The Migration Crisis: 
Towards a European burden-sharing system?

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CHAPTER 1: INTRODUCTION

1.1. Research problem

In the context of the current migration crisis, originating from conflicts in the Middle East, the need for a functioning and effective asylum processing and relocation mechanism appears. Over the past two years, several problems relating to obtaining international protection within the European Union emerged for those seeking international protection.

1.1.1. Lack of safe and legal access to the EU

The first and probably most visible issue that occurs is the lack of safe and legal access to the Union. Refugees are obliged to call upon smugglers to reach the EU through dangerous and illegal routes. Envisaging to cut off these irregular streams, the EU focusses on closing these illegal routes. The problem that arises in this context is that the closing of these routes is not sufficiently counterbalanced by the creation of safe and legal access. The EU is starting to resemble a fortress even more than before, which raises the question whether the EU and its Member States are violating their international obligations under the Geneva Convention to offer international protection.

1.1.2. Inconsistent reception and uneven distribution

Once arrived in Europe, refugees are faced with the problem of lodging an application for international protection. According to the Dublin III Regulation, the claim for asylum should be filed in the country of first entrance. The large scale migration via illegal overseas and land routes has led to overburdening of the asylum systems in the Member States situated at the external border of the Union. Due to these heavy burdens, the states at the external borders developed a policy of tolerance towards secondary movement, not registering refugees arriving through these illegal routes. Thus, in theory Dublin still applies, but in practice it does not seem to be workable any longer. Hotspots were not sufficient to bear the burden of this increase in asylum applications. Inseparably connected to this increase in asylum applications is the reception of those recognized as refugees. Since a positive decision granting asylum is only valid in the country where it was issued, this Member State will in practice be responsible for the reception. Member States at the external border therefore are faced with the sole responsibility for these refugees searching for international protection in the Union. The question should be put forward whether the other EU Member States are bound to alleviate this burden on the ground of intra-EU solidarity. The Dublin regulation was never intended to set out a relocation mechanism, as put forward in the recast, the main objective is to determine which member state is responsible to process the claim for international protection, in order to provide quick and effective access to the procedures granting international protection. Still, recent developments have shown that there is a pressing need for a more ‘fair’ allocation of refugees throughout the Union.

The systems for burden alleviation are almost entirely voluntary-based, and therefore highly influenced by the policy of Member States. Instead of making stable commitments, states are only willing to offer
protection to refugees where this suits their political objectives.¹ When burden alleviation is discussed, one of the core issues consists of how to determine at what point migration becomes a burden that exceeds state capacity, and which criteria should be taken into account to interpret state capacity.² Not only a temporary allocation mechanism is lacking: there are neither instruments or a binding policy for the temporary allocation of refugees, nor for the permanent allocation. As a result of the current situation, the question arises whether a binding relocation mechanism is needed to lighten the burden on the Members States at the external border and to manage this migration flux in general.

1.2 Research question

The core question in this research paper comes down to examining whether the Dublin system is still relevant in the context of the current migration crisis, or whether the European Union should evolve to another system for processing asylum applications and develop a complementary mechanism for relocating refugees. It is important to map which causes attributed to the failure of previous initiatives on European level to establish a mechanism of burden-sharing and how these causes can be circumvented in the future. In addition to that, it is necessary to check whether the solidarity clause in Article 80 TFEU requires that a responsibility/burden-sharing mechanism is incorporated in Dublin. In order to do so, the range of the Member States’ obligations under this article should be clarified.

Important is to examine how the Union’s approach affects fundamental rights of protection seekers, and whether the Union and its Member States fully comply with these obligations in conducting their policy in the field of asylum. Therefore, this research will go over the problems that may occur on a human rights-level in relation to the current Dublin system and the CEAS and in relation to the externalization approach of the Union. Furthermore, the question should be put forward whether it is opportune to strive for a modification in the European mindset on asylum and migration and to move the focus from national asylum systems to a fully fledged common asylum system in order to develop an efficient burden-sharing system. If so, what legal basis can be invoked to obtain an allocation mechanism aiming at temporary or permanent residency?

In the final part of this paper, some concrete policy options will be explored, trying to provide an answer to a series of questions concerning the future of the CEAS. More specifically, to what extent the CEAS can be of use in creating a system of burden-sharing? The possibility of incorporating a relocation mechanism in the CEAS will be considered. Eventually, conclusions will be drawn on whether the CEAS should be kept in place in its current form, thus focussing on further implementation of and compliance with this system, or whether the focus should be moved to a structural revision or even an abolishment of this system in order to create a fair burden-sharing system. If we want to research a fair and equal distribution of burdens, it is inevitable to define what must be comprehended under the notion ‘fair and equal burden’. In the hypothesis that there is a need of structural revision of the CEAS, what measures are required to reform the CEAS into

¹ Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 183
² Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 180
an efficiently working and enforceable system? In the hypothesis that Dublin is kept operational, what kind of measures could be developed, complementary to Dublin, that are sufficiently adequate to counterbalance Dublin?

1.3 State of affairs: general facts and figures migration crisis

Due to persisting conflicts in the Middle East, a displacement of people seeking for a better life is taking place. In the early years of the conflict in Syria, a lot of refugees found harbor in the neighboring countries, assuming that the conflicts were a temporary phenomenon. However, the conflicts kept escalating and since there was no formal recognition as refugees, they failed to receive the international protection under the Geneva Convention and were not capable of developing a future. This blind alley has brought numerous refugees to look for shelter in Europe. As a consequence of the legal pathways to Europe being very limited, the practice of irregular migration became the gateway to Europe. Due to the numerous people migrating to Europe and the practice of tolerating refugees to pass from countries as Turkey and the Balkans, true migration flows arose. These flows arrived in Europe through two illegal routes, the first being the Balkan route, through Turkey and Greece, the second being the Mediterranean route, whereby the Mediterranean sea is crossed in overcrowded boats to reach Italy or Greece. In 2015 the number of people arriving in Greece reached a peak of more than 750,000, while in Italy, over 140,000 arrived. In consequence of this expansion of arrivals, especially in Greece, the Union undertook action to close off the Balkan route. The closing of the Balkan route in early 2016 has led to a decrease in numbers of people arriving in Greece, but still over 170,000 people arrived in 2016.

Having reached the Union, the refugees are faced with the measures developed to counterbalance the free movement of persons in the Union. The Schengen Convention established a free movement of persons, abolishing identity checks at the internal borders of Union Member States. However, for this system to function well, some complementary measures had to be created to control movement originating outside the Union. The Dublin system is meant to determine the Member State responsible for examining asylum applications. According to this regulation, the Member State where a person searching for international protection first entered the Union will, in general, be responsible for examining the asylum application. The increase in arrivals through illegal routes implies that the Member States at the external border are affected disproportionately. Persons requesting asylum in another Member State should, according to the Dublin Regulation, be transferred to the country where they first crossed the external border of the Schengen-zone. The assistance received in these countries is fairly limited to date. Especially regarding the relocation of


6 European Parliament and Council Regulation 604/2014 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, art 13(1)
refugees there is hardly any support coming from the Union. There are few legal instruments, such as the relocation decisions\textsuperscript{7}, but any permanent scheme or system that concerns relocation is absent in the European context. Hence, relocation is highly dependent upon the willingness of the Member States.

1.4 Burden-sharing in the Union in the context of asylum and migration

This research will try to determine which responsibilities the Member States and the Union should bear when the influx of migrants exceeds a single Member State’s capacity. Thereby, it will be checked whether both the Member States and the Union are meeting these standards, set out by Union law. In the negative hypothesis, an analysis of the causes that attribute to this failure to meet standards needs to be carried out, thereby determining if the applicable legislation is intrinsically insufficient or deficient or whether this can be attributed to a lack of implementation. Not only will the solidarity and fair-sharing objectives in crisis times be reviewed, the presence of burden-sharing in the Union’s non-crisis policy will also be examined closely.

1.4.1 Burden-sharing on the level of processing of asylum claims

The first part of this research paper will focus on how the responsibility for asylum applications is distributed among the Member States. In the light of the former, a critical assessment of the current Dublin regulation and its recast proposals will be carried out. Lastly, this chapter will go deeper upon the reconcilability of the Dublin system for determining responsibility and the solidarity idea in Article 80 TFEU.

1.4.2 Burden-sharing on the level of reception

In the second part of this paper, a similar analysis will be conducted with regard to the reception of persons who have been granted the status of refugee. Since there is no mutual recognition of positive asylum decisions, the Member State responsible for the processing of the asylum application will automatically be concerned with the reception. The responsibilities of the Member States and the Union to assist a single Member State in case of an unduly heavy burden due to an unforeseeable increase in immigration will be investigated in the light of Article 80 TFEU. Furthermore, several legislative and policy initiatives taken in this context will be assessed and evaluated in order to map the components that have led to failure or success.

1.4.3 Externalization approach of the Union

Thirdly, I will extend on the externalization approach of the Union. Although this research is primarily specified on the internal burden-sharing in the Union, the external component cannot be circumvented. It should be inquired whether externalization is used to lighten the intra-EU burden of migration and whether

this approach can be justified in the light of the international obligations under the Geneva Convention. Thereby, it is also important to check the human rights compliance of this policy.
CHAPTER 2: BURDEN-SHARING ON THE LEVEL OF ASYLUM CLAIMS PROCESSING

2.1 Introduction

In this chapter, an exploration on whether there is a form of burden of responsibility sharing with regard to the processing of asylum claims in the European Union will take place. Therefore it is crucial to determine what burden-sharing on this level implies. In this context it is also important to list the causes of uneven distribution that give rise to the need for burden alleviation in some Member States. An extensive analysis of the legal framework will expose the deficiencies of the current mode of operation and its reconcilability with the obligations of intra-Union solidarity as expressed in Union legislation.

2.2 Factual context

2.2.1 Components of burden-sharing

As a starting point to delineate burden-sharing, the tripartite qualification, developed by Gregor Noll, will be used. This qualification distinguishes three core components of burden-sharing: sharing people, sharing money and sharing norms. Each of these components will be applied to the sharing of responsibility with respect to asylum applications and will be discussed in detail. In this section it will be considered for each of these three components how (un)equal the burden is distributed and what initiatives were already developed on this account. Since this paper is a case study of the current European migration crisis, the former will be inquired in connection to the recent developments of that crisis.

2.2.1.1 Sharing people: Physical burden-sharing

The concept of people sharing implies that the responsibility for the processing of asylum applications is distributed between the Member States, and that, in case of an unduly large increase in asylum applications in one or several Member States, the other Member States will assist them by taking over responsibility in those cases that exceed the concerned Member State’s capacity. People sharing goes a step further than fiscal responsibility-sharing and is found to be closer to true responsibility sharing since it goes beyond the mere cost-sharing (discussed later on under 2.2.1.2).

2.2.1.1.1 Numbers Eurostat and UNHCR

If we look at the number of asylum applications launched in the EU over the past few years, it is remarkable how the number of applications in Germany lies significantly higher than in other EU Member States. The height of this number cannot solely be attributed to the ‘Wir schaffen das’-approach of Germany, since they already received more applications pre-crisis. However, from these numbers, combined with the awareness that there are few legal entrance possibilities into the Union, one can deduct that the Dublin system in fact is

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not applied in full. It is striking how few applications were filed in Greece and Italy, especially when the numbers of arrival are studied.

While many documents take into account absolute number to measure the burden, this practice is misleading.\textsuperscript{10} Absolute numbers create an image of the pressure, where the divergences in Member States capacities are not represented.\textsuperscript{11} As will be demonstrated later on, a more correct representation of the asylum burden can be given through the use of relative numbers.

\textbf{2.2.1.1.2 Dublin regulation}

The Dublin Regulation, by now the second revision of the original Dublin Convention, is the instrument that determines responsibility in regard to the processing of asylum claims.\textsuperscript{12} The hierarchy comprised in this


\textsuperscript{11} Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 183

\textsuperscript{12} European Parliament and Council Regulation 604/2014 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
regulation will be discussed later on (cf. 2.4.1.1), but in most of the cases, the Member State of first entry (i.e. where the third country national crossed the external border for the first time) will be charged with this responsibility.

### 2.2.1.2 Sharing money: Fiscal burden-sharing

Fiscal burden-sharing stands for the Member States to contribute in the financial costs when one Member State is carrying responsibility for a substantively larger part of the asylum applications. This form of burden-sharing has a reparative dimension, as it, by the reallocation of funds, tries to level out existing inequalities.\(^{13}\) The ‘money sharing’ can take various forms of financial transactions.\(^ {14}\) However, the distribution of funds is not self-evident. As for the other components, the question arises whether a fiscal reallocation mechanism should only be crisis-oriented or whether it should be permanent, also taking into account inequalities in asylum applications due to geographical, economic or other factors in non-crisis situations. The difficulty of this type of burden-sharing lies within finding an acceptable distribution key, taking into account state capacity and when it is exceeded and also paying attention to the scope of the obligation: mere sharing of costs or does it go further? Moreover, it remains questionable if taking part in sharing the costs truly comes close to sharing the asylum burden and it does not resemble buying off the obligation to take responsibility. Can we expect that the Member States at the external border can manage crisis situations merely by receiving financial support or should this form of support be complementary to other measures?

#### 2.2.1.2.1 European Refugee Fund

The European Refugee Fund (ERF) can be defined as “a financial instrument for the period 2008 to 2013, which supports national and EU efforts in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures. Together with three other Funds, it forms part of the General Programme "Solidarity and Management of Migration Flows””\(^ {15}\)

More tangible, this implies the payment of financial compensation to the most popular destination countries. The Fund was explicitly based on solidarity between the Member States and therefore commonly financed by the Member States.\(^ {16}\) Although the ERF is one of the few explicit burden-sharing initiatives of the Union, it still shows some deficiencies. In allocating the resources, it takes into account the absolute number of asylum claims a Member State is charged with, thus not taking into account the majorly divergent reception


capacities of the Member States and likely favoring larger Member States. As discussed above, it would render more representative results if the relative burden would be taken into account, however the difficulty remains how to determine the relative asylum burden a Member State is confronted with.

2.2.1.2.2 Asylum, Migration and Integration Fund

The Asylum, Migration and Integration Fund (AMIF) was designed to succeed the ERF. It is described as “A financial instrument for the period 2014 to 2020, which supports national and EU initiatives that promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.” The fourth and for this paper most important aspect is the focus on solidarity, made explicit in one of the objectives, i.e. making sure that EU States which are most affected by migration and asylum flows can count on solidarity from other EU States. In comparison to the ERF, the main innovations in the field of burden-sharing can be listed as follows. First of all, the personal scope is extended, including more flexible categories of persons. Secondly, the material scope of application was broadened in certain fields, and more specifically concerning the definition of emergency situations. Financial support for intra-EU resettlement was introduced. Not taking into account these modifications, the innovative impact of the switch from the ERF to the AMIF for intra-EU burden sharing was rather limited.

2.2.1.3 Sharing norms: Policy harmonization

Through the sharing of norms, a neutralization of inequalities in the processing of asylum claims due to differences in domestic legislation is aimed at. Over the past years, the EU has taken multiple initiatives to establish such a neutralization. In contrast to the former component, the sharing of norms strives for a more equal distribution in a preventive manner. Harmonization as a form of burden-sharing has as a point of departure that variations in protection offered lead to distortions in equal distribution. Logically, this form of burden-sharing can only address differences in national legislation. However, besides those divergences, there are many other factors that contribute to an uneven distribution of asylum applications (more about the


causes of disparities in asylum burdens under 2.2.2). Since most of these policy harmonization initiatives can be related to either people or financial sharing, their impact will be discussed in those sections.

2.2.2 Principal reasons for disparities in asylum burdens

It’s an established fact that responsibility for asylum claims processing is unequally shared among the EU Member States, both in crisis and non-crisis situations. In this section, the principal causes for the uneven distribution of asylum application will be covered.

2.2.2.1 Push and Pull factors

In order to make an overview of the principal reasons that cause an uneven distribution of asylum applications, push and pull factors will be distinguished. Push factors can be described as a combination of factors that stimulated refugees to leave their country of origin or residence. Pull factors on the other hand, are reasons which render reception countries attractive destinations to lodge an asylum claim.

2.2.2.1.1 Push factors

To list the largest push factors, it is important to research the reasons that have driven people to leave their country of origin or residence. As a first and inevitable push factor, the ongoing violence and instability in origin countries has impelled people to leave these perspective-lacking situations. Secondly, the overburdening of neighboring countries has led to sub-standard reception conditions and urged some of these countries to adjust their entrance policy, consequently causing refugees to lose possibilities to access safe havens in their close proximity. Not only the lack of a near flight alternative and the sub-standard reception are driving forces for the displaced to desert. Most of these neighboring countries do not offer any work or education opportunities for refugees, and with the continuing instability and thus impossibility of return to their home countries on the short and medium term, refugees started to travel onwards to countries that do offer chances on a better future including employment and education opportunities.25

The phenomena mentioned above are anything but new, but have manifested in a more intensive and persistent way. People are starting to look at the situation more pessimistically, since there are few to no signs of impending improvements.26 Geopolitical and economic changes, and more specifically the Arab Spring, have caused an increase in migration pressures in proximity of the armed conflicts and political crises. The unstable situation in Libya and Egypt has led to the suspension of migration agreements with these countries and caused disruptions in the regional labor markets and migration flows.27


2.2.2.1.2 Pull factors

In his article dating from 2004, Thielemann points at different factors that play an important role in deciding on the country of destination.\(^{28}\) Although most of these causes mentioned are still relevant today, the emergence of some new pull factors cannot be overlooked. In the next sections, an examination of which factors are likely to be the most relevant pull factors in the current asylum crisis, producing an unequal distribution of asylum applications.

### Differences in relative restrictiveness of asylum regimes

Differences in the restrictiveness of asylum regimes can be described as the situation where countries try to render themselves as a less attractive destination for refugees by raising thresholds and trying to make their asylum policies more restrictive.\(^{29}\) As a result of this approach, the burden will shift to countries with a less restrictive policy. Although Thielemans finds the influence of the restrictiveness in countries’ asylum system to be overestimated, this factor should be taken into account in the situation of the current migration crisis. On a European level, the unequal distribution of asylum applications was intended to be stabilized by policy harmonization on the level of refugee protection standards. Even though this initiative is relevant in the fighting of competitive downgrading of standards, the negative impact of the CEAS as a harmonization

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cannot be left out of the discussion. Notwithstanding the harmonization initiatives that have been developed in the framework of the CEAS over the past few years, there was no evolution towards a more equal distribution. Therefore, the importance of difference in restrictiveness as a pull factor can be minimized due to the limited effects of policy harmonization initiatives on the dispersal of asylum applications in the EU.

### 2.2.2.1.2.2 Historical ties

As a second factor rendering a country of destination more attractive, historical ties should be considered as playing a role in deciding on where to flee. Historical ties should be understood as both former colonial links as language ties and cultural networks between two countries.\(^{30}\) If we look at historical links between the main countries of destination (such as Germany) and the main countries of origin (Syria, Afghanistan) in this particular situation, it should be noted that pre crisis, there already was a relatively large population of Syrians and Afghans in Germany.

### 2.2.2.1.2.3 Economic factors

The third possible pull factor can be linked to one of the main push factors. The lacking of perspective in labour and education opportunities result searching for a country that does offer these perspectives. Therefore countries with favorable labour conditions for refugees receive a relatively larger share of asylum applications.\(^{31}\)

### 2.2.2.1.2.4 Political reputation

An indicator that is now more determining than ever before is the political reputation of a country abroad. Since people are looking for stability and acceptance, they attach a great deal of importance to the liberal values and how they are represented in the host country. The effect of the image and message distributed by a certain country cannot be underestimated: in the specific situations of this crisis, the welcoming image of Germany is one of the most important pull factors. The most common reason reported to come to Germany, the first choice destination for the overwhelming majority of those interviewed, was the welcoming image they had of this country.\(^{32}\)

### 2.2.2.1.2.5 Geographic factors

The factor of proximity has lost a lot of its importance due to technological advancements.\(^{33}\) However, it still has to be taken into account in the light of the current migration flows. Since there is hardly any legal access to the Union, some value still must be attributed to proxy factors. It must be pointed out that in the

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\(^{32}\) REACH, 'Migration trends & patterns of Syrian asylum seekers travelling to the European Union’ (REACH, 28 September 2015)

first instant, people are looking for a flight alternative close to home. Seeing that there is no availability of such alternatives, refugees are obliged to pursue their journey.

2.2.2.1.2.6 Social factors

Research showed that the increase in relatives and friends making the journey to Europe was one of the new pull factors. Modern communication tools have facilitated information exchange, creating the possibility to share stories and advice about the route, costs and difficulties faced.34

2.2.2.1.3 The effect of the EU asylum policy on pull factors

The reason causing disparities in countries’ relative asylum burdens cannot merely be attributed to an imbalance of push and pull factors. The effects of many pull factors intrinsically connected to countries were, and are still, nullified by the system introduced by the Dublin Convention. There is a large gap between the aspired countries of destination and the countries where refugees are obliged to return to in consequence of Dublin in combination with insufficient legal access to the Union. (The inconsistency in burden-sharing induced by the Dublin Regulation will be addressed more extensively in section 2.4.)

2.3 Legal context

In order to fully capture the issues at stake, this section will address the broader legal framework of migration and asylum within the EU. What follows is an overview of European asylum and migration legislation, thereby clarifying the key principles and the impact of case-law in this area.

2.3.1 Legislation

2.3.1.1 Schengen Agreement

It is inevitable to discuss Schengen as the broader framework wherein a common European asylum claims processing mechanism was conceived. Schengen originally started out as enhanced cooperation between Germany, France and the Benelux countries. An important incentive in establishing Schengen was to counterbalance the problems occurring in relation to free movement of goods. As long as there was no free movement of people, the free movement of goods would still be hindered by border checks.35 The intention of this closer cooperation was to fully lift internal border control and to create a free movement of persons. The idea wasn’t revolutionary, since the Benelux countries had already established a common passport area and the idea of free movement of EC nationals was first put to the table years before the adoption of the Schengen Convention.

