forward to improve responsibility-allocation is not to reform Dublin III, but rather to influence the structural factors that undermine its functioning.[129]

- If existing EU standards were respected across the Dublin area, this would significantly reduce the arbitrariness of the system and the incentives applicants have to engage in secondary movements. There is vast room for improvement in the enforcement of these standards, and it is encouraging to see the Commission take action after years of excessive self-restraint.[130]
- If 'fair sharing' were truly ensured in matters of asylum and border control – to the point where Member States are fully compensated for the services they render to the whole Union – national authorities would be more likely to apply Dublin with the required equanimity and attention to individual circumstances. Large-scale, mandatory relocation does not appear to be desirable or feasible, but there are considerable margins to reinforce financial and operational solidarity, complemented by (non coercive) relocation schemes.
- If free movement was reliably promised to applicants *once* recognized as holders of a protection status, their reluctance to accept Dublin allocation would likely be less.

With these basic preconditions in place – a reasonably level playing field devoid of 'black holes', structural solidarity offsetting the marginal cost of every additional applicant, meaningful free movement rights – new responsibility-allocation rules might perhaps be negotiated with greater hopes of success, or perhaps become redundant.

At the time of writing, the reform proposals on the table are making no headway and the debates that could shuttle us towards an alternative reform of the CEAS have not even started.

The most topical development is, in fact, the increasingly widespread disregard and circumvention of the Dublin III Regulation described in section 3.2.2. Critics of the Dublin system are perhaps beginning to wonder if Dublin III is 'as good as it gets', and find

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128 See Maiani (n 126). On a possible reform of the system see Marcello Di Filippo, 'The Allocation of Competence in Asylum Procedures under EU law: The Need to Take the Dublin Bull by the Horns' (2018) 59 Revista de Derecho Comunitario Europeo 41. See also Francesco Maiani, *The Reform of the Dublin III Regulation* (2016) Study for the LIBE Committee, 45ff.

129 For the full argument see ibid 53ff. See also Elspeth Guild and others, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection* (2014) Study for the LIBE Committee; Elspeth Guild and others, *Enhancing the Common European Asylum System and Alternatives to Dublin* (2015) Study for the LIBE Committee. I am thankful to Valerio Prato, Migration Officer at the International Social Service Switzerland, for stimulating discussions on this point.

130 See European Commission – Press release, 'Migration and Asylum: Commission takes further steps in infringement procedures against Hungary', 19 July 2018 <http://europa.eu/rapid/press-release_IP-18-4522_en.htm> accessed 8 February 2019. For a critique of the Commission's traditional passivity as enforcer in the field of asylum see Henri Labayle, 'Droit d'asile et confiance mutuelle: regard critique sur la jurisprudence européenne' (2014) 50 3 Cahiers de droit européen 502, 532; Cathryn Costello, Elspeth Guild, 'Fixing the Refugee Crisis: Holding the Commission Accountable' (*Verfassungsblog*, 16 September 2018) <https://verfassungsblog.de/fixing-the-refugee-crisis-holding-the-commission-accountable> accessed 8 February 2019.

themselves invoking its full application and enforcement.[131] So far, these calls have been in vain: perhaps preoccupied with its legislative proposals, the Commission has not yet deigned to publicly acknowledge the problem, let alone to react. Wrongly, in this author's view: is it not futile to design new storeys for the CEAS building while its very foundation – the authority of EU Law – is being corroded?

131 See eg ECRE, 'To Dublin or not to Dublin?' (November 2018) Policy note #16 <https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf> accessed 8 February 2019.