In 1985, the Schengen agreement, striving to establish a free movement of persons in the countries mentioned above, was put into place. Only with the 1990 Schengen Implementation Convention, they arranged for the free movement of persons, by abolishing border checks and introducing an external border,


to be put into practice. Shortly afterwards, other countries such as Italy, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden requested to join the Schengen area. This framework was incorporated into the Union by the Amsterdam Treaty, entering into force the 1st of May 1999. The incorporation of Schengen into the EU Acquis established free movement of persons throughout the Union, with the exception of the UK and Ireland who are subject to an exceptional regime. The Schengen Acquis did not remain EU-exclusive and was opened up to non-EU states: Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area.

The relevance of Schengen in the context of asylum applications can be attributed to the implications that this free movement of persons introduced by Schengen had for asylum seekers. Not only EU citizens, but just as well asylum seekers could de facto enjoy free movement once they had entered the Union. Several measures, among them the (in)famous Dublin rule were developed to deal with the implications of free movement on asylum seekers. However, the adequacy of Dublin as a counterbalance to the free movement of persons should be questioned and will be discussed later on. In the current climate of populism that has arisen as a consequence of migratory pressure and the fear of terror, the free movement of persons as it exists under Schengen is often criticized. However, the option of reducing or, a fortiori, abolishing Schengen as a policy solution will be addressed in the final part of this paper and will therefore not be discussed here.

2.3.1.2 Dublin Regulation

The Convention determining the state responsibility for examining applications for asylum lodged in one of the Member States of the European Communities was first put into place in 1990. The Dublin Convention was developed to counterbalance the free movement of persons. The free movement as established by the Schengen Acquis had the implication that asylum seekers could now move freely once they entered the Union. In order to avoid security deficits, possibly originating from the lack of border controls, compensatory measures were adopted. In the field of asylum, responsibility-allocating measures were introduced in the form of the afore-mentioned Dublin Convention.

As to the why this Convention was drawn up, the preamble clarifies the main objectives of this instrument. First of all, this Convention aimed to avoid ‘refugees in orbit’, i.e. asylum seekers being transferred from one Member State to another successively without any of them taking up responsibility. Secondly, this Convention has the purpose of preventing ‘forum shopping’ in the field of asylum applications and lastly it is also set on the prevention of uncontrolled secondary movements in the Union. These objectives should be


Council Decision (EC) 1999/435 of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis [1999] OJ L176/1 and Council Decision (EC) 1999/436 of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis [1999] OJ L176/17


Preamble to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1997] OJ C254/1
met by introducing a hierarchical mechanism determining the Member State responsible for the asylum application.

Today, the third revised edition of Dublin still applies. With proposal for a fourth Dublin regulation on the table, it is also necessary to address this pending proposal and to cover the main changes. In section 2.4, the main deficiencies of the Dublin regulation in its current form are covered, thereby examined whether these are addressed in the recast proposals or whether the situation stays more or less the same.

2.3.1.2.1 Dublin III

As said, after the conversion of the Dublin Convention into the Dublin Regulation, a second revision appeared to be necessary in 2013. The main criticism giving cause to this revision was the unequal distribution of asylum applications and the burden that was shifted to Europe’s Southern borders. The 2013 recast of Dublin, commonly described as ‘Dublin III’, tried to address some of these concerns by strengthening time limits and introducing an ‘early warning and preparedness mechanism’. The impact of the M.S.S. judgement (discussed more extensively later on) is also clearly notable: Dublin III explicitly reiterates the importance of the respect of asylum seekers’ fundamental rights in case of a transfer to another Member State. Still, Dublin cannot be found to be anything more than a responsibility allocation mechanism for asylum applications, of which the typicalities and details will be discussed further on.

2.3.1.3 Common European Asylum System

Since 1999, the Union has been striving to create a Common European Asylum System (CEAS). This effort to harmonize asylum legislation in the Member States was only realized partially, in certain fields of asylum law. Important to note is that the idea to develop a common status for persons granted asylum throughout the Union was put forward as a long-term objective in the Presidency Conclusions of the Tampere summit:

“In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.”

Today, 18 years later, prospects for a common European asylum status are still rather negative, due to the differing mindset of the Member States in an enlarged Union. The short-term priorities set out in the CEAS were partly met through various instruments. These priorities, as set out on the Tampere summit, being:

a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should

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also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.”

Tampere thus contains the first official commitment of the Member States to develop a European Asylum Policy.

The Hague programme, resulting from the 2004 The Hague summit, aimed at implementing the objectives set out in Tampere. The aim set forward was to establish a framework that contributed in the realization of a level playing field in protection standards. The Member States committed to adopt the instruments to accomplish the realization of the second phase before the end of 2010. Further, the focus was placed on facilitating practical and collaborative cooperation.

During the third summit concerning justice and home affairs, which was held in Stockholm in 2009, some new objectives of the EU in the field of asylum were put forward. The Member States agreed on the establishment of the CEAS by 2012 remaining a policy priority of the Union. The realization thereof should be engineered by taking on common rules and through coherent application of these rules. In the program following the summit, the need for solidarity between Member States was emphasized, though mainly focussing on solidarity as a voluntary-based initiative. However, most emphasis was placed on the importance of the external component of the Union’s asylum policy. At this summit, ten years after the starting point of the CEAS, the Member States acknowledged that cooperation with third countries was required to effectively deal with migration pressure. The creation of partnerships between the EU and countries of transit and origin was underlined as essential in developing a truly common European asylum policy, since a strategy could not be limited to the mere aspect of the internal dimension to result in the desired impact.

As the Commission recently reiterated, the key objective remains to acquire the putting into place of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection in the EU. Thereby, the enhancement of practical cooperation and the external component of the EU’s migration policy remain of great value in the accomplishment.

The main elements of the CEAS that are relevant to the subject of this paper and need some elaboration are the Asylum Procedures Directive, the Qualification Directive and of course the Dublin Regulation as a

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44 Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 180


cornerstone of this system. Since the Dublin Regulation will be discussed extensively under the next sections, it will not be touched upon here.

2.2.1.3.1.1 Asylum procedures Directive

The Asylum procedures Directive was created to harmonize the national procedures for granting and withdrawing international protection. The goal of common procedures is pursued through the introduction of minimum standards and procedural safeguards. The rationale behind this Directive is bringing about a spreading of the burden through the sharing of norms. By introducing minimum standards, the role of divergences in asylum procedures in the decision process on the country of destination will be substantially restrained. In 2013, a revision of the Asylum procedures Directive was adopted, aiming at raising quality and fairness of asylum decisions and accelerating the time-span of the procedures.

2.2.1.3.1.2 Qualification Directive

The Qualification Directive in its revised version was adopted to ensure a level of harmonization concerning the grounds to decide on granting, refusing or revoking protection statuses. Besides providing minimum norms concerning the personal scope of application of asylum decisions and attempting to provide an answer on the question who should or should not be granted international protection, the revised Qualification Directive strives for the facilitation of access to and the harmonization of certain rights (e.g. residence permit, education, employment, travel, social welfare, etc.) and integration initiatives for persons granted international protection.

Both the Asylum procedures Directive and the Qualification Directive have of course limited the margin of discretion of Member States in asylum procedures, but it should be kept in mind that asylum procedures and decisions remain under the national competence of the Member States to date, so consequentially there will always be divergences between national procedures.

2.3.2 Jurisprudence

Recent judgements of both the European Court of Human Rights and the Court of Justice of the European Union have questioned and limited the Dublin system in its current form. What follows next is a short overview of the most important case law of the past few years in this regard. In their case law, both

institutions attempted to establish a balance between the efficient handling of asylum applications strived for in the Dublin Regulation and the protection of the asylum seekers’ fundamental rights.54

2.3.2.1 MSS v. Belgium and Greece

The M.S.S. case meant a shift in the Court’s case law on the Dublin system of allocating responsibility for asylum applications. The case concerned an Afghan national, who travelled to Belgium. Once arrived there, he filed for asylum. As a result from a hit in the Eurodac database, it appeared to be the responsibility of Greece to examine his asylum application.55 Greece being the Member State of first entry, the Dublin system implied that this Member State was burdened with the asylum claim and allowed the Belgian authorities to request the transfer of the Afghan national to Greece. M.S.S. was transferred to Greece and immediately placed in detention, once released he had to overcome various obstacles to apply for asylum.

The Court acknowledged that Greece, being a Member State located at the external border of the Union was suffering under an increased pressure of migration flows, and that this burden was rendered more severe by the incoming transfers of asylum-seekers under the Dublin system:

“The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. The situation is exacerbated by the transfers of asylum-seekers by other member States in application of the Dublin Regulation (…)”56

However, the Court noted that this burden could not, in any case, be put forward as a mitigating factor to discharge a Member State from its obligations under the European Convention of Human Rights:

“(…) The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum-seekers on their arrival at major international airports and of the disproportionate number of asylum-seekers when compared to the capacities of some of those States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.”57

The Court explicitly distinguished the circumstances of this case to the circumstances in its previous case law, more specifically the K.R.S. v. United Kingdom case.58 The Court pointed out that in the latter, there had been a possibility to assume that Greece was complying “with its obligations imposed on it by the


55 M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011), para 12

56 M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011), para 223

57 M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011), para 223

58 K.R.S v. United Kingdom App no 32733/08 (ECtHR, 2 December 2008)
Council Directives laying down minimum standards for asylum procedures and the reception of asylum-seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention."

To the contrary, this assumption could not be kept in place in the M.S.S case, since the Belgian Government was provided with information of UNHCR and international NGO’s emphasizing the critical situation in Greece, in particular alerting to practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis. Even the argument of the Belgian Government stating that they acquired guarantees of the Greek Government was not sufficiently convincing for the Court, since these assurances were drafted in generalized and stereotyped terms, lacking individual guarantees and merely referring to the applicable legislation.

The Member States’ vision can be illustrated by the means of an argument formulated by the Netherlands. The Netherlands stated that it goes against the principle of mutual trust to examine whether Greece fulfilled its human rights obligations:

"In keeping with the Court’s decision in K.R.S. v. the United Kingdom, it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Dublin Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, in assessing the responsibility of the States when they applied Community law."

In response to the assumption put forward by the Netherlands, the Court stated, and this is probably the most innovative element, that Member States cannot blindly rely on the principle of mutual trust as a basis of European asylum law when there are indications that a Member State is failing to meet its obligations to respect human rights and that the other Member States must proceed to carrying out an assessment to check whether the concerned Member State is compliant with its obligations under international human rights instruments:

"(…) the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities."
“The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice.”

2.3.2.2 N.S. v. UK and M.E. v. Ireland

The joined cases N.S. and M.E. concerned several individuals, originating from Afghanistan, Iran and Algeria. All of them had entered the Union through Greece, without applying for asylum, and travelled onwards to the United Kingdom or Ireland in order to lodge their asylum applications.  

The Eurodac database pointed to Greece as responsible Member State to examine these applications, since Greece was the country of first entrance. Consequently, both the UK and Ireland requested Greece to take charge of these cases. The Dublin transfer to Greece was contested by the applicants, by bringing forward the possible violation of human rights.

The CJEU started its reasoning by emphasizing that the context of the Common European Asylum System, and more specifically the Dublin Regulation, and the climate of trust between the Member State were legitimation to assume all the Member States involved were complying with fundamental rights with regard to the asylum procedure:

“Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.”

Secondly, the Court also found it to be important to reiterate the rationale of the Regulation, that is the avoidance of asylum forum shopping:

“(…)in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.”

According to the CJEU, it must be therefore assumed that the treatment of asylum seekers is human rights-compliant in all Member States. However, in its next paragraph, the CJEU follows the ECtHR by

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64 M.S.S v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011), para 359
65 Joined cases C-411/10 and 493/10 N.S. v. United Kingdom and M.E. v. Ireland [2011] ECLI:EU:C:2011:865, paras 34-35 and 51
acknowledging that this blind trust in other Member States cannot be kept up in all circumstances and that in some situations the treatment of asylum seekers will be incompatible with the international obligations of the Member States to respect fundamental rights:

“It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.”

Hence, the CJEU goes further and adds an important connotation to the ECtHR’s M.S.S. judgement. The Court continues its reasoning by underlining that not any violation of a fundamental right will suffice to lift the obligation to comply with the Dublin Regulation. Taking into account that inter-state confidence is the ‘raison d’être’ of the Union, and that derogating from it requires a certain level of severity, the CJEU restricts the derogation from the principle of mutual trust to situations where ‘systemic deficiencies’ emerge:

“At issue here is the raison d’être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.”

“By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.”

By adding the connotation of ‘systemic deficiencies’, the CJEU substantially reduces the scope where there is margin for derogation of the mutual trust base in Dublin. By using this term, the CJEU introduces a relatively high threshold for the suspension of Dublin transfers. The rationale behind this high threshold can be found in the importance attached to the principle of mutual trust as a cornerstone of European asylum law.

2.3.2.3 Tarakhel v. Switzerland

The Tarakhel case goes a step further than the previously cited M.S.S. case. An Afghan family had accessed Italy through Turkey and was placed in a reception facility. Due to the poor living conditions in this facility, the family decided to travel onwards to Austria and applied for asylum there. This application was rejected

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69 Joined cases C-411/10 and 493/10 N.S. v. United Kingdom and M.E. v. Ireland [2011] ECLI:EU:C:2011:865, para 81
70 Joined cases C-411/10 and 493/10 N.S. v. United Kingdom and M.E. v. Ireland [2011] ECLI:EU:C:2011:865, para 82
71 Joined cases C-411/10 and 493/10 N.S. v. United Kingdom and M.E. v. Ireland [2011] ECLI:EU:C:2011:865, para 83
by the Austrian authorities since there was a Eurodac hit and by consequence Italy was charged with the responsibility to examine the application. Austria requested Italy to take charge, but by the time they received formal acceptance, the Tarakhel family had already continued their journey to Switzerland where their claim for asylum once again got rejected due to a hit in the Eurodac database.\(^{74}\)

Firstly, the Court concluded that, based on the information available, the situation in Italy was not entirely comparable to the poor circumstances in Greece at the time of the M.S.S. case and thus there was no reason to suspend all Dublin transfers to Italy. Nevertheless, the Court stated that this was not a sufficiently conclusive reason not to question the requested Dublin transfer:

> "While the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raise serious doubts as to the current capacities of the system. Accordingly, in the Court’s view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded."\(^{75}\)

The groundbreaking aspect in this case can be found in paragraphs 121 and 122, where the Court abandoned the black and white division between the presence and absence of systemic deficiencies. The Court broadens the scope of situations where Dublin can be set aside in favor of human rights obligations. From now on, the mere absence of systemic deficiencies cannot lead to an automatic approval of all Dublin transfers, states cannot blindly rely on Dublin to be human rights-compliant.\(^{76}\)

> "Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention."\(^{77}\)

For the Dublin transfer to be in compliance with Article 3 ECHR, the Court requires the requesting Member State to seek individual guarantees. For that reason, the Dublin transfer is conditional upon the obtaining of specific guarantees with regard to the living conditions of the persons in question:

\(^{74}\) Tarakhel v Switzerland App no 29217/12 (ECtHR 4 November 2014), paras 8-16  
\(^{75}\) Tarakhel v Switzerland App no 29217/12 (ECtHR 4 November 2014), para 115  
\(^{77}\) Tarakhel v Switzerland App no 29217/12 (ECtHR 4 November 2014), paras 121-122
“In the present case the Court must therefore ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants’ specific situation, substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy.”

In this judgement, the ECtHR abandoned the connotation of the CJEU as a conditio sine qua non for the suspension of Dublin transfers.

2.3.2.4 Mutual trust as a foundation of European Asylum law

2.3.2.4.1 Mutual recognition

Since the introduction of the Dublin regulation, mutual recognition has been the basis of cooperation in asylum matters. The 1999 Tampere summit reaffirmed the importance of the principle of mutual recognition as the cornerstone of European Asylum law. This principle was implemented in the recognition of asylum decisions of other Member States, as if it were a decision of the Member State confronted with the decision, and the recognition of national standards. However, mutual recognition of positive asylum systems is still rather limited (we will go deeper upon this issue under 2.4.4).

Mutual recognition is founded in the climate of mutual trust between the Member States. In order to recognize one another’s decisions, a certain level of trust in the foreign judiciaries is required. This trust is, according to the Member States of the Union, justified by all of them being Council of Europe Member States and respecting fundamental rights. Somehow, it seems hypocrite to trust some states more, simply because they comply with the same conditions as other states. This principle thus implicates the a priori presumption that all Member States are human rights-compliant and thus safe countries.

2.3.2.4.1.1 Tensed relationship between mutual trust and international obligations

While applying the principle of mutual recognition, some issues in relation to international obligations manifested itself. Noteworthy in this aspect is the obligation of non-refoulement under the 1951 Geneva Convention, stating that “a refugee should not be returned to a country where he or she faces serious threats to his or her life or freedom”. As UNHCR covered in its 1997 Note, this principle contains an express obligation for the international community to universally respect human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of

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78 Tarakhel v Switzerland App no 29217/12 (ECtHR 4 November 2014), para 105
81 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33
These basic human rights can be on the verge when a refugee is sent back to a situation where they might face persecution or danger. Mutual trust however, is no sufficient guarantee for the absence of human rights violations, as the above mentioned judgements of the two European Courts have pointed out. The transfer decisions made on the grounds of mutual trust can therefore be incompatible with the principle of non-refoulement.

2.3.2.4.2 Reversal of the principle of compliance?

As a consequence of the judgements delivered by both the European Court of Human Rights and the European Court of Justice, one may wonder whether these judgements reversed the principle of compliance, enforcing the Member States to check for (systemic) deficiencies. Despite the fact that human rights are partly reintroduced as a condition, the situations where a Member State must refuse a transfer are still rather limited. Only in case of systemic deficiencies in the detention conditions or even in situations of non-systemic deficiencies where there are suspicions of human rights violations, the Member State in question must refuse the transfer in the former and acquire individual guarantees in the latter situation. Therefore, out of this tendency in jurisprudence, the conclusion can be made that there has been a gradual reintroduction of human rights as a ground for refusal.

2.4 The future of Dublin

To fully understand the criticism expressed and the deficiencies the Dublin regulation is accused of, this section will first elaborate on the perhaps most controversial aspect of this regulation in relation to burden-sharing: its responsibility-allocating hierarchy. Further on, the problematic aspects of the regulation are listed and the reconcilability of this regulation with the principles expressed in the Lisbon Treaty is questioned. This assessment should lead up to a conclusion on the further sustainability of the current system.

2.4.1 Dublin criteria to determine the responsible Member State for the asylum application

2.4.1.1 Hierarchy

Chapter three of the current Dublin regulation comprises the criteria that should be applied in order to determine the Member State responsible for the processing of the asylum application. These criteria are built up hierarchically, in order of appearance in the regulation. In the first instance, the Member State where a family member, who has been attributed the status of refugee or is subject to an asylum application, is present, carries the responsibility to examine the asylum application. In second order, the Member State who issued the applicant a valid residence permit or a valid visa, will be burdened with the obligation of examining the applicant’s asylum request. In the hypothesis where the applicant is in the possession of

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83 European Parliament and Council Regulation 604/2014 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, art 9-15

84 Article 12, ibid
multiple residence permits or visa, a hierarchical order is comprised in Article 12. Subsequently, Article 13 contains the most disputed characteristic of Dublin: the responsibility of the Member State of first entrance. According to this clause, the Member State where the applicant first crossed the external border of the Union irregularly, will be held responsible for the examination of the asylum application.\textsuperscript{85} This obligation ceases to exist after the expiry of a period of 12 months. Once this threshold has been exceeded, the application will have to be examined by the Member State where the applicant has resided continuously for more than five months. In the situation where multiple Member States meet this criterion, the Member State where the applicant has been living most recently, will be held responsible. In subordinate order, the responsibility lies with the Member State that has waived a visa requirement.\textsuperscript{86} Lastly, where the application for international protection is made in the international transit area of an airport of a Member State, that Member State shall be responsible for examining the application.\textsuperscript{87} In order to guarantee that no one falls outside the hierarchy, a residual clause was built in under the form of Article 3(2). This Article aims at avoiding any lacuna, and states that if no responsibility can be determined on the basis of the hierarchy in Chapter III of the Regulation, the first Member State where an asylum application was lodged will be responsible for the examination thereof.\textsuperscript{88} As mentioned, the Member State of first entry criterion forms the most problematic aspect of the hierarchy causing, as will be illustrated, a disproportionate spreading of the burden in asylum applications.

2.4.1.2 Exceptions

Supplementary to the general rules of hierarchy set out in chapter three, two exceptions can be found in the fourth chapter, the first being an exception for dependent persons and the latter being a discretionary clause. These exceptions form a possibility for the Member States to take up responsibility outside the allocation in accordance with the hierarchy comprised in chapter III.

2.4.1.2.1 Dependent persons clause

Article 16 of the Dublin regulation foresees the possibility to reunify dependent family members that fall outside the scope of reunification under Articles 9 and 10 of the Regulation. The conditions for this exception-regime are twofold: on the one hand the applicant has to require assistance on account of pregnancy, a new-born child, serious illness, severe disability or old age and on the other hand the family member concerned must be capable to take care of the dependent applicant.\textsuperscript{89}

This former humanitarian clause does not only benefit the applicant or family member in question, the provision entails an important cost-efficient. Since the Union saves both on specific support for dependent persons and the fact that the housing of a family group will also render a lower cost than providing

\textsuperscript{85} Article 13, ibid

\textsuperscript{86} Article 14, ibid

\textsuperscript{87} Article 15, ibid

\textsuperscript{88} Article 3(2), ibid

\textsuperscript{89} Article 16, ibid
individual accommodation. The CJEU interpreted this clause to be an obligation imposed on the Member States in the situations where the dependency link is proven.\textsuperscript{90}

\textbf{2.4.1.2.2 Discretionary clause}

Secondly, a Member State can, by a way of derogation, take responsibility on the ground of Article 17 of the Dublin regulation. Each Member State is competent to examine an asylum application lodged with it, even when it is not the responsible Member State in accordance with the hierarchy set out in the Dublin regulation.

\textbf{2.4.2 The insufficiency of Dublin}

In the light of the augmentation of refugee flows directed towards the Union, the vulnerability of Dublin as an asylum application mechanism became obvious to the larger public. This section will elaborate on Dublin’s weak spots, and why it all went wrong with the most recent migration crisis.

\textbf{2.4.2.1 Case law CJEU and ECtHR}

As appears from the case law discussed above, Member States at the external border are more heavily burdened, leading to a decrease in standards. Both courts have pointed out the divergences in Member States’ shares in the asylum burden at multiple occasions. The infractions on standards occur in Member States located at the external border, which are obviously most burdened due to the first entry criterion introduced by the Dublin regulation. This has led both courts to conclude that due to the decrease in standards, the application of the Dublin system could no longer be guaranteed unconditionally. Risking a violation of fundamental rights, the ECtHR and the CJEU came to the conclusion that Dublin transfers had to be suspended in case of systemic deficiencies in the reception facilities of the Member State responsible in accordance with the Dublin hierarchy. The ECtHR even went a step further in its Tarakhel judgement, expanding the grounds for suspension of transfers. Member States tried to assess the criticism outed in case law, by incorporating the suspension on the account of systemic deficiencies in Union legislation, thereby keeping in place the underlying cause of these deficiencies: the Dublin system.

\textbf{2.4.2.2 Policy Documents}

EU institutions have been pointing out the need for a reform of Dublin, in September 2015, the European Parliament adopted a resolution, stating: “\textit{Reiterates its calls on the Commission to amend the existing Dublin Regulation in order to include a permanent, binding system of distribution of asylum seekers among the 28 Member States, using a fair, compulsory allocation key, while taking into account the prospects of integration and the needs and specific circumstances of asylum seekers themselves}”\textsuperscript{91}

In early 2016, the Commission explicitly acknowledged through several policy documents that the Dublin regulation is no longer a workable system for determining intra-EU responsibility concerning asylum applications. In these documents, a new proposal for yet another reform of the Dublin system was put

\textsuperscript{90} Case C-245/11 K v Bundesasylamt. [2012] ECLI:EU:C:2012:685, para 51

\textsuperscript{91} European Parliament Resolution 2015/2833(RSP) of 10 September 2015 on migration and refugees in Europe [2015]
forward. In its communication of 6 April 2016\textsuperscript{92}, the Commission pointed out the main shortcoming to the Dublin III regulation, and recognized that these were not merely crisis-induced. Many of the deficiencies were already present and in need of revision before the increase of the migratory pressure due to conflicts in the Middle-East. As the Commission pointed out, the current system was not a model that intended to allocate asylum applicants in a fair and well-balanced manner, a characteristic that became more and more clear when the migratory influx expanded. As a consequence of the first entry criterion, the greater part of responsibility falls with a limited category of Member States, namely those with a detrimental location at the Union’s external border.

Only one month later, on 6 May 2016, The Commission put forward a proposal for a recast of the Dublin regulation.\textsuperscript{93} With this proposal, they tried to address some of the criticisms expressed on the Dublin III regulation. Although the Commission introduced some new aspects, the basic premises of the Dublin has been kept in place. It seems like the widely criticized criterion of first entrance will not be abandoned in the next version of Dublin, and will remain an obstacle to a more efficient and fair sharing of the burden in asylum applications. Controversial to the observation that Dublin is no longer workable, the institutions are encouraging the Member States to keep the system functioning, and to persist in transferring applicants who do not fall within their responsibility.

2.4.2.3 Objectivity before equality

One of the core criticisms that should be addressed is the fact that the Union has been rigidly holding on to a mechanism that has proven to result in an uneven distribution for years, not by far meeting the objectives set out in the regulation. One of the main objectives of Dublin III is to ensure an equitable distribution of applicants. However, the distributive impact of the Dublin regulation was very little and almost non-existing.\textsuperscript{94} This observation can be demonstrated by the fact that in 2014 70\% of all first-time asylum applications in the Union were lodged in only 5 Member States.\textsuperscript{95}

The hierarchical criteria as set out in the third chapter of Dublin do not take any level of so called ‘fairness’ or ‘equitable distribution’ into account, there is no expression of any intention to support heavily burdened Member States included in Dublin III.\textsuperscript{96} Although there is a weak attempt to address this issue in the Dublin recast proposal, the chances of success are highly doubtful. As a first remark, it should be noted that the

\begin{flushleft}
\textsuperscript{92} Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ (Communication) COM (2016) 197 final

\textsuperscript{93} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2

\textsuperscript{94} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Explanatory Memorandum

\textsuperscript{95} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Explanatory Memorandum

\textsuperscript{96} Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 180
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threshold for activating the corrective allocation mechanism lies relatively high, i.e. when capacity of a Member State is exceeded with 50%. Therefore, the corrective measures can be circumvented for the time span of one year, by paying a certain amount for each applicant that normally would be relocated to the state concerned. A remark that should be made in this context relates to the poorly executed ad hoc relocation schemes, which will be discussed later on. Since these were only to a very limited extent carried out by the Member States, what guarantees does this new corrective allocation mechanism comprise that it will not suffer the same destiny as the ad hoc relocation schemes?

2.4.2.4 Disproportionate affection of countries with a long external border

The disproportionate affection of the Member States located at the external border is undoubtedly the most characterizing and debated deficiency of the system. As a result of the criterion determining that the Member State, where the applicant first irregularly entered the Union, will be the Member State in charge of the asylum application, it is a logical consequence that Member States having a long external border will be most affected by irregular migration. The combination of the first entry criterion in Article 13 of the Regulation, in concurrence with the lack of safe legal access to the Union, leads persons seeking international protection to find harbor in illegal land or sea routes. Member States located nearest to the country of origin / the country of departure will therefore be forced to receive the largest number of asylum applicants. In the absence of a permanent and even a functioning temporary relocation mechanism, these countries will not only be responsible for the examination of numerous asylum applications, they will also be obliged to foresee post-recognition reception facilities. The issue of unequal distribution of reception will be discussed elaborately in the third chapter.

In light of the Commission proposal, an important remark should be made concerning the burdening of Member States located at the external border. This proposal is intended to abolish the transfer of responsibility after the expiry of a period of 12 months and introduces the new ‘once responsible, always responsible’ rule, resulting in an even higher pressure on the Member States at the external border.

2.4.2.5 Fictive equality of divergent domestic asylum systems

In spite of harmonization efforts on EU level, imposing minimum standards on the Member States to, a large part of the Member States are failing to align their procedures with the European standards on protection. Therefore the assumption that all Member States meet Union standards, is a major misconception. The

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97 Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, art 34.


99 Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Explanatory Memorandum.

asylum procedure in essence remains a national competence, despite efforts to harmonize certain aspects, and is consequently highly divergent from Member State to Member State. Not only the fact that the competence in asylum matters lies largely with the individual Member States should be taken into account here. At the same time, the problem of implementation plays a large part in the assumption of fictive equality of asylum systems. Practice shows a substantial gap between the decisions made and the actions taken. The mere presence of legally binding decisions have no influence on the equality of asylum systems as long as they are not properly implemented.  

Both the ECtHR and the CJEU have demonstrated that the fictive equality of all EU asylum systems cannot be kept in place unconditionally. With the MSS and NS and ME judgements, they pertly destroyed the European asylum bubble by concluding that a national asylum system showing structural deficiencies, could no longer be put on a par with the other national asylum systems. As discussed above, Greece has so manifestly failed to meet standards that transfers had to be suspended by both European Courts.

As UNHCR already noted in its 2007 comments on the European Commission’s Green Paper on the Future Common European Asylum System, the allocation of responsibility in accordance with Dublin is based on the deficient assumption that the domestic asylum systems of all Member States have a similar outcome and that they dispose of the same principles. Since asylum is up to date a shared competence of the Union and the Member States, the laws and practices are still differing largely from Member State to Member State, which consequently leads to a variation in treatment of the application throughout the Union. One of the many consequences this brings are divergent recognition rates, which can be attributed to the strictness of the procedure followed in considering whether a person should be granted international protection.

As will be demonstrated further on, the introduction of a completely European procedure and thereby creating truly equal systems will not have the inherent effect of establishing an entirely equitable distribution of asylum applications lodged. A common procedure will cause other pull factors to play a larger role, since harmonization initiatives will only influence the legal differences in the Member States, leaving aside economic, social and cultural differences rendering a particular Member State an interesting destination.

### 2.4.2.6 Dublin: originally designed for intra-EU movement

Problematic in the light of burden-sharing, is that the realization of a fair spreading of refugees was never aimed at by the Dublin system. It is important to bear in mind that this mechanism was designed with the

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objective of having a supportive function to the free movement of persons within the EU.\textsuperscript{105} Since the notion of free movement does not apply to refugees, and the level of control the Member States has drastically increased due to the abolition of national border controls, a responsibility allocation mechanism for asylum applications was a necessary mean. It’s impossible for the free movement of persons to function properly if any instruments handling the allocation of refugees were absent.\textsuperscript{106} However, Dublin was conceived too much as a flanking measure, without making any effort to achieve some form of fair-sharing. This approach resulted in the side effect of an inequitable spreading of the asylum burden. Any future initiatives determining responsibility for asylum applications should therefore sufficiently take into account its impact on burden-sharing, striving for a policy based on solidarity and fair-sharing. Alongside serving as a counterbalance to the free movement of persons, the additional objective of achieving a fair spreading must be incorporated.

\textbf{2.4.2.7 Dublin and situations of increased migratory pressure}

As the increase of migratory pressure originating from conflicts in the Middle East has shown us, and as reaffirmed in the explanatory memorandum to the Commission’s Dublin recast proposal, the Dublin system for allocating responsibility is not capable of coping with situations of increased pressure.\textsuperscript{107} This is a consequence of the disproportionate affection of Member States at the external border. Because of the insufficient spreading of asylum applications, an increase in pressure will have to be carried by a handful of Member States alone. No efforts are built in the regulation to deal with these situations on a more fair basis. This has led to the deficient application of the Dublin regulation, with Member States failing to register and a delay in procedures because the number of applications lodged exceeds their capacity.\textsuperscript{108} The regulation itself shows to be the root cause of why it cannot be applied properly. The absence of a revised action plan in crisis situations forms a structural handicap of the system.

\textbf{2.4.2.8 Dublin encouraging absconding}

Article 13(2) of the Dublin III regulation determines that the Member State of first entrance will no longer be the responsible Member State when the applicant has been living in another Member State for a continuous period of at least five months.\textsuperscript{109} As soon as the threshold of five months has been reached, the responsibility will be transmitted to this country. This provision explains the high rate of absconding during the Dublin


\textsuperscript{107} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Explanatory Memorandum

\textsuperscript{108} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Explanatory Memorandum

\textsuperscript{109} European Parliament and Council Regulation 604/2014 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, art 13(2)
procedures, resulting in a shift of responsibility to process the asylum applications. The effectiveness of the system is further undermined by the current rules which provide for a shift of responsibility between Member States after a given time. So, if an applicant absconds for long enough in a Member State without being effectively transferred, this Member State will eventually become responsible.\textsuperscript{110}

However, in the proposed recast, the provision foreseeing the shift of responsibility is eliminated, and only leaves the first entry criterion. In the preamble, a provision is added, formulated as follows:

“The Member State which is determined as responsible under this Regulation should remain responsible for examination of each and every application of that applicant, including any subsequent application, in accordance with Article 40, 41 and 42 of Directive 2013/32/EU, irrespective of whether the applicant has left or was removed from the territories of the Member States. Provisions in Regulation (EU) 604/2013 which had provided for the cessation of responsibility in certain circumstances, including when deadlines for the carrying out of transfers had elapsed for a certain period of time, had created an incentive for absconding, and should therefore be removed.”\textsuperscript{111}

The proposal for Dublin IV thus tries to solve this issue of absconding by introducing a “once responsible, always responsible” rule to discourage this practice. The proposal fortifies this intention by introducing sanctions in case of absconding. Whether the abolishment of this cessation of responsibility rule will deliver the desired result will be assessed under section 2.5.

2.4.3 The need to develop adequate counterbalances to Dublin

As can be derived from the criticisms outed and the deficiencies put forward, Dublin in itself is no longer an efficient tool for determining the Member State responsible. In order to keep the idea of a European asylum system in place and not to endanger the free movement of persons, one of the core values of the internal market, the inefficiently working Dublin system should be counterbalanced, or a fortiori replaced entirely. National systems are under strain due to the disproportionate burdens the allocating mechanism imposes on some of the Member States and while in theory Dublin still applies, and the institutions are urging the Member States to hold on to it, in practice the relevance of Dublin seems to have disappeared largely. The number of transfers effectively carried out is very limited, leading to a de facto free movement of asylum seekers. This de facto free movement results in the attractive Member States to be submerged by asylum applications. As a reaction to this, some Member States are pulling up national borders again. If we want to keep the free movement in place, a reform of responsibility allocation is inevitable.

\textsuperscript{110} Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ (Communication) COM (2016) 197 final

\textsuperscript{111} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Preamble, recital 25
2.4.4 Yes for the MS, No for the Union

As already underlined in the previous paragraphs, the asylum procedure and the outcome of it, possibly leading to the granting of an asylum status, fall within the shared competence of the Union and the individual Member States. The outcome of the asylum procedures is a national affair. However, positive decisions in an asylum procedure are valid at national level only and by consequence will only apply within the borders of the Member State that handed out the decision, in contrary to negative decisions, which have effect throughout the entire Union. In respect to the former, it should be reiterated that there are no free movement rights for recognized beneficiaries and that the right to asylum should therefore be practiced within the borders of one Member State. Nevertheless, already at the Tampere summit in 1999, a first reference to the goal of creating a uniform asylum status was made.

2.4.4.1 Article 78 TFEU: The false promise of a uniform asylum status?

In Article 78 TFEU, the Union set out the aim to strive for a uniform asylum status, valid throughout the Union:

“2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;”

Today, we are far from reaching this objective. It does not seem in line with the objectives set out that up till now, we haven’t evolved any further from the starting point of mutual recognition of negative asylum decisions. Although mutual recognition of negative decisions forms an essential part of a common status, it remains questionable if in the case of the EU mutual recognition of negative decisions can actually be seen as an effort towards a common status. Depending on the perception and the absence of any further efforts towards the creation of a common status, it may appear to be a merely beneficial measure for the individual Member States. The introduction of minimum standards can merely be seen as baby steps in bringing the national procedures closer together, however, no efforts towards the creation of a common status were taken. Notwithstanding that it is obvious that the first step towards a common European asylum status would be the mutual recognition of positive asylum decisions in all Member States. Another remark that should be made here is that the introduction of such a status, in combination with voluntary relocation won’t lead to a more equitable spreading of the burden, since the pull factors peculiar to a Member State will have free rein.

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114 Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty) [2012] OJ C326/01, art 78(2)

2.4.5 Keeping up with Dublin or keeping up with reality?

In the last chapter of this paper, an assessment of alternative responsibility allocation mechanisms will be carried out. The pro’s and con’s of these alternative models will be weighed and compared to the current and proposed Dublin system. Reality has shown us that the Dublin system is insufficient, and that therefore the holding on to it is not the most beneficial solution, keeping in mind the objective of creating a uniform procedure and status throughout the Union, in order to involve to a truly European asylum system. The most ideal solution is to evolve towards a more reality-based model, comprising built-in mechanisms to deal with abnormal pressure and crisis-situations and most importantly leading to an equitable distribution of asylum applications in both crisis and non-crisis situations.

2.5 The Dublin recast proposal: a step in the right direction?

The European Commission’s proposal of 4 May 2016 was not welcomed with open arms by doctrine, for several reasons. The importance of Dublin III as a cornerstone of the Union’s asylum acquis was underlined, justifying its objectives to be kept alive. The main innovation of this regulation can be found in the corrective mechanism, that was introduced to correct the adverse effects of the classical Dublin allocation mechanism in situations of increased pressure on the asylum systems of certain Member States. Since this mechanism can be situated on the level of reception for the major part, it will be discussed in the next chapter.

The legal basis of this proposal can be found in Article 78(2), e) TFEU, which empowers the Union to adopt measures comprising responsibility allocating criteria in the field of applications for asylum and subsidiary protection. Just like its predecessor, the proposal for a fourth Dublin regulation is set out to be the cornerstone of the Union’s asylum policy.

A first comment that should be made relates to the missed opportunity to enhance fundamental rights credibility of the Dublin system. In the Dublin III regulation, improvements on fundamental rights level were made through the incorporation of the N.S. jurisprudence in Article 3(2), holding the obligation for Member States to abstain from executing Dublin transfers to Member States with systemic deficiencies in their asylum system. The EU legislator should have made use of the reform situation to implement the Tarakhel case law. However, no such incorporation took place, resulting in a very limited scope of the compatibility assessment of transfers with fundamental rights. This could be attributed to the legislator not wanting to go directly against mutual recognition, being the underlying principle of cooperation in asylum matters, and therefore taking on a reticent attitude towards expanding the compliance test too far. This reasoning can be easily counterfeited: if fundamental rights are guaranteed, as Member States assert through mutual recognition, no harm should be found in broadening the scope of the fundamental rights compliance test. Therefore, the test should not be limited to systemic deficiencies and national courts should able to independently check for compliance with all fundamental rights provisions.
Article 3(3) of the recast proposal introduces an obligatory admissibility check for the Member States. Where the applicant originates from a safe third country, his application will be inadmissible.\textsuperscript{116} In practice, this comes down to the incorporation of the EU Turkey Agreement and other readmission agreements in Union legislation. This provision forms a clear reflection of the EU’s tendency to externalize migration pressure. Subsequently, the introduction of a safe third country list on EU level is required. For the realization of such a list, the Dublin recast proposal refers to another pending proposal, acquiring to establish an EU common list of safe countries of origin.\textsuperscript{117} The general nature of the admissibility check, only taking into account grounds of safe country of origin, might cause difficulties in the light of family unity rights. If all applications of persons coming from a country designated as safe are automatically rejected due to inadmissibility, the right to family unity could seriously be compromised.\textsuperscript{118}

New to this recast, and controversial, is the introduction of sanctions for the applicants in case of non-compliance with the Dublin hierarchy. Articles 4 and 5 of the recast respectively set out the obligations on the applicant and the consequences of non-compliance.\textsuperscript{119} The obligations in Article 4 are fourfold: an applicant has to apply in the Member State of first entry or the Member State of legal stay, has an obligation to provide information, has a duty to cooperate in the procedure and lastly needs to comply with a possible transfer decision. Article 5 lists the sanctions for any infringements on these obligations. Three categories of sanctions are foreseen in Article 5, the first being the acceleration of the asylum procedure. Other possible sanctions consist of the withdrawal of reception conditions, save for emergency health care and the inadmissibility of belated information. Important is to examine how these sanctions introduced relate to the procedural safeguards and international refugee law. More specifically, some scholars carry the opinion that these sanctions might be problematic in the light of Article 31(1) of the Geneva Convention.\textsuperscript{120} This Article states that:

“1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”\textsuperscript{121}
Thus, this provision restricts any sanctions imposed to refugees on account of their illegal presence or entry. Therefore, the sanctions included in the recast proposal will not be incompatible with this article, since they cannot be imposed on the account of illegal entry or presence of applicant. The only situations that could give cause to the application of sanctions is not fulfilling the obligations under Article 4. Even the sanction of an accelerated procedure, in case the applicant did not apply in the correct Member State, cannot be brought under the scope of Article 31(1) of the Geneva convention, since an incorrect application results from entering the Union through another Member State, not fulfilling the requirement of coming directly from a territory where his life or freedom was threatened.

On account of the high level absconding due to the hierarchy foreseeing in a shift of responsibility after the expiry of a one year time-limit, the legislator decided to abolish the provision covering this transfer of responsibility. To oppose the widespread practice of absconding, resulting in a de facto possibility to choose the country of asylum, the proposal introduces a ‘once responsible, always responsible’ rule. The obvious rationale behind the removal of this transfer of responsibility can be found in the objective of preventing irregular secondary movement to a bare minimum. However, from a fair-sharing perspective, this rule cannot be welcomed with open arms. Since it imposes even more responsibility on the already overburdened Member States located at the external border, this criterion cannot be regarded as contributing to the realization of an asylum policy based on solidarity and fair-sharing, to the contrary, it even opposes a policy governed by those principles.

The growing importance of the first entry criterion cannot only be derived from the ‘once responsible, always responsible’ rule, but also appears from the limitation of the Member States’ margin of discretion. This is most visible in the proposed revision of the discretionary clause, since the material scope of applications is limited to applications based on family grounds in relation to wider family not covered by Article 2, g) of the proposal. The introduction of this requirement forms a substantial restriction of the Member States’ margin of discretion, since the current version of the discretionary clause allows the Member States to take responsibility for any application, irrespective of the grounds to do so. Besides the limitation of grounds in the discretionary clause, this proposal comprises an overall tendency to eliminate Member States’ margin of discretion. In both Article 24(1) and 26(1), the former possibilities to issue take charge and take back requests are replaced by an imperative variety, resulting in a binding obligation. The restriction of Member States’ margin of discretion however hinders solidarity efforts on a voluntary basis, thereby contributing in the solidarity and fair-sharing gap in the EU’s asylum policy.

122 Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, art 15

123 Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, art 19

To overcome the problem of lengthy procedures, the proposal foresees in the reduction of most time-limits, aspiring to obtain a more efficient and rapid procedure and additionally to discourage absconding for the sole purpose of the cessation of the responsibility of the country of first entry. However, these shortened time-limits miss the mark, since an essential element is lacking: no consequences in case non-respecting these time-limits are admitted to the proposal.

In general, the conclusion can be drawn that this proposal does not address the majority share of deficiencies that manifested in the current version of the Dublin Regulation. Thereby, the corrective allocation mechanism as an attempt to incorporate solidarity and fair-sharing in the European asylum policy completely misses the mark, as will be discussed under the chapter of burden-sharing on the reception level.

2.6 Reconcilability Article 80 TFEU and Dublin

The entire EU asylum contentieux is based on the principles of solidarity and fair-sharing of responsibility. As concluded in the former part, Dublin by far does not lead to a situation of fair-sharing in the processing of asylum applications, since only a handful of Member States have to carry the burden. The question arises then on how the disproportional division of asylum applications caused by the Dublin system could be reconcilable with the European Union’s solidarity and fair-sharing concepts, as outed in Article 80 TFEU. More clearance should be made on the notions of solidarity and fair-sharing and the implications they cause, on what obligations these concepts hold for the Member States and on the relationship between these two concepts. Only then an assessment of whether Dublin is making an infringement on this provision of primary Union law can be carried out.

2.6.1 Interpretation of the term ‘solidarity’

Article 80 TFEU can be seen as the basis of the idea of solidarity in the Union’s asylum and migration policy, stating that:

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

The absence of any clarification whatsoever on the interpretation of the principle of solidarity, gives rise to a lot of questions on the scope and the enforceability of this notion and on how this solidarity concept should be translated into practice. There is little agreement on the scope of solidarity. Solidarity is a principle based on mutual trust between the Member States. In the context of asylum, solidarity can be described as the certainty that in periods of high migration pressure, the other Member States will take charge of part of

125 Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty) [2012] OJ C326/01, art 80

the burden, alleviating the pressure, opposed to the engagement to do the same when other member states are faced with such pressure.

2.6.1.1 Mere intra-Member State solidarity or ‘duty to support’?

The principle of solidarity as the foundation of the European asylum policy was first put forward at the 1999 Tampere Summit. The concept has been given a formal role in Article 80 TFEU, supportive to the Union’s competence to act in asylum matters as described in Article 78(2) TFEU. However, some clearance should be made on the range of this principle. It is in this context important to note whether this provision can be limited to a mere intra-EU solidarity, or whether this notion is wider, including not only intra-Member State solidarity, but also solidarity vis-à-vis third countries or vis-à-vis refugees.

A textual interpretation of the article would lead us to believe that the solidarity is meant as solely applying between Member States and the Union, since in the article itself is underlined: ‘between the Member States’. However, a working document of the LIBE committee sets out that the solidarity concept as set out in Article 80 TFEU, consists of two big categories, internal and external solidarity:

“Solidarity can take many forms but falls broadly into two categories: internal solidarity and external solidarity. Internal solidarity relates to the solidarity shown from one Member State to another Member State, or from the European Union as a whole towards one of its Member States, or from EU citizens towards third country nationals present in the EU. External solidarity refers to solidarity by the EU towards those people, not on the territory of the EU, who are affected by war, persecution, hunger or violent conflicts in their country of origin, those who are at risk of losing their lives in makeshift boats crossing the Mediterranean, and to solidarity with third countries that currently receive on their territories and in their communities huge numbers of refugees fleeing war, persecution and hunger in neighbouring countries.”

A textual interpretation of the provision raises questions on whether it is compatible with the obligation of international cooperation in the preamble of the Geneva Convention to limit the Solidarity to intra-EU matters. On the grounds of this principle, the Member States have a duty to support, demanding actions to be taken. The preamble to the 1952 Geneva Convention, the foundation of international asylum law, expresses a notion of solidarity in its preamble: “Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has

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127 Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 175


recognized the international scope and nature cannot therefore be achieved without international co-operation.”

Solidarity vis-à-vis third countries and non-EU nationals can thus be derived from the international obligations, if the scope of Article 80 TFEU falls short in doing this. Notwithstanding the fact that external solidarity is guaranteed through international obligations of the Member States and the Union, the concept of solidarity in Article 80 TFEU should be delineated as both having an internal and external component.

2.6.1.2 Hard vs. soft obligation

Another point of discussion concerning the notion of solidarity is the enforceability of this concept. The question arises on whether this somehow vague and ambiguous concept brings concrete obligations for the Member States. Some clarity could be found in a LIBE working document on Article 80 TFEU. Underlining the difficulty to conclude on the enforceability of the solidarity provision, the view expressed in the document is more lenient in the direction of non-enforceability. The need for other measures to be taken in order to render Article 80 TFEU into an effective provision is kept in mind in making the assessment. The absence of a clear definition can be seen as the largest difficulty in enforcing the concept of solidarity, it is not possible to enforce something if there is no consensus on the range of it. Although enforcing solidarity in concrete cases might be rather difficult, it cannot be ignored and needs to be incorporated in the legislation conceived in the light of Article 78(2) TFEU. As Gregor Noll so accurately described it: “Solidarity lacks the precision of ordinary legal norms while still being part of binding law ‘in some sense’. Article 80 is hardly sufficiently concrete to oblige states to do anything particular, but material enough to be more than a nullity.”

2.6.2 Connection to fair-sharing

Furthermore, Article 80 TFEU leaves all questions open on what the relationship between solidarity and fair-sharing is or should be. Fair-sharing wishes to establish a status quo that succeeds in the realization of an equitable spreading, not in absolute numbers but by taking into account the relative reception capacities of the Member States. To a certain extent, fair-sharing can thus be considered as a necessary part of a solidarity commitment. The point of controversy is how far fair-sharing reaches within the broader framework of solidarity, and to which degree fair-sharing is to be expected.

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130 Preamble to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137


2.6.2.1 Inversely proportional relationship solidarity and fair-sharing

The theory of solidarity and fair-sharing being in an inversely proportional relationship goes out from fair-sharing being directed on the European level. The more responsibility the Member States confer to the EU, the more it will be shared on EU basis and the less need of solidarity there is between the Member States.\(^{134}\) However, if we regard fair-sharing as being inherent to solidarity, this theory cannot be preserved. An increase of fair-sharing will therefore not result in a decrease in solidarity, but will have the opposite effect and requires a complementary raise of solidarity.

2.6.2.2 Fair-sharing as a form of forced solidarity

The idea of fair-sharing as forced solidarity attributes the role of safety net to fair-sharing in case solidarity does not work. On the contrary, in EU asylum law, solidarity functions more as a safety net for the failure of fair-sharing mechanisms. If fair-sharing schemes do not work, there is an obligation for the Member States to assist in handling the pressure on the grounds of the solidarity provision. In the light of the Union’s asylum policy, fair-sharing should be attributed the title role, supplemented by solidarity as a corrective mean. Solidarity and fair-sharing can be held up as two complementary principles that should balance each other out.

2.6.2.3 Calculating ‘fair shares’ of Member states

According to the Dublin system, and the fact that the right to asylum should be practiced within the Member State granting the asylum status, the Member State responsible for the examining of the asylum application will also be the Member State responsible for the reception of the applicant. Therefore, the assessment of a Member State’s capacity to examine asylum applications in inherently linked to the capacity of reception in this Member State. It makes more sense to elaborate on this issue in the next chapter. An overview of the difficulties arising in trying to agree on a distribution key will be presented in the next chapter, along with the assessment on how to calculate a distribution of the asylum burden based on fairness. Since there is a large parallel between the fair share of asylum applications and the fair share of persons granted international protection, the discussion of this subject is better suited under the third chapter, and no elaboration will be carried out in this part.

2.6.2.3.1 Measures of flow

A first issue that occurs is the measure of flow that should be taken into account as a variable to measure the migration pressure. To determine the measure of flow best fitted to do this, it should be examined where the true burden of an increase in migratory pressure takes place. The perception of the burden placed on a Member State differs the moment we switch variables between the number of refugees, the number of applications lodged or the number of persons granted international protection. On the level of asylum application, logically the measure of flow best fitted to represent the migration pressure is the number of


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applications effectively made. The measure of flow used to scale the pressure exerted on Member States’
asylum systems is an important factor in the political debate to determine a distribution key. This can be
illustrated by the altering positions of the Member States, depending on the variable used, as observed in the
European Parliament Study of the Dublin system, which is a bookmark example of the political influence on
the choice of indicators.135136

135 European Parliament Directorate General for Internal Policies Study, ‘What system of burden-sharing between Member States for

136 Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R.
175
CHAPTER 3: BURDEN-SHARING ON THE LEVEL OF RECEPTION

3.1 Introduction

In this chapter, we will further explore what the notion of burden-sharing on the reception level implies. The structure of the previous chapter will be applied, starting with a delineation of the concept followed by an extensive overview of the legal framework and policy initiatives and concludes with a compatibility-test of the current system with the obligations following from the solidarity provision in Article 80 TFEU.

3.2 Factual context

3.2.1 Components of burden-sharing

Analogous with the second chapter, the tripartite qualification of Gregor Noll will be used as a starting point to delineate burden-sharing. A component-wise assessment will be carried out for the initiatives taken with the purpose of sharing responsibility in respect to the reception of asylum seekers. Each of the three components will be applied and will be discussed in detail. Since this paper is a case study of the current European migration crisis, the former will be inquired in connection to the recent developments of that crisis.

3.2.1.1 Physical burden-sharing

The main point of focus in this chapter will be burden-sharing on a physical level, which implies the actual taking charge of persons who fall under the responsibility of another Member State in regard to the reception. This practice can be brought under the notion of relocation. The EU defines relocation as “The transfer of persons having a status defined by the Geneva Convention or subsidiary protection within the meaning of Directive 2011/95/EC from the EU State which granted them international protection to another EU State where they will be granted similar protection and of persons having applied for international protection from the EU State which is responsible for examining their application to another EU State where their applications for international protection will be examined.”

Mutual recognition of positive asylum decisions is therefore an essential component of relocation, in the cases where recognized beneficiaries of international protection are transferred from one Member State to another. The application of relocation is an exceptional regime, since there is usually only mutual recognition of negative asylum decisions and the implications following from the granting of asylum are limited to the Member State who granted the protection.

3.2.1.1.1 Ad hoc and voluntary-based: aligned with broader political objectives

To date, no permanent mechanism to regulate relocation has been established in the EU. All relocation initiatives towards a more equitable spreading of refugees are voluntary based. Even though they are

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developed through binding decisions, as will be proven later on, this is no guarantee for their effective implementation. One of the other disadvantages inherent to the nature of these initiatives, is the possibility it creates for Member States to align relocation with their broader political objectives, a chance most of them are keen to utilize. The ad hoc aspect has demonstrated to be problematic as well, since the Member States have proven on several occasions that they will only act once a certain threshold has been exceeded. The initiative to take action often comes too late, when the EU is already on the verge of a humanitarian crisis. To avoid such crises and the gross violations of human rights they bring about, a permanent system that can be activated immediately seems more in place. Migration being a sensitive domain, the Member States should have learned from past experiences that it is not easy to find a consensus among all Member States, and that a predetermined system will therefore benefit of the promptness in reacting to a sudden increase in migratory influxes. As will appear from the developments and actions taken during the past years, it will become clear that the European Union should evolve from a charity-based approach to migration pressure, given that charity will always be inherently linked to political motives, to stable commitments.

3.2.1.1.1 Relocation versus Resettlement

It is important to distinguish the concept of relocation from resettlement. A definition of resettlement can be found in the UNHCR handbook on resettlement: “Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.” Resettlement is an initiative coordinated by UNHCR, through the UNHCR resettlement program. The measure of resettlement aims at helping persons granted the status of refugee under the 1951 Geneva Convention, more specifically those who cannot return to their countries of origin, and who additionally are not offered sufficient protection and have no prospects of integration and building a new life in the country of first asylum.

Relocation has a broader range, since it can both apply to refugees granted international protection by a Member State as to refugees in the process of applying for international protection in a Member State, while resettlement can only be applicable to recognized beneficiaries of international protection. Another important difference between the two, and the reason why only relocation will be studied in this paper, is the territorial scope of application. While resettlement is a program in which countries worldwide take part, relocation can only be enforced when the country of first asylum is an EU Member State. Relocation seeks to contribute to the spreading of the European asylum burden and is a clear expression of intra-EU solidarity. From this, it can be deduced that, contrary to resettlement, which focusses in the first instance on the needs and the protection of individual refugees, relocation focusses both on state and individual needs, state needs forming the major component.

139 UNHCR, ‘UNHCR Resettlement Handbook: Division of International Protection’ (UNHCR, July 2011) <http://www.unher.org/46f7e0ee2.pdf>, accessed 14 April 2017

3.2.1.2 Temporary Protection Directive

One of the few legislative initiatives taken in the field of relocation is the Directive on Temporary protection in the event of a mass influx of displaced persons. A German initiative, Germany being a border country at the time, to develop a burden-sharing system with a fixed distribution key, cleared the table for the creation of the Temporary Protection Directive, that was laid on the table in 2001. The context of the bringing into force of this initiative can be found in the conflicts in the former Yugoslavia, which were attributing to mass displacements into the EU. So far, the Temporary Protection Directive has not been triggered, a fact that seems rather odd, since the conditions to activate provisions on relocation were more than once fulfilled.

Article 2 (a) of the TPD defines temporary protection as “a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.”

The question arises what should be understood under the notion of ‘mass influx’, since Article 2(d) hardly brings any clearance, stating that this means the arrival in the EU of a large number of displaced persons. The ambiguity on the personal applicability is one of the weaknesses inherent to it. It’s a part of the exclusive competence of the Council to identify and delineate the groups that can be considered for the regime of temporary protection. It should be noted that the major advantage of the Directive consists of the replacement of individual status determination by the introduction of a group categorization: once a person can be attributed to that certain category, he can lay claim to the temporary protection offered. This working method contributes to the realization of efficiency on a time and resource-based level.

Invoking the TPD mechanism occurs in accordance with Article 5 (1) of the Temporary Protection Directive: “The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.”

A fundamental flaw of the Temporary Protection Directive is that the reallocation mechanism is not automatically activated and needs to be invoked by the Commission, acting out of own initiative or on request of one of the Member States. The figure presented


143 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 2, a)

144 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 5

bellow gives an overview of the successive steps to be taken to activate the temporary protection mechanism. This lengthy process interferes with the objective to offer immediate protection.  

Another shortcoming of the Temporary Protection Directive is the absence of a binding, or in fact any, distribution key to reallocate refugees. The Directive solely comprises a mechanism based on a double voluntariness notion: the system operates through voluntary offers of Member States, to which the consent of the individual transferee has to be given. From a human rights’ perspective, the prerequisite of consent of the transferee required is a positive development, however, this mode of operation stands in the way of effective burden-sharing, especially in the climate where the myth that all Member States trust one another prevails. The temporary protection regime was developed especially for handling crisis situations, but has appeared to be far from crisis-proof. The need to introduce binding redistributive quota’s emerged, since the redistributive potential of the system is hindered by the limit of double voluntariness. In addition to this, no guidance or indicators on how the reallocation should be put in place are provided in the Directive. The responsibility to determine a Member State’s reception capacity is placed upon the Member States

Source: European Commission Study on the Temporary Protection Directive

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146 Preamble to the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, recital 2


148 Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 175
themselves, according to Article 25 of the Temporary Protection Directive, this can either be done in numbers or in general terms. The absence of fixed principles to determine reception capacity will result in divergent factors taken into account by the Member States, and can in no situation lead to an equitable spreading since the capacities are not calculated according to similar parameters.

This mechanism being available since 2001, the question does arise: why was this mechanism not activated in the current migration crisis or in the context of the increase in migratory pressure on Italy due to the Arab spring? It is hardly surprising that political objectives can be found as the principal motive of non-invocation. These political, nationalist motives can be played out at two stages. Firstly, a mass influx has to be acknowledged by the Council, by means of a qualified majority vote. Meeting the threshold of a qualified majority will not be obvious and is likely to be hindered, since an increase in migratory pressure often only has serious consequences in a few Member States and in that perspective the inter-Member State solidarity is hard to find. Secondly, there is a consensus among several Member States that activating the mechanism, and the lower threshold to be granted protection it brings, will result in an even larger increase of migratory influxes towards the European Union. A flaw of this piece of legislation, fortified by a climate where intra-union solidarity is far outside reach, consequently arises from its dependency on politics.

3.2.1.1.3 The EUREMA model as an example a starting point for intra-EU relocation

EUREMA was the pilot project for intra-EU resettlement, being the first in its kind established on a multilateral basis. The substantial increase in refugees arriving in Malta, being the smallest country in the Union, gave rise to the initiation of this relocation project. The EUREMA projected was executed in two phases, the first being entirely multilateral, involving 10 Member States who pledged to foresee a number of places for relocation. The second phase, initiated a year after the first phase, consisted of a multilateral scheme which involved seven Member States, complemented by bilateral commitments of several other states to provide places for relocation. Financial support was provided through the instance of the European Refugee Fund, aiming at financial compensations for the Member States taking part in the EUREMA scheme by offering places for relocation. Important is that in this scheme, it was stressed explicitly that the aim of these measures was to ensure solidarity between the Member States, an objective that the Member States confirmed on the account of a fact finding report conducted by EASO. The Member States put forward that their participation in the relocation of refugees from Malta was mainly grounded on a political decision of solidarity, in line with their commitments to pursue solidarity and fair-sharing under the Stockholm

149 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 25


programme and the European Pact for Immigration and Asylum. Even though this initiative was a step in the right direction for the incorporation of solidarity in the EU’s asylum policy, its positive effect should not be overestimated. First of all the effects produced were rather limited on a quantitative basis: in the first phase of EUREMA, only 228 persons were actually subject to a relocation decision. Thereby, some countries even failed to effectively fulfill their commitments to relocate a marginal number of people. Another aspect that is not desirable to be taken over in future relocation systems is the double voluntariness. The voluntariness aspect is for the greater part situated on the side of the Member States, allowing them to use criteria from national resettlement schemes to select persons to be considered for relocation. Persons considered for relocation are however granted the possibility to accept or refuse any relocation offer. Voluntariness is considered as an important precondition for integration. From the fact finding report, it appears that Member States were not keen on establishing a permanent system, holding on to the opinion that relocation should be a voluntary based political decision. Though assumptions could be made that this point of view could be attributed to the fact that the situation was rather isolated, not directly affecting other Member States due to Malta’s geographical location, this rationale cannot be held up in the context of the current situation, where the entire Union experiences the increased migratory pressure in some aspects. It must be reiterated that we should move to more proactive models for relocation, leaving less of a margin for the Member States to decide in what matter they want to be involved, since the redistributive effect of these kind of reactive measures is constrained by fixed quotas. As a concluding remark, the limited personal scope of application should be pointed out. As a consequence of the margin of discretion assigned to the Member States to select persons eligible for relocation, mostly recognized beneficiaries of international protection, fulfilling several other conditions, were chosen to take part in the EUREMA scheme. Not only does this give rise to doubts as to the effectiveness and fairness of the relocation, it also does not offer a solution for the unequal distribution following from the application of the Dublin Regulation.

3.2.1.2 Fiscal burden-sharing

As discussed above, this aspect of burden-sharing is realized through the payment of financial compensation to the most burdened Member States. It should be noted that financial burden-sharing is the only form of responsibility-sharing to which an explicit reference was made in Article 80 TFEU. As the European Refugee Fund, the predecessor of the Asylum and Migration Fund was already discussed in the second chapter, no elaboration will be made on it in this Chapter since it no longer applies. The focus will be set on the instruments regarding financial burden-sharing that are currently in force, i.e. the Asylum and Migration Fund (AMIF).

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The AMIF seeks to allocate financial resources to the various components of the EU’s asylum and migration policy. To make an assessment on the redistributive effect of this fund in the field of reception and relocation, it is necessary to clarify the allocation of the budgets in this field. The basic budget allocated to each Member State should be regarded as a starting point. This basic budget is calculated based on the average 2011-2013 allocations ERF+IF+RF, taking into account the number of first asylum applications, the number of positive decisions granting refugee status or subsidiary protection, the number of resettled refugees, stock and flows of legally residing third-country nationals, the number of return decisions issued by the national authorities and the number of effected returns.

On top of this basic amount allocated to each Member State, two other mechanisms in the Regulation are of interest in the context of relocation. The first of those complementary measures can be found in Article 18, supplemented by the third annex to the Regulation, foreseeing in the allocation of a lump sum per beneficiary of international transferred from one Member State to another. The additional granting of an amount per relocated refugee can be seen as a fiscal incentive to promote relocation and inter-Member State solidarity in general. Secondly, the Regulation also provides for a financial fair-sharing in emergency situations. These emergency situations can be divided in three different categories, i.e. situations resulting from:

“(i) heavy migratory pressure in one or more Member States characterised by a large and disproportionate inflow of third-country nationals, which places significant and urgent demands on their reception and detention facilities, asylum systems and procedures;
(ii) the implementation of temporary protection mechanisms within the meaning of Directive 2001/55/EC; or
(iii) heavy migratory pressure in third countries where refugees are stranded due to events such as political developments or conflicts.”

3.2.1.3 Policy harmonization

As noted in the section on policy harmonization in the second chapter, it can only address differentiations originating from the various national legislation, thereby leaving aside a large part of differences caused by other pull factors. Since these pull factors were already discussed extensively, no elaboration on them will take place in this section. The Union has initiated various harmonization measures in the field of reception over the past years, however, the success of these measures was rather limited. The aligning of policies presumes a proactive approach, aiming to avoid disparities before they emerge. The initiatives taken at EU level to spread reception of recognized beneficiaries of international protection are limited in number and cautious in nature, which can be attributed to the political sensitivity of the issue and the tendency to only undertake actions when problems occur. The additional remark that should be reiterated is the observation

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that policy harmonization is not always the best option to acquire equitable spreading: it will only fortify the role of other factors, that cannot be remedied by harmonization since they are not of a legislative nature.

3.2.2 Principal reasons for disparities in reception of refugees

The Dublin regulation in itself can be considered as the principal reason causing an inequitable spreading of refugees. The reasoning behind this conclusion is twofold. Firstly, the uneven spreading of asylum applications has spillover effects to the reception component, as there is no mutual recognition of positive asylum decisions in the European Union. Consequently, the beneficiaries rights of protection are therefore limited by a Member State’s borders. Secondly, the high rate of disparity between the Member States can be attributed to the incorrect or non-application of the Dublin regulation, giving the other pull factors particular to a Member State free rein. As will be dealt with in the last chapter of this paper, providing legal pathways into the Union can help in proceeding against this problem.

3.3 Legal context

Already in the early days of the latest migration crisis, the instruments available to deal with such an increase in migratory pressure proved to be insufficient to deal with such a situation. Hence, several instruments arose and succeeded each other in the context of the persistent migratory influxes. It is of interest to assess these instruments, and thereby also to look at their implementation and to consider how the initiatives are executed. From the presence of these instruments, it can be derived that the presence of the intention to spread the burden on the reception level is an established fact. It should however be put forward whether the measures to assure this are available and whether they are sufficient and efficient to establish a stable practice.

3.3.1 Burden-sharing: The highly desirable but missing element in the CEAS

The will to develop a mechanism of fair-sharing of responsibilities between the Member States in asylum matters was expressed in multiple instruments. While the establishment of the CEAS at Tampere was the early starting point of the envisioned fair mechanism, and that it has been reiterated continuously over the years, it is striking that today, almost 20 years later, the spreading of refugees can be called anything but fair or equitable.

3.3.1.1 The Hague Programme: Strengthening Freedom, Security and Justice

Five years after the laying out of the foundations for the creation of a CEAS, a second multi-annual programme, the The Hague program, tended to build further upon these foundations. In the context of burden-sharing, the relevance of this instrument is rather limited, however, a reference is made to the fact that the CEAS should be based on the fair sharing of responsibility: “It should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between
Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation.”

3.3.1.2 Hague Programme Action Plan

The Hague Programme was implemented through the Action plan of the Council and the Commission, all efforts to establish burden-sharing on the reception level were absent in this plan, what makes the discussion of it redundant.

3.3.1.3 Commission Green Paper on the future of the European Asylum system

The first noteworthy document in this respect is the Commission Green Paper on the future of the European Asylum system, comprising a chapter on solidarity and burden sharing. Acknowledging that the Dublin system was not established to achieve a fair and equitable distribution of refugees, since it was aimed at providing a rapid response, based on objective criteria, on the issue of determining the Member State responsible for examining an asylum application in a Union without border controls and to prevent asylum forum shopping, the Commission came to the conclusion that Dublin was not having the outcome of a fait distribution of refugees. They stated that fair sharing should therefore be created through other instruments, in the first instance complementary to Dublin. Intra-EU resettlement of recognized beneficiaries of international protection was put forward as a suggestion to achieve a more equitable distribution among the Member States. Having ascertained that the spreading of refugees is not equitable, the EC put forward two questions, the first relating to the existence of a need to complement the Dublin Regulation with measures contributing to a more fair spreading of the burden, the second being a search for other possible solutions to establish a more equitable distribution of asylum seekers and/or beneficiaries of international protection between Member States.

3.3.1.4 European Agenda on Migration

With the continuing conflicts in the Middle East causing an increase in migratory pressure on the Union, and the asylum capacity of the border states in particular, the Commission answered to this need to reorientate priorities in the field of asylum and migration by announcing Commission the new European Agenda on Migration in May 2015. Relocation is put forward as a response to the high-volumes of arrivals in the EU, on the list of immediate actions to be undertaken. The Commission urges to take measures on the basis of Article 78(3) TFEU, providing for the possibility to introduce temporary measures in emergency situations: “In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the


The Commission insists on putting into place a temporary distribution scheme as one of the short term priorities. A proposal where relocation at a stage before the examination of the application is envisaged, thereby transferring both the responsibility to examine the application as to provide reception in case of a positive decision concerning the protection status: “The proposal will include a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort. The receiving Member State will be responsible for the examination of the application in accordance with established rules and guarantees. A redistribution key based on criteria such as GDP, size of population, unemployment rate and past numbers of asylum seekers and resettled refugees can be found in the Annex.”

Once a temporary mechanism is created, the Commission also emphasizes the need to establish a permanent mechanism that will be automatically triggered in situations of mass influx:

“The EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States. The Commission will table a legislative proposal by the end of 2015 to provide for a mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges.”

The new European Agenda on Migration shows us that the Commission takes a clear position on relocation being the way forward. Important is to note that the concrete initiatives they have put forward are all crisis-induced in nature. No attention has been payed to the possibility of relocation as a measure able to achieve a more equal distribution in general. While the Commission acknowledges that the distribution of refugees, following from the application of the Dublin Regulation can be seen as anything but fair, they fail to propose any measure that could address this unfairness.

### 3.3.1.5 September 2015 Emergency Relocation Schemes

The two Council Decisions established in September 2015 were instruments agreed upon in the aftermath of the new European Agenda on Migration. The Council therefore exercised its competence to take provisional measures in situations of sudden migration inflows on the basis of Article 78(3) TFEU. Acknowledging the uneven distribution resulting from the first entry criterion in Article 13 of the Dublin Regulation, the Council agreed to a temporary derogation of this rule. To be taken into account for the relocation mechanism, a person should have launched his application for international protection in Italy or Greece, or the examination of their claim should fall under the responsibility of these Member States when the Dublin rules on allocating responsibility are applied. In the two Council Decisions, the Members States agreed to relocate

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165 Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty) [2012] OJ C326/01, art 78(3)


168 Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty) [2012] OJ C326/01, art 78(3)
160,000 persons. 39,600 persons are allocated for relocation from Italy and 66,400 from Greece, the remaining 54,000 places foreseen in Article 4(1), c) of the second Council Decision were made available for the purpose of legal admission of Syrians from Turkey to the EU. In September 2016 Member States stated that they had the intention to reserve 34,000 of these places for the allocation of Syrians from Turkey, therefore falling outside the scope of relocation sensu stricto.\(^{169}\)

As put forward in the preambles, these decisions try to straighten out the imbalances caused by the Dublin allocation mechanism. Nevertheless, some serious deficiencies obstruct the mechanism of having this corrective effect: both the time-limited aspect and the narrow personal scope of application reduce the useful effect of the decisions.

The temporary scope of the emergency relocation mechanism is restricted to a period of 24 months, which is seen as a reasonable term to alleviate Greece and Italy from the significant migration pressure and for them to get the influxes under control. Moreover, when the relocation is not completed within the time limit provided in the Regulation, Greece and Italy will remain responsible.\(^{170}\) From a legal certainty perspective this must be encouraged, but from a solidarity or fair-sharing perspective, this is rather problematic.

As for the personal scope of application, some remarks should be made concerning the emergency mechanism. First of all, the system is limited to a fixed number of persons in need of international protection. The number of 160,000 persons in total can in no way be adjusted to the actual number of arrivals in a particular Member State, impeding an effect of this mechanism in case of a new migratory influx.\(^{171}\) Secondly, the mechanism only takes into account a specific type of asylum seekers. In order to be considered for the emergency relocation mechanism, the applicant should belong to a nationality for which the recognition rate at first instance is 75% or higher. This percentage will be applied in consistence with the latest available quarterly updated Union-wide average Eurostat data.\(^{172}\) The rationale behind this limit to the personal scope can be found in the fact that the Council does not want to prolong the stay in the EU of people more likely to be returned.\(^{173}\) De facto this will lead to only Syrian and Eritrean nationals to be taken into consideration for the emergency relocation mechanism, leaving the more heavily burdened Member States to deal with the more complex, and thus requiring more resources, applications lodged.\(^{174}\)

\(^{169}\) Commission, ‘Tenth report on relocation and resettlement’ (Report) COM (2017) 202 final


Additionally, it should be noted that a lump sum of 6000 EUR per applicant relocated to another Member State is foreseen in both Council Decisions.\textsuperscript{175} No similar provision assigning financial support is comprised in the Dublin regulation, in case a Member State is unduly heavy burdened. Notwithstanding the fact that Greece and Italy receive emergency funding, the contribution of this article to the notion of solidarity and fair-sharing seems to be questionable.

However, the major deficiency of these decisions is not inherent to the decisions, but can be found in the limited and almost non-implementation of them. Notwithstanding the binding character of this Council Decision, the implementation has up till now, when the end date of this emergency mechanism is coming very close, stayed very limited.

Article 4 of the second Council decision foreseeing the possibility to derogate in case of temporary being unable to take part in the relocation mechanism, for a maximum of 30 % of applicants allocated to that Member State.\textsuperscript{177}

In January 2017, only a small 11 000 of the prospected 106 000 persons applying for international protection were effectively relocated. With only a few more months left to complete the implementation of the emergency relocation mechanism, conclusions can be drawn concerning the non-implementation. In spite of several encouragements of the Commission to execute the relocation plan, the efforts of the Member States to pursue the objective of relocation remain limited. The progress in the field of relocation is fairly slow, in the time span between January 2017 and April 2017, only 5000 refugees were relocated, leading to only 15\% of the emergency relocation mechanism being executed 19 months after its entry into force. Noteworthy is that the Member States most critical of the European response to the migratory influx, Hungary and Poland in particular, have not fulfilled any of their obligations and persist in the refusal to participate in the relocation scheme. In its last monthly report on relocation and resettlement, the Commission acknowledges that the objectives set out in the decisions will not be met by the targeted date of September 2017.\textsuperscript{178} It is also set out in this report that the failure of efficient implementation lies largely in the hands of the Member States, in contrary to Greece and the EU Agencies and international organisations, who already fulfilled their obligations.\textsuperscript{179} According to the Commission, solid commitments from the relocation states and abandoning the practice of “cherry picking” are the key elements in order to achieve the targets set out in the two Council Decisions.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{175} Council Decision 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, art 10
\item \textsuperscript{176} Council Decision 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, art 10
\item \textsuperscript{177} Council Decision 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, art 4(5)
\item \textsuperscript{178} Commission, ‘Tenth report on relocation and resettlement’ (Report) COM (2017) 202 final
\item \textsuperscript{179} Commission, ‘Tenth report on relocation and resettlement’ (Report) COM (2017) 202 final
\end{enumerate}
\end{footnotesize}
3.3.1.6 Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration

In February 2016, nine months after the launch of the new European Agenda on Migration, the Commission published a state of play on the implementation of the priority actions in that respect, and more specifically for this paper, on the implementation of the relocation initiatives put forward. Relocation as an essential component in alleviating the Member States suffering from high migratory pressure should be seen as a form of cooperation between Member States. First of all, it requires that the heavily burdened Member States make efforts towards the registration of applicants. Secondly, and more crucial, is the political engagement of the Member States of relocation. The latter has proven to be an obstacle in implementing the two Council decisions discussed above, that were taken in the aftermath of the priorities set out in the European Agenda on Migration. As has been observed in the Commission’s state of play, even though the number of applicants eligible for relocation has been increasing, the effective number of relocations that took place was still alarmingly low four months after the entry into force of the relocation mechanism. In an attempt to accelerate the implementation of the relocation scheme, the Commission has contacted all the Member States and urged them to make an effort to fulfill their obligations. As a conclusion to this state of play, the need to majorly accelerate the implementation of the relocation mechanism was underlined.

3.3.1.7 European Commission’s Back to Schengen plan

First of all, it should be noted that the title of this communication, ‘back to Schengen’ is rather odd, since Schengen was never actually abandoned. Reintroducing national border checks in certain situations forms an inherent part of Schengen. Even though some temporary derogations to the free movement of persons were introduced, the EU stayed loyal to Schengen throughout the latest refugee crisis, safeguarding the free movement of persons.

Relocation was only briefly touched upon in this communication. Emphasizing relocation as an essential tool to alleviate Member States that have been suffering most from the increased migratory pressure on the Union, the Commission acknowledges that in the case of Greece, relocation should, due to the structural deficiencies in reception facilities and conditions, also be seen as a form of humanitarian assistance. Stressing the need to accelerate the implementation of the agreed relocation schemes, the relevance of this Communication for the practice of fair-sharing is very limited. It is however notable that the focus is placed on reinforcing the external border and ensuring free movement as an answer to the migration crisis. This communication is more of an attempt to safeguard the internal order of the Union and its Acquis, than it is

180 Commission, ‘State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Communication) COM (2016) 85 final

181 Commission, ‘State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Communication) COM (2016) 85 final

182 Commission, ‘State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Communication) COM (2016) 85 final

183 Commission, ‘Back to Schengen - A Roadmap’ (Communication) COM (2016) 120 final
trying to effectively contribute to solving the problems the Union is suffering from as a consequence of increased migratory pressure.

3.3.1.8 Reforming the Common European Asylum System and developing safe and legal pathways to Europe

In its communication of 6 April 2016, the Commission put forward the Union’s objectives in the necessary reform of the Common European Asylum System. In general terms, the objective is to abandon the current system that is causing disproportionate pressure on a limited number of Member States, that can not only be attributed to the deficient implementation of the system, but also to the flawed mechanism by itself. The urgency to create legal access to the Union is an element that should be taken into account in creating a new mechanism, since the current system encourages absconding and irregular migration. Most importantly, the envisaged allocation mechanism, based on the principles of fair sharing and solidarity, should be sustainable and crisis-proof.

The establishment of a sustainable and fair system for determining was set out as one of the five key priorities in coping with the structural deficiencies of the Common European Asylum System. The new system should be capable to deal with an increased arrival of migrants and at the same time result in a fair spreading of this burden. To realize such a system, the Commission is of the opinion that there are two possible policy options, the first comprising of a supplementation of the Dublin mechanism with a corrective allocation mechanism, the latter being the creation of a new system for allocating asylum applications in the EU based on a distribution key.

In the situation where the first option is pursued, the supplementary mechanism could be based on the emergency relocation mechanism, as introduced by the two Council Decisions of September 2015. Dublin would be kept in place in situations of “normal” migratory pressure, while the corrective mechanism would be activated the moment the pressure on some of the Member states critically increases, putting a strain on their national asylum systems. A substantial change that could render relocation a more useful tool is making relocation accessible not only for persons with nationality having a first instance recognition rate of over 75%, as was decided for the emergency relocation mechanism, but for all persons with a reasonable likelihood of being granted international protection.

Contrary to the first option, the role of the first entry criterion would be limited in both crisis and non-crisis situations. This policy option put forward determines responsibility based on a fixed distribution key, taking into account several factors particular to a Member State. The system proposes a division between applicants originating from a safe country of origin and applicants who come from a country which the EU has marked

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185 Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ (Communication) COM (2016) 197 final

186 Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ (Communication) COM (2016) 197 final
as a safe third country. Persons originating from a country not designated as safe on Union basis would immediately be taken into account for relocation based on the distribution key, whilst the Member State of first application would remain responsible for processing the applications filed by persons originating from a safe third country. Important is that the overriding criteria, such as vulnerable status, family linkage etc, as they exist in Dublin, would be kept in place.\(^\text{187}\)

It should be noted that a true europeanization of the asylum procedure is still envisaged by the Commission, but that the institutional reforms and resources this requires result in this being a long term priority. A month after the publication of this communication, the Commission published a proposal for a Dublin IV Regulation, explicitly preferring the first to the second option.

**3.3.1.9 Commission proposal for a recast of the Dublin Regulation**

Having ascertained that the current allocation system is insufficiently designed to deal with situations of disproportionate pressure. Therefore, they propose to complement the current system, provided that there is a slight revision, with a corrective allocation mechanism. This mechanism is to be activated automatically where Member States are faced with a disproportionate number of asylum seekers.\(^\text{188,189}\) This automated system, monitored by EU-LISA, requires the registration of applications and will monitor the Member States’ individual share in the applications. This share will be compared to a reference key, based on population size and GDP. The corrective reallocation will automatically be triggered when the number of applications exceeds 150% of the figure as identified in the reference key in a particular Member State. Relocation will take place as long as the pressure continues to be above 150%. There is however, a possibility for Member States to buy off their responsibility to take charge of reallocated asylum applicants, namely: for the time-span of one year, they can avoid responsibility by paying €250 per applicant assigned to them. This “buy off” provision can give rise to rather problematic consequences due to its inconclusiveness. In the hypothesis where all the Member States fall back on this provision when another Member State is overly burdened, the impact of this mechanism can be reduced to zero. Taking into account the mindset and actions of the Member States during the past few years, it is very likely that this situation will not remain merely hypothetical.

The tendency to hold on to Dublin is striking. While the Commission, through the insertion of a corrective mechanism, acknowledges that the Dublin system in se is not aiming at a fair distribution or expressing solidarity, they are only prepared to abandon this route in crisis situations. The instrument entails an interpretation of Article 80 TFEU only holding a solidarity obligation in times of crisis. Thereby, the proposed distribution key, a simplified version of the key made use of in the emergency relocation system, is

\(^{187}\) Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ (Communication) COM (2016) 197 final

\(^{188}\) Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, Preamble, recitals 31-32

\(^{189}\) Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, art 34(1)
missing some crucial factors. As will be elaborated on in the last part of this paper, a relevant and efficient key cannot be established merely on the basis of population size and GDP.

Another provision standing in the way of a spreading of refugees based on fair sharing and solidarity is Article 36 (1) of the Dublin IV proposal.\textsuperscript{190} Whilst the corrective relocation mechanism would only enter into force once a particular Member State’s share is exceeded by 50%, it ceases to apply to the Member States of relocation once they have reached the threshold of 100% of their capacity, as calculated in accordance with the distribution key. The different standards applied to the Member States burdened due to their geographic location and the Member States of relocation are inexcusable in light of the principle of fair sharing.

3.4 Current mode of operation: managing the migration crisis?

3.4.1 Member State of choice or refugee of choice

An important question that should be put forward is whether it is up to the MS or to the refugees to decide on where to stay. Due to the deficient and in some cases non-application of the Dublin Regulation, a de facto possibility for refugees to decide on which Member State to turn to for asylum has manifested itself. Nevertheless, in the context of the relocation schemes introduced, Member States have the decision power to accept or decline refugees.

3.4.2 Responsibility for the asylum application brings responsibility for reception

Since asylum procedures are still largely under the competences of the individual Member States, a logical consequence of responsibility to process an asylum claim, is the fact that the Member State granting the international protection has to provide it, and that the effects of the protection offered are delimited by the Member State’s national borders.

3.4.2.1 Voluntary ad hoc based exceptions

On the general rule of responsibility according to the criteria in the Dublin Regulation, some exceptions can be identified in the instruments discussed above. A common characteristic to the existing instruments is that all of them were taken on an ad hoc basis, and thus were of a reactive nature. Although being legally binding, political will of the Member States is an important factor in the implementation and/or application of these instruments. Often political will can be used to retain the application of the instruments, as occurred in relation to both the Temporary Protection Directive and the emergency relocation mechanism.

3.4.2.2 Flaws of this system

Central in the deficient operation of this system is the absence of fair-sharing and solidarity, the principles that, according to Article 80 TFEU should be the pillars of the EU’s policy in this domain.

\textsuperscript{190} Commission, ‘Proposal for a European Parliament and Council Regulation 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/2, art 36(1)
The current system does not take into account capacity or resources of the individual Member States, instead an arbitrary assignment based on unprofitable geographic location is answering the question of responsibility, leaving aside the most relevant factor concerning reception: a Member State’s capacity. Thereby, the reactive and ad hoc nature of the initiatives impedes a quick and efficient response to sudden increases in migratory pressure. Due to the sensitive character, finding a political consensus is a difficult task. Even though the new mechanism introduced in the recast proposal of Dublin tries to tackle this problem, whether this corrective mechanism will effectively ensure a better preparedness of the Union for migration influxes is highly questionable. As will be discussed in the last chapter, more beneficial policy options exist. Furthermore, in order to develop a mechanism preventing secondary movements of asylum seekers, taking into account preferences of those seeking international protection might be advantageous, not only from this perspective, but also from a perspective of rights of refugees. Notwithstanding the de facto possibility due to the incorrect or non-application of the Dublin system, preferences of persons seeking international protection are at no stage taken into account in determining the Member State where they will enjoy international protection.

3.5 Reconcilability Article 80 TFEU and current system of intra-EU relocation

3.5.1 Interpretation of the term ‘solidarity’

As already stated in the previous chapter, a clear definition for the solidarity concept in Article 80 TFEU is unfindable. Since Article 80 TFEU applies both to the Member States and the Institutions, an effort of all these actors to apply and enforce this concept is expected. Central in the context of solidarity is trust between the Member States: when all Member States trust one another to act in line with Union legislation, implementing and applying it correctly, differentiations that require solidarity are not based on the incorrect or non application of Union law. Solidarity can therefore be seen as a mechanism to address inequalities caused by external factors, since applying solidarity instruments in situations following from incorrect application of Union legislation would be incompatible with the loyalty obligations towards the Union, and expression of Member State-Union solidarity.

Specifically in the context of asylum, solidarity should be outed in instruments and initiatives, supporting the Member States that are more heavily burdened due to certain factors particular to them, such as geographical location, political reputation,… Solidarity should be seen as the engagement of Member States to assist one another, in order to bring about an equitable spreading of the burden. Important to note is, that since no indication is given, solidarity should both be expressed in crisis and non-crisis situations. No elements in the article could lead us to deduct that the concept of solidarity only plays a part in the Union’s asylum policy when there is increased migratory pressure.

3.5.1.1 Mere intra-Member State solidarity or ‘duty to support’?

Referral should be made to the analysis made in the previous chapter on the range of solidarity as comprised in Article 80 TFEU. It should be clarified whether this provision can be limited to a mere intra-EU solidarity, or whether this notion is wider, including not only intra-Member State solidarity, but also solidarity vis-à-vis
third countries or vis-à-vis refugees.\textsuperscript{191} In the previous chapter, it was determined that both internal and external solidarity are guaranteed in the field of asylum, if not on the grounds of Article 80 TFEU, the external component can unquestionably be derived from the international obligations of both the Member States and the Union. The concept of solidarity in Article 80 TFEU should be delineated as both having an internal and external component.

3.5.1.2 Hard vs soft obligation

As elaborated on in the second chapter, a hard obligation to act in accordance with solidarity cannot be derived from Article 80 TFEU. In order to be effective, solidarity requires the adoption of other measures, legal or political. The absence of a clear definition of the solidarity notion hinders the direct effect of Article 80 TFEU, since it is required for a provision to have direct effect that it is formulated in a clear, precise and unconditional manner. The discussion about the concept of solidarity itself can by no means concern the presence of direct effect. In order to achieve solidarity among the Member States, implementing measures of the Union have to be available. It is the Union’s primordial task to carry out its competences in the field of asylum in line with the principle of solidarity.

3.5.2 Connection to fair-sharing

Fair-sharing wishes to establish a status quo that succeeds in the realization of an equitable spreading, not in absolute numbers but by taking into account the relative reception capacities of the Member States. From the assessment made in the second chapter on how this interpretation of fair-sharing relates to the concept of solidarity, it can be derived that these are to complementary notions. However, the role of solidarity is corrective in relation to fair-sharing. If fair-sharing schemes fail to meet the objectives aimed at, solidarity needs to step in and fix this imbalance. Ideally, solidarity is a temporary help to rectify faults in fair-sharing mechanisms, and in the situation where these deficiencies persist, a review of the fair-sharing mechanism is necessary, since it no longer succeeds in fulfilling its role. Translated to reception of refugees in the Union, this implies that the Union’s policy should rely on an instrument that foresees in an equitable spreading, and that they possess the competence to act correctly, as is foreseen in Article 78(3) TFEU.

3.5.3 Calculation fair shares of Member States

In order to establish a fair spreading, some interpretation should be given to the notion of fairness. The concept itself is not easy to approach quantitatively, but this will however be necessary to make a useful analysis. As a starting point, the unduly heavy burdening of a particular Member State should be put forward. When we recognize that a Member State can suffer an excessive burden, this burden must be excessive in comparison to a certain point of reference. As the point of reference, we will use a Member State’s capacity.\textsuperscript{192} This capacity can be studied from two different perspectives, the first being an absolute


\textsuperscript{192} Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ [2013] 34 Liverpool L.R. 175
perspective, the latter being a Member State’s relative capacity. When we regain that some Member States are unduly heavy burdened, we can only to this in comparison with other Member States, implying that there is a relative relation between them, or we can do this abstractedly, comparing it with the capacity of one Member State. Since the aim of this calculation is alleviating pressure of one Member State by transferring a certain number of persons to another Member State, it is indispensable that these capacities are determined by relative terms. The useful effect of absolute capacities in the context of burden sharing is very small, since they only allow us to check when a Member State’s limit is reached, and don’t allow us to develop a fair distribution key. To establish a fair spreading, there is a need to calculate the relative capacities of all Member States, based on the same indicators, in order to be fully comparable.\textsuperscript{193} Aware of the fact that only relative capacities can lead to a valuable distribution key, the development of such a key is no sinecure. Finding a consensus on which indicators to take into account in order to develop a distribution key has, due to its political sensitivity, been an issue for years.

3.5.3.1 Measures of flow

A first issue that occurs is the measure of flow that should be taken into account as a variable to measure the migration pressure. To determine the measure of flow best fitted to do this, it should be examined where the true burden of an increase in migratory pressure takes place. On the reception level, the measure of flow best fitted to represent the migration pressure is the number of persons effectively granted international protection.

For a relocation scheme to be most effective, the measure of flow incorporated should be dependent on the stage where the relocation takes place. If a relocation takes place before any procedure is initiated, the number of refugees are the most accurate variable, if on the other hand relocation takes place after a claim for international protection is launched, the number of applications effectively made is a more fair indicator. Lastly, in the situation where there is post-recognition relocation, persons granted international protection should be the measure of flow.

3.5.3.2 Political sensitivity

Political sensitivity can be seen as the main cause of voluntary and ad hoc based cooperation and burden-sharing. Member States are failing to contract a compromise on how to calculate state capacity and which factors should be taken into account. Since small variations in the indicators chosen and the weight attributed to them can give highly divergent outcomes for each Member State, this is an incentive for them to play at their best interest, leading to a politically influenced debate.\textsuperscript{194}


The political sensitivity and the effects it can have on concluding an agreement can be illustrated by the German proposal of 1992 that eventually resulted in the Temporary Protection Directive in case of mass influx. The proposal envisaged the creation of a distribution key, based on several factors, to obtain an equitable spreading of refugees. However, no agreement could be reached on this distribution key, resulting in a Directive where this essential element was absent.\textsuperscript{195}

3.5.3.3 \textit{Indicators of a Member State's capacity}

The most important and thereby the most sensitive aspect of calculating Member States’ fair shares is deciding on which indicators to involve in determining a Member State’s capacity, and what weight should be attributed to each of these components. The search for this balance has been problematic in all people-sharing instruments that were conceived to date. In the Temporary Protection Directive, the responsibility to determine a Member State’s reception capacity was placed upon the Member States themselves, and according to Article 25 of the Temporary Protection Directive, this can either be done in number or in general terms.\textsuperscript{196} With no guidance on the indicators to be involved, the result of this would be absolute, non-comparable capacities. In the emergency relocation mechanism, the spreading had to be achieved taking into account the relative capacities of the Member States, a step forward in comparison to the Temporary Protection Directive. The factors that had to be considered as to determine these relative shares and their proportion in the distribution key were the following:

"\textit{(a) the size of the population (40\%) as it reflects the capacity to absorb a certain number of refugees;}
\textit{b) total GDP (40\%) as it reflects the absolute wealth of a country and is thus indicative for the capacity of an economy to absorb and integrate refugees;}
\textit{c) average number of spontaneous asylum applications and the number of resettled refugees per 1 million inhabitants over the period 2010-2014 (10\%) as it reflects the efforts made by Member States in the recent past;}
\textit{d) unemployment rate (10\%) as an indicator reflecting the capacity to integrate refugees.}\textit{"}\textsuperscript{197}

In comparison to the emergency relocation mechanism, the corrective mechanism comprised in the Dublin recast can be seen as a step back. Even though the Commission’s proposal intends to introduce a distribution key based on the relative capacities of Member States, these capacities are to be calculated merely on the basis of two indicators: population size and GDP. In the reference key, both factors will be attributed the same weight. Crucial elements are hereby not taken into account, such as the previous efforts made in facilitating reception, the integration potential and the quality of reception facilities, although this last aspect is difficult to measure, and can be guaranteed more effectively through a human rights check incorporated in the responsibility allocation mechanism.

\textsuperscript{195} Eiko Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing’ [2004] 6 EJML 47

\textsuperscript{196} Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 25

\textsuperscript{197} Commission, ‘State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Communication) COM (2016) 85 final, Annex
CHAPTER 4: EXTERNALIZATION APPROACH OF THE UNION MAKING THE PROBLEM DISAPPEAR WITHOUT PUTTING THEIR OWN HOUSE IN ORDER

4.1 Introduction

Notwithstanding the fact that the subject of this paper is the internal allocation of refugees in the European Union, it is unavoidable to entirely leave out the Union’s external approach in this area. Due to the Union’s incompetence to effectively and efficiently control migration flows directed towards the Union, they are seeking to cooperate with non-Member States to jointly address these issues. The 1999 Tampere summit can be considered as the starting point of the Union’s externalization approach, aiming at developing common policies with the countries of origin:

"The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development."

Another important landmark for the externalization approach in the Union’s migration policy was the Seville European Council of 2002, where the obligation to include readmission provisions in all future EU association or equivalent agreements was put forward:

"The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration."

This obligatory incorporation of readmission clauses, conceived as a measure to control illegal immigration by foreseeing in the return of third country nationals when they illegally entered the Union, are now also influencing the position of asylum seekers. More and more, readmission clauses are mobilized to control the influx of persons seeking international protection. The generalized and systematic application of these readmission clause to the specific category of asylum seekers gives rise to number of questions, especially in light of the international obligations of the Union and its Member States. Under the Geneva Convention of 1951, Member States have an obligation of non-refoulement, which entails a commitment to not return


refugees to a country where they may face persecution. When a readmission agreement is in place, asylum seekers will not be capable of lodging an application in a Member State, when it can be demonstrated that they are originating from a so called safe country of origin or when they have travelled through a country where they have had to possibility to apply for international protection, de facto taking away their access to the asylum procedure in EU countries. This practice of readmission arrangements with third countries, neighboring the Union, has put in place a “buffer zone” around the Union, allowing the EU to push the burden to their neighbors to alleviate themselves. Designating a third country as safe, without any examination of human-rights compliance, prior to the agreement and systematic throughout the application of it, might cause problems relating to refoulement and an individual’s specific situation. It is however striking that the Union, relying on the credibility it gained as a human rights actor, exercises powers in the neighboring countries, and risks to lose this credibility though the exercise of these powers. There is a certain hypocrisy to the Union’s systematic and general policy to extra-territorialize asylum burdens, especially from the role of respectable human rights institution it uses to legitimate its actions.

In this limited chapter, the most recent and controversial instrument in the external migration policy will be addressed, highlighting some of its main discussion points. Thereby, a brief elaboration on the notion of ‘safe third countries’ will take place. It is not the aim of this paper to examine and assess the external policy of the Union in this area, but merely to touch upon the issues relating to this approach in order to provide a more general framework on the relation between the internal and external policy concerning asylum and migration.

4.2 EU-Turkey agreement: trading visa for refugees?

The EU-Turkey deal is probably the most widely discussed instrument in context of the EU’s approach to gain control over the situation of increased migratory pressure. With this agreement, the Union explicitly recognizes that this situation cannot be handled solely at EU level and that there is an important component of foreign policy to it. Briefly, the agreement consists of a policy where, as from the entry into force at March 2016, all Syrian refugees arriving on the Greek Islands will be sent back to Turkey. In exchange, the EU has agreed to resettle, for every Syrian being returned to Turkey from the Greek Islands, another Syrian to the EU. Additionally, Turkey engaged in tackling irregular migration from Turkey to the EU, by taking all measures necessary to prevent illegal migration over land or sea. As compensation, the EU will provide

202 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 33(1)


funds to Turkey for the facilitation of refugees in Turkey, and most importantly, the EU pledges to liberalize its visa policy for Turkish citizens.\textsuperscript{209} Returns are, according to Union law, legitimate in two types of situations. The first category of persons who can be subject of a return decision are those who do not apply or qualify for international protection. Secondly, persons who travelled through a safe third country where they could have lodged a claim for international protection, but refused to do so, are also eligible for return.\textsuperscript{210} This last category of persons gives rise to some questions in the light of the EU-Turkey agreement. In this respect it should be looked at to what extent Turkey can truly be considered as a safe country. If Turkey does not fulfill this precondition in all transfer cases, the EU Member States would be violating their obligation of non-refoulement under the 1951 Geneva Convention.

One would expect substantial changes in the relation between the EU and Turkey due to the policy of Erdogan, but it is remarkable that, regardless the recent events and changed circumstances, the EU does everything within its competences to keep the EU-Turkey deal in place. The Commission persists in the importance of continued engagement with Turkey, regardless of what they describe as ‘challenging circumstances’.\textsuperscript{211} Acknowledging the positive realizations of this agreement, and in particular the substantial reduction of irregular crossings and a decrease in lives lost at sea, a more critical position of the Commission would be expected.\textsuperscript{212} Leaving aside all the previously outed criticism on this agreement, since this would take us too far, the question should be asked whether Turkey can still be regarded as a safe third country, in the light of the events that have taken place since the agreement has been brought into force.

Emphasizing that the practices of return carried out cannot be qualified as collective expulsion, since the possibility to lodge an asylum application in the Union is safeguarded, the Commission overlooks some other important aspects in this reasoning. More specifically, they fail to address if the safe third country notion can (still) be applied to Turkey.\textsuperscript{213} Regardless the possibility for refugees to apply for asylum, they will be returned in case of inadmissibility or unfoundedness of their application. When someone arrives from a country the Union considers as safe, this will result in the inadmissibility of their application.\textsuperscript{214} Though this practice cannot be brought under the notion of collective expulsion, the systematic and generalized nature of this policy cannot be denied. For the reconcilability of this practice with international law, it must therefore be assessed if Turkey can be considered as ‘safe’. Article 38 of the Asylum procedures

\begin{thebibliography}{9}

\bibitem{209} Elizabeth Collett, ‘The Paradox of the EU-Turkey Refugee Deal’ (Migration Policy Institute, March 2016) <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> accessed 6 May 2017

\bibitem{210} Elizabeth Collett, ‘The Paradox of the EU-Turkey Refugee Deal’ (Migration Policy Institute, March 2016) <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> accessed 6 May 2017


\bibitem{212} Commission, ‘Fifth Report on the Progress made in the implementation of the EU-Turkey Statement’ (Report) COM (2017) 204 final

\bibitem{213} Commission, ‘Fifth Report on the Progress made in the implementation of the EU-Turkey Statement’ (Report) COM (2017) 204 final


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Directive was introduced to provide some clarification on the safe third country notion. This Article enlists the principles that have to be guaranteed in order for a country to fall under the notion of a safe third country:

“a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

b) there is no risk of serious harm as defined in Directive 2011/95/EU;

c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected and

e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”

Intrinsically, the readmission commitment is not problematic, as long as sufficient guarantees for the fulfillment of these conditions are provided. This is where the shoe pinches: at no stage a systematic analysis of these conditions was carried out, not before the deal was put into place and neither during its application. Although it is off topic to conduct an analysis of the criteria in this paper, several human rights actors, such as UNHCR, ECRE and HRW raised their concerns about this deal and its reconcilability with these conditions. The remark has to be made that, although Turkey has a reputation as not being the most fundamental rights-compliant country, this general situation cannot be taken into account, unless it specifically affects refugees or migrants. Additionally, for the credibility of the EU’s position as human rights defender, the mere fulfillment of the conditions in Article 38 does not suffice. The article does not comprise any condition that imposes fairness or efficiency guarantees on the asylum procedure in the third country, when applicants have access to the procedure, this will suffice. The EU as a human rights defender would benefit from detailed and repeated examinations of these conditions, instead of implicitly assuming that Turkey continuously meets this conditions.

4.3 Carte blanche on a political level due to absence of an efficient framework?

Although the Union’s asylum and migration policy needs to focus on both internal and external actions, this way of policy-making should be discouraged. While the Union and its neighbors are jointly responsible for safeguarding lives at sea and humanitarian crises were taking place, handling these crises has never been the true objective of the EU-Turkey deal. The Union saw this deal as an opportunity to attenuate the pressure on its border states. By creating some extra breathing space for the Member States, the urgency of putting the

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217 ECRE, ‘The DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey’ (European Council on Refugees and Exiles, May 2016) <http://www.refworld.org/docid/575525234.html> accessed 6 May 2017

internal asylum system in order decreased, thereby postponing the difficulty of achieving political consensus on the future of the internal asylum policy.\footnote{Evangelia Tsourdi, ‘Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance ‘crisis’?’ in ‘Searching for Solidarity in EU Asylum and Border Policies’ (Odysseus Network’s First Annual Policy Conference, 26-27 February 2016) <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf> Accessed 24 April 2017} Externalization should move from this deflecting policy to a true cooperation commitment, aiming at the fulfillment of both parties obligations under international law. Hence, for the future of the EU’s external migration policy, it is essential that some clarification is made on the interpretation of the safe third country concept.
CHAPTER 5: INTERIM CONCLUSIONS: THE ISSUE OF THE EUROPEAN MINDSET ON ASYLUM AND MIGRATION

5.1 Failure of the European burden-sharing mechanism

As a general tendency, burden-sharing seems to be absent throughout the entire EU asylum and migration policy, especially in the area of sharing people, which therefore forms the focal point of this paper. Notwithstanding the legal obligation in Article 80 TFEU to develop a policy in this field based on the principles of solidarity and fair-sharing, the de facto situation could not be more distant from a fair spreading of the burden. Although the Union succeeds to efficiently address the imbalance at a financial level by the allocation of funds through the Asylum and Migration Fund, the core of the issue of burden-sharing can be situated on a people sharing level. Burden-sharing is often translated into the sharing of norms, and thus harmonization initiatives on EU-level. By adopting common legislative initiatives, the EU expected the migration burden to shift from the individual Member States to the Union in its entirety. The function of harmonization was to remove inequalities and avoid the occurrence of any new divergences, in order to discourage asylum seekers from moving between Member States. Though the objective was to carry the pressure at EU-level, these harmonization measures did not take into account how the burden should be spread among the Member States, thus leaving aside the incorporation of any fair-sharing mechanism.

5.1.1 Asylum applications

In relation to the spreading of asylum applications, the current allocation system under the Dublin Regulation has more than once been pointed at pre-crisis for causing disturbances in a fair and equitable division of the burden between the Member States. Still the Member States proved to be dense, and refused to revise a system of which its unfairness was identified. In the few initiatives where the Union strives for a fair spreading, they all have a crisis-induced in common: to date, no initiatives have been taken to aim at burden-sharing in non-crisis situations, while this might be the key to handle situations of increased pressure. Concerning the processing of asylum applications, Member States such as Greece are already more affected in situations of normal pressure. When pressure increases, their asylum system, which already was under strain, will collapse even more easily, as was demonstrated in the latest increase of migration influxes. Burden-sharing should therefore be pursued in all situations. Further, this would not only be beneficial, the Union is also obliged to ground its asylum policy on the principle of fair-sharing under Article 80 TFEU. No indications can be found in Article 80 to assume that this obligation would only exist when a certain Member State is no longer capable to deal with a situation, i.e. a situation of crisis. In stead of meticulously holding on to Dublin, a system of which everybody has now seen that it does not work, we should evolve to a new responsibility-determining criterion for the processing of asylum applications that is more proactively oriented.

5.1.2 Reception

Seeing that the effects of a positive asylum decision are limited to a Member State’s national borders, this implies that this Member State will automatically be responsible for the reception of the individual concerned. The inequitable spreading on behalf of Dublin is extended to the spreading of refugees in terms of reception. As is the case for asylum applications, all initiatives developed until now are crisis-driven. Characterizing for the EU’s relocation schemes is their reactive nature. Only when a certain threshold is reached, generally this entails a substantial encroachment of a Member State’s capacity, the mechanisms will be activated. This is not the only flagrant deficiency inherent to these reactive schemes, problems relating to the decisive enforcement of relocation instruments frequently occur. No effective enforcement of these legally binding schemes is pursued, granting Member States the possibility to decide not to cooperate. With the Commission failing to launch infringement procedures, a policy of tolerance, which can be attributed to the political sensitivity of the substance, is being developed. From a solidarity and fair-sharing perspective, the coming into existence of a de facto possibility not to cooperate is regretful. With implementation as one of the major causes to the failure of establishing an effective approach, the question should be put forward whether we should hold on to a system where Member States are still primarily responsible to implement measures taken at EU level and are failing to do so, or whether conferring additional competences in the field of asylum to the Union could have a more opportune result. Equally problematic for the creation of a fair-sharing mechanism, is the failure of giving a clear and precise interpretation to the concept of fairness. The calculation of Member States’ capacity is essential in that respect, still finding a consensus on how to translate fairness into numeral or percentile capacities of Member States remains most difficult.

To conclude, either the responsibility allocating mechanism for asylum applications needs to undergo some fundamental changes and evolve in the direction of a system entailing the centralized treatment of asylum applications, in order that fair-sharing is established at this level, or a permanent intra-EU resettlement mechanism should be put in place, counterbalancing the inequitable spreading caused by a however slightly revised Dublin allocation mechanism.

5.1.2.1 Intra-EU relocation as a political token rather than a fully fledged operation

Voluntariness is still too much of an important factor in the pursuit of fair-sharing of refugees. From a fundamental rights perspective, the component of voluntariness should be situated at the other side of the spectrum, requiring consent of the refugee subject to a relocation decision instead of consent of a particular Member State in receiving refugees. The relocation initiatives carried out by the Member States are regarded as a form of charity, which is always inherently connected to broader political objectives. Therefore, the Union should evolve from charity to solid commitments in the area of asylum and migration. A system where preferences of the persons involved are taken into account can be considered, to create an incentive for refugees to take part in relocation schemes. To date, not complying with the system results in a de facto possibility to choose Member State of asylum, providing no incentives for refugees to act in conformity with Union legislation.
5.1.2.1.1 Concerns a particular type of asylum seekers

Another problem that can be identified in relation to the EU’s relocation schemes is that often they only take into consideration a particular type of asylum seekers. Not only is this practice discriminatory, its anticipated alleviating effect on heavily burdened Member States is not utterly made use of, since it leaves those Member States with the more complicated files, requiring more resources. Only persons with a quasi certainty that they will be recognized at first instance, are eligible candidates for European fair-sharing initiatives.

5.2 Absence of solidarity

The general tendency that can be identified in the European approach to the Migration Crisis is a policy where both intra-EU solidarity and solidarity vis-à-vis third country nationals is absent. This tendency can be derived from the difficulty to find consensus on essential aspects in instruments aimed at coping with the pressure. In stead, Member States turn to the easy solution of providing financial assistance to the most burdened Member States. Persistently holding on to the Dublin responsibility criterion of first entrance, and aiming at resuming Dublin transfers, solidarity does not seem to be the governing principle in asylum legislation it was supposed to be in accordance with Article 80 TFEU. In the few situations where the Member States did manage to reach an agreement, the issue of implementation manifested as an obstacle to solidarity. While the number of Member States making an effort to implement burden-sharing initiatives is already scarce, their achievements are limited to a bare minimum, and they are neither performing substantially better results than Member States refusing to take part in the implementation. Another practice going against the notion of solidarity consists of the reintroduction of temporary border controls, having the effect of intra-EU externalization. With populist parties gaining popularity through Europe, the perspective for a solidarity based asylum policy does not seem all too bright.

5.3 Temporary solutions to structural problems

Although there is an overall public recognition of the deficiencies to the burden-sharing initiatives, both relating to asylum applications and reception, the mode of operation still consists of trying to amend and fix these deficient mechanisms. This is done so by introducing temporary derogations to the existing instruments, keeping in place the flaws inherent to these instruments. The Union chooses to conduct a policy where structural issues are attempted to be resolved by temporary measures. In this light, gaining control over the situation and managing to re-establish the status quo is a satisfactory solution. However from a proactive perspective, the established status quo should be questioned and put against the principles of solidarity and fair sharing. If the Union truly wants to deal with the problems relating to the increased migratory pressure, it should start with striving for a status quo that succeeds in safeguarding the principles of solidarity and fair-sharing.
CHAPTER 6: CHALLENGES FOR THE FUTURE

6.1 Holding on to the present system or evolvement towards a permanent relocation model?

In this final chapter, the search for the most opportune mechanism to cope with migration on an intra-EU level requires to compare several alternatives and highlight the positive and negative implications these would bring about for particular Member States and the Union in its entirety. The first question that should be put forward is whether responsibility allocation in accordance with the criterion of first entry can be kept in place, if necessary passing through a slight revision, or whether it would be more opportune to develop a new asylum applications processing system. One possibility to take into account in developing a new responsibility allocation mechanism is to disconnect responsibility for asylum applications processing and responsibility to provide acceptable, up-standard reception, by introducing mutual recognition of positive asylum decisions, linked to a relocation system. Secondly, it is important to check what sort of measures could bring stability and result in an equitable spreading of refugees in terms of reception. Hereby, special attention should be given to the nature of the reception burden-sharing mechanism and to identify whether this system is corrective in relation to the dispersal of asylum applications, and if this would be the case, whether the application of the corrective effect only should be guaranteed in crisis situations or also in non-crisis situations. After making this general assessment of the most efficient and effective components to a system, some concrete policy options will be presented. Still, before starting the general assessment of the most opportune and efficient components that should be present in an asylum system, some preliminary remarks on asylum as a European competence should be made.

6.1.1 Is there a future for the CEAS?

In a European context where populist parties are gaining influence, a question that becomes unavoidable is whether there is a future for the further implementation and deepening of the Common European Asylum System. Undoubtedly, as long as the free movement under the Schengen Convention is kept in place, counterbalances to control the free movement of third country nationals and asylum seekers are necessary means. Therefore, some form of minimum harmonization and cooperation is required, and abolishing the entire CEAS is not a possibility.\footnote{Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty) [2012] OJ C326/01, art 78(2)} The aim of eventually obtaining a common asylum status, valid throughout the Union seems however no goal that can be achieved in the foreseeable future, holding in mind the opposition of the Visegrad countries.\footnote{Cyrille Fijnaut, “The Refugee Crisis: The End of Schengen?” [2015] 23 EJCCL & CJ, 329} Still, the creation of such a status is included in Union legislation and it may be more realistic in this climate of Euroscepticism to slow down on the deepening of the CEAS and to pursue a European asylum framework at different speeds, by creation of a common status through the framework of enhanced cooperation. If that path is chosen, it will become important to determine how this form of closer cooperation would relate to the policy of the other countries and how it would function within the Union.
6.1.1.1 The true crisis: The asylum policy crisis

It should be noted that at the moment, there is just as much a policy crisis as there is a refugee crisis. And while the solution of refugee crisis lies not only in the Union’s hands, solving this policy crisis can be achieved solely on an intra-EU basis, not requiring any external cooperation. Unable or at least unwilling to solve the internal asylum policy issues, the EU decided to take another turn in solving the crisis, namely through the externalization of the issue. Externalizing seems to be beneficial for the Union on short term, doing away with additional pressure, but still the internal policy of the Union is conducted in the same way as before, making no use of the extra breathing space created by externalizing influxes to countries as Turkey. The European asylum system has imploded and has been left in this state instead of rebuilding it.

6.1.1.2 Lack of implementation or is the legislation in itself insufficient?

As was observed in the first two chapters, the failure of the European asylum system can be attributed to a combination of both non-timely or incorrect implementation and inherently flawed legislation. Though some issues could have been avoided through the correct and timely implementation of European legislation, some problems could not have been addressed on the bases of these instruments, and a fortiori are even direct consequences following from flaws in the current instruments governing the European asylum policy. The main deficit of the European asylum system can be situated in the obligation to meet certain fair-sharing and solidarity standards.

6.1.1.3 Asylum as a shared competence: should it remain shared?

Practice has shown us that the responsibility to implement is too big of a burden for most Member States. Therefore it is necessary to take a decision on whether we should pursue the route of more effective implementation, where the Commission has a substantial role in the decisive enforcement, or whether more responsibility should become European. To ensure a coherent policy, including the objectives aimed at in Article 78(2) of the TFEU, more European responsibility will be necessary in some areas. If we lift out one aspect, the establishment of a uniform asylum status, valid throughout the Union, this can in theory be realized solely through the insertion of mutual recognition, not requiring additional European competences. However, if we want to safeguard equal procedures and conditions for granting this status, more European responsibility is required. Member States’ asylum systems are, despite harmonization efforts, still fundamentally different. Europeanization will be a workable solution to put these procedures and the evaluation of applications on the same foot in all Member States. The more responsibility is attributed to the European Union, the less we should appeal to solidarity coming from the Member States. Aiming at a form of forced solidarity by conferring additional competences to the Union would diminish the margin of discretion of the Member States, and would so avoid differential treatment and ensure a larger notion of fair-sharing. To conclude, in some areas exclusive Union competence would render more beneficial results.

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6.2 Exploration components of an efficient system

Before assessing the policy options for the future relating to the creation of a system providing burden-sharing in the field of asylum, the key components determining a mechanism must be weighed against each other. Since fair-sharing ideally is established in the areas of both asylum applications and reception, distinction should be made between these two fields.

6.2.1 The development of an asylum claims processing system

As a first step in creating an efficiently functioning asylum system for the EU, the format of the asylum applications mechanism should be discussed. The nature of the system will of course be highly dependent upon the creation of legal pathways into the Union, but even if those are in fact developed, there will still be need of a system that is built to deal with asylum applications as a consequence of irregular migration. Therefore, both options will be addressed under this section.

6.2.1.1 Asylum claims processing system for claims filed making use of legal pathways to the EU

In the most ideal situation, where the Union’s visa policy and carrier sanctions are revised, a logical consequence would be a new method of determining responsibility for the evaluation of the applications made. One of the options will then be to introduce a centralized system. This could be implemented through the creation of a centralized institution, conferred the competence to allocate or even by itself carry out the examination of asylum applications. However, this option requires a fundamental reform of the Common European Asylum System, confronting the Member States with a commitment that is not evident at the moment. In addition to that, even though this option is most desirable for the EU as a fundamental rights defender, it is not the most realistic option in the short term. A more feasible solution to develop such a centrally operating system is to do this through enhanced cooperation, where a core group of Member States would engage in improving their asylum and migration policy, complemented by an EU wide system that deals with asylum applications lodged following irregular entry into the Union. In the hypothesis where a corrective distribution key is used to achieve fair-sharing in the EU wide asylum policy, persons already granted protection through a system of enhanced cooperation creating legal access to the Union, should be taken into account when spreading the burden of refugees who irregularly entered the Union. It should be noted that a centralized system for legal access is most beneficial, especially in the light of the objectives of solidarity and fair-sharing. The option which involves the introduction of legal pathways will be further explored in the section on the concrete policy suggestions.

6.2.1.2 Asylum claims processing system for claims filed as a result of irregular entry into the EU

Taking into account that the creation of regular entry possibilities into the Union requires the revision of a number of instruments and the institutions operating in the area of asylum and migration: without doubt, the realization will take time. Meanwhile, the current situation demands a revisal of certain critical points in the short term. Besides, it would be naive to assume that once legal pathways are created, this would do away with all forms of irregular migration resulting in the initiation of asylum applications. Regardless the creation of legal access options to the Union, a responsibility system for asylum applications filed as a result of
irregular entry into the Union should be foreseen. The first entry criterion used to date has the advantage of being easy to work with, but heavily burdens Member States located at the external border. Since the objective of this research paper is to identify a method establishing fairness among the Member States at this stage of the asylum procedure, the current first entry criterion as it is applied in the Dublin Regulation should at least be modified. A possible solution would be to merely impose an obligation to carry out basic registration in the Member State of first entry, making use of the Eurodac system, followed by relocation at this early stage. It is not feasible to drop the entire notion of first entry, since this criterion allows the Union to have a certain degree of control over irregular entry, even if it was just through the availability of numbers.224

6.2.2 The development of an efficient relocation system

6.2.2.1 Type of relocation

Classically, relocation can be divided in two categories. The first category consists of the model of temporary relocation, standing for the mechanism to be activated only when particular Member States are heavily burdened. The mechanism ceases to have effect once the situation concerned is brought back to its status quo. On the other hand, relocation can be exercised on a permanent basis. As from the first refugee, relocation will occur in accordance with the Member States relative share in the burden, inherently having a more distributive effect than a temporary mechanism.

6.2.2.1.1 Temporary relocation

One of the major disadvantages connected to temporary relocation in all former instruments is that it would already start from a disrupted situation. The success of this type of system is highly dependent upon the threshold: the lower the threshold for the activation of temporary relocation measures, the more effective the system will appear in having an alleviating effect on asylum systems under strain. Therefore, contrary to thresholds provided in former relocation instruments, where a Member State’s capacity had to be exceeded substantially previous to the activation of the mechanism (f.e. proposal for a recast Dublin regulation: 150% of a Member State’s capacity has to be exceeded), a threshold that is situated below a Member State’s capacity will produce more beneficial results. Not only does a threshold below capacity prevent national asylum systems to collapse under the pressure, it also plays a part in achieving the objectives of fair-sharing and solidarity. When the threshold is fixed at 85 or 90% of a Member State’s capacity, there will be some margin left for the Member State, allowing them to work more efficiently. It should be kept in mind that preserving stability of all the national asylum systems is a crucial first step in developing an efficient system. Another aspect that should be taken into account, given the current popularity status of the Union, is that a temporary redistributive mechanism forms less of a commitment for the Member States. The EU mechanism will only intervene where it is strictly necessary. However, the question should be put forward how this type of system would align with the principles of solidarity and fair-sharing, as expressed in Article 80 TFEU, in situations where the pressure in all Member States remains below the threshold, but substantial divergences between the Member States have manifested. Especially when the differences in the level of pressure are

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224 Eiko Thielemann, ‘The future of the Common European Asylum System: In need of a more comprehensive burden-sharing approach’ [2008] European Policy Analysis 1
persistent, a fair spreading of the asylum burden can be endangered. The question remains what measures can be introduced to acquire a balance in non-crisis situations.

6.2.2.1.2 Permanent relocation

Permanent relocation on the other hand demands a greater commitment of Member States and will therefore be more difficult to realize in the populist environment that is terrorizing the EU at the moment. The installation of a permanent system requires Member States to give up another part of their sovereignty, something a number of Member States will not be keen on. When a permanent relocation mechanism is carried out properly, the chances that the asylum system of one of the Member States will collapse are substantially lower than in the situation in which the asylum burden is spread through a temporary mechanism that will only enter into force once a certain threshold is met. Higher guarantees for stability are provided when all refugees are divided according to the Member States’ relative capacity. An essential difference compared to a temporary mechanism is that it does not require for a Member State to receive a minimum number of refugees, the system automatically foresees in dispersal of refugees or recognized beneficiaries according to relative capacity, regardless the number of refugees or persons granted international protection, received in a certain Member State.

Apart from the positive aspects of this kind of relocation mechanism from a fair-sharing perspective, not all is good about this type of system. One of the disadvantages of a permanent corrective mechanism is the efforts it demands for the introduction of such a system. Putting permanent relocation into practice will de facto require more centralization on EU level, ideally through the creation of a centralized institution that is charged with the function of evaluating all asylum claims lodged in the Union. Another, less intrusive option is to expand EASO’s mandate and to reform EASO to an agency with additional operational competences in order to be able to fully coordinate the relocation process. Therefore, a permanent system will only be more beneficial and workable once a certain level of centralization is passed through, even though it is more targeted on fair-sharing and solidarity, than temporary initiatives. Effectiveness, efficiency and workability are just as well desired outcomes in an asylum system, consequently effectiveness and efficiency cannot just be put aside on behalf of solidarity and fair-sharing.

As an overall remark, it turns out to be an important policy deliberation to decide at what stage the relocation should take place. The fixation of the point where relocation should be carried out brings fundamental consequences for the level of fairness in all stages of the asylum procedure.

6.2.2.3 Core element: legally binding distribution key

In order to distribute the asylum burden in accordance with the principle of fairness, the concept of fairness has to be made more tangible. This can be done by calculating the Member States’ relative asylum capacities, taking into account the factors that will result in the most fair distribution, but at the same time ensure a high
level of fundamental rights protection. Crucially, fairness should be implemented both in terms of dignity for the persons applying for international protection and from an inter-Member State solidarity perspective.\textsuperscript{225}

6.2.2.3 Participation asylum seekers

Although many voices in doctrine are explicitly calling for the realization of a system where preferences of the persons seeking international protection are taken into account, at first instance this seems difficult to reconcile with fairness on the Member States’ side of the spectrum.\textsuperscript{226} As discussed in the second chapter, this would result in free rein of the pull factors particular to a Member State, bringing about higher burdens in economically thriving Member States or in Member States where a high population of people carrying the same nationality are present. This would be the consequence if only preferences of asylum seekers were taken into account to determine a distribution system. On the other hand, preferences can be taken into account without having this adverse effect, if they are sufficiently counterbalanced by other factors. These counterbalancing factors will represent the notion of fairness on the other side of the spectrum, i.e. the inter-Member State solidarity.

One of the possibilities to incorporate fairness on the side of protection seekers consists of the introduction of a requirement of consent on behalf of the protection seeker. For legal certainty reasons, this condition of consent cannot be of an indefinite nature, and should be limited in some way. Practically, this could imply that protection seekers are capable to refuse a relocation offer once, having as a consequence that the second allocation offered will automatically be binding. Another option would be to foresee, subsidiary or complementary to the consent requirement, in the facility for the protection seekers to report their top destination countries. This list of preferences will be taken into account, but will be counterbalanced by the level of availability in the reception system of those Member States. From the point of view of protection seekers, a list of preferences, complemented with a possibility to refuse relocation once, seems to be the most desirable option. Of course prevalence should be given to exceptional criteria for minors, family members and vulnerable categories, as is the case in the current Dublin system. Even if a certain Member State’s share in the burden has been met, it is important to put aside fairness between the Member States for the benefit of an individual’s fundamental rights. Hence, from a fundamental rights perspective, the exceptions to the general Dublin rule of first entrance should be kept in place and should be transposed to any new system based of fair-sharing.

6.2.2.3.2 Solidarity Member States

Before entering into the assessment of the components best reflecting the Member States’ capacities, a preliminary remark should be made: the distribution key, based on the Member States’ relative capacities should be applicable to all those in search for protection, not only to certain categories of protection seekers


with a fairly high first instance recognition rate, as has been the case in the initiatives developed to date.

Broadening the personal scope of applicability of the relocation mechanism would be for the benefit of implementing the solidarity notion to the fullest. Thereby, it should be determined what measure of flow will be used once the Member States’ capacities are fixed. The asylum burden can be expressed using three different parameters: the number of refugees, the number of asylum applications and the number of recognized beneficiaries. Using this last category of recognized beneficiaries would only imply a spreading of the burden in the area of reception, leaving aside the asylum burden situated during the phase of the asylum application. When the number of refugees is set as the parameter scaling the migration pressure, the problem of measurability emerges. While the number of asylum applications is capable of reflecting spreading of the burden in both phases, i.e. the phase of the asylum application and the reception phase, equitable distribution in the field of reception can be endangered by the fundamentally diverse level of restrictiveness in national procedures, causing divergences in reception pressure. Despite this comment, the number of asylum applications seems best suited as a parameter to measure the migration pressure since it takes into account the pressure at both stages and can be easily measured.

In order to comply with the obligations under Article 80 TFEU, a high degree of solidarity and fairness should be reflected in the calculation of Member States’ capacity. What follows is an enumeration of the factors that should be taken into consideration in determining a Member State’s capacity, to achieve the highest possible level of fairness. The composition consists of both positive and negative elements, positive elements being typicalities to a country which contribute in enlarging their capacities, negative factors decreasing their potential to receive refugees. The first factor that should be brought in the calculation of a Member State’s capacity is the GDP per capita. This key element reflects the financial capability of a country’s economy to provide in the reception of protection seekers. Secondly, a role is reserved for the population and territorial size, factors giving an idea about the capacity of Member States’s to provide physical accommodation for protection seekers. Another factor which reflects the capacity to receive refugees can be found in the population density: the higher the population density, the fewer the space available to provide reception for refugees. Further, the job opportunities in the Member States, represented by the unemployment rate should be brought into the calculation. The availability of jobs is of importance for medium to long term integration prospects. Thereby, it is important to emphasize that relocation will not start with a clean slate, which justifies taking into account the number of protection seekers already received in the Member State. For measurability reasons, the previous efforts taken into account should be limited in time. After a certain extend of time, this last factor has to be taken out of the equation, since the rationale behind the distribution key is to evolve to a system approximating fairness and solidarity as closely as possible. Apart from the selection of components for the calculation of capacities, the weight attributed to

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them significantly influences the outcome. Due to its limited extent, this paper will not go deeper upon the precise ratio between the different factors establishing the most fair and equitable distribution.

### 6.2.2.3.3 Conditions

For a distribution key to succeed, some additional conditions will have to be fulfilled. As a first requirement, mutual recognition of positive asylum decisions has to be introduced. This of course depends on the stage where the relocation takes place and will be redundant if relocation is executed at an early stage before asylum applications, since in that hypothesis only a shift of responsibility to examine the application will take place. In a situation where relocation is situated after the processing of the application, the extent to which mutual recognition has to be introduced remains rather limited. Since responsibility will still be allocated to one single Member State, no unconditional mutual recognition has to be attributed to asylum decisions, only the designated reception country has to recognize the consequences of a positive asylum decision produced in another Member State.

Secondly, the reception facilities in all Member States have to be up-standard. Notwithstanding European harmonization initiatives in this area, the implementation of them is insufficient, resulting in substantially different standards of the facilities provided. As an extreme example, the situation in Greece demonstrates how these conditions can even be deficient in a systemic manner. To safeguard fundamental rights of refugees, the relocation scheme should contain a mechanism, similar to the suspension of Dublin transfers, temporary excusing a Member State from its obligations under the relocation system, on the condition that they use this period of low pressure to make serious efforts concerning their reception facilities.

As already identified in the previous section, operating the number of asylum applications as the parameter measuring the pressure that has to be shared through the distribution key, points out the possible influence of the difference in the level of restrictiveness of national asylum procedures. For a distribution key to have the desired effect of establishing a fair and equitable spreading, national asylum procedures will have to be attuned to each other.

### 6.2.3 Relationship responsibility for asylum applications and responsibility to provide adequate reception

The national nature of the competence to decide on asylum applications has been emphasized throughout this paper. Having concluded that the consequences of a positive decision will only have effect in the Member State concerned, reception of recognized beneficiaries will automatically fall into their hands. If the criterion allocating responsibility for the examination of asylum applications results in an equitable spreading, the linkage does not form a problem. At the moment, this linkage is problematic since it transposes the inequalities occurring in the first phase of applications to the second phase of reception. Detaching responsibility for asylum application from responsibility to provide relocation can be established by transferring the responsibility to process asylum applications to the European Union. Therefore, automatic

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linkage cannot be justified in light of solidarity and fair sharing obligations, unless the distribution takes place at a stage before the asylum applications are examined.

6.3 Policy options

In the final part of this paper, the aim is to balance different pathways for the future of the European asylum policy against each other. Having compared the positive and negative aspects of the components to an asylum system, the question remains what combination of factors produces the most desirable and achievable result, in accordance with the principles of solidarity and fair-sharing. The first option put forward explores the route of staying as close to the current system as possible, trying to implement burden-sharing in the current system. Thereby addressing how far can we get in obtaining a fair spreading, making use of the current system and what modifications could attribute to create a distributive effect. Secondly, this section will elaborate the option of structurally revising the CEAS. Thereby focussing on the achievability of a more centralized system, complemented with the creation of legal pathways. Keeping in mind the more intrusive nature of this option, the realization of such a structural reform through enhanced cooperation will be considered. When enhanced cooperation is chosen as the way forward, the relationship of this core group’s policy to the more general Union asylum policy has to be determined as well. To conclude this research, a brief exploration of the consequences of the abolishment of the CEAS will take place, and more specifically, how this decision will affect the free movement of persons. Due to the fundamental nature of the CEAS as a counterbalance to the free movement under Schengen, the question arises whether this free movement can still be kept in place when asylum policies would be nationalized.

6.3.1 Option 1: further implementation of and compliance with the CEAS

The first option leans closest towards the Union’s approach as to hold on to the current framework. Regardless the acknowledgment that the Dublin responsibility determining mechanism no longer is a workable method, no fundamental U-turn on the allocation of responsibility was made in its proposed revision. The distributive potential of this system in its current form is very limited, therefore efforts must be made to create some sort of complementary redistributive effect in order to comply with the principles of solidarity and fair-sharing. Due to the linkage between responsibility for asylum applications and reception, the redistributive effect should be established on the level of asylum claims processing. For that reason, the main legislative innovation that ought to be pursued when this option is chosen will consist of the revision of the Dublin regulation.

6.3.1.1 Reactive rather than proactive approach

One of the main problems related to this option is the reactive nature of it. The instruments which are supposed to warrant fair-sharing instruments are all crisis-induced. Burden-sharing is only pursued where the imbalances are significant and a national system does no longer succeed in coping with the pressure. No efforts are made towards the avoidance of such concentrations of pressure. In times of crisis, this option entails the reliance on solidarity of the Member States, since no expressions of fair-sharing are incorporated in this policy. Even though the Dublin recast proposal aims at evolving from ad hoc measures to a relocation scheme incorporated in EU legislation, the mechanism will only enter into force when a certain
Member State’s capacity has substantially been exceeded, thus reacting to the pressure instead of striving to avoid it. Where the introduction of a relocation mechanism shows proof of a more anticipative approach, still the measures chosen for are reactive.

### 6.3.1.2 The implementation gap

If the Union chooses to stick with the current framework for asylum, an important issue that they will have to address is the implementation gap. The problem of implementation manifests in two different areas. Firstly, the difference between the instruments created and their translation into national law is problematic in the field of minimum standards. Minimum standards are a good starting point, but therefore they must be effectively guaranteed, instead of just relying on the fact that all Member States meet these standards. To overcome problems coming forth out of the insufficient or deficient implementation, the possibility to carry out a fundamental rights check should be introduced. The introduction of a fundamental rights check when relocating/transferring to the Member State responsible, has appeared to be necessary in several cases. Instead of relying on the corrective effect of the courts, Member States should be given the competence to act more proactively in this area and avoid human rights infringements. Thus, the first step in dealing with the problem of implementation is to move away from the flawed assumption that all national asylum systems are the same and to make sure fundamental rights are guaranteed. Secondly, the Union should make an effort concerning the decisive enforcement of these standards and pursue evolution towards truly common standards and asylum procedures that produce comparable results. The second area where the Union is suffering from implementation problems can be situated in the context of relocation. The proposed relocation mechanism in the Dublin recast regulation comes down to the incorporation of the emergency relocation schemes. With the approaching deadline to execute the emergency scheme, the success rate is dramatical. The question remains what elements will steer the Member States to comply with this mechanism, and not with the former…

### 6.3.1.3 The need for corrective burden-sharing mechanisms, complementary to Dublin allocation

By incorporating a temporary relocation mechanism in the new Dublin regulation, designed to compensate unequal spreading, the legislator goes from the assumption that the spreading resulting from the application of the Dublin allocation rules will not be equally or fairly distributed. However, the proposed relocation mechanism in its current form does not contain sufficient efforts to bring the responsibility allocation mechanism closer to a spreading resembling fair-sharing or expressing solidarity. As concluded under section 6.2.2.1.1, it is crucial for asylum systems to function efficiently that a stable status quo is obtained. Therefore it would be beneficial to lower the threshold for the activation of the mechanism, preferably to a percentage lower than a Member State’s maximum capacity. Further, if relocation is attributed the role to serve as a counterbalance to the responsibility allocating criteria, some other modifications should be made to the Commission’s proposal in order to guarantee a basic notion of burden-sharing. First, the Union should move away from the practice of only taking into account applicants with a very high success rate for relocation decisions. This kind of practice cannot be legitimated: in an approach based on fair sharing, all applicants

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should be considered for relocation once the threshold has been exceeded. For solidarity reasons, it is important to maintain the discretionary clause in its current form, instead of drastically limiting its scope of application, as the Commission proposed. Overall, it is doubtful whether this option will be fully in line with the obligation to conduct the asylum and migration policy on the grounds of fair-sharing and solidarity. As long as no clarity is brought upon the scope of these principles, it will remain hard to judge which concrete obligations they entail. Nevertheless, this option will be the most realistic one in the current climate of the Union. Since less fair-sharing is created on EU-level by holding on to this system, the need for the corrective effect of solidarity will appear to be higher.

6.3.1.4 The problem of harmonization: only addressing imbalances owing to differences in domestic legislation

As long as the asylum procedure remains largely under the national competence of the Member States, there will always be reasons for non-compliance with the responsibility allocation system. In this system, persons seeking for international protection will always be able to find a way to influence the outcome of the procedure, by disregard of the rules, for example through irregular movement. Even the guarantee of similar protection standards etc will not nullify the role of other pull factors. This problem of divergences in Member States can only be addressed by imposing a larger notion of centralization, disconnecting geographic entry from the determination of responsibility.

6.3.2 Option 2: structural revision of the CEAS: towards a more centralized model

A second trail open for the future of the CEAS consists of a fundamental reform of the current policy in the areas of migration and asylum. When revising the CEAS, it would be beneficial to focus on the creation of legal entry possibilities, since to date the existing possibilities are extremely limited, driving protection seekers to find solace in irregular migration routes. Regardless the putting into place of legal access, a complementary responsibility allocation mechanism for irregular entry cannot be taken out of the equation. No measures adopted could ever ban the practice of irregular entry entirely. Ideally, an important degree of centralization would be instituted, yet in the current climate not all Member States will be keen on such a reform. Therefore, the option of introducing more centralization through enhanced cooperation must be explored. Despite of the lower threshold to reach a consensus in a smaller group of Member States, the advantages of centralization will still bring a number of practical obstacles which will require a certain period of time to be overcome. Centralizing the asylum policy will therefore be no short term realization.

6.3.2.1 Components of a fair asylum policy

In order to implement the principles of solidarity and fair-sharing in full, some essential modifications will have to be made. Firstly, the transition from temporary and reactive initiatives to a permanent and proactive


233 Eiko Thielemann, ‘The future of the Common European Asylum System: In need of a more comprehensive burden-sharing approach’ [2008] European Policy Analysis 1
burden-sharing mechanism should be established. The permanency requirement implies the engagement to strive for an equal distribution of the asylum burden, both in crisis and non-crisis times, by putting forward preserving stability as a core objective. On the other hand, the proactive component can be realized through the installation of a mechanism that is based on a fixed distribution key, taking into account the Member States’ relative capacities. Furthermore, taking note of the multidimensionality of the concept, fairness can also be established by guaranteeing a high level of fundamental rights protection. Protection in this field can be enhanced through the replacement of minimum standards by truly common standards and by conceiving legal access to the Union, which implies moving away from the current policy by which the Union can be seen as a fortress. In the next sections, this research will briefly touch upon the issue of putting this theoretical combination of components into practice.

6.3.2.1.1 Rethinking visa requirements and carrier sanctions

The CEAS determines that persons seeking international protection in the Union must lodge their application in physical presence on the territory of the Union. However, legal access to the Union is hindered by both visa requirements, imposed by the Visa Regulation, and carrier liability, implying the penalization of transport companies for bringing insufficiently documented persons into the Union.\textsuperscript{234,235} Therefore, the availability of legal pathways to the Union to date is of a very limited extent: the only legal access possibilities consist of humanitarian visa and the UNHCR Resettlement Programme.\textsuperscript{236} The creation of additional legal pathways and/or the extension of existing legal access possibilities offer the Member States a chance to influence the spreading of the migration burden. Thereby, there is an advantage in the degree of control that the Member States will gain over these influxes by orchestrating legal access procedures. However, most importantly would be the major step forward the installation of additional access opportunities would amount to on a human rights level.\textsuperscript{237} While the crucial need for developing initiatives providing legal access has been confirmed at multiple occasions and by several EU institutions, the initiatives put into force are still nonexistent.

In the current version of the Visa Code Regulation, the requirement of insurance for return to the country of origin or another third country as set out in Article 21 seems somehow contradictory, and maybe even on the verge of hypocrisy, against the legal definition of refugees.\textsuperscript{238,239} In order to qualify as a refugee under the

\textsuperscript{234} Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1
Geneva Convention or the Qualification Directive, an essential element is the inability of return to the country where they face persecution, thus inherently comprising the impossibility of return.\textsuperscript{240,241} Thereby comes the ambiguity of the humanitarian visa regime, mostly caused by the absence of a separate procedure for the assignment of humanitarian visa.\textsuperscript{242} While the European Parliament is a strong supporter of establishing a revised and specific procedure on humanitarian visa, the Member States proved not to be keen on the introduction of a European humanitarian visa system.\textsuperscript{243} While the debate on the necessity of the reform of the Visa Code has been going on for a few years, the European Parliament reiterated the importance of the creation of a specific regime for humanitarian visa in its resolution of 12 April 2016:

“27. Considers that persons seeking international protection should be able to apply for a European humanitarian visa directly at any consulate or embassy of the Member States, and, once granted following an assessment, such a humanitarian visa would allow its holder to enter the territory of the Member State issuing the visa for the sole purpose to lodge therein an application for international protection; believes, therefore, that it is necessary to amend the Union Visa Code by including more specific provisions on humanitarian visas”\textsuperscript{244}

Further, the Parliament pursued this vision by amending the Commission’s Visa Code recast proposal:

“5a. Persons seeking international protection may apply for a European humanitarian visa directly at any consulate or embassy of the Member States. Once granted following an assessment, such a humanitarian visa shall allow its holder to enter the territory of the Member State issuing the visa for the sole purpose of lodging in that Member State an application for international protection, as defined in Article 2(a) of Directive 2011/95/EU.”\textsuperscript{245}

However, up to now no such European visa system is in place, as was confirmed in case C-638/16 PPU X and X v État belge before the CJEU:\textsuperscript{246}

“no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to
third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law.”247

Notwithstanding the fact that so far no use was made of the framework of humanitarian visa to establish a legal avenue, it must still be considered as a possibility.248 From a human rights perspective, it appears to be beneficial to limit the Member States’ discretion on this topic in order to establish a more flexible visa policy. The practical installation of such system will be dependent on the internal method of asylum claims processing the Union chooses to pursue. In the hypothesis in which a permanent relocation mechanism is introduced, humanitarian visa can be applied for at any embassy or consulate of a Member State, since there will no longer be linkage between the country where the application is lodged and the country responsible in the end. The situation becomes more difficult when the first entry criterion is kept in place, since this will result in a free choice of the Member State of first entrance. With pull factors having free rein in such situation, an equitable and fair distribution of the asylum burden is highly unlikely. Of course, concentrations can be compensated by relocation schemes, but from an efficiency perspective this is not the most desirable option. Another option consists of the introduction of Schengen Visa Centres, which would bring an increase in efficiency, as envisaged by the Parliament:

“(15) Visa applicants should be able to lodge an application in their country of residence even where the Member State competent under the general rules is neither present nor represented in that country. In order to increase the efficiency of the common visa policy the current system of representation should be reviewed after five years with a view to enhancing the sharing of infrastructure through the establishment of Schengen Visa Centres.”249

A step further would be, as some scholars have been urging for, the evolution towards extra-territorial processing of asylum claims. This approach stands for abandoning the condition inherent to the CEAS determining that asylum applications have to be lodged on the territory of the Union. The development of an external processing system will not be evident in the light of burden-sharing when the asylum procedure remains under the national competence of the Member States. It is highly unlikely that one Member State would engage in a non-delineated commitment to process asylum applications on third country territory. The alternative would be the situation in which the Member States opt for a higher degree of centralization, on Union level or in the context of closer cooperation. The presence of a common procedure will facilitate the incorporation of burden-sharing, since such system will most likely already contain a distribution key. The practical organization will also imply the choice between a system of detached units of the Member States, representing the Union or the core group participating in enhanced cooperation, or the installation of European asylum officers. Regardless the model chosen, some issues will have to be addressed either

247 C-638/16 PPU X and X v État belge [2017] ECLI:EU:C:2017:173, para 44


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Firstly, there is the decision of the institutional realization, dealing with the question of whether this should be put in place through embassies, temporary centers or permanent asylum offices. Secondly, the Member States will have to set out if and how they want to delineate the commitment, since unlimited accessibility to the procedure takes away an important incentive to seek protection elsewhere. Lastly, if the processing of asylum claims is carried out externally, the Union needs to ensure that these procedures are carried out upholding the human rights standards that are applicable to the internal asylum procedure.252

As mentioned, carrier liability forms an additional obstacle on the path of protection seekers. Although Article 4(2) of Directive 2001/51 clearly states that Member States must implement the EU rules on carrier sanctions in compliance with their obligations under the Geneva Convention, no safeguards are present that asylum seekers will be granted access to the carriers’ services.253 This can be attributed to the large margin of discretion the Member States dispose of for the implementation of this regulation. A comparison of all national legislation in this area has pointed out that the attitude of Member States substantially differs in regard to applying carrier sanctions for persons who travelled to the Union for the purpose of filing a claim for asylum or subsidiary protection.254 The possibility of a fine in the situation where an asylum seeker’s claim was manifestly unfounded or inadmissible, as is the practice in certain Member States, will encourage the carriers to refuse access to protection seekers.255 From an economic perspective, it will always be more beneficial to refuse access to their service than to risk a fine in the situation in which they have made an incorrect assessment of the likeliness that someone will be granted a protection status.256 By the incorporation of Article 4(2) of Directive 2001/51, the Union has built in a safeguard, exempting itself from being held accountable for a violation of the Geneva Convention, by guaranteeing theoretical access to the Union for asylum seekers. De facto, the legislation implementing this provision has the effect of privatizing the control over the access to the national territories, a function carriers as private actors cannot be held accountable for.257 In that regard, voices have been raised for the suspension, and a fortiori the abolishment, of carrier liability.

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of carrier liability as a measure to establish safe and legal access to the Union.\textsuperscript{258} However, the practical execution of a more flexible carrier sanctioning system is not evident. In any case, the system needs to be applicable without distinction, exempting transport companies from making an assessment on the admissibility or the merits of the claims.

\textit{6.3.2.3 Creating solidarity: responsibility-sharing as a form of forced solidarity}

The core of this second option consists of the introduction of more European responsibility. The more responsibility is European, the less compensatory measures of the Member States are required. Having settled that solidarity on a voluntary basis does not work, and that therefore it is necessary to impose some form of forced solidarity through EU legislation, pursuing more centralization.

\textit{6.3.3 Option 3: Abolishment of the CEAS: The end of Schengen?}

Finally, the implications of nationalization of the asylum policy need to be given some attention. Detrimental implications for free movement under Schengen. If the CEAS is abolished in its entirety, there will no longer be asylum-related counterbalances for the free movement of persons. As a consequence of taking away any responsibility allocation mechanisms, the need for another approach to restrict the free movement of protection seekers arises. As appeared from conduct in high crisis times (Dublin rules were/could not be applied fully), Member States will be easily tempted to reintroduce border controls when European responsibility allocation rules are withdrawn. The reintroduction of border controls would de facto deprive EU nationals from one of their most essential freedoms, the free movement of persons. Not only will border controls render detrimental effects for the free movement of persons in se, they will also have a significant influence in other fields of Union law. The most obvious implication will be appreciable in the area of the free movement of goods, but the end of Schengen would also seriously affect the Union’s criminal policy.\textsuperscript{260} The overall result would be an enormous cost, not only in terms of financial means but also on a legislative level, where the loss of various established rights and granted competences imply a major step back into time. For the purpose of avoiding the unwanted domino-effect as described, the CEAS must be kept in place as a counterbalance to the free movement under Schengen. However, the CEAS needs to be subjected to some essential modifications, for the benefit of solidarity and fair-sharing. Therefore, this leads us to conclude that the option supporting the abolishment of the CEAS is not an option at all.\textsuperscript{261}

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\textsuperscript{261} Cyrille Fijnaut, ‘The Refugee Crisis: The End of Schengen?’ [2015] 23 EJCCL & CJ, 329
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CHAPTER 7: CONCLUDING REMARKS

With regard to burden-sharing on the level of asylum applications, the Dublin Regulation has failed as an efficiently functioning responsibility allocation mechanism, and has proven to form an insufficient counterbalance to the free movement of persons. The reason for its failure is twofold. In the first instance, the failure of Dublin can be attributed to its incomplete implementation and deficient application. Mutual trust as the underlying principle in asylum matters and the harmonization of minimum standards at EU-level have led to the assumption that all national procedures warrant the same standards and produce similar results. However, this assumption can no longer be upheld, since it has been the cause of several problems with regard to the Member States’ obligations to act in compliance with fundamental rights, as has been identified by both the ECtHR and the CJEU. Due to the incomplete implementation of standards, the presumed equality between the Member States’ asylum systems has appeared to be fictive in nature. Thereby comes that there is a tendency towards non-compliance with the allocation rules when the pressure substantially increases, consequently leading to de facto free movement of asylum seekers.

Secondly, the Dublin Regulation as a responsibility allocation mechanism is taunted by flaws and can therefore be regarded as inherently deficient. Most problematic in light of burden-sharing is of course the disproportionate affection of Member States geographically located at the external border of the Union due to the first entry criterion. Further, the hierarchical criteria determining the Member State responsible have the effect of encouraging absconding and therefore non-compliance with the system. Since one of the provisions foresees a transfer of responsibility after the expiry of a certain period, it’s alluring for asylum seekers to abscond for a number of months in order to subsequently lodge an asylum application in their Member State of preference. While the Dublin recast proposal tries to address this issue by eliminating the responsibility shift, this ‘once responsible, always responsible’ rule would have adverse effects on the already overburdened border states. Lastly, it is important to point out that the realization of a fair spreading of the asylum burden was never an objective of the Regulation. The Dublin Regulation was constructed as a flanking measure to the free movement of persons, and never aimed at having a distributive effect among the Member States.

Recent events have brought the Union to admit that Dublin has lost its relevance. Although the deficiencies have been present for years, and many had been pleading for a revision, the visibility of the issue was what has led the Union to conclude that a new path had to be chosen. In its May 2016 recast proposal of the Dublin Regulation, the Commission did not succeed in addressing all previously expressed concerns. As already mentioned, the recast proposal attributes an even bigger role to the first entry criterion, by introducing the ‘once responsible, always responsible’ rule. Besides, the proposal narrows the personal scope of application of the discretionary clause, resulting in the limitation of the Member States’ margin of discretion for voluntary-based solidarity. New to this proposal is the introduction of a corrective allocation mechanism, similar to the emergency relocation schemes of September 2015. However, this measure clearly misses the mark. Placing the threshold for activation at 150% of a Member State’s reception capacity, the relocation mechanism starts from an already distorted picture and leaves aside the fundamental role of preserving stability. Thereby, the mechanism excludes all applicants with a first instance recognition rate
below the threshold of 75%, having the effect that only a limited number of nationalities will be considered for relocation and that merely a limited aspect of the burden will be shared.

In the area of reception, the Dublin Regulation and the absence of mutual recognition of positive asylum decisions can be regarded as the principle reasons causing an inequitable spreading among the Member States. As long as the asylum procedure remains largely under the competence of the Member States, the effects of the rights of protection granted will be limited to the national territory. The concentrations of pressure caused by Dublin will therefore have a spillover effect on responsibility-sharing in the field of reception. Overall, the initiatives developed to address this imbalance were disappointing. As a first point of concern, the reactive nature of the initiatives must be pointed out. Secondly, the initiatives contain a large notion of voluntariness and are therefore highly dependent upon the political will of the Member States. This can be derived from the incomplete or even non-application or implementation of the few initiatives in place.

Questions arose on the reconcilability of the policy set out above with the Union’s obligations under Article 80 TFEU. It cannot be denied that the Union fundamentally fails to reflect the principles of solidarity and fair-sharing in its asylum and migration policy, especially in the field of people-sharing.

The Union tried to overcome the failure of its internal asylum system by setting in on externalization, which led them to conclude the infamous EU-Turkey deal. This deal goes a step further than the policy of readmission clauses the Union had been conducting for years, and endangers the credibility of the EU as a human rights defender. The rationale behind this deal is the deflection of the migratory pressure, more than it intends to truly cooperate in order to save lives at sea.

This disputed deal and the emergency relocation schemes demonstrate the more general tendency to apply temporary solutions to structural problems. Notwithstanding the overall recognition of the deficiencies in the instruments applicable, the Union tries to amend or fix these deficiencies, often by introducing temporary derogations. Substantial efforts have been made to try to reinstall the status quo, while in fact, the established status quo should be revised. It is remarkable that the desire to realize a burden-sharing system has been expressed by several EU institutions, yet the measures they proposed could never achieve this. The underlying problem can be found in the lack of commitments of the Member States. At the moment there is insufficient political will to pursue a system foreseeing an equitable spreading of refugees.

Consequently, the question arises how the Union should proceed. More concretely, this implies determining how burden-sharing can/should be pursued in the current context of the Union. The Dublin Regulation is the first obstacle that has to be overcome, since it undermines attaining the objectives of solidarity and fair-sharing. It is essential for the functioning of any future asylum policy that Dublin is replaced by a system with a less distorted status quo. A first policy option that is considered entails the further implementation of and compliance with the Common European Asylum System. This could imply a step further in terms of burden-sharing, but only on the condition that some fundamental changes are introduced. The main legislative innovation that will have to take place if this option is pursued consists of the revision of the Dublin Regulation. In order to avoid further infringements, the scope of application of the fundamental rights
check should be broadened, resulting in full competence to check for human rights compliance of transfer decisions. To achieve the objective of fair-sharing, a temporary relocation mechanism must be introduced, preferably with a low threshold for activation. Placing the threshold below Member States’ reception capacities can assist in avoiding that national systems collapse under the pressure.

A second option that could be pursued is the evolvement towards a more centralized model. Since this option requires a structural reform of the CEAS, there is an opportunity for the Union to establish a more proactively oriented policy. From a burden-sharing perspective, a permanent relocation system, disconnecting responsibility for asylum applications and reception is most desirable. The permanency of such system reflects the core objective of preserving stability. More centralization would entail the installation of a common asylum procedure, instead of fictively equal systems, as was envisaged in Article 78(2) TFEU. The relocation mechanism would then be installed on the basis of a fixed distribution key, taking into account the Member States’ relative capacities.

Regardless of the model chosen, the Union has to find a way to create legal access to its territory, since applications must be lodged in physical presence on EU territory. Hindered by visa requirements and carrier liability, most asylum seekers are obliged to travel through illegal and unsafe routes. To safeguard asylum seekers’ fundamental rights, the Union must strive for the creation of new legal avenues and/or the extension of existing pathways. The three most realistic possibilities consist of the introduction of a European humanitarian visa system, the external processing of asylum claims and the flexibilization of carrier liability.

To conclude, there is no doubt that the Union has to move forward. The abolishment of the Common European Asylum System is not an option, since the very existence of the free movement of persons under Schengen depends on this system. There is however, a pressing need to reform the European asylum policy, and to incorporate the principles of solidarity and fair-sharing, as Article 80 TFEU requires.
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Presentations
ANNEX: EXECUTIVE SUMMARY (NL)

In het kader van deze masterproef werd onderzoek verricht naar de lastenverdeling inzake asiel op EU-niveau. In de context van de huidige migratiecrisis is gebleken dat het huidige systeem, dat instaat voor de toewijzing van verantwoordelijkheid binnen de EU, niet meer houdbaar is. Nu vastgesteld is dat het toepassen van de Dublin-verordening in de praktijk niet langer mogelijk is, dient een analyse van de oorzaken van het falen van deze Verordening plaats te vinden.

In het eerste deel van deze masterproef wordt dieper ingegaan op de lastenverdeling met betrekking tot asiel aanvragen. Na een beknopte bespreking van het feitelijk kader, volgt een grondige analyse van de toepasselijke wetgeving en de invloed die de rechtspraak hierop had. De verschillende pijnpunten van de Dublin-verordening, die de basis vormt van het toewijzen van verantwoordelijkheid voor het onderzoeken van asiel aanvragen, worden uitvoerig besproken. Het hoofdstuk sluit af met een denkoefening over de verzoenbaarheid van het huidige mechanisme met de principes van solidariteit en billijke verdeling van de verantwoordelijkheid, waardoor de Unie gebonden is op grond van artikel 80 VWEU.

Het tweede deel van deze masterproef tracht een overzicht te geven van de lastenverdeling inzake de opvang van erkende vluchtelingen. Analoog met het vorige deel worden eerst het feitelijk en wetgevend kader uiteengezet. Aangezien de concentratie-effecten die zich voordoen met betrekking tot asiel aanvragen doorwerking hebben op de verdeling van de last met betrekking tot de opvang van erkende vluchtelingen, werden er binnen de EU reeds een aantal instrumenten ontwikkeld om hieraan tegemoet te komen. Hoewel lastenverdeling dus wel als doel vooropgesteld wordt, slagen deze instrumenten er niet in om tot een billijke spreiding van verantwoordelijkheid te komen. Net zoals in het vorige hoofdstuk, rijzen er dus vraagtekens ten aanzien van het beleid van de Unie. Concreet moet onderzocht worden of dit beleid wel in overeenstemming is met artikel 80 VWEU.

Uit de eerste hoofdstukken kan afgeleid worden dat het interne beleid van de Unie inzake asiel niet in staat is overeind te blijven als gevolg van de verhoogde migratiedruk. Om die reden besloot de EU alternatieve pistes te verkennen, die een oplossing zouden moeten bieden in het omgaan met de stijging van migratiestromen. In die context wordt een korte bespreking gemaakt van het befaamde EU-Turkije akkoord, dat in belangrijke mate tracht de druk op de lidstaten uit te besteden.

Als tussentijdse conclusie kan gesteld worden dat het Europees asielsysteem in een trieste staat verkeert, niet alleen door de onvolledige implementatie van een aantal instrumenten, maar ook omdat het een aantal intrinsiek gebrekkige instrumenten omvat. De inefficiëntie die blijkt uit de pogingen om deze gebreken aan te pakken hebben tot gevolg dat er nog een heel aantal werkpunten voor de toekomst vooropgesteld moeten worden. Het laatste hoofdstuk van deze masterproef tracht in die context een overzicht te geven van de meest efficiënte componenten van een asielsysteem, om zo een oplossing te bieden voor deze werkpunten. Tot slot worden er kort een aantal concrete beleidsopties verkend.